

Demystifying the Concept of Peremptory Norms: The Nature and Scope of Jus Cogens

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DEDICATION

This work is for the glory of Jesus Christ, who because I am in him I am in covenant with God, and it is this that has ensured that I persevere through all the challenges that it presented.

I also dedicate this work to my Grandparents Hezekiah Oyugi, Mary Oyugi, Perez Owuor and Henry Owuor, my parents Douglas Odhiambo and Bertha Odhiambo, and my siblings Natasha, Justin, Michael, Joshua, Gabby, Vicky and David.

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DECLARATION

I, [CRAIG DOUGLAS OYUGI], do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

HARRISON MBORI OTIENO

ABSTRACT

Humanity must be governed by a set of ideals. Ideals that stretch beyond what can be seen, a law that exists outside the realm of time and legislation, a law that invalidates what does not coincide with it. This law is *jus cogens*. As a concept, it enshrines the very essence of what makes mankind humane, it is shrouded in the notion of human dignity. However, as humanity develops, so do the contents of *jus cogens*? This study seeks to answer this question, firstly by ascertaining the correct formulation of what *jus cogens* actually is. This naturally leads to the question of how *jus cogens* comes about, in other words, what are the theoretical underpinnings. I posit that *jus cogens* arises out of a fiduciary relationship between the state and its citizens, and will always permeate to cater for the needs of its citizenry because of the same fiduciary relationship. As a result, it is this fiduciary relationship that is the foundation in determining the future of *jus cogens* and its scope. In order to bring clarity to the concept of *jus cogens*, the study recommends that a formula should be enshrined in treaty law for making such a determination, on what can and can't be considered *jus cogens*. Secondly a code, law or statute enshrining all the *jus cogen* violations and bringing to life the legal principle of legality.... namely that the law should be "certain." Lastly a mode of enforcement of sanctions that is able to circumvent the obstacles that international politics presents to the fair and universal application of *jus cogen* violations.

LIST OF ABBREVIATIONS

AJIL	American Journal on International Law
AM	American
CIL	Customary International Law
EJIL	European Journal of International Law
IACtHR	Inter American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
PA	Pennsylvania
TEX	Texas
VCLT	Vienna Convention on the Law of Treaties
VJIL	Virginia Journal of International Law
UFRGS	Universidade Federal do Rio Grande do Sol
UN	United Nations
US	United States
YJIL	Yale Journal on International Law

TABLE OF CASES

INTERNATIONAL COURT OF JUSTICE

Barcelona Traction, Light and Power Company (Belgium v Spain) Limited, Judgment, I.C.J. Reports 1970.

Columbian – Peruvian asylum case (Colombia v Peru), Judgment of November 20th, 1950: I.C.J. Reports (1950).

North Sea Continental Shelf (Germany v Denmark and The Netherlands), Judgment, I.C.J. Reports 1969.

Armed Activities on the Territory of the Congo, (Democratic Republic of the Congo v. Uganda), Judgment I.C.J. Reports 2005

Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C. J. Reports 1949.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America.), Judgment, I.C.J. Reports 1986.

Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Judgment of 20 July 2012, ICJ Reports 2012.

PERMANENT COURT OF INTERNATIONAL JUSTICE

Oscar Chinn Case, (United Kingdom v Belgium), PCIJ, Series A/B No 63, (1932).

EUROPEAN COURT OF HUMAN RIGHTS

Al-Adsani v United Kingdom, ECtHR, Judgment on 21st November 2001.

INTER-AMERICAN COURT ON HUMAN RIGHTS

Advisory Juridical Condition and the Rights of Undocumented Migrants, IACtHR, Judgment, 17th September 2003.

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Michael Domingues v. United States of America, IACmHR, case 285, 2002.

UNITED STATES OF AMERICA CASE LAW

The Schooner Exchange V Mc'faddon 11 US 116, (1812)

CHAPTER ONE: PROPOSAL

INTRODUCTION

International law characteristically is comprised of the wills of collective sovereign states and thus lacks the formal structure enjoyed by national jurisdictions. States have thus recognized norms or obligations deemed to be of a different or higher status than others.¹ These obligations may be *erga omnes* or *jus cogens*.² *Jus cogens* as the notion of peremptory norms in international law is reminiscent of the distinction in Roman law between *jus strictum* (strict law) and *jus dispositivum* (voluntary law). Technically, *jus cogens* derives most of its legitimacy from the natural law thinking of the seventeenth and eighteenth century, according to which certain rules existed independent of the will of states and law makers.³ This concept has since found itself in the Vienna Convention of the Law of Treaties (VCLT) in Article 53 wherein it states that a treaty is void if, at the time of its conclusion it conflicts with a peremptory norm.⁴

Peremptory Norms, are that body of norms from which no derogation is permitted; those norms recognized by the international community as a whole as being fundamental to the maintenance of an international legal order.⁵

Erga Omnes is a quality that certain laws possess.⁶ *Erga Omnes* means that the law in question is binding to all states, in other words they are rights and obligations owed by states to the whole international community and each state has a legal interest in its implementation.⁷ In *Barcelona Traction case* it was enunciated that an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection.⁸ By their very nature, the former are the concern

¹ Shaw M, *International Law* (Cambridge) 2008.

² Shaw M, *International Law* (Cambridge) 2008

³ De Wet E, 'Jus Cogens and Obligations Erga Omnes', Dinah Shelton (Ed), *The Oxford Handbook on Human Rights*, (2013).

⁴ Article 53, *Vienna Convention on the Law of Treaties*, (1961).

⁵ Peremptory norm. (n.d) West's Encyclopedia of American law, edition 2. 2008.

⁶ Ragazzi M, 'The concept of international obligations erga omnes', Oxford University Press, (2000).

⁷ Shaw M, *International Law* (Cambridge) 2008.

⁸ *Barcelona Traction, Light and Power Company (Belgium v Spain) Limited, Judgment, I.C.J. Reports 1970.*

of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.⁹ Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression,¹⁰ and of genocide,¹¹ as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.¹² Some of the corresponding rights of protection have entered into the body of general international law others are conferred by international instruments of a universal or quasi-universal character.¹³

While there may be significant overlap between these two in terms of the content of the rules to which they relate, there is a difference in nature.¹⁴ The former applying to procedure and the latter applying to substance. *Jus cogens* refers to the legal status that certain obligations in international law get to, and obligations *erga omnes* pertains to the legal implications arising out of a certain crime's characterization as *jus cogens*. Thus, these two concepts are different from each other.¹⁵

⁹ Bassiouni, M "International crimes: jus cogens and obligatio erga omnes." *Law & Contemp. Probs.* 59 (1996).

¹⁰ This is defined by the General Assembly Resolution 3314 of 1947 which when read together with Articles 1(2) and 39 of the United Nations give the Security Council mandate to deal with crimes of aggression.

¹¹ See generally Convention on the Prevention and Punishment of the Crime of Genocide, 1948, see specifically Articles II and III.

¹² See generally the Universal Declaration of Human Rights, more particularly Articles 3-8.

¹³ *Barcelona Traction Case (Belgium v Spain)* [1970] ICJ.

¹⁴ Shaw M, *International Law* (Cambridge 2008).

¹⁵ Bassiouni, M "International crimes: jus cogens and obligatio erga omnes." *Law & Contemp. Probs.* 59 (1996).

STATEMENT OF THE PROBLEM

From a theoretical standpoint, it remains a body susceptible to ambiguity, due to the fact that the international community, lacking legislative power can accommodate the idea of peremptory norms binding on all its members.¹⁶ The absence of any international legislature capable of imposing legal rules on all the members of the international community is a major problem, evidence of the shaky foundation on which the concept of *jus cogens* has been built.¹⁷ Void of any clearly defined substantial and procedural for the creation of *jus cogens* their emergence and subsequent identification could be marred based on the 'political assertion and bias' of different states.¹⁸

JUSTIFICATION FOR STUDY

Due to societies fluidity and ever-changing nature, the status of *jus cogens* norms are subject to change over time. This change arises due to what the international community feels is of peremptory status at a given point. *Jus cogens* are principles of law enshrining common and superior values shared by the international community as a whole. This being the case *jus cogens* ascribes an ethical content to the new *jus gentium*.¹⁹ This enshrines the reason as to why identification of *jus cogens* norms is important, it is a statement of the international communities attitude towards a particular issue. Whether it attains this status can only be determined by whether it fulfills various requirements and it is of paramount importance to understand what these requirements are because it's the difference between permissibility of potentially grievous actions and not.

¹⁶ Danilenko G, "International Jus Cogens: Issues of Law Making," *European Journal of International Law*.

¹⁷ Danilenko G, "International Jus Cogens: Issues of Law Making," *European Journal of International Law*.

¹⁸ Danilenko G, "International Jus Cogens: Issues of Law Making," *European Journal of International Law*.

¹⁹ Saul M, 'Identifying jus cogen norms: The interaction of scholars and international judges', *Asian journal of international law*, 2014.

HYPOTHESES

The author hypothesizes the following;

1. *Jus cogens* gives human rights the necessary universality for its implementation.
2. The universality attained by *jus cogens* norms does not trounce state sovereignty but works in tandem with it.
3. Certain actors are beyond the reach of *jus cogens* enforcement
4. Societal Norms are what will inform the evolution of *jus cogens* norms

RESEARCH OBJECTIVES

The main aim of this study is to assess the fluid nature of obligations that are in the level of *jus cogens* and the manner in which they obtain their legitimacy and position in the hierarchy of legal norms. In doing this various issues will be addressed. These are;

- (i) Identifying *jus cogens*.
- (ii) Finding out what gives certain norms *jus cogens* status.
- (iii) Determining a means for its enforcement.

