

# JUS COGENS BEFORE INTERNATIONAL COURTS: THE MEGA-POLITICAL SIDE OF THE STORY

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## I

### INTRODUCTION

“*Quand j’entends le mot jus cogens, je sors mon revolver.*”<sup>1</sup> In the French academic world, it is common to recall an anecdote according to which a very influential French legal adviser used this periphrasis to summarize the French position vis-à-vis *jus cogens*.<sup>2</sup> The deliberate choice of such a connotative metaphor illustrates how the category of peremptory norms has always been extremely divisive, embodying in international law something that could be considered “mega-political” and its judicialization problematic.

Yet, transposing the study of the judicialization of mega-political issues to international law calls for some preliminary precautions, as the framing chapter by Alter and Madsen, which opens this special issue, very well shows.<sup>3</sup> The authors engage with Ran Hirschl’s study of the judicialization of mega-political issues and his definition of “the judicialization of ‘mega-politics’ or ‘pure’ politics [as] the transfer to courts of contentious issues of an outright political nature and significance.”<sup>4</sup> They further consider that “questions of pure politics include electoral processes and outcomes, restorative justice, regime legitimacy, executive prerogatives, collective identity, and nation building.”<sup>5</sup> As Alter and Madsen argue, the transposition of the themes observed in constitutional law to international law could involve not only a change of perspective but also of perception.<sup>6</sup> Although

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1. “When I hear the word *jus cogens*, I pull out my gun” (authors’ translation).

2. Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 344 (“[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.”).

3. Karen J. Alter & Mikael Rask Madsen, *The International Adjudication of Mega-Politics*, 84 LAW & CONTEMP. PROBS. no. 4, 2021, at 1.

4. Ran Hirschl, *The Judicialization of Politics*, in THE OXFORD HANDBOOK OF POLITICAL SCIENCE 253, 253 (Robert E. Goodin ed., 2011).

5. *Id.*

6. See generally Alter & Madsen, *supra* note 3.

this transposition remains about observing the structural movements affecting international political debates, which are increasingly framed in terms of law and rights.<sup>7</sup> The core of the theoretical discussion lies in observing these structural movements, which may be called the tectonics of mega-politics, that is, the forces and movements which produce, or can produce, deformations of a “body.” In the case of this investigation, the body is international law.

Such an approach consists of looking for the existence of a structural movement in the international legal order to identify the central political issues that divide entire polities and to understand how the debate on their judicialization points to an inevitable change in the configuration of international law. Indeed, it is what several papers in this special issue try to demonstrate, although, as Alter and Madsen show in their introduction, the outcome of the investigation is uneven.<sup>8</sup>

With regard to the approach Alter and Madsen propose, this study falls within the third category of mega-political issues, the “sovereignty-based disputes where judicial intervention interferes with deeply held notions of state sovereignty.”<sup>9</sup> Yet, as the readers may quickly realize, this study takes an extra step. Alter and Madsen take the stance that “[f]or the mega-political definition to hold, the possibility of rallying significant public support behind the political position must also exist.”<sup>10</sup> Notably, in their framework, this public support is derived from the people constituting polities. In contrast, this article’s investigation starts with the society of states as the classis structure over which international law was designed. In order to identify how the concept of *jus cogens* destabilizes traditional schemes, this study is located in the concept of the society of states, referred to as a polity. In such a perspective, with reference to such a social group, *jus cogens* is indeed a divisive issue (including in relation to the idea of democracy), although the notion as such does not refer to a specific content, which can be diverse, but to a tool or a vehicle.

With these specificities in mind, *jus cogens* is a perfect vantage point for investigating the mega-political side of international litigation, thanks to its very paradoxical situation in this regard. In 1969, as a precondition to accepting the inclusion of *jus cogens* in the Vienna Convention of the Law of Treaties (VCLT), a number of states demanded the inclusion of Article 66, a provision requiring the judicialization of *jus cogens*-related disputes. These states may have demanded this provision due to an underlying bet that it would have a deterrent effect. Later, the occurrence of *jus cogens* in judicial proceedings triggered resistance and division. This reaction may have occurred because such proceedings

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7. See generally RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004) (arguing that the judicialization of politics is part of a broader process whereby elites insulate policymaking from the vicissitudes of democratic politics).

8. See generally Alter & Madsen, *supra* note 3.

9. Alter & Madsen, *supra* note 3, at 9.

10. Alter & Madsen, *supra* note 3, at 12.

took place out of the box, that is, not in the frame initially planned in the VCLT.<sup>11</sup> Be it as it may, the main features of a mega-political issue are there.

The theory of *jus cogens* implies certain fundamental principles that are peremptory and therefore do not allow any derogation. The concept of *jus cogens*—that is of a core of norms of constitutional nature, including the principle of non-aggression or the prohibition of slavery, genocide, and piracy—was at the heart of the claims of the non-aligned and socialist states<sup>12</sup> at the time of decolonization, especially during the negotiations of the VCLT in 1968–69, which witnessed a whole spectrum of opinions regarding *jus cogens*.

At one end of the spectrum lied the perception that these norms would be a tool for non-aligned and socialist states to free themselves from the form of domination embedded in the pre-existing international law architecture. This notion of domination was incarnated in and symbolized by the figure of unequal treaties. Support for this perception has gained traction in the doctrinal discourse and the discourse of some international courts and tribunals. On the doctrinal side, the writings of Mohammed Bedjaoui and scholars of the New International Economic Order have expanded the concept in terms of function and substance. For example, *ratione materiae*, the right to development and the principle of permanent sovereignty over natural resources, was contended to be part of *jus cogens*.<sup>13</sup> In structural terms, the existence of these norms would reflect a paradigm shift from the colonial discourse of international law's civilizing mission (“*mission civilisatrice*”), toward a commitment to the principles of fundamental justice, rejecting the binding value of treaty commitments because of their profoundly unequal character.<sup>14</sup>

On the judicial side, the jurisprudence of the Inter-American Court of Human Rights (IACtHR) has undergone a similar evolution, particularly under the influence of its former President Antonio Augusto Cançado Trindade. Cançado Trindade proudly observed that, “The Inter-American Court has probably done for such identification of the expansion of *jus cogens* more than any other contemporary international tribunal.”<sup>15</sup> First, the Court expanded the very function of *jus cogens*, transforming it from a simple cause for invalidating treaties into a polymorphous concept with broader implications. In its 2003 *Opinion on the*

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11. H el ene Ruiz Fabri, *Comment on Article 66, in THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY* 1513, 1518–20 (Olivier Corten & Pierre Klein eds., 2011).

12. See generally Umut  zsu, *An Anti-Imperialist Universalism? Jus Cogens and the Politics of International Law*, in *INTERNATIONAL LAW AND EMPIRE: HISTORICAL EXPLORATIONS* 295 (Martti Koskenniemi, Walter Rech, & Manuel Jim enez Fonseca eds., 2017) (analyzing the way in which *jus cogens* was deployed by socialist and non-aligned states).

13. See generally Mohammed Bedjaoui, *The Right to Development and the Jus Cogens*, 2 *LESOTHO L.J.* 93 (1986).

14. See MOHAMMED BEDJAOU, *NEW INTERNATIONAL ECONOMIC ORDER*, 184–86 (1979); *Probl emes R ecents de Succession d' tats dans les  tats Nouveaux*, 130 *RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE* 455, 455–585 (1970).

15. *Caesar v. Trinidad & Tobago, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 123, ¶ 92 (Mar. 11, 2005)* (separate opinion of Judge Cançado Trindade).

*rights of undocumented migrants*, the Court made it clear that the concept extended beyond its original framework, the law of treaties, and explained that it pervaded all branches of international law.<sup>16</sup> In the *Brothers Gómez Paquiyauri v. Peru* case, the Court broadened the scope of application of *jus cogens*, finding that it applies equally in times of peace, war, or emergency.<sup>17</sup> In these decisions, the Court also began to broaden the concept of *jus cogens* substantively: in the 2003 opinion, the Court considered the principle of equality to be peremptory;<sup>18</sup> in the *Gómez Paquiyauri* judgment, it incorporated the prohibition of extrajudicial executions.<sup>19</sup> This was the first step in a series of decisions along the same lines: eventually incorporating prohibitions on inhuman treatment and corporal punishment,<sup>20</sup> forced disappearances,<sup>21</sup> discrimination,<sup>22</sup> and the execution of persons under eighteen years of age.<sup>23</sup>

These examples show that *jus cogens* has escaped the box of the law of treaties to which it was initially confined. Yet, one cannot ignore how much these developments remain controversial. Even in the tight frame of the VCLT, *jus cogens* was considered a threatening enough notion to trigger France's lonely refusal to even sign the convention. And still, fifty years after the conclusion of the convention, France has yet to ratify the VCLT, despite the fact that the country implements most of the VCLT in its daily international practice.<sup>24</sup> Of course, one swallow does not a summer make.

Indeed, France's stance can be seen as expressing the other end of the above-mentioned spectrum. Nobody could straightforwardly reject a notion that translates into law the idea of higher morality and norms bearing equally on all members of the international community, especially considering undeniable examples such as the prohibition of aggression or of genocide. For this reason, the debate shifted to the conditions of implementing *jus cogens* and the guarantees against its abuse. The risks put forward were a potential instability of convention relationships and the related uncertainty of international relations.

