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Jus Cogens and the Right to Self-Determination - Falsifiability of Tests -

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Summary

The right to self-determination was recently posited as one possible jus cogens norm. However, more than fifty years after jus cogens emerged in 1969, a standard test for identifying a norm as jus cogens has yet to be adopted. In 2019, the International Law Commission adopted the Draft Conclusions on jus cogens, together with the list of possible jus cogens norms . If the possibility of being shown to be false is not admitted when identifying a jus cogens norm, however, the identification would not be justified. For that matter, the test of non-derogation and modification clauses for identifying a norm as jus cogens can be falsified. Nevertheless, the text did not apply the test to the right to self-determination when it included the right in the jus cogens list. If tests are not falsifiable, there would be no means to rebut jus cogens claims for selfish purposes. Until falsifiable tests are established and shared, jus cogens should not be applied. In this way, negotiations for finding a political solution based on compromise affecting the entirety of jus cogens norms should not be discouraged by jus cogens claims. Finally, a fundamental problem regarding the legal ground for the binding force of international law, raised by the emergence of jus cogens that may be in contravention with the grundnorm of pacta sunt servanda, will be addressed. Under that grundnorm, ironically, a non-consensual jus cogens norm would lose its binding force at the very moment it is applied, because at that moment the legal ground of its binding force is denied.

Jus Cogens and the Right to Self-Determination - Falsifiability of Tests -

SUMMARY

The right to self-determination was recently posited as one possible jus cogens norm. However, more than fifty years after jus cogens emerged in 1969, a standard test for identifying a norm as jus cogens has yet to be adopted. In 2019, the International Law Commission adopted the Draft Conclusions on jus cogens, together with the list of possible jus cogens norms[1]. If the possibility of being shown to be false is not admitted when identifying a jus cogens norm, however, the identification would not be justified. For that matter, the test of non-derogation and modification clauses for identifying a norm as jus cogens can be falsified. Nevertheless, the text did not apply the test to the right to self-determination when it included the right in the jus cogens list. If tests are not falsifiable, there would be no means to rebut jus cogens claims for selfish purposes. Until falsifiable tests are established and shared, jus cogens should not be applied. In this way, negotiations for finding a political solution based on compromise affecting the entirety of jus cogens norms should not be discouraged by jus cogens claims. Finally, a fundamental problem regarding the legal ground for the binding force of international law, raised by the emergence of jus cogens that may be in contravention with the grundnorm of pacta sunt servanda, will be addressed. Under that grundnorm, ironically, a non-consensual jus cogens norm would lose its binding force at the very moment it is applied, because at that moment the legal ground of its binding force is denied.

1. Introduction

Norms of jus cogens[2], or peremptory norms of general international law[3], are usually said to stand at the top of international normative hierarchy. Jus cogens is conceived by the ILC as reflecting and protecting fundamental values of the international community[4]. Concerning fundamental values, Irawati Handayani asks, "[i]n what ways does the international community suffer losses when a country commits slavery or racial discrimination against its own citizens?"[5]

Jus cogens is defined as 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 jus cogens. The ILC submits that this second criterion of non-derogability and modification clauses is a single composite criterion. It is observed, therefore, that the two criteria

1. On the topic jus cogens, the International Law Commission (ILC) has adopted 23 draft Conclusions as the Text of the Draft Conclusions of Jus Cogens and the list of possible norms of jus cogens, together with commentaries thereto. UN Doc A/74/10, 2019. Hereinafter the report is cited as "2019 ILC Report". The ILC decided to transmit draft Conclusions, through the UN Secretary-General, to Governments for comments with the request that comments be submitted to the Secretary-General by December 1, 2020. Comments were presented by 6 States as of April 2020: Austria, Germany, the Netherlands, Paraguay, Spain and Mexico. ILC, "Comments by Governments", Analytical Guide to the Work of the ILC, 2020, https://legal.un.org/ilc/guide/1_14.shtml.
2. Literally, strong law.
3. The ILC decided to change the title of the topic from jus cogens to "peremptory norms of general international law (jus cogens)" at the 69th session in 2017. https://legal.un.org/ilc/guide/1_14.shtml. In this paper, however, the topic is called jus cogens.
4. Draft Conclusion 3, 2019 ILC Report.
5. Irawati Handayani, "Concept and Position of Peremptory Norms (Jus Cogens) in International Law: A Preliminary Study", Hasanuddin Law Review, Vol. 5, 2019, p. 242.

are cumulative[6]. In this sense, these 'non-derogability and modification clauses' may be called simply 'non-derogability clauses'.

The idea of jus cogens is said to be based on the hope that international law can be driven by justice and values other than the mere satisfaction of selfish interests of States[7]. Norms of jus cogens are, as it were, elite, or the highest ranking norms[8], from which no derogations are permitted, even by agreement between the States parties based on the grundnorm, meaning basic norm, of pacta sunt servanda[9], despite the fact that the grundnorm itself is, in a contradictory manner, also alleged to be a norm of jus cogens[10]. And, below the top, there are merely binding norms of treaty and customary international law.

A treaty in conflict with a norm of jus cogens is void ab initio at the time of its conclusion on the basis of the Vienna Convention on the Law of Treaties adopted in the UN Conference on the Law of Treaties in 1969[11]. Because of difference in legal consequence, jus cogens is contrasted with jus dispositivum[12], from which a treaty can derogate. Therefore, jus cogens is usually compared with public policy in domestic law[13]. However, jus cogens in international law has been critically described as "slippery ground"[14], due to its ambiguity.

The concept of jus cogens was suggested by the International Court of Justice (ICJ) in the decision of the North Sea Continental Shelf cases in 1969[15]. In the Nicaragua case, the ICJ has referred to "a conspicuous example of a rule of international law having the character of jus cogens"[16]. As with the Nicaragua case, in the advisory opinion on the Legality of Use or Threat of Use of Nuclear Weapons, the ICJ coined the expression "intransgressible principles of humanitarian law"[17]. In these cases, however, the term jus cogens itself was carefully avoided.

In 2006, literal reference to jus cogens by the ICJ was made in the case of Armed Activities in the Territory of the Democratic Republic of the Congo (DRC), when it addressed DRC's allegation that Rwanda's reservation to Article 9 of the Convention on the Prevention and Punishment of the Crime of

6. 2019 ILC Report, p. 157. That jus cogens norms can be modified only by a subsequent norm of jus cogens means jus cogens norms can be modified only by another jus cogens norm. Then, Sue S. Guan asks: "Does that mean all states must in unison essentially agree to derogate from the original, non-derogable norm to create a new, non-derogable norm?", in idem., "Jus Cogens: To Revise a Narrative", Minnesota Journal of International Law, Vol.26, 2017, p. 470. This almost impossible requirement is another reason why 'inderogability and modification clauses' is called simply 'an inderogability clause'.
7. Ruiz Fabri, "Enhancing the Rhetoric of Jus Cogens", European Journal of International Law, Vol. 23, 2012, p. 1050.
8. Prosper Weil, "Towards Relative Normativity in International Law?", American Journal of International Law, Vol. 77, 1983, p. 423.
9. Hans Kelsen, General Theory of Law and State, Harvard University Press, 1945, p. 369. Kelsen explains the binding force of international law by applying a grundnorm superior to all the grundnorms of States. See Norberto Bobbio and Danilo Zolo, "Hans Kelsen, the Theory of Law and the International Legal System: A Talk", European Journal of International Law, Vol. 9, 1998, pp. 361-365. On the concept of pacta sunt servanda in international law, see Hans Wehberg, "Pacta Sunt Servanda", American Journal of International Law, Vol. 53, 1959, pp. 775-786.
10. Kamrul Hossain argues that "there are rules, which are preconditions for effective international activity, such as pacta sunt servanda. To abrogate such a rule is not possible. A treaty providing that pacta sunt servanda is mere reaffirmation. A treaty denying it is an absurdity", in idem., "The Concept of Jus Cogens and the Obligation under the U.N. Charter", Santa Clara Journal of International Law, Vol. 3, 2005, p. 73.
11. Hereinafter cited as 'the Vienna Treaty Convention'.
12. Literally, law subject to the disposition of the parties.
13. Ivan A. Shearer expounds that "[t]here is undoubtedly some analogy between jus cogens and the principles of public policy which at common law render a contract void if it offends against these, such as the principle that parties cannot by agreement themselves oust the ordinary courts from their jurisdiction", in idem., Starke's International Law, 11th edition, Butterworth, 1994, p. 49.
14. Newcastle Diocese Trustees v Ebbeck, High Court of Australia, 104 CLR, 1960, p. 415.
15. North Sea Continental Shelf cases (Germany v Denmark; Germany v the Netherlands), ICJ Rep 1969, para. 72.
16. Military and Parliamentary Activities in and against Nicaragua (Nicaragua v US), ICJ Rep 1986, para. 14.
17. Legality of Use or Threat of Use of Nuclear Weapons, Advisory Opinion, ICJ Rep 1996, para. 79.

Genocide should be declared invalid[18], because the reservation was in conflict with the jus cogens of genocide[19]. In the case of Bosnia and Herzegovina v Serbia and Montenegro in 2007, the ICJ reaffirmed that the norm prohibiting genocide is assuredly jus cogens[20]. The norm prohibiting genocide has been held by the ILC as one of the possible norms of jus cogens. Similarly, the European Court of Human Rights addressed it, in the case of Al-Adsani v UK, when the court famously rejected the argument that jus cogens violations would deprive a State of sovereign immunities[21]. In the Jurisdictional Immunities of the State case in 2012, the ICJ considered the relationship of jus cogens with sovereign immunities, holding that there was no conflict between them, because the procedural rules of immunities and possible jus cogens norms of the law of armed conflict address different matters[22].

It could be true, however, that a norm of jus cogens conflicts with other principles of general international law. In such a case, according to Judge ad hoc John Dugard, the ICJ has refrained from invoking jus cogens[23]. At the same time, he warned that the concept of jus cogens should not be used as "an instrument to overthrow accepted doctrines of international law"[24].

On the legal consequence of jus cogens, Article 53 of the Vienna Treaty Convention provides that a treaty is void if, at the time of its conclusion, it conflicts with a norm of jus cogens. Also, a treaty is void if it conflicts with jus cogens that emerged after the conclusion of the treaty. However, James Crawford criticizes that "[A]rticle 53 is of little help, being entirely circular"[25]. As to a new norm of jus cogens, Article 64 prescribes that if a norm of jus cogens emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

According to the commentary of the ILC, if a State fails to implement an obligation arising under a norm of jus cogens "in a gross or systematic manner", all other States should refrain from recognizing as lawful the resulting situation, and from rendering aid or assistance in maintaining the situation[26]. Besides, jus cogens may work as a limit to domestic legislation[27], and as a constraint on the scope of State immunity as referred to above[28]. As Ulf Linderfalk argues, furthermore, a reservation to a treaty will not have the purported effect if it is in conflict with a norm of jus cogens[29], though such an argument would not be supported by State practice[30].

According to the ILC, the law of the UN Charter prohibiting the use of force in itself constitutes a conspicuous example of the jus cogens norm[31]. In this regard, Ian Brownlie submits that aid agreements

18. Hereinafter the Convention is cited as "Genocide Convention".
19. Armed Activities on the Territory of the Democratic Republic of Congo (DRC) (DRC v Rwanda), (Jurisdiction and Admissibility), ICJ Rep 2006, paras. 64 and 125.
20. Case concerning Application of the Genocide Convention (Bosnia/Herzegovina v Serbia/Montenegro), ICJ Rep 2007, para. 161.
21. Al-Adsani v UK, 2001-XI, European Court of Human Rights, Application No. 35763/97, 2001, para. 61.
22. Jurisdictional Immunities of the State case (Germany v Italy), ICJ Rep 2012, paras. 92-97.
23. Dissenting Opinion of Judge Dugard, Armed Activities on the Territory of the DRC (DRC v Rwanda), ICJ Rep 2006, para. 12.
24. Ibid., para. 6.
25. James Crawford, The Creation of States in International Law, 2nd edition, Oxford University Press, 2006, p. 101.
26. Maurizio Ragazzi, The Concept of International Obligations Erga Omnes, Oxford University Press, 1997, pp. 169, 171.
27. Erika de Wet, "The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law", European Journal of International Law, Vol. 15, 2004, p. 97.
28. Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3), per Lord Millett, House of Lords, 1 A.C., 2000, p. 147.
29. Ulf Linderfalk, "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, 2007, p. 868.
30. Karl Zemanek, "The Metamorphosis of Jus Cogens: From an Institution of Treaty Law to the International Legal Order?", in Enzo Cannizzaro (ed.), The Law of Treaties Beyond the Vienna Convention, Oxford University Press, 2011, p. 392.
31. The ILC, Report on the work of the 66h session, UN Doc A/69/10, Annex: Jus Cogens, 2014, para. 38.

may be affected by this norm of jus cogens and should not be intended for further preparation of unlawful use of force[32]. The ILC also comments that States shall not render aid or assistance in the maintenance of a situation created by a breach of jus cogens[33].

The ILC added that another example in conflict with jus cogens would be former treaties regulating the slave trade, the performance of which later ceased to be compatible with international law owing to the general recognition of the illegality of all forms of slavery. And the ICJ's case of Questions relating to the Obligation to Prosecute or Extradite qualifies the prohibition of tortures as jus cogens. It was denoted that the case could provide useful guidance in the search for specific tests for the identification of norms of jus cogens[34]. Generally, in the ILC's commentary on the Vienna Treaty Convention, examples of treaties in conflict with jus cogens are as follows[35]: (a) a treaty contemplating an unlawful use of force contrary to the principles of the UN Charter; (b) a treaty contemplating the performance of any other act criminal under international law; and (c) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide.

Additionally, the right to self-determination was mentioned as one of other possible examples by some of the ILC members[36]. Then, the 2019 ILC Report presented the following "non-exhaustive list" of possible norms of jus cogens, including the right to self-determination[37]: (a) The prohibition of aggression; (b) The prohibition of genocide; (c) The prohibition of crimes against humanity; (d) The basic rules of international humanitarian law; (e) The prohibition of racial discrimination and apartheid; (f) The prohibition of slavery; (g) The prohibition of torture; and (h) The right of self-determination.

While the possible norms of jus cogens from (a) to (g) are commented more or less in detail in 2019 ILC Report, what is commented on "(h) The right to self-determination" is only that the ILC has used the formulation "the right of self-determination", instead of "the right to self-determination"[38]. The legal foundations for identifying the right "to" or "of" self-determination as a norm of jus cogens are not provided. Its identification should have been elucidated based on the proposed tests for identification, including a non-derogability test, that are drafted by the ILC itself in 2019 ILC Report[39].