RESEARCH QUESTIONS

This research seeks to generally find a deeper rationalization for the concept of *jus cogens* in international law. More specifically, it seeks to answer the following questions;

- (i) What gives certain norms *jus cogens* status.?
- (ii) Can *jus cogens* be enforced?
- (iii) Are all states accountable for breaches of *jus cogens* despite the disparate power that they yield?
- (iv) Is there the possibility of new *jus cogens* norms arising?

METHODOLOGY

The study will be largely dependent on desktop research. Through this research the primary source of information will be secondary, derived from literary works by various scholars in the International law fraternity. These Literary works span from journal articles to textbooks. The same method will be used to analyse international case law in order to highlight on principles regarding the research topic. Primary research will also be used but not to a large extent, through conversations and interviews with lecturers. The information gathered from these sources will be collated and analyzed in an objective manner with an aim of answering the research questions and attaining the research objectives

LITERATURE REVIEW

My study will be composed of various writers attempting to answer the questions posed in my research questions.

The first question as to “*what is jus cogens?*” will be tackled through analyzing concepts from various schools of thought. Namely the theory of state sovereignty, forwarded by Knuchel²⁰ and Burley²¹ and supported by the ruling in *Schooner Exchange v McFaddon*²² regarding the equality of sovereigns and the inability of one to rule over another highlighting the principle of *parim parem non habet imperium*. The second theory that will be analysed is the constitutionalisation of international law, relying on the the seminal works of John Locke²³ Posner,²⁴ Weatherall²⁵ and Kelsen²⁶ who all determine that *jus cogens* arises out of a hint of constitutionalism in international

²⁰ Knuchel S, ‘State Immunity and the Promise of Jus Cogens,’ Volume 9, *Northwestern Journal of International Human Rights*, (2011).

²¹ Burley, Anne-Marie. "Law among liberal states: Liberal internationalism and the act of state doctrine." *Columbia Law Review* (1992).

²² *The Schooner Exchange V Mc'faddon* 11 US 116, (1812).

²³ Locke J, “Two Treatises of Government”, *McMaster University Archive of the History of Economic thought*.

²⁴ Posner, E. "Erga omnes norms, institutionalization, and constitutionalism in international law." *Journal of Institutional and Theoretical Economics* (2009).

²⁵ Weatherall T, “Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence,” *Georgetown Journal of International Law*.

²⁶ Kelsen H, *Principles of International Law*, The Lawbook Exchange (1952).

law limiting the power of states vis a vis each other and vis a vis their citizens.²⁷ Lauterpacht²⁸ and Hobbes²⁹ advance Constitutionalism and Public theory of law being both the reason states adhere to jus cogens and why these norms arise. Lastly is the Fiduciary theory of *jus cogens* advanced by Criddle.³⁰ This is the theory from which the bulk of this paper will rely. Borrowing from his aversions that the state adheres to *jus cogen* norms because they hold these rights for the citizenry in trust. Rights that arise due to the International universal conscience.

In answering the questions of whether new norms will be formed, the work of Judge Cancado Trindade will be the focal point of discussion. Namely his rulings in *The Advisory Opinion on the Juridical Condition and the Rights of Undocumented Migrants*³¹ and his paper on the analysis of *jus cogens*.³² Lastly an analysis on the enforceability of *jus cogen* norms will be assessed through the rulings in the *Nicaragua case*³³ and the United States invasion of Iraq.

²⁷ Posner, E. "Erga omnes norms, institutionalization, and constitutionalism in international law." *Journal of Institutional and Theoretical Economics* (2009).

²⁸ Lauterpacht H, Law of Treaties: Report by Special Rapporteur, [1953] 2 Y.B. Int'l L. Comm'n 90, 93, U.N. Doc. A/CN.4/63.

²⁹ Hobbes T, *Leviathan or The Matter, Forme, & Power*, printed for Andrew Crooke, at the Green Dragon in St. Pauls Church-yard 1651.

³⁰ Criddle E and Fox-Decent E, "A fiduciary theory Jus Cogens" *Yale Journal of International Law*, (2009).

³¹ *Advisory Juridical Condition and the Rights of Undocumented Migrants*, IACtHR, Judgment, 17th September 2003.

³² Cancado A, "The Determination and Gradual Expansion of its Material Content in Contemporary International Case Law," *XXV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano*, (2008).

³³ Morrison F, "Legal Issues in the Nicaragua Opinion", *American Journal of International Law*, (1987).

CHAPTER TWO: A THEORETICAL APPROACH TO *JUS COGENS*

THEORETICAL FRAMEWORK

The theories justifying *jus cogens* are the reason the same is on a collision course with state sovereignty. The tensions between state sovereignty and *jus cogens* have led to lengthy and protracted discussions. This was before Article 53 was a provision under the Vienna Convention on the Law of Treaties. Essentially, Article 53 scales down the power of states to contract on matters which are deemed contrary to the objects of the international community as expressed by *jus cogens*.

It is axiomatic that international law draws much of its legitimacy from the wills of nations to be together under one regime that ensures uniformity. However, there is also the factor of enforcement, which raises uncertainty as to whether the violators of international law can be held to account for their wrongs.³⁴ This being the case, the veracity of international law as law is further thrown into confusion. In the case of *jus cogens* which is a more amorphous idea, these concerns are magnified.³⁵ This paper contends that there must be a different theoretical framework apart from natural law that grants *jus cogens* its peremptory status in law. This chapter shall therefore point out the shortcomings of the current theoretical and institutional order in engendering obedience to international law, then it shall delve into the fiduciary theory of *jus cogens* after which it shall draw conclusions.³⁶

THE THEORY OF STATE SOVEREIGNTY

Under the current theoretical framework of *jus cogens*, the closest we can get to a justification is what is offered by natural law. The basis for the legal force behind natural law is nature and reason which binds all persons in the case of contemporary jurisprudence. This makes all persons subservient regardless of the fact that they may be “sovereign,” severely curtailing the power of

³⁴ Bassiouni, M "International crimes: *jus cogens* and *obligatio erga omnes*." *Law & Contemp. Probs.* 59 (1996).

³⁵ Christenson, G. "Jus Cogens: Guarding Interests Fundamental to International Society." *Virginia Journal of International Law*, (1987).

³⁶ Criddle E & Fox-Decent E, "The Fiduciary Theory of Jus Cogens" *The Yale Journal of International Law*, (2009).

any state. It is common knowledge that this power of the sovereign is what is deemed to be the basis of the principle of *state sovereignty*.³⁷

The principle of *parim parem non habet imperium* is widely understood as the equality of states, it is an expression of non interference and respect for the sovereignty of other states.³⁸ This means that nation states are on the same level in which case beyond the sovereign there is no other source of power. States are thus the determinants of what the law is on the international plane. All sovereign states are expected to respect the sovereignty of other sovereign states regardless of the size of the state they lead or the population of the countries. This is in consonance with the provisions of the Montevideo Convention on the Rights of States in Article 4 respectively which says states are juridicially equal, enjoy the same rights, and have equal capacity in their exercise.³⁹ The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person in international law.⁴⁰ This does not give specific numbers or land areas that will qualify a group of people under one government as a state in international law.

The principle of state equality is so crucial to the international community, it is the basis of state doctrine and is also the basis of sovereign immunity. These two are fundamental to the peaceful coexistence of the international community because they determine the relationship between states and ensure that the sovereigns can interact without the possibility of being subjected to the ignominy of trial or arrest in the territory of a different state.

The act of state doctrine is that the acts of a sovereign state cannot be challenged by another state if they are performed in the process of its governance.⁴¹ Essentially, the court in Kenya cannot determine the legality of anti sodomy laws that were passed in Uganda. Moreover, it is an act that may only lead to the souring of relations between the two states since the only conclusion that

³⁷ Dinstein Y (1966). *Par in Parem non Habet Imperium*. . . , 1, pp 407-420 available at <http://journals.cambridge.org/action/displayAbstract.jsessionid=32E16E6DBB84A9E0D35EE27D781F02A6.journals?fromPage=online&aid=8628999> accessed on 2/7/2016

³⁸ Toliakyte N, "The concept of state immunity", *POLITIKA KAIP TUŠČIA VIETA*, (2007).

³⁹ The Montevideo Convention on the Rights and Duties of States is a treaty signed at Montevideo, Uruguay, on December 26, 1933

⁴⁰ Article 4, *Montevideo Convention*, (1933).

⁴¹ Burley, Anne-Marie. "Law among liberal states: Liberal internationalism and the act of state doctrine." *Columbia Law Review* (1992).

would be drawn in these circumstances is that Kenya has no respect for the capacity of Uganda to rule itself absent of external interference.

On the other hand, sovereign immunity is the doctrine that a representative of a state cannot be subjected to the jurisdiction of municipal courts of another state. International law has to recognize the legal equality of states on the international plane otherwise most states which would feel taken for granted as less powerful states may disregard international law and its jurisdiction. The outcome of this would be to have an international law regime on paper that is not enforceable due to the absence of the will on the part of the members of the international community. In a nutshell, the principle advances two salient positions that are coterminous in both substance and form:⁴²

- a) The exclusive and unlimited exercise of jurisdiction by a state within its boundaries;
- b) The equality of states in which case they cannot and should never rule over each other.

This is aptly captured by CJ Marshall in the case of *The Schooner Exchange v Mc'Faddon*⁴³ where the learned judge expressed himself as follows:⁴⁴

“The full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him”.⁴⁵

From the foregoing, there is a clear gospel on what the learned judge was expressing which is coterminous to the absolute power of the sovereign to deal in whatever manner they deemed fit.

⁴²Knuchel S, ‘State Immunity and the Promise of Jus Cogens’. Volume 9, *Northwestern Journal of International Human Rights*, (2011).

