Normative hierarchy in international environmental law: a constitutional reading

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ABSTRACT

The current environmental law and governance regime is in need of urgent reform to the extent that it leaves too much room for state sovereignty and states' non-compliance with their environmental obligations. To some extent, this is due to the inadequacy of multilateral environmental agreements (MEAs) and environmental principles to effectively limit state sovereignty. MEAs are only binding upon state parties by their choice and much of the environmental principles' normative status remains unclear. Further, international environmental law as a whole is in a fragmented state and many non-state actors remain unaccountable for harm which they may cause to the environment. As a result, the environment is continuously deteriorating, as there is generally poor compliance with and enforcement of international environmental law (IEL). As a reform measure, this study seeks to extend the normative hierarchy debate that prevails in international law and global constitutionalism to the international environmental law context to identify ways to ameliorate the shortcomings of IEL referred to earlier. It specifically investigates the extent to which it can be said that a normative hierarchy exists in IEL; the relevance of such a normative hierarchy for global environmental law and governance from a global constitutionalism point of view; and whether there are customary international law or *jus cogens* norms in IEL, and if it is possible that they might come about.

Keywords: normative hierarchy; global constitutionalism; international environmental law; global environmental constitutionalism; *jus cogens*; *erga omnes* obligations; customary international law

OPSOMMING

Die huidige internasionale omgewingsregraamwerk moet herform word. Dit laat te veel ruimte vir staatsoewereiniteit en dus vir state om nie hul omgewingsregtelike verpligtinge na te kom nie. Dit is meerendeels te wyte aan onvoldoende multilaterale omgewingsooreenkomste en vaag omgewingsregbeginsels waarvan die normatiewe status nie duidelik is nie. Internasionale omgewingsreg is ook gefragmenteer en nie-regeringspartye kom nie hul verpligtinge na nie. Omgewingskwaliteit gaan dus agteruit omdat daar onvoldoende nakoming en afdwinging van internasionale omgewingsreg is. Hierdie studie ondersoek die mate waartoe normatiewe hiërargie, soos wat dit manifesteer in die idee van globale konstitusionalisme, hierdie tekortkominge kan aanspreek. Die studie fokus spesifiek op die mate waartoe ‘n normatiewe hiërargie in internasionale omgewingsreg bestaan; die relevansie van so ‘n hiërargie vir globale omgewinsgregulering; en of daar spesifieke hoër orde *jus cogens* of gewoonregtelike volkeregsreëls bestaan met *erga omnes* toepassing, insluitend die moontlikheid vir sulke reëls om te ontstaan.

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LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AJIL	American Journal of International Law
BYIL	British Yearbook of International Law
CBD	Convention on Biological Diversity
CC	Constitutional Court
CIL	Customary International Law
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
EIA	Environmental Impact Assessment
EJIL	European Journal of International Law
EMA	Environmental Management Act
ENMOD	Environmental Modification Convention
EU	European Union
GA	General Assembly
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
LJIL	Leiden Journal of International Law
LRTAP	Convention on Long-range Transboundary Air Pollution

MDGs	Millennium Development Goals
NEMA	National Environmental Management Act
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
PER/ PELJ	Potchefstroom Electronic Law Journal
RIAA	Reports of International Arbitral Awards
SAJELP	South African Journal of Environmental Law and Policy
SDGs	Sustainable Development Goals
SERAC	Social and Economic Rights Action Centre
UK	United Kingdom
UN	United Nations
UNCCD	United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa
UNCLOS	United Nations Convention on the Law of the Sea
UNFCCC	United Nations Framework Convention on Climate Change
UNHRC	United Nations Human Rights Council
US/ USA	United States of America
VCLT	Vienna Convention on the Law of Treaties

Chapter 1 Introduction

Much has been written on the topic of normative hierarchy in international law and different scholarly opinions exist regarding whether there is such a normative hierarchy in international law.[1] It is unclear whether and to what extent a normative hierarchy can be said to exist in international environmental law. It is also not clear what the importance of such a hierarchy is for global environmental law and governance from a global constitutionalism point of view.

Article 38 (1) of the *Statute of the International Court of Justice* (*ICJ Statute*)[2] provides that the three primary sources of international law are international treaties, international custom and general principles of law. The *ICJ Statute* with its main object of organising the composition and functioning of the International Court of Justice (ICJ) therefore seemingly[3] does not imply that there is a hierarchy of norms, nor does it provide for hierarchically superior norms. However, to deal with issues arising out of the treaties referred to in Article 38 (1) of the *ICJ Statute*, the *Vienna Convention on the Law of Treaties* (VCLT)[4] was introduced, which sparked the debate about a normative hierarchy. Article 53 of the *VCLT* states:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[5]

In terms of Article 53 above, peremptory or *jus cogens* norms are hierarchically superior norms. The same can also be argued for customary international law (CIL),[6] which refers to consistent state practice accompanied by a sense of legal obligation or *opinio juris*

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1 For example Koskenniemi 1997 *EJIL*; De Wet 2007 *PELJ*; Shelton 2006 *AJIL*.
2 *Statute of the International Court of Justice* (1946).
3 Shelton 2006 *AJIL* 295; Dupuy *Droit International Public* 14.
4 *Vienna Convention on the Law of Treaties* (1980).
5 A 64 of the VCLT (1980) further provides that should a new *jus cogens* norm arise and an existing treaty is in contravention of that norm, such a treaty will be voided and terminated.
6 A 38 (1) (b) of the ICJ *Statute* (1946).

which may be proven by existing state practice (*usus)*.[7] Both CIL and *jus cogens* norms are arguably "constitutional" in character, acting like domestic higher-order constitutional norms, to the extent that they are non-derogable (at least *jus cogens*), they are legally binding, they limit state sovereignty,[8] they have *erga omnes* application,[9] and they are based on the value system of the international community, which values are often explicated through human rights.

Therefore, it can be argued that through the lens of global constitutionalism, the fundamental norms of CIL and *jus cogens* have higher status through a normative hierarchy that is binding on states, despite their consent. Global constitutionalism is described as a process which "identifies and advocates for the application [in the global legal order] of constitutionalist principles"[10] such as the rule of law, the separation of powers and the protection of human rights. For the purposes of this dissertation, global constitutionalism also extends to the environmental law context.

Global environmental constitutionalism can be described as a concept whereby environmental law and protection is constitutionally entrenched and constitutional law is used to provide a framework of environmental governance and to protect the environment.[11] Global environmental constitutionalism therefore relates to the normative hierarchy debate to the extent that it gives environmental *jus cogens* and environmental customary law norms higher constitutional status, which allows for their limitation of state sovereignty and the extension of environmental liability to non-state actors.[12]

Arguably, only one principle of international environmental law can be argued to be legally binding to the extent that it now possesses CIL status. The no-harm principle that first emerged in the *Trail Smelter Arbitration,*[13] which includes the duty to conduct a trans-boundary environmental impact assessment (EIA), as confirmed in the *Gabcikovo*

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7 The presumption that *opinio juris* can be proven by existing state practice is however not endorsed. Compare for example the North Sea Continental Shelf case (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*) 1969 ICJ Reports 3 and Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*) Merits Judgment 1986 ICJ Reports 14 para 98.

8 S.S Wimbledon (*UK v Japan*) 1923 PCIJ 1.

9 *Erga omnes* refer to obligations that all states have towards the community of states as a whole- Barcelona Traction (*Belgium v Spain*) (*Second Phase*) 1970 ICJ Rep 3.

10 Peters 2009 *Indiana Journal of Global Legal Studies* 397.

11 Kotzé 2012 *Transnational Environmental Law* 208.

12 Kotzé 2015 *Netherlands Yearbook of International Law* 256.

13 Trail Smelter Arbitration (*United States v Canada*) 1941 3 RIAA 1907.

Nagymaros[14] and *Pulp Mills*[15] cases, is arguably the only environmental law principle that has been accorded the status of CIL by the ICJ. However, by operation of the persistent objector rule, a state that persistently refuses to be bound by a customary law rule will not be bound.[16] The persistent objector rule however does not apply to *jus cogens* norms.

It can therefore be argued that the current environmental law and governance regime arguably leaves too much room for state sovereignty and states' non-compliance with their obligations under international environmental law.[17] This has the effect of the further deterioration of the environment. A normative hierarchy, being a central structural component of global constitutional thinking,[18] can be used as a measure to fill these compliance and enforcement gaps in the global environmental law regime as far as states are concerned. This is because a normative hierarchy constitutes hierarchically superior norms in a codified or uncodified international constitution which could render international environmental law generally comprehensive, durable, accessible and enforceable.[19]

A normative hierarchy thus provides for higher order environmental laws that are binding despite states' consent to be bound, which limits state sovereignty and states' non-compliance with their environmental obligations. Furthermore, a normative hierarchy protects the fundamental values of the international community of states, which are embodied in CIL and *jus cogens* norms. A normative hierarchy also generally creates certainty in environmental law and governance by resolving conflicts of norms.[20]

The main questions that this dissertation seeks to answer then are: *to what extent can it be said that a hierarchy of norms exists in international environmental law and what is the significance of such a hierarchy for global environmental regulation from a constitutional point of view?* In answering these questions, the following sub-questions are posed around which each chapter is fashioned:

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14 Case concerning the Gabcikovo-Nagymaros Project (*Hungary/Slovakia*) 1997 ICJ Rep 1.
15 Pulp Mills on the River Uruguay (*Argentina v Uruguay*) 2006 ICJ Rep 156.
16 Charney 1993 *AJIL* 537.
17 Kotzé 2012 *Transnational Environmental Law* 202.
18 Rafferty *Constitutionalism in International Law: The Limits of Jus Cogens* 8.
19 Kotzé *Global Environmental Constitutionalism in the Anthropocene* 224.
20 Koskenniemi 1997 *EJIL* 569.

- Is there a hierarchy of norms in international law generally and what is the significance of that hierarchy from a constitutional point of view?

- What do the concepts global constitutionalism and global environmental constitutionalism entail; what are their relation to the normative hierarchy theory and why are they important and useful in establishing whether a normative hierarchy exists in international environmental law?

- Are there customary international environmental law norms which constitute part of the normative hierarchy in international environmental law; if so what are they and if they do not exist is it possible that they might come about?

- Are there environmental *jus cogens* norms which constitute part of the normative hierarchy in international environmental law, if so what are they, and if they do not exist is it possible that they might come about?

1.1 Objectives

This dissertation aims:

- To investigate the notion of a normative hierarchy in international law and how it relates to constitutionalism;

- To assess what the importance of a normative hierarchy is for the constitutional regulation of international environmental law;

- To establish which international environmental law norms form part of such a normative hierarchy in international environmental law; and

- To analyse how a normative hierarchy and constitutionalism could provide a reform tool for the current environmental law and governance regime.

1.2 Research Methodology

This research will be performed by way of a literature review in which reference will be made to textbooks, case law, statutes, international sources, internet sources, scholarly articles and journals which are relevant to assessing the topic.

1.3 Structure of the discussion

Chapter 2 of this dissertation will engage in a general discussion of the normative hierarchy theory and the global constitutionalism paradigm, as well as the interrelationship between these two concepts. The chapter will set out the views of different scholars on the existence of a normative hierarchy in international law generally, the possible need for such a hierarchy, and the factors that demonstrate the existence of such a hierarchy. The chapter will also narrow down the concept of global constitutionalism to the international environmental law context to establish the connection between the normative hierarchy and the concept of global environmental constitutionalism. This will set the scene for an enquiry into the norms which may form a normative hierarchy in international environmental law.

Chapter 3 will establish whether customary international environmental law norms exist, what they are and whether they have a global constitutional character. The chapter will also discuss the possibility of the development of other customary international environmental law norms.

Chapter 4 interrogates the concept of *jus cogens* norms in a quest to establish if there are environmental *jus cogens* norms. The chapter will provide a detailed discussion on the meaning, sources and identification criteria of *jus cogens* norms as well the extent to which they could be argued to be global constitutional norms. In doing so the chapter will also show how *jus cogens* norms are related to CIL and *erga omnes* obligations, and whether they establish a normative hierarchy in international environmental law. The chapter will conclude by establishing if environmental *jus cogens* exist and whether future environmental *jus cogens* norms might come about.

Chapter 5 will provide the dissertation's conclusions and recommendations. The chapter will evaluate whether a normative hierarchy exists in international environmental law. This will be done by considering the constitutional character of the norms discussed in chapters 3 to 5 in constituting such a hierarchy. From the former chapters, it will also be clear what the purpose of such a hierarchy would be for global environmental regulation from a constitutional point of view.

Chapter 2 Normative hierarchy and Global constitutionalism: Theoretical underpinnings

2.1 Introduction

Domestic legal systems are hierarchical in nature and hierarchy in these systems is a matter of constitutional regulation.[21] But the same cannot necessarily be said about international law. International law scholars have for years debated the existence of a normative hierarchy in international law, which debate was mostly fuelled by the introduction of the concept of *jus cogens* norms in Article 53 of the *VCLT* as highlighted in chapter 1. To illuminate this debate, chapter 2 provides the theoretical foundations of a normative hierarchy in international law to the extent that it relates to global constitutionalism and global environmental constitutionalism. The aim is to establish if a hierarchy of norms exists in international law generally and to illustrate why the concept is important from a global constitutional point of view. This chapter will discuss two of the sub-questions referred to in chapter 1, which are related to the dissertation's main research question;

- Is there a hierarchy of norms in international law generally and what is the significance of that hierarchy from a constitutional point of view?

- What do the concepts global constitutionalism and global environmental constitutionalism entail; what is their relation to the normative hierarchy theory and why are they important and useful in establishing whether or not a normative hierarchy exists in international environmental law?

The chapter will begin by defining the concepts of normative hierarchy, global constitutionalism and global environmental constitutionalism, thus establishing the relation between these concepts. The chapter will then consider if a normative hierarchy exists in international law and the relevance of such a hierarchy from a constitutional point of view.

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21 Kelsen *General Theory of Law and State* 115.

2.2 Defining normative hierarchy

The theory of normative hierarchy has been in existence for some time in international law with many scholars debating its existence, nature and purpose.[22] Hierarchy in its ordinary meaning refers to a system in which things are arranged according to their importance or prominence.[23] Normative hierarchy then can be taken to mean the relationship and ordering of law norms according to their superiority[24] in terms of the importance of their content as well as the universal acceptance of their superiority by the international community.[25] The normative hierarchy theory therefore posits the existence of a set of orderly, coherently organised norms, and that it is possible to establish form their position in the hierarchy whether they are superior or inferior norms in law.[26]

Such a hierarchy is easier to determine in domestic legal systems[27] to the extent that a constitution provides superior norms that prevail over all other (statutory and other) norms. Often within constitutions themselves there is a hierarchy, with human rights norms usually forming apex norms.[28] It can be argued that such a hierarchical setting may also apply in international law:[29]

> National legal systems are characterized by a well-established hierarchy of norms. Constitutional provisions prevail over ordinary statutes, the latter prevail over secondary legislation or administrative regulations, and so on. It is therefore only natural that international lawyers, trained in national legal systems, should seek hierarchical principles in the international legal system as well.

Shelton[30] argues that establishing the nature of a normative hierarchy in the international legal system would involve an enquiry into the nature and structure of international law as well as the rules of recognition which distinguish between binding and non-binding

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22 Koskenniemi 1997 *EJIL* 567; De Wet 2007 *PELJ* 21; Shelton 2006 *AJIL* 291.
23 Cambridge University Press date unknown dictionary.cambridge.org/dictionary/english/hierarchy
24 Petsche 2010 *Penn State International Law Review* 22.
25 *ILC Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission*, 58th session, UN Doc. A/CN.4/L.682, 13 April 2006.
26 Mayua *Human Rights and Jus Cogens: Questioning the Use of Normative Hierarchy* 3.
27 Domestic legal systems are hierarchical in nature- Kelsen *General Theory of Law and State* 115.
28 De Wet 2006 *ICLQ* 51-76; De Wet and Vidmar *Hierarchy in International Law: The place of human rights* 2.
29 Meron 1986 *AJIL* 3.
30 Shelton 2006 *AJIL* 291.

norms. According to Hart,[31] a legal system consists of primary and secondary rules. The former rules guide behaviour by imposing duties and conferring power, while the latter rules identify, change and enforce the former rules.[32] The secondary rules include three factors which are the rule of change, rule of adjudication and of importance here the rule of recognition.[33]

A rule of recognition determines which rules in a legal system are legally binding.[34] A rule of recognition serves three functions; to provide the criteria for identifying primary rules;[35] to confer validity to legal rules; and to integrate the rules in a legal system.[36] As discussed in chapter 1 and according to Article 38 of the *ICJ Statute*, the international system has more than one source of law. As such the rule of recognition also regulates the relationship[37] and defines the order of precedence among these rules.[38] In arguing that international law does not yet have a rule of recognition Hart[39] says that it will be possible to claim that international law has a rule of recognition when there are certain rules that effectively bind states despite their consent. It is therefore argued that the concept of *jus cogens*, which are binding on states despite consent, indicates that "a rule of recognition and therefore a rudimentary constitution" exists in the international order.[40]

There is no general consensus on the nature of a normative hierarchy. However, it can be argued that a normative hierarchy has three main features. Firstly, a norm acquires hierarchical superiority because of its value.[41] This was confirmed by the ICJ in the *Barcelona Traction*[42] case, when it used the words "importance of the rights involved" in addressing obligations *erga omnes,*[43] which will be discussed in the following chapters. It

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31 Hart, Raz, Green and Bulloch *The Concept of Law* 79.
32 Academia date unknown www.academia.edu/7026151/International_Law_does_not_Lack_a_Rule_of_Recognition
33 Academia date unknown www.academia.edu/7026151/International_Law_does_not_Lack_a_Rule_of_Recognition
34 Hart, Raz, Green and Bulloch *The Concept of Law* 94-95.
35 Hart, Raz, Green and Bulloch *The Concept of Law* 100-101.
36 Payandeh 2010 *EJIL* 989.
37 Hart, Raz, Green and Bulloch *The Concept of Law* 95.
38 Payandeh 2010 *EJIL* 974.
39 Hart, Raz, Green and Bulloch *The Concept of Law* 236; Seiderman *Hierarchy in International Law: The Human Rights Dimension* 284.
40 Seiderman *Hierarchy in International Law: The Human Rights Dimension* 284.
41 Mayua *Human Rights and Jus Cogens: Questioning the Use of Normative Hierarchy* 40.
42 Barcelona Traction (*Belgium v Spain*) (*Second Phase*) 1970 ICJ Rep 3.
43 Obligations *erga omnes* refers to obligations that are owed to the international community of states as a whole and which protection all states have an interest in; Mayua *Human Rights and Jus Cogens: Questioning the Use of Normative Hierarchy* 40.

is argued that "value" in this context relates to the value that a certain norm adds to individual human welfare,[44] which is why human rights are considered apex norms.

