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The Hierarchical Implication of Jus Cogens: An Analysis of Schwarzenberger and Kelsen on the Recognition of the Prohibition of Torture and Genocide as Peremptory Norms

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THE HIERARCHICAL IMPLICATION OF JUS COGENS: AN ANALYSIS OF SCHWARZENBERGER AND KELSEN ON THE RECOGNITION OF THE PROHIBITION OF TORTURE AND GENOCIDE AS PEREMPTORY NORMS.

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Abstract

This article explores the challenge faced by positivist schools of law in integrating the concept of jus cogens within their systematic legal frameworks. By comparing the theories of Schwarzenberger and Kelsen, it demonstrates that Positivism is not a monolithic representation of the traditional international regime of consent. Utilizing a doctrinal legal research methodology, the study draws upon authoritative sources, including legal scholarship, case law, and conventions related to the prohibition of torture and genocide. The article traces the origins and development of jus cogens, examining its connections to post-war Germany and Austria, and its universalistic Christian roots. Analyzing doctrinal and case law on the prohibition of torture and genocide, the study assesses whether these peremptory norms reflect an international moral source within the international legal system, concluding affirmatively. The Committee Against Torture's (CAT) usage of the concept of "human dignity" and the International Court of Justice's (ICJ) positions on the Genocide Convention, the Nuclear Weapons Advisory Opinion, and the 1996 Bosnian Genocide Case illustrate the use of abstract metalegal principles to underscore

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the significance of these prohibitions. The article concludes by acknowledging the limitations of the current research and the necessity for further studies to understand the impact of metalegal norms on diverse legal traditions and to address criticisms from other legal doctrines.

Keywords: Jus Cogens, Positivism, Hans Kelsen, Schwarzenberger, Prohibition of Torture, Genocide.

I. INTRODUCTION

A. *The Jus Cogens Debate*

The international law regime is generally regarded as a consent-based system derived from the will of States.[1] This means that States will only be bound by obligations that they chose to comply with. Article 38 of the International Court of Justice (ICJ) Statute mandates that the basis for the creation of law, namely "international conventions, whether general or particular" is established by explicit recognition from States.[2] The principle of *pacta sunt servanda* expresses the significance of consent. It states that each party that wishes to be part of a binding agreement must comply with performance in good faith, even if such acts become onerous or unwelcome to another party.[3]

In this consent-based system, issues of hierarchy arose only in specific cases where the provisions of an instrument clashed with another since there was no category of instruments inherently superior to another.[4] An exception to this regime happened with the ratification of the United Nations (UN) Charter, which specified in Article 103 that Charter obligations had primacy over inconsistent agreements—

1. *See* GLEIDER HERNÁNDEZ, INTERNATIONAL LAW 31 (1st ed. 2019).

2. Statute of the International Court of Justice art. 38(1)(a), Apr. 18, 1946, 33 U.N.T.S. 993.

3. HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW 37 (2d ed. 2019).

4. *See* ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 7 (1st ed. 2006).

establishing normative hierarchy by giving precedence to certain norms over others.[5]

The ratification of the 1969 Vienna Convention on the Law of Treaties (VCLT) revolutionized this regime with the formalization of "peremptory norms."[6] It stated that treaties in conflict with peremptory norms were void—defining these norms as "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." [7] This changed the consent-based regime, since now it did not matter if States consented to these new peremptory norms; because they are defined as intrinsically superior and cannot be suspended by lack of State will. This is further shown by the subsequent nullity of a treaty if that instrument conflicts with peremptory norms.[8]

This modification in the hierarchy of international law provoked a fierce academic debate. Diverse groups of scholars criticized or tried to explain what peremptory norms were and whether they were a valid legal concept.[9] The inductive critique developed by Professor Georg Schwarzenberger was one of the most relevant criticisms.[10] Adopting a positivist empirical approach, this objection denounced the lack of a centralized authority in international law to enforce these norms,[11] the supposed natural law and metalegal foundations of these norms.[12] In this contribution, "metalegal norms" are understood as norms

5. *See id.*

6. *See* Vienna Convention on the Law of Treaties arts. 53, 64, & 71, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

7. *Id.* art. 53.

8. *See* ORAKHELASHVILI, *supra* note 4, at 8.

9. *See* ROBERT KOLB, PEREMPTORY INTERNATIONAL LAW - JUS COGENS: A GENERAL INVENTORY 15 (2015).

10. *See id.* at 16.

11. *See id.* at 16-17.

12. *See* Georg Schwarzenberger, *International Jus Cogens?*, 43 TEX. L. REV. 455, 457 (1965).

belonging to the domain of morality and sociological inquiries, beyond the legal field.

Curiously, in the positivist school, there was a different interpretation of this phenomenon. Hans Kelsen, one of the most important scholars of that school, adopted a different approach to international law late in his career. For Kelsen, international law indeed lacked a central authority and resembled a previous stage of municipal law, "primitive law."[13] However, Kelsen stated that international morality is of extreme importance to international law, even having the capacity to become law itself.[14]

From the expositions of both authors, it can be concluded that the positivist position is not homogenous regarding metalegal sources of law. This work intends to explore the differences between these theories and ground them on a factual basis: the prohibitions of torture and genocide. Consequently, it will be assessed how these theories consider the validity of peremptory norms, thereby identifying how such norms can be understood to exist within a positive legal system of norms.

B. *The Prohibition of Torture and Genocide: Classic Jus Cogens*

The prohibition of torture is an uncontested norm recognized as jus cogens. It has been affirmed in multiple judgments that this prohibition is absolute and inflexible.[15] The legal definition of an act of torture was introduced by the United Nations Convention Against Torture (UNCAT) in its first article as:

> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him . . . information or a confession,

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13. *See* François Rigaux, *Hans Kelsen on International Law*, 9 EUR. J. OF INT'L LAW 325, 335, 337 (1998).

14. *See* HANS KELSEN, LAW AND PEACE IN INTERNATIONAL RELATIONS 37-38 (1st ed. 1942).

15. Questions relating to the Obligation to Prosecute or Extradite (Belg. v Sen.) Judgment, 2012 I.C.J. 422, ¶ 99 (July 20); Prosecutor v. Anto Furundzija, Trial Judgement, ¶ 144 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

> punishing him for an act he or a third person has committed or is suspected of it, or intimidating or coercing . . . or for any other reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation or with the consent . . . of a public official or other person acting in an official capacity.[16]

Therefore, an act of torture under the UNCAT requires infliction of severe pain or suffering, intention to commit torture, a specific purpose to obtain from the act of torture, and the involvement of a public official.[17]

This act of severe pain and suffering has been consensually viewed as barbaric and inhuman since at least the time of Beccaria; it is classified as "the most profound violation possible of the dignity of a human being."[18] This is also shown by the high number of State parties to the UNCAT (173 members currently).[19] Thus, the majority of UN member States agree on the prohibition of torture, displaying a universal consensus on the impermissibility of the act. However, even among signatory States, the practice of torture is still a reality constantly happening under the guise of state officials, although normally hidden from the public eye.[20]

This scenario is quite similar to the prohibition of genocide, another established norm of jus cogens nature. Since the horrors committed by the Axis powers during World War II that culminated in the Holocaust, a greater global conscience and support of its eradication has been prominent. It was, however, after the atrocities committed during the Bosnian war that culminated in the Srebrenica massacre,

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16. U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, U.N.T.S. 1465. (hereinafter "UNCAT")

17. MANFRED NOWAK & MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY 28 (Oxford Univ. Press, 1st ed. 2008).

18. David Sussman, *What's Wrong with Torture?*, 33 PHIL. & PUB. AFF. 1, 2 (2005).

19. UNCAT, *supra* note 16, art. 1.

20. AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 2020/21 (June 30, 2021).

that the ICJ took a renewed interest in it, claiming that there was a grave risk of acts of genocide being committed.[21] The subsequent creation by the United Nations Security Council of the International Criminal Tribunal for the former Yugoslavia (ICTY) and for Rwanda exemplified this global struggle to curtail such violations. Concurrently, national courts began taking interest in prosecuting genocide based on universal jurisdiction, something that only Israel had done in the 1960's with the *Eichmann* case.[22] These efforts are understandable considering the grave consequences that genocide produces against collectives and individuals, both in possibly destroying cultures in their entirety and in irreparably damaging the health of survivors.

Therefore, the prohibitions of torture and genocide are considerably related to basic human rights principles such as human dignity, and invoke strong normative judgments against their occurrences.[23] Consequently, these prohibitions were incorporated into the category of jus cogens—hierarchically superior norms consistent with fundamental human rights.[24] In this aspect, there is initially a possibility that these norms might have metalegal justifications besides the consensual approach; however, this will be seen later on in this contribution when analyzing the sources of peremptory norms.[25]

II. METHODOLOGY

A. *Research Problem*

The concept of jus cogens can be analyzed through a wide set of different perspectives. This article focuses on the impact that it makes in the doctrinal legal school of positivism. As it was introduced, the inductive critique questions the lack of a central arbiter to conceptualize and interpret the validity and classification of rights pertaining to

21. William A. Schabas, *The International Legal Prohibition of Genocide Comes of Age*, 5 HUM. RTS. REV. 46, 47 (2004).

22. *See id.*

23. Sussman, *supra* note 18, at 1-2.

24. ORAKHELASHVILI, *supra* note 4, at 53-54.

25. *See id.* at 37-38.

such a hierarchical value.[26] Furthermore, it decries a landmark change to an essential order of international law: the consent-based approach of States.[27]

However, the positivist school should not be understood as a monolithic endeavor. The same debate regarding the lack of centralization and the influence of value-based norms in international law was undertaken by a colleague of Schwarzenberger, Hans Kelsen. In his 1940-41 Oliver Wendell Holmes Lecture at Harvard University, Kelsen evaluated the nature of international law and the place of international morality within a positive legal framework—with a considerably different outcome.[28]

Based on these positive theories, the present contribution aims to understand the place of a value-based norm in positive international law. The prohibition of torture and genocide will be used as an example, since its jus cogens character is widely accepted by international case law.[29] Furthermore, based on this analysis, the subsequent effects on the consent-based approach of classic international law will also be assessed.