While derogation is generally conceived simply as the partial suppression of a law[40], it is specifically defined, for the purpose of international law, as "a rational response to uncertainty, enabling governments to buy time and legal breathing space from voters, courts, and interest groups to combat crises by temporarily restricting civil and political liberties"[41]. However, derogation is not conceived as contradicting the ideal of international human rights, but conversely as helpful for managing to

32. Ian Brownlie, Principles of Public International Law, 6th edition, Oxford University Press, 2003, p. 250.
33. Draft Conclusion 21 (2), in the ILC, Report on the Work of the 70th session, UN Doc A/73/10, 2018, p. 226.
34. Report of the ILC on the Work of its 66th session, Annex: Jus Cogens (Mr. Dire D. Tladi), 2014, para. 15. Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), ICJ Rep 2012, para. 99.
35. Yearbook of the ILC, 1966, Vol. II, p. 247, (3).
36. "Treaties violating human rights, the equality of States or the principle of self-determination were mentioned as other possible examples". Yearbook of the ILC, 1966, Vol. II, p. 247, (3).
37. 2019 ILC Report, Annex, p. 208.
38. Ibid., p. 207, (12).
39. Yearbook of the ILC, 1966, Vol. II, pp. 157-174.
40. Matthew Ramstein, Manual of Canon Law, Terminal Printing & Pub. Co, 1947, p. 69.
41. Emilie M. Hafner-Burton et al., "Emergency and Escape: Explaining Derogations from Human Rights Treaties", International Organization, Vol. 65, 2011, p. 680.

materialize that ideal in a serious crisis[42], like the COVID-19 pandemic[43].

Meanwhile, not as examples of jus cogens but of obligations erga omnes, most of the above-listed examples were expressly referred to in the Barcelona Traction case[44]. On the relationship between jus cogens and obligations erga omnes, the ILC considers that jus cogens establish obligations erga omnes, the breach of which concerns all States[45]. Although the concept of obligations erga omnes has often been studied in comparison with jus cogens, it is commented by Krystyna Marek that one obscure notion is to serve as a basis for another obscure notion, an operation known as defining ignotum per ignotum[46]. likewise, Christian Tams reiterates that assessing obligations erga omnes by reference to jus cogens may be no more than a description of the unknown by reference to the unknown[47]. In fact, both jus cogens and obligations erga omnes are not thoroughly known. Though the draft Conclusions in 2019 ILC Report define that jus cogens give rise to obligations erga omnes, in practice, the ILC did not attempt to describe jus cogens by reference to obligations erga omnes[48]. As such, the comparison would not directly help clarify tests for identifying norms of jus cogens. As will be discussed later, the oft-cited paragraph, addressing obligations erga omnes in the East Timor case should not be cited for proving a proposition that the right to self-determination is identified as a norm of jus cogens[49].

Ultimately, the ILC has not included any examples of norms of jus cogens in the Vienna Treaty Convention, allegedly because of its concern that the mention of some particular examples of norms of jus cogens may lead to misunderstanding as to the position concerning other cases. The ILC considered the right course to be taken is to provide in general terms only that a treaty is void if it conflicts with jus cogens and to leave the full content of jus cogens to be worked out in State practice and in the jurisprudence of international tribunals[50]. It is prescribed in Article 66 of the Vienna Treaty Convention that any one of the parties to a conflict concerning the application or interpretation of jus cogens may, by a written application, submit it to the ICJ for decision unless the parties agree by common consent to submit the dispute to arbitration[51].

Unresolved questions other than the presentation of examples of norms of jus cogens in the Vienna Treaty Convention are related to the definition of normative procedures by which norms of jus cogens may be identified. Gennady M. Danilenko had warned earlier, in the absence of clearly defined procedures to identify a norm as jus cogens, identification procedures may become a matter of conflicting assertions due to political preferences of different groups of States[52]. One of the most

42. Gerald L. Neuman, "Constrained Derogation in Positive Human Rights Regime", in Evan J. Criddle (ed.), Human Rights in Emergencies, Cambridge University Press, 2016, pp. 15–31.
43. "OHCHR & Human Rights Committee Address Derogation during COVID-19", International Justice Resource Center, 2020. https://ijrcenter.org/2020/04/29/ohchr-human-rights-committee-address-derogations-during-covid-19/.
44. The Barcelona Traction judgment was rendered only 8 months after the adoption of Article 53 (then, Article 50) of the Vienna Treaty Convention. Barcelona Traction, Light and Power Company, Ltd (Belgium v Spain) (Second Phase, Judgment), ICJ Rep 1970, paras. 33-34.
45. Draft conclusion 18 in 2018, Report of the ILC, 70th session, 30 April–1 June and 2 July–10 August 2018, UN Doc A/73/10, 2018, p. 226. On the concept of obligations erga omnes in general, see Maurizio Ragazzi, op. cit., supra note 26, pp. 1-5.
46. Krystyna Marek, "Criminalizing State Responsibility", Revue belge de droit international, Vol. 14, 1978-1979, p. 468.
47. Christian J. Tams, Enforcing Obligations erga omnes in International Law, Cambridge University Press, 2005, p. 141.
48. In draft Conclusion 17, as jus cogens give rise to obligations erga omnes, in which all States have a legal interest, any State is entitled to invoke the responsibility of another State for a breach of jus cogens in accordance with the Draft Articles on Responsibility of States for Internationally Wrongful Acts. 2019 ILC Report, p. 190.
49. East Timor case (Portugal v Australia), ICJ Rep 1995, para. 29.
50. Yearbook of the ILC, 1966, Vol. II, pp. 247-248.
51. Reservations to this Article were attached by Several States. UN, The Vienna Convention, reproduced in Multilateral Treaties Deposited with the Secretary-General, Chapter XXIII, Law of Treaties, 2020, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en.
52. Gennady M. Danilenko, "International Jus Cogens: Issues of Law-Making", European Journal of International Law, Vol. 2, 1991, p. 9.

prominent antagonists against the concept of jus cogens, Michael Glennon[53], recently issued a warning that norms of jus cogens create more problems than they are capable of solving[54]. In this connection, as Jan Klabbers exemplifies, a small group of jus cogens norms would render it fairly useless in solving conflicts involving, "say, freedom of expression and wildlife protection, or freedom to trade versus the protection of endangered species" on the one hand, on the other hand an obvious response of increasing norms of jus cogens to solve such conflicts would not be done due to conflicting interests among States[55]. While the ILC seems to adopt the policy of increasing norms of jus cogens, the increase might undermine the very idea of jus cogens. Indeed, if all or almost all norms were qualified as jus cogens, even then conflicts would continue between conflicting norms of jus cogens[56].

Considering the above arguments, two problems should be considered. The first problem concerns tests for identifying norms as jus cogens. Such tests are not explicitly stipulated in the Vienna Treaty Convention. For that matter, draft Conclusion 3 of 2019 ILC Report defines tests for their identification as below: no derogation is permitted; modification only by subsequent jus cogens; and acceptance and recognition by the international community of States as a whole. Before discussing these three tests, however, falsifiability should be considered so that norms of jus cogens may be legitimately identified and not be abused for selfish purposes.

The second problem is related to whether or not a political solution based on compromise on norms of jus cogens should be discouraged. It could be true that such compromise would affect the normative entirety of the applicable jus cogens norms, and the resulting treaty may be more or less in conflict with them. Should a treaty that involves political compromise, reached through "negotiation, enquiry, mediation or conciliation" in conformity with Article 33 of the UN Charter, be held void, because the compromise is in conflict with norms of jus cogens? Based on the list of possible norms of jus cogens presented in the 2019 ILC Report, peaceful means to resolve international disputes through compromise would be faced with dilemmas, which will be illustrated by reference to the arguments in favor of the jus cogens status of the right to self-determination.

With regard to the jus cogens status of the right to self-determination, the Netherlands insisted that ''the obligation to respect and promote the right to self-determination as well as the obligation to refrain from any forcible action which deprives peoples of this right is an obligation arising under a peremptory norm of general international law'', in a written statement concerning the Kosovo Advisory Opinion in 2010[57]. The ILC acknowledges, however, that "what norms qualify as jus cogens and the consequences of jus cogens in international law remain unclear"[58].

53. Michael Glennon's arguments are summarized and many of them are rebutted by Robert Kolb, in idem., Peremptory International Law: Jus Cogens – A General Inventory, Hart Publishing, 2015, pp. 30-31.
54. Michael Glennon, «Peremptory Nonsense», in Stephan Breitenmoser, Bernhard Ehrenzeller, Marco Sassoli, Walter Stoffel and Beatrice W. Pfeifer (eds.), Human Rights, Democracy and the Rule of Law, Nomos Publishers, 2007, p. 1266.
55. Jan Klabbers, "Beyond the Vienna Convention: Conflicting Treaty provisions", in Enzo Cannizzaro (ed.), The Law of Treaties Beyond the Vienna Convention, Oxford University Press, 2011, p. 202.
56. Giorgio Gaja, "Jus Cogens Beyond the Vienna Convention", Recueil des Cours, Vol. 172, 1981 III, pp. 271-316.
57. Advisory Opinion of Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Written Statement of the Netherlands, 17 April 2009, ICJ Rep 2009, para. 3.2.
58. Report of the ILC, 66th session, 5 May–6 June and 7 July–8 August 2014, UN Doc A/69/10, Annex, para. 3.

2. Falsifiable Tests

According to the ILC's comment, two-step approach for identifying norms of jus cogens is adopted in the Vienna Treaty Convention. First, evidence that the norm in question is a norm of general international law is required. Second, the norm must be shown to be accepted and recognized by the international community of States as a whole as having a peremptory character[59].

In spite of this two-step approach, however, the ILC itself admits that there are no simple tests by which to identify a norm as jus cogens[60]. Because of the lack of simple tests, R. Kolb regards Articles 54 and 64 of the Vienna Treaty Convention as narrow and imprecise[61]. And it is indicated that practical usefulness of jus cogens has been deteriorated by the lack of a clear definition, lack of a procedure for its identification and doctrinal weaknesses[62], leaving room for abuses due to selfish, political or ideological motives[63].

When the proper tests for identifying a norm as jus cogens are considered, falsifiability should not be missed. According to Karl Popper, falsifiability is the inherent testability of any hypothesis[64]. First of all, therefore, a proposition that a norm has the status of jus cogens is nothing but a hypothesis. Only if it is possible to establish that a hypothesis is unambiguously false, a proposition may be scientific. Though it is not a sufficient condition, falsifiability is one of the necessary conditions for a scientific proposition. That may apply as well to international law in general, and jus cogens in particular.

On the relations between natural and social sciences including jurisprudence, Popper argues[65]:

"The natural as well as the social sciences always start from problems, from the fact that something inspires amazement in us, as the Greek philosophers used to say. To solve these problems, the sciences use fundamentally the same method that commonsense employs, the method of trial and error. To be more precise, it is the method of trying out solutions to our problem and then discarding the false ones as erroneous."

59. 2019 ILC Report, p. 158.
60. Yearbook of the ILC, 1966, Vol. II, pp. 247-248.
61. R. Kolb, op. cit., supra note 53, p. vi.
62. Alfred Mwenedata and Joseph Sehorana, "The Determination and Enforcement of Jus Cogens Norms for Effective Human Rights Protection", IOSR Journal of Humanities and Social Science, Vol. 21, 2016, p. 80.
63. As measures for preventing the abuse of jus cogens, the ILC designed the procedure in Article 62 of the Vienna Treaty Convention. It provides for the procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty, to exclude the arbitrary determination of the invalidity or termination of a treaty by a State such as has happened not infrequently in the past, ensuring that recourse shall be had to the means of peaceful settlement under Article 33 of the UN Charter. Yearbook of the ILC, 1966, Vol. II, pp. 262-263. Compatibility of political compromise involved in peaceful settlement with non-derogability of applicable norms of jus cogens will be addressed later.
64. Karl Popper, The Logic of Scientific Discovery, Hutchinson, 1959, pp. 57-73. Science here signifies an observation as benchmarks for testing hypotheses. As a historical background, Popper lived during a time when psychoanalytic theories were all the rage at just the same time Einstein was laying out a new foundation for the physical sciences with the concept of relativity. Popper was initially motivated to draw a line of demarcation between science and pseudoscience. Idem., Conjectures and Refutations: The Growth of Scientific Knowledge, Routledge, 2002, p. 344. This is where the philosophy of science as falsification emerged. "Philosophers were accused of 'philosophizing without knowledge of fact', and their philosophies were described as 'mere fancies, even imbecile fancies'". Idem., "The Nature of Philosophical Problems and their Roots in Science", British Journal for the Philosophy of Science, Vol. 3, 1952 p. 127.
65. Popper, All Life is Problem Solving, Piper Verlag, 1994, p. 3. Particularly, on the relations between law and science from the perspectives of Popper and Thomas Kuhn, see Nancy Cook, "Law as Science: Revisiting Langdell's Paradigm in the 21st Century", North Dakota Law Review, Vol. 88, 2012, pp. 21-50.

In this way, Popper acknowledges that the growth of scientific knowledge begins with an imaginative proposal of hypotheses, like the Text of the Draft Conclusions on jus cogens in 2019 ILC Report. Actually, we start with a hypothesis based on a priori knowledge for generating new knowledge. Then scientists would search for illustrations or situations that falsify the hypothesis. This search is falsification. On the contrary, pseudo-science is science that does not conform with scientific standards like falsifiability.

As falsifiability is the capacity for some hypothesis to be proven wrong, it is considered synonymous with the testability or refutability of hypothesis[66]. Therefore, any theory is not completely correct, but if it can be shown both to be falsifiable and to be supported with evidence that shows it is true, the theory can be accepted as truth[67]. In this manner, any allegation that has not been proven yet remains a mere hypothesis. And hence, falsifiability is the assertion that for any hypothesis to have credence it must be inherently disprovable before it can become accepted as truth[68]. That may be true as long as a revolution like the emergence of jus cogens in the Vienna Treaty Convention is concerned[69], as affirmatively recognized even by Thomas Kuhn, a critic of Poper[70]. Thus, falsifiability was discussed in the US Supreme Court in 1982[71].

In the ruling of the McLean v Arkansas case[72], falsifiability was one of the tests to determine that creation science was not scientific and should not be taught in Arkansas public schools[73]. In its conclusion, it is held, "while anybody is free to approach a scientific inquiry in any fashion they choose, they cannot properly describe the methodology as scientific, if they start with the conclusion and refuse to change it regardless of the evidence developed during the course of the investigation"[74]. This conclusion may be significantly applicable to the method of identifying the right to self-determination as a possible norm of jus cogens.

Also, in the Daubert case in the US Supreme Court in 1993, "a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested"[75]. This passage is followed by a quotation from Michael Green, stating that scientific methodology is based on generating hypotheses and testing them to see if they can be falsified[76]. Then, Popper and other philosophers of science are referred to in the subsequent passage.

For a hypothesis to be falsifiable, naturally it must be precise. The lack of precision would be at

66. Popper, Conjectures and Refutations: The Growth of Scientific Knowledge, 5th ed., Routledge, 1989, p. 37.
67. Martyn Shuttleworth and Lyndsay Wilson, "Karl Popper's Basic Scientific Principle", Explorable, 2008, https://explorable.com/falsifiability.
68. Ibid.
69. The revolutionary essence of the recent emergence of jus cogens is discussed in Andrea Bianchi, "Human Rights and the Magic of Jus Cogens", European Journal of International Law, Vol. 19, 2008, pp. 494-496.
70. Thomas Kuhn, «Logic of Discovery or Psychology of Research?», in Imre Lakatos and Allan Musgrave (eds.), Criticism and the Growth of Knowledge: Proceedings of the International Colloquium in the Philosophy of Science, Vol. 4, Cambridge University Press, 1965, pp. 1-22.
71. The US National Research Council, The Age of Expert Testimony Science in the Courtroom, Report of a Workshop: Science, Technology, and Law Panel, National Academy Press, 2002.
72. McLean v Arkansas Board of Education, 529 F. Supp., 1982, p. 1255.
73. Under creation science it is claimed that special creation and flood geology based on the Genesis creation narrative in the Book of Genesis have validity as science.
74. William Overton, McLean v Arkansas Board of Education, 529 F. Supp., 1982, section IV, (c).
75. Daubert v Merrell Dow Pharmaceuticals, Inc., 509 U.S., 1993, p. 579.
76. Michael Green, "Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation", Northwestern University Law Review, Vol. 86, 1992, p. 645.

risk of abuse. Maurizio Ragazzi warns that the imprecise definition of jus cogens can be dangerous for the stability of treaties and "provide States with an excuse for escaping from their international commitments, and conversely it can deter a State from challenging the validity of a treaty even when this challenge would be wholly justified"[77]. Likewise, I. Shearer issues a warning about the risk of justifying interference in matters otherwise falling within the domestic jurisdiction of a State[78]. Such is the case with the risk of political abuse by the Great Powers, which usually act on the basis of imperialistic motives[79].

