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## The Political Economy of Jus Cogens

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# The Political Economy of *Jus Cogens*

Paul B. Stephan\*

## ABSTRACT

*This Article examines the basis of an asserted jus cogens exception to sovereign immunity. It demonstrates that the vision of jus cogens one embraces depends on background assumptions about the present and future of the international system. A robust conception of jus cogens assumes: (1) that independent judges and tribunals, informed by the views of non-state actors, can identify core international obligations and manage their tradeoffs with other values pursued by the international legal system, and (2) that the actions of independent judges and tribunals, informed by non-state actors, will influence state behavior. Doubts about the abilities of judges and tribunals, or fear about the rise of powerful and authoritarian actors in the international system, leads to a much narrower role for jus cogens, and thus broader sovereign immunity.*

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A deep tension exists between sovereign immunity and the contemporary *jus cogens* doctrine. On the one hand, all states recognize that subjecting a foreign sovereign to another state's legal process, in the absence of consent, flies in the face of an international system based on sovereign independence. In an earlier era it was a

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lawful cause for war.<sup>1</sup> On the other hand, since World War II there has grown an idea that violations of human rights cannot go unpunished. In the last two decades, abhorrence of impunity has migrated to the concept of *jus cogens*, the idea that certain norms of international law are so compelling that sovereign immunity falls away. The *jus cogens* concept does double duty: it both legitimizes an exercise of judicial power that would otherwise violate the settled norms of international law, and forbids sovereigns from immunizing conduct that transgresses a *jus cogens* norm.

The present dispute between Germany and Italy before the International Court of Justice (ICJ) presents both aspects of the doctrine. The Italian *Corte Suprema di Cassazione* justified the exercise of Italian judicial jurisdiction over the German state on the basis of the nature of misdeeds for which Germany was responsible. Before the ICJ, Italy also argued that a treaty purporting to settle all claims against Germany arising out of World War II atrocities had no legal effect, again because of the nature of the injuries suffered. The case thus invites a fuller consideration of the origins and functions of the *jus cogens* concept as a limit on both sovereign immunity and sovereign power. Regardless of how the ICJ ultimately disposes of the matter, what might domestic legal actors—in particular courts—take away from the case?

This Article will not advise policymakers how to resolve the obvious conflict between immunity and *jus cogens*. Indeed, part of its argument is that persons seized with lawmaking authority (domestic and international courts as well as legislators and foreign offices) should not put too much weight on the opinions of legal scholars, this one included. Rather, it will demonstrate that arguments about *jus cogens* are ultimately about power, and that strong *jus cogens* claims have complicated consequences. What works in one group of states (liberal democracies with strong civil societies and independent judiciaries) doesn't work with another (authoritarian states with the resources to resist international pressure).

Among liberal democracies, *jus cogens* arguments empower particular groups—academics, employees and advisers of international organizations, and national and international judges—at the expense of national officials and legislators. As to these states, expanding and strengthening *jus cogens* advances the privatization of international law.<sup>2</sup> Between authoritarian regimes and liberal democracies, broadening *jus cogens* may mean limiting the constraining effect of international law. Clarifying the stakes in these

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1. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 144 (1812); Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 3 (2009).

2. See Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. (forthcoming Nov. 2011).

arguments does not drive one toward any particular conclusion, but does illuminate the consequences of particular choices. Thus, this Article serves as an exercise in transparency in legal decision making, not as apologia for any particular outcome.

The Article begins with a description of the *jus cogens* arguments made by both the *Corte Suprema di Cassazione* and Italy and considers their logical implications. It then sketches the development of the *jus cogens* concept in public international law. It notes the analogy that early advocates made with the eponymous civil law doctrine. Next, it explores the polarized debate that unfolded during the Cold War, followed by the human rights paradigm that transformed *jus cogens* over the last two decades. The Article relates these developments to larger transformations in international relations and the corresponding international law structures. It then considers the implications for the distribution of power that variants of *jus cogens* imply. Finally, the Article discusses the role of non-state actors in the articulation of international law and the appropriate use of their claims by domestic courts and international tribunals. It also notes the complexities that may arise when some states in the international system assign responsible roles to independent judges and jurists and others do not.

This Article demonstrates that the vision of *jus cogens* one embraces depends on background assumptions about the present and future of the international system. A robust conception of *jus cogens* assumes: (1) that independent judges and tribunals, informed by the views of non-state actors, can identify core international obligations and manage their tradeoffs with other values pursued by the international legal system, and (2) that the actions of independent judges and tribunals, informed by non-state actors, will influence state behavior. Doubts about the abilities of judges and tribunals, or fear about the rise of powerful and authoritarian actors in the international system, will lead one to assign a much narrower role to *jus cogens*.

## I. *JUS COGENS* BEFORE THE INTERNATIONAL COURT OF JUSTICE

The story begins with a late effort to revisit the atrocities committed by German military and security forces in Italy in the latter part of World War II. A victim of deportation and forced labor brought suit in an Italian civil court against the German Federal Republic, the legal successor to the German Reich, for compensation. A first-instance court dismissed the case because Italian courts, in the absence of an applicable statute, apply the customary international law of sovereign immunity, which recognizes no exceptions for state acts that violate international law. The *Corte Suprema di Cassazione* reversed this decision. It ruled that custom had evolved so as to

recognize an exception to immunity in cases involving grave violations of that portion of customary international law that has attained the status of *jus cogens*. Accordingly, it allowed the case to proceed.<sup>3</sup>

Once Italian courts sought to enforce their judgments against German property in Italy, Germany called on the ICJ to intervene.<sup>4</sup> The jurisdiction of the ICJ rests on a 1957 Convention encompassing any dispute among the signatory European states.<sup>5</sup> Italy, while not contesting the ICJ's jurisdiction, sought to bring a counterclaim for compensation from Germany for its war crimes. The ICJ rejected this move.<sup>6</sup> The remainder of the case remains *sub judice*.

The ICJ's disposition of the counterclaim, the only substantive ruling in the dispute to date, suggests some skepticism about one possible use of the *jus cogens* concept. Most of the members of the Court regarded Italy's counterclaim as governed by the Peace Treaty of 1947, which contains a provision waiving claims that Italy and Italian nationals might bring against Germany.<sup>7</sup> All but one of the

3. *Ferrini v. Federal Republic of Germany*, Cass., sez. un., 11 marzo 2004, n. 5044, Giust. Civ. 2004 II, 1191 (It.), reprinted in 87 RIVISTA DI DIRITTO INTERNAZIONALE 539 (2004), summarized in Andrea Bianchi, *Ferrini v. Federal Republic of Germany*, 99 AM. J. INT'L L. 242 (2005). German courts have rejected this reasoning and refuse to enforce foreign judgments based on it. Bundesgerichtshof [BGH] [Federal Court of Justice] 2003 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 155 (Ger.), summarized in Sabine Pittrof, *Compensation Claims for Human Rights Breaches Committed by German Armed Forces Abroad During the Second World War: Federal Court of Justice Hands Down Decision in the Distomo Case*, 5 GERMAN L.J. 15 (2004). Before the *Ferrini* litigation, a Greek court had held that Germany would be presumed to have waived sovereign immunity in cases resting on a *jus cogens* violation. Prefecture of Voiotia v. Germany, Areios Pagos [A.P.] [Supreme Court] 11/2000 p. 2 (Greece), summarized in Maria Gavouneli & Ilias Bantekas, *Sovereign Immunity—Tort Exception—Jus Cogens Violations—World War II Reparations—International Humanitarian Law*, 95 AM. J. INT'L L. 198 (2001). Two years later a higher Greek tribunal denounced this decision. *Germany v. Margellos, Anotato Eidiko Dikastirio* [A.E.D.] [Special Supreme Court] 6/2002 (Greece), translated in 129 I.L.R. 525 (2002), summarized in Maria Panezi, *Sovereign Immunity and Violation of Jus Cogens Norms*, 56 REVUE HELLENIQUE DE DROIT INTERNATIONAL 199 (2003). For scholarly criticism of the Italian position, see generally EYAL BENVENISTI, *STANDARD SETTING BY THE BACK DOOR: ASSESSING SOFT LAW CHALLENGES TO GOVERNMENTS' DISCRETION TO SETTLE CLAIMS FOR REPARATIONS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW* (2010); Rudolf Dolzer, *The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons After 1945*, 20 BERKELEY J. INT'L L. 296 (2002).

4. Jurisdictional Immunities of the State (Ger. v. It.), Application Instituting Proceedings, at 44 (Dec. 23, 2008), available at <http://www.icj-cij.org/docket/index.php?p1=3&k=60&case=143&code=ai&p3=0>.

5. European Convention for the Peaceful Settlement of Disputes art. 1, Apr. 29, 1957, 320 U.N.T.S. 4646.

6. Jurisdictional Immunities of the State (Ger. v. It.), Order, ¶ 35 (July 6, 2010), available at <http://www.icj-cij.org/docket/files/143/16027.pdf>.

7. Treaty of Peace with Italy art. 77(4), Feb. 10, 1947, 61 Stat. 1245. As Germany was not a party to this treaty, there exists a question whether it has standing to hold Italy to this obligation. The International Court of Justice (ICJ) could not address this question, however, without exceeding its jurisdiction. See *infra* note 8.

judges concluded that the 1957 Convention, on which the ICJ's jurisdiction rested, barred any consideration of the legal interests determined by the Peace Treaty.<sup>8</sup> Judge Cançado Trindade, in dissent, asserted that "any purported waiver by a State of the rights inherent to the human person would, in my understanding, be against the international *ordre public*, and would be deprived of any juridical effects."<sup>9</sup> For him, the waiver contained in the 1947 Treaty could not bar Italy's claim, regardless of whether the ICJ had jurisdiction to apply or interpret that instrument.