B. *Academic Debate and Relevance*

The academic debate of jus cogens tends to focus on theoretical premises of peremptory norms and their relationships with the structure of international law. This academic discussion is divided by groups of scholars that: (1) see the existence of norms of jus cogens as a sign of the moralization and maturity of the international legal order, and (2) opt for a restrictive approach, in which peremptory norms are simply nothing more than a State's consent.[30] Inside the first group, Kolb and Orkhelashvili's works represent the view that peremptory norms are considered a foundational structure that can be developed by the international community as a way of deepening its normative

26. KOLB, *supra* note 9, at 16-17.

27. Schwarzenberger, *supra* note 12, at 477.

28. KELSEN, *supra* note 14, at 967-68.

29. ORAKHELASHVILI, *supra* note 4, at 54.

30. Anne Lagerwall, *Jus Cogens*, in OXFORD BIBLIOGRAPHIES, https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0124.xml (last visited Jan. 14, 2022).

hierarchy and proclaiming principles of fairness and effectivity. The second group, represented by Schwarzenberger and Hannikainen, opted for a restrictive approach of jus cogens, claiming consensual jus cogens would be the only rational way to explain its definition, foregoing the moral value attached to the first approach.

Although there are quite a few investigations into the implications and definitions of the concept of jus cogens, there are no in-depth comparisons of the interpretations of metalegal norms by positivist authors. Furthermore, Kelsen is rarely analyzed when discussing these types of norms—therefore, the concept of international morality developed by his *Bellum Justum* doctrine is novel in interpreting jus cogens. Additionally, there is evidence that legal doctrinal work can be influential to decision making and case law,[31] as is the case of Kelsen's contribution to the creation of "the conception of acts of state leading to criminal liability in the context of the Nuremberg Trials, and the construction of the United Nations as an international organization."[32] Therefore, the relevance of this contribution is to shed light on the work of positivist authors on the concept of peremptory norms, which in turn can influence the interpretation of jurists of this type of norm and publicize Kelsen's contributions to the debate of jus cogens.

C. *Research Questions*

The following research questions were chosen to guide this study:

- How do Kelsen's and Schwarzenberger's positivist theories reflect the validity of jus cogens in a legal normative system?
- Which one of these two different positivist interpretations better explains international law's jus cogens principles in relation to the prohibition of torture and the prohibition of genocide case law?

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31. EMERSON TILLER & FRANK CROSS, PUBLIC LAW AND LEGAL THEORY PAPERS 527 (2005).

32. Jacob Giltaij, *Hermann Kantorowicz and Hans Kelsen: From Debating Legal Sociology to Constructing an International Legal Order*, 48 HIST. EUR. IDEAS 112, 120 (2022).

As explained in the introduction, the concept of jus cogens challenges the positivist consent-based legal order (represented by both authors) through a superior binding category of a legal norm. Even though Article 53 of the Vienna Convention on the Law of Treaties (VLCT) has positivist jus cogens norms, it presupposes the existence of an international community of States with shared values.[33] However, the identification of which norms are jus cogens and the sources of jus cogens in relation to the closed category of the ICJ's Statute Article 38 is still quite controversial.[34] This contribution intends to give light to a possible source of jus cogens through the Kelsenian counter point on the feasibility of an international morality, possibly contaminating the purity of his legal theory with a jusnaturalistic influence.

This question intends to guide the investigation of two authorities of the positivist school of law, to show an ignored complexity of the latter mostly seen as a monolithic legal doctrinal approach. While questioning the epistemological consensus of the theory, the influence of other social sciences will be assessed to examine whether the supposedly alienated approach of positivism is evidenced. Theoretically, this questions the undifferentiated view that positivism does not possess empirical criticism on matters regarding metalegal norms and principles, while defending a logical unity of the legal order. Consequently, since decisions of international courts are carefully written when considering peremptory norms, usually considering evidence found in customary law and positive law, a positivist critical understanding of the source of peremptory norms can be influential to the understandings of judges and legislators when applied in concrete cases and practice.

Therefore, the auxiliary questions chosen for this investigation are the following:

- What is the place of a jus cogens norm in the hierarchy of international norms in a monist Kelsenian perspective?

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33. JURE VIDMAR, NORM CONFLICTS AND HIERARCHY IN INTERNATIONAL LAW: TOWARDS A VERTICAL INTERNATIONAL LEGAL SYSTEM? 17, 25 (Erika de Wet & Jure Vidmar eds., 2019).

34. THIRLWAY, *supra* note 3, at 8.

- How does the inductive approach of Georg Schwarzenberger understand the validity of the concept of jus cogens norms?
- What are the consequences of the findings of both theories to the Positivist School of Law?
- How does the prohibition of torture and genocide exemplify the international moral source of the international legal system?
- Was Kelsen's international legal doctrine a deviation from his positivist theory?

The second chapter will have the purpose to introduce or remind the readers of the history and core definitions of jus cogens norms. The first theoretical questions will be addressed in the third and fourth chapters, alongside a more in-depth discussion of each positivist author and their approach. The fifth chapter will investigate how the United Nations Convention on the Prohibition of Torture can exemplify a human rights prohibition whose source is naturalistic and non-positivist. The sixth chapter will continue to analyze the metalegal sources of the peremptory norm on the prohibition of genocide. Chapter seven will bring all the collected information together and aim to identify the consequences of both theories to the understanding of peremptory norms and how Kelsen's later theory produced a deviation from classical positivism.

D. *Methodology*

The present contribution will analyze the topic of jus cogens through an internal normative doctrinal legal research methodology.[35] This means that the normative work done by legal scholars (Schwarzenberger and Kelsen) will be utilized as explanatory criterion to investigate a possible justification of a value-based international legal order in the Kelsenian theory of "primitive law" and an international morality as possible "international *grundnorm*." In this research, the term "normative" is understood in its Kelsenian definition, a

35. Sanne Taekema, *Relative Autonomy, A Characterisation of the Discipline of Law,* in LAW AND METHOD: INTERDISCIPLINARY RESEARCH INTO LAW 3 (Bart Van klink & Sanne Taekema eds., Mohr Siebeck 2011).

"discipline of internal logic, not linked to some external criterion for making the law better."[36] Subsequently, the systematic analysis of legislation concerning the prohibition of torture, the prohibition of genocide, and developing case law will be discussed to apply the understandings of the normative work by the two authors.

As empirical sources, the present investigation will mostly utilize authoritative sources such as legal doctrinal scholarship and case law as its starting point.[37] After analyzing the core tenants of the inductive doctrine and the Kelsenian approach, an examination will be made into the case law on the prohibition of torture, the prohibition of genocide, and the normative source of the UNCAT and the Genocide Convention.[38] The data collection will be carried out in a bibliographical manner, analyzing scholarly legal writings, the referential jurists' primary works, the conventions, and case law on the prohibition of torture and genocide.

III. JUS COGENS

The present chapter is essential to understand the object analyzed in this contribution. Mainly explanatory, the chapter begins with the historical formulation of the concept of jus cogens by international jusnaturalist lawyers in the interwar period as a reaction to the German defeat in the first World War. Showcasing the metalegal content of the doctrine and its alterior political motives, the historical section ends with the cautious progress of the doctrine of peremptory norms in being incorporated into international law.

The next section concerns itself with the positivist definition of the concept in international law. Discussing mostly the VLCT and contemporary doctrinal work, sections 2.2 and 2.3 elaborate on the characteristics of peremptory norms, the possibility of modification, criteria for identification and functions. The final section on the sources of the nature of jus cogens norms demonstrates the

36. MARK VAN HOECKE & FRANÇOIS OST, METHODOLOGIES OF LEGAL RESEARCH: WHICH KIND OF METHOD FOR WHAT KIND OF DISCIPLINE? 10 (Mark Van Hoecke ed., 2013).

37. *Id.* at 11.

38. *Id.*

development of the doctrine through case law and academic debate between modern jurists, thereby revealing the jusnaturalistic and positivist tension so peculiar to this type of norm.

A. *The German Debate*

The concept of jus cogens was first defined in international law in the works of German-speaking international lawyers during the inter-war period.[39] The Austrian jusnaturalist international lawyer Aldred Verdross developed his ideas on jus cogens during the 1920's and 1930's.[40] In his Hague lecture of 1929, Verdross stated that in international law there are "rules of jus cogens*"* that oblige States to uphold certain conduct.[41] In 1932, Friederich August Von Der Heydte published an article arguing for the existence of jus cogens and several categories of the norm—rules indispensable for the existence of international law and rules in which the whole international community shares an interest.[42] In Vandross's 1937 article *Forbidden Treaties in International Law*, the jurist developed more of the concept.[43] This contribution was written as a response to a report about the law of treaties that ignored the problem of conflict between treaties and international law.[44] Verdross claimed that the freedom to conclude treaties could only suffer limitations if general international law had rules of a jus cogens character.[45] For Verdross, these jus cogens norms

39. Felix Lange, *Challenging the Paris Peace Treaties, State Sovereignty, and Western-Dominated International Law – The Multifaceted Genesis of the Jus Cogens Doctrine*, 31 LEIDEN J. OF INT'L L. 821, 824 (2018).

40. *Id.*

41. *Id.* at 825.

42. F. von der Heydte, *Die Erscheinungsformen des zwischenstaatlichen Rechts. Ius Cogens und ius dispositivum im Völkerrecht,* 16 ZEITSCHRIFT FÜR VÖLKERRECHT 461 (1932).

43. *See generally* Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. OF INT'L L. 571 (1937).

44. Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. OF INT'L L. 291, 298 (2006) (citing Harvard Research in International Law, *The Law of Treaties*, 29 AM. J. OF INT'L L. SUPP. 655, 657 (1935)).

45. *See* Verdross, *supra* note 43, at 572.

would be composed of two groups: (1) compulsory norms of customary international law and (2) general principles prohibiting States from concluding treaties *contra bonos mores*.[46]

The first group of norms (compulsory norms of customary international law) prohibits States from concluding treaties that breach principles that govern the validity of treaties, such as a treaty between two parties that restrict the freedom of the seas of other States, contravening the compulsory principle of international law.[47] This example would be in breach of the now VCLT Articles 34 and 35, which prohibit obligations for third parties without their consent.

