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Article

Jus Cogens: To Revise a Narrative

Sue S. Guan*

Abstract

For a decade or so in the mid-twentieth century, international policymakers, jurists, and scholars united briefly around the concept of a “peremptory,” or *jus cogens*, norm. Latin for “compelling law,” such “supernorms” were deemed non-derogable by states, and superior to treaty-based and customary international law that traditionally constituted international law.

International recognition of the concept of *jus cogens* was formalized in 1969 through Article 53 of the Vienna Convention on the Law of Treaties, which voids any treaty that conflicts with a *jus cogens* norm. Since then, however, the concept of *jus cogens* has come under heavy criticism, most commonly for having little (if any) practical ability to create legal rights and entitlements that bind states and people. Today, the concept of a *jus cogens* norm has faded into near irrelevance.

This Article explores the cause of the decline, and offers a solution: a narrative shift. In particular, I explain that the cost of state commitment to *jus cogens* is simply too high: no state will agree to bind itself to an inflexible set of universal principles so riddled with uncertainty and contradiction. For example, *jus cogens* is expressed in the vocabulary of the absolute, yet its binding nature remains largely contingent on state consent. Moreover, its fundamentalist narrative denies any such contingency or relevance of the political will of states or

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international actors—yet leaves open the basic question of what norms constitute *jus cogens*. To that end, this Article offers a normative framework focused on shifting the traditional fundamentalist narrative towards a more realistic narrative, which embraces a context-driven approach that is a familiar aspect of traditional treaty negotiation and lowers the cost of commitment to *jus cogens* norms.

I. INTRODUCTION

Imagine yourself as a member of the United Nations International Law Commission (“ILC”) in 1963, involved in the drafting of the Vienna Convention on the Law of Treaties (“VCLT”). Ten years earlier, in 1953, Sir Hersch Lauterpacht, the ILC’s Special Rapporteur, had presented to the ILC the following proposal: “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.”¹ According to Lauterpacht, there existed certain peremptory norms, otherwise known as *jus cogens* norms, that reflected “overriding principles of international law”² and:

[M]ay be regarded as constituting principles of international public policy . . . expressive of rules of international morality so cogent that an international tribunal would consider them as forming part of those principles of law generally recognized by civilized nations which the International Court of Justice is bound to apply³

Because you agree that such “overriding principles of international law” exist and operate to bind courts in this way, you—and the other members of the ILC—undertake to draft the following: “A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”⁴

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

2. *Id.* at 90.

3. *Id.* at 155 (citation omitted).

4. *Reports of the International Law Commission on the Second Part of Its*

Now, you are confronted with various difficult, but sensible, questions. How do you define such a “peremptory norm?” What are the mechanisms by which a norm attains peremptory status? What theoretical or practical criteria must be met? Finally, are such norms peremptory because they are inviolably integral to the concept of “international morality,” or are they peremptory because (all) states have consented? The answers are not so clear, and the ILC concludes that “[t]here is not as yet any generally accepted criterion by which to identify a general rule of international law as having the character of *jus cogens*.”⁵

Lacking principled criteria by which to identify *jus cogens* norms, you and the ILC decide to punt the determination, deferring to future state practice and international jurisprudence to fill in the content of and draw the outlines around such norms. To quote the ILC,

[I]nternational law is at a stage of rapid development . . . the prudent course seems to be to state in general terms the rule that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals.⁶

Finalized as Article 53 of the VCLT, the provision thus reads:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.⁷

At this moment, two developments occur simultaneously: (i) the concept of *jus cogens* is formally recognized by an authoritative

Seventeenth Session and on Its Eighteenth Session, [1966] 2 Y.B. Int'l L. Comm'n 169, 247, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

5. Sir Humphrey Waldock (Special Rapporteur), *Second Report on the Law of Treaties*, [1963] 2 Y.B. Int'l L. Comm'n 36, 52, U.N. Doc. A/CN.4/156 and Add. 1–3 [hereinafter *Second Report on the Law of Treaties*].

6. *Id.* at 53 (citation omitted).

7. Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT].

international legal body; and (ii) that authoritative legal body abdicates its role in determining the substance of those norms.

Thus, the concept of *jus cogens* remains undefined. However, by remaining undefined, *jus cogens* is unable to bind international actors. This is because all binding law must issue from and with binding authority; merely gesturing in all-or-nothing vocabulary to *jus cogens* (as a norm “accepted and recognized by the international community of States as a whole . . . from which no derogation is permitted”⁸) is insufficient. Because it did not determine the source of *jus cogens*’ authority or identify the scope of the norms issuing from that authority, the ILC, as a simple practical matter, inadvertently but effectively crippled lawmakers’ and jurists’ ability to invoke *jus cogens* in creating and limiting legal entitlements.

This is true for various reasons, which I will explore in this Article. In Part II, I begin by pointing out that the concept of *jus cogens*, while not an entirely novel one in the 1950s, did not gain widespread traction in international legal discourse until that time.⁹ This period was rife with legal and historical flux. Largely due to the atrocities confronted during the recently-concluded Second World War, the international legal community found itself gravitating towards various affirmations of “fundamental” rights—all expressed in the uncompromising vocabulary of the universal.¹⁰ The concept of *jus cogens* was no different, articulated in absolutist language that was in tension with its dependence—for its very content—on state practice and undeveloped international jurisprudence. In effect, its vocabulary denied its relationship to recent historical events. Does this indicate an irreconcilable rift between the fundamentalism of substantive *jus cogens* language and the historical specificity of its acceptance by the international community?

In Part III, I point out the unfortunate, somewhat inevitable circularity of sourcing such norms among the moving targets of international custom and state practice. The concept of total non-derogability begins to look incompatible with a custom-

8. *Id.* art. 53 (citation omitted).

9. See Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT’L L. 331, 334–35 (2009) (tracing the historical development of peremptory norms).

10. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

based understanding of the evolution and legitimacy of international law. Without static sources of binding law, the traditional, state-centric model of international law draws nearly all of its authority from state practice, which is constantly evolving. And as with such customary norms, the reality is that states can and do derogate from peremptory norms—especially when *jus cogens* norms threaten to chip away at states’ (and courts’) understanding of sovereignty as inviolable.¹¹

Part IV discusses the “false universalism” suffered by non-derogable rights. Because the theory and rhetoric of *jus cogens* leave no room to acknowledge its own contingency, the debate around *jus cogens* threatens to devolve into a hegemonic struggle between special interests—all expressed in the language of the universal. The inflexibility so crucial to the concept of *jus cogens* makes effecting concrete legal entitlements (especially ones that potentially curtail state sovereignty) practically impossible. Here, I contrast to traditional treaties, which reflect negotiation, compromise, and few absolutes—but actually bind state behavior. The cost of committing to *jus cogens*, however, is simply too high: no state will agree to bind itself to an inflexible set of universal principles vulnerable to manipulation, open to interpretation, and whose basic scope is yet to be determined by the practice of other states. *Jus cogens* cannot be both abstract and concrete; the attempt to do so risks the sort of inadvertent irrelevance that only the most well-intentioned, abstract ideals can achieve.

Part V offers a few suggestions to recapture the relevance of *jus cogens* norms—by lifting its fundamentalist burden. As a start, it may be useful to re-conceptualize *jus cogens* as originating in the rights of people, delinked from statehood or jurisdiction. But more importantly, *jus cogens*’ main obstacle to relevance, I argue, is its own absolute inflexibility. That narrative can be changed. Stripped of its mandatory, all-or-nothing vocabulary, *jus cogens* norms should pose less of a threat to state sovereignty and, paradoxically, stand a greater chance of effecting concrete behavioral change among international actors. For, as with traditional treaties, states could presumably more easily bind themselves to uphold *jus cogens* norms if their commitments were context-bound, rather than toothlessly

11. See, e.g., M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & CONTEMP. PROBS. 63, 66 (1996) [hereinafter Bassiouni, *International Crimes*]; Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 419, 431 (1983).

atemporal and universal. Characterized in this more modest and concrete way, the cost of committing to *jus cogens* norms is drastically lowered—and *jus cogens* may stand a chance of remaining relevant in an international legal landscape that shows little sign of moving away from a consent-based model.

Finally, I conclude by arguing that the ILC's decades-long, not entirely unsuccessful attempt to weave *jus cogens* norms into the fabric of international jurisprudence need not become irrelevant. Progress can be achieved by looking to—and committing to—a more concrete and more flexible narrative for *jus cogens* norms. Today, there is nothing mandating *jus cogens*' symbolic absolutism (if there ever was). It is time we remove that weight, however laudable it is.

II. THE HISTORICAL VOCABULARY OF *JUS COGENS*

A. IN THEORY, UNIVERSAL

As understood today, the term “*jus cogens*” refers to certain overriding, peremptory norms that states cannot opt out of, by contract or in practice.¹² These are norms “at the summit (elite norms, as it were) of enhanced normativity—‘highest ranking’ norms, worth a ‘quality label,’” which rank above the norms “below them, the great mass of merely binding norms, which the International Law Commission eloquently styles ‘ordinary customary or conventional rules.’”¹³ This idea—that some legal principles are inherently normatively superior to others—was introduced as early as the seventeenth century.¹⁴ However, the concept did not gain meaningful jurisprudential traction until after World War II (and to a non-negligible degree, as a result of that war).¹⁵

In 1945, the newly-ratified United Nations Charter (“Charter”) expressed the United Nations’ determination “to

12. See Criddle & Fox-Decent, *supra* note 9, at 331–32.

13. Weil, *supra* note 11, at 424 (quoting Charles De Visscher, *Positivisme et “Jus Cogens,”* 75 REV. GENERALE DE DROIT INT'L PUBLIC 5, 9 (1971)) (alteration in original); Paul De Visscher, *Cours Général De Droit International Public*, 136 RECUEIL DES COURS 1, 107 (1972); *Report of the International Law Commission on the Work of Its Twenty-eighth Session*, [1976] 2 Y.B. Int'l L. Comm'n, pt. 2, 1, 92, UN Doc. A/CN.4/SER.4/1976/Add.1 (Part 2) [hereinafter *Report of the International Law Commission*].