Here, in a nutshell, one can find three distinct visions of the *jus cogens* concept. The first, more traditional vision of *jus cogens* is as a *shield*. It sets a limit on international law by discarding obligations that violate a nonnegotiable norm. By diminishing the scope of international law, it necessarily increases the power a state has to select among an array of possible choices as to its domestic legal order.<sup>10</sup> It asserts that any international obligation purporting to violate *jus cogens* norms has no legal effect, and thus restricts a state's power to enter into enforceable international agreements that might expand the scope of international law. Similarly, it negates customary international legal obligations to which a state might accede, if those obligations transgress a *jus cogens* norm. One can draw an analogy to a constitutional rule in domestic law, which invalidates otherwise lawful state acts, thus restricting state power and correspondingly expanding individual liberty. By limiting the range of international obligations that a state can assume, the shield vision of *jus cogens* similarly expands the liberty of states.

In the case before the ICJ, Germany contends that customary international law imposes a general obligation on all states not to subject foreign states to domestic judicial process, at least when the suit challenges the public acts (*acta jure imperii*) of the defendant state. Italy maintains that this general obligation has an exception when the public act constitutes a violation of a *jus cogens* norm.<sup>11</sup> The

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8. The ICJ's jurisdiction over Germany's claim rests on Article 27(a) of the European Convention for the Peaceful Settlement of Disputes, *supra* note 5, which accedes to ICJ settlement of disputes between its parties. Article 27(a) excludes from this jurisdiction "disputes relating to facts and situations" that preexisted the Convention. *Id.* For the majority, Italy's counterclaim implicated the 1947 Treaty, a "situation" that fell within the Article 27(a) exclusion. Jurisdictional Immunities of the State (Ger. v. It.), Order, *supra* note 6, ¶ 30.

9. Jurisdictional Immunities of the State (Ger. v. It.), Order, *supra* note 6, ¶ 124 (Trindade, J., dissenting).

10. In Hohfeldian terms, the shield conception of *jus cogens* creates privileges in favor of a state, and non-rights on the part of the international order. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 32–44 (1913). According to the shield variant, states enjoy the privilege of transgressing an obligation that violates *jus cogens* as they choose. Correspondingly, the international order has no right to require the state to adhere to the obligation.

11. The case does not involve the question of whether, as a matter of customary international law, a lawsuit against a state for private acts (*acta jure gestionis*) violates

ICJ must decide whether Italy violated international law by asserting jurisdiction over Germany under these circumstances. If Italy prevails, it will be because *jus cogens* gives it a privilege to disregard (a shield from) a duty otherwise imposed by international law, namely the obligation to respect a state's immunity from judicial process.

A slight variant on the shield vision of *jus cogens* transforms a flat prescriptive rule (international custom permits an exception from the customary law of sovereign immunity in cases involving violations of *jus cogens* norms) into an interpretive mechanism. Some jurists have sought to blend together the widely accepted principle that a sovereign may waive its immunity and the *jus cogens* concept. They assert that, when a violation of a *jus cogens* rule is alleged, a court should assume a waiver of immunity.<sup>12</sup> However, as states normally do not focus on *jus cogens* issues when addressing sovereign immunity, this move in effect collapses into the shield vision.<sup>13</sup>

The second vision of *jus cogens* is as a *sword*. The international order insists that states bear certain duties by their very nature of existing in an international system, independent of any manifestation of assent to the obligation. The international order has a corresponding right to enforce the specified duty against states. Agents of the international order—other states, international tribunals, and domestic courts—have the power to invoke this right against the transgressing state, which is liable for its transgression. These agents wield the sword of *jus cogens* against the violating state.<sup>14</sup>

Contemporary human rights advocates find the sword conception of *jus cogens* especially attractive. They believe that *jus cogens* does impose a duty on all states to respect certain human rights and

customary international law. Given the widespread, but by no means universal, adoption of the restrictive view of foreign sovereign immunity, it seems highly unlikely that any international tribunal would regard a withholding of sovereign immunity with regard to private acts as a violation of an international obligation.

12. *Areios Pagos* [A.P.] [Supreme Court] 11/2000, p. 2 (Greece); *cf.* *Enahoro v. Abubakar*, 408 F.3d 877, 893 (7th Cir. 2005) (Cudahy, J., dissenting) (asserting that "officials receive no immunity for acts that violate international *jus cogens* human rights norms"); *Prinz v. Federal Republic of Germany*, 26 F.3d 1166, 1178 (D.C. Cir. 1994) (Wald, J., dissenting) (asserting that German wartime atrocities violated *jus cogens* norms, which constituted an implicit waiver of sovereign immunity).

13. As a matter of logic, the move constitutes a *thaumatrope*. See Leon S. Lipson, *The Allegheny College Case*, *YALE L. REP.*, Spring 1989, at 8, 11. The principle that sovereigns may waive their immunity from judicial process in another nation's courts is well established. In suits alleging violations of a *jus cogens* norm, however, the facts rarely, if ever, support the claim that an actual waiver arose. In these suits, the facts alleged support a strong intuitive sense of a need for reparation, but the existing law of sovereign immunity provides a powerful obstacle. The move spins together the strong legal argument of waiver with the strongly appealing fact of an injury to combine together two elements that, absent the move, belong apart.

14. On the juxtaposition of duties and rights, see for example Hohfeld, *supra* note 10, at 29–32 (defining a right as the opposite of a duty). On powers and liability, see *id.* at 44–54 (describing a legal power as the opposite of a legal disability).

empowers a wide range of persons to enforce those rights on behalf of the international order. In addition, they believe that *jus cogens* norms impose a secondary duty on states to assist those agents of the international order that have a right to seek reparations for *jus cogens* violations. Specifically, the sword conception would require all states to provide a forum for claims based on *jus cogens* violations, regardless of impediments in municipal law or countervailing international legal principles.<sup>15</sup> The European Court of Human Rights has considered this argument but so far has rejected it.<sup>16</sup> The ICJ does not have to decide this question, as Italy needs to show only that it is free to disregard Germany's sovereign immunity, not that it is obliged to do so. In theory, however, the ICJ could assert that Italy has not only the power to submit Germany to its process, but the duty to do so.

The third, and in some ways the most ambitious, vision of *jus cogens* is as a *bootstrap*. It maintains that the level of international law protection of *jus cogens* is so strong that general rules regarding the limits of an international tribunal's jurisdiction no longer apply. Just as states bear a duty under the sword vision to enforce *jus cogens* duties against states, international tribunals have a corresponding duty of enforcement on behalf of agents of the international order. According to this vision, the background norm of international adjudication (the tribunal may address only those matters that the parties have submitted to it) contains an exception when one party invokes a right of enforcement based on *jus cogens*.<sup>17</sup>

In the ICJ dispute, even Italy did not appear to make such a bold claim. Rather, it seems to have argued that the 1957 Convention on which the ICJ's jurisdiction rests effected an implicit modification of the 1947 Treaty of Peace. The ICJ could determine whether the

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15. See Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 65–66 (1996) (“[T]he characterization of certain crimes as *jus cogens* places upon states the *obligatio erga omnes* not to grant impunity to violators of such crimes.”).

16. See *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79, paras. 54–56 (rejecting the argument that European Convention on Human Rights required the United Kingdom to afford a forum to consider Kuwait's liability for acts of torture). In material part, the majority said:

Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.

*Id.* para. 61. Eight judges dissented from this decision. New challenges to UK law are now before that court. See Intervenor Brief by Redress, Amnesty International & Interights & Justice at 1, *Joined Cases, Jones v. United Kingdom*, App. No. 34356/06 & 40527/06 (Eur. Ct. H.R. 2010).

17. See Bassiouni, *supra* note 15, at 66 (arguing that *jus cogens* norms imply “universality of jurisdiction”).



Convention reserved a right for Italy to seek reparations against Germany for *jus cogens* violations without considering what the Treaty of Peace had done.<sup>18</sup> There is some ambiguity in Judge Cançado Trindade's opinion quoted above, but he seems to support both the argument Italy appears to have made and the even stronger claim that normal jurisdictional rules do not apply once *jus cogens* enters the picture.

There is, one should note, nothing crazy about the position that *jus cogens* trumps conventional limits on an international tribunal's jurisdiction. The principle that an international tribunal has the power to decide only claims that states have submitted to it itself rests on customary international law, including the customary rules of treaty interpretation. If *jus cogens* has such force of gravity as to bend other customary rules, such as the principle of sovereign immunity, then there exists no a priori reason why it can't bend those relating to the jurisdiction of tribunals. Put differently, if individual states, as agents of the international order, have a right to seek reparations against a state that violates its *jus cogens* duties, then they could be understood as conveying this right to international tribunals at the time they constitute them.<sup>19</sup>

*Jus cogens* norms, then, can be seen as doing powerful work in international law. But what, exactly, are these norms? Where did this powerful doctrinal trump come from, and who wishes to see the card played? The next section takes up these questions.

18. The ICJ does not release to the public the memorials submitted by the parties until after it has concluded a case, so we must infer what Italy argued from what the ICJ's order says.

19. For elaboration of this argument, see Bassiouni, *supra* note 15, at 65–66 (“To this writer, the implications of *jus cogens* are those of a duty and not of optional rights; otherwise *jus cogens* would not constitute a peremptory norm of international law. Consequently, these obligations are non-derogable in times of war as well as peace. Thus, recognizing 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).”). One might draw an analogy from the so far unresolved debate in U.S. constitutional law over the capacity of Congress to deprive the federal courts of jurisdiction over particular constitutional disputes. See, e.g., Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). Henry Hart argued that the constitutional power of Congress to limit federal court jurisdiction is subject to constitutional constraints that courts may adjudicate. One can similarly read Judge Cançado Trindade as asserting that the ICJ can adjudicate limits on its jurisdiction that would transgress *jus cogens*. See *Jurisdictional Immunities of the State* (Ger. v. It.), Order, *supra* note 6, ¶ 124 (Trindade, J., dissenting).

## II. THE EMERGENCE OF THE *JUS COGENS* CONCEPT

The *jus cogens* concept serves as an example of the “instant custom” that has dotted the postwar international law landscape.<sup>20</sup> The term itself best translates as “compulsory law.” It appears first to have found its way into American legal discourse by way of reference to German private law.<sup>21</sup> There it denotes the well understood concept that rules of public law, i.e., expressions of the *ordre public*, have priority over rules of private law. Common lawyers, for example, accept that contracts in violation of public policy are void.<sup>22</sup> Civil lawyers tend to replace the protean concept of public policy with a distinction between public and private law, but the effect is essentially the same. It means that private ordering must give way to duly enacted public law.

