

Breaking the Cycle of Deferment: *Jus Cogens* in the Practice of International Law

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1. Introduction

The variety and sheer mass amount of work done on the topic of *jus cogens* is extensive. Dating back to Roman law, but with recurring and renewed fierce debate, Sir Ian Sinclair nicely sums up the interesting evolution of the notion as having the qualities of the 'Cheshire Cat, which had the disconcerting habit of vanishing and then reappearing to deliver further words of wisdom'.¹ Moreover, like the Cheshire Cat, *jus cogens* remains a mystery. But with all of the acknowledgment and discussion around the existence of peremptory norms by international courts, state practice and academic literature, it seems odd that to this day there is still no accepted consensus on the actual content and meaning of *jus cogens* within the realm of international law. What is particularly puzzling is that if the topic has created such profound disagreement for so long, why does it remain an issue worth discussing? Additionally, in light of this seemingly never-ending dispute, are there any ways to resolve these incongruities?

As such, the aim of this research is threefold. First, it will be to understand why the concept of *jus cogens* (synonymously used with the identification of peremptory norms) continues to be unclear in international law. Second, after laying out the obvious obstacles to the practice of *jus cogens*, it is then interesting to discuss the reasons for putting in the effort to untangle this seemingly overwhelming mess. Since the normative value associated with *jus cogens* explains its continued presence in the theory and practice of international law, as argued in Section 3, the third aim is to find potential ways to resolve the revealed issues.

Correspondingly, the first section of this article establishes the background. How was *jus cogens* introduced to the practice of law? The second section explores, in different parts, how the diffusion of authority in the conception of *jus cogens* has created the perfect recipe for subjective interpretations by legal scholars, the International Law Commission (ILC), international courts and tribunals, and state practice. Here I will demonstrate how their declaratory statements and lack of initiative to provide a single clear interpretation has created nothing more than a cycle of deferment for any definitive conclusions. By cycle of deferment I simply mean that while all of the acts have acknowledged the existence of *jus cogens*, the evidence shows that none of them have decisively provided a full definition for peremptory norms. Thus, the specific criteria, content and legal meaning of the term is left unclear. The third section analyses the reasons for this cycle, whereas the fourth and final section tackles the possible way forward.

This article strongly agrees with the creative idea put forth by Sue Guan, who advocates for a reconceptualisation of *jus cogens*.² Instead of understanding the term as it was written down in the

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1 I. Sinclair, *The Vienna Convention on the Law of Treaties* (1984) pp. 203-241, p. 224.

2 S. Guan, 'Jus Cogens: To Revise a Narrative', (2017) *Minnesota Journal of International Law* 461, pp. 461-499.

Vienna Convention on the Law of Treaties (VCLT), as a fixed concept of law that requires a shopping list of hierarchically superior peremptory norms strictly applicable today, *jus cogens* should be understood as an aspirational result within each context-specific situation. While Guan recommends this adjustment for the sake of lowering the cost of commitment for states, in order to achieve international consent/consensus,³ this article argues for a reconceptualisation of *jus cogens* that emphasises a uniform approach in how to apply the underlying value that the concept offers to any given scenario. The reason for this approach is because *jus cogens* is grounded on concepts of justice, social necessity, morality, etc., which have (so far) been impossible to render determinable consensus, especially on the world stage. Therefore, if *jus cogens* is to be properly understood and applied in international law, the first step is thus to acknowledge these theoretical foundations. The result should not be to create a strict set of formal rules that are always applied in the same fashion, but rather a reasoned approach to a context-dependent outcome that upholds the fundamental values of the international society as a whole. I acknowledge that this will probably not be a very popular approach amongst those who desire a clear cookie cutter recipe for identifying peremptory norms. Nevertheless, due to the current lack of clarity on the concept itself, and subsequent ineffective application of it, the proposed reformulation can only be an improvement for the concept's development.

2. Background

The topic of *jus cogens* and the establishment of peremptory norms is not a new one. In fact, it is an idea that existed in Roman law, which stipulated that there are certain rules that can never be contracted out of due to their fundamental value and importance.⁴ This idea was mostly abandoned after the positivist theory of law took over as the dominant approach to an understanding of both domestic and international law.⁵ Nevertheless, it should come as no surprise that there was a surge in renewed interest towards establishing the existence of peremptory norms in international law after the atrocities of the Second World War. Indeed, the shared feeling throughout the international community was that these horrible events should never be allowed to happen again. From this came the birth of the United Nations, along with the many advocates who argued for the existence of certain international values that ought to always be respected.

One of the advocates of this sentiment was Alfred von Verdross, who argued that in international law there existed certain compulsory norms that prohibited the creation of treaties which were 'obviously in contradiction to the ethics of a certain community'.⁶ In other words, he brought back the notion of *jus cogens* from its grave in the Roman law era, and applied it to modern day international law. His point was that the international community had certain normative goals which required the recognition of a minimum moral standard. Although international law was (and still is) created through the consent of sovereign states, his intention was to show that every state was bound to a set of international legal norms regardless of their explicit individual consent.⁷

Evidently, then, the concept was brought forth by scholars and theorists who wanted to rationalise a legal system that would govern sovereign states. The aim was to limit the claim to absolute power unrestrained by law, and ensure protection for certain fundamental values. The problem was, and currently still is, that the concept of state sovereignty still holds as the founding basis for international law. Therefore, scholars must turn to principles of legal theory, legal history, moral and legal philosophy and even religion in order to make their point.⁸

Despite this abundance of academic discourse, the only reference to *jus cogens* in positive law is in the VCLT.⁹ Sir Hersch Lauterpacht proposed the following to the ILC in 1953: 'A treaty, or any of its provisions,

3 Ibid., pp. 493-499.

4 A. Lagerwall, 'Jus Cogens – International Law' in *Oxford Bibliographies Online* (29 May 2015).

5 For historical overview, see R. Mónica, *The Project of Positivism in International Law* (2013).

6 A. Verdross, 'Forbidden Treaties in International Law', (1937) *American Journal of International Law* 31, p. 571.

7 M. Retter, 'Jus Cogens: Towards an International Common Good?', (2011) *Transnational Legal Theory* 2, no.4, p. 539.

8 D. Shelton, 'Sherlock Holmes and the Mystery of *Jus Cogens*' in *Netherlands Yearbook of International Law 2015 Jus Cogens: Quo Vadis?* (2016), p. 25; G. Christenson, 'Jus Cogens: Guarding Interests Fundamental to International Society', (1988) *Virginia Journal of International Law* 28, pp. 585-648.