In this regard, it is proclaimed by Lucien Hubert of France, in the UN Conference on the Law of Treaties, in voting against the adoption of the draft Vienna Treaty Convention[80], that even the best conceived procedures for the settlement of disputes could not make up for the lack of precision in the drafting of the texts[81]. Then, he elucidates that this lack consists of "imprecision as to the present scope of jus cogens, imprecision as to how the norms it implied were formed, and imprecision as to its effect"[82]. In consequence, Hubert remarked that "the judge would be given such wide discretion that he would become an international legislature and that was not his proper function"[83]. Thus, Judge John Dugard makes a confession that peremptory norms "are a blend of principle and policy"[84], despite the proper jurisdiction of the ICJ is restricted only to legal disputes[85]. However, the right solution should not be sought in the politicization of the ICJ, but in the reconsideration of tests for identifying norms as jus cogens.

As regards the ICJ, it acknowledges that little advancement in identifying norms of jus cogens has been made since the concept was established, in the case of Questions Relating to the Obligation to Prosecute or Extradite in 2012[86]. In that stagnation, falsifiability as a test for identifying a norm as jus cogens has not been referred to by the ICJ. Just like the ICJ, in the ILC, problems to which attention have been paid in respect of jus cogens do not include falsifiability. The focal point of the ILC has been the lack of tests as such.

Georges Abi-Saab critically points to the ILC's original choice of leaving the box of Article 53 of the Vienna Treaty Convention empty[87]. K. Zemanek reconfirms that the Vienna Treaty Convention does not

77. M. Ragazzi, op. cit., supra note 26, p. 48.
78. I. Shearer, op. cit., supra note 13, p. 49.
79. Martti Koskenniemi, "International Law in Europe: Between Tradition and Renewal", European Journal of International Law, Vol. 16, 2005, p. 115.
80. France is the only permanent member of the UN Security Council that did not sign the Vienna Treaty Convention and has still not ratified it.
81. Lucien Hubert (France), UN Conference on the Law of Treaties, UN Doc A/CONF.39/SR.36, 1969, p. 203, para. 16. France had doubts about accepting an ill-defined concept of jus cogens that would impair the stability of treaties and the sovereignty of States. On its background, see Maurizio Ragazzi, op. cit., supra note 26, p. 71. Cf. Mark E. Villiger, Customary International Law and Treaties: A Study of Their Interactions and Interrelations with Special Consideration of the 1969 Vienna Convention on the Law of Treaties, M. Nijhoff, 1985, pp. 310-311.
82. UN Conference on the Law of Treaties, UN Doc A/CONF.39/SR.36, 1969, p. 94, para. 9. He summarized the position of France that "his delegation was not prepared to take a leap in the dark, and to accept a provision which, because it failed to establish sufficiently precise criteria, opened the door to doubt and compulsion". UN Doc A/CONF.39/11/Add. 1, 1969, p. 95.
83. UN Doc A/CONF.39/SR.36, 1969, p. 203, para. 16. Also, it is reminded by Hubert that the ILC itself has affirmed that "there is no simple criterion by which to identify a general rule of international law as having the character of jus cogens", as mentioned earlier. Ibid., p. 94, para. 10.
84. "Principles" mean, according to Judge Dugard, propositions that describe rights, and "policies" mean propositions that describe goals. Armed Activities on the Territory of the DRC (New Application, 2002) (Congo v Rwanda), Jurisdiction and Admissibility, Separate Opinion of Judge Dugard, para. 10.
85. Statute of the ICJ, Article 36.
86. Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), ICJ Rep 2012, p. 9.
87. Georges Abi-Saab, "The Third World and the Future of the International Legal Order", Revue Egyptienne de droit international, Vol. 29, 1973, p. 53.

establish tests for identifying norms of jus cogens, and then criticizes that "[i]t does not even indicate a manner in which to achieve this identification without the use of subjective evaluations"[88]. Also, Michael Glennon emphasizes the serious risk of subjectivism, complaining that the whole process of identifying norms as jus cogens is indeed heavily prone to subjectivism[89]. "Over time both Sherlock Holmes and jus cogens have generated widespread belief in their reality, but it is a reality that is subjectively shaped by each follower", Dinah Shelton narrates[90]. Therefore, "[t]here were serious doubts concerning the fact that the norm could be misused in interpreting the rules to be covered under jus cogens", said Mariya Palliwala[91].

Meantime, U. Linderfalk should be appreciated as acutely insightful in pointing out that jus cogens tends to be referred to only "for rhetorical purposes—to confer pathos on legal arguments"[92]. Then, recalling Levi-Strauss' theory concerning the effects that symbolic power may have on the structural social hierarchy[93] and Pierre Bourdieu's theory of symbolic violence in the field of law[94], A. Bianchi has recourse to a metaphor of magician noting that "international lawyers have acted as 'magicians', administering the rites of jus cogens and invoking its magical power". "Acting under the different guise of scholars, counsel, international judges, and legal advisers", Bianchi decries that, "international lawyers have succeeded in making jus cogens part and parcel of the fabric of the international law discourse"[95]. Then, Bianchi metaphorically concludes that "[t]he magicians. The future of jus cogens is primarily in their hands"[96].

With regard to the adverse effects of imprecise definition of jus cogens on the legal certainty, which is necessary to regulate the conduct of States with certainty, M. Koskenniemi points out, ambiguity regarding the scope and content of jus cogens may be considered as a threat depriving the necessary certainty of the law[97]. In a similar way, R. Kolb, who uniquely regards jus cogens as a legal technique which enhances the unity of a legal order by its refusal to apply the rule 'lex specialis derogat legi generali'[98], submits that "[i]f minimum legal certainty must be maintained, subjectivism in the definition and operation of peremptory norms has to be kept low"[99].

As such, jus cogens is compared to Pandora's Box[100]. "Today, the concept of a jus cogens norm has faded into near irrelevance", notes S. Guan[101] with disdain. In a similar vein, Markus Petsche is of the view that jus cogens is of limited relevance for the actual practice of international law and declares that jus cogens does not constitute an applicable norm of international law[102]. Thus, James Crawford finds that "few are the instances in which a court or tribunal has applied the concept so as to determine the

88. K. Zemanek, loc. cit., supra note 30, pp. 384-385.
89. M. Glennon, loc. cit., supra note 54, p. 1270.
90. Dinah Shelton, "Sherlock Holmes and the Mystery of Jus Cogens", Netherlands Yearbook of International Law 2015, Vol. 46, 2016, p. 23.
91. Mariya Palliwala, "Doctrine of Jus Cogens under International Law", iPleaders, 2020, chap. 7. https://blog.ipleaders.in/jus-cogens/.
92. U. Linderfalk, loc. cit., supra note 29, p. 855.
93. Claude Lévi-Strauss, "La structure des mythes", in idem., Anthropologie structurale, Plon, 1958, pp. 8-12.
94. Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field", Hastings Law Journal, Vol. 38, 1986–1987, p. 814.
95. A. Bianchi, loc. cit., supra note, 69, p. 494.
96. Ibid., p. 508.
97. M. Koskenniemi, loc. cit., supra note 79, p. 113.
98. R. Kolb, op. cit., supra note 53, pp. 2-3.
99. Ibid., p. 31.
100. U. Linderfalk, loc. cit., supra note 29, pp. 853-871.
101. S. Guan, loc. cit., supra note 6, p. 461.
102. Markus Petsche, "Jus Cogens as a Vision of the International Legal Order", Penn State International Law Review, Vol. 29, 2010, p. 273.

outcome of a case"[103]. The draft Conclusions in the 2019 ILC Report as such are also criticized that "[t]he chasm between the archetype and the reality is something which must be resolved if peremptory norms are to keep up with treaties as a means of resolving cases in international law"[104].

As a matter of fact, imprecise norms are not susceptible to falsifiability, but instead are much more prone to be abused than precise norms. Actually, however, jus cogens is not negligible due to the current Vienna Treaty Convention. For that reason, the lack of precision has been followed by innumerable and invaluable academic research achievements on jus cogens. As for the methodology for identifying norms as jus cogens, K. Zemanek conceives[105], there are three methods[106]: the first method of natural law[107], the second method of international public order[108], and the third method of peremptory customary law[109].

The historical origin of jus cogens in international law is traceable to natural law[110]. It was described by Mexico at the UN Conference on the Law of Treaties that "the rules of jus cogens were those rules which derived from principles that the legal conscience of mankind deemed absolutely essential to coexistence in the international community"[111]. Based on the inherent rational and moral authority, moreover, Louis Henkin and Louis Sohn have declared that jus cogens norms derive their peremptory character from their inherent rational and moral authority rather than State consent[112].

But, the vague natural law arguments combined with scant reliance on State practice would pose "one of the biggest threats to the credibility of peremptory norms as representing the core values of the international community as a whole", criticizes Erika de Wet[113]. A substantially Messiah-like belief or dogma, like creation science, that is arguably inherent in the first method of natural law, would render falsifiability insusceptible, whether it is religious or secular. In the 2019 ILC Report, eventually, though norms of jus cogens continue to be linked to notions of the conscience of mankind and scholarly writings, the material and information produced to show the recognition of norms as jus

103. J. Crawford, "Foreword", in Daniel Costelloe, Legal Consequences of Peremptory Norms in International Law, Cambridge University Press, 2017, p. xiii.
104. Madeleine Lusted, "Treaties, Peremptory Norms and International Courts: Is the Hierarchy Theory Treading Water?", LSE Law Review, Vol. 5, 2020, p. 218.
105. K. Zemanek, loc. cit., supra note 30, pp. 385-387.
106. On these three methodologies, Irawati Handayani considers, they are insufficient to answer the philosophical basis of jus cogens and insists new theories should be developed to challenge the basis of jus cogens. Idem., loc. cit., supra note 5, p. 242.
107. Emmerich de Vattel, The Law of Nations or the Principles of Natural Law, translated by C. G. Fenwick, Vol. 3, Book I, Chapter 2, Sections 16-18, 1916, quoted in Von Verdross, "Jus Dispositivum and Jus Cogens in International Law", American Journal of International Law, Vol. 60, 1966, p. 55. For that matter, René-Jean Dupuy noted that the inclusion of Article 53 in the Vienna Treaty Convention sanctioned the 'positivization' of natural law, in the UN Conference on the Law of Treaties, 1st session, 26 March– 24 May 1968, Official Records, Summary Records of the Plenary Meetings of the Committee of the Whole, p. 258, para. 74.
108. John Dugard argues that "[o]nce the right to self-determination is recognised as jus cogens it would seem to follow by necessary implication that it is jus cogens in the light of the pivotal position it occupies in the contemporary international public order", in idem., Recognition and the United Nations, Cambridge University Press, 1987, p. 159. See also Arnold D. McNair, The Law of Treaties, Oxford University Press, 1961, pp. 213-214; and Elena K. Proukaki, The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community, Routledge, 2010, p. 22.
109. Lauri Hannikainen submits that the most suited to being "a decisive source of peremptory norms" is customary international law. Idem., Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status, Finnish Lawyers' Publishing Company, 1988, p. 216. See also, K. Zemanek, loc. cit., supra note 30, pp. 385-397.
110. L. Hannikainen, op. cit., supra note 109, pp. 23-204.
111. UN Doc A/CONF.39/C.1/L.266, 1968-69, para. 6.
112. Louis B. Sohn, "The New International Law: Protection of the Rights of Individuals Rather Than States", American University Law Review, Vol. 32, 1982, p. 1.
113. Erika de Wet, "Jus Cogens and Obligations Erga Omnes", 2013, p. 7. https://case.edu/law/sites/case.edu.law/files/2020-02/CLE%20materials%203-2.pdf.

cogens remain acts and practice generated by States[114].

The second method of international public order has been most commonly followed[115]. Thus, Mostefa Trari-Tani asserts that certain norms of international public policy have jus cogens status[116]. In one view, the survey of State practice may be cited to empirically ascertain, by means of applying the test of falsifiability, the international public order as a foundation of a norm of jus cogens. For a norm to be identified as jus cogens, however, it is not enough that a norm is accepted and recognized as an international legal norm, but it must also be accepted and recognized as a peremptory norm, from which no derogation is permitted[117]. Then, the peremptory character must be established based on evidence testifying the acceptance of non-derogability by an overwhelming majority of States[118]. In fact, even a norm that is important or indispensable for the existence and working of the international public order would not be qualified as peremptory, if its non-derogability is not accepted by States[119]. That would not be favorable to the methods of natural law and international public order.

While the peremptory character is defined based on non-derogability, the peremptory character is conceived not equivalent to non-derogability. The Inter-American Commission on Human Rights states that non-derogable treaty rights constitute an important "starting point" for identifying a norm as jus cogens[120]. Then, it is made clear in the 2019 ILC Report that acceptance and recognition by a simple majority of States is not sufficient to establish the peremptory status of a norm[121], though a simple majority may be sufficient to establish an ordinary international customary law.

More fundamentally, it is not evident how the requirement of non-derogability can be falsified. Should non-derogability be expressly articulated in a norm, like Article 4 of the ICCPR, or is it good enough only if derogability is not especially stipulated? If the mere absence of a derogation clause is taken sufficient to establish non-derogability, almost all the rules of international law would be held peremptory. Regrettably, however, this problem is not explicitly addressed in the 2019 ILC Report.

3. International Community of States as a Whole

It is true that the international public order method seems to be more susceptible to falsifiability than the natural law method. In practice, however, "[w]hat is public policy remains left in the air"[122]. In the Post-Cold War era, especially, State and transnational perspectives on the international public order would not seem to be converging.