Within international law, however, the term did not gain much traction until the postwar era.<sup>23</sup> In the immediate aftermath of World War II, scholars began to try on the concept as a means of grappling with the German Reich’s enormities. The Reich tended to formalize its acts of aggression, territorial appropriation, mass murder, and other atrocities through legal instruments, thus highlighting the gap between legality and morality. Out of revulsion, theorists looked for ways to construct moral qualifications for international law.<sup>24</sup> Thus,

20. See, e.g., Bin Cheng, *United Nations Resolutions on Outer Space: “Instant” International Customary Law?*, 5 INDIAN J. INT’L L. 23 (1965) (“In that way a treaty clause can give birth to ‘instant custom’—or so says the theory of quasi-universal treaties: instruments embodying rules that, simply because they have been accepted *qua* conventional by a largely binding *qua* customary on the others.”); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 435 (1983). For my earlier discussion of the evolution of the *jus cogens* concept in international law, see Paul B. Stephan, *Symmetry and Selectivity: What Happens in International Law When the World Changes*, 10 CHI. J. INT’L L. 91, 105–06 (2009) (documenting divergence in international practice regarding *jus cogens*).

21. Ernest G. Lorenzen, *Commercial Arbitration—International and Interstate Aspects*, 43 YALE L.J. 716, 727 n.34 (1934), is the earliest reference to *jus cogens* that one can find in the Westlaw database. See also Arthur Lenhoff, *Optional Terms (Jus Dispositivum) and Required Terms (Jus Cogens) in the Law of Contracts*, 45 MICH. L. REV. 39 (1946). For a more extensive discussion of the use of the *jus cogens* concept in civil law systems, see Levan Alexidze, *Legal Nature of Jus Cogens in Contemporary International Law*, 172 RECUEIL DES COURS 219, 233–42 (1981).

22. RESTATEMENT (SECOND) OF CONTRACTS § 178 (1982).

23. In U.S. scholarship, the earliest attempt to extend the civil law concept to international law appears to be Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT’L L. 571 (1937). See also Alfred von Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT’L L. 55 (1966). Von Verdross wrote in an older natural law tradition that based constraints on the power of states to contract on concepts of reason and morality. He used the formulation “rules which hav[e] the character of *jus cogens*,” indicating that the term itself came from private law and here served as an analogy. *Id.*

24. See generally Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1957). Ironically, the largely symmetrical practice of genocide and crimes against humanity by the Soviet state between 1932 and 1945, so

one finds Hans Kelsen, writing shortly after the war, referring to “a rule of international law which has the character of *jus cogens* so that it cannot be affected by any treaty.”<sup>25</sup> Here Kelsen seemed to understand the reference as an analogy (hence “the character of”), indicating that, just as public order trumps private ordering in municipal law, something in international law might trump state-to-state ordering achieved through international agreements. However, Kelsen did not assert that this something exists, much less define it or provide its provenance. Rather, he merely recognized a logical possibility.

The problem with the private law analogy, as civil lawyers readily acknowledge, is that the underlying constitutional hierarchy of international law does not map onto that of domestic law.<sup>26</sup> In the nineteenth century in particular, private law on the continent often functioned as a reservoir of legal order embedded in political systems characterized by virtually unchecked sovereign prerogatives. The German *rechtsstaat*, for example, rested on the core assumption that the sovereign’s will was supreme, but should be expressed transparently, consistently, and in a manner that gave due regard to

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compellingly documented in TIMOTHY SNYDER, *BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN* (2010), provoked no similar reaction. In part, the Soviet regime controlled the people and territory where these acts occurred, and thus suppressed evidence of their occurrence. In the immediate aftermath of the war, moreover, there was little interest in stigmatizing an ally that had borne the greatest portion of the costs of the conflict, even if a portion of those costs was self-inflicted.

25. Hans Kelsen, *Limitations on the Functions of the United Nations*, 55 YALE L.J. 997, 1007 (1946).

26. See, e.g., GEORG SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW* (5th ed. 1967).

Unlike municipal law, international customary law lacks rules of *jus cogens* or international public policy, that is, rule which, by consent, individual subjects of international law may not modify. In fact, *jus cogens*, as distinct from *jus dispositivum*, presupposes the existence of an effective *de jure* order, which has at its disposal legislative and judicial machinery, able to formulate rules of public policy, and, in the last resort, can rely on overwhelming physical force. Unorganized international society lacks such organs. It must be content to rely on the majority of the subjects of international law acting in a spirit of reasonableness. If, and as long as, they behave in this manner, their self-restraint creates a *de facto* order of remarkable stability. On the level of organized world society, the Principles of the United Nations formulated in Article 2 of the Charter constitute consensual *jus cogens*, that is, rules of a *de jure* order which may not be modified or abrogated by arrangements between individual member states.

*Id.* at 29–30. For similar reservations, see Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT’L L. 946, 961 (1967) (“[T]his is necessary to illustrate the scope and the potentialities, but also the vagueness, the elasticity, and the dangers of the concept of international *jus cogens* . . .”).

the domain of the civil law.<sup>27</sup> *Jus cogens* thus expressed the sovereign's acknowledged authority to preempt private arrangements.

But in the international realm there is no meta-sovereign and thus no evident preemptory power. As a matter of hierarchy, there exists no higher body empowered to displace or alter the obligations that states choose to assume, by treaty or through acceptance of custom as legally binding. Domestic states typically have either written constitutions or widely accepted assumptions about legitimate order (or both), but the international world has neither of these structures. Traditionally, international law derived solely from sovereign consent, as there was no other authority to enact legal norms.

To be sure, some theorists in the past blended in strains of divine order or natural law as a means of constraining the dispositions of sovereigns.<sup>28</sup> However, the underlying basis of these efforts shifted as fashions in moral discourse changed. By the beginning of the twentieth century, it seemed clear to most international lawyers that, whatever it was that might constrain the production of international law, it could not operate as does a domestic sovereign with clear authority to preempt private ordering. Yet no consensus existed about any alternative path to preemptory rules in international law.<sup>29</sup>

During the 1950s, the International Law Commission (ILC), a body of experts working under UN auspices, sought to provide a kind of constitutional order for the international legal system. From the outset, the proponents of this project wanted to include *jus cogens* in

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27. See JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION—AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 97 (3d ed. 2007) (describing different origins and functions of public and private law in continental legal systems).

28. For a discussion of these early attempts to divine limits on the rights of sovereigns to make international law, see Stefan Kadelbach, *Jus Cogens, Obligations Erga Omnes and Other Rules—The Identification of Fundamental Norms*, in *THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: JUS COGENS AND OBLIGATIONS ERGA OMNES* 21, 21 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006) and also George D. Haimbaugh, Jr., *Jus Cogens: Root and Branch (An Inventory)*, 3 *TOURO L. REV.* 204, 207–11 (1987). Perhaps the strongest inkling in the immediate postwar period of a conception of preemptory obligation that constrained sovereigns can be found in the advisory opinion of the International Court of Justice on reservations to the Genocide Convention. In describing the Convention, the court spoke of its conception “that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.” Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28). Note the premise in this statement that international law accepted the authority of civilized nations to impose obligations on other states. It is exactly this premise that the Soviet conception of *jus cogens* later forcefully rejected. See *infra* notes 34–37 and accompanying text.

29. See *supra* note 26.

this endeavor.<sup>30</sup> This effort did not go unopposed. Hans Kelsen might have been the best known of the critics, but Georg Schwarzenberger produced the most extensive attack. He based his analysis on the absence of international structures in a position to enact and enforce *jus cogens*:

The evidence of international law on the level of unorganized international society fails to bear out any claim for the existence of international *jus cogens*. Viewed in historical and sociological perspectives, this negative result of our inquiry is hardly surprising. It required a prolonged development of primitive community laws before such laws outgrew the stages of private vengeance and outlawry. The rise of legal rules which bind without agreement between the parties affected and which override any contradictory agreement presupposes one of two things: the existence of authorities believed to be endowed with supernatural powers (as when lawyer-priests administered *jus sacrum*), or a centralized worldly power which would refuse to compound at least offenses directed against itself or the community at large.<sup>31</sup>

Absent either an international consensus about the legitimacy of unofficial authorities or an effective international state, *jus cogens* could not exist. Invocation of the concept served only as a device to enable escapes from what Schwarzenberger considered legitimate international law.<sup>32</sup>

Significant opposition to the critical arguments came from within the Soviet bloc. Beginning in the 1950s, Soviet theorists articulated a theory of international law that both accepted the legitimacy of international obligations and set significant limits on their scope. The most significant product of this effort was the concept of peaceful coexistence. Peaceful coexistence posited that: (1) two radically opposed social, economic and political systems, namely socialism and capitalism, existed in the contemporary world, and (2) current levels of weapons technology made an armed conflict between these systems unthinkable. International law could function only insofar as it

30. Rep. of the Int'l Law Comm'n to the Gen. Assembly, ¶ 18, U.N. Doc. A/5601 (1963); see also [1963] 1 Y.B. Int'l L. Comm'n, at 213-15, U.N. Doc. A/CN.4/SER.A/1963 (discussion of ILC).

31. Georg Schwarzenberger, *International Jus Cogens?*, 43 TEX. L. REV. 455, 467 (1965).

32. The delegates to the conference that approved the Vienna Convention on Law of Treaties (VCLT) noted Schwarzenberger's objections. United Nations Conference on the Law of Treaties, 1st Sess., Mar. 26-May 24, 1968, *Official Records: Summary Records of the Plenary Meetings and of the Meetings of the Committee as the Whole*, at 299, U.N. Doc. A/CONF.39/11 (1969) [hereinafter *Official Records*] (statement of Chilean representative). For later arguments critical of the *jus cogens* concept, see GEORG SCHWARZENBERGER, *INTERNATIONAL LAW AND ORDER* 27-56 (1971) and also JERZY SZTUCKI, *JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: A CRITICAL APPRAISAL* (1974). For more recent criticism, see Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585 (1988); Gennady M. Danilenko, *International Jus Cogens: Issues of Law-Making*, 2 EUR. J. INT'L L. 42 (1991); 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 (1995).

recognized and accommodated these two fundamental precepts.<sup>33</sup> The theory thus supplied the peremptory authority that Schwarzenberger believed that international law lacked.