9 The United Nations Vienna Convention on the Law of Treaties, *Treaty Series* 1155 (May 1969), p. 331.

is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice.¹⁰ He agreed with the ideas of Verdross that there existed certain peremptory norms, otherwise known as *jus cogens* norms, that reflected:

overriding principles of international law (...) expressive of rules of international morality so cogent that an international tribunal would consider them as forming part of those principles of law generally recognized by civilized nations which the International Court of Justice is bound to apply (...)¹¹

The results of this proposal was Article 53 in the 1969 VCLT,¹² reconfirmed in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986:¹³

Article 53: Treaties conflicting with a peremptory norm of general international law (*jus cogens*) – 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.¹⁴

The crucial part of Article 53 that continues to cause inconsistent and irreconcilable interpretations is the ILC's definition of a peremptory norm as a: *norm accepted and recognised by the international community of states as a whole*. As it stands, the VCLT's understanding of *jus cogens* clearly departs from its original conception of being a set of norms that are superior to state will.¹⁵ The problem with incorporating state consent is that it tries to combine two historical interpretations of law, that of natural law theory and the positivist theory of law. This will be elaborated on in the following section, but the noteworthy point for now is that *jus cogens* was sourced in trying to harmonise two irreconcilably different interpretations of law. As such, rendering clear meaning and content to *jus cogens* proved to be practically impossible. Even the ILC concluded in its report on the Law of Treaties that: 'there is not as yet any generally accepted criterion by which to identify a general rule of international law as having the character of *jus cogens*'.¹⁶ Despite this ambiguous approach by the ILC, it was successfully accepted by many states.¹⁷

This problem of ambiguity and indecisiveness was exacerbated by the fact that in the ILC's commentary to Draft Article 50 of the 1966 Draft Articles on the Law of Treaties, paragraph 3, it stated:

The emergence of rules having the character of *jus cogens* is comparatively recent, while international law is in the process of rapid development. The Commission considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of the rule to be worked out in state practice and in the jurisprudence of international tribunals.¹⁸

This, unfortunately, still applies today. This means that not only was the concept of *jus cogens* attributed a contradictory meaning by the ILC, but the actual determination of these peremptory norms was then delegated and diffused to states and international courts/tribunals.¹⁹ As such, states and international courts

10 H. Lauterpacht, 'Law of Treaties: Report by Special Rapporteur', *Yearbook of the International Law Commission*, UN Doc. A/CN.4/63/1953, 90.

11 *Ibid.*, 93.

12 UN Doc. A/CONF.39/11/Add.2 (1969), p. 331.

13 UN Doc. A/CONF.129/15 (1986); Note that Art. 64 also mentions *jus cogens*, but for practical purposes the focus of this article will be on the implications of Art. 53.

14 *Supra* note 12.

15 Guan, *supra* note 2, p. 469.

16 UN Doc. A/CN.4/156 (1963), p. 52.

17 There were 45 signatories at its conception, and as of 2018 holds 116 parties. See current status of the VCLT at <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en> (last visited 10 April 2019).

18 International Law Commission, 'Draft Articles on the Law of Treaties with commentaries', (1966) vol. II *Yearbook of the International Law Commission*.

19 Guan, *supra* note 2, p. 474; see also E.J. Criddle & E. Fox-Decent, 'A Fiduciary Theory of *Jus Cogens*', (2009) *Yale Journal of International Law*, 34, p. 346.

were essentially saddled with the task of acting as legislators and adjudicators.²⁰ Having this dispersion of authority on the topic has resulted in the constant deferment of making any conclusive elaborations on the topic. The result is a cycle where each actor defers any practical reasoning process onto the others. This is what is meant by the cycle of deferment, which will be elaborated on in the following section.

3. The cycle of deferment

3.1 Sourced in a historically irreconcilable academic debate

As stated in the previous section, *jus cogens* is a theory that was largely developed by international legal scholarship even before its introduction into the practice of international law.²¹ The aim in applying it to the modern day practice of international law – through the creation of the UN and the VCLT – was to see whether it could form part of the foundations for a world juridical order. Understandably, the debates that had long existed on the nature of law itself were being applied to these new developments in international law. The two legal theories that had the strongest following were natural law and positive law. Despite their fundamental theoretical differences, there was a general point of consensus to the fact that present-day international law had to protect the interests of the international community as a whole, in order to prevent another world war.

Nevertheless, the problem was (and still is) that there are fundamental differences in how one approaches the concept of law as such. Consequently, as stated by Georges Abi-Saab after the Lagonissi Conference in 1966: ‘Opinions diverged (...) on the content, sources and means of determination and application of these rules and on the origins, role and sociological significance of *jus cogens* in contemporary law and society.’²² These conflicting opinions existed blatantly amongst legal scholars, but also among state law practitioners and judges.

As a result, arguments became purely subjective, in the sense that scholars could cherry-pick quotes from legal practice that seemed most in line with their own perspective of law to make their point.²³ An even more troubling fact is that these judicial and state pronouncements scholars rely on only advocates for the existence of *jus cogens*. The subjectivity of the scholars’ arguments, therefore, comes out through their personal interpretation and bias in how a legal system operates generally. This creates a chain of arguments that are absent of any universal application. While this process might promote a continuation of the discussion, it does very little to clarify the contested issue.²⁴

It is well known that legal doctrinal scholarship can often influence the establishment of authoritative law.²⁵ Indeed, the ILC has stated that when researching the topic, they often rely on scholarly work in order to help guide judges, especially of domestic courts, in understanding the concept of *jus cogens*.²⁶ Nevertheless, scholarly work in and of itself is not a direct source of law.²⁷ Consequently, when there are conflicting theoretical debates around a legal concept, such as *jus cogens*, legislators and judges must reason which side of the debate they take when issuing authoritative law. Unfortunately for the story of *jus cogens*, this has not occurred. The following sub-sections explore how the ILC, international courts and tribunals, and state practice have all failed to take a firm and harmonious stance on which interpretation to follow, and consequently defers the initiative to make a decisive articulation of the actual content and legal meaning of *jus cogens* to the other law practitioners. The result is this cycle of deferment.

20 Guan, *supra* note 2, p. 473.

21 Shelton, *supra* note 8, p. 25; see also A. Bianchi, ‘Human Rights and the Magic of *Jus Cogens*’, (2008) 19 *The European Journal of International Law*, no. 3, p. 493.

22 G. Abi-Saab, ‘The Concept of *Jus Cogens* in International Law’, *Lagonissi Conference on International Law*, (1967).

23 Shelton, *supra* note 8, p. 24.

24 A. Orakhelashvili, ‘Audience and Authority – The Merit of the Doctrine’ in *Netherlands Yearbook of International Law, Jus Cogens: Quo Vadis?* (2016), p. 117.

25 UN Doc. A/CN.4/693 (2016), para. 45: ‘views expressed in literature help to make sense of the practice and may provide a framework for its systematization (...)’.

26 *Ibid.*, para. 10.

27 Note, this is probably why scholars such as Weatherall suggests that in understanding the application of *jus cogens*, research should rely predominantly on judicial pronouncements; for an overview of Weatherall’s argument, see: T. Kleinlein, ‘*Jus Cogens* Re-examined: Value Formalism in International Law’, (February 2017) 28 *European Journal of International Law*, 1, pp. 295-315.

3.2 The ambiguous approach from the ILC

The different interpretations of *jus cogens* held by legal scholars created problems for the ILC. When preparing their draft articles on the law of treaties, they knew that their role was to put something down on paper, but they were unable to decide on which side of the debate they would fall.²⁸ Instead of following one logical train of thought, their decision was to iterate a form of *jus cogens* that held elements from both the natural law and positivist conceptions, in order to increase the chances of attaining general acceptance. The first part of Article 53 declares that a treaty can be ‘void’ if it conflicts with a peremptory norm. This follows the belief that certain norms exist which do not require consent in order to be binding and have universal application, as posited by natural law scholars. The second part, however, indicates that these norms are the ones ‘accepted and recognized’ by the ‘international community as a whole’. This sticks to a positivist approach to law, which proposes that all international law must be derived from the will of states.