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16. See *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶¶ 98–99 (Sept. 17, 2003).

17. See *Gómez-Paquiyauri Brothers v. Peru*, Merits, Judgments and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶¶ 111–12 (July 8, 2004).

18. *Juridical Condition and Rights of Undocumented Migrants*, *supra* note 16, ¶ 100.

19. *Gómez-Paquiyauri Brothers*, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 76.

20. See *Caesar*, Inter-Am. Ct. H.R. (ser. C) No. 123, ¶ 70; *Ximenes-Lopes v. Brazil*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 149, ¶ 126 (July 4, 2006).

21. *Goiburú v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 93 (Sept. 22, 2006).

22. See *YATAMA v. Nicaragua*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 184 (June 23, 2005).

23. *Domingues v. United States*, Case 12.285, Inter-Am. Comm'n H.R., Report No. 62/02, OEA/Ser.L/V/II.116, doc. 5 rev. 1 ¶ 8 (2002).

24. Hélène Ruiz Fabri, *La France et la Convention de Vienne Sur le Droit des Traités*, in *LA FRANCE ET LE DROIT INTERNATIONAL* 137, 137–67 (Gérard Cahin, Florence Poirat & Sandra Szurek eds., 2007).

The pending question regarding the implementation of *jus cogens* was: who would decide which norm is of *jus cogens*? What would be the pragmatic translation of the vague concept of an international community of states as a whole? The United Nations General Assembly, on the verge of falling into the delights of automatic majority, was the favourite of some to decide which norms are of *jus cogens*, but this idea was rebutted by others. Those in disagreement argued that a body deprived of any legislative power could not suddenly become a super-legislator.<sup>25</sup> Here again, opinions opposing *jus cogens* have gained traction in the doctrinal discourse and the discourse of some international courts and tribunals. The writings of numerous authors, some of them considered especially conservative, have gone on denying the relevance of *jus cogens* in the current state of the international legal order as they see it, pointing to the dangers of such a romantic or utopian notion.<sup>26</sup>

Along these lines, The International Court of Justice (ICJ) resisted for a long time before even using the term *jus cogens*. Still, the first occurrence was to cite Portugal's argument in the Timor case,<sup>27</sup> so it was not the ICJ's own discourse. Ten more years were necessary for the ICJ to mention *jus cogens* in its reasoning, and even then, the *jus cogens* argument was not conclusive.<sup>28</sup> Whether such long-lasting resistance was related or not to an intense internal lobbying of the French judge, well known for his strong opposition to *jus cogens*, is impossible to say. However, the ICJ stayed its hand for as long as it could, and in some ways, probably still does.

Thus, the debate and its related divisions are far from being over. The VCLT has not gained many more ratifications over the past thirty years, and the reservations to provisions related to *jus cogens*, especially to Article 66, have not receded. This does not equate to a status quo. If need be, the recent work of the

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25. See generally Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983) (arguing *inter alia* that the resolutions of international organizations can be an important step in the process of elaborating international norms, but cannot be the formal source of those norms).

26. Michael J. Glennon, *De L'Absurdité du Droit Impératif (Jus Cogens)*, 110 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 529, 529 (2006). See generally JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007) (summarizing neo-conservative objections to the modern international law regime); Serge Sur, *Les Phénomènes de Mode en Droit International*, in COLLOQUE DE PARIS: LE DROIT INTERNATIONAL ET LE TEMPS 49, 53 (A. Pedone ed., 2001).

27. East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90, ¶ 30 (June 30) (“[T]he principal matters on which its claims are based, namely the status of East Timor as a non-self-governing territory and its own capacity as the administering Power of the Territory, have already been decided by the General Assembly and the Security Council, acting within their proper spheres of competence; that in order to decide on Portugal's claims, the Court might well need to interpret those decisions but would not have to decide de novo on their content and must accordingly take them as ‘givens’; and that consequently the Court is not required in this case to pronounce on the question of the use of force by Indonesia in East Timor or upon the lawfulness of its presence in the Territory.”).

28. Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. 6, ¶ 125 (February 3) (“[T]he mere fact that rights and obligations *erga omnes* or peremptory norms of general international law (*jus cogens*) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties.”).

International Legal Commission (ILC) and its Special Rapporteur<sup>29</sup> on the topic is a testimony to the divisive potential of *jus cogens*. This work shows how much opinions on *jus cogens* are not only subject to various political agendas but also diverging visions of the international legal order and the role of the judge.

In such context, the aim of this article is threefold. On the one hand, it seeks to study *jus cogens* as a mega-political tool in the hands of the judge, to demonstrate how the adjudication of *jus cogens* crystallizes in international law questions about the tectonics of mega-politics (Part II). On the other hand, it seeks to confirm that the evolution of the judicial discourse on *jus cogens* can be understood as the oscillation between an apologetic attitude opposed to the tectonics of its mega-political nature and a utopian desire to envisage it as the tool of a progressive systemic project (Part III). However, the article's ambition is not only to take stock of the usual terms of controversy, which correspond to the basic moves in the tectonics of mega-politics, but also aims to include an examination of the procedural potential of *jus cogens*. Whereas the ILC's work reveals the procedural hurdles blocking the development of *jus cogens*,<sup>30</sup> understanding the original historical promise of *jus cogens* from a Third World Approaches to International Law (TWAIL) perspective can reveal its procedural potential as an emancipatory tool for the most vulnerable (Part IV).

## II

### *JUS COGENS AS A MEGA-POLITICAL ISSUE*

As observed in the discussion above, it can be misleading to simply transpose examples of mega-politics to international law. Changing the context engenders a risk of either expanding the boundaries of the mega-politics concept *ad libitum* or losing the intellectual project that underlies the understanding of the category. More than in any other branch of public law, the international judge is aware of the inescapably political nature of the disputes he must resolve, as a well-known dictum of the ICJ underlines:

legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's functions or jurisdiction

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29. See Dire Tladi (Special Rapporteur on *Jus Cogens*), *First Rep. on Jus Cogens*, U.N. Doc. A/CN.4/693 (Mar. 8, 2016); Dire Tladi (Special Rapporteur on *Jus Cogens*), *Second Rep. on Jus Cogens*, U.N. Doc. A/CN.4/706 (Mar. 16, 2017); Dire Tladi (Special Rapporteur on *Jus Cogens*), *Third Rep. on Jus Cogens*, U.N. Doc. A/CN.4/714 (Feb. 12, 2018); Dire Tladi (Special Rapporteur on *Jus Cogens*), *Fourth Rep. on Jus Cogens*, U.N. Doc. A/CN.4/727 (Jan. 31, 2019); see also Int'l Law Comm'n, Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10, at 141–203 (2019).

30. H el ene Ruiz Fabri, *The Eternal Question of Jus Cogens Running into Procedural Hurdles*, 24 AUSTRIAN REV. INT'L & EUR. L. 141–62 (2021).

be found in the Charter or the Statute of the Court; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes.<sup>31</sup>

This article does not seek to assess the impact of mega-political issues on international decision-making as such. It is important to distinguish the analysis of *jus cogens* from the scepticism that some international lawyers may harbour towards studies of the effects of politics on international law or vice versa. As Martti Koskenniemi has pointed out, “[s]uch an enquiry would be like examining Christianity’s relationship to religion.”<sup>32</sup> International law, as a technical language used to express certain political claims in legal terms, is an expression of politics. Therefore, it is impossible to consider international law and politics as two separate entities.

No matter what one might think of this theoretical objection, it is interesting to observe how the language of the judge adapts to a particular type of cases. Indeed, calling a normative phenomenon *jus cogens* creates a methodological perplexity for the positivist. As Koskenniemi describes, “The distinctions between hard and soft law, rules and principles, regular norms and *jus cogens*, for instance, are suspect: these only betray political distinctions that undermine the law’s objectivity.”<sup>33</sup> This investigation of the way the international courts’ discourse manipulates peremptory norms seeks to examine how judges deal with the tectonics of mega-politics. To do so, this analysis distils indirectly from Hirschl’s work and directly from Alter and Madsen’s framing chapter the fundamental issues raised in the jurisdictional context. From there, it develops a meta-theoretical analysis to understand these issues in the broader context of international law.

#### A. Defining the Content of Mega-Politics: Issues That Divide Polities

Hirschl included in the content of mega-politics “matters of outright and utmost political significance that often define and divide whole polities.”<sup>34</sup> The peremptory norms seem to correspond to this idea of “matters of outright and utmost political significance that often define and divide whole polities.”<sup>35</sup> Indeed,

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31. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, ¶ 37 (May 24).

32. MARTTI KOSKENNIEMI, *THE POLITICS OF INTERNATIONAL LAW* v (2011) (“I do not think there are such separate entities. Nothing in this book participates in the sometimes fashionable enquiries of international law’s ‘impact’ on politics or vice-versa. Such an enquiry would be like examining Christianity’s relationship to religion. The relationship (if that is the correct word) is not one of two entities colliding against each other but one of identity. International law is an *expression* of politics much like Christianity constitutes one type of expression of religious spirituality. Both also operate as technical languages that are resorted to by trained professionals and lay persons alike in order to communicate human aspirations, fears and ambitions.”).

33. *Id.* at 41.

34. Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93, 94 (2008).

