

POSITIVISM’S ESCHEWAL OF NATURALISM IN *JUS COGENS*

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“Can jus cogens be defined?” “What are the elements upon which it rests?” “Can it bind a State without its will?” The scholarship on jus cogens poses more questions about jus cogens than it answers. There is also less agreement within the international law academe on what jus cogens is than on what is ‘not’. ‘Not’ considering a universal ethical norm as jus cogens stems from the positivist nature of mainstream international law and its statist claims. International law discourse is well-guarded by positivism, where law is projected as amoral and detached from any meta-legal components, thereby deflecting any possibility of conceding spaces to naturalism. Jus cogens, as the embodiment of minimum ethical norms, marked by its supremacy in the normative hierarchy, its abstractness, fluidity, and other natural law characteristics, is seen as non-conformist in this positivist schema. However, the moral and ethical weight of jus cogens compels it to be ‘accepted’ as an international law norm, but with certain concessions. This paper is shaped by the following concessions — in the natural law characteristics, its embodiment in positivist law (including the 1969 Vienna Convention on the Law of Treaties and the 2022 Draft conclusions on identification of peremptory norms), and its treatment in the decisions of the International Court of Justice — and the continued intransigence of positivist mainstream international law to jus cogens. Adopting a decolonial lens, the paper recounts the pruning and sanitising of the naturalism of jus cogens by positivism at the site of the court.

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I. THE GUARDS OF (INTERNATIONAL) LAW: A PROLOGUE

‘Why should international law be moral?’ is an existential question that has perpetually loomed over international law (‘IL’).¹ An oversimplified, positivist stance on it would be this: ‘morality is abstract in its norms’. Throwing the much-avowed ‘certainty’ of IL to the untamed boundlessness of moral abstraction would be unimaginable. This positivist view of abstraction as ‘unwanted’ and ‘undesired’² is rooted in its supposed threat to the positivist edifice of IL, which eulogises ‘certainty’ and ‘determinism’.³ These form a part of the dominant language of Mainstream International Law Scholarship (‘MILS’). Any deviation from it faces harsh criticism. With this paper, the authors deviate from the MILSian avowed commitment to ‘certainty’ and ‘determinism’ while adopting a decolonial lens. The existential question of the morality of IL looms large in the case of *jus cogens*. This paper tackles the positivist eschewal of naturalism of *jus cogens* at the site of the International Court of Justice (‘ICJ’). This paper is neither theoretical nor exclusively practice-based. It segues from the theoretical roots of positivist IL and naturalist inroads (through the case of *jus cogens*) to the cases in which ICJ enables the positivist eschewal. The authors draw the critical potential from decoloniality to question the positivist language and methods in IL and guard IL from any meta-positivist incursions, such as *jus cogens*. Decolonial scholarship forms the basis of our questioning the omnipotence of positivism.

We are all imbued in positivism. The legal documents, processes, mechanisms, and institutions that nurture and eulogise positivism convince us that certainty and determinism are ‘essential’ and ‘desired’ in law, while uncertainty and abstraction are ‘undesired’ or a ‘concern’ in law. Just as a fish habituated to water might not know what water is, it is similarly difficult for most of us to realise the dense presence of positivism around us, unless we step outside and view it from a distance. When we engage with IL while acknowledging the dense presence of positivism and distancing ourselves from it, we begin to realise how skillfully IL is gatekept on all possible fronts by the ‘guards of positivism’. The guards of positivism liquidate any scope for meaningful engagement with *jus cogens* that fails to conform to their frames of reference and principles of ‘certainty’ and ‘determinism’.⁴ They ensure the sustenance of the static and statist featuring MILS and repel the ‘raw’ form of *jus cogens* loaded with the ‘disdained uncertainty’. Through such sustenance, the guards of positivism allow an entry to only ‘positivised’ *jus cogens*. ‘Sanitised’ and ‘positivised’ as ‘certain’ and ‘deterministic’, *jus cogens* shrinks the room for any intellectual inquiry, often on the flawed pretext that such inquiry would espouse an ‘uncertain abstraction’ that engulfs spaces reserved for statist claims. A deeper fear of MILS and their guards would also be that any such inquiry would expose the loopholes inherent in the positivist crafting of the qualifications of a *jus cogens* norm. The positivist gloss of MILS over the naturalist foundations of *jus cogens* offers States the ease to surpass norms, which, if qualified as *jus cogens*, would

¹ The philosophical and moral connotations behind IL have been debated since the times of the Greeks and the Romans, see STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *Philosophy of International Law*, May 12, 2022, available at <https://plato.stanford.edu/entries/international-law/> (Last visited on June 30, 2025). These debates have continued in contemporary times, see CRDH: PARIS HUMAN RIGHTS CENTRE, *Positivism and International Law*, January 2021, available at <https://www.crdh.fr/2021/01/positivism-and-international-law/> (Last visited on June 30, 2025).

² See also Timothy A. O. Endicott, *The Value of Vagueness* in VAGUENESS IN NORMATIVE TEXTS, 27–48 (Vijay K Bhatia et al. eds., Peter Lang, 2005) (addresses a similar, myopic treatment of ‘vagueness’ as unwanted).

³ Morris D. Forkosch, *Determinism and the Law*, Vol. 60(2), KY. L. J., 364, 365 (1972); James Maxeiner, *Some Realism About Legal Certainty in the Globalization of the Rule of Law*, Vol. 31(27), HOUS. J. INT’L L., 30 (2008).

⁴ Ulf Linderfalk, *The Legal Consequences of Jus Cogens and the Individuation of Norms*, Vol. 33(4), LEIDEN J. INT’L L., 901 (2020).

amount to blatant violations, ironically by the very States resisting their qualification as such. The academic engagement with the mainstreaming of the ‘positivised’ *jus cogens* and marginalising of the naturalist *jus cogens* has been ordinary and cursory.

This allows MILS to conceal the excesses, injustices, and illegitimacies of the neo-imperial world order.⁵ Narrowed positivist constructions of IL also offer spaces to the breeding grounds of the excesses of the statist myopia.⁶ Heralded by the narrow Austinian construction of law, the paucities of legal positivism failed to account for an egalitarian and inclusive IL. Though there have been scathing revelations of the myopic nature of legal positivism,⁷ the framework and the substratum of MILS have largely remained positivist.⁸ From an “icy rejection” to a “bone-crushing embrace”,⁹ positivism continues to be MILS’s pivot. The avowed and eulogised guards of positivism perform simultaneous acts of owning and ‘othering’, while also engaging in a disproportionately dense critique of any alternative approach to IL.¹⁰ The insidious omnipresence of these guards of positivism conditions the language and framing, even within critical international law scholarship (‘CILS’) — which, while attempting to break the vicious circle of positivism often ends up sedimenting it. This paper demonstrates how the ICJ acts as an often-conscious enabler in the espousal of positivism by eulogising certainty and determinism, and the positivisation of *jus cogens*. To demonstrate this, the paper would reveal the obsessive reliance of the ICJ on the black-letter of law to recognise a customary rule as *jus cogens*. This approach has been consistently guided by specific legal provisions and case laws.

Although the recognition of *jus cogens* as a rule of customary international law (‘CIL’)¹¹ may appear insignificant in terms of its ‘utility’, ‘potency’ or the frequency with which it binds a State action, it nonetheless carries significant ‘symbolic value’ as against the positivist identity of mainstream IL. In this paper, the authors argue that this ‘symbolism’ is appropriated in the ways that *jus cogens* is ‘positivised’¹² in IL.

⁵ For example, in his recent Dissenting Opinion, the then Vice-President Sebutinde of ICJ, rejected *erga omnes* and *jus cogens* nature of the rights claimed by the Arab-Palestinians, instead relegating the issue to the status of a bilateral dispute highlighting a positivist outlook towards the issue, see Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Dissenting opinion of Vice-President Sebutinde, Advisory Opinion, July 19, 2024, I.C.J. Rep. 76.