14. See Criddle & Fox-Decent, *supra* note 9, at 334–35.

15. *Id.* at 336.

save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”¹⁶ In doing so, the Charter repeatedly invoked the idea of “fundamental freedoms.”¹⁷ For instance, the intention was expressed to: “[r]eaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small;”¹⁸ “[a]chieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;”¹⁹ and to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”²⁰ Complements to the Charter—and specifically, to this language in the Charter—UDHR, ICCPR, and other human rights treaties emerged shortly after the Charter was ratified. In 1948, for example, as a direct “result of the experience of the Second World War,” and with the birth of the UN, “the international community vowed never again to allow atrocities like those of [WWII] happen again.”²¹ Accordingly, the Universal Declaration of Human Rights (“UDHR”) was adopted, which “set[] out, for the first time, fundamental human rights to be universally protected.”²² In like fashion, in 1966 both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were adopted as well.²³ Along with various other affirmations of “fundamental” rights, these guarantees were intended to

16. U.N. Charter prml.

17. *Id.* art. 1, ¶ 3; art. 55.

18. *Id.* prml.

19. *Id.* art. 1, ¶ 3.

20. *Id.* art. 55.

21. *History of the Document: Universal Declaration of Human Rights*, UNITED NATIONS, <http://www.un.org/en/sections/universal-declaration/history-document/index.html> (last visited Aug. 14, 2016) [hereinafter *History of the Document*].

22. *The Universal Declaration of Human Rights*, UNITED NATIONS, <http://www.un.org/en/universal-declaration-human-rights/> (last visited Aug. 14, 2016).

23. International Covenant on Civil and Political Rights, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.

“complement the UN Charter with a road map to guarantee the rights of every individual everywhere.”²⁴

Running parallel to these developments were the first meaningful murmurs of peremptory norms among legal scholars. On the eve of World War II, Alfred von Verdross posited that there had come to exist in international law certain compulsory norms, which forbade treaties that “are obviously in contradiction to the ethics of a certain community.”²⁵ At the time, the issue whether such norms trumped state consent had not yet been fully confronted,²⁶ but the post-World War II landscape cemented at least some international jurists’ conviction that they should. For instance, in its 1951 Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), the International Court of Justice (“ICJ”) explained that “underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.”²⁷ In this manner, the Court explained, the Genocide Convention was “intended by the . . . contracting parties to be definitely universal in scope.”²⁸

The thread running through and uniting these developments is the understanding that all states would—and *should*—be bound by peremptory norms. The language used by proponents of such norms references the absolute, inflexible, and fundamental, and invokes their universality: these norms reflect “overriding principles of international law” and “constitut[e] principles of international public policy . . . expressive of rules of international morality so cogent that an international tribunal would consider them forming a part of those principles of law generally recognized by civilized nations.”²⁹ If “overriding,” then such norms logically are superior to the will of any state who would disagree: “[c]lose to the heart of the concept lurks the embryonic notion of a world public order not exclusively controlled by nation-states, one that is foundational, guarding

24. *History of the Document*, *supra* note 21.

25. Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571, 572 (1937).

26. See Criddle & Fox-Decent, *supra* note 9, at 335–36.

27. Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, at 23 (May 28).

28. *Id.*

29. Lauterpacht, *supra* note 1, at 155.

the most fundamental and highly-valued interests of international society.”³⁰ Such norms, presumably by definition, are “binding on States, even without any conventional obligations.”³¹ This is the most natural interpretation of *jus cogens* norms.

B. IN PRACTICE, A RETREAT TO STATE CONSENT

As finalized, the language of Article 53 of the VCLT retreats from the original conception of *jus cogens* as superior to state will. Article 53 expresses a conception of peremptory norms as explicitly sourced in state consent:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.³²

Incorporating state consent introduces several difficult logical knots, which jurists have not yet been able to unwind. For instance, philosophically speaking, this formulation is a curious combination of the natural law tradition that *jus cogens* norms fit most easily within—where such norms are universal simply due to their inherent, inviolate moral authority³³—and the

30. Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT’L L. 585, 587 (1988).

31. Reservations to Convention on Prevention and Punishment of Crime of Genocide, *supra* note 27.

32. VCLT, *supra* note 7, art. 53.

33. See, e.g., *Summary Records of the 683rd Meeting*, [1963] 1 Y.B. Int’l L. Comm’n 60, 63, U.N. Doc. A/CN.4/156 (one ILC member argued that peremptory norms could be identified on substance alone, for instance, whether they were “deeply rooted in the international conscience”); Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT’L & COMP. L. REV. 419 (1989). A. Mark Weisburd offers a useful critique of the natural law approach to conceptualizing *jus cogens*: “[S]uch an approach, exemplified by Verdross’ reliance on ‘the ethics of a particular community’ as a source of *jus cogens* rules, risks falling into the error of assuming that, if it would be a good thing for subjects of a legal system to refrain from particular behavior, it must make sense to render the behavior illegal. This does not, however, follow. If the behavior is rendered illegal, it will become necessary to determine

positivist tradition, in which peremptory norms are binding because they reflect state acceptance and consent (as evidenced, for instance, in treaties and *opinio juris*).³⁴

As a matter of language, there are various tensions created by defining a peremptory norm as one “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted,” but simultaneously “which can be modified only by a subsequent norm of general international law having the same character.”³⁵ For instance, if to attain peremptory status, a norm must be recognized by the “whole” of the international community, does that confer an absolute right of veto on any single state dissenter?³⁶ Is it rule by numbers, where a majority of states could override any such dissenter?³⁷ Can a state that never consented to such a regime be held accountable for a perceived derogation? Interestingly, the ILC has answered a version of these questions: it has explained that recognition by “the international community as a whole . . . certainly does not mean the requirement of unanimous recognition by all the members of that community, which would give each State an inconceivable right of veto.”³⁸ Instead, the ILC clarified, what is necessary is recognition “not only by some particular group of States, even if it constitutes a majority, but by all the essential components of the international community.”³⁹ But this is still unsatisfactory. Who or what forms the “essential components of the international community?”

The definition of peremptory norms in Article 53 unravels further when one considers that such norms “can be modified only by a subsequent norm of general international law having the same character.”⁴⁰ If so, that means peremptory norms can be modified only by, essentially, another peremptory norm (one having the “same character”). Does that mean all states must in

how to deal with subjects of the legal system who engage in the behavior anyway.” A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, as Illustrated by the War In Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1, 30 (1995) (quoting Verdross, *supra* note 25, at 576).

34. See Parker & Neylon, *supra* note 33, at 422.

35. VCLT, *supra* note 7, art. 53.

36. For a further exploration of this issue, see Weil, *supra* note 11, at 426.

37. See, e.g., Andreas L. Paulus, *Jus Cogens in a Time of Hegemony and Fragmentation*, 74 NORDIC J. INT'L L. 297, 308 (2005) (discussing the viability of persistent objection as a means of avoiding the binding force of *jus cogens* norms).

38. *Report of the International Law Commission*, *supra* note 13, at 119.

39. *Id.*

40. VCLT, *supra* note 7, art. 53.

unison essentially agree to derogate from the original, non-derogable norm to create a new, non-derogable norm? That is, without universal derogation, no norm could displace a peremptory norm, because any deviation would amount to a derogation and be invalid.⁴¹

There is essentially no guidance on the process by which a conventional norm attains “supernorm” or “superlaw” status—or what the consequences of attaining such status might be.⁴² For instance, how does one reconcile the idea that certain norms could “subsequently” take on the nature of a *jus cogens* norm—if *jus cogens* norms were always fundamental and are expressions of *a priori* “overriding principles of international law?”⁴³ A peremptory norm would seem by definition atemporal; there should be no “subsequent” or “precedent” involved. As another example, if certain norms are so fundamental that states may be bound without having explicitly consented, then the concept of state sovereignty begins to show some cracks. But

41. This contradiction has created much debate among legal scholars. See Weisburd, *supra* note 33, at 35 (arguing that for *jus cogens* as formulated under Article 53, “there is no higher authority in international law than the consensus of states.” This means that “it is a contradiction in terms to refer to *jus cogens* as controlling customary international law. This follows, since to assert that *jus cogens* controls customary international law is to assert that changes in the general practice of states cannot affect the legal status of those rules of customary international law of *jus cogens* status. But such a development is logically impossible with respect to Article 53 *jus cogens*, since it would require that a rule which *ex hypothesi* did not represent the general practice of states was nonetheless ‘accepted and recognized by the international community of states as a whole.’”).

42. Weil has more fully explored the differing “tiers” of norms created by the concept of *jus cogens*. See Weil, *supra* note 11, at 428 (“With normativity split into rules on several tiers, it has now become necessary to distinguish, within each codifying convention, among the purely conventional rules, the ordinary rules of general international law, and the peremptory rules of general international law. This raises, *inter alia*, the problem of derogation through particular agreements from the provisions of such conventions and the problem of reservations. The recent Convention on the Law of the Sea will certainly give rise to difficulties of this kind. One may similarly ask with regard to the provisions on *jus cogens* in Articles 53 and 64 of the Vienna Convention on the Law of Treaties: are they purely conventional rules that are binding solely on states parties to the Convention? Are they ordinary rules of customary law, so that states may derogate from them by particular agreements—which would be a denial of the very concept of peremptory norms? Or are they *themselves* the expression of norms of *jus cogens*, so that no state is entitled to reject the concept of peremptory norms?”).