35. *Id.*

in his analysis of the different discourses on *jus cogens*, Robert Kolb highlights a deep divergence within the international law community. *Jus cogens* is seen either as a dream or as the pinnacle of a new international legal order that has found a receptacle for its most fundamental values.<sup>36</sup> Thinking about *jus cogens* as a mega-political issue focuses less on identifying different layers of varying political intensity in international disputes. Instead, focus is placed on highlighting the particularism of certain disputes that call for the application of norms claimed to be at the top of a hierarchical normative structure.

Concerning the concept of mega-political disputes before the international court, Alter and Madsen consider that “mega-political disputes involve substantive issues that deeply divide societies such that one can predict that at least one important social group will be upset by the outcome.”<sup>37</sup> The international adjudication of disputes involving *jus cogens* norms can be seen to fall within this definition at different levels.

First, *jus cogens* can concern disputes on legal issues that divide national polities. A recent example lies in the story leading up to the *Germany v. Italy* case before the ICJ, and the subsequent reaction of the Italian Constitutional Court.<sup>38</sup> The background is the still sensitive issue of war reparations, as several Italian nationals sought reparations from Germany in Italian courts for wartime human rights violations. In a first upward movement, the dispute moved from the national to the international level: a Florentine judge tried to redefine the contours of sovereign immunity. Specifically, this judge introduced an exception based on *jus cogens* to lift the veil of sovereign immunity, even in the ambit of *jure imperii* acts. The German government strongly opposed this position before the ICJ, which formally reiterated the distinction between procedure, the level where immunities play, and substance to reject the Italian argument. A later downward movement generated a huge debate among international lawyers. When the ICJ’s answer on the *jus cogens* exception reached the Italian Constitutional Court, the latter used a strongly dualistic discourse—in the manner of *Kadi*<sup>39</sup>—to say that, if the ICJ’s decision reflected the state of customary international law, this conception would not have permeated the Italian legal order because it was contrary to the most fundamental national values. Consequently, this case has rekindled lively debates among international lawyers on the scope and effects of peremptory norms.

Second, *jus cogens* disputes usually concern issues that divide the community of states. Indeed, from the outset, this legal concept has been the product of intense confrontation between two cohorts of states. While Third World and Soviet Bloc states saw *jus cogens* as a promise to reform and secure their rights, Western

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36. ROBERT KOLB, THÉORIE DU IUS COGENS INTERNATIONAL – ESSAI DE RELECTURE DU CONCEPT 24 (2001).

37. See Alter & Madsen, *supra* note 3, at 8.

38. See generally Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, 2012 I.C.J. 99 (February 3).

39. See generally Case C-402/05, *Kadi v. Comm’n*, 2008 E.C.R. I-06351.

countries feared its indeterminacy and risky drawbacks. This opposition is not only reflected in the split between the positions taken during negotiations on Articles 53 and 64 of the VCLT,<sup>40</sup> but also in the disagreement on Article 66, which concerned dispute settlement in cases where a *jus cogens* norm is involved.<sup>41</sup> While Third World and Soviet Bloc states adopted a language of renewed morality (seeing *jus cogens* as a reflection of a “shared philosophy of values,”<sup>42</sup> the “universal legal conscience of civilised countries,”<sup>43</sup> the “higher interests of the international community as a whole,”<sup>44</sup> or the “very concept of justice.”<sup>45</sup>), Western countries opposed it with doubts about a morality that is difficult to define.<sup>46</sup>

Interestingly, argumentative strategies regarding *jus cogens* have repeatedly shifted and reversed over time. As Umut Özsu has perceptively noted, First World states began to attack *jus cogens* in the name of the sacrosanct idea of sovereignty at a time when “transnational law” was colonizing their discourse on public international law.<sup>47</sup> At the same time, socialist states shifted from their traditional aversion to unwritten law and their preference for treaty law as the guardian of sovereignty, to the defence of peremptory norms as the cornerstones of the international community’s general interest. Paradoxically, “[T]he utopia of a normatively integrated international order became the apology of state power; the apology of state power produced the utopia of a normatively integrated international order.”<sup>48</sup>

Finally, *jus cogens* disputes may have a mega-political dimension to the extent that their resolution reflects a fundamental structural transformation in the architecture of the international legal order. The relationship of the ICJ with *jus cogens* is characteristic of the paradoxes of *jus cogens*. Indeed, peremptory norms call on the Court to say whether a specific norm has the status of *jus cogens*, to define what the prohibition is, and to clarify the norm’s content. However, in doing so, they also call for a “*transformation de la société tel qu’un co-législateur*,

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40. See generally Özsu, *supra* note 12, at 295–98 (describing the negotiations between Western, socialist, and Third World states surrounding Article 53).

41. See generally Héléne Ruiz Fabri, *Comment on Article 66, in THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY* 1513, (Olivier Corten & Pierre Klein eds., 2011).

42. U.N. Conference on the Law of Treaties, 1st Sess., 52nd mtg. at 297. U.N. Doc. A/CONF.39/11 (May 4, 1968).

43. U.N. Conference on the Law of Treaties, 1st Sess., 53rd mtg. at 301. U.N. Doc. A/CONF.39/11 (May 6, 1968).

44. *Id.* at 305.

45. U.N. Conference on the Law of Treaties, 1st Sess., 29th mtg. at 154. U.N. Doc. A/CONF.39/11 (April 18, 1968).

46. That was essentially the position of France that rejected the VCLT as a whole because of *jus cogens*. Ruiz Fabri, *supra* note 24, at 137–67.

47. Özsu, *supra* note 12, at 305.

48. *Id.*

*changement que la Cour est pourtant incapable d'instituer dans la société dans laquelle elle opère.*"<sup>49</sup> The Court, operating in a legal system conceived as the product of voluntarism and on a voluntary jurisdictional basis, is invited to press the limits of this voluntarism. By invoking *jus cogens*, the Court is asked to legislate on the content of rules that are removed from the will of the subjects of the international legal order.

It is important to recognize that many of the problems related to the settlement of *jus cogens* disputes correspond to a clash of conceptions. On the one hand, a traditional and Eurocentric vision has portrayed peremptory norms as an "ethical minimum."<sup>50</sup> Behind a language of universalism, *jus cogens* becomes a tool for certain actors to articulate "the universal legal conscience of civilised countries."<sup>51</sup> It is no coincidence that the link between mandatory standards and the protection of the "international community" is the result of an amendment by Spain, Greece and Finland in the *travaux préparatoires* of Article 53 VCLT.<sup>52</sup> On the other hand, the Third World view made *jus cogens* the tool for consolidating their newly achieved self-determination, formulating it in an emancipatory language that defends the vulnerable.

## B. Adjudicating Mega-Politics: Questioning the Role of the Judge

Although the concept of "mega-politics" in Hirschl's work is usually linked to an eponymous article from 2008, the idea is deeply rooted in earlier work. In constitutional law scholarship, the judicialization of politics is linked to a classic discussion of constitutional design: the legitimacy of constitutional review by courts. In the late twentieth century, the "popular constitutionalism" movement proposed a counterweight to judicial constitutional review. These left-wing critics suggested that in order to reconcile parliamentary supremacy with the supremacy of the constitution, it was necessary to "take the Constitution away from courts."<sup>53</sup> The central concerns of this movement were that conservatives used courts as a weapon to limit progressive legislative action in essentially political controversies, and that judicial review reduced focus on achieving social change through political action by instead diverting all energy toward the judicial process.<sup>54</sup>

The latter argument seems to underlie Hirschl's approach, as "the constitutionalization of what he calls 'mega-politics' imposed several limiting factors on

49. Raphaëlle Rivier, *Droit Impératif et Juridiction* (2001) (unpublished Ph.D. dissertation, Université Paris II Panthéon-Assas) (on file with Author) ("[T]ransformation of society as a co-legislator, a change that the Court is unable to institute in the society in which it operates.").

50. Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571, 574 (1937).

51. U.N. Conference on the Law of Treaties, *supra* note 43.

52. A. Gomez Robledo, *Le Jus Cogens International: Sa Genèse, Sa Nature, Ses Fonctions*, 172 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 9, 37-69 (1981).

53. See generally MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 1 (2000).

54. See generally *id.*

the possibilities for true transformation from below.”<sup>55</sup> This thesis refers to the more general argument in his book *Towards Juristocracy*,<sup>56</sup> where Hirschl challenged the common view that the constitutionalization of rights and the establishment of judicial review have progressive origins and are intended to promote the diffusion or redistribution of power. On the contrary, Hirschl locates the move towards juristocracy in a fundamental historical shift that began with the end of the Cold War. Traditionally, mega-political issues were reserved for different mechanisms of popular organization, such as grassroots political action. But from the late 1990s onwards, a paradigm shift began to transform these political demands for change in terms of the logic of law. Elites and international institutions seem to shy away from political action associated with violence and uncertainty, preferring instead the orderly model of legal discourse and court decision-making. Along these lines, socio-political change was reoriented under the label of law; a new logic emerged where demands for change are structured in a rights-based form and brought to courts.<sup>57</sup>

Can a similar trend be identified for international law? It is undeniable that from the 1990s onwards, international law has undergone an intense process of judicialization. During this time, the number of international courts and tribunals has multiplied, and their mandates have significantly expanded.<sup>58</sup> International lawyers have rarely questioned this process, which is seen as an additional degree of maturity of the international legal phenomenon. Rather, fears have focused on the risks of fragmentation of the international order, fractured into different legal spheres, each with its own political agenda.<sup>59</sup>

Several states, especially in the West, conditioned their acceptance of *jus cogens* being included in the VCLT on the correlative inclusion of a dispute settlement mechanism involving binding decisions made by arbitrators or the ICJ (Article 66). The states saw this as a safeguard against abusive allegations concerning the *jus cogens* character of certain norms. This procedural mechanism was intended to give judges the final say when the existence of a *jus cogens* norm was disputed. Interestingly, this was done in 1969, shortly after the very conservative and equally controversial ICJ decision in the *South West Africa* case.<sup>60</sup> It is interesting to relate the timing of these events to possible interpretations of the rise of

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55. MARK GOODALE, A REVOLUTION IN FRAGMENTS: TRAVERSING SCALES OF JUSTICE, IDEOLOGY, AND PRACTICE IN BOLIVIA 93 (2019).