⁶ For instance, on the moral evasions in avoiding nuclear deterrence, see John Finnis et al., NUCLEAR DETERRENCE, MORALITY AND REALISM (Clarendon Press, 1987).

⁷ For instance, Stephen Hall laments the adverse effect of legal positivism on the theory and practice of international human rights law, see Stephen Hall, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism*, Vol. 12(2), EUR. J. INT’L L., 269 (2001).

⁸ The 1920 Mexico-United States General Claims Commission highlighted, “they [laws of nature] have failed as durable foundation of either municipal or international law and cannot be used in the present day as substitutes for positive municipal law, on the one hand, and for positive international law, as recognized by nations and governments through their acts and statements, on the other hand”. See North American Dredging Company of Texas (U.S.A.) v. Mexico (General Claims Commission), March 31, 1926.

⁹ Lon L. Fuller, THE MORALITY OF LAW, 232 (Yale University Press, 1969).

¹⁰ Andrea Bianchi, INTERNATIONAL LAW THEORIES: AN INQUIRY INTO DIFFERENT WAYS OF THINKING, 26, 27 (Oxford University Press, 2016).

¹¹ Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, Vol. 19(3), EUR. J. INT’L L., 493 (2008).

¹² By ‘positivised’ we mean the normalisation of the ‘process’ of ‘performative imperialism’ inherent within the discourse of mainstream IL. By ‘positivised’ we also mean how international courts act as significant enablers to attune and trim the ‘inconsistent’ and ‘incongruent’ naturalism to the positivism of the mainstream IL.

“What is *jus cogens*?” is often answered, not by a definition, but by way of illustrations and examples. *Jus cogens* has rarely been defined, and when it has, it is in abstract terms. Abstractness and vagueness are identified as values, not as a lacuna, as is generally viewed. Vagueness allows flexibility, pliability and suppleness to the otherwise inflexible law often embodied in the black-letter law. “[V]agueness is a central technique of normative texts: it is needed to pursue the purposes of formulating such texts”.¹³ The natural law antecedents of *jus cogens* partly explain its vagueness and abstractness — instilling within it a flexibility and potential for self-transformation — that is unconditionally ousted from the realm of law by positivists. This untamable naturalism of *jus cogens* disturbs the desideratum of positivist law, explicit within the MILS. MILS has even regarded *jus cogens* as “at best useless and at worst harmful in the practical conduct of international relations”.¹⁴ Succinctly reflecting upon the MILS positivist disdain for *jus cogens*, Georges Abi-Saab underlines that *jus cogens*, as an “empty box, the category was still useful; for without the box, it cannot be filled”.¹⁵

The International Law Commission’s (‘ILC’) 2022 Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*jus cogens*) (‘the 2022 Draft Conclusions’) symbolise the value of a positivist design to allow naturalism for its begrudging ‘entry’ into the gate-kept mainstream of IL. The positivist MILS, in its attempt to attune the naturalist *jus cogens* to determinism and certainty, brought the 2022 Draft Conclusions. The 2022 Draft Conclusions’ celebratory status, its projection as decadal ‘development’ in the international community’s understanding of *jus cogens*, and its being treated as mainstreaming of *jus cogens* (by adding the elements of certainty), testify to the positivist espousal of naturalism as an unsaid precondition to qualify as ‘law’. Before a certain degree of certainty in *jus cogens* was achieved through the 2022 Draft Conclusions, the threshold of a norm to qualify as a *jus cogens* norm rested upon the discretion of tribunals and courts, including the ICJ. This positivist conditioning of *jus cogens* continues even when international legal language is derived from structures of thought, and thus, indeterminacy becomes its structural property.

The paper is divided into four parts. In Part II, the authors show how positivism eschews naturalism in the case of *jus cogens* by revealing the attempt to sanitise and positivise *jus cogens* by virtue of its embodiment in the 1969 Vienna Convention on the Law of Treaties (‘VCLT’) and the 2022 Draft Conclusions. This is followed by an analysis of the method and manner in which positivism resists the non-voluntarism of *jus cogens* norms. Segueing into Part III, the authors present the ICJ decisions that developed the jurisprudence of *jus cogens* illustratively, through a study of ICJ proceedings, judgments and orders. The authors present a close (re)view of the cases: *United Kingdom v. Germany* (1923) (‘SS Wimbledon’), *Belgium v. Spain* (‘Barcelona Traction’), *Democratic Republic of the Congo v. Rwanda* (‘Armed Activities’), *Bosnia and Herzegovina v. Serbia* (‘Alleged Violation of the Genocide Convention’), and *Belgium v. Senegal*, and *Croatia v. Serbia* in part III of the paper. The selected cases have been chosen owing to their engagement with the question of *jus cogens*, while other cases that have a comparatively lesser engagement are referred to briefly. Part IV concludes.

¹³ Timothy A. O. Endicott, *The Value of Vagueness* in VAGUENESS IN NORMATIVE TEXTS, 27 (Vijay K Bhatia et al. eds., Peter Lang, 2005).

¹⁴ A. M. Weisburd, *The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina*, Vol. 17(1), MICH. J. INT’L L. (1995).

¹⁵ Georges Abi-Saab, *The Third World and the Future of the International Legal Order*, Vol. 29(27), REV. EGYPT. DR. INT’L., 53 (1973).

II. THE DISCOMFORTS AND POSITIVISATION: LEGAL POSITIVISM'S 'NATURALISM'

Jus cogens (or ‘compelling law’) are peremptory norms of general IL. They are the “ethically minimum content of international law”.¹⁶ As CIL, *jus cogens* denotes the mandatory norms that operate on all States at all times, and from which no derogation is permissible.¹⁷ In this sense, *jus cogens* norms are ‘universally binding’ and supersede any other rule or norm.¹⁸ Their hierarchical quality can be explained relying upon natural law, as Jens Ohlin also underscores, “the hierarchical quality of *jus cogens* is best explained by some element of natural law — and its explicit invocation of moral content — rather than anything one might find in legal positivism.”¹⁹ *Jus cogens* norms are regarded as so fundamental that they constrain States objectively and not voluntarily.²⁰ Alexander Orakhelashvili underscores that the essence of *jus cogens* “is that the interests of the international community as a whole shall prevail over the conflicting interests of individual States and groups of States”.²¹ They are seen as closely tied to notions of public order²² and morality.²³ *Jus cogens* — as it binds every State involuntarily and objectively — casts a ‘towards all’ obligations or *erga omnes* that are owed to the entire international community. This conceptual gravity and the absence of voluntarism accorded to *jus cogens* leads one to a gamut of questions: What are some examples of *jus cogens*? Some very fundamental questions about *jus*

¹⁶ Jens David Ohlin, *In Praise of Jus Cogens’ Conceptual Incoherence*, Vol. 63(3-4), MCGILL L. J., 701 (2018).

¹⁷ For an account of how scholars have approached *jus cogens*, see Michael Akehurst, A MODERN INTRODUCTION TO INTERNATIONAL LAW, 40, 41 (Allen and Unwin, 1984); Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 512-513 (Clarendon Press, 1979); Taslim Olawale Elias, THE MODERN LAW OF TREATIES, 177 (Oceana Publications and A. W. Sijthoff, 1974); Hans Kelsen, PRINCIPLES OF INTERNATIONAL LAW, 483 (Robert W. Tucker ed., Rinehart and Winston, Holt, 1966); Myres S. McDougal et al., HUMAN RIGHTS AND WORLD PUBLIC ORDER, 338-350 (Yale University Press, 1980); Theodor Meron, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS, 184-200 (Yale University Press, 1986).

¹⁸ In his Separate Opinion in *Cameroon v. Nigeria*, Judge Ranjeva opines that only *jus cogens* may justify impugment of consensus-based commitments made by States that indicates that it overrides the dominance that treaty-based law has in the domain of IL, see *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.)*, Judgement, Separate Opinion of Judge Ranjeva, October 10, 2002, I.C.J. Rep. 45, ¶3.

¹⁹ Ohlin, *supra* note 20.