43. Lauterpacht, *supra* note 1 at 154–55.

without a robust model of state sovereignty, the consent-based foundation of international law starts to look similarly wobbly.⁴⁴

Of course, Article 53 does not abandon the concept of state consent: a peremptory norm is one that is “accepted and recognized by the international community of states as a whole”⁴⁵ A circularity begins to emerge: how can universal acceptance be the metric by which the legitimacy of a *jus cogens* norm is measured so long as those very norms are still in flux?⁴⁶ As the ILC admitted, they intended to “leave the full content of [*jus cogens*] to be worked out in State practice and in the jurisprudence of international tribunals.”⁴⁷ However, if their fundamental nature is taken at face value, peremptory norms have never *not* been peremptory; they are by definition immutable. But the circle continues: if immutable, why did their widespread recognition take place as late as the mid-twentieth century?

Despite this theoretical confusion, there are some norms that are widely considered peremptory: prohibitions against grave breaches of humanitarian law (aggression, genocide, crimes against humanity, war crimes, slavery, and torture),⁴⁸ prohibitions against the use of force against another state, *pacta sunt servanda*, *domaine réservé*, a state’s right to enter into

44. More broadly speaking, in international law, norms are as a general matter defined by and given teeth through treaties, state practice, and customary law. In other words, to determine the type of event covered by any given norm—and the repercussions for violating that norm—one must look towards the agreements between states, as well as those states’ practices. See, e.g., Juan Antonio Carrillo Salcedo, *Reflections on the Existence of a Hierarchy of Norms in International Law*, 8 EUR. J. INT’L L. 583, 583–84 (1997).

45. VCLT, *supra* note 7, art. 53.

46. For instance, “the customary prohibition against genocide stemmed from the recognition of human rights as a substantive aim of international law after World War II.” Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 784–85 (2001).

47. *Second Report on the Law of Treaties*, *supra* note 5, at 53.

48. Bassiouni, *International Crimes*, *supra* note 11, at 68. He sources these in: “(1) international pronouncements, or what can be called international *opinio juris*, reflecting the recognition that these crimes are deemed part of general customary law; (2) language in preambles or other provisions of treaties applicable to these crimes which indicates these crimes’ higher status in international law; (3) the large number of states which have ratified treaties related to these crimes; and (4) the ad hoc international investigations and prosecutions of perpetrators of these crimes”; Weisburd, *supra* note 33; see, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 702 (1987); see also Weisburd, *supra* note 33, at 27–29; (discussing genocide as a peremptory norm).

treaties.⁴⁹ As I will discuss later, however, the contradictions found in Article 53 are not merely of theoretical consequence—they remain extremely relevant as states and courts seek to parse through disputes created by conflicts over even these “accepted” norms with *jus cogens* status.

III. THE PROBLEM OF CONTINGENCY

A. AUTHORSHIP

As formulated, the concept of *jus cogens* norms suffers from a severe definitional and authoritative vacuum. *Jus cogens* norms exist—and are non-derogable—if states act like they are, but states (presumably) will only do so if *jus cogens* norms *a priori* exist. Nowhere in that formulation does any unitary authority play a role in determining what norms qualify, when *jus cogens* status has been attained, or how to translate such norms into concrete legal rights and duties. Indeed, as the ILC expressly stated,

[I]nternational law is at a stage of rapid development . . . the prudent course seems to be to state in general terms the rule that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals.⁵⁰

States, international courts, and tribunals have effectively been saddled with the task of acting as legislatures as well as adjudicators for *jus cogens* norms: “leav[ing] everything to be worked out in state practice and by the jurisprudence of international tribunals,” “where there is no tribunal having jurisdiction,” then “the interested state . . . is made not only the judge but also the legislator in its own cause.”⁵¹ It can even be said that this “amounts to a complete abdication of the legislative function.”⁵² As Lee M. Caplan put it, “allowing the courts to determine the parameters of *jus cogens* through

49. See Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM J. INT’L L. 946, 965 (1967).

50. *Second Report on the Law of Treaties*, *supra* note 5, at 53.

51. Schwelb, *supra* note 49, at 964.

52. *Id.*

application of the normative hierarchy theory may undermine the principle of separation of powers, in some cases inappropriately transferring foreign-policymaking power from the political branches of government to the judiciary.”⁵³

Without a legislature (or with only one ill-equipped to legislate), there can be no effective author of law. It is therefore entirely unsurprising that states, international courts, and international policymakers have struggled for more than a half-century to flesh out the substance of a *jus cogens* norm—with varying amounts of confusion.⁵⁴ Without an author, there can be at most only a diffusion of authority that, because it is drawn from the heterogeneous activity of independent sovereign states, creates enormous inconsistency in the task of delineating *jus cogens* norms.

Nor does the common—but misplaced—attempt to personify any such “international community of states” adequately place authorship in that entirely vague “community.”⁵⁵ As seductive as attempting to so personify might be, the foundations of international law—as I discuss in the next section—are simply far too rooted in state consent, and any such “community” remains “impossible to identify separately from its members.”⁵⁶ For the same reason, there is a deep reluctance to grant any international organization or group of states, pluralistic or

53. Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 773 (2003).

54. See Criddle & Fox-Decent, *supra* note 9, at 346.

55. For a fuller discussion of this “tendency to vague personification,” see Weil, *supra* note 11, at 426. Weil points to the “various telltale signs of a tendency to vague personification of the international community. The international community ‘accepts and recognizes’ the ascent of an ordinary norm to the rank of peremptory norm. It ‘recognizes’ that an international obligation is essential to the protection of its ‘fundamental interest,’ which seems to imply that the community as such possesses such interests. The International Court of Justice considers that a state has obligations to the international community and can enter into commitments towards it; one Member of the Court has even spoken of rules of law that are the ‘common property of the international community.’ Perhaps this community may be viewed as identical to the ‘mankind’ whose ‘common heritage’ or ‘province’ is nowadays considered to be the use of outer space, the moon, and the seabed beyond the limits of national jurisdiction. However, for want of adequate organic representation, this community seems impossible to identify separately from its members; but those members—and here the International Law Commission has been quite unequivocal—can only be states, to the exclusion even of international organizations, which the Commission regards as simply ‘the creation of those States.’ In brief, the international community means states. But all states, or merely some, and, if so, which?”

56. *Id.*

otherwise, the authority to determine the substance and scope of peremptory norms. Whoever attempts to wield such authority purports to bind the entire globe to action or inaction. But without such authority, how can the international community identify in binding fashion so-called peremptory norms?

B. AUTHORITY VACUUM

This confusion is hardly surprising. International law has long been plagued by this sort of authority vacuum.⁵⁷ As H.L.A. Hart famously argued, the rules of international law “constitute not a system but a simple set.”⁵⁸ True or not, this statement continues to embody the main criticism of international law—that it comprises laws, customs, and rules binding only because states have accepted them as such, rather than laws, customs, and rules binding because they are inherently valid or should be.⁵⁹

Under this formulation, the international legal landscape is a pluralistic, decentralized one, built upon the voluntary consent of states.⁶⁰ Those states’ independence and sovereignty thus form perhaps the most important aspects of international law. As the Permanent Court of International Justice (“PCJ”) explained, states are the independent subjects of international

57. *Id.* at 414 (noting the following weaknesses of the international normative system: “not only the inadequacy of its sanction mechanisms, but also the mediocrity of many of its norms. In regard to certain points, international law knows no norm at all, but a lacuna. As for others, the substance of the rule is still too controversial for it effectively to govern the conduct of states. On yet other points, the norm has remained at the stage of abstract general standards on which only the-necessarily slow-development of international law can confer concrete substance and precise meaning.”).

58. H.L.A. HART, *THE CONCEPT OF LAW* 229 (1961).

59. See Weil, *supra* note 11, at 413–418 (describing the structural and conceptual weaknesses of the international normative system).

60. See Christenson, *supra* note 30, at 588 (“Despite considerable theorizing otherwise, States almost exclusively constitute the present international order.”); Salcedo, *supra* note 44, at 583 (“States are simultaneously the creators and subjects of [international law’s] norms; as sole authority on the laws they formulate, states themselves assess their meaning and scope. It is thus the individual states that interpret the obligations to which they—like their partners, the other states—are subject. Finally, it is they who decide as to the legality of their own conduct or that of third parties towards them. Hence the fragmentary nature of international law, and its relativism, the consequence of the equal nature and poorly institutionalized structure of international society.”).

law, and any law binding them must “emanate from their own free will”:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.⁶¹

This conception confirms a few deeply-rooted tenets of international law: states are the subjects of and actors under international law (as opposed to the citizens that reside in those states); states are imbued with sovereignty that is virtually inviolable; obligations are legally binding on sovereign states only if they agree, and any law purporting to bind states cannot do so if it would infringe upon that state's sovereignty.⁶² In this vein, according to the PCJ, the “first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State.”⁶³

This state-centric model of international law arguably gives rise to a corresponding normative deference to a state's own interpretation of its obligations under international law, or more specifically, its obligations to carry out the aspects of international law that it has expressly consented to (by treaty or otherwise).⁶⁴ An interpretive pluralism—wholly at odds with the concept of *jus cogens*—then arises from the international

61. S.S. “Lotus,” Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

62. See, e.g., Salcedo, *supra* note 44, at 583–84 (explaining that “international society is essentially a society of sovereign, independent states. Despite the great transformations which international organizations have brought about in the structure of international society, political power is still individually distributed among its members, and international law continues to be an eminently decentralized, little institutionalized, legal system. It is for this reason that in international law, states are both the legislators and the subjects of rules; consent by states is thus logically the keystone in the process of creating international legal rules.”).