The other type of *jus cogens*, namely the prohibition of treaties *contra bonos mores,* is different. Verdross stated that this prohibition is derived from the general principles of law recognized by civilized nations found in Article 38, paragraph 1, item (c) of the Statute of the International Court of Justice. Therefore, the author states that "no juridical order can admit treaties between juridical subjects, which are obviously in contradiction to the ethics of a certain community."[48] Consequently, treaties that breach principles recognized as the ethical minimum of the international community would be immoral and thus considered void before international law.[49] Verdross gives the example of treaties that bind a State and force it to: (1) diminish its maintenance of law and order within the State (such as reducing its police forces and court system); (2) reduce its defense to external attacks; and (3) decrease its care for the bodily and spiritual welfare of citizens at home and protection of citizens abroad.[50] The jurist goes on to harshly criticize the positivist school of law, stating that "dogmatic positivism wishes to separate positive law from its ethical mother soils" neglecting its moral basis and a "truly realistic" analysis of law—which proves that every positive juridical order has its roots in the morality of a given community.[51]

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46. *Id.* at 572.

47. *Id.*

48. *Id.* at 572-73.

49. *Id.* at 574-76.

50. *Id.* at 574.

51. *Id.* at 576.

Verdross was a jusnaturalist legal scholar that adopted a universalistic conception of international law, viewing humanity as a whole moral-legal grouping based on natural law.[52] Consequently, it is logical that the moralist nature of jus cogens to Verdross draws great influence from natural law, thus, why the author criticizes the "unrealistic" position of the positivist school of law, which would question the validity of the metalegal concepts of this type of norm.

The scholarly work of Verdross was closely related to the German academic struggle against the Paris Peace Treaties that punished Germany and Austria with territorial losses and reparations.[53] A bourgeois nationalist, Verdross defended the unification of Austria and Germany, which the treaties forbode.[54] The idea of jus cogens was then originated to confront the treaties.[55] In a 1930 article, the jurist harshly criticized the provisions of the Treaty of Versailles which considered Austrian independence as inalienable, stating that "immoral treaties are not valid according to international law."[56] After the Council of the League of Nations condemned Adolf Hitler's decisions to rearm and expand the German military, thus disrespecting the Paris Peace Treaties, Verdross wrote an article attacking the League's statement.[57] In that contribution, the jurist stated that the Treaty of Versailles was null and void in its entirety because of illegal coercion, breach of a preliminary peace treaty, and *contra bonos mores.*[58]

According to Lange, that is the reason why Sir Hersch Lauterpacht, a British international lawyer and special rapporteur of the

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52. Bruno Simma, *The Contribution of Alfred Verdross to the Theory of International Law,* 6 EUR. J. OF INT'L L. 33, 38 (1995).

53. Lange, *supra* note 39, at 825.

54. *Id.*

55. *Id.*

56. *Id.* (citing Alfred Von Verdross, *Der Zusammenschluss im Lichte des Völkerrechts,* in, DIE ANSCHLUSSFRAGE IN IHRER KULTURELLEN, POLITISCHEN UND WIRTSCHAFTLICHEN BEDEUTUNG 548 (F. Kleinwächter & H. von Paller eds., 1930)).

57. Lange, *supra* note 39, at 827; A. Verdross, *Anfechtbare und nichtige Staatsverträge*, 15 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 289 (1935).

58. Verdross, *supra* note 57, at 289, 291.

International Law Commission (ILC) responsible for the draft of the VLCT, was hesitant about the concept of immoral treaties.[59] Familiar with the German discourse and usage of the jus cogens concept as a challenge to the Paris Peace Treaties during the National Socialist period, Lauterpacht feared that the doctrine threatened the balance of international relations.[60]

B. *Incorporation as Law of Treaties*

After the horrors of the Second World War, the establishment of an international legal order based on the protection of fundamental values was one of the goals of the newly created United Nations (UN).[61] Several natural law ideas resurfaced and became popular once again in the legal scholarly debate, such as the idea of superior fundamental norms that could limit State actions.[62] Particularly, the ILC became an important proponent of the doctrine of peremptory norms. Hersch Lauterpacht, once suspicious of this doctrine, changed his opinion after Germany lost the war and the Treaty of Versailles was no longer a subject of criticism.[63] Distancing himself from Verdross's *contra bonos mores* type of jus cogens, Lauterpacht referred to the "illegality" of a norm that breached principles of international law in the ILC's first report on international treaty law, thereby dismissing the term "morality."[64]

However, Sir Gerald Fitzmaurice, Lauterpacht's successor at the ILC, once again reinforced the moral character of peremptory norms. In his 1958 report that introduced the concept of jus cogens, Fitzmaurice stated that these norms "involve not only legal rules but

59. Lange, *supra* note 39, at 829.

60. *Id.*

61. Noémie Gagnon-Bergeron, *Breaking the Cycle of Deferment: Jus Cogens in the Practice of International Law,* 15 UTRECHT L. REV. 51 (2019).

62. *See* Lange, *supra* note 39, at 831.

63. *Id.* at 832.

64. *Id.*

considerations of morals and international good order."[65] This observation showed how even though Lauterpacht tried to distance the concept from its moral root, the essence of the concept remained naturalistic.[66]

The proposal of the Draft Articles on the Law of Treaties was met with much controversy in the 1968 Vienna Conference on the Law of Treaties.[67] Some western States were opposed to a doctrine that could radically change their understanding of international law, with France representing one of the major dissenters in the debate.[68] According to Hernández, much of the opposition of Western States was a product of the threat of peremptory norms for the horizontal legal order based on the consent of States to a value-driven international order.[69] However, the doctrine gained support from another group of States, particularly recently independent States, and Global South States, Socialist States, and Western States that were receptive to the humanistic approaches of jus cogens.[70]

ILC members from recently independent and Global South States like India and Afghanistan declared that the UN Charter was an example of this doctrine when prohibiting aggression and protecting human rights.[71] These newly emancipated States viewed jus cogens as an opportunity to challenge colonialism, imperialism, and apartheid practices.[72] The motivations for this group of States were various. First, the belief in a value-laden, moral international law as an answer to the

65. *Id.*; *Documents of the tenth session including the report of the Commission to the General Assembly,* 2 Y.B. INT'L L. COMM'N 187, U.N. Doc. A/CN.4/SER.A/1958/Add.1, at 26. (hereinafter "Document of tenth session")

66. *See* ORAKHELASHVILI, *supra* note 4, at 38.

67. HERNÁNDEZ, *supra* note 1, at 60.

68. United Nations Conference on the Law of Treaties, *Official Records of the United Nations Conference on the Law of Treatises, First Session,* ¶¶ 26-34, U.N. Doc. A/CONF.39/SR.1 (Mar. 26 – May 24, 1968).

69. HERNÁNDEZ, *supra* note 1, at 60.

70. *Id.* at 61.

71. Lange, *supra* note 39, at 835.

72. HERNÁNDEZ, *supra* note 1, at 60.

crimes of World War II was deemed important.[73] For these non-aligned States, the principle was viewed positively because it gave them a chance to disengage from customary international legal norms or treaty obligations that were seen as negative.[74] According to Lange, in the 1960's several decolonized States developed a "revolutionary attitude" to a system of international law perceived as the product of imperialist States, demanding that their views be held with the same regard.[75]

For the Socialist States, other motivations were important to their views. These States perceived peremptory norms as an instrument to ensure coexistence between different economic models of States.[76] It also served them, similar to recently independent States, to criticize western imperialism and question obligations and treaties that were deemed "imperialistic" or contrary to fundamental principles.[77] Rudolf Arzinger, an East German international lawyer, argued that the principle of pacta sund servanda did not apply to agreements contrary to fundamental principles. He cited the NATO Treaty and the Treaty of Paris establishing the European Coal and Steel Community as typical examples of treaties that violated this doctrine.[78] Therefore, Socialist States used the doctrine to question treaties that were perceived as geopolitical threats.

Finally, there were Western actors, represented by the Scandanavian States, Greece, Cyprus, Spain, and Canada, that embraced the idea of jus cogens premised on humanitarian principles.[79] For them, the doctrine of jus cogens was a positive addition to international law to protect States from treaties that could endanger fundamental rights.[80]

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73. Lange, *supra* note 39, at 836.

74. *Id.*

75. *Id.*

76. HERNÁNDEZ, *supra* note 1, at 60.

77. Lange, *supra* note 39, at 834.

78. *Id.* at 835.

79. HERNÁNDEZ, *supra* note 1, at 61.

80. *Id.*

C. *Core Definition of Jus Cogens*

Article 53 of the VLCT defines peremptory norms as a "norm of international law 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."[81] Thus, according to Orakhelashvili, these norms have to apply regardless of the will and behavior of States, prevailing over treaties and thereby serving as an exception to the *lex specialis* rule.[82] Although it was introduced by the VLCT, the jus cogens doctrine is independent of treaties—being autonomous to operate outside treaty law.[83]

Besides the criteria explicitly stated by Article 53 of the VCLT, doctrine and case law refer to other certain elements that characterize peremptory norms. Firstly, these norms of jus cogens nature are universally applicable.[84] Secondly, peremptory norms are hierarchically superior to other norms of the international legal system.[85] Lastly, norms of jus cogens nature have the function of protecting the international community's fundamental values, described as ordre public or public order.[86] Different from the majority of norms (jus dispositivum) of general international law that can be amended, derogated from and abrogated by consensual acts of States—norms of jus cogens cannot be derogated from and are strong enough to invalidate contrary rules that might have been consensually affirmed by States.[87] This difference was defined already in the *North Sea Continental Shelf Cases*, where the ICJ explicitly distinguished norms of jus dispositivum from

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

82. ORAKHELASHVILI, *supra* note 4, at 8-9.

83. Vidmar, *supra* note 33, at 28.

84. Int'l L. Comm'n, First Report on Jus Cogens by Dire Tladi, Special Rapporteur, U.N. Doc. A/CN.4/693, at 38 (2016).

85. *Id.*

86. *Id.*

87. *Id.* at 39.

norms of jus cogens[88]—the latter having the potency to limit freedom of States to contract.