²⁰ Judge ad hoc Kreca in his Dissenting Opinion in *Yugoslavia v. United States of America* described the overriding nature of *jus cogens*, stating that it nullifies any action of the State (whether unilateral, bilateral or multilateral) if it is not in accordance with it indicating the supremacy of *jus cogens* over voluntary will of individual States, see *Legality of Use of Force (Yugo. v. U.S.)*, Request for the Indication of Provisional Measures, Separate Opinion of Judge ad hoc Kreca, June 02, 1999, I.C.J. Rep. 159, ¶10.

²¹ Alexander Orakhelashvili, PEREMPTORY NORMS IN INTERNATIONAL LAW (Oxford University Press, 2006).

²² On public order of the international community, see Hermann Mosler, *International Society and International Legal Community* in THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY, 1-31 (Brill | Nijhoff, 2024). Gordon A. Christenson notes, “Close to the heart of the concept lurks the embryonic notion of a world public order not exclusively controlled by Nation-States, one that is foundational, guarding the most fundamental and highly-valued interests of international society”, see Gordon A. Christenson, *Jus cogens: Guarding Interests Fundamental to International Society*, Vol. 28, VA. J. INT’L L. 585, 586 (1987).

²³ Scholars have highlighted morality as the underlying rationale and force of *Jus Cogens’* (for both to accept *jus cogens* as law and to refute it). For instance, Lauterpacht regards *jus cogens* as norms expressive of international morality., see International Law Commission, *Report on the Law of Treaties by Special Rapporteur*, UN Doc A/CN.4/63 (July 9, 1953). Drawing from Lon Fuller’s *The Morality of Law*, Bianchi notes, “The inner moral aspiration of the law thus materialized in international law with the advent of *jus cogens*”, see Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, Vol. 19(3) EU. JOUR INT’L L., 495 (2008). See also Claudio Corradetti, *Jus Cogens and the Moral Presuppositions of Public International Law*, Vol. XXVII, (2), ETICA POLIT., 501 (2025).

cogens — such as which norms are to be considered *jus cogens*? How does a particular norm reach the status of a *jus cogens* norm? These have remained unanswered or without a universal consensus in scholarship. As to the recognition of norms as *jus cogens*, there is no universal agreement or a universally accepted theory.²⁴ The creation and origin of *jus cogens* has even less agreement among scholars.²⁵ The creation, content, means of identification and application of *jus cogens* assume a mystique place in debates.²⁶

The ICJ, in its seminal 1951 *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (‘Genocide Reservations Advisory Opinion’), affirmed the universal and non-derogable nature of the obligations under the Genocide Convention.²⁷ It held that “the principles underlying the Convention are principles which are recognised by civilised nations as binding on States, even without any conventional obligation”.²⁸ This early recognition of universal norms reflects the roots of *jus cogens* in a moral and humanitarian legal order, transcending positivist state consent frameworks.²⁹

Their universality and superiority of hierarchy are highlighted by the ILC.³⁰ Any arrangement in the form of a treaty or agreement between States in supersession of *jus cogens* is impermissible.³¹ A reservation to a treaty to safeguard a state’s acts from *jus cogens* is impermissible. For instance, in the *Armed Activities* case, the Democratic Republic of Congo (‘DRC’) contended that Rwanda’s reservation to the Genocide Convention was invalid as it attempted to prevent the ICJ from safeguarding *jus cogens* norms.³² In another instance in *North Sea Continental Shelf*, Judge Padilla Nervo, in his Separate Opinion, categorically stated that customary rules belonging to the category of *jus cogens* could not be subjected to unilateral reservations.³³

²⁴ Gordon A. Christenson highlights, “Despite its ambiguity, the concept has penetrated the consciousness of public international law discourse. Publicists and commentators love to speculate with its doctrine, rich in tautologies and contradictions (emphasis added)”, see Gordon A. Christenson, *Jus cogens: Guarding Interests Fundamental to International Society*, Vol. 28, VA. J. INT’L L. 585, 586 (1987).

²⁵ Pamela J. Stephens, *A Categorical Approach to Human Rights Claims: Jus Cogens as a Limitation on Enforcement?*, Vol. 22(2), WIS. INT. LAW J., 245 (2004).

²⁶ Dire Tladi notes, “Due to its potentially far-reaching effects, *jus cogens* has become one of the most important concepts in IL. Yet, at the same time, it remains a concept that is shrouded in mystery”, see Dire Tladi, *Ius Cogens*, OXFORD PUBLIC INTERNATIONAL LAW, February 2024, available at <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1437> (Last visited on June 30, 2025).

²⁷ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (United Nations General Assembly), Advisory Opinion, May 28, 1951, I.C.J. Rep. 15, 23.

²⁸ *Id.*

²⁹ *Id.*

³⁰ U.N.G.A. Sixth Committee (73rd Session), *Report of the International Law Commission on the Work of its Seventy-Third and Seventy-Fourth Sessions*, U.N. Doc A/77/10 (August 12, 2022). Conclusion 2 of it notes the nature of preemptory norms as, “Preemptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community. They are universally applicable and are hierarchically superior to other rules of international law”.

³¹ *Id.*, ¶43.

³² *Armed Activities on the Territory of the Congo (New Application:2002) (Dem. Rep. Congo v. Rwanda)*, Judgment on Jurisdiction and Admissibility, February 3, 2006, I.C.J. Rep. 5 (‘Armed Activities’).

³³ See *North Sea Continental Shelf (F.R.G. v. Neth.)*, Judgement, Separate Opinion of Judge Padilla Nervo, February 20, 1969, I.C.J. Rep. 11, 97, 98.

Jens David Ohlin notes, “the notion that *jus cogens* is consistent with international law’s legal positivism was a useful fiction, a “noble lie” that gave us modern human rights law”.³⁴ The naturalist *jus cogens* had earlier been ousted, then critically evaluated and eventually accepted as a ‘fiction’ by the positivist MILS. The naturalist antecedents of *jus cogens* impart certain characteristics on it that attract MILS critiques. Out of several such natural law characteristics of *jus cogens* that discomfort MILS, its abstractness and fluidity, and non-voluntarism are two prominent ones that are discussed in the coming sub-sections.

A. THE POSITIVISATION OF *JUS COGENS*

The character of *jus cogens* is inherited from its Roman genesis in the concept of certain rules being incapable of being contracted out, given their fundamental sanctity.³⁵ Early Western scholars, including Hugo Grotius,³⁶ Emer de Vattel,³⁷ and Christian Wolff,³⁸ maintained that within the Roman Law, there existed *jus dispositivum* (voluntary law) and *jus scriptum* (obligatory law). *Jus scriptum* was viewed to have the capacity of binding all states without their consent. Alfred von Verdross, who valued natural law,³⁹ emphasised the need for *jus cogens* and the risks of an IL society without *jus cogens*. He pithily argues,

“Our ... as a matter of principles, states are free to conclude treaties on any subject whatsoever. All we have to investigate, therefore, is whether this rule does or does not admit certain exceptions. The answer to this question depends on the preliminary question, whether general international law contains rules which have the character of *jus cogens*. For it is obvious that if general international law consists *exclusively* of non-compulsory norms, states are always free to agree on treaty norms which deviate from general international law, without by doing so, violating general international law”. (emphasis added)⁴⁰

Jus cogens, due to its Roman natural law roots, has a fluid and abstract character, such that it reflects in the way it has been described by scholars. Alexander Orakhelashvili defines *jus cogens* as “a concept embodying the community interest and reinforced by its link with public morality [existing] in modern international law as a matter of necessity”.⁴¹ The emphasis on

³⁴ Ohlin, *supra* note 20.

³⁵ The term first appears in the Justinian Digest. However, the context appears to be different from how we use *jus cogens* in contemporary times. The Digest observes that private pacts cannot derogate from public law echoing the current *jus cogens*, see Dire Tladi, *Ius Cogens*, OXFORD PUBLIC INTERNATIONAL LAW, February 2024, available at <https://opil.oup.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1437> (Last visited on June 30, 2025).

