A BARREN EFFORT? THE JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS ON *JUS COGENS**

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1. INTRODUCTION

The notion of *jus cogens* (or peremptory norms) was codified in international law by the adoption of Article 53[2] of the 1969 Vienna Convention of the Law of Treaties (VCLT or Vienna Convention)[3] as the fundamental principle of international law from which derogation is not permitted. However, both the scope and content of *jus cogens* was not defined in Article 53. Hence, it is argued that since its inception there has not been an agreement as to which norms of international law have reached the status of *jus cogens*[4] or which criteria can be used to identify *jus cogens* norms.

As a result, *jus cogens* has received substantial attention in legal scholarship, which has extensively debated the existence of this concept,[5] as well as its scope.[6] Despite all the ink dedicated to it, there is still no conformity on what this term entails.[7]

Its elusive definition, scope and content were meant to be elucidated primarily by the International Court of Justice (ICJ).[8] However, this Court has been reluctant to clarify which norms have reached the status of *jus cogens* and what the method for their identification is.[9]

Contrary to the ICJ, the Inter-American Court of Human Rights (IACtHR or Inter-American Court), a regional human rights tribunal, has continuously expanded the content of *jus cogens* through its jurisprudence. These developments have been greatly influenced by former IACtHR Judge Cançado Trindade, who has strongly affirmed the existence of a universal juridical conscience as the ultimate material source of law.[10] During the last decade,[11] the Inter-American Court has found *jus cogens* norms in more than ten different rights. Remarkably, this jurisprudence has no precedence in international law.

Regrettably, the vast legal scholarship on *jus cogens*[12] does not yet include a detailed study on the Inter-American Court's contribution to the construction of *jus cogens*. The IACtHR's jurisprudence, which gives an evolving content to *jus cogens*, has been widely ignored, to the extent that even legal scholars like Dinah Shelton – perhaps hastily – asserted that "Human rights tribunals until quite recently […] avoided pronouncing on *jus cogens*".[13] She further affirmed that, in the Inter-American Court, "the term [*jus cogens*] has been discussed only once by the Court as a whole".[14] Perhaps she meant that the Court has extensively discussed the relevance and importance of *jus cogens* in international law only once in an advisory opinion,[15] but the concept has not been ignored by the IACtHR, which has brought it up in several sentences since 2003.[16]

Shelton's statement might be accurate as far as the European Court of Human Rights (ECtHR) is concerned.[17] Yet, the legitimacy and value of this doctrine within the framework of international law remains an open question. The Inter-American Court is well known for its progressive interpretation of the human rights protected in the American Convention on Human Rights (ACHR or American Convention), its founding document. Article 62 of this document clearly establishes that the Court has the competence to interpret and apply the ACHR. However, giving content to the term *jus cogens* implies that the Court has interpreted Article 53 of the VCLT, a function that

is not within its competences. Therefore, under the international law framework, the legitimacy of the Inter-American Court as an interpreter of the Vienna Convention and the value of the resulting jurisprudence is questionable.

This article aims to explore these matters. The first part discusses the origins and seemingly purposeful elusive genesis and understanding of *jus cogens*. The second part analyses the mandate given to the Court(s) to interpret the VCLT. While the lack of clarity of *jus cogens* begs for the interpretation of Article 53 of the Vienna Convention, the legitimate competence to do so is not part of the mandate of every single tribunal, but primarily of the ICJ. Thus, the scope and content given to this term by other international tribunals, such as the IACtHR lacks legitimacy and its relevance under international law is quite controversial, perhaps to the point of it being of little consequence or even *ultra vires*. The third part examines the ICJ's interpretation of *jus cogens* and a first confusion between this term and obligations *erga omnes*, both being terms wrongly used as interchangeable.[18] It is also shown that like the ICJ, the IACtHR has used a peculiar methodology to pinpoint the *jus cogens* nature of some rights and it is demonstrated that this Court has proclaimed more *jus cogens* norms than any other international tribunal. It has discretionally "selected" some rights that are considered to be part of international customary law and elevated them to the highest category of law: *jus cogens*. Yet, it has failed to clearly explain the criteria used to identify such norms or their peremptory nature.

2. THE HISTORICAL CONCEPTION OF *JUS COGENS*

During the United Nations Conference on the Law of Treaties, only one government, France, disputed the existence of *jus cogens* as asserted by the International Law Commission in its draft articles on the law of treaties.[19] In the face of such wide support, anyone could reasonably expect to be presented with a clearly defined concept, and for its proponents to have a specific idea of the matter. Ironically, that is not the case, and even after more than 30 years since the conference took place, the concept remains somewhat elusive and ambiguous.

However, the existence of limits to the liberty to contract or boundaries of the will, span through millennia and are shared by different schools of thought. Whether it is on natural law, public interest, ethics or moral grounds, persons as well as States cannot contravene some roughly identified norms, and all legal systems accept unwritten limitations or peremptory norms.[20]

2.1. Setting the stage: *Jus cogens* in International Law

The origins of a primordial conception of *jus cogens* are located in Roman law, as a set of norms originating primarily in private law, which, due to its importance, transcended into the public law sphere.[21] It is of little consequence for the purposes of this article to dwell deeply into the "prehistory" of this institution. However, one aspect is of relevance, namely the recognition of the need to restrain the liberty to contract, by virtue of certain principles that uphold the public interest.[22] In other words, there are certain ironclad norms that cannot be contradicted, and which supersede the will and liberty of the contracting parties.

The purpose of such peremptory norms is to safeguard the public interest in the subsistence of basic principles that allow the existence of the liberty to contract. They are the condition *sine qua non* the liberty to contract becomes impossible to uphold. This maxim originated in Roman law and was later translated and adopted in modern municipal law as the notion of *ordre public*.[23] It is in the concept of *ordre public* that another school of thought, namely natural law or *jus naturale*, meets up and even overlaps with Roman law in their recognition of preemptive norms.

Notwithstanding the ancient roots of *jus naturale*, it is with Francisco de Vitoria and Hugo Grotius that it came into play in international law and was secularised during the French Revolution, later leading to the proper *ordre public* concept. Here we have the converging point.[24] Thus, whether it is the natural law that is common to all mankind, or the law of reason proposed during the French Revolution, they recognise a series of peremptory norms to which all international law is subjected.

"In the nineteenth century, legal positivism challenged the assumptions of *jus naturale* and its propositions on the limitation of the contracting liberty of the States. Nevertheless, they did agree on one matter: treaties contrary to international public policy or basic moral principles should be void.[25] Again, the *ordre public international* is the apparent converging point.