Working within the peaceful coexistence framework, the Soviet theorists found one aspect of *jus cogens* especially attractive. For them, it provided an international law doctrine that could function as a shield, i.e., as a limitation on the power of states to produce international law. As a revolutionary regime, the Soviet regime sought to limit and combat the international law that the "imperialist" states previously generated. Then, once the outcome of World War II established its status as a superpower, the Soviet Union sought a mechanism to legitimize its control over the development of new rules of international law.<sup>34</sup> *Jus cogens* fit the bill admirably.

G. I. Tunkin, the preeminent Soviet international law theorist during its superpower phase, asserted that the theory of peaceful coexistence, which asserted the impossibility of the use of force as a means of resolving difference between the West and the Soviet camp, provided a core principle in international relations. He asserted that this theory provided the basis for peremptory norms in international law:

The growth of the forces of socialism and progress, their increasing influence, and the increase in this connection of the importance of moral principles in international relations also promote the creation of imperative principles and norms of international law. Therefore, the quantity of imperative principles and norms in contemporary international law is growing.<sup>35</sup>

For Tunkin, international law's new imperative principles rested not on bourgeois conceptions of morality that emphasize the flourishing of the individual, but rather on the foundational conception of peaceful coexistence between states with different social systems. He thus derived peremptory norms from the impermissibility of state coercion:

Today, when the authority of the world socialist system and the newly-independent states is growing steadily and the forces of peace are becoming ever stronger, there is every reason to believe that the basic principles and rules of international law will be further developed and

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33. See N. S. Khrushchev, *On Peaceful Coexistence*, 38 FOREIGN AFF., Oct. 1959, at 1, 3-4 (1959) ("The principal of peaceful coexistence signifies a renunciation of interference in the internal affairs of other countries with the object of altering their system of government or mode of life or for any other motives."). The most prominent work synthesizing post-war Soviet views of international law was PROBLEMY MEZHDUNARODNOGO PRAVA [PROBLEMS OF INTERNATIONAL LAW] (G. I. Tunkin ed., 1961).

34. See Alexidze, *supra* note 21, at 249-51.

35. G. I. TUNKIN, THEORY OF INTERNATIONAL LAW 157 (William E. Butler trans., 1974). Tunkin, as the Soviet representative in the International Law Commission, had supported the inclusion of *jus cogens* in the VCLT. *Summary Records of the Fifteenth Session*, [1963] 1 Y.B. Int'l L. Comm'n 69, U.N. Doc. A/CN.4/SER.A/1963.

strengthened, and that new principles and rules, directed at promoting international co-operation and ensuring free development of the people and the peaceful coexistence of states on the basis of equality, respect for sovereignty and non-interference in domestic affairs, will be established.<sup>36</sup>

In particular, Tunkin's conception of *jus cogens* implied a prohibition of the use of coercive pressure by one state (including civil litigation) to alter the manner in which another state dealt with the personal liberties of its subjects. Such a lawsuit would disrespect the sovereignty of another state, interfere in its domestic affairs, and subvert sovereign equality by presupposing the right of one state to elevate itself over another.<sup>37</sup>

Western specialists objected to the Soviet approach exactly because it provided a basis for disregarding international obligations that the West wished states to observe. They regarded the existing system of international law as something that had built up over centuries and that bound new as well as revolutionary states.<sup>38</sup> A realist might assert that the West constructed the status quo in their own interests, for the most part without the participation of the Soviet Union, its satellites, or the newly independent states, and that they did not want to strain this system through a filter of the Soviet bloc's

36. G. I. Tunkin, *Peaceful Coexistence and International Law*, in CONTEMPORARY INTERNATIONAL LAW 35 (G. I. Tunkin ed., 1969).

37. See G. I. Tunkin, *The Contemporary Theory of Soviet International Law*, 31 CONTEMP. LEGAL PROBS. 177, 185 (1978). Tunkin states:

Contemporary international law prohibits the resort to war, the use or threat of force and obligates states to settle their disputes by peaceful means only. . . . Contemporary international law is a law of peace, a law aimed first of all at ensuring international peace, which is the greatest common interest of all mankind. . . . Contemporary international law is in its essence anti-colonial. It is a law of equality, self-determination and freedom of peoples. . . . According to contemporary international law, states have the duty to co-operate with one another in resolving international problems. Contemporary international law, reflecting changes that have taken place in society after the Great October Socialist Revolution, has turned its face to the human being. The problem of international co-operation in ensuring respect for human rights has become one of the principle problems of contemporary international law.

*Id.* The statement about human rights, viewed in isolation, might be seen as an endorsement of the contemporary human rights program, and in particular of the equation of fundamental human rights with *jus cogens* norms. But, as the references to the October Revolution and the duty of international cooperation suggest, the conception of human rights incorporated in this reference involved the right to participate in, and benefit from socialist construction, and not personal rights of freedom from state coercion. The idea of one or several states imposing sanctions on another in response to infringement of individual interests was anathema to this conception of international law. See OLIMPIAD S. IOFFE, HUMAN RIGHTS 61-62 (Thomas J. Joyce ed., 1983) (describing Soviet approach to individual rights protection in international law).

38. See, e.g., Leon Lipson, *Peaceful Coexistence*, 29 LAW & CONTEMP. PROBS. 871, 872 (1964); *The Rise and Fall of "Peaceful Coexistence" in International Law*, 1 PAPERS ON SOVIET LAW 6 (1977).

devising. They thus resisted any concept—including *jus cogens*—that would diminish the present body of international law in the absence of general state assent to the diminution.

Within the ILC, this debate was resolved largely on the Soviet side. In 1966, the ILC reported out an instrument that contained a provision purporting to codify *jus cogens*. The draft treaty stated that this category of norms existed, that the norms did not permit any derogation, and that treaties that violated such a norm were void. It did not, however, clarify what constituted *jus cogens*.<sup>39</sup>

Following the ILC recommendation, the UN General Assembly convened a conference to consider adoption of the proposal.<sup>40</sup> During the two sessions of conference in 1968 and 1969, the *jus cogens* proposal proved polarizing, as the shadow of the Cold War defined the debate. The United States and its allies criticized the ILC's draft article and sought to water it down by setting strict limits to what would qualify as a *jus cogens* norm.<sup>41</sup> In contrast, representatives of the Soviet bloc and some newly independent states embraced the ILC's language.<sup>42</sup> The conference rejected the U.S. amendment by a vote of 57 to 24, with 7 abstentions.<sup>43</sup> It adopted the final version on a first reading by a vote of 72 to 3, but with 18 abstentions and with countries such as the United States stating that its support was provisional and dependent on creation of an authoritative dispute resolution mechanism. At a second reading the vote was 87 to 8, with 12 abstentions. In its final form, the article read:

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.<sup>44</sup>

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39. Official Records, *supra* note 32, at 66–68.

40. G.A. Res. 2166 (XXI), U.N. GAOR, 21st Sess., Supp. No. 9, U.N. Doc. A/6309/Rev.1, at 95 (Dec. 5, 1966).

41. Official Records, *supra* note 32, at 295 (objections of U.S. representative); *id.* at 304–05 (objections of British representative); *id.* at 309–10 (objection of French representative); *id.* at 316–17 (objections of Australian representative); *id.* at 330 (objections of U.S. representative); *id.* (further objections of British representative); *id.* at 331 (objections of French representative); *id.* at 472 (representatives of Britain, France, and United States expressing concerns about text of article).

42. *Id.* at 294 (support of Soviet representative); *id.* at 296–97 (support of Cuban representative for text and attack on proposed U.S. amendment); *id.* at 307 (support of Byelorussian representative); *id.* at 311–12 (support of Hungarian representative); *id.* at 312–13 (support of Romanian representative); *id.* at 313–14 (support of Bulgarian representative); *id.* at 322 (support of Ukrainian representative).

43. *Id.* at 333.

44. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.



It is with this instrument that the discussion of *jus cogens* in international law really begins.

The promulgation of the Vienna Convention on Law of Treaties (VCLT) hardly ended the controversy over *jus cogens*. Even in its indefinite and hedged form, the ILC's formulation scared off significant actors. The British, French, and U.S. governments referred to this provision as a particular instance where the VCLT sought to change, rather than codify, international custom and accordingly opposed it. The United Kingdom ultimately overcame its scruples and joined the treaty, but France and the United States did not.<sup>45</sup> Thus, two permanent members of the UN Security Council, one of which today functions as the only superpower in the global system, spurned the ILC's handiwork. The Soviet Union, the other superpower at the time of the VCLT's promulgation, stayed out of the regime until 1986, and when it did join, it lodged a reservation barring international dispute resolution of any issues relating to the *jus cogens* article except on its own terms.<sup>46</sup> Other significant international powers, including the nuclear states of India, Israel, North Korea, and Pakistan as well as the emerging nuclear state Iran, have not ratified the VCLT. Even though some of these nonparties, such as the United States, concede that portions of the VCLT reflect customary international law, they do not agree that the *jus cogens* article does.<sup>47</sup>

Moreover, although the VCLT was reasonably clear about what *jus cogens* did, it did not provide much light on what actually constitutes *jus cogens*. Its definition of *jus cogens* norms raises more questions than it answers. First, a norm exists only if it is "accepted and recognized by the international community of States as a whole."

45. The United Kingdom joined the treaty on June 25, 1971. For the current status of the treaty, see *Status: Vienna Convention on the Law of Treaties*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en](http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en) (last visited Oct. 1, 2011).

46. The Soviet reservation stated, in relevant part:

[I]n order for any dispute among the Contracting Parties concerning the application or the interpretation of articles 53 or 64 to be submitted to the International Court of Justice for a decision or for any dispute concerning the application or interpretation of any other articles in Part V of the Convention to be submitted for consideration by the Conciliation Commission, the consent of all the parties to the dispute is required in each separate case, and that the conciliators constituting the Conciliation Commission may only be persons appointed by the parties to the dispute by common consent.