³⁶ See Hugo Grotius, *DE JURE BELLII ET PACIS*, (translated by William Whewell, John W. Parker, 2009, first published in 1625).

³⁷ See Emer de Vattel, *LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE*, (Béla Kapossy & Richard Whatmore eds., Liberty Fund, 2008, first published in 1758).

³⁸ See Christian Wolff, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM*, (James Brown Scott ed., translated by Joseph H. Drake, Clarendon Press, 1934, first published in 1764).

³⁹ See generally Alfred von Verdross, & Heribert Franz Koeck, *Natural Law: The Tradition of Universal Reason and Authority* in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW*, 17–50 (Ronald St. J. MacDonald et al. eds., Brill | Nijhoff, 1983).

⁴⁰ Alfred von Verdross, *Forbidden Treaties in International Law* *international law*, Vol. 31(4), *AM. J. INT’L L.*, 571 (1937).

⁴¹ Orakhelashvili, *supra* note 25.

“community interest” and “public morality” in Orakhelashvili’s definition is a testament to the abstract nature of *jus cogens*.

Alfred von Verdross influenced the *jus cogens*’ early references in IL documents — the VCLT and the 1986 Vienna Convention on the Law of Treaties Between State and International Organisations or Between International Organisations.⁴² His understanding — that general principles of morality or public policy exist across the legal systems of the world, limiting and superseding contradictory treaty provisions — underlies the conception of *jus cogens* in the VCLT. His reasoning has eventually seeped into and conditioned the way *jus cogens* has been viewed by other international documents, institutions and scholars.

One of the earliest recognitions of *jus cogens* in international adjudication appeared in the 1934 Separate Opinion of Judge Schücking in *United Kingdom v. Belgium* (‘Oscar Chinn Case’). While the majority did not engage with the issue directly, Judge Schücking referred to “imperative rules” of IL — a phrase that anticipated the subsequent doctrinal emergence of *jus cogens*. His reference to legal norms arising from “the dictates of public conscience” aligns with the Martens Clause,⁴³ and reflects the nascent natural law thinking that later was ‘positivised’ into Article 53 of the VCLT.⁴⁴

Hersch Lauterpacht, ILC’s Special Rapporteur at that time, also played a pivotal role in the placement of *jus cogens* in the VCLT. One of his tangible contributions can be seen through a partial draft of the VCLT submitted by him in March 1953 that stated “treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice.”⁴⁵

It is noteworthy that the development of Article 53 and the codification of *jus cogens* as per Judge Ammoun’s Separate Opinion in *Barcelona Traction* was also an effort to develop a definition of *jus cogens* “capable of giving definitive sanction to the principles of the Charter”.⁴⁶ (emphasis added) The development of Article 53 of the VCLT is an attempt to reconcile the naturalist *jus cogens* with a positivist legal framework by codifying certain facets of it.⁴⁷

⁴² Vienna Conventions on the Law of Treaties Between State and International Organizations or Between International Organizations, 25 ILM 543 (adopted on March 21, 1986).

⁴³ The Martens Clause is one of the regulatory principles of International Humanitarian Law which asserts that even in the absence of specific treaty rules, individuals and armed groups involved in an armed conflict are protected by “dictates of public conscience”. The ubiquity of this idea of a baseline morality evident in early IL, be it Judge Schücking’s Separate Opinion in the Oscar Chinn Case or the Martens Clause, exemplifies the nascent constructions of *jus cogens*.

⁴⁴ Oscar Chinn (U.K. v. Belg.), Judgment, Separate Opinion of Judge Schücking, December 12, 1934, PCIJ Ser. A/B. No. 63, ¶149.

⁴⁵ International Law Commission, *Report on the Law of Treaties by Special Rapporteur*, UN Doc A/CN.4/63 (July 9, 1953). Tladi highlights, “Lauterpacht echoes the sentiment that the principle as formulated “is generally, — if not universally — admitted”, it is treated with great caution ... For Lauterpacht, the basis of the illegality is that such treaties violate rules that have acquired “the complexion of generally accepted — and, to that extent, customary — rules of international law”, see International Law Commission, *First Report on jus cogens by Dire Tladi, Special Rapporteur*, UN Doc. A/CN.4/693 (March 8, 2016).

⁴⁶ *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, Judgment, Separate Opinion of Judge Ammoun, February 5, 1970, I.C.J. Rep. 19, ¶19.

⁴⁷ See Carlos G. Ramaglia Mota, *The Hierarchical Implication of Jus Cogens: An Analysis of Schwarzenberger and Kelsen on the Recognition of the Prohibition of Torture and Genocide as Peremptory Norms*, Vol. 30(1), BUFF. HUM. RTS. L. REV., 82 (2024).

Article 53, on treaties conflicting with a *jus cogens* norm,⁴⁸ and Article 64, on the emergence of a new *jus cogens* norm,⁴⁹ authoritatively encapsulate the effects of *jus cogens*. However, they do not define or illustrate its prerequisites. Some prerequisites for the identification of *jus cogens*, as defined in Article 53 of the VCLT, were underscored by Judge Robinson in his Separate Opinion in the *Advisory Opinion on the Chagos Archipelago* (‘Chagos Advisory Opinion’).⁵⁰

Though rarely invoked in practice, Article 64 has received implicit judicial recognition outside the ICJ. In the 1993 case of *Aloeboetoe v. Suriname*, the Inter-American Court of Human Rights declared that any treaty authorising slavery, even if valid when signed, “would be void today” due to the emergence of *jus cogens* norms against slavery.⁵¹ This application of the principle of *jus cogens superveniens* provides a rare example of a court retroactively invalidating a treaty on moral grounds, affirming that the hierarchy established by Articles 53 and 64 has real interpretive consequences in contemporary human rights jurisprudence.⁵²

Thereafter, a greater clarity regarding the definition of *jus cogens* was brought about by the ILC in its 73rd Session wherein it adopted the 2022 Draft Conclusions in an attempt to infuse some ‘certainty’ into the otherwise abstract nature of the *jus cogens* discourse.

Conclusion 3 of the 2022 Draft Conclusions defines a peremptory norm or *jus cogens* —

“A peremptory norm of general international law (*jus cogens*) 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”.⁵³

⁴⁸ The Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (adopted on May 23, 1969, entered into force on January 27, 1980) Art. 53. Article 53 provides, “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”.

⁴⁹ The Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (adopted on May 23, 1969, entered into force on January 27, 1980) Art. 64. Article 64 provides, “If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates”.

⁵⁰ Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (United Nations General Assembly), Advisory Opinion, Separate Opinion of Judge Robinson, February 25, 2019, I.C.J. Rep. 177, ¶175 (Judge Robinson states: “First, the consequence of a breach of the norm by a treaty is that the treaty is rendered void. This was a seminal development in international law, based on the traditional principle of sovereignty of States, and in particular, in the law of treaties in which the principle of *pacta sunt servanda* is paramount. Ultimately the controversy at the Conference was resolved by the insertion of Article 66 in the Convention giving to a party to a dispute concerning the application of *jus cogens* to a particular treaty the right to bring that dispute to the International Court of Justice. Second, the norm in question must be a norm of general international law and must obviously meet the requirements for that status. Third, the norm in question must not only be a norm of general international law; it must be a norm that is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted. This is indeed the most important criterion for the identification of a norm of *jus cogens*”).

⁵¹ *Aloeboetoe et al. v. Suriname, Reparations and Costs*, September 3, 1993, Series C No. 15 (IA. Ct. H.R.), ¶57.

⁵² *Id.*

⁵³ U.N.G.A. Sixth Committee (73rd Session), *Report of the International Law Commission on the Work of its Seventy-Third and Seventy-Fourth Sessions*, Conclusion 3, U.N. Doc A/77/10 (August 12, 2022) (‘73rd Session’).