Thus we come to a more proximate arena in the history of *jus cogens*. A paper written by Verdross in 1936 outlined the matter and

profoundly influenced subsequent discussions, at least until the 1969 Vienna Convention on the Law of Treaties was finally drafted.[26]

Verdross argues that, "[…] each treaty presupposes a number of norms necessary to the very coming into existing of an international treaty".[27] His point is that, prior to the negotiation of a treaty, the relevant States are in principle free to contract on any subject they see fit, yet the will of the States is limited by conditions *sine qua non* a contract would be pointless or impossible. In other words, the principle of *pacta sunt servanda*, for example, has not been agreed on *a priori*, yet the negotiating parties are subjected to it by virtue of their desire to engage in a pact. Since States cannot agree to derogate from or contravene such pre-existing norms, these must be compulsory norms in general international law. Verdross then goes on to argue in favour of the existence of compulsory norms regarding the content of treaties. He turns to the general law principle that prohibits treaties that go against good morals (*contra bonos mores*[28]): "This prohibition, common to the juridical orders of all civilized states, [responds to] the fact that every juridical order regulates the rational and moral coexistence of the members of a community".[29] Verdross does not settle with revisiting the moral or reason-grounds of the previous scholars we have mentioned here, but anchors his argument more solidly in positivist terms. He argues that Article 38(3) of the Statute of the Permanent Court of International Justice[30] proves his point by establishing the general principles of law as binding in international law. Even though general principles of law are subsidiary and only apply when no treaty or customary law contradicts them, he circles back to the idea that there are certain compulsory norms in international law that, as he had already proven, cannot be derogated from or contravened by the States. Otherwise, compulsory norms would never be applicable in international law.[31]

Regardless of Verdross's lingering influence, as we have seen, others place the source of peremptory norms in consent, natural law, international public order and constitutional law.[32] The 1969 Vienna Convention on the Law of Treaties is the first international text that instituted *jus cogens*.

2.2. The codification of *jus cogens* in international law

The International Law Commission (ILC) prepared the draft of the VCLT after several sessions and reports in which *jus cogens* was a dividing factor.[33] Special Rapporteurs on the law of treaties, Lauterpacht, Fitzmaurice and Waldock, made different proposals.

Jus cogens was extensively debated among delegations.[34] It is important, however, to highlight the suggestion made by the Colombian representative, Dr. Yepes, that good faith, since it had been mentioned in the UN Charter as the supreme norm in international relations, should be duly regarded in the elaboration of treaties. According to him, good faith should be understood as the requisite of all treaties to seek a lawful purpose or otherwise be invalid.[35] Lauterpacht upheld this idea and proposed the illegality under international law of a treaty, with the effect of its invalidity or voidness if it contravened overriding principles of international law or international public policy, understood as *ordre international public*.[36]

Succeeding Special Rapporteur Fitzmaurice presented *jus cogens* as a validity point in the substance of a treaty, but distinguished legality, with its corresponding invalidity effect (if it contravened *jus cogens*), from immorality, resulting in the treaty's unenforceability (if it were unethical). The third Special Rapporteur Waldock combined both Lauterpacht's and Fitmaurice's suggestions.[37]

After exhaustive negotiations, the concept of *jus cogens* (or peremptory norm of general international law) was finally codified in international law by the adoption of Article 53 of the VCLT:

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.

Turning to its legal consequences and based on this definition, *jus cogens* norms are:

(i) regarded sometimes as "international constitutional rules" due to their power to limit States' will, as well as their nature as a fundamental principle of *ordre public*;[38]

(ii) non-derogable norms of general international law which are to be differentiated from regional common law;[39]

(iii) part of international customary law. In this light, a "majority of States can bind a minority"[40] and no individual State has a veto power in the sense that they cannot argue their

exceptionality to avoid being bound by it;[41] and established by the consent of the international community by means of State practice.

As regards the latter point, Rafael Nieto-Navia, former judge of the International Criminal Tribunal for the former Yugoslavia, has affirmed that such consent must be found through the existence of the following sources: (i) general treaties; (ii) international custom; and (iii) general principles of law recognised by civilised nations.[42]

In addition, *jus cogens* norms do not admit any justification for the absence of their enforcement, unless the existence of circumstances of *force majeure* that make their implementation impossible is proven.[43] These norms do not have a retroactive effect.[44]

Significantly, Article 53 establishes that consent of the international community of States is necessary in order to identify *jus cogens* norms. However, this article neither provides guidelines to establish such consent nor establishes which body is competent to identify the *jus cogens* nature of norms of international law.

3. COMPETENCE TO INTERPRET ARTICLE 53 OF THE VCLT

Due to the lack of an "accepted criterion by which to identify a general rule of international law as having the character of *jus cogens*",[45] and to the fact that this term is constantly evolving,[46] Article 53 does not provide a (non-exhaustive) list of *jus cogens* norms.[47]

Nevertheless, some reports on the Law of Treaties attempted to exemplify what a *jus cogens* norm is. Specific examples include: (i) Principles of the UN Charter contemplating the unlawful use of force; (ii) international laws prescribing international criminal acts; and (iii) international laws proscribing slave trade, piracy or genocide.[48] Unfortunately, the drafters of Article 53 avoided listing such norms out of fear of limiting the scope and reach of the concept of *jus cogens*.[49] On the other hand, Article 40 of the Draft Articles on State Responsibility, which also refers to peremptory norms, cited examples of what a peremptory norm is: "the prohibition against torture, the basic rules of international humanitarian law applicable in armed conflict and the principle of the right of self-determination".[50] In addition, some legal scholars had already considered "piracy, slavery, the trade of slaves"[51] and the right to non-refoulement,[52] as *jus cogens* norms prior to the adoption of Article 53 of the Vienna Convention.

Evidently, there is a need for interpretation of Article 53. The question of which international tribunal bears the duty to clarify the content of *jus cogens* is not so evident. We will now look at the ICJ and IACtHR's competence to do so.

3.1 Competence of the International Court of Justice

Notably, Articles 65(3)[53] and 66(a)[54] of the VCLT provide for the competence of the deciding authority in cases related to Article 53 (*jus cogens*). In case of dispute, the parties will submit a written application to the ICJ or will agree on an arbiter. Therefore, it is clear that the ICJ has the primary competence to rule on these *jus cogens* matters. For such a procedure to be triggered, the claimant would have to be a subject of international law (i.e. a State and not an individual), seeking the invalidation of a treaty due to a violation of a *jus cogens* norm. To this date, the courts have not received any complaint challenging the compatibility of a treaty with *jus cogens* and they have only pronounced themselves incidentally on such norms.[55]

Although the VCLT clearly establishes that the ICJ is the competent body to decide on disputes related to *jus cogens* and therefore on the content of that category of norms, Special Rapporteur Waldock believes that any international tribunal and State practice can decide on the nature of *jus cogens* norms. Thus, he stated that, at the drafting of the Vienna Convention, States decided "to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals".[56] Therefore, no tribunal would have the monopoly to interpret *jus cogens* norms. This approach was further supported by the 2001 commentaries on State Responsibility for Internationally Wrongful Acts:

> The concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals and *in legal doctrine*.[57]

Hence, the power to identify *jus cogens* norms seems to have been expanded beyond international jurisprudence and State practice to legal doctrine. Concerning the international jurisprudence, we should recall that, at the time of the drafting of the VCLT, it was difficult to foresee the proliferation of international tribunals that happened during the last decades.