⁴³ *The Schooner Exchange V Mc'faddon* 11 US 116, (1812)

⁴⁴ *The Schooner Exchange V Mc'faddon* 11 US 116, (1812)

⁴⁵ *The Schooner Exchange V M'faddon*, (1812)

This was applicable in cases where leaders of sovereign states were deemed beyond reproach and their actions were law. However, history has shown us that with the development of jurisprudence and evolution from belief that the sovereign was granted powers by a higher sovereign, ordinarily God or nature, jurisprudence moved to a more dialectical approach that perceived the sovereign as any other human capable of fallibility and whose powers also needed to be circumscribed by the law. The writings of John Locke on government give a clear movement in the case of the United Kingdom from an absolute monarchy to a constitutional democracy.⁴⁶

The next section traces the movement of international law from absolute sovereignty to a modified theory of sovereignty.

THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW

The weakness in the doctrine of absolute state sovereignty is what has led to an alteration of the doctrine to a milder status. This is especially highlighted by the ever growing awareness of the need to have a people centered approach to human rights. There is a possibility that the sovereign may not concern himself with the rights of the people he or she is leading culminating, in the violation of those people's rights. This situation would only be made worse if the international community continued to approach international law from the lenses of absolute state sovereignty. As it is, leaders or sovereigns are human and may also occasion injustice to the people they are tasked to lead.

Absolute sovereignty implies that the entire international community will not interfere with the internal affairs of states even if there are violations that run afoul human rights.⁴⁷ Ultimately, on the basis of the needs of the people who are being led, there is need to modify the theory of absolute state sovereignty, in its stead a new set of norms that allows the international community to interfere in the event of state occasioned injustice. This has been given more impetus by the

⁴⁶ The first treatise explains the fallacies of theories that suggested the divine nature of the monarchy being premised on the understanding that the sovereignty of the King was God given and not subject to questioning. The Kings were God given to lead and the Subjects were to obey. Largely, the basis of this was the biblical understanding of Kingdoms. In the second treatise, the author eruditely explains the true understanding, legitimacy and extent of a civil government, being that the basic source of power is the people and that they do enter into a social contract with the sovereign who ought to lead within the bounds of the social contract. Dunn, J. *The Political Thought of John Locke: An Historical Account of the Argument of the 'Two Treatises of Government'*. Cambridge University Press, 1982.

The works of other enlightenment authors such as Hugo Grotius, Immanuel Kant and Jean-Jacques Rousseau are instructive in this light. They are the foremost authors who led the procession towards a more civil government and democratic rights.

⁴⁷ International Court of Justice advisory opinion on Kosovo's declaration of independence. (*Kosovo Case*).

establishment of the International Criminal Court by the Rome Statute which operates to try suspects of crimes against humanity, war crimes and crimes of aggression.⁴⁸ The International community must therefore seek out a way in which the immunity of sovereigns is curtailed in the event they are believed to have occasioned injustice or have violated the rights of persons.

A keen analysis of the foregoing suggests the need for certain norms which are over and above the sovereignty of the state, in which case their violation will expose the sovereign to responsibility. It then becomes the responsibility of the international community to assist in the apprehension of such offenders who violate the rights of those led. Herein lies the parallelism with the two treatises of government as was expounded by John Locke⁴⁹. Essentially, the obligation of the states to the international community as a whole, *erga omnes*,⁵⁰ and the peremptory norms make it imperative that sovereigns respect certain rules because they are responsible for a certain people who may not necessarily agree with the acts of such sovereigns. Herein lies the fiduciary theory of *jus cogens* which does not take the glow away from the all-encompassing doctrine of state immunity but gives the sovereign a greater sense of responsibility against which he can be held to account.

In the end, the overarching rules which bind the sovereigns, act as constitutions against which the legality of their actions are measured. *Jus cogens*, by definition cannot be derogated from and any state or sovereign that violates *jus cogens* and *erga omnes* obligations are not protected by the doctrine of sovereign immunity.⁵¹ According to Ernst-Ulrich, Constitutionalism simply implies the fundamental binding normative constraints on state action.⁵² In our case, the *erga omnes* obligations as under human rights law and the Rome statute clearly proscribe the extent to which the laws of the international community can extend.

According to Posner the limitation of the immunity of the sovereign on the basis of *parim parem non habet imperium* which derives from the equality of states. It is an expression of non interference and respect for the sovereignty of other states.⁵³ This according to Posner is evidence of a mild case of constitutionalism in international law. It also determines the domain of the

⁴⁸ Article 5, *Rome Statute*, (1998).

⁴⁹ Locke J, "Two Treatises of Government," *McMaster University Archive of the History of Economic thought*.

⁵⁰ Maurizio R, *The Concept of International Obligations Erga Omnes*, Clarendon Press (1997).

⁵¹ Weatherall T, "Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence", *Georgetown Journal of International Law*, (2016).

⁵² Petersmann, E, "Constitutional Functions and Constitutional Problems of International Economic Law" Volume 3, *Progress and Undercurrents in public international law*, University Press (1991).

⁵³ Toleikyte N, *The Concept of State Immunity and The Main Challenges*, Vilnius University Lithuania.

sovereign as an agent of the people he is leading in which case he must act within these bounds. He expresses himself as follows:⁵⁴

“Perhaps not everyone would call this system “constitutional,” a word that can be given thicker or thinner meanings. The case for using this term in the present context is that here governments do not have the discretion to refuse to press the claim of an affected person. When that person is a citizen of the state ruled by that government, the government, in effect, agrees that an external institution will limit its authority over its own citizens.”

The constitution is the grund norm that guides the operations of government and its violation is unconscionable. According to Hans Kelsen, the grund norm, regardless of whether the subjects of the law accept it, is omnipotent and binding.⁵⁵ This theory of constitutional law will have the sovereigns as the proper subjects of *jus cogens* and *erga omnes* obligations.

COSNTITUTIONALISM AND THE PUBLIC THEORY OF LAW

The now covert conflict between these two theories therefore required a unification that will still engender the reverence required for the utility of *jus cogens* and *erga omnes*. As stated previously, the two doctrines of *jus cogens* and *erga omnes* place demands on sovereigns and require them to accede some power. This is in line with what the ICJ has termed *contra bonos mores* at the international level in that there are certain acts that will violate international public policy.⁵⁶ It is international public policy that states will not commit genocide or condone the same because they are under a fiduciary duty to the same people.⁵⁷ It is contrary to the moral conscience of the international community if such conduct were to go without scrutiny.

Essentially, the imperative norms of international law as expressed in *jus cogens* have been termed as the rules on international public policy by authors such as Lauterpacht.⁵⁸ In this case, they override any others sets of norms. This is typified by the veneration of the Universal Declaration

⁵⁴ Posner, E. "Erga omnes norms, institutionalization, and constitutionalism in international law." *Journal of Institutional and Theoretical Economics*, (2009).

⁵⁵ Kelsen H, *Principles of International Law*, The Lawbook Exchange (1952).

⁵⁶ For example, in the 1934 Oscar Chinn Case, Judge Schücking's influential dissent stated that neither an international court nor an arbitral tribunal should apply a treaty provision *contra bonos mores* see

⁵⁷ *Oscar Chinn Case, (United Kingdom v Belgium), PCIJ, Series A/B No 63, (1932).*

⁵⁸ Lauterpacht H, *Law of Treaties: Report by Special Rapporteur*, [1953] 2 Y.B. Int'l L. Comm'n 90, 93, U.N. Doc. A/CN.4/63.

of Human Rights⁵⁹ which sets out standard and norms which have found their way into the municipal laws of countries.⁶⁰

There is consensus that peremptory norms do not derive their legitimacy from state consent. They transcend the will of states. This being the case they override the immunity of a sitting sovereign. This for example is why there have been warrants issued against President Omar Al Bashir for crimes of genocide.⁶¹ Essentially, they therefore derive their legitimacy in theory from the fiduciary theory of *jus cogens*. This holds the leaders accountable to the people they lead. It is the people they represent that give the leaders or government the legitimacy to act in relation to other states. This is a fundamental principle of constitutional law that serves to remind us that the power is in the people and the law derives its legitimacy from the people who make it and determine its extent. Essentially, this is similar to the arguments of Thomas Hobbes in his book the Leviathan.⁶² With reference to the concept of the Commonwealth, it is argued that the power of the sovereign is derived from the people and that the people are the reason for the existence of the sovereign who exercises power as conferred to him. He states as follows in Part II of the book concerning the commonwealth and the need for these people to have a social contract with the sovereign who in turn helps move the people from their brutish state of nature:

The final cause, end, or design of men (who naturally love liberty, and dominion over others) in the introduction of that restraint upon themselves, in which we see them live in Commonwealths, is the foresight of their own preservation, and of a more contented life thereby; that is to say, of getting themselves out from that miserable condition of war which is necessarily consequent, as hath been shown, to the natural passions of men when there is no visible power to keep them in awe, and tie them by fear of punishment to the performance of their covenants...⁶³

⁵⁹ Universal Declaration on Human Rights, Adopted by General Assembly Resolution 217 A(III) (1948).

⁶⁰ *The case of the International Convention on Civil and Political Rights and the Convention on the Prevention and Punishment of the Crime of Genocide.*

⁶¹ *The Prosecutor v Omar Hassan Ahmad Al Bashir, ICC REPORTS (2009).*

⁶² Hobbes T, "Leviathan or The Matter, Forme, & Power", printed for Andrew Crooke, at the Green Dragon in St. Pauls Church-yard (1651).

⁶³ Hobbes T, "Leviathan or The Matter, Forme, & Power", printed for Andrew Crooke, at the Green Dragon in St. Pauls Church-yard (1651).