While this method may heavily depend on perspectives on international justice, they also differ

114. 2019 ILC Report, pp. 166-167. In fact, the emergence of jus cogens was made possible by means of the ratification of and accession to the Vienna Treaty Convention by States. Therefore, the positions of entities other than States, like Polisario, are not, of themselves, sufficient to establish the acceptance and recognition required for the elevation of a norm of general international law to jus cogens. Ibid., p. 167. As such, the positions of non-State entities such as Polisario would not be taken into account in identifying a norms as jus cogens.
115. K. Zemanek, loc. cit., supra note 30, p. 385.
116. Mostefa Trari-Tani, "L'ordre public transnational devant l'arbitre international", Arab Law Quarterly, Vol. 25, 2011, p. 89.
117. U. Linderfalk, loc. cit., supra note 29, p. 862. Also James A. Green, "Questioning the Peremptory Status of the Prohibition of the Use of Force", Michigan Journal of International Law, Vol. 32, 2011, p. 244.
118. Michael Akehurst, "The Hierarchy of the Sources of International Law", British Yearbook of International Law, Vol. 47, 1974-1975, pp. 284-285.
119. Alexander Orakhelashvili, Peremptory Norms in International Law, Oxford University Press, 2006, p. 46.
120. Inter-American Commission on Human Rights, Report No. 62/62, OEA/Ser.L/V/II.117, doc.1, rev.1, 2003, para 49.
121..2019 ILC Report, p. 168.
122. William E. Conklin, "The Peremptory Norms of the International Community: A Rejoinder to Alexander Orakhelashvili", European Journal of International Law, Vol. 23, 2012, p. 869.

with States that have various civilizations and cultures such as China, European States, India, Japan, Russia, the US, Africa and Arab States. Even in the Arab States, moreover, justice in Iran may be different from that in Saudi Arabia. That is even more true in today's inward-looking world, fragmented more and more by COVID-19 and racism. In fact, increasing frictions and tensions in the international society suggest a great deal of difficulty in agreeing on, establishing and sustaining a single concept of international justice[123]. Hence, it would be difficult to define the values of "the international community of States as a whole" in Article 53 of the Vienna Treaty Convention.

Meanwhile, R. Kolb argues against the method of "public order of the international community". Because, according to Kolb, jus cogens cannot confine itself only to public order, there are "different types of jus cogens", not limited to those involving fundamental values of the international community[124]. This argument would make it necessary to accept a broad range of materials and information as evidence for proving the acceptance and recognition of peremptory character of jus cogens norms. The ICJ relied on a variety of materials as evidence of peremptory character of prohibition of torture in the case of Questions Relating to the Obligation to Prosecute or Extradite[125]. Any material capable of expressing or reflecting the views of States are held to be relevant as evidence of acceptance and recognition of the international community. Also, the ILC comments, evidence of acceptance and recognition that a norm is a jus cogens norm may take a wide range of forms[126]. Although falsifiability is thus ensured, the method of international public order would not be able to make its normative basis shared by "a very large majority of States" constituting the international community which is increasingly fragmented[127].

In this way, difficulties involved in tests to identify a norm as jus cogens are related to the requirement that it must be accepted and recognized by "the international community of States as a whole". M. Ragazzi elaborates on the inherent limitation of tests involving "the international community of States as a whole", especially after the collapse of the communist regimes in the former Soviet Union and in Eastern Europe[128].

Given that "the international community of States as a whole" has duly accepted and recognized a norm as jus cogens, the test of non-derogation, one of the necessary conditions for the peremptory character, is to be applied. In order for the peremptory character of a norm to be established, there must be a non-derogability clause in the norm in a treaty or an international customary law[129]. It is not usual for a treaty, let alone an international customary law, however, to specify a suppression, though exceptions are found in international human rights treaties. In other words, there are peremptory norms that satisfy the test of non-derogation in international human rights treaties.

At this point, Article 4 of the International Covenant on Civil and Political Rights (ICCPR) should

123. Andrew Hurrell, "Order and Justice in International Relations: What Is at Stake?", in Rosemary Foot, Robert A. Gaddis and Andrew Hurrell (eds.), Order and Justice in International Relations, Oxford University Press, 2003, pp. 24-48.
124. R. Kolb, op. cit., supra note 53, pp. 33-35.
125. Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), ICJ Rep 2012, para. 99.
126. In the draft Conclusion 8 of the 2019 ILC Report, such material includes public statements made on behalf of States, official publications, government legal opinions, diplomatic correspondence, legislative and administrative acts, decisions of national courts, treaty provisions, and resolutions adopted by an international organization or at an intergovernmental conference. In addition, in the draft Conclusion 9, the subsidiary means for the determination of the peremptory character of norms of general international law are provided. The means include decisions of international courts and tribunals, in particular of the ICJ, and the works of expert bodies established by States or international organizations as well as the teachings of the most highly qualified publicists of the various nations
127. 2019 ILC Report, p. 168. The phrase "a very large majority of States" will be expounded upon below.
128. M. Ragazzi, op. cit., supra note 26, pp. 56-57.
129. Australian Government, Attorney-General's Department, "Absolute Rights", https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/absolute-rights.

be considered. The consideration would result in raising serious problems on the right to self-determination as a possible norm of jus cogens, and finally its eligibility for a norm of jus cogens will be denied.

Article 4 (1) provides, in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, that the States parties may take measures derogating from their obligations arising under the ICCPR[130]. The States parties must inform other States parties through the intermediary of the UN Secretary-General about which rights have been suspended as a result of the declaration of public emergency under Article 4 (3) of the ICCPR.

In principle, international human rights that are prescribed in the ICCPR are derogable rights which allow States parties to temporarily suspend their application, recognizing that State emergencies may require limits to be placed on the exercise of certain human rights. The derogability of the rights would exclude reliance on justifications precluding wrongfulness such as force majeure, distress and necessity under the Draft Articles on Responsibility of States for Internationally Wrongful Acts. The scale and severity of COVID-19 pandemic, for example, reaches "a level where restrictions are justified on public health grounds"[131]. As derogable rights are not peremptory, they are not eligible for norms of jus cogens.

Actually, the derogability clause in Article 4 (1) of the ICCPR is exposed to the risk of abuse for political purposes. Thus, it is reported on the COVID-19 emergency measures that "emergency decrees have already been used to achieve political ambitions beyond addressing COVID-19 in places like Hungary and Bulgaria"[132]. "Emergency powers carry a grave risk of being abused", Martin Scheinin notes, "often for political purposes such as curtailing dissent, dissolving Parliament, postponing elections or cementing the powers of a would-be dictator"[133]. Michelle Bachelet, the UN High Commissioner for Human Rights worries in a letter addressed to the President of the Human Rights Council as below[134]:

"I am profoundly concerned by certain countries' adoption of emergency powers that are unlimited and not subject to review. In a few cases, the epidemic is being used to justify repressive changes to

130. As examples of restrictive measures, Palestinian Prime Minister announced several measures that included "shutting educational institutions and other official institutions; restrictions on the freedoms of movement and expression; restrictions relevant to mandatory quarantine; and other relevant restrictions". Palestinian Center for Human Rights, "COVID-19 State of Emergency: Powers and Restrictions Under Palestinian and International Law", International Middle East Media Center, Fact Sheets, 2020, https://imemc.org/article/covid-19-state-of-emergency-powers-and-restrictions-under-palestinian-and-international-law/.

131. UN, COVID-19 and Human Rights: We are All in This Together, 2020, p.3. On the relations between the derogation and State responsibility, see Federica Paddeu and Freya Jephcott, "COVID-19 and Defences in the Law of State Responsibility: Part I", EJIL:Talk, 2020, https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-i/, and "COVID-19 and Defences in the Law of State Responsibility: Part II", https://www.ejiltalk.org/covid-19-and-defences-in-the-law-of-state-responsibility-part-ii/.

132. Cassandra Emmons, "COVID 19 and States of Emergency: International Human rights Law and COVID-19 States of Emergency", Verfassungsblog on Matters Constitutional, 2020. https://verfassungsblog.de/international-human-rights-law-and-covid-19-states-of-emergency/. Particularly, it is noted, in respect of Hungary, that "[i]n extreme cases, a permanent, unlimited state of emergency, could lead to the removal of checks and balances and undermining the rule of law to the point where a country ceases to be democratic. Indeed, the Hungarian bill appears to be just that, a push towards autocracy masqueraded as a measure that ensures the safety of citizens", in "Emergency measures and the rule of law in the age of covid-19", Democracy Reporting International, 2020, https://democracy-reporting.org/dri_publications/emergency-measures-and-the-rule-of-law-in-the-age-of-covid-19/. See also Amy Guthrie, "Report: COVID-19 Emergency Powers Open Door for Corruption in Latin America", Law.com International, 2020. https://www.law.com/international-edition/2020/05/26/report-covid-19-emergency-powers-open-door-for-corruption-in-latin-america/?slreturn=20200808000111. Generally, see "Debate: COVID 19 and States of Emergency", Verfassungsblog, 2020, https://verfassungsblog.de/category/debates/covid-19-and-states-of-emergency-debates/.

133. Martin Scheinin, "COVID-19 Symposium: To Derogate or Not to Derogate?", Opinio Juris, 2020, https://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/.

134. OHCHR, "COVID is 'a colossal test of leadership' requiring coordinated action, High Commissioner tells Human Rights Council", 2020, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25785&LangID=E.

regular legislation, which will remain in force long after the emergency is over."

A state of emergency "should not, in any circumstances, be an excuse to quash dissent", Hilary Gbedemah, Chair of the UN Committee on the Elimination of Discrimination against Women, underscored[135].

Meanwhile, in the proviso of Article 4 (1), the implementation of measures to derogate from the obligations provided in the ICCPR is conditioned. Namely, "provided that such measures … do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin". Derogation must be applied in a non-discriminatory manner. In practice, the non-exhaustive list of possible norms of jus cogens in the 2019 ILC Report includes the prohibition of racial discrimination and apartheid[136]. In the face of the COVID-19 pandemic, the UN Human Rights Office of the High Commissioner (OHCHR) requires that "emergency declarations based on the COVID-19 outbreak should not be used as a basis to target particular individuals or groups, including minorities"[137]. Thus, the Inter-American Court of Human Rights issued an advisory opinion on the juridical condition and rights of undocumented migrants, in which it ruled that the fundamental principle of equality and nondiscrimination fell within the sphere of jus cogens[138]. Also, in Mexico, the collegiate circuit courts held that the guarantee of free assistance by a translator or interpreter for persons who did not understand or speak Spanish constituted a norm of jus cogens[139]. And, in respect of the emergency measures against COVID-19 crisis, it is appealed by the OHCHR that, "[e]veryone, without exception, has the right to life-saving interventions and this responsibility lies with the government. The scarcity of resources or the use of public or private insurance schemes should never be a justification to discriminate against certain groups of patients"[140]. Considering in advance that the courts will be overwhelmed by applications on grounds of non-derogable non-discrimination norm in the aftermaths of the COVID-19 crisis, Audrey Lebret remonstrates, "States must pay particular attention to vulnerable populations in order to ensure they are not disproportionally affected"[141].

In this way, while some international human rights are absolute, other human rights, such as the right to liberty, are derogable in time of public emergency. Such derogable rights are also called relative human rights. However, even relative human rights from which derogation is otherwise permitted under Article 4 (1) should not be derogated if the above-mentioned discrimination is involved. If it were not for such discrimination, in other words, the States parties may take measures to derogate from the obligations arising under the ICCPR.

135. OHCHR, "UN Human Rights Treaty Bodies Call for Human Rights Approach in Fighting COVID-19", 2020, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25742&LangID=E.
136. 2019 ILC Report, Annex.
137. OHCHR, Emergency Measures and COVID-19: Guidance, 2020. https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf. Then, the OHCHR added sexual orientation and gender identity, disability, political or other opinion, national origin, property, and birth or other status to the grounds of prohibited discrimination in taking measures to derogate.
138. Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of 17 September 2003 on Juridical Condition and Rights of Undocumented Migrant, 2003, paras. 98-100.
139. Mexican Supreme Court of Justice, amparo directo en revisión 4530/2014, 30 September 2015, pp. 25, 27, 29, 36 and 43, reproduced in "Contribution of Mexico to the Work of the International Law Commission on the Topic 'Jus Cogens'", 2017, pp. 9-10. https://legal.un.org/docs/?path=../ilc/sessions/69/pdfs/english/jc_mexico.pdf&lang=ES.
140. OHCHR, "No exceptions with COVID-19: Everyone has the Right to Life-Saving Interventions", 2020. https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25746.
141. Audrey Lebret, "COVID-19 Pandemic and Derogation to Human Rights", Journal of Law and the Biosciences, Vol. 7, 2020, p. 15. The Palestinian Center for Human Rights refers to "[n]on-discrimination in imposing procedures, except for the categories whose movement is essential to meet the needs of the public (for example: health workers, security personnel, workers in bakeries, fuel stations, and foodstuff merchants)", in idem., loc. cit., supra note 130. The exceptions are not based on the grounds of prohibited discrimination enshrined in the proviso of Article 4 (1) of the ICCPR.

Another norm from which derogation is not permitted under the ICCPR is enshrined in Article 4 (2). According to the Secretariat for the Convention on the Rights of Persons with Disabilities, "[c]ertain rights have been considered so important that they are non-derogable. … there exist four common non-derogable rights. These are the right to life, the right to be free from torture and other inhumane or degrading treatment or punishment, the right to be free from slavery or servitude and the right to be free from retroactive application of penal laws. These rights are also known as peremptory norms of international law or jus cogens norms"[142].

To that effect, Article 4 (2) prescribes that no derogation may be made in respect of the right to life, the prohibition on torture, cruel, inhuman or degrading treatment, the prohibition of slavery, slave-trade and servitude, the prohibition on imprisonment on the basis of inability to pay a contractual obligation, the principle of legality in the field of criminal law, the right to recognition as a person before the law and the freedom of thought, conscience and religion. These are prescribed in Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18, respectively. Thus, the Inter-American Commission on Human Rights has identified the right to life as a norm of jus cogens in the case of Victims of Tugboat in 1997[143].

These articles and paragraphs enumerated in Article 4 (2) of the ICCPR are mainly related to the rights to life and personal liberty. These rights are also known as 'physical integrity rights', which are "the entitlements individuals have in international law to be free from arbitrary physical harm and coercion by their government", according to David L. Cingranelli and David L. Richards[144].

Many examples in the ILC's non-exhaustive list of possible norms of jus cogens are in effect related to the restrictively enumerated articles in Article 4 (2). The ILC list includes: the prohibition of genocide; the prohibition of crimes against humanity; the basic rules of international humanitarian law; the prohibition of slavery; and the prohibition of torture[145].

The Supreme Court of Canada held that, "the prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity were jus cogens"[146]. And the Supreme Court of India referred to "the concept of jus cogens meaning … the peremptory non-derogable norm in international law for protection of life and liberty"[147]. The OHCHR requires, in facing the COVID-19 pandemic, that even during states of COVID-19 emergency "[s]ome rights, such as the right to life, the

142. Secretariat for the Convention on the Rights of Persons with Disabilities, "International Norms and Standards relating to Disabilities", UN Enable, 10.2, 2003, https://www.un.org/esa/socdev/enable/comp210.htm#10.2. Thus, the Palestinian Center for Human Rights makes clear on the restrictions on emergency powers under the COVID-19 pandemic as below: Detention decisions are reviewed by the Attorney General within 15 days of its occurrence; The arrest or search procedure should be absolutely necessary to achieve the declared goal in the state of emergency; These powers shall not be used to suppress opposition or freedoms that are not relevant to the state of emergency; The detained person has the right to appoint a lawyer of their choice to attend the procedures; and Detainees should be protected from getting infected with the coronavirus. Idem., loc. cit., supra note 130.

143. Victims of the Tugboat ''13 de Marzo'' v Cuba, Inter-American Commission on Human Rights, Case 11.436, Report No. 47/96, Inter-Am.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev., 1997, para. 79.

144. David L. Cingranelli and David L. Richards, "Measuring the Level, Pattern, and Sequence of Government Respect for Physical Integrity Rights", International Studies Quarterly, Vol. 43, 1999, p. 407.