63. S.S. “Lotus,” 1927 P.C.I.J. at 18.

64. See, e.g., Salcedo, *supra* note 44, at 583–84.

community's lack of a hegemonic sovereign to act as a "single source of normative validity."⁶⁵

International law, in other words, traditionally operates as the law of the contingent—contingent on state consent—evidenced through practice, formalized agreement, and jurisprudential expression. International law's authority derives from the very *signs of its existence*—in treaty, in state practice, in *opinio juris*. Even more problematically for *jus cogens*, this kind of law is constantly evolving, dependent on the complex motivations that drive states in their various roles: as legislators, interpreters, adjudicators and enforcers of international law. In that model,

[E]very breach of a customary law contains the seed for a new legality. In one sense, the action is a breach because the state is judged as a subject of international law; in another sense, the action is a seed for a new law because the state acts as a legislator of international law.⁶⁶

Jus cogens norms, on the other hand, seek to affect a shift in the standing international legal framework: to bind states because such norms are supposedly *not* contingent; they are theoretically accepted by the international community of states "as a whole" because their normative validity exists *ex ante* to formalization in treaties or the like. But this proposition is extremely difficult to reconcile with the current international order, where, even as some principles may attain primacy, they do not do so without referencing state consent.⁶⁷ As Gordon A. Christenson has noted, "[w]hile some of these interests might become overriding community policies thought fundamental, they are still perceived as part of the basic legal order of the nation-state system."⁶⁸

There is an unavoidable tension between universalism and contingency, between language that binds all, and practice that

65. Martti Koskenniemi and Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 558 (2002).

66. Roberts, *supra* note 46, at 784–85.

67. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 102 n.6 (1987) (noting that *jus cogens* "is now widely accepted . . . as a principle of customary international law (albeit of higher status)" and that "[a]lthough the concept of *jus cogens* is now accepted, its content is not *agreed*") (emphasis added).

68. Christenson, *supra* note 30, at 588–89.

looks to, well, practice. This special kind of tension—the tension of an authoritative, normative struggle—finds itself further complicated in the jurisprudence of international courts and tribunals.

C. PRIMACY OF STATE SOVEREIGNTY

When it comes to adjudicating *jus cogens*-related rights in the context of specific legal disputes, there are no satisfactory answers to the questions that logically issue. For instance, who suffers injury when a peremptory norm is breached? Does universal jurisdiction attach? What about universal standing? Are states bound by a universal duty to prosecute? Where do states' obligations logically begin and end?⁶⁹

On the subject of obligations *erga omnes*, M. Cherif Bassiouni has argued that

[R]ecognizing certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite, the non-applicability of statutes of limitation for such crimes, and universality of jurisdiction over such crimes irrespective of where they were committed, by whom (including Heads of State), against what category of victims, and irrespective of the context of their occurrence (peace or war).⁷⁰

That is, “characterization of certain crimes as *jus cogens* places upon states the *obligatio erga omnes* not to grant impunity to the violators of such crimes.”⁷¹ Unfortunately, it would hardly be controversial to state at this point that essentially no such obligations have consistently managed to attach among states in the international community.⁷²

69. See Weil, *supra* note 11, at 430.

70. Bassiouni, *International Crimes*, *supra* note 11, at 66.

71. *Id.*

72. See *id.* (“The practice of the states evidences that, more often than not, impunity has been allowed for *jus cogens* crimes, the theory of universality has been far from being universally recognized and applied, and the duty to prosecute or extradite is more inchoate than established, other than when it arises out of specific treaty obligations.”); M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 L. & CONTEMP. PROBS. 9, 10–11 (1996) (noting that despite the extremely high level of victimization and hundreds of millions of deaths in the twentieth century, the number of prosecutions remains disproportionately low) [hereinafter Bassiouni,

Jus cogens norms, broadly speaking, have been incorporated in the international legal jurisprudence in very spotty fashion. On the one hand, the Inter-American Commission on Human Rights (“IACHR”) has described *jus cogens* norms as part of a “superior order of legal norms, which the laws of man or nations may not contravene,”⁷³ sourced from “the essential dignity of the individual.”⁷⁴ And Judge Lauterpacht, in his separate opinion in the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, thought that *jus cogens* norms could perhaps be superior to Article 103 of the United Nations Charter and Security Council actions.⁷⁵ On the other hand, the ICJ has often chosen instead to rely on the concept of “obligations *erga omnes*.”⁷⁶ In the *Barcelona Traction* case, the ICJ identified “obligations *erga omnes*” as those “obligations of a State towards the international community as a whole.”⁷⁷ These “by their very nature [] are the concern of all States”: because of “the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”⁷⁸ The Court drew “an essential distinction” between

Searching for Peace and Achieving Justice].

73. *Domingues v. United States*, Case 12.285, Inter-Am. Comm’n H.R., Report No. 62/02, OEA/Ser.L/V/II.117, doc. 5 rev. 1 ¶ 49 (2003).

74. *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, at 95–96 (Sept. 17, 2003).

75. *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.))*, Judgment, 1993 I.C.J. 408, 440 (separate opinion by Lauterpacht, J.).

76. See Paulus, *supra* note 37, at 307 (collecting cases).

77. *Barcelona Traction, Light & Power Co. Ltd.*, Judgment, 1970 I.C.J. 3, 33 (Feb. 5).

78. *Id.* The Court went on to note: “[s]uch obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law . . . others are conferred by international instruments of a universal or quasi-universal character.”

The ILC has interpreted this to mean that “there are in fact a number, albeit a small one, of international obligations which, by reason of the importance of their subject-matter for the international community as a whole, are—unlike the others—obligations in whose fulfillment all States have a legal interest”; thus the “responsibility engaged by the breach of these obligations is engaged not only in regard to the State which was the direct victim of the breach: it is also engaged in regard to all the other members of the international community, so that, in the event of a breach of these obligations, every State must be considered justified in invoking—probably through judicial channels—

such obligations “and those arising vis-à-vis another State in the field of diplomatic protection.”⁷⁹ The ICJ has also pointed to intransgressible principles as “elementary considerations of humanity.”⁸⁰

However, even as courts may theoretically endorse the concept of *jus cogens* (or concepts like it, such as obligations *erga omnes*), difficulties arise when courts are faced with the actual application of such norms to the rights of parties in resolving a concrete dispute. This is especially true because upholding *jus cogens* norms often appears to come at a high price: that of chipping away at accepted notions of state sovereignty—which courts, not unreasonably, have proven especially reluctant to do.⁸¹ For instance, in the ICJ’s Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, it grappled with the difficulty in balancing a state’s right to self-defense with the individual’s (and the environment’s) right to protection from nuclear evisceration.⁸² In the separate opinion of Judge Dugard in *Armed Activities on the Territory of the Congo*, Judge Dugard applauded the ICJ’s determination that a reservation to the ICJ’s jurisdiction cannot be invalidated solely because it relates to a *jus cogens* norm, such as genocide.⁸³ This is because, notably, the Court’s jurisdiction is based on consent, and “no peremptory norm requires States to consent to jurisdiction where the compliance with a peremptory norm is the issue before the Court”—the principle of consent cannot be “overthrow[n].”⁸⁴

In this fashion, tenets of jurisdiction and immunity are the most common principles courts have relied on in drawing conceptual limitations around *jus cogens* norms. For instance, in 2001, in *Al-Adsani v. United Kingdom*, the European Court of

the responsibility of the State committing the internationally wrongful act.” *Report of the International Law Commission, supra* note 13, at 99.

79. *Barcelona Traction*, 1970 I.C.J. at 33.

80. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, 112 (June 27).

81. *See Weisburd, supra* note 33, at 26 (“To the extent that enforcing a *jus cogens* rule against a particular state does significant harm to that state, the calculus of costs to international society is different from the corresponding domestic situation. If a state is weakened by application of a *jus cogens* rule, the consequences may spill over and affect other states.”).

82. *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8).

83. *Armed Activities on the Territory of the Congo, Jurisdiction of the Court and Admissibility of the Application (Dem. Rep. Congo v. Rwanda)*, Judgment, 2006 I.C.J. 86, 87 (Feb. 3) (separate opinion of Dugard, J.).

84. *Id.* at 87, 91.

Human Rights (“ECHR”) held that *jus cogens* violations cannot strip sovereign immunity from a state.⁸⁵ In 2002, the ICJ similarly upheld immunity to have been infringed by an arrest warrant respecting alleged crimes against humanity.⁸⁶ A decade later, in 2012, the ICJ affirmed the principle of immunity as deriving from the sovereign equality of states, one of the “fundamental principles of the international legal order,” and emphasized the procedural nature of immunity, making it “entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful.”⁸⁷ The ICJ essentially concluded that “state practice does not support the existence of a specific *jus cogens* exception to the jurisdictional immunity of states.”⁸⁸

National courts have varied widely in their application of *jus cogens* norms (indeed, in their application of international law more broadly), but there is a general skepticism when it comes to the propriety of anything invading a domestic sovereign’s right to create law governing its territory, even if that invasion is one of an international supernorm that the sovereign purportedly has by definition consented to.⁸⁹ In some cases, however, international precepts of *jus cogens* have been invoked to delegitimize aspects of domestic law found to be in violation of *jus cogens* norms.⁹⁰ In *Ex parte Pinochet (No. 3)*, the British House of Lords emphasized the limits of immunity with respect to gross human rights violations by State officials.⁹¹ The International Criminal Tribunal for the Former Yugoslavia (“ICTY”) has explained that “in spite of possible national authorisation [sic] by legislative or judicial bodies to violate the

85. *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 19, ¶ 61 (2001).