*Id.*

47. For the argument that the limited endorsement by the United States of the Convention partially restated customary international law, see Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 299-301 (1988).

But what constitutes the “whole” of the international community?<sup>48</sup> If this language implies unanimity (certainly not the only possibility), then what does it take to accept and recognize a norm? If unanimity is unnecessary, how many actors must agree? If even one state noisily flouts a norm, does that suffice to render it non-peremptory? How noisy must the flouting be, and what constitutes flouting? Second, the “whole” of the international community must not only recognize the norm in question, but also accept and recognize that it is nonderogable. But how does a state that accepts a norm signal separately its recognition of the norm’s nonderogable status? For example, the UN Charter, which states that its obligations “shall prevail” over obligations based on other international agreements, does not state that treaties contradicting the Charter are thereby void.<sup>49</sup> Yet the ILC offered the Charter as a quintessential example of a *jus cogens* norm.<sup>50</sup>

The notion of *jus cogens* as a new factor in international law, potentially suggestive of an underlying constitutional order, nonetheless enjoyed some local popularity in the years following the promulgation of the VCLT. Notwithstanding U.S. objections to the concept, the American Law Institute’s *Third Restatement of Foreign Relations Law* embraced it. Like the ILC, the *Restatement* cited the obligations of the UN Charter as an example of a *jus cogens* norm.<sup>51</sup> Less surprisingly, Soviet specialists also enthusiastically embraced the *jus cogens* argument. As noted above, however, their reasons for doing so should not make contemporary human rights advocates happy.

It would, of course, be too simplistic to depict the international community at the end of the 1970s as divided into two camps, one led by the United States, which insisted on the central and exclusive force of state consent in the making of international law, and another led by

48. The United States argued that each important member of the international community possessed a veto over the recognition of a *jus cogens* norm. Official Records, *supra* note 28, at 66–68. But the Conference as a whole did not address this contention.

49. U.N. Charter art. 103; see SZTUCKI, *supra* note 32, at 97 (“Art. 103 . . . confers superior character upon the obligations under the Charter, but which at the same time does not provide for the invalidity of treaties inconsistent with it, is but one—most remarkable—example of such norms.”).

50. *Summary Records of the Fifteenth Session*, *supra* note 35, at 17.

51. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987). The *Restatement* also enumerated several human rights obligations that, it asserted, had become *jus cogens* obligations. *Id.* § 702 cmt. n. For further development of this position by the *Restatement*’s reporter, see Louis Henkin, *Human Rights and State Sovereignty*, 25 GA. J. INT’L & COMP. L. 31 (1995). For criticism of the use of *jus cogens* in this project, see Anthony D’Amato, *Human Rights as Part of Customary International Law: A Plea for a Change of Paradigms*, 25 GA. J. INT’L & COMP. L. 47 (1995). For a historical analysis of the *Restatement*’s position on these issues, see Paul B. Stephan, *Courts, the Constitution, and Customary International Law: The Intellectual Origins of the Restatement (Third) of the Foreign Relations Law of the United States*, 44 VA. J. INT’L L. 33 (2003).

the Soviet Union, which barred the production of international law that interfered with certain underlying principles of the international order. But one can fairly describe the concept of *jus cogens* at that time as deeply controversial, in large part due to a lack of agreement about the fundamental nature of the international system.

Moreover, the debate during the 1960s and 1970s focused entirely on the existence of a check on the enforcement of international legal obligations (the shield). One can find little evidence at that time for a widespread (or even substantial) belief that *jus cogens* endowed the international order with rights that its agents could enforce against states (the sword).<sup>52</sup> The vision of *jus cogens* as a sword emerged only later, once the bipolar superpower world wound down and a new human rights paradigm emerged.

The 1980s saw further developments in *jus cogens* law. The most significant was the ICJ's decision in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*.<sup>53</sup> Although the authority of the case is somewhat impaired because of the nonparticipation of the United States, it nonetheless represents the high point of *jus cogens* jurisprudence in the ICJ.<sup>54</sup>

In the *Military and Paramilitary Activities* case, *jus cogens* functioned as both a sword and a bootstrap. Because the United States had validly reserved its consent to ICJ jurisdiction over any dispute resting on a multilateral treaty, the ICJ lacked the authority to determine whether U.S. support of armed attacks on Nicaragua violated the UN Charter. To hurdle this obstacle, the ICJ determined that the obligation not to use force rests not only on the Charter, but also on customary international law that attained *jus cogens* status. To support this conclusion, the Court referred to the assertion of the ILC that a ban on the use of force in interstate relations "constitutes a conspicuous example of a rule of international law having the character of *jus cogens*."<sup>55</sup> This obligation gave the ICJ a basis for

52. For a discussion of the emergence in the 1970s of human rights as a new paradigm of international relations, see SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010).

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

54. The United States had argued that the ICJ was incompetent to adjudicate issues that the UN Charter relegated to the exclusive jurisdiction of the UN Security Council. After the ICJ rejected this argument, the United States refused to participate in the proceedings. The United States vetoed a Security Council resolution that would have required it to pay reparations to Nicaragua in accordance with ICJ's judgment. U.N. SCOR, 41st Sess., 2704th mtg. at 54-55, U.N. Doc. S/PV.2704 (July 31, 1986). A U.S. court subsequently determined that the ICJ's decision had no legal effect in the United States. *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988). For strong criticism of the U.S. position on the ICJ's authority by one of Nicaragua's representatives in the dispute, see Abram Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445 (1985).

55. *Military and Paramilitary Activities*, 1986 I.C.J. at 90 (citing *Summary Records of the 880th Meeting*, [1966] 2 Y.B. Int'l L. Comm'n 247, U.N. Doc.

taking action against the United States, notwithstanding its lack of competence over Charter-based claims against that country.

Unpacking the significance of the ICJ's invocation of *jus cogens* is difficult. Once the Court established that non-use of force had become customary law, it did not need *jus cogens* to apply this rule to the United States. Evidence that the United States accepted this norm would have sufficed. What additional work did *jus cogens* do in the opinion?

In one sense, the Court used the concept to increase the scope of a state's international obligations. The doctrine empowered a tribunal to enforce a customary norm that, as a matter of treaty law, appeared to be non-justiciable. This point is muddied somewhat, however, by the failure of the ICJ to make clear exactly why it mattered that the obligation not to use force had attained *jus cogens* status. If the non-use norm instead functioned as a rule of customary international law from which the United States did not seek to derogate, would it not work just as well in establishing a legal obligation that the ICJ could enforce against the United States?<sup>56</sup> If this conjecture is correct, then the *jus cogens* character of the norm might not add that much of a sword or a bootstrap.

Moreover, the duty that the ICJ saw the international order as imposing on the United States was a traditional international obligation in the sense that by its character the obligation was owed only to another state, and not to non-state actors. Thus, the ICJ's decision maintained the conception of international law as embracing state-to-state obligations. The *jus cogens* norm invoked in the case expanded the legal duties owed by the United States to Nicaragua, but not the duties that any state owed to particular individuals. In this

A/CN.4/SER.A/1966). Earlier references to *jus cogens* in international law by individual members of the ICJ include Aegean Sea Continental Shelf (Greece v. Turk.), 1978 I.C.J. 3, 69 (Dec. 19) (dissenting opinion of Judge de Castro) (describing the Vienna Convention on the Law of Treaties, *supra* note 45, art. 53); Nuclear Test (Austl. v. Fr.), 1974 I.C.J. 253, 405 (Dec. 20) (dissenting opinion of Judge Barwick) (arguing for absence of any applicable *jus cogens* norm in the case at hand); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 15, 90 (Jan. 29) (separate opinion of Judge Ammoun) (arguing about the right to self-determination); Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), 1970 I.C.J. 3, 304 (Feb. 5) (separate opinion of Judge Ammoun) (principles in Preamble of UN Charter); North Sea Continental Shelf (Ger. v. Den.), 1969 I.C.J. 3, 97 (Feb. 20) (separate opinion of Judge Padillo Nervo) (general reference to concept); South West Africa (Eth. v. S. Afr.), 1966 I.C.J. 6, 297 (July 18) (dissenting opinion of Judge Tanaka) (addressing a law concerning the protection of human rights, specifically norm of nondiscrimination reflecting natural law).

56. I put to one side the question of what the United States would have had to do not to be bound by such a customary norm. For a discussion on this point, see Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202 (2010) (noting and criticizing the recent trend towards wide acceptance of the "Mandatory View," which provides that nations do not have a legal right to unilaterally withdraw from the rules of customary international law).

sense, then, the decision reflected a conception of *jus cogens* as a means for regulating interstate relations, not as a mechanism that addresses the relation of states and their subjects.

The end of the Cold War led to a fundamental reorientation in international law. The waning of general state-to-state confrontation diminished the importance of duties owed by states to each other and opened up new areas of international cooperation. One of the fields that took off at this time was international human rights, understood as the set of obligations that international law imposed on states with regard to their treatment of persons. Advocates sought to use tools that evolved in an earlier context to strengthen and expand the international law of human rights. In the case of *jus cogens*, this meant finding peremptory norms regarding duties owed to persons, rather than to states.

The next ICJ case, the only other instance in which that body as a whole addressed a question of *jus cogens* on the merits, reflected this transformation. In the *Case Concerning the Arrest Warrant of 11 April 2000*, the Democratic Republic of the Congo (DRC) attacked Belgium's attempt to prosecute its foreign minister.<sup>57</sup> The DRC asserted a traditional international law argument, namely that, as a matter of customary international law, a sitting head of state enjoyed complete immunity from the judicial process of other states. Belgium rested its response on a claimed authority to enforce the rights of individuals under international law. Because the foreign minister stood accused of transgressing human rights based on *jus cogens*, Belgium argued, it could violate the DRC's sovereign immunity. The ICJ rejected Belgium's argument:

The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.<sup>58</sup>

Whatever duties the DRC had to individuals, they were not so strong as to overcome the immunity *ratio personae* of a head of state. Thus, it

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57. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 3 (Feb. 14).