145. 2019 ILC Report, p. 208, Annex.

146. Nevsun Resources Ltd. v Araya, 2020 SCC 5, Supreme Court of Canada, 28 February 2020, quoted in "Nevsun Resources Ltd. v. Araya: Supreme Court of Canada Allows Eritrean Miners' Claim for Violations of Customary International law to Proceed", Herbert Smith Freehills, 2020, https://hsfnotes.com/publicinternationallaw/2020/03/16/nevsun-resources-ltd-v-araya-supreme-court-of-canada-allows-eritrean-miners-claim-for-violations-of-customary-international-law-to-proceed/.

147. State of Punjab v Dalbir Singh, Supreme Court of India, Criminal Appeal No, 117 of 2006, Decided on 01 February 2012, quoted in Chhaya Bhardwaj, "Indian Courts and Jus Cogens", International Law and the Global South, 2020.https://internationallawandtheglobalsouth.wordpress.com/2020/06/29/guest-post-indian-courts-and-jus-cogens/. Even though India is not a State party to the Vienna Treaty Convention, India's Supreme Court interprets and applies it. Ibid.

prohibition from torture and the principle of legality in criminal law, cannot be derogated from and continue to apply in all situations"[148]. With respect to the principle of legality in criminal law, the UN Human Rights Committee adds the fundamental principles of fair trial, including the presumption of innocence to the list of non-derogable norms[149].

It is reported that Morocco has declared a state of emergency in response to the growing threat of COVID-19 outbreak, to come into effect starting on March 20, 2020[150]. Morocco has been under a state of emergency until August 10, empowering the Moroccan government to reimpose lockdown measures when warranted by pandemic-related public health threats[151]. As Matt Pollard submits, "States have obligations to take effective protection measures arising from the right to life and right to health"[152]. For that purpose, courts should maintain their jurisdiction to adjudicate claims for violations of non-derogable rights[153]. Therefore, as the Siracusa Principles declare, States parties to the ICCPR should take special precautions in times of public emergency to ensure that "neither official nor semi-official groups engage in a practice of arbitrary and extra-judicial killings or involuntary disappearances, that persons in detention are protected against torture and other forms of cruel, inhuman or degrading treatment or punishment, and that no persons are convicted or punished with retroactive effect"[154].

To explain the normative structure under Article 4 of the ICCPR, it is noted that "[l]egal and anthological scholars have introduced the dual concepts of cultural relativism and universalism into the human right debate"[155], different from the sheer universalism of the Universal Declaration of Human Rights in 1948[156].

In reference to norms of jus cogens, the Human Rights Committee has commented in the General Comment No. 29 on emergency as below[157]:

"The enumeration of non-derogable provisions in Article 4 is related to … the question whether certain human rights obligations bear the nature of peremptory norms of international law. The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in Article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., Articles 6 and 7)."

On the contrary, other rights prescribed in the ICCPR, including the right to self-determination, are derogable in times of public emergency. The OHCHR proclaims, relating to the COVID-19 pandemic, that "[s]ome rights, such as freedom of movement, freedom of expression or freedom of peaceful

148. OHCHR, Emergency Measures and COVID-19: Guidance, 2020, https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf.
149. UN Human Rights Committee, General Comment No. 29: State Emergency (article 4), UN Doc CCPR/C/21/Rev.1/Add.11, 2001, para. 11.
150. Morgan Hekking, "COVID-19: Morocco Declares State of Emergency", Morocco World News, 2020, https://www.moroccoworldnews.com/2020/03/296213/covid-19-morocco-declares-public-health-emergency/.
151. Safaa Kasraoui, "Morocco's Minister of Health: COVID-19 Offers No Deadline", Morocco World News, 2020, https://www.moroccoworldnews.com/2020/07/312312/moroccos-minister-of-health-covid-19-offers-no-deadline/.
152. Matt Pollard, "COVID-19 Symposium: The Courts and Coronavirus (Part I)", Opinio Juris, 2020, http://opiniojuris.org/2020/04/03/covid-19-symposium-the-courts-and-coronavirus-part-i/.
153. OHCHR, Emergency Measures and COVID-19: Guidance, 2020, supra note 136.
154. American Association for the International Commission of Jurists, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, 1984, Annex, para. 59.
155. "Human Rights Act 1998: Are All Human Rights Absolute and Inalienable?", Lawaspect.com, 2020, https://lawaspect.com/human-rights-act-1998-are-all-human-rights-absolute-and-inalienable/.
156. UN GA Res 217 (III), 1948.
157. UN Human Rights Committee, General Comment No. 29: State Emergency (article 4), UN Doc CCPR/C/21/Rev.1/Add.11, 2001, para. 11.

assembly may be subject to restrictions for public health reasons"[158]. In times of public emergency, the normative status of the right to self-determination is not different from that of relative human rights[159]. Therefore, the right to self-determination is not eligible for a norm of jus cogens. Even though the right to self-determination is placed on the ILC's non-exhaustive list on possible norms of jus cogens, therefore, its feasibility as a norm of jus cogens should be falsified in application of the test of non-derogabilty.

Another question on tests for identifying a norm as jus cogens, in addition to the peremptory character, is the customary character. The existence of customary character would take norms a step further towards jus cogens. Thus, in order for the physical integrity rights and non-discrimination norm to be identified as norms of jus cogens, existence of the customary character is required, in addition to the peremptory character.

With respect to the customary character, at first, it should be recalled that the number of States parties to the ICCPR amounts to 173 as of July 2020 and China has signed up for it in 1998[160]. The States parties range all over the world. Besides, non-derogable obligations arising under the ICCPR are shared by Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms[161], and Article 27 of the Inter-American Convention on Human Rights[162]. These Conventions cover very many European and Latin American States.

On the other hand, the African Charter on Human and Peoples' Rights (African Charter) does not literally provide for non-derogable obligations[163]. However, faced with the COVID-19 pandemic, the African Commission referred to "the obligation that States Parties to the African Charter assumed under Article 1 of the Charter to take appropriate measures to give effect to the rights, duties and freedoms enshrined in the Charter including through taking measures necessary for preventing threats to the life, safety and health of people"[164]. And Solomon Ayele Dersso, Chairperson of the African Commission presented as below[165]:

"The morbidity and mortality that the pandemic precipitates pose the most serious threat to fundamental human rights, most notably the right to health, the right to personal safety and the

158. OHCHR, Emergency Measures and COVID-19, supra note 136.
159. There is a difference in the presence or absence of a claw back clause, but not in derogability in time of public emergency.
160. OHCHR, Status of Ratification Interactive Dashboard, 2020, https://indicators.ohchr.org/.
161. Aly Mokhtar, "Human Rights Obligations v. Derogations: Article 15 of the European Convention on Human Rights", International Journal of Human Rights, Vol. 8, 2004, pp. 65-87. On the case law, see Jean Allain, "Derogation from the European Convention of Human Rights in light of Other Obligations under International Law", European Human Rights Law Review, Vol. 11, 2005, pp. 480-498.
162. Mariela M. Antoniazzi and Silvia Steininger, "How to Protect Human Rights in Times of Corona?: Lessons from the Inter-American Human Rights System", Blog of the European Journal of International Law, 2020, https://www.ejiltalk.org/how-to-protect-human-rights-in-times-of-corona-lessons-from-the-inter-american-human-rights-system/.
163. The African Commission on Human and Peoples' Rights (African Commission) has confirmed in the case of Media Rights Agenda and Others v Nigeria, long before the outbreak of COVID-19 pandemic, as below: "In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore, limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances". AHRLR 200 (ACHPR 1998), 2000, paras. 68, 69.
164. The African Commission, "Press Statement on Human Rights Based Effective Response to the Novel COVID-19 Virus in Africa", 2020, preamble. https://www.achpr.org/pressrelease/detail?id=483. For that matter, Etong Kame emphasized, "[e]ven in a state of emergency, the use of force remains guided by the principles of legality, necessity, proportionality and precaution. The use of force and firearms must be avoided, and all possible non-violent means must be exhausted before resorting to violent means. We therefore urge governments to condemn such actions and to hold agents accountable". African Commission, "ACHPR 66 | States must ensure a human rights approach to fighting COVID-19", https://www.ishr.ch/news/achpr-66-states-must-ensure-human-rights-approach-fighting-covid-19.
165. African Commission, "Presentation of Commissioner Solomon Ayele Dersso, Chairperson of the African Commission on Human and Peoples' Rights at the Dialogue between Regional Human Rights Protection Commissions in the Context of the Pandemic Hosted by the Inter-American Commission of Human Rights 12 August 2020", 2020, p.2, https://www.achpr.org/pressrelease/detail?id=529.

right to life. It is a human rights necessity that States in pursuit of discharging their human rights obligations under Article 1 of the African Charter on Human and Peoples' Rights, the founding treaty of the African human rights system, take appropriate measures for safeguarding the public from the threat that this pandemic poses to health, safety and life."

Though the African Commission does not use the word 'non-derogability' itself. the above-mentioned reference and statement may be construed that the States parties to the African Charter are under obligation to give effect to the right to life, safety and health even in the midst of COVID-19 pandemic, i.e. in time of public emergency.

As regards the non-derogability of non-discrimination norm, the African Commission seems, in one view, as if it were accepting and recognizing it when the African Commission requires the States parties that "[t]he restrictions on rights should not in their application have disproportionate impact on vulnerable groups including precarious workers, people operating in the informal sector, persons with disabilities, homeless people and small businesses"[166], in the de facto state of public emergency. In response to the COVID-19 pandemic, the African Union Group of Ambassadors to the UN condemned stigma, hate speech, hate crimes, xenophobia, racism and all forms of discrimination[167].

Therefore, it may well be justified to conclude that the non-derogable or peremptory character of norms prescribed in Article 4 of the ICCPR, i.e. norms on physical integrity rights and non-discrimination, is accepted and recognized by the African States. Even if the African States did not accept and recognize the non-derogability of these norms, almost all the African States are States parties to the ICCPR. In consequence, the non-derogable peremptory norms of physical integrity rights and non-discrimination are accepted and recognized by so many States with different civilizations and cultures as to establish the non-derogability of the norms as customary.

Based on the acceptance and recognition of the customary character of non-derogable norms, then, David Kennedy asks a question on the applicability of a norm of jus cogens: Will this norm be opposable to those States which have persistently objected to its peremptory character?[168] On the concept of 'persistent objector', I. Brownlie alleges that "it is well recognized by international tribunals"[169], citing the Anglo-Norwegian Fisheries[170] and the North Sea Continental Shelf cases[171]. But, in the 2019 ILC Report, it is announced that the persistent objector rule is not applicable to jus cogens. The ILC adds the proviso, however, that this inapplicability is limited to the extent that "such persistent objection implies that the norm in question is not accepted and recognized by the international community of States as a whole as one from which no derogation is permitted". The ILC summarizes that if a rule of customary international law was the object of persistent objections from several States, such objections might not be sufficient to preclude the emergence of a rule of customary international law but might be sufficient to preclude the norm from being accepted and recognized as a norm of jus cogens[172].

166. Ibid., para. 10.
167. African Union Group of Ambassadors to the UN, "Statement to the UN in New York on Covid 19", Regional Human Rights Mechanisms: Response to the Novel COVID-19 Virus, 2020, https://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Countries/NHRI/RHRM/RHRMs.Covid-19.response.docx&action=default&DefaultItemOpen=1.
168. David Kennedy, International Legal Structures, Nomos Verlagsgesellschaft Mbh & Co, 1987, p. 57.
169. I. Brownlie, op. cit., supra note 32, p. 11.
170. Anglo-Norwegian Fisheries Case (UK v Norway), ICJ Rep 1951, p. 131.
171. North Sea Continental Shelf cases (Germany v Denmark; Germany v the Netherlands), ICJ Rep 1969, pp. 26-27.
172. 2019 ILC Report, pp. 156, 185-186.

The exact meaning of 'customary' in the phrase "the customary character of jus cogens" may be different from the same word in the phrase "customary international law". Can there be such a case that a norm is peremptory but not customary in the sense of "customary international law"? The answer may be in the negative. What can be revealed from the comment of the ILC may be only that the corroboration of peremptory character is conceived as quantitatively more or less harder than that of mere customary character. Thus, Serge Sur submits that "the formation of a rule of jus cogens is identical to that of a customary rule and that jus cogens is a strengthened form of custom, a higher derivation of custom"[173]. The ILC conceives as well that customary international law is the most common basis for jus cogens[174]. Because of the empirical qualities, the method of peremptory customary law may be appreciated from the perspective of falsifiability[175].

The reason why norms of jus cogens must have the customary character is that a decisive difference of jus cogens from a treaty is in its absence of consent by States. Indeed, jus cogens based on consent is contradictory[176]. In the opinion of the Austrian delegation, "it seems doubtful whether also treaty provisions, including some that are not universally applied or even contained in multilateral treaties, might 'serve as bases' for jus cogens norms"[177].

That a norm of jus cogens must be at least an international customary law is implied by the use of the word 'emerges' in Article 64 of the Vienna Treaty Convention[178]. E. Proukaki observes that "[A] rticle 53 seems to reflect a concept that already existed in customary international law"[179]. The ILC conceives, in this regard, that establishment of a norm as an international customary law is the most common basis for the emergence of a norm of jus cogens[180].

But, usually there would be no explicit non-derogation and modification clauses in the rules of international customary law. On the contrary, non-derogation and modification clauses are involved in treaties. The repetition of the same rule provided in different treaties may constitute "the most common basis for the emergence of a norm of jus cogens"[181]. I. Handayani argues, in this respect,

173. Serge Sur, "Discussion Statement", in Antonio Cassese and J. H. H. Weiler (eds.), Change and Stability in International Law-Making, de Greyter, 1988, p. 128.
174. 2019 ILC Report, pp. 159-161. The ILC adds that treaty provisions and general principles of law may also serve as bases for jus cogens. Draft Conclusion 5, ibid., p. 143.
175. Although the method of peremptory customary law seems to be more susceptible to falsifiability in comparison with other methods, the phrases "the conscience of mankind" and "moral law" referred to in 2019 ILC Report would be suggestive of the method of international public order. 2019 ILC Report also refers to "obligations which protect essential humanitarian values" (pp. 151-152). In this way, it may be argued that the ILC is paving a way towards a "moral value oriented public order" (Alain Pellet, "Comments in Response to Christine Chinkin and in Defense of Jus Cogens as the Best Bastion against the Excesses of Fragmentation", Finnish Yearbook of International Law, Vol. 17, 2006, p. 87), or in the direction of international public order, arguably for justifying the inclusion of the right to self-determination in the list of possible norms of jus cogens. The argument based on the second method of international public order is, however, not susceptible to falsifiability.
176. A. Pellet, ibid.
177. Permanent Mission of Austria, Statement of Austria, 2017, p. 3. https://legal.un.org/docs/?path=../ilc/sessions/70/pdfs/english/jc_austria.pdf&lang=E.
178. I. Shearer, op. cit., supra note 13, p. 49.
179. K. Proukaki, op. cit., supra note 108, p. 22. If so, however, how and when it is established as an international customary law should be specified, as it were as an interim report. "Custom must have a beginning", Sheldon Glueck reconfirms. Idem., "The Nuremberg Trial and Aggressive War", Harvard Law Review, Vol. 59, 1946, p. 398, quoted in Regina v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3), House of Lords, 1 A.C., 2000, p. 147, http://www.uniset.ca/other/cs5/2000AC147.html.
180. 2019 ILC Report, p. 161.
181. The customary character of a norm of jus cogens would, then, evoke an issue on the applicability of jus cogens norms to the non-State parties to the Vienna Treaty Convention. In respect of the right to life as a norm of jus cogens, Bertrand G. Ramcharan maintains, the rule of non-derogability is applicable to all States. Idem., "The Concept and Dimensions of the Right to Life", in idem. (ed.), The Right to Life in International Law, Martinus Nijhoff, 1985, p. 15. And in the case of Armed Activities on the Territory of the DRC (DRC v Rwanda), the ICJ refers to "the fact that a dispute relates to compliance with a norm having such a character [being a peremptory norm of general international law (jus cogens)], which is assuredly the case with regard to the prohibition of genocide". ICJ Rep 2006, para. 64.

that States can express agreement with peremptory norms "by codifying them in agreements and accepting them as customary international law"[182]. An establishment that a peremptory norm has customary character is tantamount to the identification of the norm as jus cogens.