This being the case, the sovereign is enthroned by the people and derives his said authority from the people. In extrapolation, he is therefore supposed to act to the benefit of the people. Credit goes to Montesquieu for realizing that power can corrupt such leaders who in turn end up violating the rights of those who have given them the power to lead.⁶⁴ In the event they do not act in accordance with the power granted to them by the social contract, essentially the constitution in the modern era, they must be held not to be immune from prosecution by the entire international community.

Therefore, the same way constitutions create governments as agents of the people, under international law, governments must be viewed under *jus cogens* as the agents of the states they represent and that their acts cannot enjoy immunity if they act ultra vires the powers under which they have been made leaders. This should still hold, notwithstanding the lack of clarity as to whether the international community can sustain an injury to necessitate the obligation placed against the sovereign to act conscientiously.

RATIONALIZATION OF THE FIDUCIARY THEORY OF *JUS COGENS*

The fiduciary theory of *jus cogens* gains legitimacy as a means of establishing an overarching theory that fully explains the need for international law subjects to comply with the same. Hitherto, the theories of natural law, public order and positivism do not fully rationalize the deposing of the fundamental position of the state at the apex of international law. As a matter of fact, the European Court of Human Rights has rejected the notion that *jus cogens* can override state sovereignty.⁶⁵ In the case of *Al-Adsani v. United Kingdom*, the court was categorical that it could not countenance a rule of international law that could theoretically depose state sovereignty. The argument was that the same would throw the entire international order into disarray and confusion.⁶⁶

Therefore, borrowing from Kant's understanding of the place of the state, the theory of a fiduciary relationship attempts to find a theoretical understanding of *jus cogens*. This will aid in the development of *jus cogens*, especially in international human rights cases. The fiduciary theory goes beyond mere recognition which hitherto has not improved beyond the recognition as being imperative under Article 53 of the VCLT. In the main, this debate grants the ICJ and other tribunals the foundational basis to deal with the harmonization of the concept of state sovereignty and *jus*

⁶⁴ Lord Acton, Letter to Archbishop Mandell Creighton, 1887.

⁶⁵ *Al-Adsani v United Kingdom*, ECtHR, Judgment on 21st November 2001.

⁶⁶ *Al-Adsani v United Kingdom*,

cogens which on the face of it are counterintuitive in effect. There are many other instances where the ICJ has decided not to override the concept of state sovereignty on the basis of a clash between *jus cogens* and other more established norms and state consent.⁶⁷

THE THEORY: INNATE DIGNITY

Under fiduciary relations, there is a duty of the person with the power to act in a manner that is coterminous to the inherent dignity of the person subject to the power. The social contract gives the sovereign the power to act within the territory.⁶⁸ The power is granted to the sovereign by law as the official power to exercise governance over the people it rules over. This is a social contract as it were. Under all contracts, there are rights and obligations between the parties to the contract. In this case, there are also rights and obligations.

Immanuel Kant used the example of children and parents wherein the parents are under an obligation to act as good fiduciaries over their children who have inherent dignity as human beings.⁶⁹ This has undertones of the social contract theory as explained in the preceding paragraph. Therefore, the fiduciary theory owes most of its foundational perspectives to the theory of the social contract. The benefit of such a theory is it moves from abstract conceptions such as international conscience and international public order as the underpinning theoretical understanding.⁷⁰

This understanding deviates from the amorphous nature of natural law, public order and conscience. It also avoids the technicalities that are involved in the international positive law. We find ourselves in a practical approach. An approach that concerns itself with practical challenges to the current international order, responding and going a step ahead in explaining why states ought to comply as may be required of them by the international community.

⁶⁷ *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)* (Judgment of Feb. 3, 2006), at 2 (dissenting opinion of Judge Dugard), available at <http://www.icj-cij.org/docket/files/126/10449.pdf> () (citing Arrest Warrant of Apr. 11, 2000 (Dem. Rep. of Congo v. Belg.), 2002 I.C.J. 121; East Timor (Port. v. Austl.), 1995 I.C.J. 90 (June 30); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21) as Used by Evan Criddle and Evan Fox

⁶⁸ Rousseau J, *The Social Contract*, (1762).

⁶⁹ Kant I, *The Metaphysics and Morals*, Translated by Mary Gregor, Cambridge University Press (1996), (1797).

⁷⁰ *Michael Domingues v. United States of America, IACmHR, case 285, 2002.*

According to Michael, the human rights of the subjects of a particular sovereignty form the basis for the doctrine of sovereignty.⁷¹ Criddle and Fox, aver that this originates from Kantian ideas of fiduciary duties, it borrows heavily from natural law as the preeminent source of law, however they argue that a distinction arises, in that this theory does not force itself upon the reader on the basis of deeply cherished and innate norms.⁷² Quite on the contrary, it is an appreciation of the fact that on the basis of the fiduciary relations, there arises a duty of care and with it a responsibility to ensure that the actions of one do not violate the duty of care.

The authors go further to argue that the basis of public law and to be more particular administrative role is the fiduciary nature of government power.⁷³ As a matter of fact, the reason as to why a government is bound by treaties that were entered into by a preceding government is because a government is held to be a fiduciary of the people.⁷⁴ It shall be there and it shall go.⁷⁵ On the basis of this fiduciary relationship, it must act in good faith and take into consideration the rights of the subjects and the successive governments which will represent the same people.⁷⁶

The foregoing then according to Fox and Criddle forms the basis for the illegality of acts such as slavery, genocide among others which are essentially crimes against the persons who are subjects of the state.⁷⁷ In the long run we find that under the fiduciary duty the state is under the ordinary principles of reasonableness and integrity which form the foundation of most if not all accepted interactions between persons whether natural or juridical.

In drawing primarily from Immanuel Kant and the seminal work of Fox and Criddle, we have a better theoretical explanation of the need to have *jus cogens* and *erga omnes* obligations which bind all players at the international plane. It is therefore important to note that this theory only serves to rationalize *jus cogens* and does not create *jus cogens* on its own. It helps in the identification of *jus cogens* and gives a factual basis of the need for states to abide by *jus cogens* because of their role as fiduciaries of the people.

⁷¹ Reisman M, "Sovereignty and Human Rights in Contemporary International Law", Volume 84, *American Journal of International Law*, (1990).

⁷² Fox E, "The Fiduciary Nature of State Legal Authority," Volume 31 *Queens Law Journal* (2005).

⁷³ Fox E, "The Fiduciary Nature of State Legal Authority," Volume 31 *Queens Law Journal* (2005).

⁷⁴ Finn P, *The Forgotten "Trust": The People and the State*, Malcolm Cope ed., 1995

⁷⁵ Purdy J & Fielding K, "Sovereigns, Trustees, Guardians: Private-Law Concepts and the Limits of Legitimate State Power", Volume 70 *Law and Contemporary Problems*, (2007).

⁷⁶ Criddle E, "Fiduciary Foundations of Administrative Law," Volume 54 *UCLA Law Review*, (2006).

⁷⁷ Fox E, "The Fiduciary Nature of State Legal Authority," Volume 31 *Queens Law Journal* (2005).

CHAPTER THREE: A CRITICAL ANALYSIS OF THE CONCEPT OF *JUS COGENS*

This ordering, which developed from the customary way in which things were done would stop different states from derogating on the requirement to abide by the previous rules of engagement despite the lack of a clearly promulgated legal framework. This chapter delves into a finer category of international obligations. These are norms or customs from which players on the international plane are not allowed to derogate. These are called *jus cogens* or peremptory norms.

The chapter shall endeavor to bring to the fore the concept of *jus cogens*. It shall also analyze its historical development henceforth attempt to locate the theoretical place of *jus cogens* under the ambit of international law.

WHAT IS *JUS COGENS*?

Jus cogens is a Latin term which translates to mean peremptory norms.⁷⁸ In international law *jus cogens* refers to those norms that states and other subjects of international law must abide to. Failure to which they will have committed serious breaches.⁷⁹ A state, in relating with another international actor or persons will be required to abide by certain standards. The state will expect a certain level of treatment in relation to issues such as equality between states, immunity of diplomatic agents and restraint from the use of force unless serious need arises. In other words, the rules of *jus cogens* take the status of international Constitutional law.⁸⁰

There is no clear catalogue of the rules of international law that have been given *jus cogens* status apart from other rules of customary international law, however, there is consensus as to what some of these rules of *jus cogens* are.⁸¹ For instance, it is common ground among members of the international community that acts of slavery are *jus cogens*. It must be noted that in the past, before

⁷⁸ Nieto-Navia, R. "International peremptory norms (*jus cogens*) and international humanitarian law." *Man's inhumanity to man, essays on international law in honour of Antonio Cassese. Kluwer Law International, The Hague* (2003).

⁷⁹ Hossain, K. "Concept of *Jus Cogens* and the Obligation under the UN Charter," *Santa Clara J. Int'l L.* 3 (2005).

⁸⁰ Byers M, "Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules", Volume 66 *Nordic Journal of International Law.* (1997).

⁸¹ Dromina-Voloc, N. "Imperativization of international law: *jus cogens* concept in jurisprudence." *Evropsky politicky a pravni diskurz.* ,(2015)

the emergence of human rights slavery and the trafficking of slaves from certain countries was deemed to be lawful.⁸² This was before the evolution of human rights movement which led to the development of the need to respect the inherent right of a human being in spite of the color of their skin or their country of origin.⁸³

Other examples of *jus cogens* include the prohibition against genocide which is now succinctly provided for under the Rome statute and the procedure therein,⁸⁴ there's also the prohibition against the taking of a territory that belonged to a country other than the one that seeks to annex, and lastly the prohibition against maritime piracy.⁸⁵ A keen look at these prohibitions illustrates that they ought to be there for international law to work as it ought. There is no way peace can be observed if for instance states are allowed to take away the territories of another arbitrarily. Additionally, were it not for the prohibition against the use of force by Article 2(4) of the UN Charter, wars would break out every day.⁸⁶

By dint of the reverence for *jus cogens*, international law has developed to the effect that these peremptory norms cannot be derogated from even by two states which enter into a treaty that violates what the international community deems to have attained *jus cogens* status.⁸⁷ This position is expressed in Article 53 of the Vienna Convention on the Law of Treaties which is explicit that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.⁸⁸ This provision gives a hint as to the status *jus cogens*. They can be deemed to

⁸² Alvarez R, Ignacio, and Contreras-Garduño D "A Barren Effort? The Jurisprudence of the Inter-American Court of Human Rights on Jus Cogens."