56. See generally HIRSCHL, *supra* note 7 (arguing that the trend toward constitutionalization is the product of a strategic interplay among political elites, economic stakeholders, and judicial leaders).

57. GOODALE, *supra* note 55, at 69–70.

58. See generally KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS (2014) (charting developments and trends in the creation and role of international courts).

59. See generally Martti Koskeniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2020).

60. Liberia and Ethiopia had attempted an *actio popularis* claim that the Court rejected. See generally 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. Rep. 16 (June 21).

juristocracy.

Some mega-political issues, resolved with a rights-based approach, cause a structural change in a given societal framework. The same is true for international adjudication: the empowerment of the judge to resolve mega-political issues provokes structural movements that can be interrogated. The fundamental question is to identify the societal impact of the international judge's discourse when dealing with such issues. Part III addresses the set of questions relating to the international judge's ability to handle a disruptive instrument like *jus cogens*. This reasoning goes hand in hand with the question of whether international adjudication should be the means of dealing with such mega-political situations or whether the trend should be reversed, and the involvement of the international judge in mega-politics should be limited.<sup>61</sup>

### III

#### THE AXIOLOGICAL MATERIALITY OF *JUS COGENS*: SHOULD THE JUDGE SPEAK OUT?

In international law doctrine, it is common to link the fact that *jus cogens* norms aim at protecting values of the highest importance for the entire international community with their close relationship to morality. This link between *jus cogens* and morality has been considered "the most usual and frequent explanation of a norm's peremptory character."<sup>62</sup> This link is traditionally attributed to the separate opinion of Judge Schücking in the *Oscar Chinn* case, considering that "the Court would never [...] apply a convention the terms of which were contrary to public morality."<sup>63</sup> But the link has now become a standard part of the argument: during the ILC's work on the Vienna Convention, Special Rapporteurs Lauterpacht and Fitzmaurice also considered that the peremptory character of a norm was derived from the fact that it was a manifestation of international morality.<sup>64</sup> This axiological explanation has gradually faded away, as the notion of "general interest" has replaced the difficulty of the moral content explanation.<sup>65</sup>

Despite the shift in discourse, this axiological materiality of peremptory norms has continued to pose problems for judicial intervention. This part will examine how the discourse of international law has articulated concerns about

61. See Alter & Madsen, *supra* note 3 (posing questions about the proper role of international adjudication).

62. Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 EUR. J. INT'L L. 59, 62 (2005).

63. Oscar Chinn (Brit. v. Belg.), Judgment, 1934 P.C.I.J. Rep. (ser. A/B) No. 63, at 148, 150 (Dec. 12) (separate opinion by Schücking, M.).

64. Report by Mr. H. Lauterpacht, *Special Rapporteur*, [1953] 2 Y.B. Int'l L. Comm'n 90, 155, U.N. Doc. A/CN.4/61; Third Report by G.G. Fitzmaurice, *Special Rapporteur*, [1958] 2 Y.B. Int'l L. Comm'n 20, 41, U.N. Doc. A/CN.4/155.

65. Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55, 58 (1966); Jochen Frowein, *Jus Cogens*, in 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 327, 329 (R. Bernhardt ed., 1984).

the adequacy of judicial intervention in a mega-political subject. First, the most troubling claim in this respect is whether, in such cases, the judge must be silenced for justice to be expressed. Second, when the judge intervenes in the recognition of a *jus cogens* norm, his action is closely linked to a structural problem of “verticalization.” Third, the consequences of exercising jurisdiction in these cases means that the judge often becomes the target of criticism.

#### A. A Moral Problem: The Silence of the Judge/The Voice of Justice?

A generalized unease with the moral nature of *jus cogens* is intrinsic to the discourse of international lawyers on peremptory rules. Some authors try to sanitize this value dimension, focusing on a strictly technical approach that avoids tackling the symbolic value of these rules. Other authors focus exclusively on the moral dimension, ignoring the technical problems of *jus cogens*.<sup>66</sup> The latter approach would highlight the fact that *jus cogens* is primarily a moral issue. Yet, even in this respect, two opposing positions can be identified regarding what this moral phenomenon entails in terms of judicial intervention.

Advocates of *jus cogens* tend to believe in the importance of judicial means to resolve disputes involving it. Antonio Cassese, for example, believed that the ICJ’s compulsory jurisdiction in this area would provide “an authoritative third party determination of *jus cogens* [constituting] a welcome safeguard against any abuse.”<sup>67</sup> Recourse to judges is necessary because it is the only way to ensure that the norm invoked is of central concern to the international community. Cassese’s position in favour of a greater role for the judge is rooted in the belief that the international judiciary is the part of the international legal order that can bring about change and be less prone to conservatism.<sup>68</sup>

A similar enthusiasm for the role of the international judge in relation to *jus cogens* results from the separate opinion of Judge Dugard in *Congo v. Rwanda*. The starting point of this decision is the open acceptance of a rather realist approach to adjudication, where international judges make decisions based on both principles and policies. Since *jus cogens* norms “advance both principle and policy . . . they must inevitably play a dominant role in the process of judicial choice.”<sup>69</sup> Even more, international judges who invoke *jus cogens* “affirm the high principles of international law, which recognise the most important rights of the international order” and “give legal form to the most fundamental policies or goals of the international community.”<sup>70</sup>

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66. See generally Thomas Kleinlein, *Jus Cogens Re-examined: Value Formalism in International Law*, 28 EUR. J. INT’L L. 295 (2017) (discussing various scholarly approaches to *jus cogens*).

67. Antoine Cassese, *For an Enhanced Role of Jus Cogens*, in REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 158, 169 (Antoine Cassese ed., 2012).

68. Hélène Ruiz Fabri, *Enhancing the Rhetoric of Jus Cogens*, 23 EUR. J. INT’L L. 1049, 1054–55 (2012).

69. Armed Activities on the Territory of the Congo, (Dem. Rep. Congo v. Rwanda), Provisional Measure, 2002 I.C.J. Rep. 265, ¶ 10 (July 10) (separate opinion by Dugard, J.).

70. *Id.*

Martti Koskenniemi took a different position in his commentary on the ICJ's silence in the Advisory Opinion on the *Legality of the Threat and Use of Nuclear Weapons*. In his view, the international judicial system is not fit to speak about the "massive killing of the innocent," as it is unable to address the political and moral dilemma underlying the case: "for the voice of justice to be heard, law must sometimes remain silent."<sup>71</sup> His reasoning could be transposed to cases involving *jus cogens* violations to reflect on the relevance of judicial involvement. For Koskenniemi, the first reason for this silence is the weakness of legal language: judges resolve international disputes by referring to technical rules and interpretation techniques that are considerably weaker than the values at stake in the murder of innocents. The second reason is the articulation of absolute rules and relative principles in judicial reasoning, as this allows the impact of an absolute rule (like a ban) to be modulated in particular cases. The use of the relative principle of proportionality, for example, would involve "thinking about the killing of the innocent in terms of gains and losses,"<sup>72</sup> which is not neutral. Third, legal reason is epistemologically limited: while the belief that mass murder of innocents is wrong does not need to be justified by reference to any other truth, the truth of legal norms always depends on the truth of another proposition about its authority. The idea is that "legal reason is premised on the assumption that obligations exist (or are valid) by virtue of there having been an anterior fact of a certain sort (...). The prohibition of the massive killing of the innocent, however, cannot be derived in this way without losing its force."<sup>73</sup>

This debate highlights the need to step back and ask whether the greater the value underlying a norm, the more a judicial mechanism is needed to enforce it. Cassese's position ignores the problems associated with the ability of the judicial voice to deal with issues as humanly complex as those at stake in the sphere of *jus cogens*. Whether the coldness of judicial application of law is not incompatible with protected values is a fundamental question—"for the meaning of the massive killing of the innocent is conveyed neither by applying technical rules or principles nor by deferring to professional authority."<sup>74</sup> For Koskenniemi, Cassese's assertion that the courts are there because "*il ne faut pas oublier*"<sup>75</sup> is highly problematic, as it assumes that the judge can establish the truth in these cases, whereas "a judicial 'truth' is a truth produced by the weak and highly selective idiosyncrasies of legal process and evidence."<sup>76</sup>

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71. Martti Koskenniemi, *The Silence of Law-The Voice of Justice*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 488, 489 (Laurence Boisson de Chazournes & Phillippe Sands eds., 1999).

72. *Id.* at 497.

73. *Id.* at 499.

74. *Id.* at 508.

75. "One should not forget."

76. *Id.* at 504.