As a consequence of such characteristics, one of the effects of these norms of jus cogens nature is that it transforms the international legal system from a consensual legal order into a vertical order of law.[89] In this new system, there are rules of inferior and superior hierarchical standings. Superior rules can determine the frame in which rules of lesser importance can be valid; requiring that these inferior rules comply with them.[90] According to Orakhelashvili, besides operating as peremptory norms and thus constraining the contractual capacities of legal persons, norms of jus cogens nature also operate as constitutional norms.[91] In a decentralized international legal system, States, through their consensual treaty-making, are the primary source of international law. Because individual States act in the role of legislators, the author argues that jus cogens limitations on these international lawmakers closely resemble constitutional limitations of municipal law jurisdictions.[92]

D. *Possibility of Modification*

The purpose of Article 53 of the VLCT is to safeguard fundamental rules of international order; however, these rules are not meant to be perpetual. Nevertheless, the process of modification is complex since it requires that the subsequent norm is of a similar jus cogens nature itself.[93] Some obstacles surge when partaking in a close analysis of such requirements. Peremptory rules are not permissive, rarely prescriptive (e.g. the imposition of a rule), and mostly proscriptive (e.g.

88. *North Sea Continental Shelf* (Federal Republic of Ger. v. Den.; Federal Republic of Ger. v. Neth.), Judgment, 1969 I.C.J. Reports 3, ¶ 72 (Feb. 20).

89. *See* ORAKHELASHVILI, *supra* note 4, at 9.

90. *Id.*

91. *Id.*

92. *Id.* at 10.

93. OLIVER DÖRR & KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 984 (2018).

rule of prohibition).[94] In this sense, new rules could either enlarge or delimit the content of the obligation or the prohibition—the second possibility bringing quite a bout of controversy. If a new rule of jus cogens (accepted by the international community as a whole) allows formerly illegal conduct, then all the past proscriptive treaties that conflict with the new rule shall be deemed invalid, causing a possible great transformation on the international framework at that time.[95]

However, the process of modification does bring much discussion from academics. Some international legal scholars[96] claim that Article 54 is self-contradictory since it prohibits derogation but requires it for the possibility to create a new jus cogens norm. According to Linderfalk, this is an incorrect assumption based on the interpretation that the change of a norm of jus cogens requires an "immediate change of that rule itself."[97] In his interpretation, Linderfalk stipulates that jus cogens norms are composed of two orders within the norm. The first order is the recognized peremptory norm (e.g. prohibition of torture), which is indeed non-derogable. The second orders are not themselves jus cogens, but ordinary customary international law, accompanied by new *opinion juris* and new practice.[98] Therefore, it is through customary law that new peremptory norms are consequently formed and then are able to replace an existing norm of jus cogens nature.

E. *Identification of Jus Cogens Norms*

According to Orakhelashvili, the process of identifying the peremptory character of a norm is a multilevel analysis.[99] The categorical

94. *Id.*

95. *Id.*

96. A. D'Amato, *It's a Bird, It's a Plane, It's Jus Cogens!*, CONN. J. INT'L L. 6 (1990); M. J. Glennon, *Peremptory Nonsense, Human Rights, Democracy and the Rule of Law*, in LIBER AMORICUM LUZIUS WILDHABER 1265, 1269 (S. Breitenmoser ed., 2007); T. Meron, *On a Hierarchy of International Human Rights,* 80 AM. J. INT'L L. 1, 9 (1986).

97. Ulf Linderfalk, *The Creation of Jus Cogens: Making Sense of Article 53 of the Vienna Convention*, 71 HEIDELBERG J. INT'L L. 359, 377 (2011).

98. *Id.* at 376-77.

99. ORAKHELASHVILI, *supra* note 4, at 36.

argument focuses on what makes a norm peremptory by examining its jus cogens nature. The normative argument analyzes if a norm categorically qualifies as a peremptory norm and whether it is recognized as such under international law.[100] In order to be considered part of this category, a norm, besides protecting an individual or value must: (1) safeguard interests that go beyond those of individual States; (2) possess moral or humanitarian intention; and (3) have a deplorable moral consequence, upon breach, that is considered absolutely unacceptable by the international community as a whole.[101]

As clearly indicated, Orakhelashvili favors the natural law moralist position on the identification of this category of norms. Quoting Special Rapporteur Lauterpacht, the author argues that to operate as norms, these do not need to have been posited and accepted as a rule of law.[102] They may have been "expressive of rules of international morality so cogent" that they would be considered by an international tribunal to be part of the general principles of law in Article 38 of the ICJ Statute.[103]

The question that arises from this discussion is how to identify in practice such norms? Kadelbach states that there are some methods to discover these norms of jus cogens nature. First, the narrow "purely inductive" method encourages an examination of both norm acceptance and its nullifying effect.[104] Because of its scarce practice, there is a tendency to consider pertinent opinio juris related to general principles of international law to compensate for the lack of practice.[105] However, critiques of the indeterminacy and contingency of the outcomes of this natural law argument bring its backing to numerous objections.[106] According to Kadelbach, the most favorable method

100. *Id.*

101. *Id.* at 50.

102. *Id.* at 49.

103. *Id.*

104. Stefan Kadelbach, *Genesis, Function and Identification of Jus Cogens Norms,* in NETHERLANDS YEARBOOK OF INT'L L. 2015: JUS COGENS: QUO VADIS? 166 (Maarten den Heijer & Harmen van der Wilt eds., 2016).

105. *Id.*

106. *Id.*

takes a middle approach. Practice and opinio juris are required for the recognition of the peremptory rule; however, collective opinio juris can be found in treaty law.[107] This method follows a trend started by the *North Sea Continental Shelf Case* and is generally accepted in the doctrine of customary law.[108] According to this interpretation, custom can be identified by treaty analysis, which holds more backing if international conventions use similar clauses continuously, with different groups of contracting parties and different time periods, showcasing that jus cogens can be found in many if not all sources of international law.[109]

In the *Obligation to Prosecute or Extradite Case*, the ICJ concluded that the prohibition of torture was both part of customary international law and a jus cogens norm, pointing to domestic implementation, State practice, and opinio juris for coming to such conclusion.[110] In the *Nicaragua Case*, the ICJ examined the peremptory status of the prohibition on the use of force based primarily on the reference of the State's representatives.[111] These past judgments seem to imply that the Court would accept evidence of customary international law to identify norms of jus cogens nature; however, the Court has not explicitly affirmed that notion. In a similar direction, the special rapporteur of the ILC exposed the same category of sources for the identification of peremptory norms as the ones necessary to identify customary international laws, such as treaties, resolutions made by international organizations, governmental legal opinions, decisions of national courts, official publications, and public statements on behalf of States.[112]

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107. *Id.* at 167.

108. *Id.*

109. *Id.*

110. *Questions Relating to the Obligation to Prosecute or Extradite* (Belg. v. Sen.), Judgment, 2012 I.C.J. Reports ¶ 422 (July 20).

111. *Military and Paramilitary Activities In and Against Nicaragua* (Nic. v. U.S.), Judgment, 1986 I.C.J. ¶ 190 (Jun. 27).

112. Int'l L. Comm'n, *Second Report on Jus Cogens by Dire Tladi, Special Rapporteur,* U.N. Doc. A/CN.4/706, at 70-71 (2017); HERNÁNDEZ, *supra* note 1, at 64.

As controversial as the topic is, there is criticism of the equivalence between peremptory norms, customary law, and treaty law. Orakhelashvili states that, besides Article 53 not referring to custom, the moral or social values predominant for the international community reflected in peremptory norms are not built through practice necessarily.[113] Customary law would also be corrupted by contrary practice or persistent objection—something not possible with norms of jus cogens nature. Additionally, customary law lacks the logical devices to identify peremptory norms of abstention.[114] Finally, Orakhelashvili informs that the criteria for customary law found in the *Asylum* and *North Sea Continental Shelf Case* (proof of practice by the other state party to a treaty) were focused on the bilateral relationships of States that consensually forge relationships—being strange to a value-based approach independent of State will.[115]

F. *Functions of Peremptory Norms*

Similar to other aspects regarding norms of jus cogens nature, there is a lively debate about their purpose. Initially, there is the approach that peremptory norms have no distinctive role in positive law. This position, argued by Focarelli, states that the various effects of jus cogens norms are a consequence of autonomous norms of customary international law such as nullity of acts, universal jurisdiction, special consequences of state responsibility, etc.[116] However, peremptory norms would possess a promotional role in the context of legislation of international law—persuading international lawyers and judges to create a novel and different future international law.[117] This new international law would be molded in accordance with jus cogens requirements, thus, these norms would shape State practice and mobilize legal reform.

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113. ORAKHELASHVILI, *supra* note 4, at 114.

114. *Id.*

115. *Id.*at 115-16.

116. Carlo Focarelli, *Promotional Jus Cogens: A Critical Appraisal of Jus Cogens' Legal Effects,* 77 NORDIC J. OF INT'L L. 455 (2008); KOLB, *supra* note 9, at 12.

117. *Id.*

A political context interpretation gives a different meaning to the purpose of these norms. In this analysis, jus cogens can expand the domain of States' liberty, casting off international law restraints by providing nullity for treaties that go against these norms.[118] However, they could also be used for the enforcement of certain obligations regardless of State—such as human rights obligations.[119] Thus, the purposes of jus cogens vary in accordance with its usage based on the political contingencies of a State or organization.

A more positivist approach recognizes jus cogens functions as mainly of legal effects. This position argues that peremptory norms have legal functions of (1) contractual jus cogens, with nullifying effects on treaties; (2) judicial jus cogens, peremptory norms acting as a threshold of control over the Security Council by internal or international tribunals; and (3) sanctioning jus cogens, with repercussions for State responsibility.[120]

Finally, there is the position that jus cogens are superior norms of international law, creating a new legal system for the whole of humankind or a new jus gentium.[121] This approach understands that peremptory norms of international law are not limited to conventional norms or the law of treaties, but are extended to every juridical act.[122] Therefore, jus cogens norms are considered the juridical achievement of humankind, forever changing the consent-based system of international law to a universal value-based system—with peremptory norms sitting at the top of the universal hierarchy of norms.[123] Finally, the question is no longer of a type of norm that does not allow the derogation of

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118. Paul B. Stephan, *The Political Economy of Jus Cogens*, 44 VANDERBILT J. OF TRANSNAT'L L. 1077, 1077-79 (2011); KOLB, *supra* note 9, at 13.