⁸³ Alvarez R, Ignacio, and Contreras-Garduño D "A Barren Effort? The Jurisprudence of the Inter-American Court of Human Rights on Jus Cogens."

⁸⁴ Gould, D. *Jus Cogens. The Legacy of Punishment in International Law*. Palgrave Macmillan US, 2010.

⁸⁵ Schwarzenberger, G. "International jus cogens," Volume 43, *Texas Law Review* (1964).

⁸⁶ However, there is the utilitarian argument which avers that states would still not engage in wars despite such provisions if they knew that the same would only lead to losses and give the said states no benefit. This is the theory of interests which holds that states are entities, which like human beings, only act in their interest. They do not consider common good or what would benefit the other players of the international community. This theory actually holds that states know that on the existence of peace there is the possibility of prosperity for both and would especially after the tragic experiences the World Wars that left both economies and human lives eternally wounded.

⁸⁷ Vienna Convention on the Law of Treaties, Article 53, (1961).

⁸⁸ Vienna Convention on the Law of Treaties, Article 53, (1961).

be the *grund norm* of international law by custom or by treaty in that they set out the basis upon which all other rules of international law derive their legitimacy and force of law.⁸⁹

In this introductory stage of the discussion, it is important to note that the very existence of *jus cogens* as a source form whence we draw international law norms is robustly debated and challenged.⁹⁰ As earlier noted, there is no concrete consensus among highly publicized writers that there is such a thing as peremptory norms. On the basis of the principles of state sovereignty, it has been argued extensively by some scholars that states are like the legislative assemblies within the framework of municipal law. In which case they themselves are the source of law being the representatives chosen for that particular task.⁹¹

FORMAL DISCUSSIONS ON JUS COGENS: THE WATERSHED

After the first world war, we saw what could be assumed to be the first step in formally recognizing *jus cogens*. Article 20 of the Covenant on the League of Nations⁹² provided that it was illegal for members of the league to enter into bilateral or multilateral treaties that would water down the objects of the League of Nations or that were contrarian in approach to the text of the Covenant of the League of Nations. In the *Oscar Chinn case*, Judge Schückin interpreted the provisions of Article 20 to be of the effect of impeding members of the League from certain conduct. In his individual opinion, he stated that the provision would be useless if members of the international community could make treaties that were contrary to the said Article.⁹³ Thereafter, judicial opinion was to the effect that there were certain rules of law drawn from common practice and the generality of nature that were binding upon the actions of states in entirety.⁹⁴ Furthermore, the Convention on the Punishment of the Crime of Genocide⁹⁵ which in its decision, the International

⁸⁹ Hossain, Kamrul. "Concept of Jus Cogens and the Obligation under the UN Charter." *Santa Clara J. Int'l L.* 3 (2005).

⁹⁰ Verdross, A, "Jus dispositivum and jus cogens in International Law." *Am. J. Int'l L.* (1966).

⁹¹ 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*, (2007).

⁹² Article 20, *Covenant On The League Of Nations*, (1919).

⁹³ *The Oscar Chinn Case*, (1934) PCIJ Rep. Ser. A/B, No. 63, p. 149.

⁹⁴ Friedman W, "The Uses of "General Principles" in the Development of International Law", Volume 57 *American Journal of International Law* (1963).

⁹⁵ Convention on the Prevention and Punishment of the Crime of Genocide, (1948).

Court of Justice stated that there were certain veritable norms which were not derogable and that states were bound to obey or abide by. In the case of this current convention, the court was of the opinion that the individual states did not have, on the basis of the text of the treaty latitude or individual rights and by extension once they had ratified the same, they were bound to abide by the provisions of the Convention.⁹⁶

Towards the Vienna Conference, in the discussions between states, there was a general feeling that there were certain rules that states could not derogate.⁹⁷ According to the ILC, the general feeling, that the sustainability of the principle of state sovereignty in will and capacity to enter into all manner of contracts was no longer sustainable.⁹⁸ It must be noted that at this time there had already been suggestions to appoint a committee of experts that would be tasked with checking the moral content of treaties as against the existing needs of the international community.⁹⁹ In case certain treaties were found to be inconsistent with the conscience of the international community, the same, as per the proposals would be declared void.¹⁰⁰ At the end of the Conference whose preparations had started in 1949, Article 3 of the Vienna Convention on the Law of Treaties 1969 provided for certain peremptory norms in international law which could not be derogated from,¹⁰¹ however, as the case still appears to be today, there is no clear consensus as to what really constitutes *jus cogens*.¹⁰² There is little that has been done in the development of the concept of *jus cogens* by the competent international tribunals.¹⁰³ However, academic debate has been livelier than ever.¹⁰⁴

⁹⁶ *Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports (1951).*

⁹⁷ Rafael N, *International Peremptory Norms and International Humanitarian Law*, available at <http://www.iccnw.org/documents/WritingColombiaEng.pdf> pg. 7

⁹⁸ Rafael N, *International Peremptory Norms and International Humanitarian Law*, available at <http://www.iccnw.org/documents/WritingColombiaEng.pdf> pg. 3

⁹⁹ Lauterpacht, *Règles Générales de Droit de la Paix*, 62 *Recueil des Cours* (1937), pp. 306 – 307 as cited by Rafael

¹⁰⁰ Article 15, Vol. II, ILC Yearbook (1953), p. 93: “**A treaty, or any of its provisions, 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.**” (**Emphasis supplied**)

¹⁰¹ Akehurst M, *A Modern Introduction to International Law*, HarperCollins Academic, 1972,

¹⁰² Sztucki, J, *Jus cogens and the Vienna Convention on the Law of Treaties: a critical appraisal*. Springer-Verlag, 1974.

¹⁰³ Criddle E and Fox-Decent E. "A fiduciary theory of *Jus Cogens*." *Yale Journal of International Law* 34 (2009).

¹⁰⁴ Hannikainen L, *Peremptory Norms (Jus Cogens) in International Law* Helsinki, Finnish Lawyers' Publishing Company (1992) at 186-188

JUS COGENS AND CUSTOMARY INTERNATIONAL LAW

Primarily, the identification of *jus cogens* leads to some conclusions regarding the relationship between *jus cogens* and customary international law. To some scholars *jus cogens* and customary international sources as the same¹⁰⁵ and others distinguish between the two.¹⁰⁶ This leads to the ambiguity as to whether *jus cogens* forms part of Customary International Law.¹⁰⁷ Foremost, *jus cogens* like customary international law requires that there is some form of uniformity in international acceptance. However, the distinction between the two as regards acceptance is that in the case of *jus cogens*, the acceptance is almost required to come from the entire globe.. Jus Cogen norms are a subset of customary international law, this presumption was stated in both the *Nicaragua Case* where it stated “which held that the prohibition of the use of force is ‘not only a principle of customary international law but also a fundamental or cardinal principle of such law.’”¹⁰⁸ And *The Obligation to Extradite and Prosecute* which held the same sentiments in stating “the prohibition of torture is part of customary law and has become a peremptory norm (*jus cogens*), and is “grounded in a widespread international practice and on the *opinio juris* of States.”¹⁰⁹

According to Baker, certain rules of customary international law are considered so vital that they cannot be contracted out of by individual states, such preemptory rules are labeled *jus cogens* norms.¹¹⁰ It is the mental, or subjective element that oxymoronically gives customary law its *jus cogen* status, *Opinio juris* plays a key role in elevating a regular customary international norm into a *jus cogens* norm,¹¹¹ for only when the majority of states in the international system believe that a regular customary international norm cannot be persistently objected to, or contracted out of, does this regular norm achieve elevation to *jus cogens*.¹¹²

¹⁰⁵ D’Amato A, “The Concept of Custom in International Law”, Volume 63, *American Journal of International Law* (1971).

¹⁰⁶ Christenson G, “Jus Cogens: Guarding Interests Fundamental to International Society”, *Virginia Journal on International Law* (1988).

¹⁰⁷ B Bassiouni, M “International crimes: *jus cogens* and *obligatio erga omnes*.” *Law & Contemp. Probs.* 59 (1996).

¹⁰⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America.) Merits, Judgment, I.C.J. Reports 1986.*

¹⁰⁹ *Obligation to Prosecute or Extradite (Belgium v Senegal)* ICJ Reports (2012).

¹¹⁰ Roozbeh R, “Customary International Law”, *Brooklyn Journal of International Law*, (2016).

¹¹¹ ILC, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, Fifty-Third Session, art. 26, U.N. Doc. A/56/10 (2001).

¹¹² Higgins R, *Problems and Processes: International Law and How we use it*, Oxford University Press, 1995.

In essence, they are needful for the efficient coexistence of the international community and the derogation from them ought not to be allowed. Therefore there exists a higher species of rules of customary international law, rules which bind the entire globe. The best approach to explain such an elevated place in the hierarchy of norms is with reference to perhaps the natural school of law. This instructs that there are certain necessary rules of international law, essentially, these rules would exist whether or not the states are observing them or have developed them by state practice but they command utmost respect. It is therefore the conclusion of this section that the two share this point limited to the fact that *jus cogens* requires that the acceptance be of a global scale

ELEMENTS OF JUS COGENS

As it stands, common elements have been identified that are useful in the identifying *jus cogens*. This section shall highlight them and seek a theoretical approach to the entire concept. Moreover, the theoretical justification of *jus cogens* is important in the process of identifying *jus cogens*.