Amongst the ranks of such tribunals, the iIACtHR has become the most prominent interpreter of *jus cogens*:[58]

> The Court can, and beyond this, has the obligation to attribute *jus cogens* nature to those rights most dear to the person, the core components of protection ("hard core of human rights"), so as to protect and comply with the objective of protecting human rights covered by the American Convention.[59]

In the following section we analyse the framework under which the IACtHR exercises its functions.

3.2. The competence of the Inter-American Court

The IACtHR is an autonomous judicial organ and one of the two main bodies of the Inter-American System of Human Rights,[60] created by the American Convention in 1969. According to this document, the Court's mandate is twofold: interpreting and applying the ACHR, its founding document. This mandate is fulfilled through both a contentious and an advisory function.[61]

The Court's contentious jurisdiction implies that it has power to adjudicate claims of human rights violations under the ACHR by issuing judgments against States and ordering reparations for victims.[62] Through its advisory opinions, the Court "assist[s] states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions associated with the contentious judicial process".[63] Even though it is labelled an "opinion", which entails that there are no parties to the process and it is not binding, the Court is exercising its jurisdictional powers in "an alternate judicial method of a consultative nature".[64] Thus, the advisory opinion would resemble a statement or definition of policy, both for states' compliance with the American Convention as it is for the Court's own course of action.

Although there are several substantial and procedural differences between their functions, it has been in both contentious cases and advisory opinions that the Court has defined its own competence, mainly through the interpretation of Articles 62(3) and 64 of the American Convention.[65]

In its first advisory opinion, Costa Rica asked the IACtHR to define its own competence to interpret the meaning of "other treaties" in Article 64. In its response, the Court acknowledged that it had even wider powers than the ICJ and the ECtHR in its advisory functions and stated that the scope of the ACHR clearly pointed to a universalist perspective with "a certain tendency to integrate the regional and universal systems for the protection of human rights".[66] The Court advanced its reach and declared that its competence stretched further than regional treaties and encompassed *all* treaties, as long as they involved any Member State of the OAS and contained provisions regarding human rights (even if ancillary). This rather assertive and extensive interpretation of Article 64 was left with the safeguard that, regardless, the Court would decide on a case-by-case basis, giving due consideration to the convenience of the matter and the ulterior effects.[67]

The Court has further reaffirmed its authority over decisions regarding its competence, stating that "as with any court or tribunal, [the Court] has the inherent authority to determine the scope of its own competence (compétence de la compétence/Kompetenz-Kompetenz)".[68] Accordingly, "acceptance of the Court's binding jurisdiction is an ironclad clause to which there can be no limitations except those expressly provided for in Article 62(1)[69] of the American Convention".[70]

Thus, the IACtHR has adopted a rather expansionary perspective of the ACHR and reserves the right to decide on whatever it finds reasonable. We will come back to this later and comment on its legitimacy.

4. EXAMPLES OF *JUS COGENS'* INTERPRETATIONS

4.1. The jurisprudence of the International Court of Justice

Despite the ICJ's primary competence on defining *jus cogens* norms, it has been very reluctant to elaborate on these norms. However, it has indirectly referred to such norms several times. These indirect references have been made in judges' separate opinions, and through some "cacophonic neologism",[71] the creation of diffuse terms, such as the concept of *erga omnes* obligations or the use of abstract phrases such as "intransgressible principles of humanitarian law".[72]

4.1.1. Erga Omnes *Obligations and* Jus Cogens, *Two Sides of the Same Coin*

Many scholars and even courts have used the terms *erga omnes* and *jus cogens* interchangeably.

However, there are differences that should be kept in mind to avoid such confusion. For example, the source of *jus cogens* is in the VCLT, while obligations *erga omnes* were properly raised for the first time in the *Barcelona Traction Case*. Another difference is that "although the examples given by the ICJ of obligations *erga omnes* may also have the nature of *jus cogens*, the Court did not seek to emphasize their non-derogability".[73] In addition, *erga omnes* is the shift from bilateralism (where "the *entitlement* to invoke the cause of invalidity in question is reserved to the *contracting* [...] *states only*"[74]) to a conception of the protection of the interests of the international community as a whole (allowing for any State to raise the issue). Furthermore, *erga omnes* norms "were not necessarily distinguished by the importance of their substance" and "the Court did not seek to emphasize their non-derogability",[75] while those are essential characteristics of *jus cogens* norms. In other words, the concept *erga omnes* has more of a procedural purpose, while the opposite applies to *jus cogens* as they are essentially substantial norms.

Regardless of the various differences, both concepts tend to refer to the same principles, rights and peremptory norms, for example torture or genocide, and therein lies its erroneous interchangeable use.

There is another common confusion in the application of Article 103 of the Charter of the United Nations (UN Charter).[76] Even though the sources of international law tend to have a horizontal hierarchical arrangement, Article 103 establishes the pre-eminence of the obligations provided by the UN Charter over others that the States may have acquired by virtue of other treaties. However, the UN Charter is subject to the provisions of the VCLT and is therefore not above *jus cogens* norms. Moreover, even though, according to Article 103, the UN Charter prevails over other treaty obligations, it does not have the effect of nullifying the conflicting treaty, as would happen with a *jus cogens* norm.[77] Hence, the UN Charter will be subject to the VCLT (and *jus cogens* norms) as other treaties would.