Secondly, it is argued that the function of a norm determines its hierarchical superiority.[45] Norms that are non-derogable and serve to limit state sovereignty are therefore superior to derogable norms.[46] This means that even in emergency situations, such as during a time of war or public danger, these norms remain non-derogable.[47] In this sense, it is argued that hierarchical norms appear as a "result of accommodating competing values."[48]

The third feature of normative hierarchy is that hierarchically superior norms are based on the interests of the international community as a whole.[49] There is no generally accepted definition of the concept of the international community. However, the international community of states can be defined as a society which has the ability to "frame and direct political power in light of common values and a common good."[50] The primary subjects of the international community are states who are central to international law making and enforcement and their representative international organisations with legal personality.[51] With reference to states, it is argued that the concept of the international community entails imposing global public policy on all states, including non-consenting states to limit states' freedom of action.[52]

The international community is "glued together" by the international value system.[53] The international value system can be described as those:[54]

> … norms with a strong ethical underpinning, which have been integrated by states into the norms of positive law and have acquired a special hierarchical standing through state practice.

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44 Mayua *Human Rights and Jus Cogens: Questioning the Use of Normative Hierarchy* 40.
45 Mayua *Human Rights and Jus Cogens: Questioning the Use of Normative Hierarchy* 40.
46 Teraya 2001 *EJIL* 937.
47 A 4(1) of the *International Covenant on Civil and Political Rights* (1966).
48 Mayua *Human Rights and Jus Cogens: Questioning the Use of Normative Hierarchy* 40; Teraya 2001 *EJIL* 937.
49 A 53 of the VCLT (1969).
50 Von Bogdandy 2006 *Harvard International Law Journal* 223.
51 For example, the United Nations- Gaja 2011 *RCADI* 29; De Wet 2006 *LJIL* 611.
52 Shelton 2006 *AJIL* 194.
53 Vidmar "Norm Conflicts and Hierarchy in International Law" 13-41.
54 De Wet 2006 *LJIL* 612.

This international value system therefore entails the fundamental rules that states have high regard for and that protect, for example, the right to life,[55] and state sovereignty.[56] Vidmar[57] argues that the minimum threshold of the international value system is reflected in *jus cogens* and *erga omnes* norms, which will be discussed in more detail in Chapter 4. It is also argued that these common values have been formulated in *The Charter of the United Nations* (UN Charter),[58] which basically calls for the maintenance of peace, international security and respect for human rights.[59]

A normative hierarchy in international law can therefore be argued to mean the systematic ordering of legal norms according to their importance, which depends on the values of the international community, the function of the norms, and their recognition by the international community as superior norms, with some higher order "constitutional" norms taking precedence over ordinary norms.

The global constitutionalism debate provides the context for normative hierarchy as highlighted in chapter 1. As such, it is important at this stage to discuss what global constitutionalism is and how it relates to the normative hierarchy phenomenon. It must be noted that it is beyond the scope of this dissertation to give a conclusive account on global constitutionalism and all its related aspects and the discussion will focus on global constitutionalism as well as global environmental constitutionalism only to the extent that these relate to the debate about the possibility of the existence of a normative hierarchy in international environmental law.

2.3 Global constitutionalism

It is important to first briefly define global constitutionalism before explaining how it relates to the debate on normative hierarchy. Different meanings have been assigned to the concept of global constitutionalism. Von Bogdandy[60] describes it as an endeavour to have a global legal community which frames, directs and limits political power in the light of

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55 The right to life can be argued to have led to recognition of the *jus cogens* norms on the prohibition of torture and genocide, for example.
56 Vidmar "Norm Conflicts and Hierarchy in International Law" 13-41.
57 Vidmar "Norm Conflicts and Hierarchy in International Law" 13-41.
58 UN *Charter* (1945).
59 United Nations date unknown http://archive.unu.edu/unupress/unupbooks/uu12ee/uu12ee0q.htm
60 Von Bogdandy 2006 *Harvard International Law Journal* 223.

common values and a common good. De Wet[61] agrees in defining global constitutional law as the international legal order norms that limit the exercise of public state power in international relations. Rafferty[62] says that:

> Constitutionalism [in the global sphere] is associated with reconceptualising international law by amongst other considerations, subjecting political power to the rule of law, giving international law a certain public order function through the development of an international community as well as advocating the application of specific constitutional norms within the international legal order.

Global constitutionalism in this sense has the effect of giving fundamental norms higher status through a normative hierarchy that is binding on states despite their consent. These norms are arguably "constitutional" in nature to the extent that they are universal, non-derogable, are onerous to amend and determine the creation of other norms,[63] which characteristics are similar to those of domestic constitutional law norms.

Bodansky[64] says the fact that international law has such constitutive rules on how other rules are developed, interpreted and enforced, shows that it has a constitutional character. It can be argued that the gist of the constitutional argument here is to limit states' powers, free will and sovereignty,[65] and to increase state and non-state accountability to the international community as a whole. Detailed accounts of these constitutional norms will be provided in chapters 3 and 4.

Proponents of global constitutionalism maintain that a constitutional hierarchy of norms is one of the features of global constitutionalism.[66] Global constitutionalism is argued to be a response to the fragmentation of international law.[67] Fragmentation in international law refers to the normative and institutional framework of international law, which is made up of specialized functional regimes, each with its own treaties, principles and institutions.[68] Such a framework is centred on separate functional areas such as

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61 De Wet 2007 *PELJ* 23.
62 Rafferty *Constitutionalism in International Law: The Limits of Jus Cogens* 8.
63 A 64 of the VCLT (1980).
64 Bodansky 2009 *Indiana Journal of Global Legal Studies* 567.
65 Kotze 2012 *Transnational Environmental Law* 202.
66 It is argued that global constitutionalism has four prominent features: the value system of the international community, the idea of a constitution, multilevel constitutionalism and constitutional hierarchies of norms- Kleinlein 2012 *Nordic Journal of International Law* 87.
67 Dunoff and Trachtman "A Functional Approach to Global Constitutionalism" 3-36.
68 Dunoff and Trachtman "A Functional Approach to Global Constitutionalism" 3-36.

environmental law, human rights law and trade law.[69] In international environmental law, for example, further fragmentation exists within these functional areas, where there are different laws governing different areas such as climate change, biodiversity and the oceans.[70]

Fragmentation causes instability and inconsistency in law and threatens the legitimacy of the international legal order.[71] This is because the values and interests involved within these separate regimes are not always compatible with those of other regimes.[72] For example, the values and interests involved in protecting human rights, such as the right to property, may not always be compatible with or may need to be balanced with the interests and values protected by the right to a healthy environment.[73] Through a normative hierarchy, global constitutionalism addresses fragmentation by providing principal institutions or providing particular hierarchies amongst rules[74] which would thus give some order to a system that may otherwise be perceived as chaotic or fragmented.[75]

An argument is also made in favour of global constitutionalism's addressing issues of "deconstitutionalisation" at the domestic level.[76] Deconstitutionalisation at the domestic level has mostly been caused by processes of globalisation and global governance.[77] Globalisation refers to the process of interaction among people, companies and governments of different states.[78] Globalisation, together with the increase of global problems which compel states to cooperate globally, has foregrounded the need for global governance. Climate change is compelling evidence of the need for global governance.

Globalisation has also caused the transfer of ordinary domestic governmental functions such as guarantees of freedom, human security and equality to global governance and

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69 Dunoff and Trachtman "A Functional Approach to Global Constitutionalism" 3-36.
70 Dunoff and Trachtman "A Functional Approach to Global Constitutionalism" 3-36.
71 International Law Commission *Report of the International Law Commission on the work of its fifty-second session*, Annex, at 144, U.N. Doc. A/55/10 (2000)
72 Dunoff and Trachtman "A Functional Approach to Global Constitutionalism" 3-36.
73 Shelton "Resolving Conflicts between Human Rights and Environmental Protection: Is there a Hierarchy?" 207- 235.
74 Rafferty *Constitutionalism in International Law: The Limits of Jus Cogens* 10.
75 Rosenfeld 2014 *EJIL* 190.
76 Peters 2006 *Leiden Journal of International Law* 579- 610.
77 Dunoff and Trachtman "A Functional Approach to Global Constitutionalism" 3-36.
78 Anonymous date unknown http://www.globalization101.org/what-is-globalization/

to non-state actors such as the World Bank and the World Trade Organisation.[79] Peters[80] illustratively suggests that in the military occupation of Iraq by the United States in 2003, private actors as the employees of federal contractors and sub- contractors worked as police, guards, prison officers and mercenaries, which are typical governmental functions. These effects of globalisation and global governance have therefore gone beyond the reach of state regulation and the influence of state constitutions. This has led to some degree of "deconstitutionalisation" at the national level and hence the need for compensatory constitutionalism at the global level:[81]

> This vision of an international constitutional model is inspired by the intensification in the shift of public decision-making away from the nation State towards international actors of a regional and functional (sectoral) nature, and its eroding impact on the concept of a total or exclusive constitutional order where constitutional functions are bundled in the nation state by a single legal document.[82]

Global constitutionalism can therefore be described as a process in which the international legal order is governed by the rule of law, higher order constitutional–type norms and standards which direct and limit states' political powers in favour of the common values of the international community, which are most often based on fundamental rights. Global constitutionalism has since expanded into many branches of international law and for our purposes into international environmental law, through the concept of environmental constitutionalism. The following discussion will briefly discuss global environmental constitutionalism to the extent that it relates to the debate on normative hierarchy.

2.3.1 Global environmental constitutionalism

There is no universally accepted definition of the concept environmental constitutionalism. May and Daly[83] believe:

> Environmental constitutionalism is a relatively recent phenomenon at the confluence of constitutional law, international law, human rights and environmental law. It embodies the

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79 Peters "The Globalization of State Constitutions" 251- 308.
80 Peters "The Globalization of State Constitutions" 251- 308.
81 Peters 2006 *LJIL* 579- 610.
82 De Wet 2006 *ICLQ* 14.
83 May and Daly *Global Environmental Constitutionalism* 1.

recognition that the environment is a proper subject for protection in constitutional texts and for vindication by constitutional courts worldwide.

Environmental constitutionalism therefore falls within the ambit of constitutional and international law generally, as well as in human rights and environmental law. Environmental constitutionalism includes *inter alia* the creation and enforcement of environmental law; environmental institutions and the rules that direct and limit those institutions;[84] provision for the right to a healthy or quality environment and procedural rights,[85] and the protection of other associated rights such as the right to life, health and dignity. Environmental constitutionalism has since permeated the global context, as most states have now constitutionalised environmental protection.[86]

It can be argued that global environmental constitutionalism is being employed as a reform measure to the current global environmental law and governance regime.[87] This regime has been criticized mainly for leaving too much room for state sovereignty, its failure to address the issues of fragmentation in international environmental law, and its failure to address states' non-compliance with their environmental obligations.[88] Therefore, global environmental constitutionalism seeks to limit state sovereignty and discourage non-compliance, as these norms are binding on states despite their consent.

The normative hierarchy as part of global environmental constitutionalism also addresses the fragmentation of international environmental law by providing a body of environmental laws which is comprehensive, ascertainable and enforceable. The combined effect of a normative hierarchy in this regard is that it might result in stronger and more stable environmental laws as well as improved compliance with states' environmental obligations. Furthermore the universal application of *jus cogens* and customary environmental law norms makes it possible for global environmental constitutionalism to

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84 This is constitutionalism in the thin sense- Kotze 2015 *Widener Law Review* 190.

85 For example the right to access to information, the right to just administrative action and the right to access to courts/justice. In South Africa, these rights are provided for in section 32, 33 and 34 of the *Constitution of the Republic of South Africa*, 1996, respectively.

86 For example section 24 of the *Constitution of the Republic of South Africa*, 1996; Section 73 of the *Constitution of Zimbabwe*, 2013; A 225 of the *Constitution of Brazil*, 1988.

87 Kotze 2012 *Transnational Environmental Law* 200.

88 Kotze 2012 *Transnational Environmental Law* 203.

extend the accountability and liability of environmental harm to non-state actors such as transnational corporations, banks and inter- governmental organisations.[89]

It can be argued that global environmental constitutionalism manifests through multilateral environmental agreements (MEAs), environmental custom and general principles of law. Bosselmann[90] says that having a global environmental constitution is not per se necessary, although it would advance the notion of global environmental constitutionalism. This is because having a constitution could make the laws governing international environmental law comprehensive and easily accessible which promotes compliance with international environmental law generally.

Global environmental constitutionalism is also relevant for the normative hierarchy debate in the international environmental law context to the extent that both concepts involve the identifying and or development of new hierarchically superior "constitutional" environmental law norms. This includes the identification of potential *jus cogens* and CIL norms, which will be discussed in chapters 3 and 4. Having established the connection between global constitutionalism and the notion of a normative hierarchy, the following discussion will now establish if a normative hierarchy exists in international law.

2.4 Does a normative hierarchy exist in international law?

There is no general consensus on the existence of a normative hierarchy in international law. The differing views mainly stem from the natural law proponents and the positivists, with the latter believing that is a normative hierarchy in international law and the former disputing its existence. Dupuy,[91] for example, maintains that such a normative hierarchy does not exist, as all sources of international rules and procedures originate from one source, which is the will of states, and as such all norms are equal. Combacau[92] also argues that international law norms, unlike domestic law norms, do not have a hierarchical structure as their effects are homogenous, considering that the norms all stem from the will of states.

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89 Kotze 2012 *Transnational Environmental Law* 222.
90 Bosselmann 2015 *Widener Law Review* 182.
91 Dupuy *Droit International Public* 14.
92 Combacau and Sur *Droit International Public* 26; Salcedo 2010 *EJIL* 22.

In arguing against a normative hierarchy, MacDonald[93] maintains that the form and content of international law norms are not yet sufficiently developed for one to be able to be "categoric about the interrelationship of the various norms" and to have a neat hierarchy between the norms. MacDonald[94] argues that this is so because international law norms are "complementary rather than overlapping" in their functioning. International law has long been considered to be a horizontal system,[95] where rules apply equally and where the ideal of a hierarchy of norms therefore has no place. MacDonald,[96] however, recognizes the need to settle the relationship between various norms, but maintains that in the long run, such an ordering should blur and the norms should merge into one order. His vision of what currently exists and how the situation is developing is not easily reconciled with the idea of a normative hierarchy in the strict sense of the words.

Although some scholars continue to debate the existence of a normative hierarchy in international law, it could be argued that "the debate has lost momentum,"[97] as many scholars[98] now accept that such a hierarchy exists. A number of other considerations also exist to suggest that a normative hierarchy exists in international law. The following discussion will now focus on the factors that indicate the existence of a normative hierarchy in international law before the discussion turns to the relevance of such a normative hierarchy.

2.4.1 Factors indicating the existence of a normative hierarchy in international law

There are a number of considerations which suggest that a hierarchy of norms exists in international law. Firstly, a careful reading of Article 38 of the *ICJ Statute* shows that the sources of international law are not on an equal footing.[99] This is because the *ICJ Statute* refers to judicial decisions and academic writings as "subsidiary sources of law."[100] By definition, subsidiary means "serving to assist or supplement,"[101] which shows that judicial decisions and academic writings are "additional" and therefore possibly "inferior" to

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93 MacDonald 1987 *The Canadian Yearbook of International Law* 143- 144.
94 MacDonald 1987 *The Canadian Yearbook of International Law* 144.
95 De Wet and Vidmar *Hierarchy in International Law: The Place of Human Rights* 1.
96 MacDonald 1987 *The Canadian Yearbook of International Law* 144.
97 Weiler and Paulus 1997 *EJIL* 545.
98 Vidmar "Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?" 13- 41; Shelton 2006 *AJIL* 291; Koskenniemi 1997 *EJIL* 571.
99 Shelton 2006 *AJIL* 295; Dupuy Droit *International Public* 14.
100 A 38 (1) (d) of the ICJ *Statute* (1946).
101 Anonymous date unknown www.dictionary.com/browse/subsidiary

treaties, international custom and general principles of law. As such, it can be argued that there is some form of hierarchy in this regard to the extent that judicial decisions and academic writings are subject to treaties, international custom and general principles of law. Article 38 of the *ICJ Statute* therefore (even though possibly unintentionally) does not place all the sources of international law on an equal footing.

This reasoning is in line with the second consideration of a normative hierarchy in international law, which is the existence of soft law.[102] "Soft law" refers to rules that are neither strictly binding in nature nor completely lacking in legal significance.[103] These include guidelines, action plans, resolutions, policy declarations and codes of conduct. The *Rio Declaration on Environment and Development* (Rio Declaration)[104] and *Agenda 21*[105] are examples of soft law instruments in international law. Since soft law is not legally binding, it is therefore inferior to legally binding norms such as treaties, CIL and *jus cogens* norms, which will be discussed later on in this chapter.

Thirdly it has been argued that the primary subjects of international law, which are states, create norm hierarchies themselves "between the various international law obligations they assume."[106] Article 103 of the *UN Charter,*[107] for example, provides that in the event of conflict between the obligations of its member states under the Charter and their obligations under any other international agreement, their obligations under the Charter will prevail. The *Rome Statute of the International Criminal Court Statute*[108] (ICC Statute) also contains a similar provision where it sets the hierarchy of norms to be followed in the event of conflict.[109] It can therefore be argued that states themselves contribute to and at least implicitly support the existence of a normative hierarchy in international law.