Who is, then, entitled to eventually decide on the emergence of a norm of jus cogens? G. Gaja answers that the Vienna Treaty Convention assigns such decision to the ICJ, in accordance with its Article 66[183]. Indeed, the emergence of a norm of jus cogens may be authoritatively confirmed by the ICJ. In practice, however, K. Zemanek unveils that the ICJ has over decades only vaguely hinted at the possible emergence of norms of jus cogens[184], until the case of Armed Activities on the Territory of the DRC in 2006. Why has the ICJ changed its passive position on jus cogens? Related to this question, it is interesting to note Zemanek's impression of the judicial dictum as "being the result of a spontaneous concurrence of opinion among the judges, each using his or her undisclosed method to reach it". "Careful research is not discernable", he observes[185]. That's why falsifiability matters. The problem will be illustrated by considering the right to self-determination that is proposed as a possible norm of jus cogens in 2019 ILC Report.

4. Right to Self-Determination

In the 1960s, the right to self-determination has been developed as an international customary law, culminating in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in 1970, to bring a speedy end of colonialism, bearing in mind that "subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle"[186]. The Declaration entitles such peoples to seek and receive support in accordance with the UN Charter. However, the Declaration, which was adopted half a year after the emergence of jus cogens by the adoption of the Vienna Treaty Convention in 1969, does not refer to the jus cogens status of the right to self-determination.

In the post-colonial days, the focuses of self-determination arguments have been applied largely to the obligation erga omnes to respect the right to self-determination on the one hand[187], and the legitimacy of remedial secession on the other hand[188]. In the discussions on jus cogens in the post-colonial era, in this way, the right to self-determination has not always been highlighted. Sometimes, 'electoral self-determination', in the sense of "the freedom of political choice and the right to elect the governing bodies", has been referred to, though it is a derogable right. The forum for the discussions on the right to self-determination as a possible norm of jus cogens has been mainly the ILC. Thus in the 2019 ILC Report, the right to self-determination is put on the non-exhaustive list of possible

182. I. Handayani, loc. cit., supra note 5, p. 250.
183. G. Gaja, loc. cit., supra note 56, p. 282.
184. K. Zemanek, loc. cit., supra note 30, p. 387.
185. Ibid., p. 389.
186. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN GA Res 2625 (XXV), 1970.
187. The ICJ holds that the respect for the right to self-determination is an obligation erga omnes. See Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, advisory opinion, ICJ Rep 2019, para. 158; East Timor case (Portugal v Australia), ICJ Rep 1995, para. 29; and Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Second Phase), ICJ Rep 1970, para. 33.
188. S. Matsumoto, "Separatism in Africa: A Fundamental Problem", Policy Center for the New South, Policy Brief PB-19/43, 2019.

norms of jus cogens[189].

2019 ILC Report exposes[190], it is true that one State expressed the view that, contrary to the ILC's previous conclusions, the jus cogens status of self-determination was "highly questionable"[191], taking into account Article 53 of the Vienna Treaty Convention, which provides for the requirement of non-derogability. The ILC's response to the criticism did not, however, refer to non-derogability, but only alleged that the previous conclusions were justified by the practice and that its inclusion in the list previously was not in error[192].

Why is the right to self-determination included in the ILC's list of possible norms of jus cogens? Its answer may lurk in the relations between the phrase "the international community of States as a whole" in draft Conclusion 2 and the phrase "the international community" in draft Conclusion 3. They differ in the existence of the phrase "of States as a whole".

With regard to the words "of States", they were used in the phrase "international community as a whole" in 1982[193], and thus excluded the words "of States" from the phrase. In respect of this exclusion, the 2019 ILC Report did not overlook, but on reflection, the ILC decided, as mentioned above, that in the present state of international law, it is States that are called upon to establish or recognize peremptory norms[194]. The International Criminal Court held, in the case of Prosecutor v Katanga, that the peremptory character found increasing recognition "among States"[195]. The ICJ also determined the peremptory character of the prohibition of torture on the basis of instruments developed by States[196], not those developed by non-State entities. In a similar way, domestic courts have continued to link the identification of a norm as jus cogens with recognition by States[197], not by non-State entities. Also, Joe Verhoeven views that any norm cannot be considered as having a peremptory character unless States agree[198]. Therefore, non-State entities are to be excluded from the concept of 'the international community' so long as norms of jus cogens are concerned. In consequence, 'the international community of States' and 'the international community' are not substantially different.

On the meaning of 'as a whole', it was defined in the ILC meeting in 1976 as "all the essential components of the international community"[199]. But, once again, what "the essential components of the international community" are is not self-evident in our fragmented world. In the ILC Commentary to Article 19 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the ILC in 2001, it is commented regarding the concept of 'as a whole' that "this certainly does not mean the requirement of unanimous recognition by all the members of the community, which

189. Eric Neumayer, "Do Governments Mean Business When They Derogate?: Human Rights Violations during Notified States of Emergency", Review of International Organizations, Vol. 8, 2013, p. 15. It may be no exaggeration to say that the right to self-determination as a possible norm of jus cogens has been discussed mainly in the framework of the ILC.
190. 4th Report on Peremptory Norms of General International Law (Jus Cogens) by Dire Tladi, Special Rapporteur, UN Doc A/CN.4/727, 2019, para. 108.
191. Mr. Eidelman (Israel), Report of the ILC on the Work of its 70th session, UN Doc A/C.6/73/SR.27, 2018, para. 64.
192. 4th Report on Peremptory Norms of General International Law (Jus Cogens), supra note 190.
193. See paragraph (3) of the commentary to draft Article 53 of the Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations, Yearbook of the ILC, 1982, Vol. II, p. 56.
194. Ibid., p. 133.
195. Prosecutor v Katanga, Case Decision on the Application for the Interim Release of Detained Witnesses, Trial Chamber II, International Criminal Court, No. ICC-01/04-01/07-34-05-tENg, 2013, para. 30.
196. Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), ICJ Rep 2012, para. 99.
197..Buell v Mitchell, 274F.3d 337, 2001, p. 373.
198. Joe Verhoeven, "Jus Cogens and Reservations or 'Counter-reservations' to the Jurisdiction of the International Court of Justice", in Karel Wellens (ed.), International Law: Theory and Practice, Martinus Nijhoff, 1998, pp. 195-196.
199. Yearbook of ILC, 1976, Vol. I, p. 73.

would give each state an inconceivable right of veto", on the one hand. In the 2019 ILC Report, on the other hand, 'as a whole' is not a simple 'majority' of States. Rather, the report continues, the majority has to be "a very large majority of States"[200]. Determining whether there is "a very large majority of States" is not, however, a mechanical exercise in which only the number of States is to be counted. The non-specified expression of "a very large majority of States" would weaken falsifiability. The Austria delegation reiterates that "although that notion may not require participation of 'all states', it certainly requires a 'very large majority' of or virtually all states. Such language has been usefully added to the current wording of draft conclusion"[201].

Meantime, Robert Ago has once suggested as a Special Rapporteur that a norm of jus cogens should be recognized by "the basic components of the international community", including Western and Eastern and developed and developing States[202]. Similarly, according to Teraya Koji, the concept of 'as a whole' must include common elements among "major legal cultures"[203]. According to the 2019 ILC Report, 'as a whole' is captured by the phrase 'community of States' as opposed to simply 'States'. Then, the combination of the phrases 'as a whole' and 'community of States' serves to emphasize that it is States as a collective or community[204]. In this way, 'as a whole' would not add much to 'community'. Both indicate 'States as a collective'.

From the above, there would be no substantial difference between 'the international community as a whole' and 'the international community'. If that is so, what is the purpose for adopting these two different expressions in the Text of the Draft Conclusions on jus cogens?[205] One of the purposes may be, as a possible interpretation, to include the right to self-determination in the ILC's list of possible jus cogens norms, arguably for political reasons. If following this interpretation, then it can be guessed that the concept of 'fundamental values of the international community' would be expected to help justify the inclusion of the right to self-determination, which is not non-derogable, in the list. In other words, the ILC seems to have attempted to justify its inclusion in the list not by its non-derogability on the basis of the method of peremptory customary law, but by 'fundamental values' based on the method of international public order[206]. That may explain the reason why draft Conclusion 3 that is implicitly based on the method of international public order is included in the Text of the draft Conclusions on jus cogens, despite its contradiction with the method of peremptory customary law on which other draft Conclusions are based.

For that matter, H. Espiell submits, in favor of the jus cogens status of the right to self-determination, that "the exceptional importance of the principle of the self-determination of peoples in the modern

200. Draft Conclusion 7, 2019 ILC Report, p. 143. In the process of drafting the Vienna Treaty Convention, the representative of Iraq has asserted that acceptance by all States is not required for a norm to be identified as jus cogens, but that assertion is not explicitly confirmed in the finally adopted articles of the Vienna Treaty Convention. Comment by Mr. Yaseen, 80th Meeting Committee of the Whole, 21 May 1968, quoted in Kreijen Greig (ed.), State Sovereignty and International Governance, Oxford University Press, 2002, pp. 534-535. As an example, the US Court of Appeals held, in determining that the prohibition of the death penalty was not a jus cogens norm, because only 61 states, or approximately 32 percent of States, had completely abolished the death penalty. Buell v. Mitchell, 274 F.3d 337, 6th Cir., 2001, p. 754, quoted in the 2019 ILC Report, p.166.

201. Permanent UN Mission of Austria, "Statement of Austria", 2017, p. 3. https://legal.un.org/docs/?path=../ilc/sessions/70/pdfs/english/jc_austria.pdf&lang=E.

202. 5th Report on State Responsibility, Report of Special Rapporteur, Mr. Robert Ago, Yearbook of the ILC, 1976, Vol. II, pp. 53, 151.

203. Teraya Koji, "Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights", European Journal of International Law, Vol. 12, 2001, p. 929.

204. 2019 ILC Report, p. 167-168.

205..Ibid., p.142.

206. According to the ILC's commentary, the characteristics contained in draft Conclusion 3 are themselves not criteria for the identification of norms of jus cogens, though "'characteristics' provide supplementary evidence". 2019 ILC Report, p. 157, (16).

world" is such that it is one of the cases of jus cogens[207]. As the ILC itself emphasizes, however, it is not sufficient to point to "the importance" of a norm in order to show the peremptory character[208]. Espiell's phrase "the exceptional importance of the right to self-determination ... in the modern world" would be suggestive of the second method of international public order. In discussing 'public order', however, a clear distinction should be made between the international and domestic societies. The concept of international public order, as opposed to 'inter-personal' public order, has been doubted by the historical fact that State crimes were not eventually incorporated in the Rome Statute on the International Criminal Court adopted in 1998 and the Draft Articles on Responsibility of States for Internationally Wrongful Acts in 2001.

Considering from the perspective of peremptory customary law, on the other hand, the ILC has persistently quoted paragraph 29 of the East Timor case as evidence for the jus cogens status of the right to self-determination[209]. However, this paragraph does not refer to jus cogens as such but discusses only the erga omnes character of the right[210]. In other words, the oft-cited paragraph of the East Timor case as such is irrelevant to the jus cogens status of the right to self-determination. Besides, any other evidence to show that status is scant. Regrettably, moreover, the ILC has not elaborated on how the nationalist values of a specified people are necessarily related to 'the fundamental values of the international community' which are to be reflected in and protected by a norm of jus cogens[211], if based on the method of international public order. What is more important, the ILC's own test of non-derogability is not applied to the identification of the right to self-determination as a possible norm of jus cogens.

Though based on the third method of peremptory customary law, Predrag Zenović concludes that the right to self-determination is jus cogens, with evidence of international treaties, the General Assembly resolutions and State practice on decolonization[212]. However, among 'international treaties' is the ICCPR, under which the right to self-determination is not non-derogable. As regards the General Assembly resolutions, Special Rapporteur Aureliu Cristescu concludes in his UN report on the right to self-determination that no UN instrument confers a peremptory character on the right to self-determination[213]. As an established interpretation of the UN Charter, the General Assembly resolutions are all derogable, because they are not legally binding[214]. Besides, State practice concerning autonomy agreements may be cited as evidence to evince that the right to self-determination does not have the non-derogable peremptory character[215]. Nina Capersen examines 20 autonomy agreements reached

207. H. Espiell, Report on the Right of Self-Determination, UN Doc E/CN.4/Sub.2/405/rev.l, 1980, pp. 11-13. At the same time, Espiell notes that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is condemned in the UN. Ibid., p. 10.
208. 2019 ILC Report, p. 157.
209. Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, 2008, p. 85, n. 416.
210. ICJ Rep. 1995, para. 29.
211. Draft Conclusion 3 on the definition of jus cogens, 2019 ILC Report, p. 142.
212. Predrag Zenović, "Human Rights Enforcement via Peremptory Norms – A Challenge to Sate Sovereignty", Riga Graduate School of Law Research Papers, No. 6, 2012, p. 33. See also Karen Parker, "Jus Cogens: Compelling the Law of Human Rights", Hastings International and Comparative Law Review, Vol. 12, 1989, p. 440.
213. Aureliu Cristecsu, The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments, UN Doc E/CN.4/Sub.2/404/Rev.1, 1981, para.154.
214. Kofi Annan, In Larger Freedom: Towards Development, Security and Human Rights for All, UN, 2005, p.40.
215. According to J. Crawford, "autonomous areas are regions of a State, usually possessing some ethnic or cultural distinctiveness, which have been granted separate powers of internal administration, to whatever degree, without being detached from the State of which they are part". Idem., The Creation of States in International Law, 2nd edition, Oxford University Press, p. 323. On autonomy in general, see Yoram Dinstein, Autonomy Regimes and International Law, Villanova Law Review, Vol. 56, 2011, pp. 437-453.

on compromise after 1989[216]. And Markku Suksi refers to 70 instances of autonomy agreements[217]. Such agreements may be cited as examples of derogation from the entirety of the right to self-determination, thus depriving the right of its non-derogable peremptory character. In this way, the Siracusa Principles do not include the right to self-determination in the examples of non-derogable rights[218].