4.1.2. The ICJ's Indirect Reference to *Jus Cogens* in Separate Opinions

In 1934, prior to the adoption of Article 53 VCLT, a separate opinion in *The Oscar Chinn Case* became the first official document referring to *jus cogens*. Judge Schücking interpreted Article 20 of the Covenant of the League of Nations to stipulate that State members should not undertake obligations incompatible with the terms and object of the Covenant, because of its *jus cogens* nature. [78]

Since then, several judges have elaborated on the *jus cogens* nature of some rights. For example, in the *Application of the Convention of 1902 Governing the Guardianship of Infants Case,* Judge Moreno Quintana listed the following *jus cogens* norms: freedom of the seas, piracy, warfare rules, inviolability of treaties, and the independence and legal equality of states.[79] Judge Tanaka's dissenting opinion in *The South West Africa Case* in turn found a *jus cogens* norm in the protection of all human rights.[80]

In the *Nicaragua v. United States Case*, the Court itself declared that the principle of non-use of force is a *jus cogens* norm. In his separate opinion Judge Nagendra Singh supported the Court's view by stating that this principle "is the very cornerstone of the human effort to promote peace in a world torn by strife" as well as part of the "peremptory rules of customary international law".[81] Judge Sette-Camara also supported this view, adding that the principle of non-intervention is also a peremptory norm.[82]

Furthermore, in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia Case*, Judge Ammoun upheld that the right of self-determination was a norm *jus cogens*. [83] In the *Lockerbie Case*, Judge Weeramantry asserted that the principle of *aut dedere aut iudicare* (extradite or prosecute) is a *jus cogens* norm.[84] Most recently, Judge Cançado Trindade in the *Ahmadou Sadio Diallo Case* referred to the principle of equality and non-discrimination as *jus cogens*, by quoting the IACtHR's jurisprudence.[85] In the *Jurisdictional Immunities of the State Case,* he also stated that the waiver of "claims for reparations of serious breaches of rights" on the basis of State immunity, "is in breach of *jus cogens*".[86] Judge Cançado Trindade recalled that "*jus cogens* stands above the prerogative or privilege of State immunity".[87]

Finally, in the *Questions relating to the Obligation to Prosecute or Extradite, jus cogens* was discussed separately by several ICJ judges. Judge Abraham and *ad hoc* Judge Sur suggested that the ICJ's reference to *jus cogens* was an *obiter dictum*[88] (a remark), and not necessary for the settlement of the dispute.[89] In turn, Judge Cançado Trindade believes that "*jus cogens* ascribes an ethical content to the new *ius gentium*".[90]

4.1.3. The ICJ's Indirect Reference to *Jus Cogens* through Cacophony Neologism

It is argued that, as part of the Court's great reluctance to establish *jus cogens* norms, it has used the term *erga omnes* obligations. In the *Barcelona Traction Case,* the Court established that the prohibition of slavery was an *erga omnes* obligation.[91] Similarly, in the *Western Sahara Advisory Opinion* and *East Timor Case,* the Court stated that self-determination today is a right *erga omnes.*[92]

The ICJ's reluctance to determine *jus cogens* norms can be clearly seen in its stance regarding the prohibition of genocide. In its *Advisory Opinion regarding Reservations to the Genocide Convention*, the Court established that the prohibition of genocide was binding on all States: "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation".[93] The Court advanced its posture in some contentious cases by highlighting that such a prohibition is an obligation upon the international community.[94] Eventually, the Court acknowledged that this prohibition was part of *jus cogens* norms.[95]

Moreover, the Court has made use of abstract wording suggesting that *jus cogens* norms derive from universally binding obligations. In the *Nicaragua v. United States Case,* the Court referred to Common Articles 1 and 3 of the Geneva Convention as *elementary considerations of humanity* and established their binding character for all States.[96] Lastly, in the *Consequences of the Construction of a wall in the occupied Palestinian Territory Case,* the Court established that 'many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity", that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law",[97] and also *erga omnes* obligations.[98]

Instead of defining *jus cogens* norms, the Court is eager to create new, but also abstract, terms with similar legal effects to those of the *jus cogens* one which have been characterised by Biachi as cacophonic neologism.

4.1.4. The ICJ's Direct Reference to *Jus Cogens*

Significantly, the Court has only explicitly mentioned the *jus cogens* nature of three norms: the prohibition of the use of force, the prohibition of genocide and the prohibition of torture.

The first time that the Court established a *jus cogens* norm was in the *Nicaragua v. United States Case* in which the Court upheld that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*".[99] In the *Armed Activities on the Territory of the Congo Case* it affirmed that "the norm prohibiting genocide was assuredly a peremptory norm of international law".[100] The Court further confirmed that the prohibition of genocide is a *jus cogens* norm in the *Bosnia and Herzegovina v. Serbia and Montenegro Case*.[101] Finally, in the *Questions relating to the Obligation to Prosecute or Extradite Case* the Court established that "the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)".[102]

Regrettably, the Court has on the one hand established some *jus cogens* norms, but on the other has undermined the nature and legal effects inherent to such norms. After having established that the prohibition of genocide is a *jus cogens* norm, the ICJ also upheld that this cannot be the basis for the Court's jurisdiction,[103] as the latter always depends on the consent of the parties. This reasoning evidently contradicts both: (i) its previous affirmation that "the prohibition of genocide was binding to all States, including non-States parties",[104] and more importantly (ii) the nature of *jus cogens* norms, which are binding on all States. [105]

Similar interpretations that diverge from the original meaning given to *jus cogens* in the Vienna Convention can be found in the *Germany v. Italy Case,* in which "the Court conclude[d] that, even on the assumption that the proceedings in the Italian courts involved violations of *jus cogens* rules, the applicability of the customary international law on State immunity was not affected".[106] The Court's view in this case is that *jus cogens* norms do not enjoy a higher position than rules of customary international law. Here again, the Court seems to ignore the text of the VCLT.

All in all, it is important to highlight that, although the ICJ has indirectly found the *jus cogens* nature of more than fourteen rights, those findings have almost no influence in the ICJ's direct reference to *jus cogens*, which is limited to three rights.

Table 1. The different norms found to be *jus cogens* by the ICJ

	Indirect reference		Direct reference
	Separate Opinions	Cacophony neologism	
1	Covenant of the League of Nations' terms		
2 **3** **4** **5** **6**	Freedom of the seas Piracy Warfare rules Inviolability of treaties Independence and legal equality of states		
7	Human rights protection	Fundamental rights	
8	Non-use of force		**1** Non-use of force
9	*aut dedere aut iudicare*		
10		Slavery	
11	Self-determination	Self-determination	
12		Genocide Prohibition	**2** Genocide Prohibition
13	Non-intervention		
14		Common articles of Geneva Convention	
15		Rules of humanitarian law	
16	principle of equality and non-discrimination		
17	Waiver of claims for reparation of serious breaches of rights due to state immunity		
			3 Torture

4.2. The Inter-American Court's jurisprudence on *Jus Cogens*

As opposed to the ICJ, the Inter-American Court has been more than keen to pinpoint *jus cogens* norms when interpreting the human rights protected by the American Convention.[107] Its active task of finding *jus cogens* has been deeply influenced by the vast legal scholarship of Judge Cançado Trindade, who has explicitly "referred to the need to develop the case law on *jus cogens* prohibitions (beyond the law of treaties, covering any violation of human rights, including by way of unilateral action, so as to establish in a crystal-clear fashion the objectively unlawful nature of torture practices, summary executions and forced disappearances)".[108]

The following sections demonstrate how the legal scholarship of Judge Cançado Trindade has influenced the IACtHR's jurisprudence on *jus cogens*.