The fourth consideration of a normative hierarchy in international law, which is the most important one upon which most proponents of the normative hierarchy theory rely,[110] is

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102 Shelton 2006 *AJIL* 319; Petsche 2010 *Penn State International Law Review* 22.
103 US Legal 2010 http://definitions.uslegal.com/s/soft-law/
104 *Rio Declaration on Environment and Development* (1992).
105 Action plan of the *United Nations* with regards to sustainable development- U.N. GAOR, 46th Sess., Agenda Item 21, UN Doc A/Conf.151/26 (1992).
106 Petsche 2010 *Penn State International Law Review* 22.
107 UN *Charter* (1945).
108 The *Rome Statute of the International Criminal Court Statute* (1998).
109 A 21 of the *Rome Statute of the International Criminal Court Statute* (1998).
110 Shelton 2006 *AJIL* 301; Vidmar "Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?" 13- 41; De Wet and Vidmar *Hierarchy in International law: The place of human rights* 3; Salcedo 1997 *EJIL* 595.

the concept of *jus cogens* and the international community of states. The International Law Commission (ILC)[111] argues that *jus cogens* reflect a normative hierarchy in international law. Weiler[112] agrees:

> The existence of a hierarchy (of norms) in international law cannot be put into question, at least since the introduction of the concept of *jus cogens* into Article 53 of the *Vienna Convention on the Law of Treaties*.

It must be noted that the discussion of *jus cogens* norms at this point is limited to the extent to which they are a factor indicating a normative hierarchy only. A full discussion of the concept will be provided in Chapter 4. It is argued that since the introduction of Article 53 of the *Vienna Convention*, the superiority of norms is no longer determined from their sources but from the value or content of the norm.[113] Zimnenko and Butler[114] agree: "hierarchy determined by the content of the norm is acquiring greater significance."

Jus cogens norms are therefore hierarchically superior norms to the extent that they are based on the universally endorsed[115] values of the international community. The value placed on the protection of the fundamental right to life, for example, can be argued to have led to the recognition of the prohibition of torture[116] and genocide[117] as *jus cogens* norms. In *Anto* v *Furundzija*,[118] *the International Criminal Tribunal for the Former Yugoslavia* (ICTY), in explaining the relationship between *jus cogens* norms and the normative hierarchy theory, expressed the superiority of *jus cogens* norms as being based on the values they protect:

> Because of the importance of the values (which the prohibition of torture) protects, this principle has evolved into a peremptory norm of *jus cogens,* that is a norm which enjoys a

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111 *ILC Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission*, 58th session, UN Doc. A/CN.4/L.682, 13 April 2006 para 365.

112 Weiler and Paulus 1997 *EJIL* 558.

113 Mayua *Human Rights and Jus Cogens: Questioning the Use of Normative Hierarchy* 3; Weiler and Paulus 1997 *EJIL* 545-565.

114 Zimnenko and Butler *International Law and the Russian Legal System* 293.

115 *Jus cogens* must be accepted and recognised by the international community, Mayua *Human Rights and Jus Cogens: Questioning the Use of Normative Hierarchy* 3.

116 Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*) 2012 ICJ Reports 422 para 99.

117 Armed Activities on the Territory of the Congo (*DRC v Rwanda*) 2006 ICJ Reports 126.

118 *Prosecutor v Anto Furundžija* IT-95-17/1 1998 PT Judicial Reports para 153.

> higher rank in the international hierarchy than treaty law and even "ordinary" customary rules.

By virtue of being based on the value system of the international community, *jus cogens* norms are therefore hierarchically superior to CIL, and even more so to treaty law, which states must consent to. Moreover, *jus cogens* norms can also be argued to be hierarchically superior norms to the extent that they are non-derogable, invalidate norms that are not consistent with them, and pre-determine the creation of other norms. As such, it can be argued that *jus cogens* are situated at the highest level of the international law hierarchy, in very much the same way as human rights are often regarded as being situated at the top of the normative hierarchy in domestic constitutional legal orders.[119]

2.4.2 The relevance of the normative hierarchy theory

The most important reason for the existence of the normative hierarchy theory in international law is that it is useful to resolve norm conflicts which have mainly been fuelled by the fragmentation of international law. Shelton[120] states that:

> As international law has expanded into new subject areas over the past century, with a corresponding proliferation of international treaties and institutions, conflicts have increasingly arisen between substantive norms or procedures within a given subject area or across subject areas necessitating means to reconcile or rank the competing rules.[121]

A conflict of norms can be described as a situation whereby there are two conflicting norms and in obeying or applying one norm, the other norm is "necessarily or possibly violated."[122] Pauwelyn[123] agrees in saying that if the application of one norm leads to a breach of the other, then there is a conflict between these two norms. According to judicial practice, conflicts of norms are usually between human rights obligations and other obligations such as immunities and extradition, for example.[124]

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119 Koskenniemi 1997 *EJIL* 567.
120 Shelton 2006 *AJIL* 293.
121 Shelton 2006 *AJIL* 293; Meron 1986 *AJIL* 1; Oxman 2001 *AJIL* 277.
122 Kelsen "Derogation" 339-355.
123 Pauwelyn *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* 169.
124 De Wet and Vidmar *Hierarchy in International Law: The Place of Human Rights* 2.

Norm conflicts in international law can be divided into two types, broad and narrow. [125] Narrow norm conflicts occur when one international obligation is given effect to, and this results in an unavoidable breach of another right or obligation.[126] For example, the House of Lords in *Al-Jedda*[127] dealt with a narrow norm conflict between the right to liberty and security provided for in Article 5 (1) of the *European Court of Human Rights* (ECHR) and the power to intern individuals for important security reasons in terms of United Nations Security Council Resolution 1546 (2004).[128]

The conflict was resolved by applying Article 103 of the *UN Charter,* which provides that in the event of a conflict, the rights and obligations under the Charter will prevail over any other international agreement.[129] The ICJ in *Libyan Arab Jamarihiya* v *United Kingdom*[130] also dealt with a narrow norm conflict between obligations under a Security Council decision in terms of its Chapter VII powers[131] and provisions in terms of the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation* (Montreal Convention)[132] which provide a domestic criminal investigation as the "only viable alternative to extradition."[133] The ICJ, in using the same reasoning as in *Al-Jedda*, applied Article 103 of the *UN Charter* to resolve the conflict and prioritized the Security Council obligations over Libya's rights under the *Montreal Convention*.[134]

It is argued that when there is a narrow norm conflict between a human rights obligation and another obligation of international law, and a court resolves such conflict by giving effect to the human rights obligation, it indicates a human rights-based hierarchy.[135] Such

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125 De Wet and Vidmar "Conflicts between International Paradigms: Hierarchy versus Systematic Integration" 196- 217.

126 De Wet and Vidmar "Conflicts between International Paradigms: Hierarchy versus Systematic Integration" 196-217.

127 *R (Al-Jedda) (FC) v Secretary of State for Defence* 2007 UKHL 58.

128 Tzanakopoulos "Collective Security and Human Rights" 42- 70.

129 *R (Al-Jedda) (FC) v Secretary of State for Defence* 2007 UKHL 58 paras 33-35.

130 Questions of Interpretation and Application of the 1971 *Montreal Convention* arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamarihiya v United Kingdom*) (Provisional Measures) 1992 ICJ Rep 3.

131 Chapter VII of the *UN Charter* contains broad powers including non-military sanctions and other measures to maintain international peace and security.

132 *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation* (1971).

133 Plachta 2001 *EJIL* 127.

134 Tzanakopoulos "Collective Security and Human Rights" 42- 70.

135 De Wet and Vidmar "Introduction" 1-12.

dispute settlement therefore involves the reaffirmation of the hierarchical position of the norms in conflict, with human rights norms operating at the superior level.[136]

In the broad sense, norm conflicts refer to the situation where compliance with one international law obligation results in the limitation of another such obligation or the limitation of all the rights and obligations at stake.[137] For example, international refugee law and state sovereignty arguably present a broad norm conflict.[138] This is because while states' powers include the right to control entry or refusal to a non-national in their territory, international refugee law[139] limits the rights of states regarding these powers in terms of Articles 31 and 33 of the *Convention Relating to the Status of Refugees*.[140] International refugee law therefore arguably limits state sovereignty. Kleinlein[141] also states that broad conflicts occur:

> …whenever a norm somehow impedes the operation of *jus cogens*, for example in situations in which the rules of states immunity would lead to the undesired result of impunity for violations of peremptory norms by individuals, in particular war crimes, genocide and torture.

It can be argued that broad norm conflicts may also arise between international environmental law and human rights.[142] The creation of nature reserves, for example, could arguably limit the right to freedom of movement, the right to property and the rights of indigenous people.[143] A norm conflict in this regard is "broad," since the human rights involved are not extinguished upon the creation of the nature reserve, but are limited. It

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136 Koskenniemi 1997 *EJIL* 568.

137 De Wet and Vidmar "Conflicts between International Paradigms: Hierarchy versus Systematic Integration" 196-217.

138 Gilbert "Human Rights, Refugees, and Other Displaced Persons in International Law" 170- 205.

139 *Convention Relating to the Status of Refugees* (1951). A 31 prohibits penalizing refugees for illegal entry and restricting their freedom of movement in the state. A 33 prohibits the expulsion or return (refoulment) of a refugee to his state where his life or freedom are at threat based on race, religion, nationality, political opinion or social affiliation.

140 Gilbert "Human Rights, Refugees, and Other Displaced Persons in International Law" 170- 205.

141 Kleinlein 2015 *Netherlands Yearbook of International Law* 184.

142 Shelton "Resolving Conflicts between Human Rights and Environmental Protection: Is there a Hierarchy?" 206- 235.

143 Shelton "Resolving Conflicts between Human Rights and Environmental Protection: Is there a Hierarchy?" 206- 235.

can also be argued that a conflict between environmental law and human rights is a broad conflict since both obligations are aimed at protecting human well-being.[144]

Therefore, conflicts between human rights norms and environmental law, as well as other broad norm conflicts, are usually resolved through harmonious interpretation where the rights and obligations involved are balanced against one another.[145] However, according to the jurisprudence of domestic and international courts,[146] and due to the absence of a global constitutional environmental right, human rights norms such as the rights of indigenous people and the rights to property have mostly been given priority over environmental law norms.[147] To this end, it can be argued that where a court resolves a broad norm conflict through a human rights-friendly interpretation, this indicates the existence of a human rights-based hierarchy.[148]

When certain norms are in conflict, a normative hierarchy resolves such a conflict through determining which norm is superior to the other in terms of content and acceptance by the international community. It does away to some extent with the reasoning that international law is a horizontal system in which all rules are equal by establishing the hierarchically superior in resolving a norm conflict. Such a conclusion further ensures that international law is generally certain, accessible and stable, a situation which has the effect of preventing further norm conflicts and developing international law generally.[149]

A normative hierarchy could serve the purpose of protecting the fundamental values of the international community. As argued before, *jus cogens* norms are based on the values of the international community, which are related to fundamental human rights norms such as the right to life. By entrenching and elevating such values, a normative hierarchy has the effect of constitutionalising such norms, which will be binding on states despite their consent and which are onerous to amend.

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144 Shelton "Resolving Conflicts between Human Rights and Environmental Protection: Is there a Hierarchy?" 206- 235.

145 De Wet and Vidmar *Hierarchy in International Law: The Place of Human Rights* 2.

146 *ACHPR Centre for Minority Right Development and Minority Rights Group International on behalf of Endorois Welfare Council* v *Kenya* (2010) 49 ILM 861; *Haraldsson and Sveinsson* v *Iceland* Merits, Communication No 1306/2004, UN Doc CCPR/C/91/D/1306/2004, IHRL 2745 (UNHRC 2007), 24th October 2007, Human Rights Committee [UNHRC].

147 Shelton "Resolving Conflicts between Human Rights and Environmental Protection: Is there a Hierarchy?" 206- 235.

148 De Wet and Vidmar "Introduction" 1-12.

149 This has been termed the "diplomatic discourse" Koskenniemi 1997 *EJIL* 568.

The recognition of a hierarchy in international law is also essential for the adjudication of legal conflicts. A hierarchy makes adjudication easier in the face of norm conflicts as a court does not need to determine how to construe one rule to conform to another since there will be an existing hierarchy.[150] In *Al Adsani v United Kingdom*[151] the dissenting judges applied the normative hierarchy theory to solve the issue before it by holding that:

> The acceptance … of the *jus cogens* nature of the prohibition of torture entails that a state allegedly violating it cannot invoke hierarchically lower rules to avoid the consequences of the illegality of its actions.

As argued above, international law is currently in a fragmented state[152] because of the pluralistic sub-regimes of international law.[153] As such, there generally has been poor implementation of international law rules. Therefore, there is arguably a need for some overarching rules to establish order and enhance the effectiveness of law at the international level. A normative hierarchy in this regard has the effect of constituting the hierarchically superior norms in either a codified or uncodified international constitution, which might prevent fragmentation. The results could be better enforcement and implementation of international law as well as enhanced protection of human rights and the well-being of the international community.

Finally, it can be argued that a normative hierarchy is also important for the reasons of "mode control."[154] This means a normative hierarchy controls and sets out what is lawful and unlawful, a right or duty, what is permitted and prohibited, and whether a subject is in conformity or in violation of a norm.

While a normative hierarchy is important for these reasons, the concept has been criticized mainly because of its indeterminate[155] and undefined[156] scope and for the uncertain content of *jus cogens* norms. It is argued that the ICJ has never identified a *jus cogens* norm in a judgment or advisory opinion[157] and it is not clear how these norms develop and how they can be recognized. However, *jus cogens* norms are still in a

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150 Martin 2002 *Saskatchewan Law Review* 335.
151 *Al-Adsani v United Kingdom* 35763/97 (2001) ECHR.
152 Rosenfeld 2014 *EJIL* 190.
153 De Wet 2006 *ICLQ* 51-76.
154 Koskenniemi 1997 *EJIL* 567.
155 Weiler and Paulus 1997 *EJIL* 559.
156 Caplan 2003 *AJIL* 773.
157 Shelton 2002 *Saskatchewan Law Review* 115.

developing state and those *jus cogens* norms that have been identified may be used as indicators of potential and future *jus cogens* norms, as shall be seen in chapter 4.

Furthermore, it can be argued that in the face of fragmented international laws, a normative hierarchy at least provides the means to constitute hierarchically superior norms in a codified or uncodified constitution for better implementation, compliance with, and enforcement of international law. From the above discussion, a normative hierarchy therefore arguably exists in international law with the upper and lower extremes of *jus cogens* and soft law respectively.

2.5 Summary

The purpose of this chapter was to provide a theoretical foundation for the concepts of normative hierarchy and global (environmental) constitutionalism in answering the question of whether a normative hierarchy exists in international law and why such a hierarchy is important from a constitutional point of view. The main findings of the chapter are the following:

- Hierarchy in international law involves an enquiry into the nature and structure of international law as well as the rules of recognition which distinguish between binding and non-binding norms. A norm acquires hierarchical superiority based on its function and value to the international community. International law has a rule of recognition to the extent that it has constitutional rules which are binding on states despite their consent (such as *jus cogens*). These rules have also changed the structure of international law from a horizontal to a vertical system of law.

- Global constitutionalism has the effect of giving fundamental norms, such as *jus cogens* and CIL, higher status through a normative hierarchy that is binding on states despite their consent. Some of these norms are also constitutional in nature to the extent that they are universal, non-derogable, legally binding, and determine the creation of other norms.

- Global constitutional law has expanded to the international environmental law context through the concept of global environmental constitutionalism. A normative hierarchy through *jus cogens* norms and the development of other constitutional norms advances global environmental constitutionalism through curtailing state

sovereignty; extending liability and accountability for environmental harm; providing comprehensive ascertainable and stable environmental laws; entrenching environmental rights; and according constitutional status to important principles such as sustainable development to protect the environment.

- A careful reading of Article 38 of the VCLT, the existence of soft law, Article 103 of the *UN Charter* and more importantly *jus cogens* norms indicate that a normative hierarchy exists in international law with the upper and lower extremes being *jus cogens* and soft law respectively.

- A normative hierarchy serves the purpose of resolving norm conflicts, giving order and structure to international law, protecting the fundamental values of the international community, adjudicating legal issues, and providing for mode control.

The following chapter will explore the CIL norms which exist in international environmental law to investigate whether they exist in a hierarchical fashion and what that hierarchy is or should be, with the purpose ultimately of concluding if a hierarchy of norms exists in international environmental law.

Chapter 3 Customary international environmental law norms

3.1 Introduction

In terms of Article 38 of the *ICJ Statute*, when courts are deciding disputes in accordance with international law, they must apply "international custom as evidence of a general practice accepted as law." As highlighted in the preceding chapters, CIL refers to consistent state practice (*usus*) accompanied by a sense of legal obligation or *opinio juris*. It can be argued that in international human rights law the concept of CIL is well developed, as there are a number of norms which are generally accepted as having CIL status.

For example, the protection against genocide,[158] the prohibition on the use of force,[159] the prohibition of torture,[160] state sovereignty, and diplomatic immunity[161] are generally accepted as CIL norms. However, the prohibition against genocide, the use of force and torture are also *jus cogens* norms. This is because *jus cogens* norms are first CIL rules before they become peremptory norms - hence the overlap between these two norms. However, the difference between CIL and *jus cogens* is that *jus cogens* norms are non-derogable, which makes them hierarchically superior to CIL norms. *Jus cogens* norms will be discussed in more detail in chapter 4.

De Wet[162] also goes on to say that the human rights obligations in the *International Covenant on Civil and Political Rights* (ICCPR)[163] and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)[164] are CIL norms which have *erga omnes* effect because the international community as a whole has an interest in their observance and protection. However, it is not sufficiently clear which norms have CIL status in

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158 Shelton 2002 *Saskatchewan Law Review* 320; Preamble of the *Convention* for the Prevention *and Punishment of the Crime of Genocide* (1951); Advisory Opinion on *Reservations to the Convention on the* Prevention *and Punishment* of *the Crime* of *Genocide* 1951 ICJ Reports 15.