119. *Id.*

120. Joe Verhoeven, *Sur les "Bons" et les "Mauvais" Emplois du jus cogens*, 5 ANUARIO BRASILEIRO DE DIREITO INT'L 133, 140 (2008); KOLB, *supra* note 9, at 13.

121. KOLB, *supra* note 9, at 14.

122. ANTÔNIO AUGUSTO CANÇADO TRINDADE, INTERNATIONAL LAW FOR HUMANKIND: TOWARDS A NEW JUS GENTIUM 295 (2013).

123. *Id.* at 310.

certain norms, but of a superior norm that takes priority and interprets all other norms of the legal order.[124]

G. *Sources*

In the *Lotus Case*,[125] the classical position about the sources of international law was exposed. This view regarded that rules of international law are based on evidentiary considerations on the consent of States.[126] Therefore, for assuming the source of a norm, there was to be found evidence that a translated State will be bound by it.

However, as seen before, peremptory norms escape the logic of an international legal system dictated only by consent. Orakhelashvili exposes that legal scholars frown upon the classical position about sources when dealing with jus cogens.[127] Instead, citing Tomuschat, he argues that to "establish them is, therefore, less a constitutive than a declaratory process"—turning the identification of its source 'irrelevant.'[128] The author goes on to expose the argument of some scholars who say that States should consent two times to Article 53 of the VCLT: first recognizing the norm and secondly, its peremptory character.[129] Orakhelashvili disagrees with such a position, claiming that this rationale would make jus cogens difficult to operate if States could avoid its peremptory status in specific cases—arguing that Article 53 does not require "a State by State acceptance or even recognition" for a norm to become peremptory.[130] This interpretation would initially solve an obstacle posed by States that are "persistent objectors" to a norm that is to be considered of jus cogens nature. Conclusively, Orakhelashvili states that it is plausible for a source expressing *prima facie* "community will" to give rise to a peremptory nature of a rule.

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124. KOLB, *supra* note 9, at 14.

125. *The Case of the S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, (Sept. 7).

126. *Id.* at ¶¶ 161-62.

127. ORAKHELASHVILI, *supra* note 4, at 105.

128. *Id.*

129. *Id.* at 106.

130. *Id.* at 107.

However, after this initial condition would be met, the community interest and moral character of the norm would be more relevant to determine whether such norm is peremptory or not.[131]

Ulf Linderfalk has a divergent opinion that found support among the International Law Commission.[132] In his view, the peremptory norms contained in Article 53 of the Vienna Convention have a striking similarity with the rationale contained in Article 38 para. 1(b) of the ICJ Statute.[133] In this sense, norms of jus cogens nature would have customary international law as its source. Similar to customary law, peremptory norms would have to first be evident in a certain pattern of state practice: State actors generally not derogating from the peremptory rule.[134] Furthermore, there needs to exist a certain belief; for example, States widely agree that due to an authoritative set of rules existing in customary international law, no derogations from that peremptory rule are permitted and any modification of that rule through means of ordinary international law is prohibited.[135]

The ICJ in its 2012 judgment in *Obligation to Extradite or Prosecute* seemed to interpret a similar rationale in this sense. The Court concluded that the prohibition of torture was both customary international law and a peremptory norm, noting as evidence, State practice, domestic implementation, and opinio juris.[136] Therefore, it seems that both the ICJ and the ILC still favor a classical approach to the evidentiary considerations on State practice and consent to identify a norm of jus cogens nature.

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131. *Id.* at 108.

132. Int'l L. Comm'n, *Rep. of the International Law Commission on the Work of its Fifty-Third Session,* UN Doc. A/56/10, art. 24, art. 50 (2001); *Int'l L. Comm'n, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law,* UN Doc. A/CN.4/L.682 at 184 (2006).

133. Linderfalk, *supra* note 97, at 372.

134. *Id.* at 373.

135. *Id.*

136. *Questions relating to the Obligations to Prosecute or Extradite* (Belg. v Sen.), Judgment, 2012 I.C.J. Reports ¶ 422 (July 20); *Prosecutor v. Furundzija,* Case No. IT-95-17/1-T, Trial Judgment ¶ 144 (Int'l Crim. Trib. For the Former Yugoslavia Dec. 10, 1998).

This chapter is meant to introduce the reader to the object analyzed in the present article (peremptory norms). More than that, it also intended on showing the duality that permeates this type of norm; a metalegal concept brought on by political motives and received by an international legal system that was architected through consent and rational contract-like language. The next two chapters will introduce the reader to the scholarship of two positivistic authors that will serve as the doctrinal lenses for the possible explanation of the reception and validity of peremptory norms in the international legal system.

IV. THE INDUCTIVE CRITIQUE OF JUS COGENS

This chapter intends on presenting the reader to the inductive approach of international law elaborated by Professor Georg Schwarzenberger. This theory had great difficulty in accepting the existence of peremptory norms due to its non-legal roots and value-based approach to international law. Schwarzenberger's approach bases itself mostly on positive law embodied in the Statute of the ICJ and a narrow interpretation of principles, making itself a representative of an orthodox positivist doctrine.

The exploration of Schwarzenberger's theory in this chapter will be of great importance to understand the research questions elaborated in this study. First, the analysis of the characteristics inherent to the inductive approach will be obligatory to grasp the possible validity, or not, of peremptory norms in said theory. Furthermore, the rationale elaborated by Schwarzenberger presented in this chapter will be investigated when examining the prohibitions against torture and genocide—thus, seeing if in practice the inductive approach holds ground on explaining international legal developments.

A. *Historical Development*

At its naturalistic core, the jus cogens doctrine was a reaction to the growing influence of the school of positive law in the early 20th century. That is made clear by Verdross's defense of Christian naturalistic universalism decrying that "dogmatic positivism wished to

separate positive law from its ethical mother soil."[137] Thus, by advocating for rules of jus cogens that corresponded to "universal ethics of the international community," Verdross exemplified the intellectual turn from legal positivism and its systematic interpretation of the law to a naturalistic value-orientation of international law.[138]

However, its initial controversial purpose of denouncing the Paris Peace Treaties and serving as legal arguments to a national socialist Germany had brought negative attention to peremptory norms. For these reasons, Lauterpacht's 1953 ILC draft referred to the positive term "illegality" for a treaty that breached norms of jus cogens norms—distancing itself from the naturalistic notion of "immorality."[139] Nevertheless, after Germany lost the war and the Paris Peace Treaties were no longer an issue, the moral content of jus cogens was once more attractive to a value-driven international legal order.[140] In that sense, Sir Gerald Fitzmaurice, Lauterpacht's successor, in his 1958 report highlighted that jus cogens were more than legal rules, but "considerations of morals and of international good order."[141] Finally, the 1963 draft by the British Special Rapporteur Humphrey Waldock provided the basis for the discussion in the Vienna Conference on the Law of the Treaties.[142] Waldock argued that the consent-based approach to international law was difficult to sustain since the law of the United Nations Charter concerning the prohibition of the use of force required the existence of superior norms of jus cogens.[143]

Although gaining support on the need to confine the unlimited consent power of States, several state representatives called attention to the dangers of the doctrine.[144] In academia, a positivist critique of the doctrine argued that it could be used to circumvent contractual obligations and to thwart the foundational principles of international

137. Lange, *supra* note 39, at 831.

138. *Id.*

139. *Id.* at 832.

140. *Id.* at 831-32.

141. Document of tenth session, *supra* note 65, at 40-41.

142. Lange, *supra* note 39, at 832.

143. *Id.*

144. HERNÁNDEZ, *supra* note 1, at 60.

law.[145] This position was defended by Georg Schwarzenberger, a naturalized British international lawyer and professor at University College London, who wrote against the perceived inconsistencies of the jus cogens doctrine. Although not claiming to be a positivist lawyer, Schwarzenberger criticized the lack of evidence for the existence of jus cogens, its breach of the inalienable principles of international law, and the absence of international courts or organs with compulsory jurisdictions to impose rules of public policy in the international system akin to domestic orders.[146]

B. *The Inductive Approach of International Law*

Schwarzenberger referred to his doctrine of international law as the "inductive approach," an empirical technique based on the authority of "near-universal consent" found in Article 38 of the Statute of the ICJ.[147] The goal of this method was to "safeguard" international law from the deductive approach and "subjectivism of naturalists, Grotians, and voluntarists with their vague principles masquerading as law finding theories which were really law making doctrines."[148] Schwarzenberger defined the four distinctive features of this theory as (1) emphasis on the creating processes of international law, (2) establishment of the means for the determination of rules of law, (3) awareness of rules of international law as the only binding norms, and (4) perception on the differences of application of international law in different types of societies.[149]

The creating processes of international law understood by the inductive approach are mirrored in Article 38 of the Stature of the ICJ and are consensual understandings, international customary law, and the general principles of law recognized by civilized nations.[150]

145. Lange, *supra* note 39, at 834.

146. Schwarzenberger, *supra* note 12, at 457-58, 476.

147. GEORG SCHWARZENBERGER, THE DYNAMICS OF INTERNATIONAL LAW 2 (1976).

148. *Id.*; Georg Schwarzenberger, *The Inductive Approach to International Law,* 60 HARV. L. REV. 553 (1947).

149. Schwarzenberger, *supra* note 147, at 2.

150. *Id.*

Consensual understandings through treaty creation are viewed as the primary law-creating process in international law; its binding character resting on governing rules of international customary law—the principle of consent.[151] International customary law is recognized by the evidence that a State acts a certain way because they recognize a legal obligation to this effect, as exposed in the *Lotus* and *Asylum* cases.[152] Here, highlighting the importance of treaties, Schwarzenberger claims that many important customary laws have been created over centuries in a multitude of international treaties. The general principles of law are understood as valuable to forestall any argument that there are gaps in the system of international law which would prevent international courts from rendering a judgment in a matter not foreseen in the written law.[153]

The second distinctive feature of this theory is the establishment of the "means for the determination of rules of law" as stated in Article 38(1)(d) of the Statue of the ICJ.[154] Here Schwazenberger states that these means need to be rationally verifiable criteria used by law-determining agencies and their elements—showcasing the importance given to empirical data in his theory.[155] Therefore, all criteria utilized by the author need to be based on factual evidence such as legal practice or norms.