As mentioned, the ILC stated that determining the actual content and meaning of these norms was ‘(...) to be worked out in state practice and in the jurisprudence of international tribunals’.²⁹ This means that not only was the existence of peremptory norms given ambiguous meaning in the VCLT itself, but the major theoretical aspects of the debate surrounding *jus cogens* were completely ignored, and any clarification on the criteria for peremptory norms was deferred to other actors to decide. As such, a full fledged mystery about the content and application of *jus cogens* in international law was fashioned. At this point, the only chance for it to be solved was to wait and see whether the jurisprudence of international courts and tribunals, and/or state practice would take a definitive understanding.

3.3 Unreasoned declarations by the international courts and tribunals

By the time the VCLT was drafted, there had not been a single case dealing with *jus cogens*.³⁰ It is in the opinion of some scholars that, initially, international courts and tribunals had been ‘deliberately avoiding any engagement with the *jus cogens* concept’.³¹ This is probably related to the lack of state practice on the issue, meaning that courts have had little to no grounding for a ruling on the topic.³² Over time, courts started making more references to *jus cogens*,³³ but the judicial practice had still simply been to accord a norm the status without giving further explanation.³⁴

A good example of this can be seen in judgments by the Inter-American Court of Human Rights (IACtHR), where the court identifies the right to life as a *jus cogens* norm, and explains that ‘these [*jus cogens* norms] are the rules that have been accepted, either explicitly in a treaty or tacitly by custom, as necessary to protect the public interest of the society of nations or to maintain levels of public morality recognized by them’.³⁵ While this judicial jurisprudence did attribute minimal content to a peremptory norm, that of the ‘right to life’, the actual reasoning for the identification process and the source of the peremptory norm was left unclarified.

It is essential to point out that this is by far not the only example of courts stating a norm as being peremptory, without giving any real justification or further legal significance for such a declaration.³⁶ This lack of legal reasoning, arguably the most important function of a court in deciding a case, is an indication that there could be a deeper factor of general relevance that influences the approach taken to *jus cogens* identification.³⁷ This is what will be explored and analysed in the third section of this article.

28 Christenson, *supra* note 8, p. 604.

29 UN Doc. A/CN.4/SER (1966), p. 244.

30 L. Alexidze, ‘Legal nature of *jus cogens* in Contemporary International Law (Volume 172)’, *Collected Courses of the Hague Academy of International Law*. Ed. The Hague Academy of International Law, Brill (1981), pp. 243-258.

31 D. Shelton, ‘International Law and Relative Normativity’ in M.D. Evans, *International Law* (2010), pp. 149-154.

32 Retter, *supra* note 7, p. 547.

33 For examples, see: *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, [2012] ICJ Rep. para. 9; *Victims of the Tugboat ‘13 de Marzo’ v Cuba*, [1997] IACHR C-11.436, para. 79 (*Tugboat*); *Yassin Abdullah Kadi v Council of the European Union & Commission of the European Communities*, [2005] ECR II-3649.

34 M. Saul, ‘Identifying *Jus Cogens* Norms: The Interaction of Scholars and International Judges’, (2014) *Asian Journal of International Law*, p. 18.

35 *Tugboat*, *supra* note 33.

36 For a long list of examples, see: UN Doc. A/CN.4/693, *supra* note 25, para. 47; Saul, *supra* note 34, pp. 26-54.

37 Saul, *supra* note 34, p. 45.

3.4 The incompleteness of state practice

As mentioned, the ILC deliberately left the content of *jus cogens* to be determined by state practice and the jurisprudence of international tribunals. Therefore, the first question that requires clarification is: What is considered to be the state practice of peremptory norms? The ILC has recently clarified that the following materials can be used (collectively) as acceptable evidence for the acceptance and recognition of peremptory norms: ‘treaties, resolutions adopted by international organizations, public statements on behalf of states, official publications, governmental legal opinions, diplomatic correspondence and decisions of national courts’.³⁸ Nevertheless, even with this clarification, the existing ‘state practice’ has still not generated enough evidence to provide a clear understanding of the content and meaning of *jus cogens*.

It is important to note that *jus cogens* was argued by many as simply being part of customary international law. This is reflected in the statements from several states in the General Assembly over the years,³⁹ as well as a number of domestic court cases.⁴⁰ The logic is that if customary international law is seen as having a close link with social reality because of its requirement to be sourced in actual conduct within the international society,⁴¹ then peremptory norms that are ‘accepted and recognized by the international community as a whole’ must fall within the realm of custom.⁴²

However, it has now been accepted that *jus cogens* norms are actually hierarchically superior to customary international law.⁴³ This has been proclaimed throughout academia,⁴⁴ international court jurisprudence⁴⁵ and statements from states.⁴⁶ From this, the Special Rapporteur on the topic thus clarified that: ‘for a rule to qualify as a norm of *jus cogens* it has to be a norm of general international law and it has to be accepted and recognized as a norm from which no derogation is permitted’.⁴⁷ This means that peremptory norms have an extra criteria compared to customary international law rules: acknowledgement of non-derogability.⁴⁸

With all this in mind, there are many potential sources of state practice to turn to when trying to determine the content and meaning of *jus cogens*. For example it has been endorsed in debates surrounding the negotiation of treaties,⁴⁹ and in submissions to international courts.⁵⁰ One such instance is when the Netherlands submitted to the ICJ that ‘the obligation to respect and promote the right to self-determination as well as the obligation to refrain from any forcible action which deprives peoples of this right is an obligation arising under a peremptory norm of general international law’.⁵¹ Furthermore, national courts

38 UN Doc. A/CN.4/706 (2017).

39 See the statement by Pakistan at the thirty-fourth session of the General Assembly, UN Doc. A/C.6/34/SR.22 (1979), para. 8; Statements by the United Kingdom, UN Doc. A/C.6/34/SR.61 (1979), para. 46 and Jamaica, UN Doc. A/C.6/42/SR.29 (1979), para. 3.

40 UN Doc. A/CN.4/706, supra note 38, para. 43.

41 S. Verhoeven, ‘Norms of *Jus Cogens* in International Law A Positivist And Constitutionalist Approach’, PhD manuscript, (Katholieke Universiteit Leuven, 2011), p. 47.

42 The ICJ has clarified that in effect, custom entails a repetition of certain conduct in a particular timeframe. See, *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark/Federal Republic of Germany v the Netherlands) Judgment*, [1969] ICJ Reports, p. 3, para. 74.

43 See the following works as examples: R. Kolb, ‘*Jus cogens*, intangibilité, intransgressibilité, derogation, “positive” et “negative”’, (2005) 109 *Revue générale de droit international public*, pp. 305-330; A. Paulus, ‘*Jus Cogens* In a Time of Hegemony and Fragmentation’, (2005) *Nordic Journal of International Law* 74, 331; D. Shelton, ‘Normative Hierarchy in International Law’, (2006) 100 *American Journal of International Law*, pp. 291-324; Orakhelashvili, supra note 24; U. Linderfalk, ‘The Effect of *Jus Cogens* Norms: Whoever Opened Pandora’s Box, Did you Ever Think about the Consequences?’, (2007) 18 *European Journal of International Law*, pp. 853-871.