At the same time, the idea that judges should not pronounce on cases at the heart of international society's most fundamental concerns is also somehow paradoxical.<sup>77</sup> Admittedly, the judge's voice will never match the horror of the issues at stake, as his response risks trivializing the nature of the problem through technical rhetoric. However, taking this reasoning too far risks blocking the functioning of international criminal justice as a whole, or stifling human rights courts on the most serious issues. A similar situation arose in the case of *Armed Activities on the Territory of the Congo*. The Court reiterated its 1951 position that a reservation to the Genocide Convention excluding the Court's jurisdiction is not incompatible with the object and purpose of the treaty. The dissenting judges, Higgins, Kooijmans, Elaraby, Owada and Simma, took the opposite position, stating forcefully that:

It is a matter for serious concern that at the beginning of the twenty-first century it is still for States to choose whether they consent to the Court adjudicating claims that they have committed genocide. It must be regarded as a very grave matter that a State should be in a position to shield from international judicial scrutiny any claim that might be made against it concerning genocide. A State so doing shows the world scant confidence that it would never, ever, commit genocide, one of the greatest crimes known.<sup>78</sup>

This debate shows the issues surrounding the ability of judicial discourse to capture the complexity of the mega-political content of *jus cogens*. The idea that the judicial response is inadequate can be advanced for different objectives: to bar any possibility of judgement on the most serious violations of international law, or to show the structural limits of the judicial response. This diversity nevertheless confirms the importance of taking the debate seriously.

## B. A Structural Problem: The Discourse of Verticalization

The second discursive trend concerning the moral content of *jus cogens* tends to highlight the technical dimension of this normative vehicle, specifically the creation of a "higher law" in the international legal order. The technical logic underlying the functioning of *jus cogens* is that of verticalization. By inserting a hierarchy into an international legal order that is traditionally based on the equivalence of sources, *jus cogens* allows for the recognition of the superiority of certain fundamental principles.

It is no coincidence that this idea of superior norms is a privileged element of the discourse on global constitutionalism, as the peremptory norms placed at the top of the legal system pursue a logic of constitutional order: "[I]n order to keep fragmented units together, something of a higher status must be involved and invoked, and it is precisely constitutionalism, or constitutionalization, that promises to be able to create some order in what otherwise would be chaos."<sup>79</sup> Scholarship on this kind of constitutionalization "identified fundamental norms with

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77. See Alter & Madsen, *supra* note 3.

78. *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. Rep. 65, ¶ 25 (Feb. 3) (separate opinion by Higgins, R., Kooijmans, P., Elaraby, N., Owada, H. & Simma, B.).

79. Jan Klabbers, *Setting the Scene*, in *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* 1,

the distinguishing traits of a constitutionalization process” and “laid down the theoretical foundations of a world order based on a priority of values reflecting a hierarchy of norms.”<sup>80</sup> In doing so, it “broke away from the traditional principle of mutual flexibility between the sources, whereby treaty and customary law rules could derogate from one another.”<sup>81</sup>

This process influences the judge when they use a *jus cogens* argument. The judge deploys a discourse of verticalization and is thus seen as introducing a hierarchy into a system that traditionally rejects it. This verticalization represents one of the risks of the relativization of normativity in international law that Prosper Weil has identified. In his view, super-normativity occupies a central place among the pathologies affecting the normativity of international law. *Jus cogens* attempts to introduce a value hierarchy into an intersubjective, consent-based, and therefore horizontal international legal order. In this sense, *Jus cogens* is necessarily alien to the traditional structure of international law. Weil would say that verticality disturbs the normative metabolism of international law.<sup>82</sup>

Thus, the fundamental reason for criticising the judicial use of such a megapolitical concept is that it requires a normative structure that seems iconoclastic to the international legal order. The ICJ has in fact long resisted this category of norms, preferring more certain categories, at the expense of clarity in its case-law on the topic. In the *Barcelona Traction* case, the Court cited examples of *erga omnes*<sup>83</sup> obligations which were all *jus cogens* norms without the name, which was kept at arm’s length.<sup>84</sup> In the *Wall* opinion, the ICJ adopted the ILC’s reasoning on the legal consequences of a serious breach of a peremptory norm by using the regime of *erga omnes* obligations, but again did not explicitly name them as *jus cogens*.<sup>85</sup> In 1996, the Court preferred to bypass<sup>86</sup> the word and spoke of “intransgressible principles of humanitarian law” concerning the prohibition of mass-destruction weapons.<sup>86</sup> When it finally used the concept of *jus cogens*, the Court filled it out in a minimalist way, at least with the prohibition of genocide, and recalled that its normative content was a separate issue from the existence of the Court’s jurisdiction.<sup>87</sup>

15 (Jan Klabbbers, Anne Peters & Geir Ulfstein eds., 2009).

80. Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EUR. J. INT’L L. 491, 494 (2008).

81. *Id.* at 495.

82. Prosper Weil, *Le Droit International en Quête de son Identité: Cours Général de Droit International Public*, 272 RECUEIL DES COURS DE L’ACADEMIE DE LA HAYE EN LIGNE 11, 261–73 (1992).

83. *Erga omnes* refers to obligations that states have to all other states.

84. 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 21, 22 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006).

85. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 159 (July 9).

86. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 266, ¶ 79 (July 8).

87. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. Rep. 6, ¶¶ 64, 69, 125 (Feb. 3). The Court reiterated what it had already said concerning *erga omnes* obligations in the *East Timor* case. *East Timor*, Judgment, 1995 I.C.J. Rep. 90, ¶ 29 (June 30).

Furthermore, the discourse of verticalization is said to lead to problematic results in different sub-branches of international law. Thus, in international human rights law, the Inter-American Court of Human Rights receives criticism because of its repeated discovery of *jus cogens* norms. These discoveries would be problematic because of the resulting hierarchization of human rights norms. On the one hand, the distinction of some human rights standards as being higher than others would contradict the philosophy of the 1948 Universal Declaration of Human Rights, which is based on the indivisibility of human rights.<sup>88</sup> The establishment of a hierarchy implies different levels of importance in an area where all rights should be considered axiologically equal and ultimately mutually supportive. On the other hand, this judicially established hierarchy of norms would potentially contradict the distinction in existing human rights treaties between rights that tolerate derogations and those that do not.<sup>89</sup>

In the same vein, various sceptical views point to the dangers of the hierarchy of values in international human rights law. For example, Elaine Webster has shown that the focus on torture distracts from and impoverishes the notions of inhuman and degrading treatment.<sup>90</sup> Similarly, Philippe Sands has shown that “over time genocide emerged in the eyes of many as the crime of crimes, a hierarchy that left a suggestion that the killing of large numbers of people as individuals was somehow less terrible.”<sup>91</sup> As a result, this elevation of genocide tends to demote the other crimes against humanity within an informal hierarchy in international criminal law.

The risks of verticalization are even more evident in international investment law. There, *jus cogens* may become a means of reducing human rights issues to extremes with which economic arbitrators are unfamiliar. Even where investment tribunals show openness to “exogenous” sources of international law, their discourse actually leads to an expansion of the “economic” idiom without a genuine commitment to taking these exogenous sources seriously. In the *Phoenix* case, the tribunal expanded the concept of “protected investment” by introducing into the Salini test an implicit requirement of legality and good faith whose theoretical justification lies in a “teleological reading” of “protected investment” based on

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88. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (June 25, 1993) (“All human rights are universal, indivisible, and interdependent and interrelated.”).

89. Catherine Maia, *Le Jus Cogens dans la Jurisprudence de la Cour Interaméricaine des Droits de l’Homme*, in *LE PARTICULARISME INTERAMERICAIN DES DROITS DE L’HOMME* 271, 271–311 (Ludovic Hennebel & Hélène Tigroudja eds., 2009).

90. See generally Elaine Webster, *Interpretation of the Prohibition of Torture: Making Sense of ‘Dignity’ Talk*, 17 *HUM. RTS. REV.* 371 (2016).

91. PHILIPPE SANDS, *EAST WEST STREET: ON THE ORIGINS OF GENOCIDE AND CRIMES AGAINST HUMANITY* 6 (2006). Sands identified this hierarchy with the two opposing visions of the *ratio* of international criminal law’s protection. Lauterpacht’s idea, according to whom the protection of individuals had to translate into the concept of crimes against humanity, was challenged by the idea of Lemkin, according to whom the international legal order owed reprobation above all against those acts aiming at the eradication of a group.

general principles of international law.<sup>92</sup> Nevertheless, the tribunal explained that:

[N]obody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs.<sup>93</sup>

Assuming that primary human concerns are taken into account at this early stage of legal reasoning, the hyperbole expressed in the award shows that the arbitrators felt the need to choose extreme examples in order not to diminish the overriding importance of investment concerns.<sup>94</sup> To this extent, it looks more like paying lip service to political correctness than genuine engagement.