The 2022 Draft Conclusions elucidate the nature⁵⁴ and definition⁵⁵ of peremptory norms, while enlisting the criteria for the identification of,⁵⁶ and basis for *jus cogens*.⁵⁷ It further mentions the subsidiary means of determination of *jus cogens*,⁵⁸ and elaborates upon the legal consequences of it.⁵⁹ The 2022 Draft Conclusions, in Conclusion 23, provide a non-exhaustive list of *jus cogens* norms.⁶⁰ It denotes the prohibition of aggression, genocide, crimes against humanity, racial discrimination, apartheid, slavery, torture, international humanitarian law rules and the right to self-determination as *jus cogens*.⁶¹ For the natural law appeal and corresponding abstractness of *jus cogens*, the 2022 Draft Conclusions are a detailed account for setting the terms of *jus cogens* debates.

B. THE DISCOMFORTS OF THE NON-VOLUNTARIST *JUS COGENS*

One of the ramifications of positivist IL, and its centring of state consent as fundamental to IL's authority and legitimacy, is that achieving states' agreement on *jus cogens* norms is impossible unless every affected state perceives a benefit.⁶² The maximum accommodation to state authority and sovereignty, coupled with the bare minimum space afforded to the authority of IL, forms the edifice of state voluntarism in IL. Thus, ever since the genesis of modern IL, states have largely remained apprehensive and sceptical of IL and international institutions that 'apply' IL.

All ICJ rulings involving *jus cogens* norms are potent sites of the resistance offered by the MILS form of voluntarism to the peremptory force of *jus cogens*. In *Portugal v. Australia* ('East Timor'), the Court stated, "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things".⁶³ This position was later echoed in the *Armed Activities* case, where the Court held that "the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute".⁶⁴ Echoing this

⁵⁴ *Id.*, Conclusion 2.

⁵⁵ *Id.*, Conclusion 3.

⁵⁶ *Id.*, Conclusion 4.

⁵⁷ *Id.*, Conclusion 5.

⁵⁸ *Id.*, Conclusion 9.

⁵⁹ *Id.*, Conclusions 10–19.

⁶⁰ *Id.*, Conclusion 23.

⁶¹ *Id.* Conclusion 23 notes, "Without prejudice to the existence or subsequent emergence of other peremptory norms of general international law (*jus cogens*), a non-exhaustive list of norms that the International Law Commission has previously referred to as having that status is to be found in the annex to the present draft conclusions.

Annex:

- (a) The prohibition of aggression;
- (b) the prohibition of genocide;
- (c) the prohibition of crimes against humanity;
- (d) the basic rules of international humanitarian law;
- (e) the prohibition of racial discrimination and apartheid;
- (f) the prohibition of slavery;
- (g) the prohibition of torture;
- (h) the right of self-determination".

⁶² Andrew Guzman & Jerome Hsiang, *Some Ways that Theories on Customary International Law Fail: A Reply to László Hsiang*, Vol. 25(2), EUR. J. INT'L L., 557 (2014).

⁶³ *East Timor (Port. v. Austl.)*, Judgment, June 30, 1995, I.C.J Rep 90, ¶29.

⁶⁴ *Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda)*, Judgment on Merits, February 3, 2006, I.C.J Rep 6, ¶64.

sentiment, scholars highlight, “The rise of peremptory norms over the past century has sent shock waves across international legal theory, transforming the venerable doctrine of sources and unsettling inherited conceptions of state sovereignty”.⁶⁵ The ICJ conveniently deflects any engagement with this fragile dynamic between the moral abstraction of *jus cogens* and the positivist MILSian voluntarism. Judge Robinson, in his Separate Opinion in the Chagos Advisory Opinion, regrets the ICJ’s hesitation in fully engaging with *jus cogens*, often applying it in an indirect or oblique manner, or at times, not pronouncing on the application of the norm.⁶⁶

Each instance of the ICJ’s hesitation to acknowledge the violation of peremptory norms without a positivist anchorage is a step closer to the resolute espousal of positivism by the ICJ. Nevertheless, a contrasting reasoning can be seen in sporadic instances. In his Separate Opinion in the Chagos Advisory Opinion, he criticised the positivist outlook regarding ICJ’s jurisdiction, emphasising that ICJ “cannot at all keep on overlooking the legal consequences of *jus cogens*, obsessed with the consent of individual States to the exercise of its own jurisdiction”.⁶⁷ Moreover, he opines that the invocation of the ‘consent’ of individual states cannot deprive *jus cogens* of all its legal effects, nor the legal consequences of its breach.⁶⁸ In addition, in his Dissenting Opinion in *Marshall Islands v. India*, he forcefully argues that the norms of *jus cogens* need to be further recognised and asserted to secure full practical application for the benefit of all human beings.⁶⁹

A more recent and direct engagement with *jus cogens* appears in *Azerbaijan v. Armenia*, where the Court firmly reiterated: “the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute”.⁷⁰ *Jus cogens*, though considered a part of CIL, sits at a higher pedestal than any other CIL rule.⁷¹ The naturalist moorings of *jus cogens* accord this kind of gravity to it. But the positivist obsessions make many argue for weighing the ‘certain’ and ‘defined’ elements of a customary rule, such as ‘State practice’ in order to qualify a norm as a *jus cogens*. As an illustration of this, the 2006 case of Armed Activities,⁷² which held genocide to be a peremptory norm, was criticised for doing so without analysing the state practice.⁷³

⁶⁵ Evan J. Criddle and Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, Vol. 34(13), YALE J. INT’L L., 332 (2009).

⁶⁶ *Supra* note 60, ¶82.

⁶⁷ *Id.*

⁶⁸ Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (United Nations General Assembly), Advisory Opinion, Separate Opinion of Judge Cañado Trindade, February 25, 2019, I.C.J. Rep. 97, ¶155.

⁶⁹ Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (*Marshall Islands v. India*), Judgment on Merits, Dissenting Opinion of Judge Cañado Trindade, October 5, 2016, I.C.J. Rep. 30, ¶193 (‘Marshall Islands’).

⁷⁰ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Azerbaijan v. Armenia*), Order for Provisional Measure, February 22, 2023, I.C.J. Rep. 260, ¶48.

⁷¹ In fact, Judge ad hoc Lauterpacht in his Separate Opinion in the case of *Bosnia & Herzegovina v. Serbia & Montenegro* has opined that the concept of *jus cogens* is superior to both CIL as well as treaty law, see Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Order for Provisional Measure, Separate Opinion of Judge ad hoc Lauterpacht, September 13, 1993, I.C.J. Rep. 14, ¶100.

⁷² Armed Activities on the Territory of the Congo (New Application: 2002) (*Dem. Rep. Congo v. Rwanda*), Jurisdiction and Admissibility, February 3, 2006, I.C.J. Rep. 6, ¶32.

⁷³ Dinah Shelton, *Normative Hierarchy in International Law*, Vol. 100(2), AM. J. INT’L L., 306 (2006).

C. (UN)CERTAINTY OF *JUS COGENS* AND THE *DESIDERATUM OF POSITIVISM*

Perceived and created by positivism, the centrality of consensus in IL invariably leads to the impossibility of States' agreement to CIL rules unless they benefit.⁷⁴ Though CIL reflects consent, inasmuch as it applies only to those who contribute to its formation through state practice and express it through *opinio juris*, *jus cogens* binds all states regardless of these considerations. Even within the domain of CIL, which is itself distant from positivist IL, *jus cogens* stands farthest from it.