The third feature of the inductive approach is the "[a]wareness of the character of the rules of international law as the only binding norm of international law unless evidence is forthcoming that a principle, which has been abstracted from such rules, has itself acquired the character of an overriding rule."[156] This postulate exposes the focus given to formal positive rules of international law which are inductively verified by the three recognized law-creating processes in Article 38 of the Statute of the ICJ: consensual understandings, international

151. GEORG SCHWARZENBERGER & E.D. BROWN, MANUAL OF INTERNATIONAL LAW 24-25 (1976).

152. *Id.* at 24-25.

153. *Id.*

154. SCHWARZENBERGER, *supra* note 147, at 2.

155. *Id.*

156. *Id.*

customary law and the general principles of law recognized by civilized nations. Here Schwarzenberger exposes that there are certain undisputed rules, such as the principle of sovereignty, which entails each State to exercise exclusive jurisdiction inside of its territory; or the jurisdiction of international institutions depending on State consent—all universally recognized rules that are known as operative rules of international law, or *primary* rules.[157] Secondary rules would be the ones produced by the interaction of two or more primary rules: such as the norms of the territorial sea which are the product of interaction between primary rules of territorial sovereignty and freedom of the seas.[158]

Although Schwarzenberger is quite critical of legal positivism in his writings,[159] it is undeniable that the three first features of his inductive theory possess strong elements of positivist scholarship. He was also classified as a positivist jurist by scholars like Crawford and Robert Cryer, which noted the similarity between his method of inductive approach and classical legal positivism.[160] By basing his three constitutive criteria on Article 38 of the Statute of the ICJ, Schwarzenberger upholds the positivist paradigm of the "unity of sources" which recognizes as law only the norms that can be traced to one exclusive source—generated by a consensual legal procedure between States, independent of their inherent value.[161] This is exactly what he does when claiming that the three primary law creating processes are the ones delineated in Article 38 of the Statute of the ICJ and by stating

157. SCHWARZENBERGER & BROWN, *supra* note 151, at 34-35.

158. *Id.*

159. Schwarzenberger, *supra* note 148, at 544; GEORG SCHWARZENBERGER, INTERNATIONAL LAW VOLUME I, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 1 (1945).

160. Robert Cryer, *International Law and the Illusion of Novelty: Georg Schwarzenberger,* in BRITISH INFLUENCES ON INTERNATIONAL LAW, 1915-2015 7 (2016); James Crawford, *Public International Law in Twentieth-Century England,* in JURISTS UPROOTED: GERMAN-SPEAKING EMIGRÉ LAWYERS IN TWENTIETH CENTURY BRITAIN 681-708 (2004).

161. FRAUKE LACHENMANN, MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW, LEGAL POSITIVISM (2011), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1856?prd=MPIL (accessed July 25, 2021).

as the goal of his theory to uphold the "means for the determination of rules of law" as they are termed in Article 38.[162] His third criteria explicitly invokes formal norms of international law as the only binding norms, establishing that principles could only be the by-product of such positive rules—a positivistic position later criticized by Dworkin for failing to acknowledge the autonomous role of legal principles that play a major role in the solution of "hard cases."[163] Therefore, Schwarzenberger, when faced with legal principles, chooses to use a deductive approach based on the supremacy of the positive sources of law in Article 38—showcasing a methodological approach characterized as a "positivism founded on an empirical basis."[164]

The last feature of his inductive approach is the "realization of the differences which exist between international law as applied in unorganized, partly organized and fully organized international societies."[165] Schwarzenberger states that while international law of unorganized international societies is largely jus strictum, meaning law interpreted without any modifications and with the most rigor, the international law of partly organized and fully organized international societies, such as contemporary world society under the United Nations, tends to be transformed into jus aequum, a legal system in which rights are relative and must be exercised reasonably and in good faith.[166] This criterion shows how different international societies possess different approaches to international law, demonstrating the interdisciplinary nature of the inductive approach with other social sciences such as sociology and international relations.[167] This

162. SCHWARZENBERGER, *supra* note 147, at 2.

163. LACHENMANN, *supra* note 161; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 36 (1978).

164. Stephanie Steinle, *Georg Schwarzenberger* (1908-1991), in JURISTS UPROOTED: GERMAN-SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN 664, 679 (2004).

165. GEORG SCHWARZENBERGER, THE INDUCTIVE APPROACH TO INTERNATIONAL LAW 6 (1965).

166. *Id.*

167. SCHWARZENBERGER, *supra* note 147, at 2; Stephanie Steinle, *Georg Schwarzenberger* (1908-1991), in JURISTS UPROOTED: GERMAN-SPEAKING

interdisciplinary caveat is found as a product of Schwarzenberger's experience with international relations, culminating in his 1941 book *Power Politics* which expressed the realist school of international relations' view of international law.[168] In this work, Schwarzenberger exposed his disappointment to the developments of international politics that led to the World War and the failure of international law to contain it.[169] Hence, the jurist would infer that international relations did not foster a sense of community. Instead, entities like the League of Nations and later the United Nations exemplified states engaging in power politics in a veiled manner. This highlights the fragility of the international legal order, which relies on the strength of superpowers.[170]

C. *The Content of the Critique: Evidence of Peremptory Norms in Individual Rules and Principles of Customary International Law*

In his 1965 article *International Jus Cogens?* Schwarzenberger exposes his main arguments against norms of jus cogens nature, using his inductive approach as his method to analyze if these norms possessed legal validity or in his words "declaratory of existing international law or constitute a development of the law as it stands (lex lata)."[171] In order to apply his inductive approach, first, the author begins to analyze whether peremptory norms are to be found in international customary law, general principles of law or treaties—the "three law creating processes in international law" as found in the first feature of his inductive approach. Furthermore, Schwarzenberger highlights how even the International Law Commission admitted that "there is not yet any generally recognized criterion by which to identify a general rule of international law as having the character of jus

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ÉMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN 664, 679 (Jack Beatson & Reinhard Zimmermann eds., Oxford Univ. Press 2004).

168. GEORG SCHWARZENBERGER, POWER POLITICS A STUDY OF INTERNATIONAL SOCIETY 38-39 (1951).

169. Steinle, *supra* note 164, at 675.

170. *Id.* at 676-77.

171. Georg Schwarzenberger, *International Jus Cogens?,* 43 TEX. L. REV. 455, 456 (1965).

cogens"—adding that the commission could only approve a proposition against any formula to define international jus cogens.[172]

His analysis starts by identifying if there are any individual rules and principles of international customary law asserted to constitute jus cogens. He continues by examining seven fundamental principles of international customary law: sovereignty, consent, recognition, good faith, international responsibility, freedom of the seas, and self-defense. Regarding the principle of sovereignty, Schwarzenberger cites the Hungarian branch of the ILC to state that some view it as an "inalienable" principle, something that he states is a weak natural-law premise not backed by the three law creating processes of international law.[173] He proceeds to mention the *S.S. Wimbledon Case*, where the Permanent Court of International Justice upheld the power of every sovereign State to limit the exercise of its sovereignty, describing this power as the very core of State sovereignty. Therefore, being any State free to alienate a part or whole of its territory, transform itself into a dependent State or give up its international personality, the author concludes that none of the rules of international customary law assert that the principle of sovereignty is an international jus cogens.[174]

Continuing with the principle of consent, Schwarzenberger states that there is a possibility for States to create "consensual *jus cogens*" on a bilateral or multilateral footing, limiting its effects on the contracting parties.[175] He claims that evidence that such bilateral consent may affect third parties is "either spurious" or rests on recognition on other grounds, such as active or passive commitments by third parties. However, this does not mean that legal effects of consensual jus cogens are automatic consequences of transactions *inter alios acta*.[176] Concluding this rationale, Schwarzenberger claims that if the intention of the contracting parties to a treaty is that it shall not be made possible to modify or abrogate its stipulations—then the greater number of parties to a treaty, the greater the likelihood of a great encompassing jus

172. *Id.* at 457.

173. *Id.* at 458.

174. *Id.*

175. *Id.* at 459.

176. *Id.*

cogens that such treaty cannot be effectively revised.[177] He mentions the Charter of the United Nations with its de facto immutability, with its revision clauses designed to preserve its immutability when unanimity between the permanent members of the Security Council is lacking.[178] However, even if a treaty is wide encompassing and has a majority or almost totality of State members, in Schwarzenberger's view, it would never render automatic effects (if any) in third parties.[179]

Regarding the principles of recognition and good faith, a similar scenario is found. Schwarzenberger claims that a new subject of international law is bound to recognize rules of universal and general international customary law existing at the time of its creation.[180] Yet again, the author claims that such duty reflects on an "operative legal phenomenon," mainly on the double assumption that the entity recognized is: (1) able and willing to carry out its obligations under international law, and (2) that, in the absence of more far-reaching obligations of a consensual character accompanying the act of recognition, these obligations include the whole body of the rules of general international customary law.[181]

Therefore, this operative legal phenomenon cannot be equated to a peremptory norm. On the principle of good faith, the author explains that such a rule being considered the "very basis of international law" could be confused with rules belonging to jus cogens.[182] This is refuted by Schwarzenberger, who claims that such a principle has as its origin a consensual origin on several historical treaties that repeated rules of good faith.[183] Therefore, this principle was created as a rule of international customary law (not peremptory norm) stating that all international obligations must be carried out in good faith—respecting the mutual commitments of parties to a treaty.