Accordingly, in its contemporary description, *jus cogens* has the following characteristics:

- a) The norm must be one of general international law;¹¹³

In essence, it must be the case that the said norm is binding on all members of the international community.¹¹⁴ The importance of this point is to distinguish *jus cogens* from other norms which are recognized by a particular section of the international community while at the same time not applicable to others. (Not all norms of general international law have the character of *jus cogens*.)¹¹⁵ The acceptance ought not to be only general but must bear towards recognition by the globe as a whole.¹¹⁶ Having such a wide sweeping applicability is essentially what gives such norms the venerable status that is above what we would consider Customary International Law.

¹¹³ Nieto-Navia, R. "International peremptory norms (jus cogens) and international humanitarian law." *Man's inhumanity to man: essays on international law in honour of Antonio Cassese*. Kluwer Law International, The Hague (2003):

¹¹⁴ Oppenheim L, *Oppenheim's International Law*, Oxford University Press, 1992.

¹¹⁵ Schwarzbenger G, *The Problems of International Public Policy*, (1965).

¹¹⁶ Verdross, A, "Jus dispositivum and jus cogens in International Law." *Am. J. Int'l L.* (1966)

b) The derogation from the same must be impermissible.¹¹⁷

It could be stated that this is the main feature of *jus cogens*.¹¹⁸ It must be the case that any form of derogation from such a norm is not acceptable.¹¹⁹ The only acceptable derogation must be where the derogation is necessitated by a new norm that has overtaken the former.¹²⁰ However, with time, society is refined and perhaps the particular norms, no matter how fundamental they are may change or be overtaken by events. This is where the line between obligations *erga omnes* and *jus cogens* thins. However, international norms that rise to the status of *jus cogens* constitute obligation *erga omnes*.¹²¹ In essence, *erga omnes* are obligations that are owed to the entire international community arising out of their *jus cogens* status, hence *erga omnes* and *jus cogens* concepts are usually presented as two sides of the same coin.¹²² The practical application of *erga omnes* obligations as by states against others was highlighted in *Barcelona traction*¹²³ case whereby they stated “An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”¹²⁴

Therefore, to some extent, such rules are necessary for international public order or take the form of urgency that is bestowed upon them by their capacity to engender international justice or reduce human suffering. On the basis of such theoretical justifications, we find the reason for the status

¹¹⁷ Nieto-Navia, R. "International peremptory norms (*jus cogens*) and international humanitarian law." *Man's inhumanity to man: essays on international law in honour of Antonio Cassese. Kluwer Law International, The Hague* (2003)

¹¹⁸ Nieto-Navia, R. "International peremptory norms (*jus cogens*) and international humanitarian law." *Man's inhumanity to man: essays on international law in honour of Antonio Cassese. Kluwer Law International, The Hague* (2003)

¹¹⁹ Article 53, Vienna Convention on the Law of Treaties. (1961).

¹²⁰ Article 53, Vienna Convention on the Law of Treaties. (1961).

¹²¹ Bassiouni, M. "International crimes: *jus cogens* and obligation *erga omnes*." Volume 59, *Law & Contemp. Probs.* (1996).

¹²² Bassiouni, M. "*International crimes: jus cogens and obligatio erga omnes*." Volume 59, *Law & Contemp. Probs.* (1996).

¹²³ *Barcelona Traction, Light and Power Company (Belgium v Spain) Limited, Judgment, I.C.J. Reports 1970.*

¹²⁴ *Barcelona Traction, Light and Power Company (Belgium v Spain) Limited, Judgment, I.C.J. Reports 1970.*

of 'non derogability'. Moreover, they ought to be pivotal to international order; and apart from having humanitarian ends be needful for international stability.

CHAPTER FOUR: ENFORCEMENT AND GRADUAL EXPANSION OF *JUS COGENS* IN CASE LAW

UNITED STATES OF AMERICA AND *JUS COGENS* ENFORCEMENT

In general, International Law is criticized for the lack of enforcement mechanisms.¹²⁵ In my conversations my lecturer¹²⁶, he opined, and an opinion I aptly agree with, that the conversation on whether *jus cogens* is law and whether it can be enforced are two different issues altogether. The USA and enforcement of peremptory norms is an all too clear indication of the difficulty of enforcement of peremptory norms.

It is incontrovertible that the prohibition of the unilateral use of force is a fundamental aspect of the United Nations (U.N.) era system for governing the relations between states.¹²⁷ As set out in the UN charter¹²⁸ it is often seen as archetypal example of a *jus cogens* norm.¹²⁹ *The Nicaragua Case*¹³⁰ was the first instant in which the *jus cogens* status of the prohibition against use of force was dealt with, the I.C.J in its ruling expressed the view 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*."¹³¹ Furthermore that the United States were in breach of this obligation and should pay reparations to Nicaragua. This notwithstanding the United States refused to participate in the proceedings at the I.C.J and blocked the enforcement of the judgment by the United Nations Security Council from obtaining compensation.¹³²

Article 39 of the UN Charter states that The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore

¹²⁵ Hossain K, "The Concept of Jus Cogens and the Obligation under The U.N Charter", *Santa Clara Journal of International Law*, 2005.

¹²⁶ Conversation with Mr Desmond Tutu, Professor of International Environmental Law at Strathmore University regarding the veracity of jus cogens and the difference between enforcement and Law.

¹²⁷ Green J, "Questioning the peremptory status of the prohibition of the use of force", *Michigan Journal of International Law*, (2011).

¹²⁸ Article 2, UN Charter, 1948

¹²⁹ Charlesworth H, *The Gender of Jus Cogens*, 15 Hum RTS, 1993.

¹³⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America.) Merits, Judgment, I.C.J. Reports 1986.*

¹³¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America.) Merits, Judgment, I.C.J. Reports 1986.*

¹³² Morrison F, "Legal Issues in the Nicaragua Opinion," *American Journal of International Law*.

international peace and security.¹³³ The United States and the United Kingdom went on an invasion in Iraq deploying over 150,000 troops.¹³⁴ Although aggression is yet to be define in international law this seems to be a good indicator of what it might be. Notwithstanding the actions by the two world powers, the security council fails to act with the mandate given to it under Article 4¹³⁵ or 42.¹³⁶

Both instances are clear violations of *jus cogens* norms however the international community namely the security council have failed to act. The U.S. military invasion of Iraq in March 2003 was an illegal war of aggression that took place without any specific authorization of the Security Council and in the absence of any justification for self-defense under Article 51 of the UN Charter.¹³⁷

This begs the question, although *jus cogens* is legitimate law, and the veracity of international law cannot be questioned, is its enforcement political? Are *jus cogens* norms really enforceable against the United States and other permanent members of the security council?

“despite all the sufferings of past generations, there persist in our days new forms of exploitation of man by man, illustrated by the increasing disparities among and within nations, amidst chronic and growing poverty, up rootedness, social exclusion and marginalization, - does not mean that “regulation is lacking” or that Law does not exist to remedy or reduce such man-made imbalances. It rather means that Law is being ostensibly and flagrantly violated, from day to day, to the detriment of millions of human beings.”¹³⁸

This coincides Mr Desmond Tutu’s initial assertion, that a lack of enforcement does not necessarily mean a lack of laws. In agreement with Mr Desmond Tutu, although direct enforcement might not be possible, its pronouncement acts as a deterrent.

¹³³ Article 39, UN Charter, 1948.

¹³⁴ Kim J, *The Crime of Aggression against Iraq*.

¹³⁵ Article 41, UN Charter, 1948.

¹³⁶ Article 42, UN Charter, 1948.

¹³⁷ Kim J, *The Crime of Aggression against Iraq*.

¹³⁸ Cancado A, *The Determination and Gradual Expansion of its Material Content in Contemporary International Case Law*,

EXPANSION OF THE CONTENTS OF *JUS COGENS*

New conceptions of the kind (*jus cogens*), impose themselves in our days, their faithful observance will be dependent on the evolution of contemporary International Law.¹³⁹ According to Judge Trindade, *jus cogens* does not arise due to the inscrutable will of states, but due to the *opinion juris communis* or rather the human conscience.¹⁴⁰ In *The Advisory Opinion on the Juridical Condition and the Rights of Undocumented Migrants*¹⁴¹ Judge Cancado Trindade maintained that *jus cogens* is not a closed juridical category but rather one in evolution and expansion.¹⁴² He goes on to aver that *jus cogens* is an open category which expands itself to the extent that the universal juridical conscience awakens for the necessity to protect the rights inherent to each human being in every situation.¹⁴³ As was stated earlier *jus cogen's* evolution is predicated on the evolution of the conscience of the international world order. For as long as rights are evolving so to is the conscience of *jus cogens*. As these rights evolve, they are deposited in trust by the citizens of the world to the state as fiduciaries of the same.

The evolution of the aforementioned jurisprudential construction ought to be appreciated in a wider dimension.¹⁴⁴ In reaction to the successive atrocities which, along the XXth century, victimized millions and millions of human beings, in a scale until then unknown in the history of humankind, the *universal juridical conscience*.¹⁴⁵ Burst forth as never before, as the ultimate material source of law.¹⁴⁶

¹³⁹ Cancado A, The Determination and Gradual Expansion of its Material Content in Contemporary International Case Law,

¹⁴⁰ Cancado A, The Determination and Gradual Expansion of its Material Content in Contemporary International Case Law,

¹⁴¹ *Advisory Juridical Condition and the Rights of Undocumented Migrants*, IACtHR, Judgment, 17th September 2003.