86. Arrest Warrant of 11 April 2000 (*Dem. Rep. of Congo v. Belg.*), Judgment, 2002 I.C.J. 3, 30, ¶ 71 (Feb. 14).

87. *Jurisdictional Immunities of the State* (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 98, ¶¶ 57–58 (Feb. 3).

88. See Ronald J. Bettauer, *Germany Sues Italy at the International Court of Justice on Foreign Sovereign Immunity – Legal Underpinnings and Implications for U.S. Law*, AM. SOC’Y INT’L LAW (Nov. 19, 2009), <https://www.asil.org/insights/volume/13/issue/22/germany-sues-italy-international-court-justice-foreign-sovereign>.

89. See, e.g., Paulus, *supra* note 37, at 321.

90. See *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment of Judge Mumba, ¶¶ 155–56 (Int’l Crim. Trib. For the Former Yugoslavia Dec. 10 1998).

91. *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No. 3)* [2000] AC 1 (H.L.) 147 (appeal taken from Eng.).

principle banning torture, individuals remain bound to comply with that principle.”⁹²

Ultimately, even as international courts may ideally “represent the primacy of abstract humanitarianism over diplomatic technique [and] morally oriented retributivism over the subtle techniques of public law,”⁹³ this “primacy” has been less than completely adhered to in the decisions of these courts. If anything, only the “primacy” of state sovereignty has been confirmed. As evidenced, there is not a tremendous amount of consistency throughout the jurisprudence.⁹⁴ The one exception may be the tendency of courts to reference the signs of state consent,⁹⁵ and consequently to flesh out the normative outlines of *jus cogens* extremely carefully in light of the dominant, state-centric model of international law. That is, international courts and tribunals are generally (and not unreasonably) reluctant to impose on states binding and concrete obligations in potential curtailment of their sovereignty.

D. UNIVERSAL AND CONTINGENT

The absolutist, fundamental vocabulary of *jus cogens* denies its own contingency, its perennial search for authorship, and finally, the limitations imposed by a consent-based model of international law. But this is a false denial—the complex interaction between *jus cogens* and state consent cannot be ignored. As Martti Koskenniemi has put it, “[u]niversal values’ or ‘the international community’ can only make themselves

92. *Furundzija*, IT-95-17 at ¶ 155.

93. Koskenniemi & Leino, *supra* note 65, at 577.

94. See Markus Petsche, *Jus Cogens as a Vision of the International Legal Order*, 29 PENN ST. INT'L L. REV. 233, 247 (2010) (Petsche divides the jurisprudence into three categories: “[t]he first category includes those cases in which a court or tribunal refers, often in an *obiter dictum*, to a specific rule as being a *jus cogens* rule, without any direct effect on the actual outcome. The second group of decisions includes those cases in which the alleged *jus cogens* character of a norm is relied upon to seek a result different from a holding of invalidity of a treaty. The third category, which is directly relevant for the present analysis, comprises the very few cases where the validity of a treaty, or a treaty provision, is challenged on the grounds of an alleged *jus cogens* violation.”).

95. See Martti Koskenniemi, *International Law in a Post-Realist Era*, 16 AUSTL. Y.B. INT'L L. 1, 3 (1995) (“If we accept treaties and custom as sources of the law, this is precisely because they represent, as it were, the external face of international social facts. They provide the jurists with a special technique for grasping what, in the hard reality of social life, emerges as norms.”).

known through mediation by a State, an organization [sic], or a political movement.”⁹⁶

Even the conception of a more ‘modern,’ hybrid rise to legitimacy for norms such as *jus cogens* cannot untether itself from the will of states or other such independent international actors. Such a process, some have argued, would be deductive, “begin[ing] with general statements of rules rather than particular instances of practice,” whereby multilateral treaties and declarations by international organs (the United Nations, for instance) can more quickly launch widespread recognition of declarative customs that are confirmed by state practice.⁹⁷ But again, the legitimizing anchor remains state practice: the fictionalized, pluralistic unity of state consent remains the final arbiter of the scope of international norms.

Judge Bedjaoui at the ICJ has endorsed the replacement of a “resolutely positivist, voluntarist approach of international law” with “a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of States organized as a community.”⁹⁸ However, even that “collective juridical conscience” is still comprised of “States organized as a community.” A similar problem frustrates the sometimes-proffered conception of international law as formed around a set of constitutional principles that are hierarchically superior to principles merely reflective of the political will of states (which are subject to this hierarchy), in analogy to many domestic legal systems.⁹⁹ It is difficult to conceive of such a model existing independent of state consent, or at the least, some rise among states of a hegemon sitting at the top of the (normative) hierarchy.

Prosper Weil’s position in 1983 still resonates today: “international society remains at bottom a society of juxtaposition, founded on the ‘sovereign equality of States.’”¹⁰⁰

96. Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 CAMBRIDGE REV. INT’L AFF. 197, 199 (2004) [hereinafter *International Law and Hegemony: A Reconfiguration*].

97. Roberts, *supra* note 46, at 758; see also Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT’L L. 82, 89-90 (1988-89).

98. Threat or Use of Force by Nuclear Weapons, Declaration of Mohammed Bedjaoui, 1996 I.C.J. 268, ¶ 13 (July 8) (declaration of Mohammed Bedjaoui).

99. See, e.g., Stefan Kirchner, *Relative Normativity and the Constitutional Dimension of International Law: A Place for Values in the International Legal System?*, 5 GERMAN L.J. 47, 57 (2004).

100. Weil, *supra* note 11, at 419 (quoting Annex to UNGA Res. 2625 (XXV))

This creates a “fundamental intellectual confusion” for *jus cogens* norms: they are “derived from rules limiting the freedom of subjects of law in legal systems in which the authority to determine such rules is undisputed; the subjects of law cannot escape the courts’ control; these subjects have in any case considerable incentive to submit themselves to the rules applied by the courts; and the negative social consequences of compelling any single subject of the law to conform to public policy rules will almost always be modest. The concept is to be applied, however, in an international system in which none of those circumstances are present.”¹⁰¹

The reality is that states, courts and tribunals have demonstrated great reluctance to move away from the entrenched consent-based model of international law—where there is little space for *jus cogens* norms to take root—to one that allows universal norms to operate as binding law and confer rights on parties in a legal dispute or otherwise. Nor does it seem likely that such reluctance will diminish anytime soon. Thus, as discussed in the next part, it may behoove the international community to focus instead on addressing a preceding issue: the rhetoric of *jus cogens*.

IV. THE PROBLEM OF RHETORIC

A. PRIMACY OF INTERPRETATION

Today, to put it mildly, “[t]he gap between legal expectations and legal reality is [] quite wide.”¹⁰² Rights only matter if they actually effect change in individual entitlements and behavior, and there are serious difficulties in matching discrete entitlements and remedies to “*jus cogens*” rights, conceptualized as they are in such broad and absolute terms. For, as discussed, as currently formulated *jus cogens* norms suffer from various inherent tensions: a definitional vacuum; jurisprudential application that veers uneasily between universal sources of authority and those rooted in state consent; and a less than ideal rhetorical inflexibility that only papers over these tensions without resolving any of them.

(1970), reprinted in 65 AJIL 243 (1971), 9 ILM 1292 (1970)).

101. Weisburd, *supra* note 33, at 27.

102. Bassiouni, *International Crimes*, *supra* note 11, at 66.

At the highest levels, *jus cogens* norms seek to shift the paradigm of international rights—especially in relation to entrenched notions of state sovereignty.¹⁰³ The problem is that *jus cogens*, because it seeks to create a kind of superlegal supernorm, denies the relevance of authorship and its attendant political and rhetorical realities—that is, it denies the “strategic choices that are opened by particular vocabularies of global governance.”¹⁰⁴ For instance, even Bassiouni’s bold, seemingly categorical statement, that *jus cogens* consists of “certain crimes [that] affect the interests of the world community as a whole because they threaten the peace and security of humankind and because they shock the conscience of humanity,”¹⁰⁵ is still contingent on the existence of an international, state-driven agreement as to what “threaten[s] the peace and security of humankind,” and what “shock[s] the conscience of humanity.”¹⁰⁶ Thus, even Bassiouni has acknowledged that “*jus cogens* leaves open differences of values, philosophies, goals, and strategies of those who claim the existence of the norm in a given situation and its applicability to a given legal issue.”¹⁰⁷ To quote Oliver Gerstenberg, “concepts such as *jus cogens* are interpretive concepts, i.e. concepts that are constitutively part of a global transjurisdictionally-led debate about the sources of international law—concepts that permit, indeed, invite, deep, sharp and pervasive reasonable disagreement among interpreters over their meaning and scope.”¹⁰⁸

Definitions and interpretations are excruciatingly important, and *jus cogens* cannot seek to source its authority in the disparate will of the states while simultaneously denying

103. See, e.g., Hersch Lauterpacht, *The Reality of the Law of Nations*, in 2 INTERNATIONAL LAW, BEING THE COLLECTED PAPERS OF SIR HERSCHE LAUTERPACHT 26 (E. Lauterpacht ed., 1975) (As the origin source remains state practice, in 1941 Lauterpacht tellingly expressed the hope that the modern world approached unity: “The disunity of the modern world is a fact; but so, in a truer sense, is its unity. This essential and manifold solidarity, coupled with the necessity of securing the rule of law and the elimination of war, constitutes a harmony of interests which has a basis more real and tangible than the illusions of the sentimentalist or the hypocrisy of those satisfied with the existing status quo.”).