4.2.1. The IACtHR's Indirect Reference to *Jus Cogens* through Separate Opinions

Interestingly, Judge Cançado Trindade, through a separate opinion, has stated that the protection of the right to life is not only a precondition for the enjoyment and exercise of other rights, but also that "There can no longer be any doubt that the fundamental right to life belongs to the domain of *jus cogens*".[109] This approach seems to be in line with the Special Rapporteur Ribero's 1987 report, in which he pointed out that the right to life is a *jus cogens* norm.[110]

Similarly, Judge García Ramírez also observed that the right to life belongs to *jus cogens*, however, he further extended this category to the right not to be submitted to torture[111] or cruel, inhuman and degrading treatment.[112] Notably, he also appears to have identified the crystallisation of a *jus cogens* norm in the prohibition of the death penalty.[113]

During the adjudication of widespread human rights violations before the IACtHR, the first judicial body to adjudicate crimes of a mass scale, Judge Cançado Trindade took the opportunity to affirm, first, that the prohibition against grave and systematic violations of human rights were *jus cogens* norms,[114] and second, that "grave human rights violations, acts of genocide and crimes against humanity, amongst other atrocities, violate absolute prohibitions of *jus cogens*".[115] Thus, if a violation of human rights or humanitarian law is grave, regardless of whether it is also systematic, it qualifies as a violation of *jus cogens*. Furthermore, he explicitly affirmed that enforced disappearance, a crime considered grave by the IACtHR, was also a prohibition of *jus cogens*. He based his reasoning on the fact that the IACtHR had previously established that the crime of enforced disappearance encompasses the violation of multiple rights, such as the right to freedom from torture. Since the latter is generally accepted as a *jus cogens* norm, enforced disappearance would also belong to the *jus cogens* domain.[116]

Judge Cançado Trindade also constructed a very progressive view on *jus cogens* by stating that "a crime of State is defined as a grave violation of peremptory international law (the *jus cogens*), which directly affects its principles and foundations, and which is a matter that concerns the international community as a whole".[117] Judge Cançado Trindade seems to have accepted the concept enshrined in Article 19 of the 1973 draft of the State Responsibility Code, written by the Special Rapporteur Roberto Ago, which intended to criminalise some State acts. [118] However, this concept was dropped in later versions due to a lack of consensus.[119]

Furthermore, Judge Cançado Trindade has asserted that the right to a fair trial is also "part of the realm of the international *jus cogens*".[120] It is of great importance to mention that he based this reasoning on the IACtHR's findings in its *Advisory Opinion No. 18*, in which it declared that the right to due process of law must be recognised as one of the minimum guarantees to all, without discrimination.[121] He also seems to have been influenced by some ICJ rulings. For example, he has found *jus cogens* norms in provisions common "to international human rights law and international humanitarian law".[122] Although both the protection of human rights and rules of humanitarian law have been (are) seen as *jus cogens* by some ICJ judges, he does not refer to them, but rather to the universality of those norms.[123]

Additionally, he has also included as *jus cogens* norms the right to access to justice,[124] minimum guarantees of international humanitarian law,[125] and respect for personal honour and beliefs.[126] It is remarkable that most of the IACtHR's separate opinions that elaborate on *jus cogens* come from Judge Cançado Trindade, with the exception of three opinions by Judge García Ramirez.

4.2.2. The IACtHR's Direct Reference to *Jus Cogens*

The first reference the Court as a whole ever made to *jus cogens* can be found in the *Aloeboetoe Case*, in which the Court referred to the prohibition of slavery as a norm of *jus cogens*.[127] It is important to mention that, prior to this case, the ICJ had already highlighted the *erga omnes* obligation of the prohibition of slavery.[128]Apparently, the IACtHR either understood *erga omnes* as a synonym of *jus cogens* or elevated the obligation regarding this prohibition to a higher position.

In the *Maritza Urrutia Case*, the IACtHR determined the *jus cogens* nature of the prohibition of torture.[129] The ICJ confirmed this qualification in 2012.[130] Significantly, the IACtHR extended the character of *jus cogens* to the prohibition of cruel, inhumane or degrading treatment or punishment, which is also a *jus cogens* norm.[131]

Perhaps the IACtHR's most well-known finding of *jus cogens* norms concerns the principle

of non-discrimination and equality before the law. In its *Advisory Opinion No.18*, at the request of Mexico, it elaborated on whether the principle of non-discrimination and the right to equal and effective protection before the law were *jus cogens* norms.[132] Based on the fact that several international treaties protect it, the Court answered this question positively.[133]

In another case, the IACtHR adopted Judge Cançado Trindade's gravity criterion and declared that the prohibition of grave and systematic practices of human rights violations is a *jus cogens* norm.[134] Judge Cançado affirmed in several *obiter dicta* "that […] systematic practice of human rights violations [which constitute crimes against humanity] violates international *jus cogens*".[135] Such practices include systematic extra-legal executions for example.[136]

Moreover, the IACtHR has characterised the prohibition of the forced disappearance of people as *jus cogens*.[137] Before this Court's decision, Judge Cançado Trindade had already reached that conclusion. It is important to mention that, like Judge Cançado Trindade, the IACtHR does not require this crime to be systematic in order for it to be considered *jus cogens*.[138] Interestingly, the Court not only established the prohibition of this crime as a *jus cogens* norm, but it also found that the State's duty to investigate and punish those responsible for this crime is also a norm of that character.[139] Later on, the IACtHR extended the *jus cogens* nature to the duty to investigate and punish perpetrators of all grave human rights violations.[140]

Furthermore, the Court's very well-known role in the fight against impunity in the region can also be seen in the *Almonacid-Arellano Case* in which it declared that self-amnesties were prohibited by *jus cogens* and therefore were in contravention of the American Convention. The Court reached this conclusion by first declaring that the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity was *jus cogens* and, second, that "even though the Chilean State has not ratified said Convention, the Court believes that the non-applicability of statutes of limitations to crimes against humanity is a norm of General International Law (*jus cogens*), which is not created by said Convention, but it is acknowledged by it".[141]

From this landmark decision, it can be seen that, unlike the ICJ's stance in the case of *Bosnia and Herzegovina v. Serbia and Montenegro*, the IACtHR highlighted that the existence of a peremptory obligation does not require States' consent in order to make it enforceable.