44 For example, see M. den Heijer and H. van der Wilt, ‘*Jus Cogens* and the humanization and fragmentation of international law’, in *Netherlands Yearbook of International Law: Jus Cogens — Quo Vadis?* (2016), pp. 3-21. See also Linderfalk, supra note 43, p. 371.

45 See, *Prosecutor v. Anto Furundzija* [1998] IT-95-17/1-T, ICTY, para. 153; where it is stated that *jus cogens* is a law ‘that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules’ in that it corresponds to an ‘absolute value from which nobody must deviate (...)’. See also, *Kadi*, supra note 33, para 226.

46 For examples, see the statement by the Islamic Republic of Iran, UN Doc. A/C.6/71/SR.26 (2016), para. 118; the statement by Ireland, UN Doc. A/C.6/71/SR.27 (2016), para. 20; the statements by the Netherlands, UN Doc. A/C.6/68/SR.25 (2016), para. 101.

47 UN Doc. A/CN.4/706, supra note 38, para. 39 (emphasis added).

48 *Ibid.*, para. 87.

49 Saul, supra note 34, p. 5; see also G.M. Danilenko, ‘International *Jus cogens* : Issues of Law-Making’, (1991) *European Journal of International Law*, p. 58.

50 See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, [2010] ICJ Reports, p. 403, paras. 4 and 24 (*Kosovo Advisory Opinion*).

51 See *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)*, [2009] Written Statement of the Kingdom of the Netherlands, para. 3.2 (Written Statement of the Kingdom of the Netherlands); Saul, supra note 34, p. 5.

have declared the existence of *jus cogens*, especially when enunciating a view that the particular norm is one taken very seriously in domestic law and policy.⁵² The conclusion that the Special Rapporteur comes to, after examining a number of these sources, is that the notion of *jus cogens* is a reflection and protection of fundamental values of the international community and is clearly identifiable in the practice of international law.⁵³

While the reflections of the Special Rapporteur might be true on its surface, when taking a closer look at the statements themselves a problem becomes rather obvious. The ‘state practice’ that has acknowledged the existence of peremptory norms does very little to explain how such norms reached their peremptory status, i.e. their foundational content and meaning. Taking the submission from the Netherlands to the ICJ as an example, the explanation as to why the norm of self-determination deserves *jus cogens* status was simply centred on quotes from the ICJ and the ILC, none of which provide a clear justification for why self-determination should be accepted as a peremptory norm.⁵⁴ When confronted directly about what the criteria for *jus cogens* should be, such as during the debate in the Sixth Committee of the ILC, many states merely emphasised that they should be based on Article 53 of the VCLT.⁵⁵ Yet, as discussed earlier, the VCLT does nothing to establish the content of peremptory norms and explicitly relies on states and international courts for its determination.

Evidently, the use of these unhelpful references to what other actors have said (namely the ICJ and ILC) clearly points to an issue of deferment. Instead of adopting a justified and explainable interpretation of *jus cogens*, states rely on a useless reiteration of what has already been said. The result of this is, as pointed out by many scholars, that most of these types of declarations of *jus cogens* have little or no practical consequence.⁵⁶

Furthermore, this cycle of deferment does not seem to have an end point within the foreseeable future. On the one hand, the ILC has plainly stated that the content and meaning of peremptory norms is to be determined by state practice and decisions of international courts. On the other hand, it has been summarised by Kleinlein that:

(...) in their reactions to the inclusion of the topic of *jus cogens* on the agenda of the ILC, many states have taken the view that the greatest contribution the Commission could make to the understanding of *jus cogens* is in the area of the requirements for the elevation of a norm to the status of *jus cogens*.⁵⁷

So, states have drawn specific attention to the lack of clarity on the topic, and believe that the ILC is better placed to address this issue. So the question now is whether the ILC responded in any helpful way that might shed some light on the matter, or does the cycle continue?

3.5 The deferral cycles back to the ILC

The aforementioned plea to the ILC is not a recent development. Jacovides presented a paper on *jus cogens* as a possible ILC topic in 1993. He stated that the problem which needed resolving was the fact that ‘(...) no authoritative standards have emerged to determine the exact legal content of *jus cogens*, or the process by which international legal norms may rise to peremptory status’.⁵⁸ Clearly, the necessity to determinatively clarify the practical implications of Article 53 has existed for a while now.

During the sixty-ninth session in August 2017, the ILC acknowledged in their second report on *jus cogens* that when referring to *jus cogens*, international courts and tribunals generally referred to Article 53 of the

52 Shelton, *supra* note 8, p. 45.

53 UN Doc. A/CN.4/706, *supra* note 38, para. 22.

54 Written Statement of the Kingdom of the Netherlands, *supra* note 51; Saul, *supra* note 34, p. 5.

55 See, for example, the statement by Czechia, UN Doc. A/C.6/71/SR.24 (2016), para. 72; Canada, UN Doc A/C.6/71/SR 27 (2016), para. 9; Chile, UN Doc. A/C.6/71/SR 25 (2016), para. 101; China, UN Doc A/C.6/71/SR.24 (2016), para. 89; the Islamic Republic of Iran, UN Doc. A/C.6/71/SR.26, *supra* note 46, para. 118.

56 Shelton, *supra* note 8, p. 44; Guan, *supra* note 2, p. 461; Christenson, *supra* note 8, p. 615; Paulus, *supra* note 43, p. 330.

57 UN Doc. A/CN.4/693, *supra* note 25, para 8.

58 UN Doc. A/69/10, (2014), para. 3. Similarly, the ILC’s Study Group Report on Fragmentation, para. 363.

VCLT.⁵⁹ Moreover, much of the academic literature proceeds from the premise that Article 53 provides the definition for *jus cogens*.⁶⁰ Therefore, the syllabus of the ILC's report also recognises that Article 53 is the starting point for any study of *jus cogens*.⁶¹ As such, and considering the acknowledged influence and problems caused by Article 53, it would have been expected to receive useful and conclusive clarification from the ILC in their recent report on how *jus cogens* rules are determined through the application of Article 53.