104. Martti Koskenniemi, *The Politics of International Law – 20 Years Later*, 20 EUR. J. INT’L L. 7, 12 (2009).

105. Bassiouni, *International Crimes*, *supra* note 11, at 69.

106. *Id.*

107. *Id.* at 71.

108. Oliver Gerstenberg, *What International Law Should (Not) Become. A Comment on Koskenniemi*, 16 EUR. J. INT’L L. 125, 127 (2005).

that any definitional authority is necessary. For even as the narrative around *jus cogens* is so abstracted that it simply ignores (albeit unsuccessfully) its own contingent state of being, that denial cannot cancel the need for interpretation. Instead, the denial opens up a struggle among international actors to declare the content of *jus cogens* norms. As such, states—still operating under the traditional, consent-based model of international law—will continue to have little incentive to defer to the (as of yet unknowable) fundamental legal principles that *jus cogens* stands for.

This is not least because the interpretive struggle renders the concept of *jus cogens* vulnerable to manipulation, as the contestants in that struggle seek “to make their partial view of the meaning appear to be the total view, their preference seem like the *universal preference*.”¹⁰⁹ To quote Koskenniemi, “‘human rights,’ like any legal vocabulary, is intrinsically open-ended, what gets read into it (or out of it) is a matter of subtle interpretative strategy.”¹¹⁰ Indeed, “[f]rom its vague introduction as some sort of social democracy, the idea of human rights had been redeemed only as a concrete Cold War position.”¹¹¹ A rampant kind of normative contest across states and legal bodies is risked, where such organs “are engaged in a hegemonic struggle in which each hopes to have its special interests identified with the general interest,”¹¹² and “[e]ach institution speaks its own professional language and seeks to translate that into a global Esperanto, to have its special interests appear as the natural interests of everybody.”¹¹³ As Carl Schmitt pithily stated, “[w]hoever invokes humanity wants to cheat.”¹¹⁴

And so proponents of *jus cogens* espouse their “Esperanto.” But the universalism professed by *jus cogens* advocates may be due at least in part to the belief (not necessarily mistaken) that

109. Martti Koskenniemi, *International Law in Europe: Between Tradition and Revival*, 16 EUR. J. INT'L L. 113, 119 (2005) (emphasis in original) [hereinafter *International Law in Europe*].

110. Koskenniemi, *supra* note 104, at 9–10 (“If a British court is able to read the indefinite detention of a person in Iraq as a human rights measure, then that decision will become part of a shifting pattern of outcomes produced by institutions having recourse to human rights vocabularies.”).

111. SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 79 (2010).

112. Koskenniemi & Leino, *supra* note 65, at 562.

113. *Id.* at 578.

114. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 54 (1996).

such norms must be so radically superior because they threaten state sovereignty (a norm that in all likelihood no state will ever agree to displace) and the foundational principles of international law. After all, in the wake of World War II, the prevailing sentiment behind the formalization of *jus cogens* norms in Article 53 was to ensure that no state ever engaged in similar atrocities again. But as demonstrated, merely expressing that “universal preference” while deferring indefinitely the final, authoritative determination of what constitutes a *jus cogens* norm has rendered it meaningless. That is, without determinative legal standards, the ILC’s idea of some international “Rule of Law” has only unhelpfully deferred the decision-making into “further procedure, interpretation, equity, context, and so on.”¹¹⁵

Jus cogens thus suffers from “false universalism,” or the universalism of empire: “a universal law, too, has no voice of its own . . . all we hear are voices making claims under the law.”¹¹⁶ In this way, the ostensible fixity of *jus cogens* risks collapse into a “normative myth masking power arrangements that avoid substantive meaning until later decision, thereby both postponing and inviting political and ideological conflict.”¹¹⁷ Myths can rarely affect or bind real actors.

B. TREATIES: SOME CONTEXT

In a way, all law represents the transposition of certain ideals into rules that create and limit rights and entitlements among people. With respect to *jus cogens* norms, states have barely even been able to agree on the scope of those ideals—in large part because doing so is framed as an all or nothing exercise. And, so long as the narrative remains binary, the cost of committing to it will be too high: no state will agree to bind itself to an inflexible set of universal principles whose scope is yet to be determined by the practice of other states. Further, even if states were able to agree on a list of norms qualifying for peremptory status, that list would still be only a theoretical one so long as courts or authoritative international bodies remain reluctant to apply that list of norms in a concrete, predictable fashion. Because abstract norms cannot on their own create

115. Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT’L L. 4, 28 (1990) [hereinafter Koskenniemi, *The Politics of International Law*].

116. Koskenniemi, *International Law in Europe*, *supra* note 109, at 118.

117. Christenson, *supra* note 30, at 590.

justiciable rights, *jus cogens* will likely remain doomed to languish in well-intentioned irrelevance.

At this juncture, one possibility deserves a moment of consideration. What if *jus cogens* norms are acknowledged as aspirational and context-driven? Perhaps a more useful way of conceptualizing *jus cogens* norms—and lowering their cost of commitment—lies in understanding the mandatory, universal language through which they are formulated as intentionally inconsistent with the fluctuating nature of customary law.

This statement may seem radical, but it is not. It relates to a conception of modern customary law as a hybrid of declaratory law and confirmatory practice. More specifically, the idea is taken from some commentators' formulation of treaty law, where treaties use "mandatory language to prescribe a model of conduct and provide a catalyst for the development of modern custom."¹¹⁸ As an example, Anthea Elizabeth Roberts has noted that the various "fundamental" rights enumerated in the UDHR, "expressed in mandatory terms," have managed to attain "customary status even though infringements are widespread, often gross and generally tolerated by the international community."¹¹⁹ In this way, modern customary law might represent "progressive development of the law masked as codification by phrasing *lex ferenda* as *lex lata*."¹²⁰

Of course, if this conception of international law were applied to *jus cogens* norms, and derogations were openly tolerated, carried to its extreme logical conclusion, such a narrative could be so flexible that any violation of a *jus cogens* norm might be acceptable. This would be an incoherent result, and not one borne out by treaty law.

Traditional treaties may suffer from some degree of normative free-for-all,¹²¹ but to a manageable extent. That is because in many cases nowadays, "to agree to a treaty is to agree on a continued negotiation with [] reference to contextual deal-striking."¹²² Treaties generally involve parties' ready

118. Roberts, *supra* note 46, at 763.

119. *Id.* at 763 (quoting OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 335 (1991)).

120. *Id.*

121. See Weil, *supra* note 11, at 414 (exploring the issue of "soft law" as compared to "hard law").

122. Martti Koskeniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1, 11 (2007) [hereinafter Koskeniemi, *The Fate of Public International Law*].

acknowledgement of the negotiating reality and the factual and historical context against which that negotiation takes place.¹²³ This is so even as, for instance, the notion of “peace” may call for interpretation,¹²⁴ and even though much treaty vocabulary might be formulated in the language of the aspirational.¹²⁵

Ultimately, there are specific historical contexts that give rise to the treaty—that is, real events—that (usually) underpin the binding rules and concretely-referenced entitlements that a treaty’s signatories have formally consented to. This is most easily seen in the treaties enacted at the end of international conflict, where any given peace settlement has its place in a larger, ever-evolving narrative of international history and process.¹²⁶ A fixed narrative of what occurred must be established. Negotiations with the very leaders who may have perpetrated atrocities must be held.¹²⁷ Ideological compromises must be made. But in the end, binding rules are created (and states readily consent to them) because they acknowledge the necessary malleability of ideals.¹²⁸

123. See Ulrich Fastenrath, *Relative Normativity in International Law*, 4 EUR. J. INT’L L. 305, 335 (1993).

124. See Bassiouni, *Searching for Peace and Achieving Justice*, *supra* note 72, at 12–13 (“[T]he word peace is freely used in the context of ending conflicts or ensuring transition to non-tyrannical regimes but without being defined or, more particularly, without any identification of what the peace goal is or how long the purported peace is designed to last. There is therefore a wide range to what peace can mean. In the political discourse of ending conflicts it ranges from the cessation or absence of hostilities to popular reconciliation and forgiveness between social groups previously in conflict with one another. It also includes the removal of a tyrannical regime or leader, and the effectuation of a regime change. The processes of attaining peace, whatever the intended outcomes may be, vary in accordance with the type of conflict, its participants, the level of victimization, the manner in which the victimization occurred, other destructive conduct by opposing groups, and popular perceptions of what occurred, as well as the future expectations of popular reconciliation between, or co-existence among opposing groups. Peace, therefore, encompasses a wide range of policy options, some of which could be combined to attain it.”).

125. See, e.g., Weil, *supra* note 11, at 414.

126. See Bassiouni, *Searching for Peace and Achieving Justice*, *supra* note 72, at 26 (“[L]arge-scale victimization arising out of international crimes is never safely tucked away in the limbo of the past. Instead, it remains fixed in time in an ongoing present that frequently calls for vengeance and longs for redress. Victims need to have their victimization acknowledged, the wrongs committed against them decried, and the criminal perpetrators, or at least their leaders, punished, and compensation provided for the survivors.”).

127. See *id.* at 12 (“The grim reality is that in order to obtain peace, negotiations must be held with the very leaders who frequently are the ones who committed, ordered, or allowed terrible crimes to be committed.”).