Martin Totaro highlights that “[l]egal rules in the international realm arise through treaties, custom, and general principles of international law, although the last two categories are particularly contested”.⁷⁵ The dominance of MILS over the IL landscape has led to the popularisation and undisputed authority of ‘treaties’ as the primary ‘source’ of law, satisfying the positivist obsession with black-letter law.⁷⁶ Customs and general principles of IL are placed at a comparatively lower footing in this landscape, though the Statute of the ICJ remains silent on any such hierarchy. The hierarchy within the sources of IL has remained a controversial question.⁷⁷ With the formalisation of the supremacy of *jus cogens* in Article 53, VCLT shook the sedimented positivist conception of the sources of IL and their hierarchy.⁷⁸ On this, Carlos Mota underlines, “This modification in the hierarchy of international law provoked a fierce academic debate. Diverse groups of scholars criticised or tried to explain what peremptory norms were and whether they were a valid legal concept”.⁷⁹

This resistance to the moral authority of *jus cogens* is forcefully challenged in Judge Cançado Trindade’s Separate Opinion in the Chagos Advisory Opinion, where he criticised the Court’s silence on the *jus cogens* status of the right to self-determination. He asserted that this right “indeed belongs to the realm of *jus cogens*, and entails obligations *erga omnes*, with all legal consequences ensuing therefrom”.⁸⁰ He also stated that State voluntarism and unilateralism are incompatible with the foundations of the true international legal order. He opined that *jus cogens*

⁷⁴ Andrew T. Guzman and Jerome Hsiang, *Some Ways that Theories on Customary International Law Fail: A Reply to László Blumman*, Vol. 25(2), EUR. J. INT’L L., 557 (2014).

⁷⁵ Martin V. Totaro, *Legal Positivism, Constructivism, and International Human Rights Law: The Case of Participatory Development*, Vol. 48(4), VA. J. INT’L L., 724 (2008).

⁷⁶ The Statute of International Court of Justice, in its Article 38(1) includes — conventions, customs, general principles of law recognized by civilized nations, and judicial decisions and writings of most highly qualified publicists — as the sources of international law.

⁷⁷ Christopher Greenwood, *Sources of International Law: An Introduction*, THE UN AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, available at https://legal.un.org/avl/pdf/ls/greenwood_outline.pdf (Last visited on March 20, 2025).

⁷⁸ In his Separate Opinion in the *Armed Activities* judgment, Judge ad hoc Dugard explains the reason for the superiority of *jus cogens* over the other sources of IL. He explains that the *jus cogens* norms are a blend of both policy and principle. They affirm the high principles of international law and, at the same time, also give legal form to the most fundamental policies or goals of the IL. Thus, they enjoy hierarchical superiority over the other sources of IL, see *Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda)*, Jurisdiction and Admissibility, Separate Opinion of Judge ad hoc Dugard, February 3, 2006, I.C.J. Rep. 28, ¶10 (‘Congo’).

⁷⁹ Carlos G. Mota, *The Hierarchical Implication of Jus Cogens: An Analysis of Schwarzenberger and Kelsen on the Recognition of the Prohibition of Torture and Genocide as Peremptory Norms*, Vol. 30(1), BUFF. HUM. RTS. L. REV., 3 (2024).

⁸⁰ Congo, *supra* note 78, ¶119.

emerged from ‘human conscience’ rather than the will of States.⁸¹ In another Dissenting Opinion in *Marshall Islands v. India*, Judge Trindade emphasised the universal nature of the *jus cogens* norms, stating that they need to be “further recognised and asserted to secure full practical application for the benefit of all human beings”.⁸² For Trindade, *jus cogens* was not merely a political entitlement but rather a legally binding norm rooted in ‘the universal juridical conscience’ and embedded in a humanised international legal order.⁸³

Robert Kolb highlights the capability of *jus cogens* to deepen the normative hierarchy of IL.⁸⁴ Dire Tladi highlights, “the idea that there are some rules from which States cannot validly contract out fits uncomfortably in the horizontal structure of international law”.⁸⁵ The natural law antecedents of *jus cogens*, along with its corollary of non-voluntarism, make it a rare illustration of natural law tendencies persisting in modern IL.

Modern IL’s impetus for legal positivism and objectivity makes many scholars view *jus cogens* with scepticism. Scholars have even called it “a source of confusion and distraction”.⁸⁶ It is noteworthy that this was the primary reason behind the scepticism of many Western states towards Article 53 of the VCLT, which defined but did not identify peremptory norms — a concern that led several states to withhold ratification of the VCLT.⁸⁷ The idea of ‘binding all states regardless of their willingness’ — along with its fluid, naturalist connotations — is a source of concern for both positivists and states. Any violation of a *jus cogens* norm would then become “objectively illegal, independently of the attitudes of individual States”.⁸⁸ As it cannot be defined, and may be interpreted to include what previously was not ‘agreed upon’ (in the positivist sense), it shakes the fundamentals of state centrality and state voluntarism in IL. States that have not ratified the VCLT — beyond their apparent opposition to the mystical, non-illustrative, and abstract definition of *jus cogens* — also reject its non-voluntarist nature.

The sceptics of *jus cogens* view it as ‘unrealistic’, lacking ‘utility’, and one that paves the way to express moral indignation.⁸⁹ The impractical character of *jus cogens*, including the lack of consensus on ‘what constitutes *jus cogens*’, has long remained a point of debate among scholars. On this, Tladi argues, “Yet for all its potential destabilising effect on international

⁸¹ *Id.*, ¶194.

⁸² *Marshall Islands*, *supra* note 69, ¶¶192, 193.

⁸³ *Congo*, *supra* note 78.

⁸⁴ Special Rapporteur on *Jus Cogens*, *Fourth Report on Peremptory Norms of General International Law (Jus Cogens)*, ¶23, U.N. Doc. A/CN.4/727 (January 31, 2019).

⁸⁵ Dire Tladi, *Jus Cogens*, OXFORD PUBLIC INTERNATIONAL LAW, February 2024, available at <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1437> (Last visited on June 30, 2025).

⁸⁶ *Supra* note 58.

⁸⁷ Erika de Wet underlines, “The definition in Article 53 VCLT does not identify any norms having peremptory status. This relates to the fact that at the time of its adoption the concept was regarded with suspicion by some western countries (notably France), while enjoying more support amongst the (then) socialist and newly independent states”. See Erika de Wet, *Jus Cogens and Obligations Erga Omnes* in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW, 541–561 (Oxford University Press, 2013).

⁸⁸ Orakhelashvili, *supra* note 25.

⁸⁹ Georg Schwarzenberger, *The Problem of International Public Policy*, Vol. 18(1), CURRENT LEGAL PROBS., 191 (1965).

law, *jus cogens* has remained largely unimpactful on the legal system, with the result that it has been described as a car stuck in its garage”.⁹⁰

Despite its recent popularity and acceptance with caveats, *jus cogens* must pass through positivist frameworks, such as customs and treaties, for its ‘their entry’ into the positivist conception of law. An example of the same can be seen in *Germany v. Italy* (‘Jurisdictional Immunities’), where the Court concluded that “[t]he rules of State immunity do not conflict with the rules of *jus cogens*; they operate on different levels”.⁹¹ Only when courts, tribunals, or other such forums ‘declare’ a particular norm as *jus cogens*, or when a treaty explicitly recognises it as such, is the norm accepted as *jus cogens*.⁹² This exemplifies how the gatekeeping of what qualifies as international ‘law’ is maintained by the legal positivists.

However, this formalist framing of legal hierarchy was challenged in powerful Dissenting and Separate Opinions. In the Jurisdictional Immunities case, Judge Cançado Trindade challenged the formalist hierarchy by declaring that “There is no immunity for crimes against humanity ... Without [access to justice], there is no credible legal system at all, at national or international levels” and argued that state immunity should not be used to shield responsibility for gross human rights violations stating that the waiver of claims of reparation in such cases in itself constitutes a violation of *jus cogens*.⁹³ He also commented on the antithetical nature of *jus cogens* and state consent, providing a strong pushback against the positivist conception of IL based on State consent as its edifice.⁹⁴ In his Dissenting Opinion, he recalled his intervention during the official debates at the 1986 Vienna Conference, where he had warned against the manifest incompatibility between *jus cogens* and the static, positivist-voluntarist conception of IL,⁹⁵ offering a strong critique of the positivist framework. Judge Trindade has gone to the extent of stating that even intra-State violations provide no immunity against the legal repercussions of *jus cogens* violations, even if such repercussions have not been sufficiently elaborated through international case law or legal doctrine yet.⁹⁶ This take on *jus cogens* is a novel one, because States generally plead sovereign liberty whilst justifying intra-State violations.⁹⁷ Moreover, it also moves further away from the positivist determinacy in IL by establishing that even if there has been no ‘certain’ formulation of a legal repercussion, it does not cease to exist.