However, as one might be able to guess by now, this was not the case. While it is understandable that the majority of the members of the Commission believe that the report on *jus cogens* should be based on practice, for the sake of their own legitimacy and desire to attain general approval, their hesitation to provide constructive guidance on the content and meaning of peremptory norms means that the establishment of any reliable understanding of *jus cogens* has once again been deferred. This is probably most noticeable in statements from the second report itself, which posit that 'the characteristics of *jus cogens* identified in the first report of the Special Rapporteur and further expounded upon in the current report are not criteria for the identification of norms of *jus cogens*. They are rather, descriptive elements (...)'⁶² and that 'the question of who determines whether the criteria [for the identification of *jus cogens*] have been met falls beyond the scope of the topic'.⁶³

It is in the opinion of this article that the ILC's deliberate desire to leave these elements of *jus cogens* as open and ambiguous relates to the normative struggle associated with the concept indicated earlier. The normative value behind *jus cogens* is intrinsically linked to the ideas of natural law. Yet, application in today's international law has to be based on positive law.⁶⁴ These are, arguably, irreconcilable approaches/ understandings of law, and it would be extremely difficult for the ILC to pick a side or to reconcile these debates and attain general approval. Indeed, the ILC acknowledged that so far, no *single* theory adequately explains the uniqueness of *jus cogens* in international law.⁶⁵ Consequently, as stated in the 2017 report, 'the Special Rapporteur does not intend to resolve the natural law versus positive law debate or adopt one approach over the other (...) the determination of whether a norm has reached the status of *jus cogens* remains in article 53'.⁶⁶

4. The reasons for the continued deferral

4.1 The issue of legitimacy

The previous section demonstrated the existence of the cycle of deferment and how it circles around, but now the question is: Why? The obvious reason for why international courts have not been more forthcoming with an explanation for affording a norm *jus cogens* status has to do with their concern for legitimacy.⁶⁷ The authority of an international court is sourced in the consent of the states that have created it.⁶⁸ As such, an international court is more likely to be considered legitimate if its judgments are based on ideas and notions that have gained sufficient general consensus within the community of states. Therefore, for the sake of legitimacy, the court feels obligated to refer to state practice. However, when trying to do this for an

59 See as examples: *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, [1996] ICJ Reports, p. 226, para. 83; *Prosecutor v Furundžija*, supra note 45, para. 155; *Prosecutor v Jelisić*, [1999] ICTY IT-95-10-T, para. 60; See also, *Sentencia*, [1995] C-578/95, (Constitutional Tribunal of Colombia). See, especially, Separate Opinion of Judge *ad hoc* Dugard in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, [2006] ICJ Reports, p. 6, para. 12 (*Congo v Rwanda*).

60 See, for example, S. Knuchel, *Jus Cogens: Identification and Enforcement of Peremptory Norms* (2015), p. 19; See also U. Linderfalk, 'Understanding the *jus cogens* debate: the pervasive influence of legal positivism and legal idealism', in *Netherlands Yearbook of International Law: Jus Cogens — Quo Vadis?*, (2016), p. 52; S. Kadelbach, 'Genesis, function and identification of *jus cogens* norms', in *Netherlands Yearbook of International Law: Jus Cogens — Quo Vadis?* (2016), p. 166.

61 UN Doc. A/CN.4/706, supra note 38, para. 7.

62 Ibid., para. 89.

63 Ibid., para. 31.

64 Lauterpacht, supra note 10, pp. 306-307.

65 UN Doc. A/CN.4/693, supra note 25, para. 59.

66 UN Doc. A/CN.4/706, supra note 38, para. 18.

67 Saul, supra note 34, p. 21.

68 For a clear account of this, see N. Peterson, 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law', *The European Journal of International Law*, 28, 2, (2017), pp. 357-385.

explanation of *jus cogens*, the court is faced with very little practice and diverging opinions. Furthermore, even if a majority of states declare the existence of peremptory norms in international law, as derived from principles established in their domestic settings,⁶⁹ it is still not clear how these principles should be translated from a highly organised domestic system to a decentralised international system.⁷⁰ As argued by Christenson: ‘If a court were to define *jus cogens* in spite of this indeterminacy, it would need to enter into an inquiry of political power and the demands and expectations from within the entire international community, beyond the system of states.’⁷¹ Certainly, this course of action may undermine the principle of separation of powers, as it would transfer foreign-policy-making endeavours from the hands of state politicians to the judiciary.⁷²

Correspondingly, if the court decided to conduct such an inquiry, it is likely that states will perceive the court as having a much greater discretion on the topic compared to other areas of international law. As a result, procedural legitimacy comes into play, since the courts choosing one interpretation of *jus cogens* over another might question whether the court is driven by a preference for one of the parties to a case.⁷³

Additionally, since *jus cogens* is undetermined, and requires the recognition of the ‘international community as a whole’, one judgment of a case will not be conclusive. As such, even if a court (be it any international court or tribunal) were to give a definitive indication on the full content and meaning of *jus cogens*, there is a chance that states, even those party to that case judgment, will deviate from the ruling in some form. This would threaten the reputation of the court, and questions its outcome legitimacy.⁷⁴

That said, these evaluations do not suggest that perfect harmonious agreement is required to solve each case involving *jus cogens* norms, nor is it necessary for the courts’ practical reasoning. Indeed, that would defeat the purpose of having an international court in the first place. However, if a topic has not reached general agreement on how to achieve satisfactory justification for its application, as is the case for *jus cogens*, the court risks overstepping its mandate by imposing an inconclusive theory on the states.⁷⁵ This explains why the courts have an apparent preference for referring to norms with *jus cogens* status only once they have been firmly established in other international treaties (e.g. prohibition of torture)⁷⁶ and an unwillingness to elaborate on the effects of *jus cogens* in the event of conflicting norms (e.g. the ICJ’s approach to how *jus cogens* relates to state immunity).⁷⁷ The general absence of sufficient explanation for *jus cogens* content and meaning indicates that international courts believe they currently do not possess the tools necessary to come to any definitive conclusions on the topic without risking their own legitimacy.⁷⁸

This concern for legitimacy, unsurprisingly, also applies to the ILC. Since the introduction of international law, both as a concept and actual practice, there have been questions surrounding authority.⁷⁹ As it currently stands, international law is understood as being comprised of rules and customs that are only binding because states have accepted them as such, rather than because they are inherently valid or sourced from a higher authority.⁸⁰ Therefore, international law is derived from a decentralised system, and from the voluntary consent of states.⁸¹ As the Permanent Court of International Justice (PCJ) has explained:

69 See Orakhelashvili, *supra* note 24.

70 Christenson, *supra* note 8, p. 602.

71 *Ibid.*, p. 645.

72 L.M. Caplan, ‘State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory’, (2003) *American Journal of International Law* 97, p. 773.

73 Saul, *supra* note 34, p. 48.

74 *Ibid.*

75 See J. D’Aspremont, *Formalism and the Sources of International Law* (2011), p. 170; M. Koskeniemi, ‘Hierarchy in International Law: A Sketch’, (1997) *European Journal of International Law*, 566-580, p. 105.

76 UN Doc. A/CN.4/693, *supra* note 25, paras. 5-24.

77 *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, [2012] ICJ Reports, p. 99, paras. 92, 95 and 97 (*Germany v Italy*); Guan, *supra* note 2, p. 480.