Table 2. The different norms found to be *jus cogens* by the IACtHR

	Separate opinions		IACtHR	
	Cançado Trindade	**García Ramírez**		
1	Right to life	Right to life	**1**	Slavery
2		Torture	**2**	Torture
3		Any cruel, inhuman and degrading treatment.	**3**	Any cruel, inhumane or degrading treatment or punishment
4	Common provisions in human rights and humanitarian law		**4**	Non-discrimination and equality before the law
5	Grave or systematic violations of human rights and humanitarian law; Acts of genocide, Crimes against humanity		**5**	Grave violations of human rights and humanitarian law
6	Forced disappearance's crime		**6**	Forced disappearance's crime

	Separate opinions		IACtHR	
	Cançado Trindade	García Ramírez		
7	Failure to respect personal honor and beliefs		7	Failure to punish perpetrators of grave violations of human rights
8	Non-applicability of statutes of limitations to crimes against humanity (prohibition of self-amnesties)		8	Non-applicability of statutes of limitations to crimes against humanity (prohibition of self-amnesties)
9	Right to access to justice			
10	State crimes			
11	Fair trial rights			
12	Minimum guarantees of international humanitarian law			
13		Death penalty		

4.3. Cross-fertilisation between the ICJ and the IACtHR

Interestingly, both the ICJ and the IACtHR seem to pay little attention to the difference between establishing international customary law and *jus cogens* norms.

In the *Questions relating to the Obligation to Prosecute or Extradite Case,* the ICJ declared that the prohibition of torture is a *jus cogens* norm, as this prohibition "is grounded in a widespread international practice and on the *opinio juris* of States".[142] The ICJ cited several international instruments in order to support this and clearly recalled that *jus cogens* norms are to be found in customary international law.[143]

Likewise, in its *Advisory Opinion No.18* the IACtHR relied on the existence of 19 treaties and 14 soft-law instruments which protected the principle of non-discrimination in order to elevate this right to the status of *jus cogens.* In this light, those binding and non-binding instruments were the source of evidence of a universal obligation to respect and guarantee human rights and prohibit discrimination.[144] Judge Cançado Trindade uses a similar approach when constructing *jus cogens* norms.[145]

It must be recalled that: (i) "treaties and declarations represent *opinion juris* because they are statements about the legality of action, rather than examples of that action",[146] and (ii) *opinion juris* and state practice are the two elements to establish customary international law.[147] Thus, both the ICJ and the IACtHR seem to establish customary international law when identifying *jus cogens.*

Similarly, Judge Cançado Trindade has stated that *jus cogens* norms are part of customary law which might be framed in international law and which, at some point, reach the status of *jus cogens*. [148] Unfortunately, he has not elaborated on how some norms of customary international law "at some point" become *jus cogens*. However, he seems to suggest that a distinction between customary international law and *jus cogens* can be drawn when this could be seen as a way to protect human rights.[149]

Since *jus cogens* are norms which are to be "contained in a treaty or in customary international law",[150] it is deemed necessary to first establish their nature as a customary norm. However, it remains a mystery how the Courts elevate some of those norms to the status *jus cogens*.

4.4. Legitimacy of the IACtHR

If regional systems "may […] serve the additional purpose of articulating regionally specific conceptions of shared human rights concepts, or interpreting locally identified human rights norms",[151] what would be the value of

the Inter-American jurisprudence on *jus cogens* norms?

If the IACtHR has been very active in giving content and scope to *jus cogens* as part of its fight against impunity, it has invoked this term outside its original content. The IACtHR is aware of and has acknowledged the risks of overstepping its competence. However, it has been dismissive of such perils. In its *Advisory Opinion OC1-82* (*Otros tratados*), the Court addresses the concern of rendering an opinion that would affect States unrelated either to the Convention or to the Court. Those States could not only be eventually troubled by the decision, but they would also have no legal standing to be heard by the Court. The response of the Court was that:

> The mere possibility that the event hypothesized […] might arise, which can after all be dealt with on a case-by-case basis, is hardly a sufficient enough reason for concluding that the Court, *a priori*, lacks the power to render an advisory opinion interpreting the human rights obligations assumed by an American State merely because such obligations originate outside the framework of the Inter-American system.[152]

Thus the IACtHR decided to keep its options open, possibly at the expense of certainty.

The next issue discussed in the same advisory opinion is the very real possibility of conflicting interpretations. Of course it is true that the organisation of international tribunals is not vertical and if various courts have the competence to interpret a treaty there will always be a possibility of contradiction. The IACtHR though, rashly disregarded the importance of this, basing its argument on its seemingly quotidian quality. The Court found it natural and therefore uneventful for courts to have contradicting criteria: "the conflicts being anticipated, were they to occur, would not be particularly serious," and in any case would only be contained in advisory opinions, which the Court itself found of lesser consequence: "the advisory opinions of the Court and those of other international tribunals, because of their advisory character, lack the same binding force that attaches to decisions in contentious cases".[153]

5. CONCLUSIONS

History and theory do not clarify the content of *jus cogens* norms and it was explicitly left to the "international tribunals" to determine what they are. In doing so, it was perhaps not up to any international tribunal to decide on their content. The procedure for declaring that a norm is *jus cogens* should start through a controversy amongst States on the question of whether a treaty is in accordance with a *jus cogens* norm, not *motu proprio* by the deciding tribunal. According to article 53 of the Vienna Convention, *jus cogens* was foreseen as a sort of recourse of last resort, but the courts have rushed to use it, too soon and for other purposes, and thus have distorted its exceptional nature. Through an overuse of the term, it has been confused and mixed up with other concepts with similar effects, but with fundamentally different purposes. Its overlap with *erga omnes* and human rights in general will bring little to provide for better adjudication or even to serve the cause of human rights.

Furthermore, the lack of clear criteria distinguishing the creation of international customary law and *jus cogens* norms by the ICJ challenges the value of the latter in international law as it suggests that universal norms are established on a discretional basis.

As it becomes clear by comparing the above tables, the IACtHR has been acting as the international tribunal primarily responsible for giving content and scope to *jus cogens* norms. However, the IACtHR's interpretations of *jus cogens* are regional interpretations of identified values and norms and therefore they cannot be considered global interpretations. If *jus cogens* norms are universally binding norms, on which legal basis can the IACtHR have the task to define them?

Finally, it is clear that individual judges from both the ICJ and the IACtHR seem to be more active than their respective courts in establishing the *jus cogens* nature of several norms.