In sum, how can *jus cogens* be uncontroversial when it confronts all actors in international law with a contradiction? Specifically, the question of how to install a hierarchy in the law of a social group that does not have an institutional apparatus supporting or echoing that hierarchy and, therefore, is not equipped to draw clear consequences from it?<sup>95</sup>

### C. A Problem of Consequences: The Judge as a Target of Criticism

The consequences of the judicial use of *jus cogens* are a source of puzzlement. Considering the “aftermath of the adjudication of mega-politics,” Alter and Madsen suggest that such adjudication is more likely to inflame stakeholders, and therefore creates the risk that the decision remains a dead letter.<sup>96</sup> Even more, it may imply at worst, a high political risk for the authority of the court, affected by the “flagrant disregard” of its decision.<sup>97</sup>

The jurisprudence of *jus cogens* has undoubtedly created such tensions. The alleged uses and abuses of *jus cogens* by the IACtHR are one of the main reasons for the current backlash against the Court.<sup>98</sup> On 11 April 2019, the governments of Argentina, Brazil, Chile, Colombia, and Paraguay sent a joint note regarding

92. See *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶ 114 (15 April 2009), [http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C74/DC1033\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C74/DC1033_En.pdf) [<https://perma.cc/MFJ3-U8TD>] (“To summarize all the requirements for an investment to benefit from the international protection of ICSID, the Tribunal considers that the following six elements have to be taken into account: 1—a contribution in money or other assets; 2—a certain duration; 3—an element of risk; 4—an operation made in order to develop an economic activity in the host State; 5—assets invested in accordance with the laws of the host State; 6—assets invested bona fide.”).

93. *Id.* ¶ 78.

94. Edoardo Stoppioni, *Rethinking the Structures of the Hegemonic Discourse of the WTO Judge and Investment Arbitrator: A Gramscian Analysis*, LEGAL FORM (Oct. 26, 2018), <https://legal-form.blog/2018/10/26/rethinking-the-structures-of-the-hegemonic-discourse-of-the-wto-judge-and-investment-arbitrator-a-gramscian-analysis-edoardo-stoppioni/> [<https://perma.cc/7Y9Q-U7UE>].

95. Jean Combacau, *Le Droit International: Bric-à-Brac ou Système?*, 31 ARCHIVES DE PHILOSOPHIE DU DROIT 85 (1986).

96. Alter & Madsen, *supra* note 3, at 2, 9.

97. *Id.* at 2.

98. See generally Jorge Contesse, *Resisting the Inter-American Human Rights System*, 44 YALE J. INT'L L. 179 (2019) (analyzing facets of resistance and backlash in the inter-American human rights system).

the functioning of the inter-American system to Paulo Abrao, Secretary General of the Inter-American Commission on Human Rights. The five governments declared to be very “worried” about the evolution of the Commission and proposed “actions that will allow a better functioning of the system facing the challenges of the [twenty-first] century.”<sup>99</sup>

The note highlights four points that constitute major national criticisms of the Court’s functioning and the evolution of its legal reasoning: the role of subsidiarity, the use of the margin of appreciation doctrine, the case law on reparation, and the use of international law sources. Behind these last criticisms, one can read an allusion to the unwavering discovery of *jus cogens* norms. Specifically one can see a criticism of the use of *jus cogens* to further restrict the margin of appreciation of states, either in terms of positive obligations to prevent gross violations of these peremptory norms or in terms of the reparation due for their violation.<sup>100</sup> The concerned states seem to criticise the use of this mega-political tool in circumstances where it is not necessary, with the effect of extending its perimeter *ad libitum* without consideration of the high political consequences of such extension.

There is no answer *in abstracto* to this type of backlash. If one accepts that it is generally true that the reading of a judicial decision is closely linked to the political posture of the observer, it is even more true for decisions mobilizing mega-political issues. Moreover, any disturbing discourse in a conservative field will inevitably result in the responsible party being blamed. Cassese was well aware of the criticism of utopianism when he called for greater judicial involvement in *jus cogens*: “is it feasible to expect states to modify their constitutions in order to ensure the domestic impact of *jus cogens* or unreservedly to accept the compulsory jurisdiction of the ICJ? Obviously not, and although we can be sure that Nino Cassese knew this perfectly well, he nevertheless persisted.”<sup>101</sup>

A different approach underlies the criticism regarding the supposed universality of a discourse based on *jus cogens*. As Koskeniemi states, “[T]he realist critique usefully reminds us that, in law, political struggle is waged on what legal words such as ‘aggression,’ ‘self-determination,’ ‘self-defence,’ ‘terrorist,’ or ‘*jus cogens*’ mean, whose policy they will include, and whose they will exclude. To think of this struggle as *hegemonic* is to highlight that the contestants’ objective is to make their partial view of the meaning appear to be the total view; their

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99. Press Release, Comunicado de Prensa Ministerio de Relaciones Exteriores – Ministerio de Justicia y Derechos Humanos sobre Sistema Interamericano de Derechos Humanos (Apr. 23, 2019), <http://www.minjusticia.gob.cl/comunicado-de-prensa-ministerio-de-relaciones-exteriores-ministerio-de-justicia-y-derechos-humanos-sobre-sistema-interamericano-de-derechos-humanos/> [<https://perma.cc/2US7-GELA>].

100. Of course, interesting parallels could be drawn with the complex use of the margin of appreciation concept before the European Court of Human Rights, its political use of consensus and the relations with national decision-makers. See generally Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT’L L. & POL. 843 (1999) (arguing that the European Court of Human Rights’s liberal use of the margin of appreciation doctrine may compromise the efforts of other human rights bodies and national judges to set universal standards).

101. Ruiz Fabri, *supra* note 68, at 1055.

preference seems like the universal preference.”<sup>102</sup> That could be true, of course. However, it would not fully explain why some countries belonging to the powerful First World group fear the judicial development of *jus cogens* so much. For example, reverting to France’s stance, it is quite clear, even if not explicitly stated, that their reluctance towards *jus cogens* is based on the fear that *jus cogens* would develop in the direction of criminalizing colonization or declaring nuclear weapons unlawful. For sure, even the most determined state cannot counter the flow of historical events being reconsidered or reviewed. However, looking for *jus cogens* as a tool for doing so, which is an existing temptation, supposes to consider a different approach of *jus cogens*. In this view, *jus cogens* is not so much a tool of universalism and hegemony, but rather an instrument of empowerment of the vulnerable.

Recovering this conception of *jus cogens* as a tool for the emancipation of the vulnerable can change our understanding of the normative question. For this reason, Part IV shifts the investigation’s perspective, looking at *jus cogens* from the procedural perspective of the plaintiff. Indeed, one of the editors’ hypotheses is that mega-political disputes, except for jurisdictional issues, were dormant during the Cold War and awakened with the advent of a new kind of international courts.<sup>103</sup> What if the use of *jus cogens* was a sign of a new procedural maturity of the post-Cold War international legal order? What if its systematic use by the Inter-American Court of Human Rights was the very corollary of the procedural humanization of international law in the service of protecting the weakest? What if its use as an *erga omnes* obligation began to make sense in a new international context, embodied by the *Gambia v Myanmar* case?

#### IV

##### THE PROCEDURAL PROMISE OF *JUS COGENS*: CAN THE SUBALTERN ACT?

The mega-political nature of *jus cogens* is evident from the fact that it revolutionizes the traditional paradigms of the international legal order. *Jus cogens* embodies in international law a claim for profound structural transformation, which this article has called the tectonics of mega-politics. *Jus cogens* has introduced into the discourse of international law “ideologically charged connotations, the materialization of which has turned out to be much more difficult than expected” and “[b]y imposing shared values and aspirations applicable to all on a global scale, it has also unleashed opposite forces aimed at fostering parochial interests.”<sup>104</sup>

Powerful and ideologically charged, the concept of *jus cogens* has undergone a peculiar evolution that can be divided into two phases: rejection, and then enthusiasm. The mega-political demands that had been dormant during the Cold

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102. Martti Koskeniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EUR. J. INT’L L. 113, 119 (2005).

103. See generally Alter & Madsen, *supra* note 3.

104. Bianchi, *supra* note 80, at 496.

War were reawakened with the advent of a new kind of international court. The question now is whether international tribunals use the full procedural potential of *jus cogens* in contemporary international law, or whether these tribunals stifle its potential in line with the posture of procedural avoidance.

In the first phase, *jus cogens* inspired a strong reluctance because of its architectural impact. The first generation of cases, mostly decided by the ICJ, avoided applying *jus cogens*. As a result, these decisions were criticised by some as conservative and unnecessarily resistant. A second phase began in the post-Cold War context. While the ICJ has consistently limited the procedural availability of *jus cogens*, new-style tribunals have opted for various paths, either following the ICJ or making a radical break with this conservative discourse. The latter posture encountered the opposite criticism of judicial activism.

To articulate a universalist rhetoric that does not fall back on criticisms of imperialism or Eurocentrism requires that *jus cogens* is reconsidered in light of its history as a tool of emancipation. Feminist approaches to international law deconstruct it along this logic.<sup>105</sup> Similarly, the first generation of TWAIL characterized Article 53 of the Vienna Convention on the Law of Treaties as the “greatest triumph” of the Non-Aligned Movement.<sup>106</sup> If *jus cogens* is seen as a tool for the empowerment of the vulnerable, its procedural impact is of fundamental importance.

However, it is interesting to keep in mind the ILC’s work on this topic in recent years. One can wonder if the final outcome, somehow distanced from the work done by the Special Rapporteur, cannot be interpreted as a backlash against judicial involvement regarding *jus cogens*. Indeed, the ILC report can be read as reminding judges that they should not free themselves from state practice, more or less in the same terms as what was done regarding international customary law. The concession made to root such genealogy was to consider that, at the end of the day, the customary process was the most likely one for the emergence of *jus cogens* norms. It was a nice way of adding difficulty upon difficulty in the sense that, would *jus cogens* norms be super customary rules, they would require mega proof. In any event, the report can be read as a strong warning to adjudicators not to depart from state practice.