177. Schwarzenberger, *supra* note 12, at 462.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

When analyzing the contents of the principles of international responsibility and freedom of the seas, Schwarzenberger examines the case of piracy. Although his position is similar to the other principles analyzed, it is interesting to see his reasoning since the prohibition of piracy is considered to be a norm of jus cogens nature.[184] The author states that piracy is an instance of jure gentium or law of the nations, a form of international customary law.[185] That means that States have an obligation and a right under customary law including: (1) the obligation of not allowing their territories to be employed as bases of piratical operations, and (2) the entitlement to assume an extraordinary jurisdiction to apply criminal sanctions against practitioners of piracy.[186] However, Schwarzenberger states that two or more subjects of international law could consent to a treaty to make piracy lawful—although its effects would be extremely limited. In relation to third parties, they would still be bound by the rules of international customary law against piracy, permitting them to sanction practitioners of piracy from these contracting States. The author even mentions a similar possibility of treaties regulating slave trading between States (although mentioning that the prohibition of slavery might rest on rules of general international law) permitting them to trade between treaty parties but leaving them exposed to the sanctions of third States.[187] Curiously, after Schwarzenberger mentions such examples, he argues and cautions against the "unlikeliness" of such controversial treaties based on a moralist argument.[188] The author writes that States contemplating "activities on such lines, would be symptomatic of a deeper malaise, they would have sunk to a level of barbarism incompatible with any claim to be regarded any longer as civilized communities."[189] He goes on to compare such practices to the pre-1939 period where totalitarian States resorted to practices of forced-labor camps,

184. *Int'l Law Comm'n Rep. on the Work of Its Seventy-First Session,* UN Doc. A/74/10, at 141-47 (2019).

185. Schwarzenberger, *supra* note 12, at 463.

186. *Id.* at 465.

187. *Id.*

188. *Id.*

189. *Id.*

concentration camps, and forcible exchanges of populations.[190] The author concludes that third States could retaliate by breaking diplomatic relations, withdrawing recognition from governments and States—but still holds valid the consent-based relation between these States.[191] Schwarzenberger adds that in the drafting stages of the 1958 Convention on the High Seas, the members of the conference considered themselves "free" to reformulate, without inhibitions, rules such as on piracy jure gentium like "any other rules of *jus dispositivum* bearing upon the law of the sea."[192] Furthermore, they did not show "any exaggerated awareness of the fact that they might have created new rules of consensual *jus cogens*."[193]

D. *Unorganized International Society and Rules of Public Policy: The "Institutionalist" Argument*

Schwarzenberger's concluding argument in the article is considered to be the most important to contemporary peremptory norm scholarship—being called the *Institutional Critique of Jus Cogens by Kolb*.[194] The author argues that international jus cogens is an analogy from municipal law and its rules of national public policy.[195] He proceeds to define national rules of jus cogens as containing two peculiar features: (1) they are public law in the strict sense, that is, they remain unaffected by agreements to the contrary between private persons—such private agreements become void, or, at least, unenforceable by community organs, especially national courts;[196] (2) these rules of national jus cogens are prohibitory rules. Their function is to prevent individual parties from taking actions they wished to take.[197] For the author, these "rules of public policy" form an essential part of domestic

190. *Id.*

191. *Id.*

192. *Id.* at 474.

193. *Id.*

194. KOLB, *supra* note 9, at 16.

195. Schwarzenberger, *supra* note 12, at 456.

196. *Id.*

197. *Id.*

constitutions, being an essential part of the legal fabric and closely related to the "underlying order of overwhelming physical coercion upon which every effective legal system must ultimately rest."[198] Therefore, Schwarzenberger defines the main obstacles of such a norm of domestic public policy on the international stage as both the lack of centralized organization in the international legal system and sanctions for the effective character of the *jus cogens* norm.

Schwarzenberger begins his argument by presenting the results of his empirically inductive method (which was applied in the first parts of the article) showing the complete lack of evidence regarding the existence of norms of jus cogens in international society. He argues that the reason for that is the "absence of any center of government with overwhelming physical force and courts with compulsory jurisdiction to formulate rules akin to those of public policy on the national level."[199] He adds that the international legal order was founded on "common-sense limitations of freedom of contract and employment of the principle of reciprocity which would counsel restraint and encourage a far-sighted use of the motivating power of self-interest."[200] Furthermore, he adds that when the principle of reciprocity was discarded and gave way to power, "international law tended to degenerate into a mere ideology of the might."[201] Consequently, these "new" international legal orders of good fellowship proved to be little more than ephemeral effort and "more often than not, an empty stunt."[202]

In a more organized world society, the author argues that the "principles of the United Nations" and similar forms of jus cogens in other international institutions present "attempts at the creation of consensual rules of international public policy."[203] Yet, these efforts are not successful, or limited ratione personae or ratione materiae such as is the case of specialized agencies of the United Nations or "the

198. *Id.* at 457.

199. *Id.* at 476.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

supranational European Communities, to constitute more than international quasi-orders."[204]

Therefore, in Schwarzenberger's critique, the lack of a central organized international society and the incapability of exercising sanctions by a compulsory jurisdiction, something native to the realms of municipal law, undermine the efficacy of an already very fragile international legal fabric. This positivistic argument is shared by Hans Kelsen's earlier writings on international law, where the Austrian jurist argued that the decisive criterion for a legal order is that it is a social order "that attempts to bring about the desired conduct of individuals by the enactment of sanctions."[205] If a social order loses its character as a "coercive order," then this social order does not possess "law."[206] In the initial edition of Kelsen's magnum opus, *Pure Theory of Law*, the jurist asserts that his theory aligns with the 19th-century positivist legal tradition.[207] He argues that the illegality of certain human actions (delicts) is determined by a specific consequence outlined in the reconstructed legal norm. In response to such behavior, the positive legal system enforces a coercive act, making a legal norm inherently coercive.[208]

However, Schwarzenberger's "realist" position applied to the last part of his argument. Drawing from his international relations and international political experience, Schwarzenberger argues that the intimate connection between members of the ILC with foreign ministries "of their own countries" must be considered.[209] This "law-making" approach of the commission should be analyzed as "power politics in disguise," suggests the author.[210] Therefore, the jus cogens theory advocated by the commission can "readily be made to serve hidden

204. *Id.*

205. KELSEN, *supra* note 14, at 7.

206. *Id.* at 9.

207. *Id.*

208. HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY: A TRANSLATION OF THE FIRST EDITION OF THE REINE RECHTSLEHRE OR PURE THEORY OF LAW 26 (1997).

209. Schwarzenberger, *supra* note 12, at 477.

210. *Id.*

sectional interests, not apparent at first sight."[211] Schwarzenberger suggests that the "beauty" of a general formula of *jus cogens* is that it leaves every State free to argue for or against the *jus cogens* nature of any particular rule of international law.[212] Moreover, since questions of public policy would be "everybody's business," these norms of *jus cogens* would provide opportunities for third parties to abuse semi-legal jargon into matters that otherwise would not be of their interest.[213] He adds, worryingly, that some States might even invoke unilateral arguments of jus cogens as justification of non-compliance with a burdensome treaty, restricting the area of rules governed by the primordial principle of consent.[214] Finally, in a sarcastic note, Schwarzenberger acidly concludes his article by stating that a draft article "perfectly adapted to the idiosyncrasies of a hypocritical age" has emerged, with its "trappings of fashionably progressive and unrealistic thinking," where international judicial organs are "likely to continue to be condemned to a subordinate position."[215]

E. *The Indeterminacy of Jus Cogens, State Practice and Power Politics*

Although Schwarzenberger's pessimistic views of jus cogens have in part been dismissed by the subsequent approval of the VCLT and decisions of the ICJ, the concept still faces obstacles identified by the author. That was made evident during the sixty-ninth session of the ILC in August 2017, where their second report on jus cogens recognized the importance of Article 53 of the VCLT.[216] However, it echoed Schwarzenberger's concerns of the indeterminacy of the concept when the same report informed that the characteristics of jus cogens identified in the first report of the Special Rapporteur and further expounded upon in the current report are not criteria for the identification of norms of jus cogens. They are rather, descriptive elements, the

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 478.

216. Gagnon-Bergeron, *supra* note 61, at 56.

question of who determines whether the criteria for the identification of jus cogens have been met falls beyond the scope of the topic.[217]

Therefore, the ILC's criticized remark "that there weren't any generally recognized criterion to identify a norm of *jus cogens* character" evidenced by Schwarzenberger in 1965, still holds strength fifty-two years later.[218] Furthermore, international courts act conservatively when determining peremptory norms—treading carefully on matters of the legitimacy of such decisions.[219] For this reason, international courts are more likely to have their judgments considered legitimate if they are based on notions and ideas that have gained consensus between States.

The leading example of this factor is the *Nicaragua* decision where, in its analysis of the applicable rules of customary international law, the ICJ based itself utterly on the consent of the parties.[220] The Court started out its examination by noting that there was factual evidence to conclude that there was consent between the parties (US and Nicaragua) on the validity of the prohibition of the use of force, currently a widely recognized jus cogens, and non-intervention.[221] For the latter, it based itself on Article 2(4) of the UN Charter and on the "attitude of the parties" (US and Nicaragua) on accepting the UNGA Resolution 2625.[222] For the principle of non-intervention, it based itself on principles of humanitarian law from the Geneva Conventions and declarations adopted by international organizations in which the United States and Nicaragua were parties.[223] Apart from the *Nicaragua Case*, several other cases were based on the consent of States through State practice, such as the *Corfu Channel*, the *North Sea Continental Shelf*,

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217. Tladi, *supra* note 112, at para 7.

218. Schwarzenberger, *supra* note 12, at 457.

219. Gagnon-Bergeron, *supra* note 61, at 57.

220. Nicar. v. U.S., 1986 I.C.J. ¶¶ 326-27.

221. Niels Petersen, *The International Court of Justice and the Judicial Politics of Identifying Customary International Law*, 28 EUR. J. OF INT'L L. 370 (2017).

222. *Nicar. v. U.S.,* 1986 I.C.J. ¶ 188; G.A. Res. 2625 (XXV) (Oct. 24, 1970).

223. *Id.* ¶ 203.

and the *Territorial and Maritime Dispute* cases.[224] Such court practice shows how Schwarzenberger and his inductive approach's foundation on Article 38 of the Statute of the ICJ hold true when international courts uphold the importance of State practice and consent to determine the nature of an international norm.