NOTES

1. Article 53 VCLT: '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'.
2. A complementary provision is embraced in Article 64 VCLT: 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'.
3. Hasmath, R., 'The Utility of Regional Jus Cogens', *available at*: http://dx.doi.org/10.2139/ssrn.1366803.
4. Linderfalk, U., 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?', *European Journal of International Law*, Vol. 18, No.5, 2008, pp. 583-571.
5. Verdross saw *jus cogens* as a general principle of law recognized by all legal systems.
   See also: Simma, B., 'The Contribution of Alfred Verdross to the Theory of International Law', *European Journal of International Law*, Vol. 6, No. 1, 1995, pp. 33-54.
6. Linderfalk, *loc. cit.* note 4, at p. 584; Orakhelashvili, A., *Peremptory Norms in International Law*, Oxford University Press, Oxford, 2006; Hannikainen, L., *Peremptory Norms (Jus Cogens) in International Law*, Finnish Lawyers' Publishing Co., Helsinki, 1988; Allain, J., 'The Jus Cogens Nature of Non-Refoulement', *International Journal of Refugee Law*, Vol. 13, No. 4, 2001, pp. 533-558.
7. Hansbury, E., *Le juge interaméricain et le «jus cogens»*, The Graduate Institute, Geneva, 2011, p. 5.
8. Bianchi, A., 'Human Rights and the Magic of Jus Cogens', *The European Journal of International Law*, Volume 19, No. 3, 2008, pp. 491-508, at p. 501.
9. Trindade, A.A.C., *International Law for Humankind: Towards a New Jus Gentium*, Martinus Nijhoff Publishers, The Hague, 2010, p. 144. This resembles the definition of *jus cogens* given by the Mexican representative at the United Nations Conference on the Law of Treaties: '[…] those rules which derived from principles that the legal conscience of mankind deemed absolutely essential to coexistence in the international community at a given stage of its historical development'. See: UN Committee of the Whole, Official Records of the United Nations Conference on the Law of Treaties, First Session, UN Doc. A/CONF.39/C.1/SR.52 (1968), p. 294, para. 7, *available at*: http://untreaty.un.org/cod/diplomaticconferences/lawoftreaties-1969/docs/english/1stsess/a_conf_39_c1_sr52.pdf.
10. The Court first referred to *jus cogens* in the 1993 *Aloeboetoe Case*. However, from 2003 onwards, it has constantly found jus *cogens* norms among the rights protected by the American Convention on Human Rights.
11. Seiderman, I., *Hierarchy in International Law: the Human Rights Dimension*. Intersentia, Antwerp, 2001, pp.335; Nieto-Navia, R., 'International Peremptory Norms (Jus Cogens) and International Humanitarian Law' in: Cassesse, A. and Vohrah, L.C. (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassesse*, Martinus Nijhoff Publishers, The Hague, 2003, pp. 595-640, at p. 604; Hossain, K., 'The Concept of Jus Cogens and the Obligation Under the U.N. Charter', *Santa Clara Journal of International Law*, Vol 72 (2005), pp. 96-97
12. Shelton, D., 'Normative Hierarchy in International Law', *The American Journal of International Law*, Vol. 100, No. 2, 2006, pp. 291-323, at p. 309.
13. *Idem*.
14. IACtHR, *Juridical Condition and Rights of the Undocumented Migrants* (Advisory Opinion), 17 September 2003 (Series A, No. 18).
15. IACtHR, *Maritza Urrutia v. Guatemala* (merits, reparations and costs), 27 November 2003 (Series C, No. 103), at para 92; IACtHR, *Tibi v. Ecuador* (preliminary objections, merits, reparations and costs), 7 September 2004 (Series C, No. 114), at para. 143; IACtHR, *Gómez-Paquiyauri Brothers v. Peru* (merits, reparations and costs), 8 July 2004 (Series C, No. 110), at para. 76; IACtHR, *Fermín Ramírez v. Guatemala* (merits, reparations

and costs), 20 June 2005 (Series C, No. 126), at paras. 117 and 184; IACtHR, *Mapiripán Massacre v. Colombia* (merits, reparations and costs), 15 September 2005 (Series C, No. 134), at para. 178; IACtHR, *Servellón-García et al. v. Honduras* (merits, reparations and costs), 21 September 2006 (Series C, No. 152), at para. 94; IACtHR, *Almonacid-Arellano et al. v. Chile* (preliminary objections, merits, reparations and costs), 26 September 2006 (Series C, No. 154), at para. 153.

16. The European Court of Human Rights has only referred once to *jus cogens*, see: ECtHR, *Al-Adsani v. United Kingdom*, 21 November 2001 (Appl.no. 35763/97), at para. 61.
17. Picone, P., 'The Distinction between Jus Cogens and Obligations Erga Omnes', in: Cannizzaro, E. (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford University Press, Oxford, 2011, pp. 411-424, at p. 411.
18. UN Committee of the Whole, United Nations Conference on the Law of Treaties: Official Records, First and Second Sessions, UN Doc. A/CONF.39/11/Add.2 (1971), at p. 67.
19. UN International Law Commission, Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 (2006), para. 361.
20. Gómez Robledo, A., *El Ius Cogens Internacional (Estudio histórico-crítico)*, Universidad Autónoma de México: Instituto de Investigaciones Juridicas, Mexico City, 1982, at pp. 1 and 227.
21. *Ibidem*, at pp. 1-21.
22. Dörr, O. and Schmalenbach, K. (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Springer, Heidelberg, 2012, at p. 900.
23. Robledo, *op. cit.* note 20, at pp. 10-12.
24. See Dörr and Schmalenbach (eds.), *op. cit.* note 22, at p. 900.
25. *Ibidem* at p. 901.
26. Verdross, A., 'Forbidden Treaties in International Law', *The American Journal of International Law*, Vol. 31, No. 1, 1937, pp. 571-577, at p. 572.
27. '"Against good (and right) practices."
(1) Immoral
(2) Inequitable
(3) Inconsistent with or contrary to preferred or sound practices, customs, public policy, or notions of equity'. Fellmeth, A.X. and Horwitz, M., *Guide to Latin in International Law*, Oxford University Press, New York, 2009.
28. Verdross, *op. cit.* note 26, at p. 572.
29. Equivalent to the current Article 38(1)(c) of the Statute of the International Court of Justice, which reads: '1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: […] c. the general principles of law recognized by civilized nations; […]'.
30. Verdross, *op. cit.* note 26, at p. 573.
31. Shelton, *loc. cit.* note 12, at p. 299.
32. *Ibidem*, at p. 300.
33. See: UN International Law Commission, Summary Records of the Fifteenth Session: Vol. I, UN Doc. A/CN.4/SER.A/1963 (1963); Vol. I, Part II, UN Doc. A/CN.4/SER.A/1966 (1966); UN International Law Commission, Summary Records of the 684th Meeting: Vol. I, UN Doc. A/CN.4/SR.684 (1963); and UN International Law Commission, Summary Records of the 878th Meeting: Vol. I(2), UN Doc. A/CN.4/SR.878 (1966).
34. See Robledo, *op. cit.* note 20, p. 22.
35. See Dörr and Schmalenbach (eds.), *op. cit.* note 22, at p. 901.
36. *Idem*.
37. Hossain, K., 'The Concept of Jus Cogens and the Obligation Under the U.N. Charter', *Santa Clara Journal of international Law*, Vol. 3, No. 1, 2005, pp. 72-98, at p.74.
38. Nieto-Navia, *op. cit.* note 11, at p. 604.
39. Wouters, J. and Verhoeven, S., 'The Prohibition of Genocide as a Norm of Jus Cogens and Its Implications for the Enforcement of the Law of Genocide', Koninklijke Universiteit Leuven: Institute for International Law, Working Paper No. 69, 2005, pp. 1-16, at p. 4.
40. Shelton, *loc. cit.* note 12, at p. 300.
41. Nieto-Navia, *op. cit.* note 11, pp. 11-12.
42. Wouters and Verhoeven, *loc. cit.* note 39, at p. 5.
43. Quispe, R.F., 'Ius Cogens en el Sistema Interamericano: Su relación con el Debido Proceso', *Revista de Derecho*, Vol. 34, 2010, pp. 42-78, at p. 48.
44. UN International Law Commission, Second report on the law of treaties, by Sir