Similarly, Judge Gaja suggested that while the obligation to provide reparation may not itself be *jus cogens*, a breach of a *jus cogens* norm should entail specific consequences —

⁹⁰ Dire Tladi, *Ius Cogens*, OXFORD PUBLIC INTERNATIONAL LAW, February 2024, available at <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1437> (Last visited on June 30, 2025).

⁹¹ Application of the Jurisdictional Immunities of the State (Ger. v. It., Greece intervening), Judgment on Merits, February 3, 2012, I.C.J. Rep. 99, ¶¶93–95.

⁹² An example of this may be Judge Robinson’s Separate Opinion in the *Chagos Archipelago case* where while accepting the imperative nature of the *jus cogens* norm, Judge Robinson remarked that self-determination is a norm of *jus cogens* since there is State practice, case law and scholarly practice backing the same, *see supra* note 60, ¶50.

⁹³ Application of the Jurisdictional Immunities of the State (Ger. v. It., Greece intervening), Judgment, Dissenting Opinion of Judge Cançado Trindade, February 3, 2012, I.C.J. Rep. 99, ¶¶178, 308.

⁹⁴ *Id.*, ¶141.

⁹⁵ *Id.*

⁹⁶ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (United Nations General Assembly), Advisory Opinion, Separate Opinion of Judge Cançado Trindade, July 22, 2010, I.C.J. Rep. 49, ¶215.

⁹⁷ Martti Koskenniemi, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT, Chapter 1, 43 (Cambridge University Press, 2005).

including potentially lifting immunity — under Article 41 of the ILC Articles on State Responsibility.⁹⁸ In addition, Judge ad hoc Rigaux in his Separate Opinion in *Islamic Republic of Iran v. USA* has also iterated that States cannot invoke bilateral treaty clauses to justify actions that would otherwise contravene *jus cogens*.⁹⁹

III. THE PRUNING OF *JUS COGENS* AT AND BY THE ICJ

The entry of the *jus cogens* norms into the positivist MILS is ‘allowed’ only after its ‘pruning’— a careful, meticulous act aimed at improving a thing. Here, the naturalism of *jus cogens* is carefully removed at the site of international courts, by its ‘experts’, to ‘improve’ the naturalist *jus cogens* norm into a ‘useful’ rule of CIL. Table 1 displays the various black-letter law (treaty provisions and case laws) on which the ICJ relies to decide on cases involving *jus cogens* norms. The protraction of natural *jus cogens* on the positivist idea of IL reveals how the ICJ weighs positivism vis-à-vis naturalism. The following sub-sections will showcase such instances of pruning at the sites of the Permanent Court of Justice (‘PCIJ’) and the ICJ. Sub-section A recounts the early references to *jus cogens* in two cases, while sub-sections B and C display the ICJ as a site for the positivisation of the *jus cogens* norms of prohibition of genocide and torture, respectively.

A. EARLY HINTS OF *JUS COGENS*: CASES OF *SS WIMBLEDON* AND *BARCELONA TRACTION*

The earliest reference to *jus cogens* in a case law can be found in the 1923 case of *SS Wimbledon*, in which the PCIJ noted that even those international obligations emanating from treaties could be overridden by peremptory norms of the general principles of IL (referring to *jus cogens*).¹⁰⁰

The case arose when a British steamship, the ‘S. S. Wimbledon’ — loaded with munitions and artillery consigned to the Polish Naval Base — was denied passage through the Kiel Canal in Germany.¹⁰¹ The legal question involved whether Germany breached its international obligations by refusing passage to S.S. Wimbledon, when Article 380 of the Treaty of Versailles granted the right of passage.¹⁰²

Germany maintained that the refusal was based on the German domestic “neutrality” orders of July 25 and 30, 1920,¹⁰³ which were issued in connection with the Russo-Polish war. The PCIJ did not explicitly use the term ‘*jus cogens*’, but M. Schücking, in his dissent, argued,

⁹⁸ Application of the Jurisdictional Immunities of the State (Ger. v. It., Greece intervening), Judgment on Merits, Dissenting Opinion of Judge ad hoc Gaja, February 3, 2012, I.C.J. Rep. 99, ¶¶10, 11.

⁹⁹ Oil Platforms (Iran v. U.S.), Judgment on Merits, Separate Opinion of Judge ad hoc Rigaux, November 6, 2003, I.C.J. Rep. 61, ¶17.

¹⁰⁰ The S. S. ‘Wimbledon’ Case (U.K. v. Ger.), Judgment, August 17, 1923, P.C.I.J. Ser. A. No. 1.

¹⁰¹ See PERMANENT COURT OF INTERNATIONAL JUSTICE, *First Annual Report of the Permanent Court of International Justice* 1925, August 12, 1925, Series E, No. 1, 163–168, available at https://legal.un.org/PCIJsummaries/documents/english/5_e.pdf (Last visited on May 20, 2025).

¹⁰² Article 380 of the Treaty of Versailles provides, “The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany in terms of entire equality”.

¹⁰³ S. S. ‘Wimbledon’ Case (U.K. v. Ger.), Judgment, August 17, 1923, P.C.I.J., Ser. A. No. 1.

“The right to free passage through the Kiel Canal undoubtedly assumes the form of a *servitus juris publici voluntuaria* or servitude. [...] Again ... the States benefiting by the servitude are under the obligation *civilter uti* as regards the State under servitude. The vital interests of the State under servitude must in all circumstances be respected”.¹⁰⁴ (emphasis added)

Another early mention of *jus cogens* at the ICJ can be found in the 1970 case of Barcelona Traction concerning the violation of the *erga omnes* obligation.¹⁰⁵ Barcelona Traction noted *erga omnes* obligations as those deriving from the outlawing of acts of aggression, genocide and basic human rights, including protection from slavery and racial discrimination.¹⁰⁶ The Court, differentiating between obligation towards a State and obligation towards all the States, underscores:

“In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*”.¹⁰⁷

B. PROHIBITION OF GENOCIDE AS *JUS COGENS*: RECOGNITION IN THE ICJ

The 2006 decision in *Armed Activities*¹⁰⁸ was unprecedented for acknowledging and dealing with the question of characterisation of the prohibition of genocide as a peremptory norm of IL.

The case pivoted on the question of the jurisdiction of the ICJ and thereby the admissibility of the DRC’s application, for which Article 30 of the 1984 Convention against Torture (‘CAT’) and Article 9 of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies (‘Convention on Privileges’) were to be considered. Article 30 of CAT, as a basis for the ICJ’s jurisdiction, could not be invoked by DRC, as Rwanda was not a party to the CAT, while Article 9 of the Convention on Privileges was not invoked by DRC in its final arguments.

¹⁰⁴ *Id.*, ¶87.

¹⁰⁵ Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, February 5, 1970, I.C.J. Rep. 3, ¶33.

¹⁰⁶ *Id.* The Court noted, “Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”.

¹⁰⁷ *Id.*

¹⁰⁸ *Armed Activities*, *supra* note 32, ¶6.

DRC further relied on Article 66 of the VCLT¹⁰⁹ to establish the ICJ's jurisdiction to decide a matter that arose from the violation of a *jus cogens* norm.¹¹⁰ DRC also highlighted that Rwanda's reservation to Article 9 of the Genocide Convention is invalid as the Genocide Convention has the force of general law — DRC infused this argument with the spirit of Article 53 of the VCLT.¹¹¹

Interestingly, out of the sixteen references to *jus cogens* in the decision,¹¹² the Court relied on Article 66 of the VCLT in paragraphs 2, 15, 121, and 123; on the reservation to Article IX of the Genocide Convention in paragraph 56; on Article 120 of the Statute of the International Criminal Court in paragraph 58; and on Article 53 of VCLT and Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination ('CERD') in paragraph 73. The reliance on avowedly positivist black-letter laws — such as the VCLT, Genocide Convention, CERD, and the Statute of the International Criminal Court ('Rome Statute') — to justify the existence of naturalism in *jus cogens* is extraordinary. This reveals the dominance and precedence of positivism in international institutions such as the ICJ, which largely remains concealed.