78 Saul, *supra* note 34, p. 53.

79 Guan, *supra* note 2, p. 475.

80 *Ibid.*

81 Christenson, *supra* note 8, p. 88.

International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of states cannot therefore be presumed.⁸²

With this in mind, it is no surprise that the ILC, being neither a state nor a centralised source of authority, cannot legitimately impose qualifications for a legal norm of *jus cogens* status. While the ILC can help to further develop international law, in practice and in theory, the main source of authority is still derived from the states. Otherwise, the ILC would be going against the fundamental understanding of international law today, a change that the ILC has no legitimate legal basis for provoking. Only through state practice can the *full* content of an international legal rule be formulated. This is exactly why the ILC explicitly left the determination of *jus cogens* to be worked out in state practice.⁸³

This leaves us with the question of why states have not elaborated more on the full content and meaning of *jus cogens*. Even though they are seemingly in the strongest position to determine the content of *jus cogens*, with respect to upholding legitimacy, they too are concerned about stepping forward with a clear definition. The reason for this lies in the tension states face in applying the theoretical understanding of *jus cogens*. On the one hand, state sovereignty is currently the primary tenant of international law.⁸⁴ On the other hand, *jus cogens* aims at restricting what states can do. Therefore, *jus cogens* inherently challenges the traditional understanding of international law.⁸⁵ But obviously the state-consent-based model is in their best interest, as it inherently protects their sovereignty. Consequently, it should not be much of a surprise that states continue to have little incentive to defer away from the current operation of international law. The alternative would be to move towards a currently unknowable set of fundamental legal principles that *jus cogens* stands for.⁸⁶

To summarise, states are the only actors that are recognised as having the necessary legitimacy to assert the full content of *jus cogens*. However, they are still reluctant to elaborate on the content of the norms in the application of international law because this would inherently mean that they would be limiting their own power in some fashion.⁸⁷ Correspondingly, states prefer to use the sort of declaratory tactics described earlier, in order to be in line with the generally accepted normative view that certain international values ought to be protect, but without changing the status quo.

4.2 The ethical appeal

If the actors lack the incentive or legitimacy to conclusively explain the content and meaning of *jus cogens*, why does this discussion continue to persist? What is the point of keeping this topic on the table if everyone defers any meaningful elaboration onto the others? Peterson has argued that it is because of the symbolic representation that *jus cogens* offers. The substantive outcome of this symbol is the endorsement of an ethically appealing concept. This draws greater attention to the normative value of *jus cogens*, rather than the depth and quality of the underlying legal reasoning used in case judgments or policy decisions.⁸⁸ This explains why a scholar might be willing to cite a judicial identification of *jus cogens* status even if it has not been reasoned, as a basis for furthering an argument that is ethically appealing.⁸⁹

So, the intention in referring to *jus cogens* is to evoke a morally virtuous result. On the surface this is interesting, as it sparks a discussion on how normative values are linked to the practice of law. Yet,

82 *France v Turkey*, [1927] PCIJ (Ser. A) No. 10, p. 18 (S.S. 'Lotus').

83 UN Doc. A/CN.4/706, supra note 38, para. 53.

84 S.S. 'Lotus', supra note 82: 'first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State'.

85 Retter, supra note 7, p. 538; for an example of the argument that this indicates a move towards global constitutionalism, see: Orakhelashvili, supra note 24, pp. 7-35.

86 Guan, supra note 2, p. 486.

87 UN Doc. A/CONE39/1 (1969), para. 11.

88 N. Petersen, 'Lawmaking by the International Court of Justice – Factors of Success', (2012) *Germany Law Journal*, 12, pp. 1295-1316.

89 Saul, supra note 34, p. 40.

when taking a closer look at this process of argumentation, an inconspicuous trap emerges. The enticing component is most obviously depicted in judgments of international courts and tribunals. There are judges, such as Judge Trindade, who argue that *jus cogens* forms part of this process he calls the *humanisation* of international law.⁹⁰ He insists that the universality of the concept brings unity to human kind, which was the inspiration for the adoption of *jus cogens* and continues to be the driving force of its development. In this way, the ‘emergence and assertion of *jus cogens* in the contemporary international legal order [is] erected upon pillars in which the juridical and the ethical are merged’.⁹¹ Further examples can be taken from the jurisprudence of international courts and tribunals, where *jus cogens* has been used to suggest that the judges find the particular norm in question to be of high importance for the international community.⁹²

This sort of ethical appeal then inspires scholars to further elaborate on the normative value behind the concept.⁹³ For example, Bianchi believes that the primary function of *jus cogens* has been symbolic or expressive of fundamental values ‘by fostering a political and normative project, clearly at odds with the paradigms of the past, *jus cogens* has produced a moral force of unprecedented character’.⁹⁴ He continues by stating that peremptory norms are the ‘projections of the individual and collective conscience, materialized as powerful collective beliefs. As such, they inherently possess an extraordinary force of social attraction that has an almost magical character’.⁹⁵

With such influential and appealing normative value, combined with the strong endorsement from courts and scholars, states are also inclined to accept the use of the concept. Even at the start of its development in contemporary international law, nearly all states during the Vienna Conference were favourable to include the concept in the law of treaties and issued statements in which they recognised that international law does contain peremptory norms. Although some states opposed Article 53 of the VCLT (namely France),⁹⁶ this was merely because of its vagueness and the lack of an independent dispute settlement procedure.⁹⁷ This was reiterated in the sixty-eighth session of the ILC, when the Special Rapporteur stated that: ‘the important point (...) was that, contrary to widespread assumption, states did not question the idea of *jus cogens*, nor did they question its status as part of international law as it stood at the time’.⁹⁸ The reason for this widespread validation is well explained by Sztucki, who indicated that: ‘the members treated *jus cogens* as a sacred cow (...) because the uneasiness in raising voice against *jus cogens* was apparent, as if one who would criticize it were running the risk of being declared a grave offender of international legality’.⁹⁹

This is where the trap becomes apparent. The actors are all enticed into the acceptance and further proclamation for the existence of *jus cogens* due to its ethical appeal. However, since they all carry some sort of inability/disincentive to actually give full content and legal meaning to the concept, as shown in the previous sub-section, they become trapped in the cycle of deferment after being lured into acknowledging the concept. A perfect example of this is well captured in the ICJ’s judgment for *Congo v Rwanda*, where the court, on the one hand, emphasised that the prohibition of torture is ‘assuredly’ a peremptory norm of *jus cogens* status, but on the other hand also declared that *jus cogens* status does not in itself grant the court with the necessary jurisdiction to rule on the application of those peremptory norms,¹⁰⁰ since that remains governed by state consent.¹⁰¹

90 For more citations of case judgments which proclaim the same idea, see: Antônio Augusto Cançado Trindade, ‘*Jus Cogens: The Determination and the Gradual Expansion of its Material Content in Contemporary International Case-Law*’, *XXXV Course of International Law*, organized by the OAS Inter-American Juridical Committee, Rio de Janeiro, Brazil, August 2008, 3–29, <http://www.oas.org/publications_digital_catalogue_course2008.htm> (last visited 10 April 2019), p. 7.

91 Ibid, see the rest of his article for more citations of case judgments which proclaim the same idea.

92 Shelton, *supra* note 8, pp. 42-46; see for example the ICJ’s statements in *Congo v Rwanda*, *supra* note 59, on the prohibition of genocide.

93 Note that the scholars who disagree or criticise the concept do so from a point of practical legality, not from a point of disagreement with its ethical appeal.

94 Bianchi, *supra* note 21, p. 496.

95 Ibid., p. 508.

96 UN Doc. A/CONF.39/C.1/L.24 (1969).

97 Verhoeven, *supra* note 41, p. 47.

98 UN Doc. A/71/10. para. 107.

99 J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal* (1974), p. 157; Christenson, *supra* note 8, p. 605.

100 *Congo v Rwanda*, *supra* note 59, para 60.