Under the ICCPR, Article 1, which is the only article providing for the right to self-determination, is not among the specified non-derogable articles (6, 7, 8 (1) & (2), 11, 15, 16 and 18) in Article 4 (2). So, obligations to protect the right to self-determination may be derogated from in time of public emergency. In this sense, it is not accurate to argue that self-determination represents the absolute legal right[219]. Even in times of public emergency, States parties to the ICCPR are not empowered to derogate from obligations to protect absolute rights, different from derogable rights[220]. The Australian Human Rights Commission reconfirms that "such derogation to Article 1 is not explicitly precluded" in the ICCPR[221]. For that matter, the UN Human Rights Committee did not refer to the right to self-determination in its statement on the non-derogable rights during COVID-19 pandemic[222].

Derogability of the right to self-determination in times of public emergency is also applicable in non-self-governing territories, despite Robert McCorquodale's assertion that the right to self-determination may represent a jus cogens norm "at least to the extent of non-self-governing territories"[223], simply because any such rule cannot be found in the ICCPR and the relevant articles of the UN Charter. The necessity of derogation in times of public emergency to the right to self-determination in non-self-governing territories would not be different from other territories, if the emergency situation is not different. Thus, derogation for saving lives should be accepted even in non-self-governing territories particularly during the COVID-19 pandemic[224]. For that matter, McCorquodale's argument may be conversely construed that the right to self-determination would not be qualified as a norm of jus cogens at least in territories other than non-self-governing territories[225]. Conclusively, the ILC is convinced that international law does not recognize the notion of regional jus cogens[226].

216. Nina Capersen, Peace Agreements: Finding Solutions to Intra-State Conflicts, Polity Press, 2017. See also Jason M. Quinn, "What Makes Autonomy Agreements Work?", International Studies Review, Vol. 21, 2019, pp. 314–315.
217. Markku Suksi, "Autonomy and Conflict Resolution", in Hans-Joachim Heintze and Pierre Thielbörger (eds.), From Cold War to Cyber War: The Evolution of the International Law of Peace and Armed Conflict over the Last 25 Years, 1st edition, Springer, 2016, pp. 21-42.
218. UN Human Rights Commission, "The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR", UN Doc E/CN .4/1985/4, 1984, Annex, para. 58.
219. Nasir Qadri, "The Basis of Right to Self-Determination", International Islamic University Islamabad, 2018, p. 1. https://www.researchgate.net/publication/329153669_The_basis_of_right_to_Self_determination.
220. The right to self-determination is not, usually, included in the examples of non-derogable rights. For an example, see Adina Ponta, "Human Rights Law in the Time of the Coronavirus", ASIL Insights, Vol. 24, 2020. https://www.asil.org/insights/volume/24/issue/5/human-rights-law-time-coronavirus.
221. Australian Human Rights Commission, "Right to Self-Determination", 2013, https://humanrights.gov.au/our-work/rights-and-freedoms/right-self-determination.
222. Human Rights Committee, "Statement on derogations from the Covenant in Connection with the COVID-19 Pandemic", UN Doc CCPR/C/128/2, 2020, para. 2, (c).
223. Robert McCorquodale, "Negotiating Sovereignty: The Practice of the United Kingdom in Regard to the Right of Self-Determination", British Yearbook of International Law, Vol. 66, 1995, p. 326.
224. COVID-19 would cause exceptional situations, which are arguably based on thederogablility of the right to self-determination. Thus, due to the situation related to COVID-19 the UN Special Committee on Decolonization decided to postpone its regional seminar. "Decolonization Seminar Postponed due to Coronavirus", Samoa News, 2020, https://samoanews.com/local-news/decolonization-seminar-postponed-due-coronavirus.
225. In fact, non-self-governing territories are not accorded special treatment in the UN report entitled "The Security Sector and the COVID-19 Emergency", prepared by the Office of Rule of Law and Security Institutions of the UN Department of Peace Operations. "The Security Sector and the COVID-19 Emergency: Policy Recommendations for UN Staff Working in Mission and Non-Mission Settings on Improving Security Sector Governance", UN, 2020. https://peacekeeping.un.org/sites/default/files/security_sector_and_the_covid-19_emergency.pdf.
226. 4th Report on Peremptory Norms of General International Law (Jus Cogens), supra note 209, para. 47.

In respect of the jus cogens status of the right to self-determination, Matthew Saul significantly points out that the status must be influenced by "the level of specificity in the norm"[227]. In respect of international law in general, Rosalyn Higgins proclaimed, international law should provide clear normative indications[228]. The right to self-determination has not attained such level of normative specificity, as vividly exemplified by the Sahara Issue.

In terms of the acceptance and recognition by States, H. Espiell emphasizes the statements made by the representatives of Czechoslovakia, Pakistan, Peru, Ukraine and the USSR[229], and statements made by 6 out of the 26 delegations that gave examples at the UN Conference on the Law of Treaties in favor of jus cogens status for the right to self-determination[230]. However, A. Cassese aptly points out, whenever States have referred to the right to self-determination as a norm of jus cogens, "they have not specified either the areas of application of self-determination, the means or methods of its implementation, or the permissible outcome of self-determination"[231]. Besides, M. Saul observes that only a limited number of States, not an overwhelming majority of States, have made their position clear on the jus cogens status of the right to self-determination[232]. Since these statements hardly constitute sufficient evidence of acceptance and recognition by an overwhelming majority of States, M. Saul conceives that H. Espiell could only decide to adopt a natural law stance on the right to self-determination in favor of its jus cogens status[233].

5. Compromise

Marc Weller alerts that "the all-or-nothing game of self-determination has helped to sustain conflicts, rather than resolve them". To make matters worse, "[s]elf-styled self-determination movements see no alternative to an armed struggle or the resort to terrorist strategies in order to achieve their aims", continues M. Weller[234]. In that matter, Peter Hilpold finds two closely interwoven elements in the self-determination processes: State dismembration and self-determination. He believes that these are two sides of the same coin, adding an admonition that "it should remain open which element should be the decisive one"[235].

Particularly with regard to the effect of the right to self-determination as a norm of jus cogens on the transfer of territory, I. Brownlie finds there are many problems in application of the right to self-determination. If a State resorts to force to implement the right to self-determination, then Brownlie

227. Matthew Saul, "The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?", Human Rights Law Review, Vol. 11, 2011, p. 636.
228. Brian Risman, "An Exclusive Interview with President Rosalyn Higgins of the International Court of Justice", The Law Journal UK, http://www.thelawjournal.co.uk/Interview-Rosalyn%20Higgins-International%20Court%20of%20Justice.htm.
229. H. Espiell, loc. cit., supra note 204, para 71.
230. Ibid., para 73. See Jerzy Sztucki, Jus cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal, Springer-Verlag, 1974, p. 119.
231. Antonio Cassese, Self-Determination of Peoples: A Legal Reappraisal, Cambridge University Press, 1995, p. 140.
232. M. Saul, loc. cit., supra note 227, p. 642.
233. Ibid., p. 637.
234. Marc Weller, "Settling Self-determination Conflicts: Recent Developments", European Journal of International Law, Vol. 20, 2009, p. 111.
235. Peter Hilpold, "Self-Determination and Autonomy: Between Secession and Internal Self-determination", International Journal on Minority and Group Rights, Vol. 24, 2017, p. 317.

asks, "is it possible to assume that one aspect of jus cogens is more significant than another?"[236]. Richard Burchill is of the view, in this regard, that it is also an extremely contentious political issue as it is too commonly seen as a threat to the principle of respect for the territorial integrity of a State or the principle of State sovereignty enshrined in the UN Charter[237].

According to S. Guan, "compromises in any given convention or agreement respecting jus cogens might simply reflect practical constraints, not any fundamental opposition to a given jus cogens norm". Then, Guan continues, "jus cogens-related agreements can reflect the reality of compromise and negotiation"[238]. Guan's argument is made in response to a question: Is a compromise agreement invalidated, only because it does not fully satisfy self-determination claims?[239] On this question, R. Kolb further asks the following questions by way of illustration[240]: How to explain compromise settlements like the Dayton Agreement of 1995 at the end of the Bosnian War, which hardly corresponded fully with jus cogens claims?; Are all the Arab Charters calling for the destruction of Israel void, because they are in conflict with the right of the Jewish people to self-determination as a norm of jus cogens?[241]

Reconsidering the rigid concept of justice, which matters especially in the second method of international public order, it is submitted by Ernst Wolff that "[t]he perfect justice might be the cleanest in theory, but can be quite messy in practice; a good enough justice accepts compromise to various degrees in common circumstances and while it doesn't exclude the dramatic exception, it doesn't live constantly under the pressure of tragedy"[242]. When negotiations for finding a political solution based on compromise involve self-determination claims, a problem may be raised on the compatibility of two or more norms of jus cogens. In practice, such problem may be raised in the context of the UN-sponsored negotiations made in conformity with the UN Security Council resolutions on the Sahara Issue. In fact, the Security Council reaffirms its commitment to assist the parties to achieve a just, lasting, and mutually acceptable political solution, based on compromise, and encourages the parties to demonstrate further political will towards a solution "in a spirit of realism and compromise"[243]. If it were not for compromise, peaceful means to solve a conflict in conformity with Article 33 of the UN Charter would greatly lose their practicability.

Discussions that have been made on the peremptory prohibition of the use of force may be helpful for answering the problem[244]. Do the exercise of the right to self-defense and the use of armed force under the authorization of 'any available means' in the UN Security Council decisions conflict with

236. I. Brownlie, op. cit., supra note 32, p. 490. While the ICJ held that "respect for the right to self-determination is an obligation erga omnes" and "all States have a legal interest in protecting that right", it is for the General Assembly to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius, all Member States must co-operate with the United Nations to put those modalities into effect. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, advisory opinion, ICJ Rep 2010 (II), para. 44. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, advisory opinion, ICJ Rep 2019, paras. 179-180.
237. Richard Burchill, "Democratic and Civil Rights", in Alex Conte, Scott Davidson and Richard Burchill, Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee, 1st edition, Ashgate, 2004, p. 41.
238. S. Guan, loc. cit., supra note 6, p. 498.
239. On the accommodation of sovereignty and self-determination toward autonomy in general, see Hurst Hunnum, Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights, revised edition, University of Pennsylvania Press, 1996.
240. R. Kolb, op. cit., supra note 53, p. 25.
241. Arthur M. Weisburg, "The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina", Michigan Journal of International law, Vol. 17, 1995, pp. 21-51.
242. Ernst Wolff, Political Responsibility for a Globalised World: After Levinas Humanism, Transcript Verlag, 2011, p. 272.
243.UN Doc S/RES/2468, 2019.
244. The principle of non-use of force has been characterized as one of the most typical examples of jus cogens. Sondre T. Helmersen "The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations", Netherlands International Law Review, Vol. 61, 2015, pp. 167-193.

the non-derogability of a norm of jus cogens prohibiting the use of force? Though according to one view "the fact that force is allowed in circumstances of self-defense or in the light of Security Council authorization makes the norm derogable", E. Proukaki suggests, "the other school of thought supports that these exceptions merely define the scope of the prohibition"[245]. On the basis of the latter view, the above-mentioned problem on the right to self-determination in conflict with other norms of jus cogens may be solved in a similar way by reexamining its definition.

As a matter of course, a treaty that completely denies any mode of implementing the right to self-determination would be void, if it is identified as a norm of jus cogens. However, a treaty that is based on some mode of implementing the right to self-determination other than independence would not be void, even if the right is identified as a norm of jus cogens[246]. As such, any negotiations to achieve a political solution involving the right to self-determination should not be discouraged due to its status as jus cogens. Thus, the Lund Recommendations on the Effective Participation of National Minorities in Public Life in 1999[247] and the Liechtenstein Draft Convention on Self-Determination through Self-Administration in 2002 advocate autonomy instead of secessionist self-determination[248].

As regards the Sahara Issue, none of the parties, i.e. Morocco, Polisario, Algeria and Mauritania[249], totally denies the right to self-determination of the inhabitants in Saharan Provinces. Their differences in opinion concern who is eligible to exercise the right to self-determination and which mode of implementation should be followed. The options presented in the UN General Assembly resolution on modalities of implementing the right to self-determination are: emergence as a sovereign independent State; free association with an independent State; or integration with an independent State[250]. And in 1970, it was added that "the emergence into any other political status freely determined by a people" constitutes a mode of implementing the right to self-determination by that people[251]. That is reaffirmed in the Chagos Advisory Opinion that "[t]he right to self- determination under customary international law does not impose a specific mechanism for its implementation in all instances"[252].

As Samuel J. Spector reaffirms, self-determination is neither equivalent to the independence of the territory nor predicated on "a winner-take-all formula for resolution"[253]. Each modality is a full measure of self-government and a proper modality of implementing the right to self-determination, whether identified as jus cogens or not. The ICJ deems the question on modalities of implementing the right to self-determination as an essentially political question within the power of the General

245. E. Proukaki, op. cit., supra note 108, p. 27.
246. M. Saul discusses the right to self-determination as a norm of jus cogens "in its entirety, a qualified manner or just possibly", in idem., loc. cit., supra note 227, pp. 631-641.
247. Reproduced in A. El Ouali, Sahara Conflict: Towards Territorial Autonomy as a Right to Democratic Self-Determination, Stacey International, 2008, pp. 171-177.
248. Reproduced in Wolfgang Danspeckgruber (ed.), The Self-Determination of Peoples, Community, Nation and State in an Interdependent World, Rienner, 2002, pp 36-45.
249.UN Doc S/RES/2468, 2019.
250. Principles which Should Guide Members in Determining whether or not an Obligation Exists to transmit the Information Called for under Article 73 e of the Charter, UN Doc A/4684, 1960, Annex, Principle VI.
251. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc GA Res 2625 (XXXV), 1970.
252. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, advisory opinion, ICJ Rep 2019, para 158. In this respect, the Saharan Advisory Opinion states that "[t]he validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a 'people' entitled to self- determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances". Western Sahara Opinion, advisory opinion, ICJ Rep 1975, para. 59.
253. Samuel J. Spector, "Self-Determination for Western Sahara: The Evolution of a Concept", in Anouar Boukhars and Jacques Roussellier (eds.), Perspectives on Western Sahara: Myths, Nationalisms, and Geopolitics, Rowman & Littlefield, 2014, p. 209.

Assembly, as in the Northern Cameroons case[254].

According to Wolfgang F. Danspeckgruber, autonomy has been increasingly proposed as "the principal remedy" for solving self-determination conflicts[255]. Autonomy would grow increasingly important, in particular, in African States. H. Hannum views, the principles of territorial integrity of a State and national unity have been conceived as more fundamental than the right to self-determination, quoting Tilma Makonnen's argument on Somalia as the only exception[256]. As the only exception in Africa, Makonnen identifies only Somalia as pressing for "the self-determination of peoples" on behalf of ethnic Somalis, not for "the self-determination of colonial territories"[257].

Because autonomy is one of the recognized modalities of implementing the right to self-determination, the UN-sponsored negotiations based on the Moroccan Autonomy Initiative in 2007 for finding "a mutually acceptable political solution based on compromise" is unquestionably in conformity with the right to self-determination, even if it is identified as a possible norm of jus cogens[258], since the right is not equivalent to the right to secession. Any modality of implementing the right to self-determination will equally do, in conformity with the UN General Assembly resolution[259]. The Moroccan Autonomy Initiative stipulates, it shall be submitted to the populations concerned for a referendum in keeping with the principle of self-determination, and reiterates that "[t]he referendum will constitute a free exercise, by these populations, of their right to self-determination"[260].