159 A 2 (4) of the UN *Charter* (1945); Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*) Merits Judgment 1986 ICJ Reports 14; Linderfalk 2008 *EJIL* 860.

160 Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*) 2012 ICJ Reports 422.

161 *Al-Adsani v United Kingdom* 35763/97 2001 ECHR; Arrest Warrant Case (*Democratic Republic of the Congo v Belgium*) 2002 ICJ Reports 3, para 58.

162 De Wet 2007 *PER*/*PELJ* 28.

163 ICCPR (1966).

164 ICESCR (1966).

international environmental law. The no-harm principle, the precautionary principle,[165] the polluter pays principle and the principle of sustainable development have generally been argued to be CIL in international environmental law. However, there is no consensus on the customary status of these norms and international courts have also not explicitly confirmed their CIL status (except for the no-harm principle, as we shall see below).[166] This chapter will address the following sub-question, which is related to the dissertation's main research questions:

- Are there customary international environmental law norms which constitute part of the normative hierarchy in international environmental law; if so what are they; and if they do not exist, is it possible that they might come about?

The chapter will begin by discussing the nature and sources of CIL, followed by the requirements of CIL. The last part of the chapter will discuss the extent to which it can be said that there are international environmental law norms that have attained CIL status and how such customary international environmental law norms might come about.

3.2 The nature of customary international law

CIL norms are higher-order legal norms[167] which are "constitutional" in character when considered through the lens of global constitutionalism, as discussed above. This is because CIL norms are generally binding on all states, have universal or *erga omnes* application,[168] and limit state sovereignty. It can be argued that when a rule meets the two requirements of CIL, namely *usus* and *opinio juris*, which will be discussed later, it becomes universally binding on all states irrespective of whether they originally participated in its establishment or not.[169] This is also true of *jus cogens* norms, which are first and foremost CIL rules.

CIL rules are also onerous to amend as they "cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary

165 Cameron and Abouchar 1991 *Boston College International and Comparative Law Review* 20-21.
166 Kotze *Global Environmental Constitutionalism in the Anthropocene* 266.
167 Kotze *Global Environmental Constitutionalism in the Anthropocene* 234.
168 Koji 2001 *EJIL* 933.
169 Dubois 2009 *Nordic Journal of International Law* 137.

effect."[170] Further, CIL norms are hierarchically superior norms to the extent that they are based on the fundamental values of the international community[171] and protect the "common interests of most if not all states."[172]

CIL is also constitutional in character to the extent that the process of the development of CIL is part of the international constitutional order.[173] Byers[174] argues that:

> The process of customary international law involves the development, by way of state practice and within a structure of shared understandings and virtually immutable principles, of informal but nevertheless binding rules.

Therefore, the process of the development of CIL establishes the values which the international community considers fundamental and universally binding, and then protects those values with rules,[175] arguably in a more or less similar way as domestic actors would do in a domestic constitutional process. It may take time for states to agree on which values are fundamental to the international community as a whole,[176] hence the argument that CIL is generally developed over a long period of time.[177]

If a state has, however, consistently refused the existence or applicability of a particular CIL rule, by operation of the persistent objector rule such a state will not be bound by that CIL rule.[178] The persistent objector rule is therefore an exception to the universal application of CIL to the international community as a whole. Notably, however, the persistent objector rule does not apply to *jus cogens,* as will be discussed in chapter 4.

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170 *Roach and Pinkerton* v *United States* Case 9647 (1987) Inter- Am CHR Res No 3/87, OEA/ Ser L/V/11.71

171 Kotze *Global Environmental Constitutionalism in the Anthropocene* 122.

172 Byers 1997 *Nordic Journal of International Law* 212.

173 Byers 1997 *Nordic Journal of International Law* 212.

174 Byers 1997 *Nordic Journal of International Law* 212.

175 Byers 1997 *Nordic Journal of International Law* 222.

176 Kotze *Global Environmental Constitutionalism in the Anthropocene* 124.

177 Vidmar "Norm Conflicts and Hierarchy in International Law: Towards a Vertical International legal system?" 13-41.

178 Crawford *Brownlie's Principles of Public International Law* 11; Charney 1985 BYIL 1; Anglo- Norwegian Fisheries Case (*UK v Norway*) 1951 ICJ Reports 115 para 131; North Sea Continental Shelf case (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*) 1969 ICJ Reports 3 para 26, 27 and 131; Asylum case (*Colombia v Peru*) 1950 ICJ Reports 265 paras 277-278; Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*) Merits Judgment, 1986 ICJ Reports para 107.

To this extent, CIL is generally considered to be based on state consent.[179] Byers[180] says consent to customary rules may:

> ...come in the form of a diffuse consensus, or general consent to the process of customary international law, rather than as an explicit and specific consent to individual rules.

As such, deducing states' consent to a CIL rule can be onerous. Such consent may therefore be inferred from state conduct, a state's silent acquiescence in a rule, or its failure to protest against the rule in its formative stages.[181]

In terms of the persistent objector rule CIL therefore leaves some room for state sovereignty, as states can elect not to be bound by a CIL rule. However, it is argued that there is no evidence suggesting a perpetual persistent objection to a CIL rule.[182] To this extent, CIL is therefore hierarchically inferior, as it were, to *jus cogens* norms, which cannot be derogated from by treaty or any other means. In *Prosecutor* v *Anto Furundzija*,[183] the International Criminal Tribunal for the Former Yugoslavia (ICTFY) also held that *jus cogens* norms enjoy a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules.

However, CIL plays a very important role in international law generally and in its hierarchy more specifically. Unlike domestic legal systems, the international legal system lacks a legislature and a centralised compulsory judiciary.[184] As such, CIL plays an important role as the "common law of the international community."[185] Although states have and may conclude treaties, CIL is important for filling gaps which may not be covered by these treaties. Outside treaty law, it is also argued that CIL has the function of catching non-contracting "outsiders" who are not bound by treaties.[186] These parties' relations with the other members of the international community are then governed by CIL, although only

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179 Byers 1997 *Nordic Journal of International Law* 222; Mayua *Human Rights and Jus Cogens: Questioning the Use of Normative Hierarchy* 12; Lotus Case (*France v Turkey*) 1927 PCIJ Reports, Ser. A, No 9, 18; Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*) Merits Judgment, 1986 ICJ Reports 14 para 269.

180 Byers 1997 *Nordic Journal of International Law* 222.

181 Dugard *International Law: A South African Perspective* 26.

182 Martin 2002 *Saskatchewan Law Review* 354.

183 *Prosecutor v Furundzija,* Trial Chamber, Judgment, IT-95-17/1-T 1998 PT Judicial Reports para 153.

184 Dugard *International Law: A South African Perspective* 26.

185 Dugard *International Law: A South African Perspective* 26.

186 Beyerlin and Marauhn *International Environmental Law* 282.

to the extent that they are not persistent objectors to the CIL in question. Furthermore, as higher order legal norms, CIL also provides a normative framework in dispute resolution. For example, in the dispute between Canada and the United States on transboundary pollution,[187] the CIL rule of no harm arguably provided a normative framework for negotiations between the two states to later conclude the *Canada-United States Air Quality Agreement* (1991).[188]

CIL is arguably derived from a number of sources. First, it can be argued that CIL is formed through states' compliance with non-binding norms[189] such as soft law instruments. McIntyre[190] agrees in saying CIL is formed when normative rules and principles are consistently included in the declarations and resolutions of international organisations. CIL may be derived from treaties.[191] This is because a treaty may crystallize emerging CIL during treaty negotiations,[192] and generate new CIL through the treaty's subsequent ratification by a sufficient number of states or through state practice,[193] as will be discussed in the next section of this chapter. CIL can also accrue from general principles of law, and the no-harm principle is again an example of such CIL.[194] This is because the no-harm principle arguably also emerged from the general principle of *sic utere tuo ut alienum non laedas,*[195] which means one must not use one's property in such a way as to do any injury to others.

As argued before, there are two requirements for a norm to attain CIL status and these are state practice (*usus)* and *opinio juris*. The following section will now expand on these requirements before engaging in an enquiry of whether customary international environmental law norms exist and, if not, how they might come about.

187 Trail Smelter Arbitration (*United States v Canada*) 1941 3 RIAA 1907.
188 Bodansky 1995 *Global Legal Studies Journal* 119.
189 Shelton 2006 *AJIL* 321.
190 McIntyre 2006 *Natural Resources Journal* 158.
191 Martin 2002 *Saskatchewan Law Review* 355.
192 Martin 2002 *Saskatchewan Law Review* 355.
193 Asylum case (*Colombia v Peru*) 1950 ICJ Reports 265 para 277.
194 Beyerlin and Marauhn *International Environmental Law* 283.
195 Beyerlin and Marauhn *International Environmental Law* 283.

3.3 State practice/usus

For a rule to have CIL status there must be state practice showing states' adherence to the rule and evidence of custom. State practice is therefore an objective requirement for CIL. It should be noted that practice and not political statements by states or states' mere declaration of the recognition of a rule[196] is required as evidence of custom.[197] The ICJ in Military and *Paramilitary Activities in and against Nicaragua*[198] also confirmed this view in saying:

> …the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.[199]

It is generally accepted that such state practice must be widespread and repetitive.[200] However, it is not clear how many states must take part in that practice for it to be considered "general,"[201] although it can be argued that universal acceptance is not necessary.[202] In essence, the practice must be followed by "a significant number of states and not be rejected by a significant number of states."[203] On the time period that a particular practice must have been established, the ICJ in the *North Sea Continental Shelf Cases*[204] said:

> Although the passage of only a short period of time is not necessarily or of itself a bar to the formation of a new rule of customary international law … an indispensable requirement would be that within the period in question, short though it might be, state practice, including

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196 Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*) Merits Judgment, 1986 ICJ Reports 14 para 184.

197 South West Africa Cases (*Ethiopia v South Africa; Liberia v South Africa*) Second Phase 1966 ICJ Reports 6 para 169.

198 Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*) Merits Judgment, 1986 ICJ Reports 14 para 184.

199 Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*) Merits Judgment, 1986 ICJ Reports 14 para 184.

200 Fisheries Jurisdiction Case (*United Kingdom v Iceland*) 1974 ICJ Reports 3 para 23-26.

201 Beyerlin and Marauhn *International Environmental Law* 282.

202 Dugard *International Law: A South African Perspective* 27; dictum of J Lachs in the North Sea Continental Shelf Case (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*) 1969 ICJ Reports 3 para 229.

203 Janis and Noyes *International Law: Cases and Commentary* 148.

204 North Sea Continental Shelf case (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*) 1969 ICJ Reports 3 para 43.

that of states whose interests are specifically affected, should have been both extensive and virtually uniform.

Therefore, a rule must not necessarily have been in practice for a very long time to qualify as CIL but within the particular period of its existence its practice must have been widespread and consistent.[205] The ICJ in the *Asylum* case[206] confirmed this in saying that state practice must constitute "constant and uniform usage." As such, there must not be too much fluctuation and discrepancy in the exercise of a CIL rule.[207]

It is generally accepted that the acts which constitute general practice include *inter alia* authoritative governmental statements made in the domestic sphere, declarations issued in the international arena, national legislative acts, domestic[208] and international court decisions, and state conduct in international organisations and other international bodies.[209] In this regard it is argued with reference to international environmental law that if a particular environmental problem is uniformly regulated in a number of treaties, such MEAs may be regarded as evidence of customary international law.[210]

3.4 Opinio juris

Opinio juris refers to states' conviction that their conduct and actions are required by international law.[211] The frequency or habitual character of states' acts does not suffice for the requirement of *opinio juris,*[212] as states must feel legally compelled to act. It is difficult to ascertain why states act as *opinio juris* is a subjective element, but it is argued that *opinio juris* may be implied in state practice. The ICJ in the *North Sea Continental Shelf Cases*[213] held that state practice must be such:

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205 Dubois 2009 *Nordic Journal of International Law* 137.
206 Asylum Case (*Colombia v Peru*) 1950 ICJ Reports 266.
207 Asylum Case (*Colombia v Peru*) 1950 ICJ Reports 266 para 277.
208 De Wet and Vidmar "Introduction" 1-12.
209 Beyerlin and Marauhn *International Environmental Law* 282.
210 Beyerlin and Marauhn *International Environmental Law* 282.
211 Beyerlin and Marauhn *International Environmental Law* 283; Sands, Peel, Fabra and MacKenzie *Principles of International Environmental Law* 146; North Sea Continental Shelf case (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*) 1969 ICJ Reports 3 para 45.
212 North Sea Continental Shelf case (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*) 1969 ICJ Reports 3 para 44.
213 North Sea Continental Shelf case (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*) 1969 ICJ Reports 3 para 44.

> …as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it … The states concerned must therefore feel that they are conforming to what amounts to a legal obligation.

Evidence of *opinio juris* can also arguably be determined using the persistent objector rule. As discussed earlier, in terms of the persistent objector rule, a state which persistently refuses to be bound by a CIL rule is not bound by that rule.[214] It can be argued therefore that where there is no objection to a CIL rule, *opinio juris* may be implied. Non-binding instruments such as the resolutions of the United Nations General Assembly have also been argued to provide the "necessary statement of legal obligation (*opinio juris*)."[215]

3.5 Customary international environmental law

When a rule meets the requirements of state practice and *opinio juris*, such a rule attains CIL status. As highlighted in the introduction to this chapter, there is no general consensus on the norms which have CIL status in international environmental law. Bodansky[216] argues that the proliferation of MEAs in international environmental law for every environmental problem "suggests a diminished role for CIL." However, this does not necessarily mean that when there is a new MEA existing CIL will be replaced, as both norms can co-exist as "supporting pillars of the international legal order."[217]

The following discussion will engage in an enquiry of customary international environmental law through the discussion of four norms. These are the no-harm principle, sustainable development, the precautionary principle and the polluter pays principle. These four norms have been chosen because the no-harm principle is generally believed to be a CIL rule, while the other three might also become customary international environmental law norms as they show some emerging but latent evidence of state practice and *opinio juris*. The following discussion will now analyse the extent to which it could be said that these norms are or might become customary environmental law norms.

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214 Dugard *International Law: A South African Perspective* 29.
215 Shelton 2006 *AJIL* 321; Leathley 2007 *New York University Journal of International Law and Politics* 263.
216 Bodansky 1995 *Global Legal Studies Journal* 106.
217 Beyerlin and Marauhn *International Environmental Law* 281.

3.5.1 The no-harm principle

The Permanent Court of International Justice in *SS Wimbledon*[218] stressed that state sovereignty is not inalienable, meaning it can be limited. Such a viewpoint goes hand in hand with the no-harm principle, which provides that no state may use its territory in a way that will cause harm to the territory of another. The no-harm principle first emerged in an environmental context in the *Trail Smelter Arbitration,*[219] in which the Tribunal held:

> under the principles of international law … no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequences and the injury is established by clear and convincing evidence.

In terms of the no-harm principle, harm therefore refers not only to the environment, but also to people, animals and properties. For example, harm may include damage to another state's subsistence crops, the contamination of water bodies, and the causing of health problems to another state's population. It can be argued that transboundary environmental harm usually takes three forms: air pollution, the transboundary movement of hazardous waste, and the pollution of a transboundary watercourse.[220] So one might argue that where these forms of pollution occur the no-harm principle has been breached.

Significantly, it is not necessary for either the polluter or the affected state to prove intent to harm, as negligence suffices for the purposes of causation. The state which causes harm to another must prove that it exercised due diligence in carrying out its activities and took all reasonable measures to prevent or mitigate harm.[221] However, what constitutes "reasonable" measures differs from case to case and depends on the circumstances of each case.[222]

The harm suffered must be substantial, not inconsequential. The Tribunal in the *Trail Smelter Arbitration*[223] confirmed this in saying that environmental harm must apply to

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218 S.S Wimbledon *(U.K v Japan)* 1923 PCIJ (ser. A) 1.
219 Trail Smelter Arbitration (*United States v Canada*) 1941 3 RIAA 1907.
220 Schwabach "Transboundary Environmental Harm and State Responsibility: Customary International Law" 200- 211.
221 Beyerlin and Marauhn *International Environmental Law* 42; McIntyre 2006 *Natural Resources Journal* 170.
222 Beyerlin and Marauhn *International Environmental Law* 42.
223 Trail Smelter Arbitration (*United States v Canada*) 1941 3 RIAA 1907.

cases "of serious consequence" only. However, what constitutes substantial or significant harm may be subjective and debatable. In the case of such a debate, the *Convention on Environmental Impact Assessment in a Transboundary Context* (Espoo Convention)[224] provides, for example, that the parties to such a dispute may submit their dispute to an enquiry commission which will give a non-binding conclusion that may help settle the dispute.[225]

It could be argued that for the effective operation of the no-harm principle, both the polluter and the affected state(s) must be identifiable. For example, in cases of acid mine drainage or transboundary air pollution it may be fruitless to invoke the no-harm principle, as liability for pollution in these cases is often difficult to prove, including the identification of the source of pollution and the pathways of pollution. Further, the harm suffered must be quantifiable and there must be evidence to prove such harm. However, proving harm can also be quite onerous, especially in tracing nuclear pollution, for instance.[226]

It is argued that it is difficult to establish state practice with respect to the no-harm principle, because if there is no harm then no consequences should arise.[227] However, state practice can be proved where states are at least able to pursue their objectives without harming other states.[228] As such, state practice and *opinio juris* for the no-harm principle are reflected by the principle's subsequent codification in a number of soft law instruments and MEAs, recognition by the ICJ, and in other instruments. After its recognition in the *Trail Smelter Arbitration*, the no-harm principle was included in Principle 21 of the *Stockholm Declaration* which says:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

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224 *Convention on Environmental Impact Assessment in a Transboundary Context* (1991).
225 A 3 (7) of the *Convention on Environmental Impact Assessment in a Transboundary Context* (1991).
226 Okowa *State Responsibility for Transboundary Air Pollution in International Law* 198.
227 Odaguiri 2010 *Doutrina Estrangeira* 183.
228 Odaguiri 2010 *Doutrina Estrangeira* 183.