128. See *id.* (“Thus, the choice presented to negotiators is whether to have

Derogating from ideals is not always prudent, of course. The consequences of the realities of negotiating a treaty may be “grim,” and justice may be “bartered away for political settlements.”¹²⁹ However, setting aside whether the results are the most just or the most normatively superior, the rights and entitlements created through such a bartering process, I argue, are more real and lasting—if only because states view them as such (and here we return to the primacy of state consent)—than the virtually non-existent rights and entitlements created by *jus cogens* fundamentalist vocabulary. For example, as Weil has noted, some believe “a customary rule prohibiting certain nuclear tests has emerged from the 1963 Moscow Treaty,” even though he accuses that treaty of suffering from the vagaries of international “soft” commitment.¹³⁰

By contrast, *jus cogens* is so weighed down by its claim to unanimous acceptance by the “international community of states as a whole” that, in effect, it will never bind states, because the likelihood that states will agree to a set of universal, all-or-nothing rules whose scope is yet inchoate and whose enforcement might impinge upon their sovereignty is vanishingly small. However, if the burden of absolute obligation is lifted, and if the normative aspirations are humbled, treaties concerning *jus cogens* norms could be much less costly for states to enter into. Moreover, they could mark a helpful trend toward applicable law or the development of relevant custom. State sovereignty would not be so threatened, and leaving wiggle room for potentially necessary “derogations” (while reality at the

peace or justice. Sometimes this dichotomy is presented along more sophisticated lines: peace now, and justice some other time.”).

129. *Id.* (“Bartering away justice for political results, albeit in the pursuit of peace is the goal of most political leaders who seek to end conflicts or facilitate transitions to non-tyrannical regimes . . . the choice presented to negotiators is whether to have peace or justice. Sometimes this dichotomy is presented along more sophisticated lines: peace now, and justice some other time. The choice is, however, frequently fallacious and the dichotomy may be tragically deceptive.”).

130. Weil, *supra* note 11, at 435. That treaty provides, for instance, that “each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country,” as well as including numerous other exhortatory provisions. *Id.* at 414 (pointing to “numerous treaty provisions whereby the parties undertake merely to consult together, to open negotiations, to settle certain problems by subsequent agreement; and the purely hortatory or exhortatory provisions whereby they undertake to ‘seek to,’ ‘make efforts to,’ ‘promote,’ ‘avoid,’ ‘examine with understanding,’ ‘act as swiftly as possible,’ ‘take all due steps with a view to,’ etc.”).

moment the treaty is signed catches up to the ideals expressed in the treaty), could foster much needed, concrete movement toward universal acceptance of *jus cogens* norms.

C. NARRATIVE FRAMING

Treaties, ultimately, engage in a give and take between the ideal and reality: they are “a form of governance, a profession, a movement . . . turning text into deed, aspiration into institution.”¹³¹ They further reflect the reality that narratives themselves (peace, justice, compensatory rights) must be bargained for as well. Finally, their bargained-for flexibility and acknowledged need for continuing interpretation provide the vehicles for international agreement on the content of binding law that perhaps could not otherwise be agreed upon. Thus, treaties reveal their signatories’ understanding that there exists a “contextually determined equity.”¹³² they reflect honest acknowledgement of the power struggle inherent in the negotiating process—not only for present and future entitlements to be formalized in the treaty’s text, but also in the ongoing interpretive struggle over narrative.

Even though proponents of *jus cogens* may not readily acknowledge as much, this kind of narrative struggle is easily identified in the interpretive choices made when applying peremptory norm-based narratives to legal disputes. For instance, in the *Palestine Wall* case, the ICJ had the choice to author its decision based on the laws of self-determination, self-defense against terrorism, and human rights law.¹³³ In another example, the European Court of Justice (“ECJ”) effectively overrode the challenges of certain national courts to the ECJ’s

131. David Kennedy, *The International Human Rights Movement: Still Part of the Problem?*, in EXAMINING CRITICAL PERSPECTIVES ON HUMAN RIGHTS 19, 20–21 (Robert Dickinson et al. eds., 2012).

132. Koskenniemi, *The Politics of International Law*, *supra* note 115, at 31.

133. Legal Consequences of Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9). See Koskenniemi, *The Fate of Public International Law*, *supra* note 122, at 6; Marjan Ajevski, *Fragmentation in International Human Rights Law – Beyond Conflict of Laws*, 32 NORDIC J. HUM. RTS. 87, 88 (2014) (“[P]roblems of international human rights and international criminal law seem to be particularly acute in this sense since while they rest on an assumption of normative unity due to their allegiance to the Universal Declaration on Human Rights, this presumption can easily be threatened by increasing the number of institutions that can authoritatively pronounce on the meaning of the regime norms.”).

jurisdiction and the supremacy of European community law by interpreting it as a fundamental rights regime and thereby confirming its supremacy over domestic law.¹³⁴ And, for a more hypothetical illustration:

An agreement between two States . . . to undertake collective humanitarian intervention against a third State engaged in gross human rights abuse of its own citizens could be considered invalid as in conflict with a *jus cogens* norm against forcible intervention in another State. It could also be considered, however, as an agreement in aid of a peremptory norm against the gross abuse of human rights, justifying an exception to the general norm against forcible intervention. The political outcome would determine to a large extent the legitimacy of the claim of invalidity of the original agreement.¹³⁵

As these examples show, the normative framework matters, and it can certainly influence international power dynamics:¹³⁶ “[p]olitical intervention is today often a politics of re-definition, that is to say, the strategic definition of a situation or a problem by reference to a technical idiom so as to open the door for applying the expertise related to that idiom.”¹³⁷ To borrow a

134. See Koskenniemi, *The Fate of Public International Law*, *supra* note 122, at 8.

135. Christenson, *supra* note 30, at 601.

136. See *id.* at 597 (“First, when Western nations refer concretely to peremptory norms serving these yet undefined fundamental interests, they tend to emphasize, in the liberal tradition, negative prohibitions against the official use of force, genocide, slavery, slave trade, state torture, or arbitrary state murder. Second, Third World nations tend to view *jus cogens* norms as a category of legal order that prohibits ordinary, Euro-centric rules from undermining an affirmative and emerging new international justice and morality. Resenting the dominance by the West of the sources and biases of international law, these countries emphasize self-determination, non-aggression, and human rights as among the most fundamental interests of international society. Third, socialist nations tend to view the concept through prisms seeing peaceful coexistence, progressive development, prohibition against crimes against humanity, autonomy of States, non-intervention, and defense of peace and security.”).

137. Koskenniemi, *The Politics of International Law – 20 Years Later*, *supra* note 104, at 11 (“Think about an everyday international occurrence such as the transport of hazardous chemicals at sea. This can be conceptualized at least through half a dozen vocabularies accompanied by the same number of forms of expertise and types of preference: law of trade, law of transport, law of the environment, law of the sea, ‘chemical law,’ and the law of human rights. Each would have something to say about the matter. Each would narrate it as part

concept from the realist critique of international law, “in law, political struggle is waged on what legal words such as ‘aggression,’ ‘self-determination,’ ‘self-defence,’ ‘terrorist’ or ‘*jus cogens*’ mean, whose policy they will include, and whose they will exclude.”¹³⁸ Indeed, defining “aggression” took nearly twenty years for the United Nations, and defining “terrorism” stonewalled altogether.¹³⁹ This especially matters because “the problem is clearly less to explain why people who agree are bound than why also those should be who do not and how one should argue if interpretative controversies arise.”¹⁴⁰

Thus, I argue—and explore more fully in Part V—the imperative should be one of transforming the toothless *narrative* surrounding *jus cogens* into a more powerful one. The current narrative, where *jus cogens* draws its authority from a consent-based model that is somewhat irreparably at odds with the basic concept of *jus cogens* (universal and non-derogable), will likely never translate into legal rights and entitlements that can be applied consistently by courts and international legal organs.

V. LEVERAGING NARRATIVE: AN ALTERNATIVE FORMULATION OF *JUS COGENS*

A. TOWARDS COMPROMISE

There is nothing that inherently prevents states from acting on behalf of some generalized international interest.¹⁴¹ To quote Koskenniemi, “[s]urely our lack of certainty about whether or not rape is covered under some definition of ‘crimes against humanity’ can be no argument against taking all available measures to prevent or punish it.”¹⁴² The absolute should not be the enemy of the effective.

And yet, the absolutism of *jus cogens* guts its effectiveness: the current framing of *jus cogens* as “absolute” creates a binary,

of a different set of human pursuits, values, and priorities.”).

138. Koskenniemi, *International Law in Europe*, *supra* note 109, at 119.

139. See Koskenniemi, *International Law and Hegemony: A Reconfiguration*, *supra* note 96, at 199–200.

140. Koskenniemi, *The Politics of International Law*, *supra* note 115, at 27.

141. See Koskenniemi, *International Law and Hegemony: A Reconfiguration*, *supra* note 96, at 201–02, discussing the history of states acting unilaterally to act in the interest of the collective international community.

142. Koskenniemi, *International Law in a Post-Realist Era*, *supra* note 95, at 14–15.

all-or-nothing choice for states that understandably makes them skittish. For “[w]hatever view the speaker has taken on the ‘absolutes of international law’ the one thing they seem to agree upon is that they are indeed ‘absolutes’ and, as such, call for total commitment or total rejection.”¹⁴³ But this is an unnecessary opposition—and one that needlessly ratchets up the cost of committing to such norms. For instance, *jus cogens*, viewed for what it arguably is—the “global Esperanto” and “hegemonic technique”¹⁴⁴ of well-meaning jurists who laudably seek to protect the (human) rights of individuals—might be more easily committed to by state actors if the obligation were not absolutely binary—and if the consequences of commitment were less unknown.