58. *Id.* at 24. This case is limited to the issue of immunity *ratione personae*, i.e., immunity due to the current occupation of a high office such as head of state, foreign minister, or ambassador. It thus does not shed much light on the balance between immunity and *jus cogens* in other contexts. See generally Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 238 (noting that the ICJ's decision was largely motivated by the current status of the minister, whose status entitled him to "full immunity from criminal jurisdiction and inviolability" even for "war crimes or crimes against humanity.").

appears, a sitting high government official does not have to answer to other states for official conduct, no matter how heinous.

Human rights advocates find this decision troubling. Proponents of *jus cogens* claims can read the *Arrest Warrant* decision as limited to the narrow instance where the principles of non-interference and sovereign equality come together in the well-established principle of head-of-state immunity. A skeptic, however, can argue that, in the view of the ICJ, even the gravest violations of international human rights do not justify suspension of at least some of the general principles of international law on which sovereign immunity rests.<sup>59</sup>

While the *Arrest Warrant* case did not vindicate the human rights claim, it does illustrate how *jus cogens* arguments shifted from protection of states to protection of persons. A later decision by a different international (some would say supranational) tribunal extended this transformation. In *Kadi v. Council*, the European Court of Justice (ECJ) had to choose between honoring duties imposed by the UN Charter and developing the procedural norms applicable to official interference with property rights.<sup>60</sup> The Court of First Instance argued that *jus cogens* provided the sole means for making the choice. The Grand Chamber took a more expansive approach to human rights law, in the process turning traditional *jus cogens* arguments on their head.

The dispute involved a European Community (EC) regulation implementing decisions of a committee established by the UN Security Council (UNSC) to interdict financial support of terrorism. Various UNSC resolutions obligate states to freeze the financial assets of

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59. At a minimum the Court's decision contradicts the position of a few advocates that sovereign immunity itself has only a limited and contingent role to play in the international system. For an example of this effort, see Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 748 (2003) (claiming that sovereign immunity is evolving from "an exception to the principle of state jurisdiction").

One should note the International Law Commission's evolving interpretation of *jus cogens*. Its Draft Articles on State Responsibility for Internationally Wrongful Acts, adopted in 2001, comes closer to the sword vision of the concept than did the Vienna Convention on the Law of Treaties. Draft Articles on State Responsibility for Internationally Wrongful Acts, arts. 26, 40–41. Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.1 The views of this body, while prestigious, have no direct legal effect. Also relevant is the decision of the European Court of Human Rights in *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79. The *Al-Adsani* decision does not shed much light on the issue before the ICJ, however. First, it addressed the question of whether international law mandated an exception to sovereign immunity, not whether international law permits such an exception. Second, notwithstanding the language of the decision, the case ultimately turned on *lex specialis*, namely the European Convention on Human Rights, and not on general rules of customary international law.

60. Case T-315/01, *Kadi v. Council*, 2005 E.C.R. II-3649, *rev'd*, Joined Cases C-402/05 and C-415/05, *Kadi v. Council*, 2008 E.C.R. I-6351. For a later decision holding invalid the regulation adopted to replace the one struck down in the first round of litigation, see Case T-85/09, *Kadi v. Comm'n*, 2010 E.C.R. II (forthcoming).

persons identified by the committee.<sup>61</sup> The committee put on the list Yassin Kadi, a Saudi resident who controlled a foundation in Sweden. Kadi and his foundation attacked the EC's freeze of their assets, arguing that the EC did not provide him with an adequate opportunity to challenge the terrorist designation. The Court of First Instance framed the issue as whether there existed any higher authority to release the EC from its obligation to implement UNSC decisions. The court reasoned that the EC could disregard the UNSC if, and only if, that body had contravened a *jus cogens* norm of international law.<sup>62</sup> Whatever the procedural defects of the process through which the committee put together its list of funders of terrorism, the court argued, the outcome did not constitute a *jus cogens* violation. As a result, the court rejected Kadi's challenge.<sup>63</sup>

On appeal, the Grand Chamber of the ECJ reframed the question. First, it determined that the rules that a U.S. lawyer would describe as procedural due process emanated from the various treaties constituting European law, even though none to which the EC was a party specifically adverts to such norms.<sup>64</sup> Second, it reasoned that an obligation to implement UNSC decisions, although grounded ultimately on the UN Charter, could not override these procedural rules. The obligation to apply European law trumped other treaty obligations, including those in the UN Charter that applied directly to the EC's member states.<sup>65</sup>

Although the Grand Chamber's decision disavowed the *jus cogens* doctrine as such, its elevation of unwritten human rights norms over express, treaty-based commitments operates exactly in the manner that the human rights conception of *jus cogens* does. But this move illustrates a deep tension between the human rights paradigm and the traditional *jus cogens* project. An earlier generation, including the authors of the U.S. *Third Restatement*, regarded the obligations of the

61. The original measure was UN Security Council Resolution 1267. S.C. Res. 1267, ¶ 4(b), U.N. Doc. S/RES/1267 (Oct. 15, 1999).

62. At least one European national court also has embraced the argument that *jus cogens* provides a state with a basis to violate its obligations under a resolution of the UN Security Council. Like the European Court of First Instance, a Swiss court upheld the Security Council terrorist financing regime as not violating any such rule. Bundesgericht [BGer] [Federal Supreme Court] Nov. 14, 2007, 133 ENTSCHIEDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 450 (Switz.).

63. *Kadi*, 2005 E.C.R. II-3649 ¶ 294.

64. In the United States, it seems reasonably well settled that the government must comply with constitutional standards of due process when designating persons and organizations as supporters of terrorism. See *People's Mojahedin Org. of Iran v. U.S. Dept. of State*, 613 F.3d 220, 222 (D.C. Cir. 2010) (remanding designation because the Secretary failed to accord the organization due process protections). While that case did not involve an organization that the United Nations had designated as a supporter of terrorism, there is no reason to believe that U.S. courts would reach a different result in such instances. Compliance with a resolution of the Security Council is not generally justiciable in the United States. *Diggs v. Richardson*, 555 F.2d 848, 850 (D.C. Cir. 1976).

65. For my earlier discussion of the *Kadi* case, see *supra* note 60.

UN Charter as a paradigmatic example of an international norm that states lack the capacity to disavow. By subordinating an express Charter obligation to comply with UNSC decisions relating to the maintenance of peace and security, the court effectively inverted the hierarchy the earlier generation envisioned.

*Kadi* suggests that *jus cogens* (or something like it), rather than establishing the foundation (*grundnorm*) on which international law rests, instead provides a mechanism for brushing aside the bounds of those international law obligations that have become inconvenient. Rather than anchoring international law to something stable and deep, the ECJ's move seems to fulfill the concerns expressed by the Western powers at the time of the debate over Article 53 of the Vienna Convention: the *jus cogens* concept makes international legal obligations less stable and reliable.

One might respond, of course, that whatever international lawyers thought in the 1940s or the 1980s, it now has become clear, and will remain clear, that core human rights protections dwell at the heart of the international law project.<sup>66</sup> One might cite the emergence of international criminal tribunals and the assertion by several European states of universal jurisdiction over transgressions of these rights as evidence of this development. Human rights thus anchor the current conception of *jus cogens* in a fundamental aspect of contemporary international law. Instability across time, the argument might continue, is inevitable in such a politically contingent field as international law. What matters is that, for now, international law values nothing more than the vindication of certain core human rights. Arguments of this sort enjoy great support among academic specialists and lie at the heart of the decision of the *Corte Suprema di Cassazione*.

To summarize, the idea that some fundamental principles of international law impose obligations on states in spite of inconsistent treaties or custom is a product of the postwar era, although earlier theorists sought to enlist natural law or other moral values into international law to similar purpose. The ILC's effort to propound a treaty that codified one aspect of *jus cogens*, namely its restriction on a state's treaty-making power, provoked a split along traditional Cold War lines, but put the topic on the international agenda. During the era of superpower rivalry, the leading governments in the West expressed skepticism about the concept out of concern that it would undermine the stability of treaties. The Soviet side, however, endorsed the concept due to its convergence with the principle of peaceful

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66. See generally Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331 (2009); Christopher A. Ford, *Adjudicating Jus Cogens*, 13 WIS. INT'L L.J. 145 (1994); Kadelbach, *supra* note 28; Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411 (1989); Markus Petsche, *Jus Cogens as a Vision of the International Legal Order*, 29 PENN. ST. INT'L L. REV. 233 (2010).



coexistence, understood as a reservation of a veto over the development of international rules. As long as bipolar competition dominated international relations, sovereigns invoked *jus cogens* mostly to guard their prerogatives against international interference. With the end of that era, people looked to new uses for *jus cogens*, one of which was the bolstering of human rights protection. Some European governments and many international law specialists in particular have embraced this move.

### III. A FUNCTIONAL ANALYSIS OF *JUS COGENS*

Debates over the content of *jus cogens* have distracted attention from the mechanisms for production of these norms. At its heart, the concept has only the loosest of connection to state consent and acts of state power. Instead, it allows actors engaged in dispute resolution to propose checks on what states can do, the protestations of officials notwithstanding. The check can function as a shield, undoing the legal basis for a state action; a sword, imposing an obligation on states not to infringe the interests of private persons; and as a bootstrap, expanding the authority of international tribunals to vindicate those interests they see as fundamental.

The immediate question facing the international system is whether *jus cogens* will continue along the path of the last two decades, serving as a buttress to legal rules limiting what states can do to persons, or whether it will instead reemerge in the form envisioned by an earlier generation and memorialized to a certain extent in the VCLT. The prevailing conception today regards *jus cogens* as imposing duties on states and therefore creating corresponding rights in the international order (the sword). The earlier vision saw *jus cogens* as creating privileges in states and a corresponding non-right in the international order (the shield). The sword is closely related with the human rights revolution because international human rights impose duties rather than conferring privileges on states. The shield is tied to the principles of sovereign independence, non-interference in domestic affairs, and sovereign equality, all of which provide a rationale for resisting obligations that the international order otherwise might impose on states. In this section, I will consider separately the sword and the shield of *jus cogens*.