It is clear from principle 21 above that the no-harm principle not only protects states' environmental integrity but also that of the global commons (common areas such as the high seas, the Antarctica, the deep seabed and outer space).[229] The no-harm principle is also included in Principle 2 of the *Rio Declaration.* Although not binding, these soft law instruments reflect the opinion of 172 states and the widespread acceptance of the no-harm principle.

The ICJ has further endorsed the no-harm principle in a number of judicial decisions. In the *Corfu Channel* case[230] the ICJ said that a state may not knowingly allow its territory to be used to injure another state. The court in the *Lake Lanoux Arbitration*[231] also said that where there is a shared resource, states must take the interests of other states into account before engaging in an activity which may cause harm to others. In the *Advisory Opinion on the Legality of the Threat and Use of Nuclear Weapons*,[232] the ICJ held with regards to the no-harm principle:

> The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.

The no-harm principle has also been accepted in other judicial decisions,[233] in the codification work of the ILC,[234] in declarations and resolutions adopted by the United Nations,[235] and in other instruments.[236] The *Convention on Long-Range Transboundary Air Pollution*, the *United Nations Framework Convention on Climate Change*, the *United Nations Convention on the Law of the Sea*, the *Espoo Convention on the Transboundary*

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229 Beyerlin and Marauhn *International Environmental Law* 39.

230 Corfu Channel Case (*UK v Albania*) 1949 ICJ Reports 4 para 22.

231 Lake Lanoux Arbitration (*Spain v France*) 1957 12 R.I.A.A. 281.

232 Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict 1996 ICJ Reports 266 para 29.

233 Lake Lanoux Arbitration (*Spain v France*) 1957 12 R.I.A.A. 281; Corfu Channel Case (*UK v Albania*) 1949 ICJ Reports 4 para 22; Case concerning the *Gabcikovo-Nagymaros Project* (*Hungary* v *Slovakia*) 1997 ICJ Reports 1; Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in Nuclear Tests (*New Zealand v France*) 1995 ICJ Pleadings 288.

234 A 3 of the 2001 *ILC Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities* adopted at the 53rd session of the International Law Commission UN Doc A/56/10 (2001).

235 For example the UN General Assembly *Resolution on the Cooperation in the Field of Environment Concerning Natural Resources Shared by Two or More States* G.A. Res. 3129 (XXVIII), U.N. GAOR Supp. (No. 30A), U.N. Doc. A/9030/Add. 1 (1973); Beyerlin and Marauhn *International Environmental Law* 44.

236 For example the *OECD Council Recommendation Concerning Transfrontier Pollution* (1972) and A 3 (1) of the *Montreal Rules of International Law Applicable to Transfrontier Pollution* (1982).

Effects of Industrial Accidents, and the *Convention on Biological Diversity* are some examples of MEAs that have codified the no-harm principle.[237] As such these MEAs and the above-mentioned judicial decisions provide evidence that the no-harm principle satisfies the requirements of state practice and *opinio juris* for the purposes of CIL. Many scholars[238] also support the view that the no-harm principle is now a customary environmental law norm.

It could also be argued that the no-harm principle has *erga omnes* application. Every state arguably owes an obligation to the international community as a whole to protect the "global environmental goods,"[239] which are the concern of all states and in the protection of which all states have a legal interest. The no-harm principle, as said before, also possesses the character of a higher-order legal norm to the extent that it limits state sovereignty. Beyerlin and Marauhn[240] agree in saying that the no-harm principle is a compromise between the territorial sovereignty of the state causing environmental harm on the one hand, and the territorial integrity of the state likely to be affected by such harm on the other. Ultimately, the no-harm principle arguably favours territorial integrity over state sovereignty.[241]

Further, the no-harm principle can be argued to be a higher order legal norm to the extent that it places both negative and positive obligations on states. It has prohibitive steering effects on states[242] to the extent that it prohibits states from causing substantial transboundary environmental harm. It also has preventative steering effects on states which are also positive obligations imposed on states to the extent that the rule requires states to take adequate measures to prevent and control potential transboundary harm.[243]

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237 For example the preambles of the *Convention on Long Range Transboundary Air Pollution* (1979) and the *United Nations Framework Convention on Climate Change* (1992); A 194 (2) of the *United Nations Framework Convention on Climate Change* (1992); A 194 (2) of the *United Nations Convention on the Law of the Sea* (1982); A 192 (2) of the *Espoo Convention on the Transboundary Effects of Industrial Accidents*; A 3 of the *Convention on Biological Diversity*.

238 For example Birnie**,** Boyle and Redgwell *International Law and the Environment* 104-105; Kiss and Shelton *International Environmental Law* 130; Sands, Peel, Fabra and MacKenzie *Principles of International Environmental Law* 190.

239 These include the atmosphere, climate and biodiversity, for example- Beyerlin and Marauhn *International Environmental Law* 283.

240 Beyerlin and Marauhn *International Environmental Law* 40.

241 Beyerlin and Marauhn *International Environmental Law* 40.

242 Beyerlin and Marauhn *International Environmental Law* 40.

243 Beyerlin and Marauhn *International Environmental Law* 40.

It can be argued that the only other principle that has attained CIL is the duty to conduct a transboundary environmental impact assessment (EIA). In as much as the duty to conduct such an EIA may be argued to be a separate CIL, it could be argued that such a duty is part of the no-harm principle.[244] This is because the purpose of the EIA is to foresee and prevent or minimise harm to the environment, which purpose is tangential to the no-harm principle. The duty to conduct a transboundary EIA involves an evaluation by a state of the likely impact of a proposed activity on the environment.[245] The authorising body of such a project is required to engage in a balancing exercise of the environmental consequences of such a project on the one the hand and economic development on the other.[246]

Article 2 of the *Espoo Convention* provides a general outline on how an EIA must be conducted. The EIA includes *inter alia* obligations to prevent, reduce and control significant adverse effects on the environment, consultations and notifications,[247] and the exchanging of information with the parties likely to be affected by the proposed activity.[248] These procedural requirements are also important in discharging the standard of due diligence required under the no-harm principle.[249] It is also argued that even when the duty to conduct a transboundary EIA is not explicitly mentioned in a MEA, the duty may be implied in these procedural duties and more particularly in the duty to notify other states of the likely transboundary harm.[250]

This means that when a state foresees that its proposed activity may cause transboundary harm, it must conduct a transboundary EIA as a matter of due diligence. It is also argued that the precautionary principle may help states in deciding when a transboundary EIA would be necessary.[251] Once the EIA has been completed, an EIA document should be prepared and sent to all affected parties,[252] who must be given

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244 Birnie, Boyle and Redgwell *International Law and the Environment* 104.
245 A 1 (vi) of the *Convention on Environmental Impact Assessment in a Transboundary Context* (1991).
246 Beyerlin and Marauhn *International Environmental Law* 230.
247 Corfu Channel Case (*UK v Albania*) 1949 ICJ Reports 4 (judgement of 9 April); Lac Lanoux Arbitration (*Spain v France*) 1957 12 R.I.A.A. para 138.
248 Bodansky 1995 *Global Legal Studies Journal* 106; Partan 1988 *Boston University International Law Journal* 83; A 4 and 5 of the *Convention on Long-Range Transboundary Air Pollution* (1979).
249 McIntyre 2006 *Natural Resources Journal* 171.
250 Okowa 1996 *British Yearbook of International Law* 279.
251 McIntyre 2006 *Natural Resources Journal* 171.
252 A 4 (2) of the *Espoo Convention* (1995).

opportune and reasonable time to comment on the proposed project before it commences.[253]

The general duty to conduct a transboundary EIA is enshrined in Principle 17 of the *Rio Declaration,* which states that such an exercise must be engaged in for projects likely to have an adverse impact on the environment. The duty is also included in the *United Nations Convention on the Law of the Sea* (UNCLOS),[254] and the *US-Canada Air Quality Agreement.*[255] It also surfaces in article 7 of the *ILC's Draft Articles on the Prevention of Transboundary Harm*,[256] even though these are non-binding. The ICJ in the *Gabcikovo Nagymaros* case indirectly confirmed the duty to conduct a transboundary EIA based on a community interest in international rivers, which requires states' cooperation.[257] In the *Pulp Mills*[258] case, where there was a shared resource (the River Uruguay), the ICJ also held that there was a duty to conduct a transboundary EIA, since the activity in question was likely to cause significant harm to the shared water resource.

Therefore, the no-harm principle, coupled with the duty to conduct a transboundary EIA, is an environmental customary law norm which the ICJ has pronounced on and accepted. A breach of the no-harm principle is therefore an internationally wrongful act which might in principle invoke state responsibility in terms of the ILC *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (2001). The state which causes harm will be required in terms of the draft articles to cease the wrongful act and make full reparation for the injury caused.[259] However, the Draft Articles are not yet binding and to date only provide guidance for state responsibility when harm occurs.

3.5.2 Sustainable development

"Sustainable development" refers to development that meets the needs of the present generation without compromising the ability of future generations to meet their own

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253 Beyerlin and Marauhn *International Environmental Law* 233.
254 UNCLOS (1982).
255 *Canada-United States Air Quality Agreement* (2000).
256 *ILC Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities* 53rd Session UN Doc A/56/10 (2001).
257 Gabcikovo-Nagymaros Project (*Hungary v Slovakia*) 1997 ICJ Reports 1 para 41.
258 Pulp Mills on the River Uruguay (*Argentina v Uruguay*) 2010 ICJ Reports 156 para 204.
259 A 30, 31 and 28- 41 of the *ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts* November 2001, Supplement No. 10 (A/56/10).

needs.[260] It requires the balancing of environmental, social, economic and developmental goals. Principle 4 of the *Rio Declaration* reiterates the interdependence between development and the environment in saying:

> In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

Sustainable development is also concerned with inter- and intra-generational equity, which is the balancing of interests between members of a specific generation and of the present and future generations. It is argued that sustainable development is a "universally accepted notion."[261] To this extent, sustainable development has been described as "the worldwide dominating leitmotif for shaping international environmental and developmental relations."[262] This is due to the proliferation of the concept of sustainable development in contemporary international law generally and especially in international environmental law.

The *United Nations Framework for Climate Change Convention* (UNFCCC) and the *Kyoto Protocol* provide that sustainable development is an important objective for combating climate change.[263] The UNFCCC also specifically provides that the state parties to the treaty "have a right to, and should promote sustainable development."[264] The *United Nations Convention to Combat Desertification* (UNCCD) refers to sustainable development in its preamble in saying that:

> …sustainable economic growth, social development and poverty eradication are priorities of affected developing countries, particularly in Africa, and are essential to meeting sustainability objectives.

Sustainable development is also referred to in articles 2 and 3 of the UNFCCC, article 2 (1) of the *Kyoto Protocol*,[265] articles 2 (1) and 4 (2) (b) of the *United Nations Convention to Combat Desertification* (UNCCD)[266] and MDG 7 of the *UN Millennium Declaration*.[267]

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260 United Nations Brundtland Report: *Our Common Future* (1987).
261 McIntyre 2006 *Natural Resources Journal* 173.
262 Beyerlin and Marauhn *International Environmental Law* 76.
263 A 2 of the UNFCCC (1992); A 2(1) of the *Kyoto Protocol the* UNFCCC (1997).
264 A 3 of the UNFCCC (1992).
265 *Kyoto Protocol to the* UNFCCC (1997).
266 UNCCD (1994).
267 UNGA Res 55/2 (8 September 2000).

More significantly, the *United Nations Sustainable Development Goals* (SDGs)[268] have superseded the MDGs and are now the most important framework for sustainable development. Articles 1, 5, 8 and 10 of the *Convention on Biodiversity* (CBD) also stress the importance of "sustainable use," which is part of the notion of sustainable development. However, despite such wide recognition these instruments do not specify what the normative status of sustainable development is. It remains unclear if sustainable development is a mere political objective, or whether it has since become a minimum standard to measure conduct that may impact on the environment.

The ICJ has also referred to sustainable development in the *Gabcikovo Nagymaros* case[269] in saying:

> …the need to reconcile economic development with protection of the environment … [is] aptly expressed in the concept of sustainable development.

However, the court also did not clarify the normative quality of sustainable development. The concept remains ambiguous and susceptible to various interpretations as to its normative status. To this end, it is argued that the proliferation of references to sustainable development has led to confusion rather than clarity of the concept.[270]

Different scholars also have differing views on the normative quality and status of sustainable development. Some argue that sustainable development is part of CIL,[271] while some say it is soft law,[272] and others maintain that sustainable development is a mere political ideal.[273] Birnie, Boyle and Redgwell[274] state:

> Whether or not sustainable development is a legal obligation, and as we have seen this seems unlikely, it does represent a policy which can influence the outcome of cases, the interpretation of treaties, and the practice of states and international organisations, and may lead to significant changes and developments in the existing law.

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268 United Nations 2016 http://www.un.org/sustainabledevelopment/sustainable-development-goals/
269 Case concerning the Gabcikovo-Nagymaros Project (*Hungary v Slovakia*) 1997 ICJ Reports 1 para 162.
270 Beyerlin and Marauhn *International Environmental Law* 76.
271 Sands, Peel, Fabra and MacKenzie *Principles of International Environmental Law* 254.
272 Mensah 2008 "Soft Law: A Fresh Look at an Old Mechanism" *Environmental Law and Policy* 52.
273 Beyerlin and Marauhn *International Environmental Law* 80.
274 Birnie, Boyle and Redgwell *International Law and the Environment* 127.

Beyerlin and Marauhn[275] say sustainable development:

> stipulates a political aim to be reached, or, alternatively, constitutes a political ideal to be pursued, rather than a legal principle that entails indirect steering effects on the conduct of its addresses.

In a separate opinion in the *Gabcikovo Nagymaros* judgement, Judge Weeramantry, quite contrary to the foregoing views, held that sustainable development is "a principle with normative value" and not just "a mere concept."[276] He also added that the principle is widely and generally accepted by the global community.[277] However, Judge Weeramantry did not specify the normative quality or status that sustainable development may have. It also remains unclear if the majority of the court agreed with his reasoning.[278]

At this stage, sustainable development arguably has not attained customary law status.[279] Despite its proliferation, there is no evidence suggesting widespread and consistent state practice of sustainable development, accompanied by *opinio juris* of the concept. For example, though many developing states profess their adherence to sustainable development (with the concept of common but differentiated responsibilities (CBDR) realising the different capabilities of developing and developed states),[280] many of them arguably still view sustainable development as a goal to be reached in the future rather than a norm to which present practice must adhere. It is nothing more than a non-binding political/policy guideline or strategic goal.

Moreover, since sustainable development is ambiguous and susceptible to various interpretations, it can be argued that it is unfit, for now at least, to be a higher order legal norm which can "deploy any appreciable steering effect on states' environmental behaviour."[281] As such, sustainable development can best be described as "a principle that guides states in their decision-making."[282]

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275 Beyerlin and Marauhn *International Environmental Law* 81.
276 *Gabcikovo-Nagymaros Project* (*Hungary* v *Slovakia*) 1997 ICJ Reports 1 para 92.
277 *Gabcikovo-Nagymaros Project* (*Hungary* v *Slovakia*) 1997 ICJ Reports 1 para 95.
278 Beyerlin and Marauhn *International Environmental Law* 80.
279 De Wet 2006 *ICLQ* 62.
280 McIntyre 2006 *Natural Resources Journal* 175.
281 Beyerlin and Marauhn *International Environmental Law* 81.
282 Beyerlin and Marauhn *International Environmental Law* 81.

However, since sustainable development is already recognised in a number of MEAs and soft law instruments, the principle has the potential to become CIL. As argued before, if an environmental problem or concept is regulated uniformly in a number of treaties, such MEAs may be regarded as evidence of CIL. Further, CIL is also derived from soft law instruments, as argued earlier. Therefore the inclusion of sustainable development in more soft law instruments and MEAs may contribute in the future to the elevation of sustainable development to a customary international environmental law rule.

Furthermore, in as much as it can be argued that sustainable development at this stage is a political ideal, it must be noted that governments' statements coupled with domestic legislation and domestic court decisions may also be evidence of state practice for the purposes of CIL. When such state practice is established, the *opinio juris* of states to sustainable development might then also be implied from such state practice. However, there is currently insufficient domestic practice of sustainable development at this stage to conclude that it has attained CIL status.

3.5.3 Precautionary principle

Principle 15 of the *Rio Declaration* provides that:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The precautionary principle therefore provides that the lack of scientific certainty on an identified environmental risk must not be a reason to postpone action.[283] It is a mechanism for inducing states to foresee and avoid or minimise environmental risks. McIntyre[284] argues that the precautionary principle helps in identifying the general standards for the due diligence, the standard of care required for preventing transboundary harm. To this extent, it is also argued that the precautionary principle is closely intertwined with the duty to conduct a transboundary EIA,[285] as described earlier,

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283 Beyerlin and Marauhn *International Environmental Law* 50.
284 McIntyre 2006 *Natural Resources Journal* 172.
285 Birnie, Boyle and Redgwell *International Law and the Environment* 120.

although this does not necessarily mean that the precautionary principle is also a CIL norm.

The precautionary principle has been included in a number of MEAs either directly or indirectly. For example, both the *Vienna Ozone Convention* and the *Montreal Protocol* refer to the precautionary principle in their preambles.[286] The CBD states in its preamble that:

> where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.

The *Cartagena Biosafety Protocol*[287] in Article 1 also refers to the precautionary principle. The 1992 UNECE Water Convention[288] provides that:

> [t]he precautionary principle, by virtue of which action to avoid the potential transboundary impact of the release of hazardous substances shall not be postponed on the ground that scientific research has not fully proved a causal link between those substances, on the one hand, and the potential transboundary impact, on the other hand.