¹⁴² *Advisory Juridical Condition and the Rights of Undocumented Migrants*, IACtHR, Judgment, 17th September 2003.

¹⁴³ Cancado A, The Determination and Gradual Expansion of its Material Content in Contemporary International Case Law,

¹⁴⁴ Cancado A, The Determination and Gradual Expansion of its Material Content in Contemporary International Case Law,

¹⁴⁵ Cancado Trindade, A "Reflexiones sobre el Desarraigo como Problema de Derechos Humanos Frente a la Conciencia Jurídica Universal", in *La Nueva Dimensión de las Necesidades de Protección del Ser Humano en el Inicio del Siglo XXI*, ACNUR, 2001

¹⁴⁶ Cancado A, The Determination and Gradual Expansion of its Material Content in Contemporary International Case Law,

CONCLUSIONS AND RECOMMENDATIONS

INTRODUCTION

This last aims at bringing together the findings of the entire research and seeks to analyze whether the questions the research set out to answer have been answered exhaustively. The conclusions that shall be drawn from the research shall be the basis for the succeeding section, which shall make recommendations on the questions that arise when dealing with *jus cogens*.

CONCLUSIONS

Jus cogens is an integral part of the international legal order because certain crimes and actions affect the interests of the world and shock the conscience of humanity.¹⁴⁷ Trouble arises when trying to create a legal order with no international legislative order that should bind mankind's actions. Although it was concluded that *jus cogens* are first customary norms that attain a certain elevated status, explaining the reason that it applies world over, without the need for continued state practice and the ability to be a perpetual objector leads to some ambiguity. This leads to obvious issues of enforcement, certainty, consent and state sovereignty. An expose into the underpinnings of *jus cogens* was necessary to establish what exactly informs the doctrine and the norms. If it is natural law then their need be no promulgation, if it is positive law then the norms should all be enshrined in legal instruments, if its public order theory then *jus cogens* is merely an instrument of social control. Due to the fact that the international order is a melting pot of "equals" then state sovereignty would be the main antagonist to all these approaches. How best can *jus cogens* and state sovereignty coexist, in my view they're both indispensable. It is the view of this paper that the fiduciary theory is the only theory that adequately rationalizes both the scope and nature of *jus cogens*. State sovereignty and *jus cogens* are no longer at polar ends, they work together to preserve the dignity of mankind.¹⁴⁸ This is due to the fiduciary relationship that arises between a state and its subjects,¹⁴⁹ a relationship that ensures that the rights, in the form of *jus cogen* norms are held in trust for the people by the state and explains its universal application.

The enforceability of *jus cogens* is a concept that must be separated from its veracity as law. This paper avers that enforceability is dependent on factors enshrined in more than law, that political persuasions take the day. This is especially true in situations involving violation of *jus cogens* by permanent members to the security council as was seen in Nicaragua and Iraq.

Lastly this paper concludes by determining the future of *jus cogens*. Whether new norms can be formed, based on the work of Cancado, it is the view of this paper that new norms will materialize as the conscience of the international community develops to accommodate for more human rights

¹⁴⁷ Bassiouni, M. Cherif. "International crimes: *jus cogens* and *obligatio erga omnes*." *Law & Contemp. Probs.* 59 (1996).

¹⁴⁸ Criddle E and Fox-Decent E, *A fiduciary theory Jus Cogens*, Yale Journal of International Law, (2009).

¹⁴⁹ Criddle E and Fox-Decent E, *A fiduciary theory Jus Cogens*, Yale Journal of International Law, (2009).

that it believes to be of paramount importance. As the scopes of rights grows, so to will the scope of *jus cogens*.

RECOMMENDATIONS

In light of these conclusions there is still some ambiguity and uncertainty as regards the fiduciary approach to *jus cogens*. This has led to the following recommendations:

EXPANSION OF ARTICLE 53 OF THE VCLT.

That there be a clear methodology enshrined in Treaty law on *jus cogens* apart from the provisions of Article 53 and 64 of the VCLT and spasmodic expressions on the said topic by the International Court of Justice. This would allow a clear distinction between the norms of *jus cogens* and those that are merely customary international law and haven't or are yet to attain the requisite status. If this is done, there is a better chance of enforcement since the international tribunals will be clear as to what has been agreed on by the states as forming *jus cogens*.

This requires an expansion of Article 53. Expansion of Article 53 would be both an exhaustive list of what draft articles, customary law and case law have envisaged to be *jus cogen* norms. This would fulfill the requirement of the principle of legality in law. The principle of legality is a core value, a human right but also a fundamental defense in criminal law prosecution according to which no crime or punishment can exist without a legal ground.¹⁵⁰ In order for there to exist a legal ground for enforcement of *jus cogens* its tenets must be known and enshrined in a legal instrument. As regards enforcement of *Jus Cogen* Norms The envisaged intervention of the security council as is seen in Article 41 of the UN Charter¹⁵¹ is an appropriate mechanism. It allows sanctions to be placed on countries that violate norms of *jus cogens* through the use of embargoes, military action and sanctions.¹⁵² Unfortunately difficulty arises when enforcing these said norms against permanent members of the security council, however in the security council's resolution they stated that states must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular, international human rights, refugee, and humanitarian law.¹⁵³

¹⁵⁰ Crisan I, *The Principles of Legality and their role*, Effective Justice Solutions.

¹⁵¹ Article 41, UN Charter, (1945).

¹⁵² Article 41, UN Charter, (1945).

¹⁵³ S/RES/1456, operative paragraph 6.

CLARIFICATION BY INTERNATIONAL COURTS AND TRIBUNALS ON THE NATURE AND SCOPE OF *JUS COGENS*.

International Courts need to play a more elaborate and activist role in the definition of *Jus Cogens*. *Jus Cogens* has been referred to in a number of judgments of both the Permanent Court of International Justice and the International Court of Justice as well as in dissenting and separate opinions of various judges.¹⁵⁴ In various cases the courts have not been clarified on the nature, content or requirements of *jus cogens*.¹⁵⁵ In *Questions Relating to the Obligation to Extradite or Prosecute*¹⁵⁶ questions as to the status of the prohibition against torture being enshrined with *jus cogens* status have been entertained and deliberated over at length. The courts stated that the prohibition of torture is part of customary international law and it has become a peremptory norm.¹⁵⁷ Furthermore the court elaborated on its elements averring that the prohibition is grounded in a widespread international practice and on the *opinio juris* of States,” that it appeared “in numerous international instruments of universal application”, that “it has been introduced into the

¹⁵⁴ In the Report on the Fragmentation of International Law, the Study Group listed opinions of individual judges dealing with *jus cogens* which included the Oscar Chinn case, P.C.I.J. Series A/B, No. 63 (1934) (separate opinion of Judge Schücking) p. 149; Application of the Convention of 1902 Governing the Guardianship of Infants (the Netherlands v. Sweden) ICJ Reports 1958, 55 (separate opinion of Judge Moreno Quintana) pp. 106 et seq.; North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) ICJ Reports 1969, 3 (separate opinion of Judges Padilla Nervo and Sörensen) pp. 97 and 248; North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) ICJ Reports 1969, 3 (dissenting opinion of Judge Tanaka), at p. 182; Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase) ICJ Reports 1970,3 (separate opinion of Judge Ammoun), at p. 304; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) ICJ Reports 1986, 14 (separate opinion of President Nagendra Singh) p. 153; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) ICJ Reports 1986, 14 (separate opinion of Judge Sette-Camara) pp. 199 et seq; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Yugoslavia (Serbia and Montenegro)) ICJ Reports 1993, 325 (separate opinion of Judge ad hoc Lauterpacht) p. 440; Legality of Use of Force (Yugoslavia v. United States of America) Request for the Indication of Provisional Measures, ICJ Reports 1999, 916 (dissenting opinion of judge ad hoc Kreća) pp. 53-61, paras. 10–17; Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) ICJ Reports 2002, 3 (dissenting opinion of Judge AlKhasawneh) p. 95, para. 3; Oil Platforms (Islamic Republic of Iran v. United States of America) ICJ Reports 2003, 161 (separate opinion of Judge Buergenthal), para. 23. See The Arbitral Award in the Matter between the Government of Kuwait and American Independent Oil Company, (1982) 21 ILM 976, para 90. Azanian People’s Organisation (AZAPO) v Truth and Reconciliation 1996 (4) SA 562 (C), 574B.

¹⁵⁵ Tladi D, *Jus Cogens*, ILC Reports, A/69/10.

¹⁵⁶ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, ICJ Reports 2012

¹⁵⁷ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, ICJ Reports 2012

domestic law of almost all States”, and that “acts of torture are regularly denounced within national and international fora.¹⁵⁸ This is an attempt by courts to elaborate on the substance surrounding *jus cogens* norms. In the courts making such pronouncements, then a light can be shed with regards to the nature, scope and consequences surrounding it. Due to the lack of a legislature, the courts can be used as a means of guiding the jurisprudence regarding the norm.

BIBLIOGRAPHY

1. Winkel L, *Peace Treaties and international European History* (Randall Lesaffer Edition) (Cambridge 2004).
2. Bentham J, *An Introduction to the Principles of Moral Legislation* (1789).
3. Basset Moore J, *A digest of International Law*, (US Government Printing Office).
4. Shaw M, *International Law* (Cambridge) (2008).
5. De Wet E, *Jus Cogens and Obligations Erga Omnes* (2013), Oxford Handbook on Human Rights.
6. Peremptory norm, West Encyclopedia of American Law, edition 2, 2008.
7. *Barcelona Traction Case* (Belgium v Spain) (1970) ICJ.
8. Bassiouni M, *International Crimes: Jus Cogens and Obligation Erga Omnes*, Law and Contemporary problems, (1996).
9. Vienna Convention on the Law of Treaties (VCLT).
10. Posner E and Goldsmith J, *The limitations of International Law* (Oxford University Press).