In this context, considering *jus cogens* from a procedural point of view offers the opportunity to take yet another perspective on it as a mega-political issue.

#### A. The Procedural Impact of *Jus Cogens*: A Dialectical Circle

There is a paradox in the way *jus cogens* has traditionally been treated in the case-law. Today, the jurisprudence of *jus cogens* oscillates between the homeostatic conservatism of courts unwilling to accept its iconoclastic potential, and the activism of courts that see it as the promise of a new paradigm in international

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105. See generally Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63 (1993).

106. Georges Abi-Saab, *The Third World and the Future of the International Legal Order*, 29 REVUE EGYPTIENNE DE DROIT INTERNATIONAL 27, 52 (1973).

law. While the idea is supposed to have a powerful impact on the material structure of international law, courts have generally silenced this potential by arguing the substantive power of *jus cogens* could not be activated because certain procedural preconditions were lacking. In doing so, international courts have not had to draw any particular consequences from the qualification of a norm as peremptory.

The question of the procedural potential of *jus cogens* norms has been largely underestimated, based on the binary reasoning that rules blocking *jus cogens* are procedural and the *jus cogens* rules themselves are not procedural. Gradually, the question becomes more acute of whether “normal” procedural rules should be waived when *jus cogens* rules are applicable to the merits of a case.

As mentioned above, the ICJ has developed a rather conservative jurisprudence, hiding the *jus cogens* norm behind *erga omnes* obligations and claiming their particular normative nature does not, by itself, create a basis for jurisdictional competence if this basis does not otherwise exist.<sup>107</sup> More recently, the ICJ has used the rhetoric of “procedure versus substance” to segment the reasoning and prevent the complex materiality of *jus cogens* from generating the structural transformation it could otherwise create. The jurisprudence on state immunity provides a clear example of the homeostatic use of this line of argument. The idea that *jus cogens* might call for an evolution of the theory of state immunity and a broader jurisdiction of the national judge in mega-political cases has gradually emerged in doctrine<sup>108</sup> and practice, as the Italian example proves. The ICJ, in the *Germany v. Italy* case, rejected the Italian theory that an exception to state immunity existed under the *Acta jure imperii* doctrine in cases where a *jus cogens* norm is violated.<sup>109</sup> The Court’s reasoning was based on a “procedure versus substance” opposition: immunity is a procedural rule, and it ignores the content of the substantive obligation violated.

The criticism of this very conservative view of immunities is well known. Georges Scelle has already studied the theory of state immunity in light of the inadequacies of the judicial function at the international level. According to him, all international courts operate on the basis of state consent, but *dédoublement fonctionnel*<sup>110</sup> could compensate for this lack of compulsory jurisdiction. More specifically, national judges could compensate for the lack of compulsory international jurisdiction by using their own office to act in the role of an international

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107. See *East Timor (Port. v. Austl.)*, Judgment, 1995 I.C.J. 90, ¶ 29 (June 30) (“[T]he *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.”).

108. MICHEL COSNARD, *LA SOUMISSION DES ÉTATS AUX TRIBUNAUX INTERNES: FACE A LA THEORIE DES IMMUNITES DES ÉTATS* (1996).

109. *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 2012 I.C.J. 99, ¶¶ 92-97 (February 3).

110. *Dédoublement fonctionnel* is the idea that a public authority can act on behalf of two different parties at the same time. Here, it refers to a national judge that also acts in the role of an international judge.

agent. However, according to Scelle, the wide-ranging scope of immunities blocks the potential effect of functional duplication. The national judge is paralysed by state immunities and a wide range of other circumstances, so that “*nous nous permettrons ... de qualifier cette coutume de vicieuse, du point de vue de la technique juridique. Elle aboutit à paralyser la fonction juridictionnelle dans des cas si nombreux et des proportions si considérables qu'elle compromet sérieusement la réalisation de l'ordre juridique international.*”<sup>111</sup>

What Scelle criticized as a *coutume odieuse*<sup>112</sup> seems to remain as it was, blocking the procedural potential of *jus cogens*. Indeed, the Court did not directly answer the Italian argument asserting that procedural norms for reparation of *jus cogens* violations were themselves *jus cogens* norms, implying a shift in their proper judicial treatment.<sup>113</sup>

A very different attitude stems from judicial discourse in the inter-American context. In the *Goiburú* case, the Court found that the right of access to a national judge to invoke one's human rights violations is a peremptory norm.<sup>114</sup> This is a departure from the philosophy outlined above. The elevation of this procedural right to *jus cogens* status calls into question the procedural versus substantive divide applied in other contexts. The iconoclastic potential of such a claim seems obvious: depending in part on who is the holder of such a right, it would compete with the consensual principle that forms part of the backbone of traditional international law.

The second line of jurisprudence that highlights this dialectical oscillation concerns the burden of proof regarding the violation of *jus cogens* norms. The practice of international tribunals reveals that procedure is also used as a tool to avoid a decision on the merits in cases of *jus cogens* violations. The preferred procedural tool for avoidance is the standard of proof, the idea being that extreme gravity requires extreme evidential certainty. In its decision in *Bosnia v. Serbia*, the ICJ theorized the existence of a higher standard of proof in genocide claims:

The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive (cf. *Corfu Channel (United Kingdom v. Albania), Judgment, ICJ Reports 1949*, p. 17). The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.<sup>115</sup>

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111. “[W]e may, however, call this custom vicious, from the point of view of legal technique. It results in the paralysis of the jurisdictional function in so many cases and to such a considerable extent that it seriously compromises the realisation of the international legal order.” GEORGES SCELLE, *COURS DE DROIT INTERNATIONAL PUBLIC* 790–92 (1948).

112. “Odious custom.”

113. Erik Fusshoeller, *Is the Obligation to Make Reparation for the Breach of a Jus Cogens Obligation a Jus Cogens Obligation on Itself?* (2012) (LL.M. thesis, University of Oslo) (on file with the Law Library, University of Oslo).

114. *Goiburú v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (Ser. C) No. 153*, ¶ 131 (Sept. 22, 2006).

115. *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz.*

This idea, that “mega-standards” lead to the need for “mega-evidence,” is confirmed in international criminal law. Both the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), in their landmark decisions on genocide, have considered that the proof of genocide should focus on *dolus specialis*.<sup>116</sup> Thus, in the *Tadic* and *Akayesu* cases, the judges asked for evidence of this additional intent.<sup>117</sup> The ILC report on *jus cogens*, which takes stock of the international case-law as its main material, while stressing the fact that state practice should be at the forefront, confirms this logic of mega-proof for mega-norms.<sup>118</sup>

However, this position makes proving *jus cogens* violations extremely difficult, which contradicts the axiological importance of the value at stake. The result of the axiological verticalization is the strengthening of procedural requirements, so that the violation of the highest values is procedurally more difficult to prove. This approach may run counter to the *pro victima* reading of the Inter-American Court, which tends to see *jus cogens* as a tool for empowering the individual.

If the violation of *jus cogens* is difficult to judge before the national judge and difficult to prove before the international judge, then the idea that this megapolitical issue is reawakening before international courts after the Cold War should be nuanced. Nevertheless, some judicial discourses offer alternatives for thinking about the evolution of the international legal order.

#### B. Avenues for the Emancipatory Potential of *Jus Cogens*?

When Cassese writes that judges should be trusted to make *jus cogens* a reality,<sup>119</sup> he does not blindly and utopianly assume that judges would be idealists. Rather, he expresses the conviction that someone with authoritative speech and the ability to make binding decisions is needed to realize the promise of *jus cogens*. However, neither extreme of this judicial dialectic offers a solution: “*Jus cogens* may not sweep everything away when applied to a case . . . And yet it would be a defeat for the international community to get rid of the concept altogether, reneging on the difficult but ultimately successful building up of communitarian values.”<sup>120</sup> The wisest way to disentangle this complex relationship between international courts and *jus cogens* lies in the concept of teleological interpretation: “Rather than focussing on the hierarchical superiority of the rule and its mechanical application, regard should be had to implementing effectively

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v. Serb. & Montenegro), 2007 I.C.J. 43, ¶ 209 (Feb. 26).

116. *Dolus specialis* refers to the special intent to destroy a protected group required for an act to be considered genocide.

117. Prosecutor v. *Tadić*, Case No. IT-94-I-A, Appeals Chamber Judgment, ¶¶ 273-305 (Int’l Crim. Trib. for the Former Yugoslavia Jul. 15, 1999); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 510-24 (Sep. 2, 1998).