101 Ibid., para 64.

Evidently, there are attractive reasons to endorse the value of *jus cogens*. After the atrocities of the Second World War, advocating for the protection of fundamental values seemed like the sensible and logical step forward. The problem, however, is that normative support for *jus cogens* does not outshine the disincentives in giving full content and legal meaning to the concept. Issues of legitimacy and concerns about changing the international legal order cannot be ignored. This, so far, is what has impeded the development of *jus cogens* in the practice of international law. It is why no actor has taken it upon themselves to make determinative conclusions. Nevertheless, the normative value associated with *jus cogens* is still present and felt by many, which is what drives the endless discussion on the topic.¹⁰² For this reason, despite the controversy and lack of effectiveness, even if *jus cogens* is seen as an ‘empty box, [creating the] category was still useful; for without the box it cannot be filled’.¹⁰³ Because even though the legal consequences of the declarative statements of *jus cogens* are limited at best, they represent a symbol for shared interests. It is also a symbol for the mutual recognition that states are not entitled to use their law-making powers to violate the most fundamental norms in today’s international society.¹⁰⁴ In light of this incentive to continue the conversation, the next section will explore a possible solution to break the unproductive cycle.

5. Effectuating *jus cogens*: the choice and use of narrative

The most noteworthy point to take away from the aforementioned analysis is that *jus cogens*, as it stands today, is rooted in a choice of narrative. There are many and conflicting interpretations within legal theory that try to explain the practice and concept of *jus cogens*. Schwarzenberger, a sceptic on the effectiveness of *jus cogens*, believes that the currently indeterminable character of *jus cogens* can be used to serve hidden interests. In his view, ‘the beauty of a general, as distinct from more specific, formula of international *jus cogens* is that it leaves everybody absolutely free to argue for or against the *jus cogens* character of any particular rule of international law’.¹⁰⁵ In other words, because *jus cogens* is a theory that is rooted in disputed principles such as justice, societal needs, legitimacy, etc., it is practically impossible to be framed in such a way that relies on non-circular justification, and from which consistent conclusions can be drawn.¹⁰⁶ It will require the acknowledgment of the relevant context and subsequent compromise between the parties to transform this complex theoretical idea into actual legal entitlement. For this reason, Guan argues that:

The war over *jus cogens* can be framed as a war over narrative: over text and interpretation. And narrative – like law – is human-made. Both can be shifted, and in the case of *jus cogens*, both should be. Let us refocus the war, and negotiate an end where the casualty will not be the loss of the ideal itself, but rather, one where the outcome may reflect compromise, but in doing so create binding law.¹⁰⁷

Guan makes a very interesting and important point here. Those who study and practice law should remember that law is created through a dynamic process, where different narratives interact and finally get translated into legal principles and rights. Scholar Jan Smits has also remarked on this, and believes that because of this, a complete picture of the law can only be obtained through the use of a holistic approach. Applying this to legal studies generally, he points to the problem that legal textbooks usually try to ban uncertainty, ‘meaning that the law is presented as a given and not as a discursive and contingent whole (...) an ideal law curriculum would explore and contrast conflicting normative positions and their implications (...) [and] should be exposed to alternative ways of achieving justice’. Additionally, because the law reflects on what people *ought* to do, this can be determined in a variety of different ways, so ‘it is only by reflecting upon these alternative outcomes that we get to appreciate the richness of the law’.¹⁰⁸

102 As evident through the ILC’s decision to include the topic in 2017; and continual publications, such as *Netherlands Yearbook of International Law: Jus Cogens — Quo Vadis?* (2016).

103 G. Abi-Saab, ‘The Third World and the Future of the International Legal Order’, (1975) *Revue Egyptienne de Droit International* 29, p. 53.

104 Paulus, supra note 43, p. 331.

105 Schwarzenberger, ‘International Jus Cogens?’, (1965) 43 *Texas Law Review*, 455 p. 477.

106 Koskeniemi, supra note 75, p. 578.

107 Guan, supra note 2, p. 499.

108 Jan Smits, ‘Law and Interdisciplinarity: On the Inevitable Normativity of Legal Studies’, (2014) *Critical Analysis of Law*.

By replacing ‘the law’ with ‘*jus cogens*’ in Smits’ quote, the professed problems clearly resonate very closely with the existing issues in trying to legally apply *jus cogens*. When discussed in case judgments, ILC reports and state practice, *jus cogens* is also simply presented as ‘a given’. However, the findings of this article demonstrate a confusing and complex development, which has made it impossible to speak of a single ‘given’ formulation of *jus cogens*. Its development has been far from linear, nor has it been interpreted or used consistently.¹⁰⁹

As such, the ideal approach to *jus cogens* would be to ‘explore and contrast these conflicting normative positions and their implications’. Only by doing this can the ‘richness’ of the concept be fully appreciated and adequately applied. This means that the entire rhetoric behind *jus cogens* needs to be shifted. Instead of using a declarative approach to merely identify its existence, the discussion and application of *jus cogens* needs to incorporate acknowledgment of its contingencies and the necessity to compromise.

As it currently stands in Article 53 of the VCLT, *jus cogens* is phrased in inflexible and absolute terms. Therefore, Guan proposes a reconceptualisation of the concept as having a more contextualised approach. This would, according to Guan, lower the cost of commitment for states because the norms would be ‘more explicitly understood as aspirational’, and thus ‘states could more easily agree to incremental but binding entitlements in pursuit of that ideal’.¹¹⁰ Practically speaking, using *jus cogens* as a road to compromise and as a contextualisation of the relevant interests would allow states to confirm their intention to protect the norms of the international community as a whole, without confining them to a strict list of requirements/norms that they might not always agree with. In essence, the practice of *jus cogens* would affirm state sovereignty, instead of being an encroachment on it. Correspondingly, this could lead to a much higher chance of obtaining state consent.¹¹¹

While Guan’s argument and proposal is enticing, employing her strategy purely for the sake of achieving greater state consent falls short of a complete and comprehensive reformulation of the concept. The scope of *jus cogens* extends beyond the requirement for state consent. Correspondingly, a reconceptualisation should target other areas of the law as well. For example, even though *jus cogens* is currently only formulated under the VCLT, scholars¹¹² and ILC reports¹¹³ have both proclaimed that *jus cogens* is in fact not limited to the law of treaties. It has also been discussed in relation to the Articles on the Responsibility of the State, adopted by the ILC of the United Nations in 2011. This is a clear expansion of the concept’s scope from when it was originally codified. Furthermore, issues within human rights law have also been associated with *jus cogens*. According to the IACtHR, the principles of equality and non-discrimination have entered into the domain of *jus cogens*, and therefore states have an obligation to respect and protect those rights.¹¹⁴ Similarly, the basic principle of *non-refoulement* was also recognised as having *jus cogens* character.¹¹⁵

Evidently, when trying to fully grasp the implications of *jus cogens*, it would be misconceived and naïve to simply look at the VCLT. Yet this is the approach that is accepted by states, the majority of judges throughout international courts and tribunals, and the ILC.¹¹⁶ So here, yet again, another tension appears. On the one hand there is general acceptance that *jus cogens* applies to areas outside the law of treaties. On the other hand, there is a reluctance to interpret the concept outside of the contradictory and confusing formulation in Article 53 of the VCLT.