¹⁵⁸ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, ICJ Reports 2012

11. Posner E, *A Theory of Customary International Law*, University Of Chicago, John M. Olin Law and Economics Working Paper, (1998).
12. Allot P, *The Concept of International Law*, European Journal of International Law.
13. Slaughter Burley A, *International Law and International Relations Theory: A dual Agenda*, American Journal of International law.
14. Weatherall T, *Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence*, Georgetown Journal of International Law,
15. *The Black's Law Dictionary*, Online Legal Dictionary 2nd Ed at <http://thelawdictionary.org/custom/>
16. Da Rocha Ferreira A, '*Formation and Evidence of Customary International Law*' UFRGS Model United Nations Journal (2013)184
17. Da Rocha Ferreira A, '*Formation and Evidence of Customary International Law*' UFRGS Model United Nations Journal (2013)
18. Mendelson, M. H. "The Formation of Customary International Law." In *Recueil des cours de l'Académie de Droit International de La Haye* Vol. 272, 155-410.(1998)
19. Brownlie, I, and Kathleen B. *Principles of public international law* Vol. 1. Oxford: Clarendon Press, (1973).
20. Harris, D *Cases and Materials on International Law* London: Sweet & Maxwell, (2010) 30
21. Bederman, David J., *International Law Frameworks* New York: Foundation Press (2001) 15-16
22. *Statute of the International Court of Justice* (1945).
23. Bederman, David J, *International Law Frameworks*
24. *Colombia v Perú* [1950] ICJ 6
25. *Germany v Denmark and the Netherlands* [1969]
26. Tasioulas J, "*Custom's Future: International Law in a Changing World*" Cambridge University Press, 2015.
27. Nieto- Navia R, "*International Peremptory Norms and International Humanitarian Law*" *Man's inhumanity to man: essays on International law in Honour of Antonio Cassese*, Kluwer Law International, (2003).
28. Hossain K, *Concept of Jus Cogens and the Obligations under the UN Charter*, Santa Clara Journal, (2005).
29. Byers M, *Conceptualising the Relationship Between Jus Cogens and Erga Omnes Rules*, Nordic International Journal (1997).
30. Dromina Voloc N, "*Imperativisation of International Law: Jus Cogens concept in jurisprudence.*" *Evropsky Politicky a pravni diskurz* (2015).
31. Alvarez R, *A Barren Effort? The Jurisprudence of the Inter American Court of Human Rights on Jus Cogens*
32. Gould D "*Jus Cogens*" *The Legacy of Punishment in International Law*, Palgrave Macmillan (2010).
33. Schwarzenberger G "*International jus cogens*" *Texas Law Review*, (1964).

34. Verdross A, “*Jus Dispositivum and jus cogens in International Law.*” American Journal on International Law (1966),
35. Linderfalk U, “*The Effect of Jus Cogens Norms: Whoever opened the Pandora’s Box, Did you Ever think About the Consequences?*” European Journal of International Law (2007).
36. Woods T, *How The Catholic Church Built Western Civilisation*, Regenery Publishing (2005).
37. Greig D, *International Law*, 2nd edition Butterworths (1976).
38. Belfanti C, “*Between Mercantilism and Market: privileges for invention in early modern Europe.*” Journal of Institutional Economics (2006)
39. Trachtman J, *International Economics and Law Revolution*, (1996).
40. Locke J, *Two treatises of government student edition*, Cambridge University Press (2012).
41. Brunn S, *A treaty of Silicon for the Treaty of Westphalia, New territorial dimensions of modern statehood*, Geopolitics (1998)
42. Stefano C, Jus Cogens: The History, Challenges and hope of a ‘Giant on Stilts’ Plymouth Law and Criminal Justice Review (2015).
43. Groitius H, *De Jure Beli Ac Pacis Libri Tres* (1625).
44. Charlesworth, H, *Gender of Jus Cogens* , The Human Rights Question (1993).
45. Kunz L, *The Changing Law of Nations*, AJIL.
46. Oppenheim L, *International Law*, Longmans London, (1905).
47. Janis M, *Nature of Jus Cogens*, Connecticut Journal of International Law, (1987).
48. Freidman W, *The Uses of General Principles” in the Development of International Law*, American Journal of International Law, (1963).
49. *Reservation to the Convention on the Prevention and punishment of the Crime of Genocide*, ICJ Reports, (1951).
50. Lauterpacht, *Regles Generales de Droit de la Paix*, 62 Recueil des Cours (1937).
51. Vol II, ILC Yearbook (1953).
52. Akerhurst M, *A Modern Introduction to International Law* (1972).
53. Sztucki J, *Jus cogens and the Vienna Convention on the Law of Treaties: a critical appraisal*, Springer-Verlag, (1974).
54. Criddle E and Fox-Decent E, *A fiduciary theory Jus Cogens* , Yale Journal of International Law, (2009).
55. Hannikainen L, *Peremptory Norms (Jus Cogens) in International Law*, Helsinki Finnish Lawyers Publishing Company, (1992).
56. Schwarzeberger G, *International jus cogens*, Texas Law Review, (1964).
57. Saul M, “*Identifying Jus Cogens Norms: The Interaction of Scholars and International Judges.*” Asian Journal of International Law. (2015).
58. Whiteman M, “*Jus Cogens in International Law, with a projected list*” Georgia Journal of International & Comparative Law, (1977).

59. Danilenko G, "International Jus Cogens: Issues of Law Making." *European Journal of International Law*, (1991).
60. *The Case of the Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports, (1949).
61. Pechota, Carnegie Endowment Conference on the Process of Change in International Law (Menton Conference) Report.
62. McNair A, *The Law of Treaties*, (1961).
63. Christenson A, "Jus Cogens: Guarding Interests Fundamental to International Society" *Virginia Journal International Law*(1987).
64. Koh H, "Why do nations obey International Law?" (1997).
65. Chantot A, "Conflicting Authorities. Asyilia between Secular and Divine Law in the Classical and Hellenistic Poleis." *Kernos, Revue International et pluridiscipline de religion grecque antique* (1996).
66. Wright B, *American Interpretations of Natural Law: A Study in the History of Political Thought*. Harvard University Press, (1931).
67. Schmitt C, *The nomos of the earth in the international law of the Jus Publicum Europaeum*, Telos Press Publishing, (2003).
68. Kelsen H, *Principles of International Law*, The Lawbook Exchange, (1952).
69. Lawrence T, *The principles of international law*, Macmillan (1911).
70. Austin J, *Lectures on Jurisprudence: Or, The Philosophy of Positive Law*, (1875).
71. Kosenneimi M, *The gentle civilizer of nations: the rise and fall of international law*, Cambridge University Press, (2001).
72. Kathrani P, *Social Contract theory and International Normative Order: A New Global Ethic?* JURISPRUDENCE, (2010).
73. Duvall R, "Institutions and International order." *Global Changes and Theoretical Challenges: Approaches to World Politics for the 1900s* (1989).
74. Orakhelashvili A, *Peremptory norms in international law*, Oxford University Press (2006).
75. Baker, "Customary International Law in the 21st Century: old challenges and new debates" *European Journal of International Law* (2010).
76. Posner E, *Erga omnes norms, institutionalisation and constitutionalism in international law*, *Journal of Institutional and Theoretical Economics* (2009).
77. Engel C, "Erga Omnes: Why does Public International Law Ignore Privity of Contract: Comment." *Journal of Institutional and Theoretical Economics*, (2009).
78. Bassiouni M, *International crimes: jus cogens and obligation erga omnes*, *Law and Contemporary Problems* (1996).
79. D'Amato A, *The Concept of Custom in International Law*, (1971).
80. Christenson G, *Jus Cogens: Guarding Interests Fundamental TO the International Society*, *Vriginia International*, (1987).

81. Hobbes T, *Leviathan or The Matter, Forme, & Power*, printed for Andrew Crooke, at the Green Dragon in St. Pauls Church-yard (1651).
82. Criddle E, Fox Decent, *The fiduciary theory of jus cogens*, Yale Journal International Law.
83. Toliemyte N, “ *The Concept of State Immunity and the main challenges*” Vilnius University Journal.
84. Kruchel S, *State Immunity and the Promise of Jus Cogens*, Northwestern University School of Law, Northwestern Journal of International Human Rights. (2011).
85. *The Schooner Exchange v M’Faddon* (1812)
86. International Court of Justice advisory opinion on Kosovo’s declaration of independence. (*Kosovo Case*).
87. Statute of the International Criminal Court, (1998).
88. Maurizio R, *The Concept of International Obligations Erga Omnes*, Oxford University Press (1997).
89. Petersmann E, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991).
90. Reisman M, *Sovereignty and Human Rights in Contemporary International Law*, American Journal on International Law, (1990).
91. Fox E, *The Fiduciary Nature of State Legal Authority*, (2005).
92. Criddle E, *Fiduciary Foundations of Administrative Law*, UCLA Law Review, (2006).
93. Green J, *Questioning the preemptory status of the prohibition of the use of force*, Michigan Journal of International Law, 2011.
94. Charlesworth H, *The Gender of Jus Cogens*, 15 Hum RTS, 1993.
95. Kim J, *The Crime of Aggression against Iraq*.
96. Morrison F, *Legal Issues in the Nicaragua Opinion*, American Journal of International Law.
97. Cancado A, *The Determination and Gradual Expansion of its Material Content in Contemporary International Case Law*,
98. Tladi D, *Jus Cogens*, ILC Reports, A/69/10.