Article 3 (3) of the UNFCCC provides that the precautionary principle is one of its guiding principles in saying:

> [t]he Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost.[289]

The precautionary principle has also been referred to in some judicial decisions. Two of the dissenting judges in the *Nuclear Tests* case referred to the precautionary principle as

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286 Preambles of the *Vienna Convention for the Protection of the Ozone Layer* (1985) and the *Montreal Protocol on Substances that Deplete the Ozone Layer* (1987).

287 *Cartagena Protocol on Biosafety to the Convention on Biological Diversity* (2002).

288 A 2 (5) (a) of the *Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (1992).

289 Art 3(3) of the UNFCCC (1992).

an emerging feature of international environmental law.[290] Although the principle was brought up in the *Gabcikovo Nagymaros* case, the ICJ did not address the principle in much detail.[291] In the *Southern Bluefin Tuna* case,[292] the International Tribunal for the Law of the Sea (ITLOS) said that:

> [Although there is] scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna and ... although the tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration.

The Tribunal in this case, just as the ICJ, did not clarify if the precautionary principle is a binding principle of customary international law. However, it is unlikely at this stage that the precautionary principle has attained CIL status. There is no clear evidence that the precautionary principle is a "command to act"[293] which imposes duties on states to take definable action.[294] Furthermore, international courts have been reluctant to apply the principle "as a legal yardstick for solving interstate disputes."[295] As such it can be argued that the precautionary principle has not yet attained customary law status.

However, the precautionary principle is arguably an "emerging rule of customary international environmental law."[296] As is evident from the foregoing, soft law and a number of MEAs recognise the precautionary principle, which provides some evidence for state practice. Further recognition of the precautionary principle in more MEAs, and more importantly by the ICJ, might see the recognition of the precautionary principle as a customary international environmental law norm in the not too distant future.

3.5.4 The polluter-pays principle

The origins of the polluter pays principle (PPP) can be traced back to 1972, when the principle was identified in the Organisation for Economic Co-operation and Development (OECD) Guiding Principles as the method to be used for the allocation of the cost of

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290 Nuclear Tests (*New Zealand* v *France*) 1974 ICJ Reports 253 paras 412 (dissenting opinion) and 342 (dissenting opinion).
291 Beyerlin and Marauhn *International Environmental Law* 51.
292 Southern Bluefin Tuna Case (*Australia v Japan; New Zealand v Japan*) Provisional Measures, Order of 27 August 1999 ITLOS cases para 79.
293 Beyerlin and Marauhn *International Environmental Law* 54.
294 Beyerlin and Marauhn *International Environmental Law* 50.
295 Beyerlin and Marauhn *International Environmental Law* 52.
296 Beyerlin and Marauhn *International Environmental Law* 283.

pollution prevention and control.[297] In 1992 the PPP was included in Principle 16 of the *Rio Declaration,* which provides:

> [n]ational authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the costs of pollution.

Basically the polluter pays principle PPP means that the party which is responsible for polluting the environment, or for an activity which may pollute the environment, must bear the costs of remediating such pollution or the costs of preventing and controlling such pollution. To this extent, it is argued that the PPP is a principle for the allocation of the costs of pollution control rather than a liability principle.[298]

It could also be argued here that the PPP is based on the concept of environmental justice to the extent that the parties who engage in and profit from the activities which cause environmental pollution must be liable for such pollution and not the individuals who are affected by such pollution.[299] The PPP has therefore been described as a method for "internalising externalities."[300] In most cases, however, the government does cover the costs of such pollution, meaning that the ordinary taxpayer in essence pays for the pollution. Nevertheless, the PPP aims to regulate pollution, ensure environmentally sustainable activities,[301] and provide for the "most efficient way to allocate costs of pollution prevention and control measures."[302]

In terms of principle 16 of the *Rio Declaration* above, the PPP places a duty on states' national authorities, who hold the environment in public trust, to set the measures of controlling pollution, or where pollution has already occurred, to ensure that the polluters are held accountable.[303] To this extent the PPP is therefore a "national endeavour to be directly promoted or implemented by national authorities."[304] In this sense, Beyerlin and

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297 OECD 1972 http://www.oecd.org
298 Nabileyo *The Polluter Pays Principle and Environmental Liability in South Africa* 11; Hunter, Salzman and Zaelke *International Environmental Law and Policy* 413.
299 Anton and Shelton *Environmental Protection and Human Rights* 148.
300 Kiss and Shelton *International Environmental Law* 214.
301 Schwartz "The polluter-pays principle" 243- 261.
302 Anton and Shelton *Environmental Protection and Human Rights* 86.
303 Beyerlin and Marauhn *International Environmental Law* 58.
304 Schwartz "The polluter-pays principle" 243- 261.

Marauhn[305] argue that the PPP is best applicable in a "geographic region that is subject to uniform environmental law, such as within a state" or in a regional context such as the European Union (EU).

The PPP is recognised in a number of MEAs and soft law instruments, although its application therein varies. In some contexts, such as the *Barcelona Convention for the Protection of the Mediterranean Sea against Pollution*,[306] the PPP is "represented as cost bearing for pollution control, prevention and reduction measures," which measures are set by national authorities or within the MEAs themselves.[307] In other treaties, states are urged to be "guided" by the PPP and in others "to take the principle into account" or "to apply it."[308] In some contexts the PPP is also recognised as a general principle of international environmental law,[309] and in other contexts as an indication of the acceptance of responsibility for pollution.[310]

The PPP is further reaffirmed in Article 2(2)(b) of the *Convention for the Protection of the Marine Environment of the North-East Atlantic,*[311] which provides that the polluter bears the costs of pollution prevention, control and reduction measures. The PPP is also referred to in the preamble of the *Stockholm Convention on Persistent Organic Pollutants*.[312] However, the ICJ has not yet equivocally pronounced on the normative quality of the PPP or confirmed its CIL status.

Despite such wide recognition, the above mentioned MEAs and soft law instruments do little to remove the ambiguity surrounding the meaning, content and legal effects of the

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305 Beyerlin and Marauhn *International Environmental Law* 58.

306 *Barcelona Convention for the Protection of the Mediterranean Sea against Pollution* (1976) (as amended in 1995).

307 Schwartz "The polluter-pays principle" 243- 261.

308 For example in A 4 (4) of the *Convention on Co-operation for the Protection and Sustainable Use of the Danube River* (1994); A 2 (5) (b) of the *Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (1992).

309 Preamble of the *London Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances* (2000); preamble of the *Convention on the Transboundary Effects of Industrial Accidents* (1992); *International Convention on Oil Pollution Preparedness, Response and Cooperation* (1990).

310 *Kyoto Protocol to the* UNFCCC (1997); *Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa* (1991); *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* (1989).

311 *Convention for the Protection of the Marine Environment of the North-East Atlantic* (1992).

312 *Stockholm Convention on Persistent Organic Pollutants* (2001).

PPP.[313] The meaning and application of the PPP, as well as the nature and extent of the costs involved, therefore remain open to interpretation.[314] Further, the PPP does not specify who the polluter is where there is a "pollution chain,"[315] for example in cases of acid mine drainage. Anton and Shelton[316] also say there is no universal consensus on the scope of the PPP and "its implications for those involved in past or potential polluting activities." Furthermore, the softened wording in Principle 16 of the *Rio Declaration* ("should endeavour to promote") might show that the PPP lacks the binding effect of a legal rule.[317] At best, the PPP at this stage is a recognised legal rule in the European Community, the OECD and the United Nations Economic Commission for Europe (UNECE) context.[318]

However, despite these uncertainties, the PPP serves to steer the conduct of potential polluters[319] where there is a risk of pollution or where pollution has occurred. The PPP also provides guidance to states when framing domestic environmental legislation and policies.[320] To this extent, the PPP has the potential to become a legal rule. Further, the PPP is recognised in a number of MEAs, which could be construed as evidence of state practice and *opinio juris* if the principle is also endorsed as a binding rule by the ICJ.

3.6 Summary

The purpose of this chapter was to establish if customary environmental law norms which constitute part of a normative hierarchy exist in international environmental law; which norms these are; and if they do not exist, whether they might come about. The main findings of the chapter are the following:

- CIL are higher order legal norms which are "constitutional" to the extent that they are binding on the international community as a whole, except in the case of a persistent objector; they are based on the fundamental values of the international

313 Beyerlin and Marauhn *International Environmental Law* 57-58.
314 Crawford *Brownlie's Principles of Public International Law* 280; Sands, Peel, Fabra and MacKenzie *Principles of International Environmental Law* 280.
315 Beyerlin and Marauhn *International Environmental Law* 59.
316 Anton and Shelton *Environmental Protection and Human Rights* 20.
317 Beyerlin "Different Types of Norms in International Environmental Law: Policies, Principles and Rules" 426- 448.
318 Sands, Peel, Fabra and MacKenzie *Principles of International Environmental Law* 280.
319 Nabileyo *The Polluter Pays Principle and Environmental Liability in South Africa* 9; Soltau 1999 *SAJELP* 38.
320 Hunter, Salzman and Zaelke *International Environmental Law and Policy* 412.

community; they have *erga omnes* application; they limit states sovereignty and they are onerous to amend.

- CIL is important *inter alia* for filling any gaps in law which may not be covered by MEAs, regulating the legal relations between non-contracting states, and providing a normative framework in dispute resolution.

- CIL is mainly derived from soft law instruments, treaties and general principles of law.

- The two requirements for a rule to attain CIL status are state practice, an objective requirement which must be widespread and consistent, and *opinio juris*, a subjective requirement which means states must feel legally compelled to act. Evidence of state practice includes *inter alia* authoritative governmental statements made in the domestic sphere and declarations issued in the international arena, national legislative acts, domestic and international court decisions, and state conduct in international organisations and other international bodies.

- There is no general consensus on which norms have acquired CIL status in international environmental law. However, the no-harm principle coupled with the duty to conduct a transboundary EIA is the only customary environmental law norm that the ICJ has unequivocally pronounced on and which has sufficient evidence of state practice and *opinio juris*.

- The precautionary principle, polluter pays principle and the principle of sustainable development have been discussed to the extent that they are recognised in a number of soft law instruments and MEAs, which is evidence of some state practice. However, such state practice is arguably not yet widespread and consistent. Further, it is also not clear yet if there is sufficient evidence of *opinio juris*, especially in the case of sustainable development which, to date, remains more of a political ideal than a legally binding rule.

- However, these norms might become customary international environmental law norms in future should these principles acquire more evidence of state practice and more importantly, recognition by the ICJ as legally binding rules.

Chapter 4 Environmental *jus cogens* norms

4.1 Introduction

A considerable amount of literature[321] has been dedicated to the concept of peremptory norms or *jus cogens* (compelling law)[322] in international law. However, there is no general consensus as to the nature, probable sources,[323] content, or legal consequences of *jus cogens* norms. Tladi[324] supports this in saying "the precise contours, content and effects of *jus cogens* remain in dispute." It can be argued that while the concept of *jus cogens* is arguably well-trodden scholarly ground in international law generally, the concept has not been critiqued as much in international environmental law. This chapter will address the following sub-question, which is related to the dissertation's research questions:

- Are there environmental *jus cogens* norms which constitute part of the normative hierarchy in international environmental law; if so, what are they; and if they do not exist, is it possible that they might they come about?

The chapter will commence by defining *jus cogens* norms, investigating their sources and how they can be identified. The discussion will then focus on the main question that this chapter seeks to answer by investigating if environmental *jus cogens* norms exist in international environmental law.

It must be noted that while there is extensive literature dealing with various aspects of the concept of *jus cogens*, this chapter will discuss only those facets of *jus cogens* norms that will help make a case for establishing environmental *jus cogens* norms. Secondly, it must also be noted that while this chapter argues for the existence of environmental *jus cogens* norms for increased environmental protection, it does not in any way suggest that environmental *jus cogens* norms will be a cure for all the ills of international environmental law.

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321 For example Shelton 2006 *AJIL* 299; Rafferty *Constitutionalism in International Law: The Limits of Jus Cogens*; Uhlmann 1999 *The Georgetown International Environmental Law Review* 102; De Wet and Vidmar *Hierarchy in International Law: The Place of Human Rights*; Weil 1983 *AJIL* 413.

322 The terms *jus cogens* and peremptory norms will be used interchangeably.

323 Shelton 2006 *AJIL* 299.

324 Tladi 2014 legal.un.org/ilc/reports/2014/english/annex.pdf

4.2 Defining jus cogens

A peremptory norm of general international law is a norm which is accepted and recognised by the international community of states as a whole, from which no derogation is permitted, and which can be modified only by a similar norm of the same character.[325] These characteristics will be discussed in detail in section 4.4 of this chapter. It is not clear from the VCLT which rules have *jus cogens* status in international law, but it is generally accepted that the following have attained *jus cogens* status: the prohibition of aggression;[326] the prohibitions against slavery and the slave trade; the prohibition of genocide,[327] the prohibition of racial discrimination and apartheid;[328] the prohibition of torture;[329] and the right to self-determination.[330] These examples show that most of the recognised *jus cogens* norms to date are human rights norms.[331] However, this list is not exhaustive, as Article 64 of the VCLT envisages the creation of new peremptory norms of general international law:

> If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

In earlier decisions,[332] the ICJ held that states are bound only by international rules which they have consented to in treaties or through custom.[333] However, states' consent to be bound by legal rules has been limited since the introduction of *jus cogens* norms, as they are binding on the international community as a whole despite consent, protest,

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325 A 53 of the VCLT (1980).

326 Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*) Merits Judgment, 1986 ICJ Reports 14 para 190; Barcelona Traction (*Belgium v Spain*) (*Second Phase*) 1970 ICJ Rep 3.

327 Barcelona Traction (*Belgium v Spain*) (Second Phase) 1970 ICJ Reports 3; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures,* Order of 13 September 1993, ICJ Reports 3; Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v Rwanda*) 2006 ICJ Reports 26.

328 United Nations 1966 legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf

329 *Prosecutor v Furundzija,* Trial Chamber, Judgment, IT-95-17/1-T 1998 PT Judicial Reports; *Al-Adsani v United Kingdom* 35763/97 (2001) ECHR.

330 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* 1996 ICJ Reports 266 para 79.

331 De Wet and Vidmar *Hierarchy in International Law: The place of human rights* 3; Forest 2002 *Saskatchewan Law Review* 346.

332 S.S Lotus (*France v Turkey*) 1927 PCIJ (ser. A); Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v United States*) Merits 1986 ICJ REP 14.

333 S.S Lotus (*France v Turkey*) 1927 PCIJ (ser. A).

recognition, or acquiescence.[334] Kelsen[335] agrees by saying that international obligations cannot be based solely on consent as they are fundamental norms that impose a duty on states to comply with their obligations.

Jus cogens norms are arguably "constitutional" in nature. This is because *jus cogens* cannot be violated under any circumstance (non-derogability), create negative obligations for states,[336] protect the fundamental values of the international community, and could determine the creation of other norms.[337] Further, *jus cogens* norms have universal or *erga omnes* application, meaning they apply to every state, and upon violation injure the international community as a whole.[338] *Jus cogens* are constitutional rules as they are derived from the process of CIL, which is part of the international constitutional order.[339] This argument will be discussed in the following section of this chapter. It is clear, however, that these characteristics of *jus cogens* make them hierarchically superior to other international law norms, such as CIL, treaties and general principles of law.[340]

4.3 Sources of jus cogens norms

There is no consensus regarding the sources of *jus cogens* norms. Some scholars argue that they are derived from general principles of international law,[341] while others argue that they derive from constitutional principles, state consent, or from natural law.[342] Byers[343] suggests *jus cogens* norms are derived from the process of making CIL. He argues that this process is in "itself part of an international constitutional order" because in the process informal but binding values and immutable principles of the international community are developed through state practice:[344]

> States, by participating in the customary process, may therefore be consenting to that process, to any existing customary rules, to any subsequently developed customary rules

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334 Shelton 2006 *AJIL* 313; *Michael Domingues (United States)*, Case 12.285, (2003) Inter-American Court of Human Rights Report 62/02, OEA/Ser.L/V/IL.117, doc.1, rev.1.
335 Kelsen *Pure Theory of Law* 214-17.
336 Vidmar "Norm Conflicts and Hierarchy in International Law" 13-41.
337 Byers 1997 *Nordic Journal of International Law* 212.
338 However, not all *erga omnes* obligations have *jus cogens* status- De Wet 2006 *AJIL* 61.
339 Byers 1997 *Nordic Journal of International Law* 212.
340 Application of the *Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 13 September 1993, ICJ Reports 3.
341 Verdross 1937 *AJIL* 572.
342 Kolb *Theorie du Ius Cogens International* 14.
343 Byers 1997 *Nordic Journal of International Law* 212.
344 Byers 1997 *Nordic Journal of International Law* 212.

the development of which they have not opposed, and to any *jus cogens* rules, even if they have opposed their development.[345]

It is argued that the values protected by *jus cogens* norms are already CIL to the extent that they form part of the *UN Charter* to which all member states have consented.[346] These values include *inter alia* refraining from the use of force against other states, settling disputes peacefully and respecting human rights, fundamental freedoms and self-determination. Further, the majority of states have accepted the humanitarian conventions on the laws of war, which express CIL.[347]

It can also be argued that *jus cogens* are derived from CIL, as they are subject to double acceptance by the international community of states.[348] This means that for a norm to attain *jus cogens* status it must first satisfy the requirements of a CIL norm (state practice and *opinio juris*). When such a norm has achieved customary international status the international community of states as a whole must then accept the norm's peremptory status. The requirement of double acceptance will be expanded upon later in this chapter but from the foregoing it could be argued that *jus cogens* norms proceed from CIL norms and then in time achieve their peremptory status.

4.4 The identification criteria of jus cogens norms

Article 53 of the VCLT provides some guidance when it sets out the general characteristics by which to identify *jus cogens* norms. These are discussed below.