On the negative side of an autonomy agreement, S. Spector fears that "a right of secession may be examined in the future subject to agreement between the autonomous government of Western Sahara and Morocco"[261]. According to a parliamentary resolution of the Council of Europe, however, "there is frequently little evidence to sustain this fear"[262]. And W. Danspeckgruber argues that the notion of self-governance avoids the slippery slope to the secession and leads to "increased gender equality and non-discriminatory politics, cultural flexibility, and environmental awareness"[263]. Abdelhamid El Ouali emphasizes, in this regard, that in an era of post-modernity, States must share sovereign power with "sub-national" entities. Then, he submits, without territorial autonomy States cannot survive. And he elaborates on the revival of territorial autonomy[264].

The Moroccan Autonomy Initiative may be the only means to fully implement the subsequent Security

254. Case concerning the Northern Cameroons (Cameroon v UK) (Preliminary Objections), ICJ Rep 1963, p. 32.
255. W. Danspeckgruber, "Recent Trends in Autonomy and State Construction", in Marc Weller and Stefan Wolff (eds.), Autonomy, Self-Governance and Conflict Resolution: Innovative Approaches to Institutional Design in Divided Societies, Routledge, 2005, p. 262.
256. H. Hannum, op. cit., supra note 236, p. 47.
257. Tilma Makonnen, International Law and the New States of Africa: A Study of the International legal Problems of State Succession in the Newly Independent States of Eastern Africa, UNESCO, 1983, p. 462.
258. Moroccan Initiative for Negotiating an Autonomy Statute for the Sahara Region, UN Doc S/2007/206, 2007. Hereinafter cited as 'Moroccan Autonomy Initiative'.
259. UN General Assembly Resolution 1541 (XV), UN Doc A/4684, 1960, Annex, Principle VI.
260. Moroccan Autonomy Initiative, paras. 8, 27.
261. S. Spector, loc. cit., supra note 248, p. 230. S. Spector concludes, it should be added, that "while the Autonomy Plan is far from a flawless blueprint for resolving the Western Sahara dispute, its entry into the debate has greatly improved the chances of achieving, through peaceful means, a compromise outcome acceptable under international law". Ibid., p. 231.
262. "Positive Experiences of Autonomous Regions as a Source of Inspiration for Conflict Resolution in Europe", Council of Europe, Parliamentary Assembly Resolution 1334, 2003, para. 9. See Gross Report, Doc 9824, 2003. http://www.assembly.coe.int/nw/xml/Xref/X2H-Xref-ViewHTML.asp?FileID=10177&lang=EN.
263. W. Danspeckgruber, "Self-Governance Plus Regional Integration: A Possible Solution to Self-determination Claims", in M. Weller and S. Wolff (eds.), op. cit., supra note 255, p. 37.
264. A. El Ouali, Territorial Integrity in a Globalizing World: International law and States' Quest for Survival, Springer, 2012, pp. 303-369. The determining factor of territorial autonomy is, he expounds, the effective enjoyment of territorial democracy by a given ethnic group. Ibid., p. 316.

Council resolutions concerning the Sahara Issue, for the resolutions reiterate the commitment of the Security Council to assist the parties to achieve a political solution "based on compromise" and "in a spirit of realism and compromise"[265]. Given the present situation of the Sahara Issue, the meaning of 'compromise' is unambiguous. For Polisario, it would necessarily involve the renunciation of independence, because there can be no other significant alternatives for a compromise on its self-determination claims. For Morocco, on the other hand, the compromise would involve autonomy for the residents of Saharan Provinces. The details of this autonomy are to be decided through a consultation between the Moroccan government and the residents within the framework of the Moroccan Autonomy Initiative[266].

In the Sahara Issue, the mode of implementing the right to self-determination claimed by Polisario, i.e. independence, would conflict with the obligation to respect the territorial integrity of Morocco. Normally, the conflict of jus cogens norms would be decided by a balancing of interests, not by an all-or-nothing solution. In the Sahara Issue, in particular, the right to self-determination claimed by Polisario is in conflict with the principle to respect the territorial integrity of Morocco. In such a case, it is submitted in the Joint Separate Opinion of Judges Rosalyn Higgins, Pieter Kooijmans and Thomas Buergenthal that the interpreter may have recourse to "a balancing of interests" on a case-by-case basis[267].

In making a balance of interests, each of the conflicting jus cogens norms would be more or less affected. A treaty concluded on compromise on the basis of a balancing of interests may, therefore, affect the entirety of each jus cogens norm. However, such a compromise-based treaty should not be invalidated. Otherwise, disputes like the Sahara Issue would never be solved. It can be said that this dilemma is caused by the unreasonable inclusion of the right to self-determination in the ILC's list of possible jus cogens norms. Overcoming the dilemma, the UN's efforts to find a peaceful solution for the Sahara Issue on compromise in conformity with Article 33 of the UN Charter should be encouraged.

The last problem is related to the use of force to implement the right to self-determination in the post-colonial era[268]. When 'an armed attack' by another State under Article 51 of the UN Charter does not occur, the use of force cannot be justified even on the pretext of implementing the right to self-determination. As has been argued above, the right to self-determination is not non-derogable, not eligible to be identified as a jus cogens norm. So, any implementation of the right to self-determination may be justified only within the range of the non-use of force norm as jus cogens. Then, the total confrontation between different norms of jus cogens will be excluded. On the other hand, when different norms of jus cogens are in conflict with each other in a particular case, compromise is not only inevitable but recommended.

265. UN Doc S/RES/2468, 2019.
266. Moroccan Initiative for Negotiating an Autonomy Statute for the Sahara Region, UN Doc S/2007/206, 2007, paras. 27-34.
267. "A balance therefore must be struck between two sets of functions which are both valued by the international community. Reflecting these concerns, what is regarded as a permissible jurisdiction and what is regarded as the law on immunity are in constant evolution. The weights of the two scales are not set for all perpetuities", in Arrest Warrant of 11 April 2000 (DRC v Belgium), Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, ICJ Rep 2002, para. 75.
268. Particularly in the Sahara Issue, another problem is raised on the applicability of norms of jus cogens to Polisario which is not a State, because, as a rule, the norms of international law are not applied to a non-State entity like Polisario if the entity is not recognized as a national liberation movement or an organization engaged in a war of national liberation. Helmunt Freudenschuss, "Legal and Political Aspects of the Recognition of National Liberation Movements", Millennium: Journal of International Studies, Vol. 11, 1982, pp. 115-129.

6. Conclusion

One of the most serious problems concerning jus cogens is the neglect of falsifiability in identifying a norm as jus cogens. Falsifiable tests for determining the peremptory and customary characters of possible norms of jus cogens are essential for the proper functions of jus cogens.

Actually, falsifiability may be found in the requirement of a non-derogation clause for identifying a norm of jus cogens, though not explicitly recognized. Such a clause is related to Article 4 of the ICCPR. In order for a norm to be identified as jus cogens, a non-derogability clause has to be so frequently repeated in treaties as to constitute the customary character. In other words, a norm that does not involve a non-derogability clause is to be excluded from the candidates for norms of jus cogens.

The first thing to be done, therefore, is to establish falsifiable tests, based on "acceptance and recognition of the international community of States as a whole". Christian Tomuschat aptly warns, for that matter, that the international community's will should not be substituted by personal wishes[269]. Until falsifiable tests come to be shared, norms of jus cogens should not be applied.

Secondly, if falsifiable tests for identifying norms of jus cogens are shared, the maintenance of legal stability in the international society would become an urgent problem. For that purpose, an international judicial organ mainly to rule on whether a treaty in question is in fact in conflict with a norm of jus cogens should be organized, like a constitutional court in the domestic society. Hersch Lauterpacht has once advocated the creation of an international judicial organ responsible for deciding on the legitimacy of the object of a treaty[270]. Otherwise, a treaty would be always exposed to the risk of being suddenly invalidated, leading to the instability of international law and the international community. Unfortunately, this is the reality.

Furthermore, the emergence of jus cogens by virtue of the Vienna Treaty Convention poses a far more fundamental problem on the legal ground of binding force of international law[271], because jus cogens is originally incompatible with the grundnorm of pacta sunt servanda, which seems to be universally accepted by States as the only legal ground of binding force of international law.

E. Proukaki describes that one of the difficulties concerning jus cogens relates to how it may be reconciled with consent theory as held in the SS Lotus case, which emphasizes that the rules of law binding upon States emanate from their own free will[272]. As a matter of principle, Proukaki is of the view that the consent theory cannot explain why a State would still be bound by a norm of jus cogens if that State withdraws its consent to be bound by the norm[273]. This contradictory legal situation is called 'nonconsensual international lawmaking', which is defined by Laurence R. Helfer as the creation of a legal obligation that binds a State even when that State has not consented to the obligation[274]. Likewise, it is submitted by Dinah Shelton that the consensual framework of the international system

269. Christian Tomuschat, "Obligations Arising for States without or against their Will", Recueil des Cours, Vol. 241, 1993-IV, p. 307.
270. Hersch Lauterpacht, Régles générales de droit de la paix, Recueil des Cours, Vol. 62, 1937, pp. 306 – 307. "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", Yearbook of the ILC, 1953, Vol. II, p. 9.
271. J.L. Brierly argues, "[t]raditionally there are two rival doctrines which attempt to answer the question why states should be bound to observe the rules of international law. They are the doctrine of 'state of nature' and the doctrine of positivism based on consent. Idem., The Law of Nations: An Introduction to the International Law of Peace, 6th edition, Oxford University Press, 1963, pp. 49-56.
272. SS Lotus case (France v Turkey), Permanent Court of International Justice, Series A, No. 9, 1927, p. 18.
273. E. Proukaki, op. cit., supra note 108, p. 24. n. 75.
274. Laurence R. Helfer, "Nonconsensual International Lawmaking", University of Illinois Law Review, 2008, p. 74.

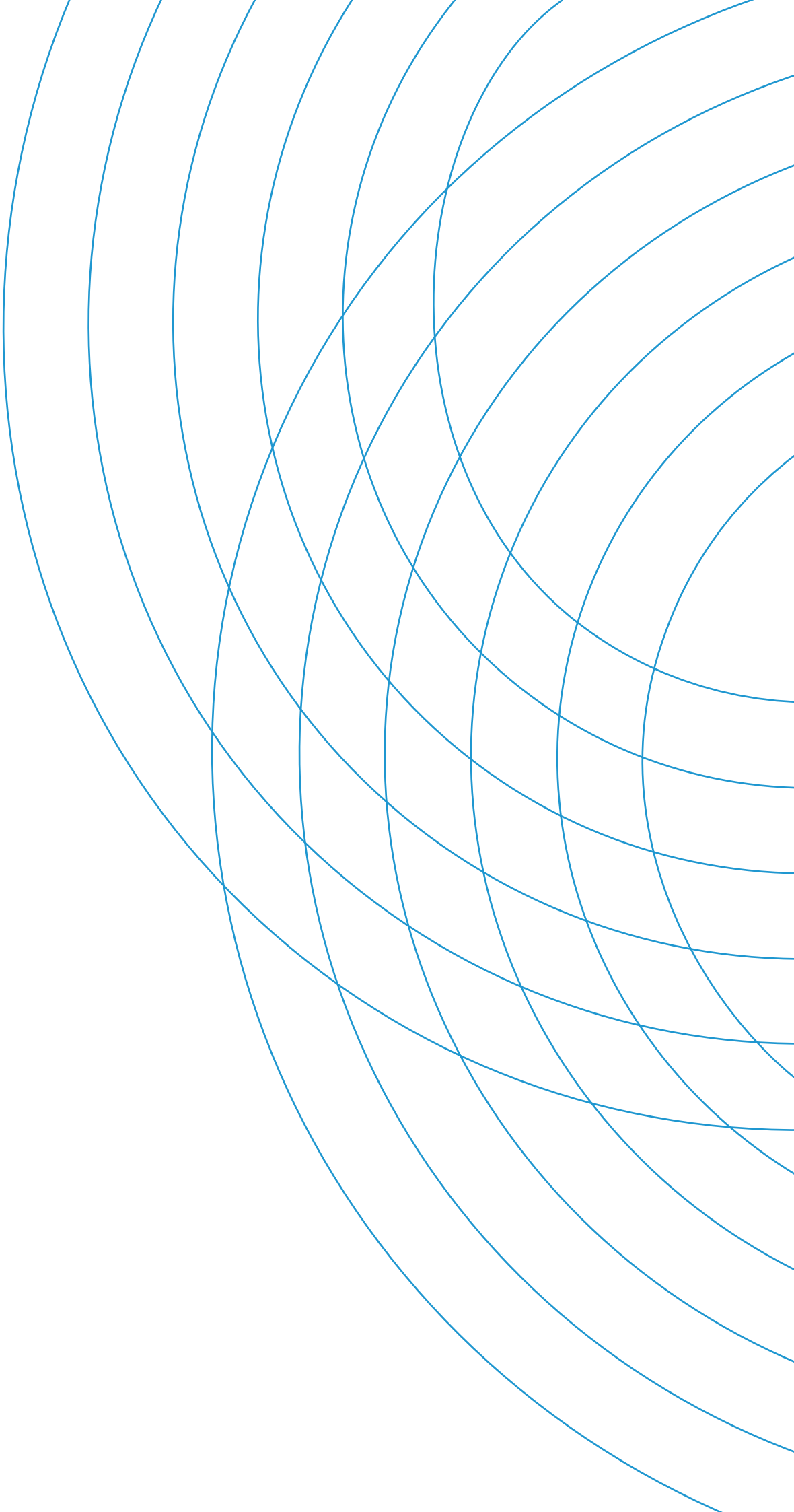
is fundamentally challenged by seeking to impose obligations on dissenting States[275].

As a result, under the unconsensual concept of jus cogens, free wills of States that have long enabled States, since the Treaty of Westphalia in 1648, to make their own determination to give consent would not come first. To describe in an extreme manner, a norm of jus cogens would lose the legal ground of its binding force at the very moment when it is applied. If the legal grounds of binding force are left ambiguous, the persuasive and regulating potentialities of international law would be weakened. Therefore, the legal grounds for justifying the binding force of international law other than pacta sunt servanda cannot help being reviewed. Since the existing grundnorm is based on the rights, the new grundnorm would be consequently based on the concepts other than rights.

Responsibility is one of the concepts other than rights. Thus, Volker Roben conceives that "[a] ccountability generally lies to the international community"[276], though the term used here is not responsibility. Setting accountability aside, the term responsibility itself flows from the idea of 'responding'[277], which may be socially required even in the absence of any breaches of legal norms.

Considering the seriousness of the problem on the legal ground of binding force of international law, the time when norms of jus cogens can be duly applied had better be when an alternative gurundnorm is accepted and recognized by the international community of States as a whole, no matter how long it takes. Citing Popper again, finally, to solve a problem, the sciences use the method of trial and error. "To be more precise, it is the method of trying out solutions to our problem and then discarding the false ones as erroneous"[278].

275. Dinah Shelton, "International law and 'Relative Normativity'", in Malcom D. Evans (ed.), International Law, 2nd edition, Oxford University Press, 2006, pp. 159, 173.
276. Volker Roben, "Responsibility in International law", Max Planck Yearbook of International Law, Vol. 16, 2012, p. 101.
277. Robert Kolb, The International Law of State Responsibility, Edward Elgar Publishing Limited, 2017, p. 1.
278. Popper, op. cit., supra note 65.



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