The current formulation creates a binary: states must either commit to the fact that there exists a concrete list of hierarchically superior norms in the international community as a whole that can nullify a treaty, with the added presumption that they are aware of this list (which they are not) since they are

109 D. Costelloe, *Legal Consequences of Peremptory Norms in International Law* (2011), p. 288.

110 Guan, *supra* note 2, p. 497.

111 *Ibid.*, p. 494.

112 Trindade, *supra* note 90, p. 12; see also T. Weatherall, *Jus Cogens: International Law and Social Contract* (2015), p. 6: ‘Although the Vienna Convention concerns the law of treaties and binds only signatories (...) Article 53 reflected a concept with legal effect beyond the treaty context.’

113 UN Doc. A/CN.4/706, *supra* note 38, para. 5.

114 Trindade, *supra* note 90, p. 16; referring to *Advisory Opinion on Juridical Condition on Rights of the Undocumented Migrants*, [2003] IACtHR OC-18/03.

115 J. Allain, ‘The *Jus Cogens* Nature of *Non-Refoulement*’, (2002) 12 *International Journal of Refugee Law*, pp. 538-558.

116 UN Doc. A/CN.4/706, *supra* note 38, para 32.

members of the international community as a whole, or reject this proposition. But this all-or-nothing scenario is unnecessary. As explained earlier, the richness of the law is best demonstrated by exposing the variety of alternatives, and diving into the process of compromise. Perhaps the best way forward then is to strip *jus cogens* of its restrictive definition, and instead embrace the reflexivity of the concept, moving towards a balance between theory and practice.¹¹⁷ The effect in doing so would emphasise the underlying value of the concept; which is the presumption that there are certain values that are inherently necessary for the continued growth and development of the international community as a whole, which merit explicit recognition and active protection.¹¹⁸ Evidently, however, the determination of those particular values and interests are dependent on the perspectives of the parties involved. While it might be argued that some of those values are so fundamentally important that they will never change (for example the right to life), the ways in which a state will effectively accept, recognise and protect those values *is* in a perpetual state of change. As such, giving *jus cogens* a more contextualised approach would give the respective adjudicator or legislator the freedom to effectively articulate what the specific interpretive presumptions are in association with the peremptory norm involved in the case.

Furthermore, the presently strict interpretation of the concept imposes a risk on states and judges; as any statement they make in relation to the topic could potentially overstate their position or over-bind themselves to non-negotiable, underdeveloped law.¹¹⁹ These risks have made states and courts reluctant to take definitive action in their duty to uphold *jus cogens* norms, and disinclined them to develop the concept to any practical significance. Therefore, finding a way to avoid this useless declarative approach that has been taken so far is essential for the concept's application.

In other words, a context-dependent approach emphasises the necessity to articulate the reasons behind, and the appropriate measures to be taken in, the promotion or protection of a given *jus cogens* norm. The current discourse in practice is mostly centred around how to identify these hierarchically superior (*jus cogens*) norms. A contextualised approach, however, would require some discourse on *why* a norm is *jus cogens*, and more importantly what that consequently implies for the circumstances at hand. Therefore, a judge or state legislature would not have to determine in absolutist language that 'X is a norm that is inherently superior to all other norms of international law,' but instead would focus on rationalising why 'X is the norm of superior value in this context, and for that reason Y measures will be taken to protect that norm in this case'. This would uphold the state's ability to make its own legislative and normative decisions, and thus 'would stand a greater chance of creating binding law – even if modest – that forces signatories to take concrete measures'.¹²⁰ The risk of challenging the current international legal order would thus be eliminated. It would also render greater legitimacy to the courts in issuing judgments on the topic, as it would replace the restrictive implications of Article 53 with a holistic approach that will allow judges to pay greater attention to the ways in which effective implementation of the underlying values of the international community as a whole can take place. What matters most is not that a certain rule takes formal precedence in all cases (or in case of conflict), but that there is *reasoned* articulation of what ought to be given precedence at the interpretive level, given the circumstances.¹²¹ *Jus cogens* can thus provide a means to balance the particular interests of a given case with the overarching values of the international community as a whole, and subsequently construe the appropriate legal obligations. In this way, what will be affirmed is 'the emergence of values which enjoy an ever-increasing recognition in international society'.¹²² This type of understanding and legal reasoning could actually help solve complex cases with potentially conflicting norms, rather than push judges into a corner that causes them to avoid the conflict all together.¹²³ It would also afford the opportunity to apply *jus cogens* beyond the law of treaties.

117 Koskeniemi, *supra* note 75, p. 15.

118 Costelloe, *supra* note 109, p. 286.

119 Guan, *supra* note 2, p. 498.

120 *Ibid.*

121 Bianchi, *supra* note 21, p. 504.

122 See the joint separate opinions of Judges Higgins, Kooijmans and Buergenthal in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, [2002] ICJ Reports, p. 3, para. 73.

123 For example, *Germany v Italy*, *supra* note 77.

There should be acknowledgment of the fact that these views will not be well received by everyone. It does not provide for a neat, strictly or directly applicable formulation. For this reason, many will probably point to the fact that a move in this direction will not completely eradicate violations of peremptory norms, such as torture. Additionally, the critique that this understanding is too vague might also be raised. However, this perception is only because it is open-ended, which is actually done intentionally. The reformulation would be dependent on the relevant context, which requires an open-ended concept. States and judges need the freedom to give full and appropriate reasoning for their position on *why* certain norms, in the given context, require protection, and *how* that will be done given the situation. Therefore, the only determinative feature of *jus cogens* should be that it is an aspirational concept, one that aims to protect the fundamental values of the international society as a whole, whichever those may be and however that might be done.

More importantly, the current articulation of *jus cogens* in international law, as clearly evidenced throughout this article, is far from adequate. It suffers from many contradictory and ineffective pitfalls. As such, while this proposal for a new contextualised and more theoretical approach might not be a perfect solution that will provide immediate success, it will at least be a significant improvement on the current understanding and application of *jus cogens*.

6. Conclusion

The aim of this article was to uncover why there has been a lack of clarity on the topic of *jus cogens*, and why, despite all of the literature and legal endorsements of the concept, this uncertainty persists. Sections 1 and 2 provide the necessary background to answer the ‘why’ questions posed (and answered) in Section 3. The final section discussed the possible way forward in light of how the concept has developed.

The argument put forth by Guan was used as the inspiration for the suggestion presented in this article. The basis for my proposed reconceptualisation of *jus cogens* rests on the important fact that the concept, as understood in international law today, originated in an unresolved theoretical debate. As such, any iteration of the notion must rely on a particular choice of narrative to make its point. The consequence of this is that *jus cogens* does not and cannot have a strict universal understanding or application under its current formulation. Therefore, if *jus cogens* is reconceptualised as an aspirational result that is context-dependent, then international courts and state practice will have both the capacity and the incentive to engage in the necessary reasoning to impose effective legal obligations that promote and uphold the fundamental values of the international society.

The hope is that through this reconceptualisation, the ‘magical character’ of *jus cogens* can be used to fill its previously ‘empty box’ with actual legal consequences. Instead of having the mysterious characteristics of the ‘Cheshire Cat’, it will be transformed into an applicable concept for legal reasoning, one that appropriately balances theory and practice. ■