4.4.1 Norm of general international law

Norms of general international law refer to rules of general applicability which create rights and obligations for the majority of the international community.[349] These rules are general to the extent that they apply to all the members of the international community. This

345 Byers 1997 *Nordic Journal of International Law* 228.
346 Shelton "International law and Relative normativity" 143- 165.
347 Shelton "International law and Relative normativity" 143- 165.
348 Vidmar "Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?" 13- 41.
349 Hannikainen *Peremptory Norms (Jus Cogens) in International Law* 208; Academia 2015 http://www.academia.edu/14497941/Criteria_for_identifying_jus_cogens_norms_in_public_international_law

means that *jus cogens* have *erga omnes* or universal scope of application.[350] Obligations *erga omnes* are:

> obligations which a state owes to the international community as a whole and in the enforcement of which all states have an interest.[351]

This means that if a state violates any *jus cogens* norm, such a violation affects all the members of the international community who have a legal interest in the protection of such norms.[352]

Arguably, general principles of international law are based on "morality or public policy common to all civilised states."[353] To this extent, most *jus cogens* norms arguably stem from human rights principles which are connected to a higher norm of morality.[354] Sustainable development is arguably informed by morality to the extent that it caters for future generations who should be able to live a life worth living.[355] However, as was argued in chapter 3, sustainable development arguably does not have CIL status yet and neither does it have *jus cogens* status as such.

4.4.2 The values of the international community

Jus cogens norms are value laden and have a strong ethical underpinning.[356] It can be argued that what makes a norm to be of *jus cogens* character are the underlying values that norm seeks to protect.[357] Chapter 2 has already briefly highlighted what some of the values of the international community entail and how *jus cogens* are hierarchically superior because of the values they protect. It is argued that the fundamental interests of the international community are also determined by looking at whether the violation of a

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350 Academia 2015 http://www.academia.edu/14497941/Criteria_for_identifying_jus_cogens_norms_in_public_international_law

351 Dugard 2001 *International Law* 40.

352 Barcelona Traction (*Belgium v Spain*) (*Second Phase*) 1970 ICJ Rep 3 para 32.

353 Verdross 1937 *AJIL* 572.

354 However, this does not mean that all human rights are *jus cogens* norms – United Nations 2006 legal.un.org/ilc/texts/instruments/word_files/english/draft_articles/1_9_2006.doc

355 Uhlmann 1999 *The Georgetown International Environmental Law Review* 118.

356 Vidmar "Norm Conflicts and Hierarchy in International Law" 13-41.

357 *Prosecutor v Furundzija,* Trial Chamber, Judgment, IT-95-17/1-T 1998 PT Judicial Reports.

rule shocks the conscience of the international community as a whole and/or threatens the survival of states.[358]

It is argued that the protection of the values of the international community is both the purpose and "paramount criterion for *jus cogens* norms."[359] In *Prosecutor* v *Anto Furundzija*,[360] the ICTFY stated that the prohibition of torture is a *jus cogens* norm because of the "importance of the values that it protects." The ICJ in the *Barcelona Traction*[361] also held that prohibitions on genocide, slavery, and racial discrimination should be conferred with *erga omnes* status because of the "importance of the rights involved." In international environmental law, these values could include *inter alia* the preservation of a healthy environment, the interest in the use and preservation of the global commons,[362] the protection of the ozone layer and the preservation of biological diversity.

Arguably, an understanding that *jus cogens* norms are based on the values of the international community also legitimises their limitation of state sovereignty. The values of the international community further entail that states now have a common interest in the protection of certain values. In its Advisory Opinion on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,* the ICJ said:[363]

> In such a Convention [on the prevention of genocide] the contracting states do not have any interests of their own; they merely have, one and all, a common interest…

The idea of a common interest has arguably led to the development of related concepts such as the common heritage of mankind, the global commons, *jus cogens* of *erga omnes* application and international crimes.[364] These concepts have also developed as a result of environmental problems which concern all states as climate change and the depletion

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358 Advisory Opinion to the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* 1951 ICJ Rep 15, ICGJ 227 (ICJ 1951); Academia 2015 http://www.academia.edu/14497941/Criteria_for_identifying_jus_cogens_norms_in_public_international_law

359 Uhlmann 1999 *The Georgetown International Environmental Law Review* 108; Verdross 1966 *AJIL*.

360 *Prosecutor v Furundzija,* Trial Chamber, Judgment, IT-95-17/1-T 1998 PT Judicial Reports para 153.

361 Barcelona Traction (*Belgium v Spain*) (*Second Phase*) 1970 ICJ Reports 3 para 33.

362 Uhlmann 1999 *The Georgetown International Environmental Law Review* 108.

363 Advisory Opinion to the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide 1951 ICJ Reports 15.

364 Uhlmann 1999 *The Georgetown International Environmental Law Review* 104.

of the ozone layer illustrate. The preambles of the *Convention on Biological Diversity* (CBD)[365] and the *United Nations Framework Convention on Climate Change* (UNFCCC)[366] for example, state that their goals are the "common concern of humankind." However, the concepts of the common heritage/the concern of mankind, global commons and international crimes are neither CIL nor *jus cogens* norms as yet.

4.4.3 Acceptance and recognition by the international community of states as a whole

As mentioned earlier, *jus cogens* norms are subject to double acceptance by the international community of states.[367] The majority of the international community of states must accept the content and the peremptory status of the norm. The ILC in the work of the Study Group on the Fragmentation of International Law[368] stated that *jus cogens* become hierarchically superior because of the importance of their content as well as the universal acceptance of their superiority. As such, the threshold for identifying *jus cogens* norms is arguably high.[369]

The international community's acceptance of the content of a *jus cogens* norm is evidenced by state practice and *opinio juris.*[370] To this extent it can be argued that *jus cogens* norms are essentially elevated but distinct CIL norms. In justifying their finding that the prohibition of torture is a *jus cogens* norm, the ICJ in *Belgium* v *Senegal* said that the norm has "widespread international practice and is based on the *opinio juris* of states."[371] The acceptance of the peremptory character of a norm is evidenced by considering the values that such a norm protects and whether the norm has a strong ethical underpinning.[372]

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365 CBD (1992).
366 UNFCCC (1992).
367 Vidmar "Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?" 13- 41.
368 *ILC Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission*, 58th session, UN Doc. A/CN.4/L.682, 13 April 2006.
369 De Wet "*Jus Cogens* and Obligations *Erga Omnes*" 541- 561.
370 Vidmar "Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?" 13- 41.
371 Questions relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*) 2012 ICJ Reports 422 at para 99.
372 Vidmar "Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?" 13- 41; De Wet 2006 "The International Constitutional Order" 55 *ICLQ* 57.

4.4.4 Non-derogability

Jus cogens are non-derogable and therefore absolute in character. It is argued that the non-derogability criterion is both a prerequisite and consequence of *jus cogens* norms.[373] This means that states cannot violate any *jus cogens* norm under any circumstances through, for example, international agreements, unilateral acts or domestic laws.[374] Derogations also include amendments of or partial derogation from a *jus cogens* norm.[375] The non-derogability of *jus cogens* norms means that *jus cogens* are binding even on states that have objected to the norm from the beginning.[376]

As mentioned before, the ICJ has referred to *jus cogens* norms as intransgressible principles of international customary law.[377] In *Prosecutor v Anto Furundzija*,[378] the ICTFY also held that the *jus cogens* norm on the prohibition of torture can never be derogated from, even in times of emergency. As argued earlier, the non-derogability of *jus cogens* norms therefore makes them hierarchically superior to other norms.

While Article 53 of the VCLT says that a treaty is void if at its conclusion it conflicts with a peremptory norm of general international law, in terms of Article 64 of the VCLT a treaty cannot derogate from an existing *jus cogens* norm or from one that may emerge after the conclusion of such a treaty. However, it must be noted for the purposes of Article 64 that the existing treaty is void "only from the date when the new rule of *jus cogens* is established."[379]

4.4.5 Modification only by a similar norm

Jus cogens, like domestic constitutional principles, are onerous to amend or to modify. The modification of a *jus cogens* norm refers to its development, expansion in scope, replacement or abolition.[380] It can be argued that since *jus cogens* norms protect the values of the international community, they cannot be easily modified for the purposes of

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373 Uhlmann 1999 *The Georgetown International Environmental Law Review* 110.
374 Mik 2013 *Polish Yearbook of International Law* 44.
375 Mik 2013 *Polish Yearbook of International Law* 44.
376 Uhlmann 1999 *The Georgetown International Environmental Law Review* 112.
377 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* 1996 ICJ Reports 266 para 79.
378 *Prosecutor v Anto Furundzija* IT-95-17/1-T, ICTY 1998 PT Judicial Reports para 144.
379 In other words the *jus cogens* norm does not annul the treaty but forbids its continued existence and performance.
380 Orakhelashvili *Peremptory Norms in International Law* 127.

durability and to avoid abuse of power. Therefore the modification of a *jus cogens* norm also requires the acceptance of the international community of states as a whole.[381]

It is clear from the above discussion that for a norm to have *jus cogens* status, it must first be a CIL norm. This means there must be proof of state practice and *opinio juris*. A majority of states must then accept that such a norm is hierarchically superior. Furthermore, such a norm must be seen to be non-derogable. With this at hand, these criteria will now be employed to establish if environmental *jus cogens* norms exist and if not, how they might be developed.

4.5 Environmental jus cogens norms

In a dissenting opinion in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, Judge Weeramantry said that states' environmental obligations:

> may range from obligations *erga omnes*, through obligations which are in the nature of *jus cogens,* all the way up to the level of international crime.[382]

However, Judge Weeramantry did not specify which environmental norms may have *jus cogens* status. The ICJ in the *Gabcikovo- Nagymaros*[383] judgment also acknowledged the concept of *jus cogens* in the context of environmental law based on Article 64 of the VCLT in saying:

> Neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty, and the Court will consequently not be required to examine the scope of Article 64 of the *Vienna Convention on the Law of Treaties*.

Again the court hinted that there may be environmental *jus cogens* developed in terms of Article 64 of the VCLT, but did not engage in a discussion of what such norms may be. It

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381 Academia 2015 http://www.academia.edu/14497941/Criteria_for_identifying_jus_cogens_norms_in_public_international_law

382 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* 1996 ICJ Reports 266 paras 142-143.

383 Case concerning the *Gabcikovo-Nagymaros Project* (*Hungary/Slovakia*) 1997 ICJ Reports 1 para 112.

is clear from the above cases that neither the ICJ nor any other court has clearly pronounced on any environmental *jus cogens* norms to date:[384]

> only very few rules can actually be considered as peremptory norms and hardly any of them is part of international environmental law.[385]

However, an international environmental value system arguably now exists, as argued earlier, and the environmental customary law principles referred to in chapter 3 can attest to this. This means that there may be norms in international environmental law with *jus cogens* character or with the potential to become *jus cogens* norms in future, based on such a value system. It has been argued that norms as permanent sovereignty over natural resources[386] and access to justice[387] constitute *jus cogens*. However, there is neither evidence that these norms are CIL norms nor is there evidence that the international community as a whole accepts their peremptory status.

This chapter proposes four international environmental law norms that could possibly have *jus cogens* character through the application of Article 64 of the VCLT; existing customary environmental norms; and the extension of existing *jus cogens* norms to the environmental context or through human rights norms. The four norms to be discussed are the no-harm principle; the human right to a healthy environment; the prohibition of wilful serious damage to the environment during armed conflicts;[388] and the general prohibition of causing or not preventing environmental damage that threatens the international community as a whole.[389]

The no-harm principle is already CIL, meaning it has already satisfied part of the double acceptance requirement of *jus cogens* norms. What remains to be established is whether the international community of states as a whole accepts its peremptory status and non-derogability. The right to a healthy environment, as will be shown, now forms part of many states' domestic constitutions that recognise and respect that right. As such, the right to a healthy environment could attain CIL status and eventually be recognised as a *jus*

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384 Birnie, Boyle and Redgwell *International Law and the Environment*; Shelton "Resolving Conflicts between Human Rights and Environmental Protection: Is there a Hierarchy?" 206- 235.
385 Beyerlin and Marauhn *International Environmental Law* 362.
386 *The Government of the State of Kuwait* v *The American Independent Oil Company* (1982) Ad hoc Arbitral Tribunal 66 ILR 518.
387 *Atabong Denis Atemnkeng v African Union* (2013) App 014/2011.
388 Uhlmann 1999 *The Georgetown International Environmental Law Review* 118.
389 Uhlmann 1999 *The Georgetown International Environmental Law Review* 118.

cogens norm. There is also some evidence suggesting that the prohibition of wilful serious damage to the environment during armed conflict and the general prohibition of causing or not preventing environmental damage that threatens the international community as a whole could attain CIL status and become *jus cogens* norms in future.

4.5.1 The no-harm principle

As argued earlier, *jus cogens* norms are derived from the process of the development of CIL. As such, a good place to begin the search for environmental *jus cogens* may arguably be in the already accepted customary environmental norms. As argued in chapter 3, the no-harm principle (and the concomitant duty to conduct a transboundary EIA) is arguably the only principle with customary law status in international environmental law. For the purposes of this discussion, the customary law status of the no-harm principle will not be discussed in detail, as such a discussion has already been conducted in chapter 3.

Despite its ability to limit state sovereignty by imposing negative obligations on states to not cause harm to the environment, the no-harm principle arguably does not have *jus cogens* status yet. However, it might attain *jus cogens* status should the international community of states as a whole agree that the principle is non-derogable and has peremptory status. At this point the no-harm principle therefore remains a customary environmental norm, but it is a particularly strong contender for being recognised as an environmental *jus cogens* norm in future.

4.5.2 The human right to a healthy environment

Although there is neither a globally recognised international right to a healthy environment yet, nor an international human rights treaty which provides for an enforceable individual right to a healthy environment, the right is widely recognised at both the domestic and the regional levels. More than 90 domestic constitutions[390] now recognise the right to a healthy environment,[391] while regionally the right to a healthy environment is also recognised in the *African Charter on Human and People's Rights* (ACHPR) and in the

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390 For example, section 24 of the *Constitution of the Republic of South Africa*, 1996; Section 73 of the *Constitution of Zimbabwe*, 2013; A 225 of the *Constitution of Brazil*, 1988; A69 of the *Constitution of the Arab Republic of Egypt* 2014.

391 May and Daly *Global Environmental Constitutionalism* 4.

Additional Protocol to the American Convention of Human Rights in the Area of Economic, Social and Cultural Rights, for instance.[392]

When invoked, the substantive right to a healthy environment triggers other procedural rights which also help in the implementation of the right to a healthy environment.[393] Examples of these procedural rights include the right to information, access to justice, and participative and representative environmental governance.[394] South Africa, for example, protects the right to an environment that is not harmful to the health or well-being of its citizens,[395] and also provides for procedural rights such as the right to access to information,[396] to just administrative action,[397] and to access to courts[398] to complement the substantive right to a healthy environment.

The right to a healthy environment usually imposes positive and negative obligations on states. States are required to respect, protect and fulfil[399] environmental rights and their obligations towards the environment. In the South African Constitution,[400] for example, the government is required:

> to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure the ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

When the right to the environment is invoked, other human rights such as the right to dignity, the right to life and the right to health are usually inferred. The *Rio Declaration* supports this in saying the protection of the environment is intrinsically linked to the protection of human rights.[401] For instance, the courts in South Africa have linked the right to a healthy environment to the right to dignity.[402] The United Nations Special Rapporteur

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392 A 24 of the ACHPR (1986) and A 10 of the *Additional Protocol to the American Convention of Human Rights in the Area of Economic, Social and Cultural Rights* (1988).
393 May and Daly *Global Environmental Constitutionalism* 77.
394 Kotze 2012 *Transnational Environmental Law* 210.
395 Section 24 of the *Constitution of the Republic of South Africa*, 1996.
396 Section 32 of the *Constitution of the Republic of South Africa*, 1996.
397 Section 33 of the *Constitution of the Republic of South Africa*, 1996.
398 Section 34 of the *Constitution of the Republic of South Africa*, 1996.
399 Kotze 2012 *Transnational Environmental Law* 208.
400 Section 24 (b) of the *Constitution of the Republic of South Africa*, 1996.
401 Principle 1 of the *Rio Declaration on Environment and Development* 1992.
402 *Beja and Others v Premier of the Western Cape and Others* 2011 (10) BCLR 1077.

on Human Rights and the Environment, John Knox, also agrees in saying that the realisation (of human rights such as dignity, equality and liberty) "depends on an environment that allows them to flourish."[403] However, international courts do not yet recognise the right to a healthy environment, although in his separate opinion in the *Gabcikovo Nagymaros* judgement, Judge Weeramantry said:

> [t]he protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.[404]

Shelton[405] supports this view in saying that "environmental protection may reinforce or even be a prerequisite to the enjoyment of other rights." Unfortunately, since international courts do not recognise the right to a healthy environment yet, it can be argued that there is little chance that the right will attain *jus cogens* status.

However, it could be argued that the right to a healthy environment has the potential to become CIL in the near future. This is because there is widespread and repetitive state practice regarding the right to a healthy environment, which states arguably feel legally compelled to protect. As mentioned earlier, almost three quarters of the states in the world now recognise and protect the right to a healthy environment, and this is one way in which state practice can be deduced. Evidence of state practice regarding the right to a healthy environment can also be found in domestic legislation[406] and in decisions of national courts,[407] for example.

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403 UNGA, Human Rights Council, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc. A/HRC/22/43, 24 December 2012, 4.

404 Case concerning the *Gabcikovo-Nagymaros Project* 1997 ICJ Rep 1 Separate Opinion of Vice-President Weeramantry, paras 91–92.

405 Shelton "Resolving Conflicts between Human Rights and Environmental Protection: Is there a Hierarchy?" 207-235.

406 For example the *National Environmental Management Act* 107 of 1998 in South Africa (NEMA) and the *Environmental Management Act* 13 of 2002 in Zimbabwe (EMA).

407 For example, *Fuel Retailers Association of South Africa* v *Director General Environmental Management, Department of Agriculture, Conservation and Environment* 2007 6 SA 4 (CC); *Lopez Ostra* v *Spain* (1995) 20 EHRR 277; *Antonio Horvath Kiss y Otros* v *National Commission for the Environment* (1997) 29 AIR 2006 SC 1350.