It is only in paragraph 60 that it is observed that the norms codified in the Genocide Convention enjoy the status of *jus cogens*.¹¹³ Paragraph 56 is of particular significance as it places the Genocide Convention on a *jus cogens* footing — holding a treaty, the highest source in the hierarchy of positivist sources, within the brackets of *jus cogens*. This would therefore imply that State consent to the Genocide Convention becomes irrelevant as it has the status of *jus cogens* that binds all States regardless of their will. The ICJ finding of the prohibition of genocide as a *jus cogens* norm from Armed Activities was reiterated in *Alleged Violations of the Genocide Convention* and in *Croatia v. Serbia*.¹¹⁴

In the 2007 ICJ decision in *Alleged Violations of the Genocide Convention*,¹¹⁵ the Court, while highlighting the original intent of the drafters, noted, “The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional

¹⁰⁹ The Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (adopted on May 23, 1969, entered into force on January 27, 1980) Art. 66. Article 66 provides, “If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed: (a) any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration...”.

¹¹⁰ *Armed Activities*, *supra* note 32, ¶16.

¹¹¹ *Id.*, ¶¶29, 30.

¹¹² *Id.*, ¶¶2, 15, 56, 58, 60, 64, 73, 121, 123.

¹¹³ The ICJ, while summing up Rwanda's arguments states, “Rwanda first observes that, although, as the DRC contends, the norms codified in the substantive provisions of the Genocide Convention have the status of *jus cogens* and create rights and obligations *erga omnes*, that does not in itself suffice to “confer jurisdiction on the Court with respect to a dispute concerning the application of those rights and obligations...”, see *supra* note 40, ¶60.

¹¹⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.)*, Judgment on Merits, February 3, 2015, I.C.J. Rep. 70, ¶3.

¹¹⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, February 26, 2007, I.C.J. Rep. 43, ¶87.

obligation”.¹¹⁶ The Court further reaffirmed in *Armed Activities* that the norm prohibiting genocide forms a peremptory norm.¹¹⁷

C. PROHIBITION OF TORTURE AS JUS COGENS: BELGIUM V. SENEGAL

In the Registry of the ICJ, an application instituting a proceeding was filed by Belgium against Senegal on February 19, 2009. This was in respect of Senegal’s compliance with its obligation under the CAT to prosecute the former President of Chad, Mr. Hissène Habré.¹¹⁸ The Court held the prohibition of torture as a peremptory norm or *jus cogens*. The Court based this observation on two tangents: *first*, the widespread international practice, and *second*, the *opinio juris* of States.¹¹⁹ The ICJ highlighted the presence of the prohibition of torture in several international documents.

Like in *Armed Activities*, the ICJ in *Belgium v. Senegal*, relied upon several positivist constructs of law — including the Universal Declaration of Human Rights, Geneva Conventions, and the International Covenant on Civil and Political Rights — to show the “widespread international practice and on the *opinio juris* of States” on the prohibition of torture as a *jus cogens* norm.¹²⁰ While the judgment relied on a positivist approach, a strong dissent by Judge Trindade positioned *jus cogens* above State consent because it emanates from “superior common values”.¹²¹

| NORM | CASE | RELIANCE ON |
|--------------------------------|--|---|
| Prohibition of Genocide | <i>Democratic Republic of Congo v. Rwanda</i> , 2006 | (i) Articles 53 & 66 of the VCLT, 1969 (ii) Article IX Reservations to the Genocide Convention, 1951 (iii) Article 120 of the Statute of the International Criminal Court |

¹¹⁶ *Id.*, ¶161.

¹¹⁷ *Id.*, ¶64.

¹¹⁸ Questions relating to the Obligation to Prosecute or Extradite (*Belg. v. Sen.*), Judgment, July 20, 2012, I.C.J. Rep. 67.

¹¹⁹ *Id.*, ¶99 (The ICJ observed, “That prohibition is grounded in a widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims; the International Covenant on Civil and Political Rights of 1966; General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora”).

¹²⁰ *Id.*, ¶99.

¹²¹ Questions relating to the Obligation to Prosecute or Extradite (*Belg. v. Sen.*), Judgment, Dissenting Opinion of Judge Cançado Trindade, May 28, 2009, I.C.J. Rep. 12, ¶71.

| | | |
|-------------------------------|---|--|
| | | (iv) Article 22 of the CERD, 1965 |
| | <i>Alleged Violations of the Genocide Convention</i> , 2007 | (i) Article VI of the Genocide Convention (ii) <i>Democratic Republic of Congo v. Rwanda</i> , 2006 |
| | <i>Croatia v. Serbia</i> , 2015 | (i) <i>Democratic Republic of Congo v. Rwanda</i> , 2006 |
| Prohibition on Torture | <i>Belgium v. Senegal</i> , 2012 | (i) Universal Declaration on Human Rights (ii) International Covenant on Civil and Political Rights (iii) 1949 Geneva Conventions for the Protection of War Victims (iv) General Assembly resolution 3452/30 of December 9, 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |

Table 1: *Reliance on ‘positivist’ idea of law by the ICJ while deciding cases involving jus cogens norms*

IV. CONCLUSION

Although the existing scholarship on *jus cogens* has raised pertinent questions and critiques, it has not viewed *jus cogens* as paradigmatic of the friction between natural law and legal positivism. The natural law appeal of *jus cogens* makes it a thoroughly debated concept within the realm of positivism that dominates IL. The curious case of *jus cogens* illustrates both the positivist guarding of IL’s boundaries and the inroads made by natural law into the mainstream. The reliance placed on the black-letter law — provisions and cases, to recognise a customary rule as *jus cogens* — is a unique case of the ‘positivisation’ of the naturalist *jus cogens*. To allow its entry into the realm of the positive mainstream, it is pruned and sanitised by the guards of positivism. The pruning aimed at ‘improving’ *jus cogens* to make it ‘useful’ as a (positive) law is done vehemently at the site of the ICJ. An account of the ICJ’s decisions involving *jus cogens* norms has been

presented in this paper to reveal the *jus cogens* norms' sustenance and dependence as 'law' on the positive fulcrum of law to be considered law 'enough'.

The nature of *jus cogens* renders it difficult and counterproductive to confine it within a definition, which also explains the reasons for its sporadic development, illustrated by the ICJ's decisions. The prohibitions of genocide, torture, slavery, and piracy are some recognised *jus cogens* norms. However, a theoretical account of how a norm achieves the status of *jus cogens* remains a contested discourse. The compelling, universal and non-consensual features of *jus cogens* are seen as problematic by the positivist and statist MILS. As it does not depend upon the consent of the states and is binding 'on all' irrespective of their consent, states have often opposed its existence. The MILS has also treated *jus cogens* as a mystical and problematic aspect that needs thorough introspection before its entry as a source of (positivist) IL. *Jus cogens*, in most fundamental ways, depicts the tussle between natural law and legal positivism, which this paper shows illustratively through the ICJ's decisions.

The reliance on the positivist framework of the ICJ and the positivist substance of treaty provisions for the acknowledgement of *jus cogens* reveals the concealed dominance and enduring omnipotence of positivism in IL. The ICJ acts as an enabler in this 'substantiation' and 'supplanting' of naturalism with positivism. Although the ICJ, in the normal sight of IL academe, is perceived as neutral and apolitical, this perception conceals its role in the 'positivisation' of IL in various forms and ways. Though this paper focuses on revealing the ICJ's positivist allegiance, future studies on other international institutions may yield coincidental findings that further strengthen the line of enquiry taken in this paper.