#### A. *Jus Cogens as a Sword*

This vision of *jus cogens* allows the imposition of duties on states and thus the creation of rights in the international order, whether a state consents to the imposition or not. The invocation and application of *jus cogens* as a sword is naturally attractive to non-state actors and official organs that operate largely free of political control. To the

extent that private persons, domestic courts, and international tribunals can act as agents of the international order to enforce these rights, their power and influence grows.

In a world of judicial independence and robust civil institutions, the move to *jus cogens* becomes enormously consequential. Empowering non-state actors and judges to wield a doctrine that trumps state consent takes on meaning once the exercise of this power in opposition to state preferences becomes possible. Seen in this light, the rise of *jus cogens* becomes one more piece of evidence for the claim that the end of the Cold War and the rise of globalization resulted in the hollowing out of the state.<sup>67</sup> What results is, in effect, the privatization of international law, a shift in authority over international lawmaking from political actors to other interested persons. It also should surprise no one that international and supranational bodies, much more than national governments, have done much of the heavy lifting in developing the sword vision of *jus cogens*.<sup>68</sup> Acceptance of the doctrine expands their influence.

Sovereign immunity, the subject of this colloquium, illustrates how the sword function works. Analysis might begin with an assessment of the rational interests of government officials left to their own devices.<sup>69</sup> *Ceteris paribus*, immunity from civil suits in foreign courts, meets the needs of these actors. Defending such suits takes time and money and may lead to embarrassment. Under pressure from the people they represent or rule, these officials might tolerate suits against foreign actors, but they always should prefer immunity for themselves. If the absence of a selfish hegemon (which would reserve immunity for its own actors and impose liability on everyone else's) makes this most desirable of all outcomes unattainable for anyone,

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67. The literature on this point is vast. See, e.g., KAREN J. ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE* (2001); *RESTRUCTURING WORLD POLITICS: TRANSNATIONAL SOCIAL MOVEMENTS, NETWORKS, AND NORMS* (Sanjeev Khagram et al. eds., 2002); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* (Steve Smith et al. eds., 1996); Jean Louise Cohen, *Whose Sovereignty? Empire Versus International Law*, 18 *ETHICS & INT'L AFF.*, Dec. 2004, at 1; John O. McGinnis, *The Decline of the Western State and the Rise of the Regime of International Federalism*, 18 *CARDOZO L. REV.* 903 (1996); Saskia Sassen, *Neither Global Nor National: Novel Assemblages of Territory, Authority and Rights*, 1 *ETHICS & GLOBAL POL.* 61 (2008); Phillip Trimble, *Globalization, International Institutions and the Erosion of National Sovereignty*, 95 *MICH. L. REV.* 1944 (1997).

68. See, e.g., José E. Alvarez, *Governing the World: International Organizations as Lawmakers*, 31 *SUFFOLK TRANSNAT'L L. REV.* 591, 594 (2008) (noting that *jus cogens* is largely a product of the work of international organizations).

69. There are many more conceptions of international relations than that of rational actors, but this is the tradition in which I work. For a discussion of the work of rational-actor models in theories of international lawmaking and enforcement, see ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* 52-56 (2006).

then surely officials would regard the second best world as one of no accountability to foreign courts for any governmental actors.<sup>70</sup>

Such a strong immunity rule might appeal to officials, but it may not constitute an optimal outcome for the world as a whole. Expanded accountability might deter wrongdoing and promote better governance. Collaboration between private actors, independent courts, and tribunals might better serve important public goals by overcoming the self-interested opposition of officials to judicial scrutiny.

To be sure, official opposition to liability might not be entirely selfish. Lawsuits may cause frictions with foreign states and thus endanger valuable cooperation. Some countries' civil litigation systems might have unusual or eccentric procedures that alarm potential defendants, such as civil juries, class action mechanisms, punitive damages, and contingent fee arrangements. Putative plaintiffs might sue for publicity, political leverage, or malice. States legitimately might employ mechanisms to sort out worthy suits from those that do more harm than good. The question is, what mechanisms best achieve a desirable separation of worthwhile from undesirable lawsuits?

As a matter of logic as well as modern practice, three types of domestic mechanisms present themselves. First, one might permit the legislature to prescribe rules for judges to apply. Litigants and courts could seek to exploit any interpretive ambiguity, but sufficiently clear statutory rules would limit their discretion. The United States and the United Kingdom, among others, take this approach.<sup>71</sup> Second, one might permit the government to invoke immunity on behalf of foreign sovereigns. This mechanism minimizes the role of private actors and maximizes the importance of politicians. The United States, among other countries, did this before 1976, when Congress enacted the Foreign Sovereign Immunities Act.<sup>72</sup> Third, one might leave it to the

70. One might note in passing that the United States, the closest thing to a hegemon that exists in the present world, does embrace some one-sided immunity rules. It permits the President to designate certain states as state sponsors of terror, a determination that then allows U.S. persons to sue that state in a U.S. court for injuries due to torture, extrajudicial killing, and certain violent acts. 28 U.S.C. § 1605A (2006). But it has not waived its immunity in its courts for similar acts undertaken by its own officials and employees, at least when those agents act within the scope of their authority. *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (dismissing suit under Federal Tort Claims Act as well as limiting the Alien Tort Statute); *Wilson v. Libby*, 535 F.3d 697, 713 (D.C. Cir. 2008) (dismissing suit against government officials as properly against the United States); *Arar v. Ashcroft*, 532 F.3d 157, 200 (2d Cir. 2008), *rev'd en banc*, 585 F.3d 559 (2d Cir. 2009) (refusing to find cause of action); *Lebron v. Rumsfeld*, 764 F. Supp. 2d 787, 798 (D.S.C. 2011) (finding no cause of action for detention as unlawful enemy combatant); *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 95 (D.D.C. 2007) (same). *But cf. Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1020–21 (N.D. Cal. 2009) (recognizing constitutional claim by U.S. citizen detained in United States).

71. *See Foreign Sovereign Immunities Act*, 28 U.S.C. §§ 1602–1611 (2006); *State Immunities Act*, 1978, c. 33, § 1 (U.K.).

72. *See, e.g., Samantar v. Yousuf*, 130 S. Ct. 2278, 2280 (2010) (discussing the common law doctrine of foreign sovereign immunity); *Bradley & Helfer*, *supra* note 58,

courts to craft the immunity rules that they might apply. International law might set the boundaries for appropriate judicial choices, but domestic courts and the advocates who appear before them would have freedom to determine where those boundaries lie. Many countries, including Germany and Italy, appear to take this approach.

*Jus cogens* can affect these mechanisms in at least two ways. Its most powerful potential role is as an override of legislative choices. A minority of the European Court of Human Rights has asserted that the European Convention on Human Rights obligates states to recognize a *jus cogens* exception to foreign sovereign immunity, domestic legislative preferences notwithstanding.<sup>73</sup> If a consensus in international law were to embrace this position, then the first and second mechanisms no longer would be acceptable. International tribunals could sanction states that enforce such legislation or use executive power to block suits, and domestic courts would have a free pass to impose liability on foreign states for at least some human rights violations. Many in the human rights community might wish for this outcome, but present practice seems very much to the contrary.<sup>74</sup>

Alternatively, *jus cogens* can dominate the third mechanism by allowing courts, in the absence of any legislative or treaty commitment to the contrary, to suspend state immunity in particular instances. A decision by the ICJ in favor of Italy, for example, could have this effect, even though its ruling as a formal matter would bind only the two state parties. As a structural matter, private advocates would have greater freedom to persuade both international tribunals and domestic courts to adjudicate human rights claims, and thus would have increased ability to subject states to international oversight.

Either of these outcomes would shift the balance of policy away from avoiding international friction and toward increasing governmental accountability. As suggested above, there exists no evidence at present to indicate as a general matter the costs and benefits of such a move. The costs of friction, perhaps in the form of

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at 220. The act of state doctrine, at least as it functions in U.S. law, has functional effects comparable to immunity, and for a range of cases (e.g., disputes over ownership of assets in the United States) the Executive Branch has unreviewable authority to invoke it. Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (2010). For criticism of proposals to revive unreviewable executive discretion to recognize immunity in the wake of *Samantar*, see Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 922 (2011) (arguing that federal common law, and not unreviewable executive discretion, should provide basis for official immunity).

73. *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79, para. 60.

74. Compare Frederic L. Kirgis, Jr., *Alien Tort Claims, Sovereign Immunity and International Law in U.S. Courts*, 82 AM. J. INT'L L. 323, 329 (1988) (arguing that courts should read a *jus cogens* exception into the Foreign Sovereign Immunities Act to meet U.S. international law obligations), with *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009) (recognizing immunity of foreign official accused of extrajudicial killing and grave breaches of laws of war), and *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1176 (D.C. Cir. 1994) (finding no *jus cogens* exception in Foreign Sovereign Immunities Act).

tit-for-tat retaliation, might outweigh the benefits of accountability. States with weak civil institutions and relatively great political, military and economic power—think China—might impose considerable costs on the international system while thwarting significant levels of accountability. Or the threat of external accountability, whether before international tribunals or foreign domestic courts, might induce states to behave better rather than to retaliate. Courts might make good guesses about where to draw the line, or might miss the mark entirely. The most one can say with confidence is that growth in the power of *jus cogens* will seem desirable to those who trust courts and tribunals to do the right thing and worry about selfish decisions by government officials, while entrenching the status quo will appeal to those who believe that officials have a unique advantage in managing international conflicts and worry about the hubris of judges, arbiters, and advocates.<sup>75</sup>

One extreme case would provide a strong test of these predispositions. Were a strong sword vision of the *jus cogens* concept to prevail and impose an obligation to reject immunity in cases involving allegations of grave human rights abuses, then international law would lock states into a system of judicial management. International instruments such as the United Nations Convention on Jurisdictional Immunities of States and Their Property, which does not contain a *jus cogens* exception to immunity, would transgress the *jus cogens* principle of the VCLT.<sup>76</sup> Countries such as the United States and the United Kingdom, which have statutes that fail to recognize such an exception, would be considered in violation of international law. The international legal system, in other words, would insist on only one institutional response to the problem of balancing the costs and benefits of limiting immunity—judicial management.