Humphrey Waldock, Special Rapporteur, UN Doc. A/CN.4/156 and Add.1-3 (1963), at p. 52, *available at*: http://untreaty.un.org/ilc/documentation/english/a_cn4_156.pdf.

45. Parker, K. and Neylon, L.B., 'Jus Cogens: Compelling the Law of Human Rights', *Hastings International and Comparative Law Review*, Volume 12, No. 2, 1989, pp. 411-464, at p. 428.

46. Nieto-Navia, *op. cit.* note 11, at p. 15.

47. UN International Law Commission, Documents of the second part of the seventeenth session and of the eighteenth session: Vol. II, UN Doc. A/CN.4/183 and Add.1-4 (1966), at p. 248, *available at*: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1966_v2_e.pdf; UN International Law Commission, Documents of the fifteenth session: Vol. II, UN Doc. A/CN.4/SER.A/1963/ADD.1 (1963), at p. 53, *available at*: http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1963_v2_e.pdf.

48. Dörr and Schmalenbach (eds.), *op. cit.* note 22, at p. 903.

49. UN International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, UN Doc. A/56/10 (2001), p. 112, *available at*: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

50. Parker and Neylon, *loc. cit.* note 45, at p. 429.

51. *Ibidem*, at p.435.

52. Article 65(3) VCLT: 'If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations'. Yet, Article 33 of the UN Charter establishes that in case of dispute between States, the Security Council shall, when it deems this necessary, call upon the parties to settle their dispute by means such as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, and so on. Additionally, Article 36 of said Charter recalls that, when the Security Council calls upon the parties to settle a legal dispute under Article 33, it will generally refer the parties to the ICJ. See the Charter of the United Nations, *available at*: http://www.un.org/en/documents/charter/.

53. Article 66(a) VCLT: 'If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed: (a) any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration'.

54. Zemanek, K., 'The Metamorphosis of Jus Cogens: From an Institution of Treaty Law to Bedrock of the International Legal Order?', in: Cannizzaro, E. (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford University Press, Oxford, 2011, pp. 381-410, at p. 410, *available at*: http://oxfordscholarship.com/view/10.1093/acprof:oso/9780199588916.001.0001/acprof-9780199588916.

55. UN International Law Commission 1963, *loc. cit.* note 44, at p. 53.

56. UN International Law Commission 2001, *loc. cit.* note 49, at p. 112. (Emphasis added)

57. IACtHR, Caesar Case, 2005, Separate Opinion Judge Cancado, para. 92; Hansbury, *op. cit.* note 7, at p. 13.

58. IACtHR, *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil* (Separate Opinion Judge Figueiredo-Caldas), 24 November 2010 (Series C, No. 219), at para. 19. Judge García Ramírez has also pointed out that the Court can go as far as to observe the presence of norms of *jus cogens* resulting when solving a dispute. See, IACtHR, *Bámaca-Velásquez v. Guatemala* (merits) (Separate Opinion Judge Sergio Ramirez), 25 November 2000 (Series C, No. 70), at para. 25.

59. The other main body is the Inter-American Commission on Human Rights. See Article 33 ACHR.

60. See Articles 61-65 ACHR.

61. See Buergenthal, T., 'The Inter-American Court of Human Rights', *The American Journal of International Law*, Vol. 76, No. 2, 1982, pp. 231-245.

62. IACtHR, *Restrictions to the Death Penalty* (Advisory Opinion), 8 September 1983 (Series A, No. 3), at para. 43.

63. Ledesma, H.F., *The Inter-American System for the Protection of Human Rights: Institutional and Procedural Aspects*, Inter-American Institute of Human Rights, San José, 2008, p. 884.

64. Article 62(3) ACHR: 'The jurisdiction of the Court shall comprise all cases concerning the

interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement'.
Article 64(1) ACHR: 'The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states.[…]'

65. IACtHR, *"Other Treaties" Subject to the Advisory Jurisdiction of the Court* (Advisory Opinion), 24 September 1982 (Series A, No. 1), at paras. 40-41.
66. *Ibidem* at para. 49.
67. IACtHR, *Ivcher-Bronstein v. Peru* (competence), 24 September 1999 (Series C, No. 84), at para. 32.
68. Article 62(1) ACHR: 'A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention'.
69. IACtHR, *Ivcher-Bronstein v. Peru*, *supra* note 67, at para. 36.
70. Bianchi, *loc. cit.* note 8, at p. 502.
71. ICJ, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, 8 July 1996, at para. 79.
72. Pronto, A. and Wood, M., *The International Law Commission 1999-2009: Volume IV: Treaties, Final Draft Articles, and Other Materials*, Oxford University Press, Oxford, at p. 770.
73. Picone in Cannizzaro (ed.), *op. cit.* note 17, at p. 414.
74. UN International Law Commission 2006, *loc. cit.* 19, at para. 389.
75. Article 103 UN Charter: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.
76. UN International Law Commission 2006, *loc. cit.* note 19, at para. 333 and ss.
77. Permanent Court of International Justice, *The Oscar Chinn Case (Britain v. Belgium)*, Separate Opinion (Judge Schücking), 12 December 1934, at para. 341.
78. ICJ, *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)*, Separate Opinion (Judge Moreno Quintana), 28 November 1958, at p. 107.
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