The right to a healthy environment is also arguably a norm of general international law based on the values of the international community to protect the global commons and individuals' health and life, among other rights. As such, if states possess the necessary political will[408] and achieve an almost universal consensus in regard to the right to a healthy environment, it might eventually become an environmental *jus cogens* norm in future.

In the light of the foregoing, it can be argued that the *jus cogens* character of the right to a healthy environment at this stage can only manifest through other means as human rights.[409] As argued before, the right to the environment is closely intertwined with a number of other human rights, such as the right to life. Uhlmann[410] argues that the right to life is a *jus cogens* norm of general international law. It is protected in every human rights convention[411] and is non-derogable even in times of emergency in terms of the ICCPR,[412] the *European Convention on Human Rights* and the *American Convention on Human Rights*.[413] The right to life also meets the double acceptance criteria, as the majority of states have ratified the ICCPR and provided for the right to life in their domestic constitutions.

It could be argued that a violation of the environment directly or indirectly violates the right to life.[414] For example, transboundary air pollution affects the health and life of human beings and sea pollution may violate the right to life by destroying a population's source of food and/or water. It can therefore be argued that the *jus cogens* character of the right to a healthy environment could indirectly be recognised through the *jus cogens* right to life. The right to the environment could also be recognised through other recognised *jus cogens* norms such as the prohibition of genocide. Using the same example as above, polluting a population's water or food source violates that population's right to a healthy environment and may result in the extinction of that population, amounting to genocide.

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408 Perez-Leiva 2009 http://ezinearticles.com/?International-Law-And-The-Right-To-A-Healthy-Environment-As-A-Jus-Cogens-Human-Right&id=1933199

409 Uhlmann 1999 *The Georgetown International Environmental Law Review* 128.

410 Uhlmann 1999 *The Georgetown International Environmental Law Review* 132.

411 Uhlmann 1999 *The Georgetown International Environmental Law Review* 128.

412 A 4 (2) of the ICCPR (1966).

413 A 15 of the *European Convention on Human Rights* (1953); A 27 of the *American Convention on Human Rights* (1970).

414 Perez-Leiva 2009 http://ezinearticles.com/?International-Law-And-The-Right-To-A-Healthy-Environment-As-A-Jus-Cogens-Human-Right&id=1933199

4.5.3 The prohibition of serious wilful damage to the environment during armed conflicts

In the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* the ICJ stated that:

> the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment … the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or areas beyond national control is now part of the corpus of international law relating to the environment.[415]

However, the ICJ also specified that this does not mean a state cannot exercise its right to self-defence under international law, but that:

> … states must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives.[416]

A number of scholars[417] argue that the prohibition of wilful serious damage to the environment during armed conflicts must be a *jus cogens* norm. The prohibition is a norm of general international law based on the community interest of states in protecting the global commons.

It is argued that there is some evidence of state practice on the prohibition of wilful and serious damage to the environment during armed conflict because of the condemnation of Iraq's wilful environmental destruction in the Kuwait conflict.[418] Further, the Additional Protocol I to the *Geneva Convention* has been ratified by many states and the adoption of the *Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques* (ENMOD) has been ratified by 64 states.[419] *The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be*

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415 Advisory Opinion on the *Legality of Theat or Use of Nuclear Weapons* 1996 ICJ Reports 266 para 29.
416 Advisory Opinion on the *Legality of Threat or Use of Nuclear Weapons* 1996 ICJ Reports 266 para 30; Uhlmann 1999 *The Georgetown International Environmental Law Review* 121.
417 For example Uhlmann 1999 *The Georgetown International Environmental Law Review* 121; Gangl 1980 *Cornell International Law Journal* 87.
418 Uhlmann 1999 *The Georgetown International Environmental Law Review* 122.
419 *Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques* (1976); Uhlmann 1999 *The Georgetown International Environmental Law Review* 122.

Deemed to Be Excessively Injurious or to have Indiscriminate Effects [420] has also been ratified by a significant number of states.[421]

Article 1 of ENMOD says state parties may not:

> engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other state Party.

The preamble of the *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects* (1980) also provides that parties in an international armed conflict are prohibited from choosing:

> methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

However, at this stage it seems that states have not accepted that the prohibition of wilful serious damage to the environment during armed conflicts is non-derogable. More importantly, there is insufficient evidence of state practice for the norm to have CIL status. Nevertheless, the prohibition of wilful serious damage to the environment during armed conflicts arguably has the potential to attain customary law status and upon acceptance of its non-derogability by the international community of states as a whole might become a *jus cogens* norm in future.

4.5.4 The general prohibition of causing or not preventing environmental damage that threatens the international community as a whole

In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ held that states have a:

> general obligation … to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control.[422]

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420 *The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to have Indiscriminate Effects* (1980).

421 The Convention has been ratified by 71 states and signed by 51 states.

422 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons in Armed Conflict* 1996 ICJ Reports 266 para 29.

A breach of this obligation constitutes an international crime in terms of Article 19 (3) (d) of the ILC's *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (Draft Articles),[423] which defines an international crime as:

> a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

It must be noted here, however, that the ILC's Draft Articles are at this stage non-binding and unenforceable. Nonetheless, the nature of the Draft Articles suggests that when or if they become binding law, the prohibition of causing or not preventing environmental damage that threatens the international community as a whole might attain *jus cogens* status.

According to Article 19 (3) (d) of the Draft Articles, an international environmental crime is committed when there is "a *serious breach* of an international obligation of *essential importance* for the … human environment." Uhlmann[424] argues that it is widely understood that an obligation whose breach is considered an international crime will usually be of a peremptory character. The massive pollution of the atmosphere or the seas, despite wilful causation, is therefore an international crime according to the ILC. The ILC does not define massive pollution but it could be argued that the phrase refers to pollution that is widespread, long lasting and severe. The violation of the obligation to protect the environment from massive pollution threatens the international community as a whole, since such pollution damages the global commons. It has been indicated that had the ILC drafted the articles today, the problems of climate change, ozone depletion and loss of biological diversity would also form part of Article 19.[425]

Although the prohibition of massive pollution does not yet have CIL status, it could be argued that the norm may have *erga omnes* application. This is because all states arguably have an obligation to protect the atmosphere and the seas, which obligation is owed to the international community as a whole, since the atmosphere and the seas are

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423 *Report of the International Law Commission on the work of its 32nd session*, UN Doc. A/35/10, 5 May-25 July 1980, 32.
424 Uhlmann 1999 *The Georgetown International Environmental Law Review* 123.
425 Uhlmann 1999 *The Georgetown International Environmental Law Review* 123.

the common concern of humankind.[426] It could also be argued that the prohibition of massive pollution of the environment may also have an absolute character to the extent that reservations to the norm are prohibited in some MEAs, such as in the *UNCLOS* and in the *Vienna Convention for the Protection of the Ozone Layer* (1988).

Article 19 (3) of the Draft Articles was unanimously adopted by the ILC, but as highlighted before, they arguably do not as yet form part of binding treaty law or CIL. As long as this remains the case, the requirement of consent is lacking for the prohibition of massive pollution to have *jus cogens* status. There is also scepticism as to whether *jus cogens* is the appropriate concept to reduce environmental pollution.[427] As can be deduced from the on-going discussion, *jus cogens* can take a long time before developing, and stringent criteria have to be met. On the other hand, pollution continues to damage the environment, which pollution requires immediate action to remediate, stop and or reduce it. It could be argued that while a *jus cogens* norm prohibiting massive pollution of the environment is desirable, at this stage soft law instruments and MEAs may be more appropriate to get a grip on the problem.

4.6 Summary

The purpose of this chapter was to establish if environmental *jus cogens* norms which constitute part of the normative hierarchy exist in international environmental law, what these norms are and, if they do not exist, whether they might come about. The main findings of the chapter are the following:

- Generally accepted *jus cogens* or peremptory norms exist mostly in the context of human rights law, and to date no international court or tribunal has unequivocally pronounced on or confirmed any environmental *jus cogens* norm.

- *Jus cogens* norms are arguably derived from the process of CIL. In addition, *jus cogens* norms are constitutional type rules in the global regulatory domain to the extent that they are obligatory, non-derogable, have *erga omnes* application, and are onerous to amend.

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426 Uhlmann 1999 *The Georgetown International Environmental Law Review* 124.
427 Beyerlin and Marauhn *International Environmental Law* 287.

- There are no generally accepted criteria for identifying *jus cogens* norms, but *jus cogens* are usually seen to be (a) norms of general international law; (b) based on the values of the international community of states as a whole (state community interests); (c) accepted and recognized by the international community of states as a whole (double acceptance/ consent requirement); (d) non-derogable; and (e) capable of modification only by a similar norm of the same character.

- Four norms in international environmental law might have the potential to become environmental *jus cogens* norms, even though none of them yet have this status. This could take place through the application of Article 64 of the VCLT; existing customary environmental norms; the extension of existing *jus cogens* norms to the environmental context, and through human rights norms.

- The four norms discussed are: the no-harm principle; the right to a healthy environment; the prohibition of wilful serious damage to the environment during armed conflict; and the general prohibition of causing or not preventing environmental damage that threatens the international community as a whole. These four norms were chosen as they may have the potential to become CIL (except the no-harm principle, which is already a CIL) and eventually environmental *jus cogens* norms in future.

Chapter 5 Conclusion and recommendations

5.1 Conclusion

This study has attempted to investigate the concept of normative hierarchy in international environmental law from a constitutional point of view. It has been established that the current international environmental law and governance regime is arguably inadequate to the extent that it is fragmented and leaves too much room for state sovereignty and states' non-compliance with their environmental obligations.[428] Further, the normative status of many principles in international environmental law is not clear, including the precautionary principle, the polluter pays principle, and the notion of sustainable development.[429] To this end, the questions that this dissertation had to address were: *to what extent could it be said that a hierarchy of norms in international environmental law exists and if so, what would the significance of such a hierarchy be for global environmental regulation from a constitutional point of view?*

In addressing these questions, chapter 2 discussed the theoretical underpinnings of the concepts of normative hierarchy and global constitutionalism by firstly determining what a normative hierarchy is, whether a hierarchy of norms exists in international law generally, and what the significance of such a hierarchy is from a constitutional point of view. Accordingly, a normative hierarchy was defined in this context as a systematic ordering of legal norms according to their importance, which depends on their value to the international community, the function of the norms, and their recognition by the international community as superior norms, with some higher order "constitutional" norms taking precedence over ordinary norms.[430]

It was established that investigating the possibility of the existence of such a normative hierarchy entails an investigation into the nature and structure of international law, which involves the distinction of binding from non-binding norms.[431] In this regard it was established that a norm becomes hierarchically superior based on its function and value

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428 See para 2.3.1 above in this regard.
429 See para 3.3 above in this regard.
430 See para 2.2 above in this regard.
431 See para 2.2 above in this regard.

to the international community of states as a whole.[432] This discussion then led to the conclusion that a normative hierarchy exists in international law to the extent that:[433]

- Article 38 of the VCLT, by referring to some sources of international law as "subsidiary," does not place all the sources of international law on equal footing;
- soft law is not legally binding, which means that it is inferior to legally binding norms such as treaties, CIL and *jus cogens* norms;
- Article 103 of the *UN Charter* provides that in the event of conflict between the obligations of its member states under the Charter and their obligations under any other international agreement, their obligations under the Charter will prevail;
- *Jus cogens* norms as provided for in Article 53 of the VCLT, are non-derogable norms which are binding on states despite their consent.

Secondly, chapter 2 also interrogated the relationship between global constitutionalism and the normative hierarchy theory. It was established that establishing the existence of a hierarchy in international law involves conducting an enquiry into the rules of recognition which distinguish between binding and non-binding norms, and that international law has a rule of recognition to the extent that it has constitutional rules (CIL and *jus cogens* norms) which are binding on states despite their consent, with the exception of the persistent objector rule in CIL.[434] As such, it was determined that global constitutionalism gives these fundamental norms (such as *jus cogens* and CIL) higher status through a normative hierarchy.[435] Further, it was also determined that these norms are constitutional in nature to the extent that they are non-derogable, legally binding, have *erga omnes* application, and could determine the creation of other norms.[436] They operate internationally very much in the same way as constitutional rules would domestically.

In essence, it was also determined that having a normative hierarchy is important for the regulation of environmental law from a constitutional point of view to the extent that through the precedence of hierarchically superior norms a normative hierarchy might:

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[432] See para 2.2 above in this regard.
[433] See para 2.4.1 above in this regard.
[434] See para 2.2 above in this regard.
[435] See para 2.3 above in this regard.
[436] See para 2.3 above in this regard.

curtail state sovereignty; address fragmentation by providing comprehensive and accessible environmental laws; extend the liability and accountability for environmental harm to non-state actors; entrench environmental rights; and endow important principles such as sustainable development with constitutional status for advanced environmental protection.[437] Furthermore, a normative hierarchy is significant for environmental law to the extent that it provides a framework to understand the protection offered through the fundamental values of the international community underpinning CIL and *jus cogens* norms; gives a structure and instils order in international environmental law; and helps in resolving norm conflicts and in the adjudication of legal issues.

Based on the hierarchically superior norms highlighted in chapter 2, chapter 3 narrowed down the discussion of the normative hierarchy to the environmental law domain by investigating if customary international environmental law norms exist; what they are; and whether they might come about. It was determined that CIL norms are higher-order legal norms which are constitutional in character, as they are legally binding on the international community as a whole (with the exception of the persistent objector rule), have *erga omnes* application, limit state sovereignty and are based on the fundamental values of the international community.[438] The following findings were established regarding the existence of customary international environmental law norms:[439]

- The no-harm principle, which includes the duty to conduct a transboundary EIA, is to date the only customary environmental law norm that the ICJ has unequivocally pronounced on and which shows sufficient evidence of state practice and *opinio juris*.

- The precautionary principle, the polluter pays principle and the principle of sustainable development are included in a number of MEAs and soft law instruments suggesting evidence of state practice and *opinio juris* for the purposes of CIL. However, it was established that such state practice is not yet sufficiently widespread and consistent to classify these norms as CIL.

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437 See para 2.3.1 above in this regard.
438 See para 3.2 above in this regard.
439 See para 3.5 above in this regard.

- To the extent that there is some evidence of state practice (though inadequate at this stage) of the precautionary principle, the polluter pays principle and the principle of sustainable development, it was determined that these norms have the potential to become CIL should they also be endorsed as such by the ICJ, among other such institutions.

Following from the investigation of customary international environmental law norms, chapter 4 engaged in an enquiry of environmental *jus cogens* norms. Like CIL, *jus cogens* norms are also constitutional in nature to the extent that they are obligatory, are based on the values of the international community of states as a whole, have *erga omnes* application, and are onerous to amend.[440] What distinguishes *jus cogens* norms and makes them hierarchically superior to CIL is that they are non-derogable. As such, *jus cogens* norms are binding on states despite consent and can effectively limit state sovereignty and promote states' compliance with their environmental obligations. In answering the question of whether environmental *jus cogens* norms exist, it was determined that:[441]

- To date there are no clear and generally accepted environmental *jus cogens* norms.

- Four norms, however, have the potential to become *jus cogens* norms in future to the extent that they already have or might have the potential to become CIL, and eventually environmental *jus cogens* norms. These are the no-harm principle; the right to a healthy environment; the prohibition of wilful serious damage to the environment during armed conflict; and the general prohibition of causing or not preventing environmental damage that threatens the international community as a whole.

- These four norms might come about through the application of Article 64 of the VCLT; existing customary environmental norms; the extension of existing *jus cogens* norms to the environmental context; and through human rights norms.

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440 See para 4.2 above in this regard.
441 See para 4.5 above in this regard.

5.2 Recommendations

The study has attempted to show the potential of a normative hierarchy to provide reform to the current international environmental law and governance regime and the opportunity it presents for both states and the courts, both domestic and international. The courts therefore have an opportunity to endorse and confirm the hierarchically superior norms which will make up a normative hierarchy in international environmental law so as to limit states' sovereignty and ensure states' compliance with their environmental obligations. Such a normative hierarchy establishes cohesion in international law which has the effect of avoiding further norm conflicts.[442] A normative hierarchy would also go a long way in advancing global environmental constitutionalism by providing for a codified or uncodified environmental "constitution."[443] This "constitution" could promote the accessibility, durability, certainty and enforceability of international environmental law generally and more importantly would contribute to states' better compliance with their environmental obligations under international environmental law.

It is suggested that state parties to a legal dispute in international environmental law should explicitly invoke the hierarchically superior norms of CIL and *jus cogens* norms in their arguments to the extent that such norms are applicable. The effect of this would be that courts would then be forced to consider and pronounce on these norms, their meaning, their legal effects, their content and more importantly, their normative status. The courts must in turn explicitly pronounce on the normative status of environmental law principles to ensure the certainty and effective application of and compliance with international environmental law. This recommendation also applies to domestic courts to the extent that court decisions, both domestic and international, are also evidence of state practice, which may result in a norm's attaining CIL status and, upon consensus on the non-derogability of such a norm, *jus cogens* status in future.[444]

It is recommended that the courts, and especially the ICJ, should prioritise the right to a healthy environment and sustainable development and endow these rights with hierarchically superior normative status. In regard to the right to a healthy environment, the courts must take into account the indivisibility of human rights to the extent that other

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442 See para 2.4.2 above in this regard.
443 See para 2.3.1 above in this regard.
444 See para 3.3 above in this regard.

human rights such as the right to health, the right to dignity and the right to life cannot be fully realised if the right to a healthy environment is not protected.[445]

Further, in terms of norm conflicts between human rights and environmental law, this study has established that in most cases human rights norms are prioritised over environmental law norms because of the absence of an internationally recognised right to a healthy environment.[446] In regard to sustainable development, the environment is currently deteriorating at a fast rate because of anthropogenic stresses. As such it is suggested that the courts must require sustainable development to be a CIL norm with *erga omnes* effect to avoid unsustainable activities that threaten the very existence of human life on earth.[447]

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445 See para 4.5.2 above in this regard.
446 See para 4.5.2 above in this regard.
447 See para 3.5.2 above in this regard.

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