This outcome is not unthinkable, but it does set the limiting case for a combination of optimism about judging and pessimism about politicians. It presumably would expect judges to take into account the judgments expressed through legislation and treaties, but also to retain the final say as the appropriate balance between avoiding international friction and vindicating core international interests. This outcome rests on an especially strong assumption about the

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75. Cf. Paul B. Stephan, *A Becoming Modesty: U.S. Litigation in the Mirror of International Law*, 52 DEPAUL L. REV. 627, 628 (2002) (expressing concern about judicial competence in formulation of international law).

76. United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38 (Dec. 16, 2004). As of this writing, this Convention has 28 signatories, 11 of whom have ratified or accepted the instrument. It will not go into effect until 30 parties join. *Status: Jurisdictional Immunities of States and Their Property*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtdsg\\_no=III-13&chapter=3&lang=en#Participants](http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=III-13&chapter=3&lang=en#Participants) (last visited Oct. 1, 2011).

ability of judges, acting either through domestic courts or international tribunals, to influence state behavior.

### B. *Jus Cogens as a Shield*

The sword analysis assumes that both non-state actors engaged in dispute resolution and the organs that resolve disputes function free of state control. These actors can make independent judgments about what norms constitute *jus cogens* and what state acts count as transgressions. The organs in turn can enforce their decisions against states and expect compliance. To what extent are these assumptions valid?

In the liberal democratic world of Europe and North America and in a few other parts of the world, robust civil society and independent judges largely hold sway. During the bipolar world that ended two decades ago, however, one would have had to concede that the majority of people did not live in such an environment. An unstated premise of the Soviet position was the insignificance of non-state actors in the development of principles of international law, *jus cogens* included. The Soviet Union and its allies presumed they could maintain effective control over nominally independent judges and all elements of civil society, international law jurists in particular. Party and security organs took care of this within the bloc. The Soviet Union and its allies also barred any international tribunal from exercising jurisdiction over their international legal obligations, except on terms that allowed them to retain control over the process. The bloc enjoyed sufficient security resources and economic autarky to resist outside pressure.<sup>77</sup> To the publicists on the Soviet side who promoted the *jus cogens* concept during the Cold War, then, the possibility that their proposal would lead to a shift in power would have made no sense.

What of the contemporary world? From 1989 to 2000, we witnessed a remarkable move away from dictatorships and toward political pluralism and civil liberty, marked not only by the collapse of the Soviet bloc, but also the end of *apartheid* in South Africa and more complicated reforms in East Asia. One plausibly might have believed at that time that the influence of civil society and independent judges would only grow, and that states that resisted these developments would find themselves under overwhelming pressure from the rest of the world. However, in the last decade, countries such as Russia and Venezuela (and to a lesser extent Ecuador, Nicaragua, and Peru) revived the authoritarian state. In addition, South Africa's democracy seems on less stable footing, and countries such as Zimbabwe have engaged in massive human rights violations with only limited international repercussions. The so-called

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77. See generally IOFFE, *supra* note 37.

colored revolutions of the mid-2000s in Georgia, Kyrgyzstan, and the Ukraine ended up disappointing their admirers.<sup>78</sup> Even more significantly, the one great power that has not embraced political pluralism and tolerates only limited forms of civil liberty, the People's Republic of China, accumulated considerable economic might during this period. These developments make faith in the inevitable ascendancy of civil institutions and a rule of law administered by judges problematic. What seemed inevitable in 2000 looks far more contingent and uncertain today.

Consider in particular a world where China's influence and sphere of interests continues to grow. China's ability to resist foreign pressure, including that of international tribunals and foreign courts, may become greater than that of other states that have resisted privatization of international law enforcement. Her power to retaliate, whether economically or otherwise, might deter other states from acting against her interests and might encourage them to thwart international tribunals that might sanction China.

In such a world, *jus cogens* might end up playing the role that the Soviet bloc once imagined, namely as a means for one great power to avoid inconvenient international obligations. Rather than bolstering the growth of protection of persons against states, it could serve strong states that wish to avoid outside supervision on how they treat their subjects. It might once again posit inalienable state interests in sovereign independence, non-interference in domestic affairs, and sovereign equality, which in turn would trump claims of the international order of states.

Chinese jurists have moved in this direction already.<sup>79</sup> Their reliance on the doctrine, which can deflect, *inter alia*, claims that it owes the international community an accounting for its human rights practices, might grow. As China's power and influence increases, partially due to its wealth, partly due to attraction as a successful model of development, other states might come to its side. The United States and Europe, deeply dependent on their economic ties with China, might temper their criticism. Among other things, China's representatives plausibly could argue that their understanding of *jus*

78. The ultimate outcome of the wave of change now rolling over the Arab world is, to say the least, uncertain. One hopes that these developments will constitute a new 1989, when Central and Eastern Europe threw off Soviet hegemony and local authoritarianism, but fears that they will turn into a new 1979, when the Iranian Revolution threw out a secular authoritarian regime and replace it with an even more pernicious system.

79. See Li Haopei, *Jus Cogens and International Law*, 1982 Y.B. INT'L L. CHINA 37 (1982), translated in INTERNATIONAL LAW IN THE POST-COLD WAR WORLD: ESSAYS IN MEMORY OF LI HAOPEI 499 (Sienho Yee & Wang Tieya eds., 2001); Wang Tieya, *International Law in China: Historical and Contemporary Perspectives*, 221 RECUEIL DES COURS 195, 279-87 (1990).

*cogens* reflects the VCLT somewhat better than does the modern, sword vision.

A strong position on the shield vision of *jus cogens* might not be confined to human rights, of course. One can imagine a world in which China rejects portions of international economic law (say the IMF rules on currency manipulation, or the WTO's rules regarding protection of trade-related intellectual property) as improperly interfering with core sovereignty values.<sup>80</sup> The *jus cogens* shield does not exclude any of these possibilities.

This, of course, is not the only scenario for the future of *jus cogens*. China might come to see the value of Western conceptions of human rights and economic freedom, either because its people demand decency and liberty, because Western states engage in a socialization process that persuades China of the value of these rights, or because China chooses to confront the West over other issues instead. My point is only that the *jus cogens* concept contains the possibility of multiple functions, not all of which have the benign effects of the vision currently in fashion in some circles in Europe and the United States.

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80. Less this seem far-fetched, one should recall that reputable scholars consider much of international investment law to constitute an illegitimate infringement of sovereign interests. *E.g.*, MUTHUCUMARASWAMY SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 143 (3d ed. 2010) (“[It] is incorrect to speak in terms of a well-established law on foreign investment that is universally accepted, though the tendency in the law has been to speak in terms of such certainty.”); *id.* at 235 (“[T]he law will return to the same state of normlessness that prevailed prior to the making of investment treaties.”). Adding a *jus cogens* frosting to this cake would not constitute such a great leap. *Id.* at 469–73 (discussing exceptions to investment treaty obligations based on *jus cogens* arguments). One also should note China's absolute position on sovereign immunity, which brooks no exceptions. In a recent case in the Hong Kong Court of Final Appeal, the government submitted the following statement:

The consistent and principled position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution, and has never applied the so-called principle or theory of “restrictive immunity.” The courts in China have no jurisdiction over, nor in practice have they ever entertained, any case in which a foreign state or government is sued as a defendant or any claim involving the property of any foreign state or government, irrespective of the nature or purpose of the relevant act of the foreign state or government and also irrespective of the nature, purpose or use of the relevant property of the foreign state or government. At the same time, China has never accepted any foreign courts having jurisdiction over cases in which the State or Government of China is sued as a defendant, or over cases involving the property of the State or Government of China. This principled position held by the Government of China is unequivocal and consistent.

Democratic Republic of the Congo v. FG Hemisphere Assocs. LLC, [2011] H.K.C.F.A.R. 41, ¶ 197 (C.F.A.) (H.K.).



## IV. CONCLUSION

*Jus cogens* came into the international legal system as a result of two profoundly different traditions. On the one hand, jurists for centuries have tried to bring normative constraints into the system, relying either on religious convictions or moral reasoning. On the other hand, during the postwar period one side of the superpower divide, the Soviet bloc, sought recognition of a mechanism that gave it a veto over international legal obligations. The VCLT brokered a compromise between these traditions, but on a whole gave more to the Soviet side than to the moralists.

The VCLT position seemed to understand *jus cogens* as a shield protecting states against the demands of the international legal system. Only with the transformation of the international system following the end of the Cold War did an alternative vision become popular, one that saw in *jus cogens* a means for imposing duties on states and corresponding rights in the international order. With the dispute between Germany and Italy, the ICJ now has an opportunity to contribute to our understanding of what *jus cogens* does today.

The ICJ could determine that Italy has a privilege, but not a duty, to carve out an exception from the customary international law of foreign sovereign immunity. At least some advocates, however, might then argue that the recognition of a privilege suggests a duty: if a state has the capacity under international law to impose liability on foreign states for *jus cogens* violations, what arguments can justify not exercising this authority? Thus, embracing the shield might sow the ground for wielding the sword.

Other states, however, might view any decision by the ICJ tolerating suits against foreign sovereigns as itself a violation of the *jus cogens* norms of sovereign equality, noninterference in domestic affairs, and sovereign independence. If *jus cogens* shields states from the international order, then surely its protection should extend to agents of the order such as the ICJ. We might then witness a kind of dialectic, in which an articulation of one view of *jus cogens* drives influential international actors toward a stronger embrace of a radically different vision. The new synthesis would depend on the correlation of forces engaged. The result would not necessarily be a strengthening of international protection of human rights.

However the ICJ resolves the case and whatever it happens to say about *jus cogens*, we must acknowledge that within the concept lies distinct visions with significantly divergent functional consequences. Further development of the sword conception has the potential to enhance the authority of civil society and disinterested judges to defend social ends against a selfish or abusive state. But the same doctrine, understood as a shield, might expand the power of individual states to resist the demands of the international order. As the old proverb says, we must be very careful about what we wish for.