If the rhetoric of *jus cogens* is shifted to acknowledge its necessary contingency and incorporate the realities of compromise, I believe that such norms—promoted through more modest, incremental and concrete means—can be wielded with just as much clout as the ILC could have hoped for, but with a lowered cost of commitment and correspondingly higher chance of obtaining state consent. Otherwise, if there can be no realistic compromise that takes place—as it does, for instance, in treaty drafting, reflecting the compromise necessary when authority is diffused between sovereign state-authors—then without some kind of clear legislative voice, *jus cogens* norms will never achieve easy translation into legal entitlement. Without compromise and context,

[T]heories that hope to ground law on justice, equity, social necessity, development trends of history, and so forth are always vulnerable to the charges of being ideological, unable to demonstrate their correctness in a non-circular fashion and framed in such general language that it is impossible to draw conclusions from them.¹⁴⁵

Again, the binary opposition that *jus cogens* norms has created is a false one, and one that impedes its effectiveness.

143. Koskenniemi, *International Law and Hegemony: A Reconfiguration*, *supra* note 96, at 198.

144. *Id.* at 199.

145. Martti Koskenniemi, *Hierarchy in International Law: A Sketch*, 8 EUR. J. INT'L L. 566, 578 (1997).

B. RIGHTS OF THE PEOPLE

It may be worth considering, here, another means of lowering the cost of committing to *jus cogens* norms: the idea of re-sourcing the authority for *jus cogens* norms in human individuals. Rather than casting international legal rights as those wielded by nation-states, it may be time to cast those rights as the rights of the individual subjects of those states—so that an affirmation of *jus cogens* norms is not automatically equated with the limitation of a state’s ability to act and therefore an encroachment on its sovereignty.

The outlines of this concept can be found in the very invocation of *jus cogens* by international organizations and international courts. The vocabulary surrounding the protection of “fundamental” human rights in, for instance, the United Nations Charter, refers to those rights as inhering in the “human person:” the Charter affirms “the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,”¹⁴⁶ “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion,”¹⁴⁷ and “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹⁴⁸ These “fundamental human rights to be universally protected” are exactly that: *human* rights. A parallel can be seen in international jurisprudence surrounding peremptory norms: the ICJ has referred to “elementary considerations of humanity”¹⁴⁹ and emphasized “the essential dignity of the individual.”¹⁵⁰ With respect to *erga omnes* rules, the ICJ has affirmed similar universal “obligations of a State to the international community as a whole” regarding “the principles and rules concerning the basic rights of the human person.”¹⁵¹

146. U.N. Charter pmb. ¶ 2.

147. *Id.* ¶ 3.

148. U.N. Charter art. 55, ¶ 4.

149. *Nicar. v. U.S.*, 1986 I.C.J. Rep. 14, ¶ 218 (quoting *Corfu Channel Case* (Alb. v. U.K.), Judgment, 1949 I.C.J. 22).

150. Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶ 55 (Jan. 19, 1984).

151. *Barcelona Traction*, 1970 I.C.J. at 33. *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, Judgment, 1970 I.C.J. Rep. 3, ¶ 34 (Feb. 5) (citing Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15 (May 28)).

In other words, a normative shift in *jus cogens* to conceiving of them as the rights of the individual might not so much require an overhaul of the international rights regime, as simply a reframing of the narrative. Again, this is not as radical as it may seem. Some commentators have in fact argued that one of the current problems with international human rights law is that while human rights were originally conceptualized as rights of the individual, their legitimacy and protection rests in the power of the states.¹⁵² Evan Criddle and Evan Fox-Decent have proposed to address this disconnect by embracing a fiduciary theory of rights, whereby “peremptory norms arise from a state-subject fiduciary relationship rather than from state consent,” and as such, “the state and its institutions are fiduciaries of the people subject to state power, and therefore a state’s claim to sovereignty, properly understood, relies on its fulfillment of a multifaceted and overarching fiduciary obligation to respect the agency and dignity of the people subject to state power.”¹⁵³

Such a shift would also approach more closely the public order conception of *jus cogens*, in which peremptory norms reflect the global community’s conscience, a conscience dedicated to protecting human rights and the like.¹⁵⁴ This conception would also hew more closely to the original formulation of *jus cogens*, and less closely to the formulation finally adopted as Article 53 of the VCLT, which, in the end, depends wholly on state consent.¹⁵⁵

Also applicable to this analysis are (arguably) changing notions of sovereignty itself. For instance, according to W. Michael Reisman, “[i]nternational law still protects sovereignty, but—not surprisingly—it is the people’s sovereignty rather than the sovereign’s sovereignty.”¹⁵⁶ He continues: “[u]nder the old concept, even scrutiny of international human rights without the permission of the sovereign could arguably constitute a violation of sovereignty by its ‘invasion’ of the sovereign’s *domaine réservé*.”¹⁵⁷ Such a normative shift suggests that *jus cogens*

152. See e.g., Jamie Mayerfeld, *Who Shall Be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights*, 25 HUM. RTS. Q. 93, 108 (2003).

153. Criddle & Fox-Decent, *supra* note 9, at 347.

154. *Id.* at 345.

155. See Weisburd, *supra* note 33, at 35.

156. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866, 869 (1990).

157. *Id.*

norms can in all likelihood be similarly de-linked from the “sovereign’s sovereignty.”

If such a de-linking were to occur, it stands to reason that states could more easily bind themselves to uphold *jus cogens* norms in a way that is not automatically reflective of some amount of sovereignty being bartered away. This decoupling could provide enormous practical benefits to those who are protected under *jus cogens*—that is, everyone. Thus, the ICJ’s affirmation in its *Advisory Opinion on Reservations to the Genocide Convention* of the “common interest” of all states begins to take on more meaning:

The Convention was manifestly adopted for a purely humanitarian and civilizing purpose In such a convention the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the Convention.¹⁵⁸

C. AFFIRMATIVE AND CONCRETE

If the cost of committing to *jus cogens* norms is thus lessened, I believe that states’ reluctance to bind themselves to upholding *jus cogens* norms will decrease as well. Shifting authority to individuals helps dispense with the instinct to express *jus cogens* in the binary vocabulary of the absolutely non-derogable; the vocabulary of affirmation may be used instead. Confirming the intention to protect the rights of its subjects would (ideally) operate as an affirmation of a state’s sovereignty, rather than subjecting that sovereignty to encroachment by an inflexible, absolute commitment to Article 53 of the VCLT.

More basically, if the expectations around *jus cogens* norms are lowered, that is, if such norms are more explicitly understood as aspirational, I argue states could more easily agree to incremental but binding entitlements in pursuit of that ideal. In this scenario, reservations or compromises in any given convention or agreement respecting *jus cogens* might simply reflect practical constraints, not any fundamental opposition to

158. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15, at 23 (May 28).

a given *jus cogens* norm. Here, even the treaties that reflect the “grim” reality of post-conflict compromise between peace and justice can be instructive. For, like those treaties, *jus cogens*-related agreements can reflect the reality of compromise and negotiation. Such agreements might not completely eradicate torture, for instance. But they would stand a greater chance of creating binding law—even if modest—that forces signatories to take concrete measures in pursuit of eradication—already a vast improvement over what the current formulation of *jus cogens* can(not) do.

Stripping *jus cogens* of its stubbornly fundamentalist, mandatory vocabulary, and instead embracing “reflexivity, a movement between theory and practice,”¹⁵⁹ would, I argue, greatly benefit the concept of *jus cogens*. Not only would doing so increase the likelihood of affirmative state action, but this more contextualized approach would also allow courts greater freedom to incorporate *jus cogens* norms in their decisions. As it stands, potentially overstating their position with respect to and over-binding themselves to non-negotiable, undeveloped law poses such enormous cost to states and courts that they have completely abrogated their duty to uphold *jus cogens* norms.

VI. CONCLUSION

Jus cogens currently has mere “symbolic significance.”¹⁶⁰ This will remain true so long as *jus cogens* remains mired in the uncompromising vocabulary of the fundamental. However, while the road to building *jus cogens* into the fabric of international legal rights and entitlements will no doubt be long and complicated, doing so certainly remains possible. For that process to materialize, proponents must shift the narrative of *jus cogens* and lower the cost of international commitment; they must recognize its contingency and the enduring primacy of the state-centric model of international law, engage with its

159. Koskenniemi, *International Law in a Post-Realist Era*, *supra* note 95, at 15.

160. Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 66 (1993); *see also* Weisburd, *supra* note 33, at 1 (“[T]his article seeks to show that the problem lies in the concept of *jus cogens* itself. More specifically, the article intends to make the case that the concept is intellectually indefensible – at best useless and at worst harmful in the practical conduct of international relations.”).

rhetorical limitations, and finally, jettison the weight of its all-or-nothing fundamentalist rhetoric.

Advocates of *jus cogens* norms would do well to remember the degree to which the choice of narrative interacts with the translation of moral or legal ideals into legal and factual rights and entitlements. It is useful to consider a reminder on this point from Koskenniemi:

This play of narratives of unity and fragmentation is quite central for the self-understanding of Western law, often expressed in the tension between historical ‘positivity’ and rational ‘system.’ Developments in seventeenth century law were told as a story about progress from civil war to the united nation as well as descent from the Christian community to sovereign states. Eighteenth century natural jurisprudence — Samuel Pufendorf in Germany, Adam Smith in Britain — turned the Reformation fear of individualism and human self-love into a scientific explanation for enlightened absolutism on the one hand, and the wealth of nations on the other, while the Kantian postulate of the ‘unsocial sociability’ from 1784 remained the last refuge for the faith of many a liberal internationalist until well into the twentieth century. And today, when every unifying deep-structure has been subjected to demystifying deconstruction what will be left is demystification deconstruction as the great unifying myth.¹⁶¹

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

161. Koskenniemi, *The Fate of Public International Law*, *supra* note 122, at 25.