118. Int’l Law Comm’n, Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10, at 168-70 (2019).

119. Cassese, *supra* note 67, at 166.

120. Bianchi, *supra* note 80, at 503.

its underlying values, taking context duly into account.”<sup>121</sup>

A key perspective is to emphasize the procedural aspects of *jus cogens*. The main bottleneck in the genesis of *jus cogens* is procedural.<sup>122</sup> But at the same time, the procedural potential of *jus cogens* can create room for its historical emancipatory role. This emancipatory seed is the common grammar that seems to bind the TWAIL voices. For some of them, the real benefit of the concept is to strengthen the claims of independence and self-determination of those who had been reduced to subalterns<sup>123</sup> and ensure that their voices are heard when they articulate *jus cogens* “in their actual experience of struggle and cooperation.”<sup>124</sup>

Furthermore, the strength of *jus cogens* lies in its ability to consolidate the emerging transformations of the post-decolonization context, bringing with it “the necessary ballast to keep the ship of society stable and steady.”<sup>125</sup> These ideas have been insightfully summarized in Bedjaoui’s book, which argues that *jus cogens* offers the prospect that the old paradigm of international law “might finally be replaced with a genuinely inclusive and participatory order.”<sup>126</sup> This was already forty years ago. However, in this line, the post-Cold War judicial experience may offer some insights into thinking about *jus cogens* as a procedural tool for a more inclusive and participatory international legal order. As discussed below, there are two possible dimensions that deserve to be highlighted.

First, *jus cogens* can be seen as a powerful provider of intersystemic linkages, an idea in line with the tectonics of mega-politics. The General Court of the European Union’s reasoning in its 2005 *Kadi* decision contrasts with the strong dualism of the Grand Chamber of the Court of Justice in its subsequent decision upon appeal. The General Court had considered that it could go beyond the separation of legal orders and verify that Security Council resolutions did not violate *jus cogens*.

[T]he Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.<sup>127</sup>

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121. *Id.* at 504.

122. Ruiz Fabri, *supra* note 30.

123. *Subaltern* refers to populations that are historically repressed and subject to more powerful classes. This term is especially used in TWAIL approaches to speak of Third World peoples, most of the time formerly colonized.

124. Merlin M. Magallona, *The Concept of Jus Cogens in the Vienna Convention on the Law of Treaties*, 51 PHIL. L.J. 521, 523 (1976).

125. V. Nageswar Rao, *Jus Cogens and the Vienna Convention on the Law of Treaties*, 14 INDIAN J. INT’L L. 362, 368 (1974).

126. Özsü, *supra* note 12, at 307.

127. Case T-315/01, *Kadi v. Council and Comm’n*, 2005 E.C.R. II-3724 ¶ 226. The General Court clarified the inter-systemic dimension of the dispute: “[I]n so far as the alleged infringements arise exclusively from the freezing of the applicant’s funds, as decided by the Security Council, through its Sanctions Committee, and put into effect by the contested regulation, without the exercise of any discretion whatsoever, it is in principle by the sole criterion of the standard of universal protection of the fundamental rights of the human person falling within the ambit of *jus cogens* that the applicant’s claims may appropriately be examined, in accordance with the principles set out above.” *Id.* ¶ 235.

The Court of Justice did not maintain this line of argument and preferred to follow a more classical dualist reasoning, based on the distinction between the international and EU legal orders. However, what is interesting here is not so much the final outcome of the decision.<sup>128</sup> Rather, the interesting point is the theoretical position that the iconoclastic nature of *jus cogens* may allow for a rethinking of models of inter-system relations.

Second, the *erga omnes* character of any *jus cogens* norm may be the new procedural path for future developments in the international legal order concerning mega-political issues. It is in this sense that the ICTY elaborated in the *Furundžija* case on the possible systemic corollaries of the peremptory nature of a norm:

The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorising act.<sup>129</sup>

The recent *Gambia v. Myanmar* case may lead to a new era in the procedural analysis of mega-political disputes, including the procedural development of *actio popularis*. This development is in line with the emancipatory promise of *jus cogens*. As Pierre-Marie Dupuy puts it, “The concept of *jus cogens* and its initial inclusion in Article 53 of the Vienna Convention on the Law of Treaties were above all a victory for the South over the West. And ‘obligations *erga omnes*’, set forth in the famous paragraph 33 of the International Court of Justice’s ruling in the *Barcelona Traction* case was not intended to please Western states, but rather to encourage developing countries to once again go down the ICJ route, which they had abandoned following its ultra-conservative decision in the *South-West African* case.”<sup>130</sup>

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128. The *jus cogens* norm nevertheless encapsulates important limitations, in the reasoning of the court: “[T]he Court considers that the limitation of the applicant’s right of access to a court, as a result of the immunity from jurisdiction enjoyed as a rule, in the domestic legal order of the Member States of the United Nations, by resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations, in accordance with the relevant principles of international law (in particular Articles 25 and 103 of the Charter), is inherent in that right as it is guaranteed by *jus cogens*.” *Id.* ¶ 288.

129. Prosecutor v. Furundžija, IT-95-17/1-T, Judgment, ¶ 155 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1995) (citation omitted).

130. Pierre-Marie Dupuy, *Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi*, 16 EUR. J. INT’L L. 132, 134 (2005).

A related issue is the potential of *jus cogens* to expand the scope of intervention before the ICJ. The multiple interventions announced by states in *Gambia v. Myanmar* and the Court's forthcoming response to them may prove beneficial in assessing the procedural potential of *jus cogens*. The Court will likely be called upon to rule on interventions under Articles 62 and 63 of its Statute. Under Article 62, states must demonstrate a special interest in the case to intervene, even as a non-party. Nevertheless, an expanded view of the *jus cogens* doctrine envisages a broader possibility of intervention in the case of an *erga omnes* obligation,<sup>131</sup> which would ultimately amount to extending the logic of *actio popularis* to intervention. The idea would be that for the violation of peremptory norms, the greatest number of voices deserve to be heard, so that justice is done. The development of case law on this point will have to be closely followed.

In a famous text, Gayatri Spivak defended the idea that “the phased development of the subaltern is complicated by the imperialist project.”<sup>132</sup> Therefore, from the perspective of the subaltern, a fundamental question arises:

According to Foucault and Deleuze (in the First World, under the standardisation and regimentation of socialised capital, though they do not seem to recognise this) the oppressed, if given the chance (the problem of representation cannot be bypassed here), and on the way to solidarity through alliance politics (a Marxist thematic is at work here) *can speak and know their conditions*. We must now confront the following question: On the other side of the international division of labor from socialised capital, inside *and* outside the circuit of the epistemic violence of imperialist law and education supplementing an earlier economic text, *can the subaltern speak?*<sup>133</sup>

In accordance with its emancipatory historical genome, *jus cogens* poses the same question to the international legal order. International courts are increasingly called upon to answer them.

## V

### CONCLUSION

The political science approach to the judicialization of mega-politics encourages one to step back and examine the operation of international law in mega-political issues from a meta-theoretical perspective. Concerns about the morphology of mega-political issues seem to point towards a blockage of judicial intervention. This judicial paralysis goes hand in hand with the traditional view of the issues surrounding *jus cogens* adjudication, especially by positivist jurists. Now that it is becoming increasingly politically correct to say that the ICJ should rule on these issues, it is necessary to reflect on the possible evolution of the surrounding problems. *Jus cogens* cases are consubstantially linked to mega-political as-

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131. Beatrice I. Bonafé, *Interests of a Legal Nature Justifying Intervention Before the ICJ*, 25 LEIDEN J. INT'L L. 739, 739–57 (2012) (exploring the different types of legal interest that could justify permitting a third state to intervene before the ICJ).

132. Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in MARXISM AND THE INTERPRETATION OF CULTURE 66, 78 (Cary Nelson & Lawrence Grossberg eds., 1988).

133. *Id.*

pects, and fears continue to be expressed about the adequacy and the consequences of intervention by international judges.

Nancy Fraser has developed a fascinating distinction between “normal justice” and “abnormal justice.” She argues that public debates about justice sometimes adopt an ordinary discourse, as participants share certain underlying assumptions about what a demand for justice is: who the actors entitled to a claim are, who the agency of redress is, who the recipients of these claims are, and what the social cleavages that may harbour the injustices being contested are.<sup>134</sup> But in other cases, the discourse may become one of abnormal justice when all these underlying assumptions are not shared, and instead, the answers to these questions are at stake. In cases of “abnormal justice,” the judicial mandate is pushed to its limits. The limits of the game itself are challenged: “[n]ot only substantive questions, but also the grammar of justice itself, are up for grabs.”<sup>135</sup> From this perspective, Nancy Fraser has identified problems of “metapolitical injustice”: “In addition to ordinary-political injustice, which arises *within* the frame of a bounded polity, we can also conceptualise another level, call it *metapolitical injustice*, which arises as a result of the division of political space *into* bounded polities. This second level comprehends injustices of *misframing*.”<sup>136</sup>

This mega-political investigation aimed to highlight the benefits of a new conception of *jus cogens* as an emancipatory tool that addresses these structural problems of mis-framing, in line with its original Third World historical project. Our central thesis concerns the evolution of the *jus cogens* approach in international litigation. The concept has long been approached from a purely substantive perspective, with all the risks arising from its axiological materiality. This view has triggered a criticism of *jus cogens* as a Eurocentric and ideologized tool. Nevertheless, this description clashes with the historical reality of *jus cogens*, which has emerged as a tool to strengthen Third World claims.

Following the thinking of those who have tried to restore the emancipatory potential of *jus cogens* for the most vulnerable, this article argues that the procedural side of history remains open to allow a reconciliation between this historical ontology of the instrument and its judicial use. The traditional “procedure versus substance” divide used by the ICJ to avoid certain issues can be nuanced. *Jus cogens* can become a fundamental tool for procedural justice if its procedural potential is further explored.

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134. See generally Nancy Fraser, *Abnormal Justice*, 34 CRITICAL INQUIRY 393 (2008).

135. *Id.* at 395.

136. *Id.* at 408.