Furthermore, the translation of principles of domestic law and States from an organized system of domestic jurisdiction to a non-centralized system of international law is challenging. Gagnon-Bergeron, citing Christenson, states that when a Court defines a peremptory norm, it invariably enters into an inquiry of "political power and the demands and expectations from within the entire international community, beyond the system of States."[225] Therefore, questions of procedural legitimacy possibly leveraged by States halt international courts' attempts to define these norms, preventing the risk to overstep the court's mandate by imposing an inconclusive theory on States.[226] In the words of Gagnon-Bergeron, "[t]he general absence of sufficient explanation for jus cogens content and meaning indicates that international courts believe they currently do not possess the tools necessary to come to any definitive conclusions on the topic without risking their own legitimacy."[227] This position is once more echoed in Schwarzenberger's "power politics" approach of international law—where the creation of a general formula of peremptory norms would give States a vast semi-legal repertoire for justification of non-compliance with treaties and serve as ammunition for diplomatic protests and international relations strategies.[228] Schwarzenberger's pessimistic prediction of "international judicial organs likely to continue to be condemned to a subordinate position" would be the consequence of the non-determinacy of superior norms in an international legal order still ruled by the principle of consent.

Conclusively, the inductive approach struggled to accept the possibility of peremptory norms in the international legal system. Besides

224. Petersen, *supra* note 206, at 370-71.

225. Gagnon-Bergeron, *supra* note 61, at 58.

226. *Id.*

227. *Id.*

228. Schwarzenberger, *supra* note 12, at 477.

not encountering a basis for jus cogens in the Statute of the ICJ, Schwarzenberger's empirical analysis of State practice also did not substantiate the existence of peremptory norms in State practice. Therefore, in his critical writings of jus cogens, Schwarzenberger focused on the practical infeasibility of such norms by appointing a lack of a coercive central organ of international law. Noticing that the draft articles of the VCLT had a great chance of being approved and thus validating the concept of peremptory norms, Schwarzenberger turned to his international relations theory of "power politics," apparently because his legal theory could not explain the development of jus cogens.

V. THE KELSENIAN APPROACH TO INTERNATIONAL LAW

In this chapter, the theory of Hans Kelsen will be examined to grasp the suitability of peremptory norms in his approach. It will be shown that far from being a static theory, the Kelsenian theory possesses great adaptability to both the social realities of its time and the influence of moral norms. This shift in his work will be exemplified in his Oliver Wendell Holmes Lectures of 1940-41. There, Kelsen elaborated onto the moral root of international law, enabling the reception of norms of *jus cogens* nature into his understanding of international law. Therefore, analyzing this adaptation of his theory, this chapter will delve into the validity of peremptory norms in the Kelsenian approach, the sociological conception of the international legal order as primitive law (making moral norms a possibility into the international system), and the moral source of international law as the ultimate acceptance of metalegal norms into the Kelsenian system.

When discussing positive theorists of law, one cannot ignore the contributions made by Hans Kelsen, considered one of the most important jurists of the 20th century. Being the author of the Austrian Constitution of 1920 and serving as a judge of the Austrian Constitutional Court during the entire time period of pre-war democratic Austria (1920-1929), Kelsen was a reputable constitutionalist and public law scholar.[229] However, it was with legal theory and international law that Kelsen had a global influence—being translated into 24 languages

229. Benjamin Akzin, *Hans Kelsen—In Memoriam*, 8 ISR. L. REV. 325, 326 (1973).

by 1970, making him the most translated jurist of the last century.[230] His school of the pure theory of law or the Viennese School regarded positive law as an autonomous normative system—thus "pure" from alien elements i.e., psychology, politics, etc.[231] Endowing this system with validity, a presupposed higher norm called the "basic norm" (Grundnorm) is introduced by Kelsen, being that norm the one to be traced by all norms in a legal system, deriving their validity from this grundnorm and constituting the unity in the multitude of norms—representing the "reason for the validity of all norms that belong to this order."[232] In an abstract scenario, the positive legal system proposed by Kelsen would be a pyramid, with the "basic norm" at its top and consequently the superior constitutional norms of a system and so on; each norm possessing validity through its relation with the immediate posterior superior norm, and all of them being traceable to the Grundnorm.

It is not surprising that Kelsen's view on international law is inspired by this neo-Kantian systematic perspective.[233] In this sense, a monistic position of international law is required for the "unity of the epistemological standpoint of the pure theory of law."[234] Therefore, no conflict is possible between a higher and lower norm of a legal order, otherwise, it would destroy the unity of this system by making it impossible to describe it in non-contradictory rules of law.[235] That is the reason why Kelsen rejects dualism. He considers the international and national legal systems as being different and mutually independent, a notion that would be logically impossible to exist under the pure theory of law.[236] In Kelsen's words:

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230. *Id.* at 327.

231. HANS KELSEN, PURE THEORY OF LAW 1 (1967).

232. *Id.* at 194-95.

233. JOCHEN VON BERNSTORFF, THE PUBLIC INTERNATIONAL LAW THEORY OF HANS KELSEN: BELIEVING IN UNIVERSAL LAW 79 (2010).

234. HANS KELSEN, DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VOLKERRECHTS: BEITRAG ZU EINER REINEN RECHTSLEHRE 96 (1928).

235. KELSEN, *supra* note 216, at 276.

236. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 363 (1949).

> [T]he dualistic construction becomes impossible as a consequence of its indispensable assumption that the validity of the norms of international law for a State depends on the recognition of this law by the State, for if international law is regarded as merely a part of national law, then it cannot be a different legal order…and its validity cannot be independent of national law; hence there can be no conflict between the two because both are based on the "will" of the same State.[237]

At first, Kelsen's conception of a Grundnorm for international law was based on the maxim pacta sunt servanda: "agreements are to be complied with."[238] This favored positivistic rule belonged to a view that tried to diminish the questions of natural scholars' moral beliefs or contestable normative commitments. These written agreements were formal instruments that tried to reduce elements of uncertainty in the nature and scope of legal obligations.[239] However, Kelsen took different approaches than the traditional positivistic method to construct an approach that would account more fully to aspects of legal arguments ignored by positivists and favored by naturalists. These questions were summed up by Mitchel as:

> Why is international law treated as valid by its subjects? Despite the presence of inconsistencies in the norms of legal systems, can these nonetheless make up a coherent, consistent body of rules? Moreover, and perhaps most importantly, when and how is it legitimate and logically justified for the norms of this legal system to change?[240]

Focusing on such questions, Kelsen began to investigate what would constitute the core of his theorizations, such as the Grundnorm,

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237. KELSEN, *supra* note 216, at 336.

238. KELSEN, *supra* note 195, at 107.

239. Ryan Mitchell, *International Law as a Coercive Order: Hans Kelsen and the Transformations of Sanction*, 29 IND. INT'L & COMP. L. REV. 245, 254 (2019).

240. *Id.* at 254-55.

law as a pure system and the relationship between the sovereignty of States and international law.[241] This was quite different from positivist scholars of the time such as Carl Bergbohm, Franz von Liszt, Paul Laband, Dionisio Anzilotti, Heinrich Triepel, and Lassa Oppenheim, who accepted the same variant that international law's validity was grounded on State will.[242] Kelsen struggled to maintain such a formalist position, claiming that it reduced international law to "do what you will," thereby, degrading the science of international law into a descriptive view on interests and power of states and ultimately, abolishing it."[243]

However, in the vastly revised second edition of the *Pure Theory of Law,* Kelsen abandons this definition. He changes the *Grundnorm* of international law to "[t]he States ought to behave as they have customarily behaved," thus, customary international law, developed on the basis of this norm, is the first stage of the international legal order.[244] This rethinking of Kelsen's theory happened just after the end of World War II—ironically, with the advent of a new world order, a possible "world constitution," the UN Charter—something that would definitely be in consonance with the pacta sunt servanda of previous years.[245] It is important to emphasize that Article 2 of the UN Charter and the monopoly of the legitimate use of force, represented a new positive authority that could centralize legal sanctions at the international level and modernize international law on par with the importance given to centralization and sanction in Kelsen's legal theory.[246]

A. *The Purpose of Sanction in the Pure Theory of Law*

As seen above, the role of the Grundnorm in Kelsen's theory is that of validity to a legal system. Although it is considered one of the

241. *Id.* at 255.

242. *Id.* at 256.

243. KELSEN, *supra* note 219, at 96; Mitchell, *supra* note 224, at 257.

244. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 369 (1949)

245. Mitchell, *supra* note 224, at 278.

246. *Id.*

most important elements of the doctrine, there is also another foundational definition for the pure theory of law: the role of sanction. Here, the concept of "effectiveness" is quite important for understanding. Kelsen claims that "effectiveness is a condition of validity in the sense that effectiveness has to join the positing of a legal norm if the norm is not to lose its validity."[247] Thus, a sanction is attached to a certain behavior, qualifying this behavior as illegal, or a delict. This is further explored by two facts: (1) the application of a norm by legal organs (courts), translated as a concrete case where a sanction is ordered and executed, and (2) the norm is obeyed by individuals subjected to the legal order, behaving in a way that avoids the sanction.[248] Therefore, a coercive social order is effective as far as behavior conditioning the reward is caused by the desire for the reward, and the behavior avoiding the punishment is caused by the fear of punishment, without regard to the motive of their behavior.[249]

Posteriorly, Kelsen defines sanction as a coercive act conditioned by a legally ascertained human behavior or the consequence of a delict.[250] This act of sanction is an exclusive characteristic of the legal order since this order is of a coercive nature—that is to say, by inflicting on the responsible individual that practices a delict, such as deprivation of life, health, liberty, or economic values, which, if necessary can be employed against the individual's will through the use of force (if met with resistance).[251] Therefore, what distinguishes a legal order from moral or religious orders, is that law is a coercive order, a normative order that attempts to bring about a certain behavior by attaching a contrary behavior with a legally recognized coercive act, while the sanctions of the moral order are "merely the approval of the norm conforming and the disapproval of the norm-opposing behavior, and no coercive acts are prescribed as sanctions."[252]

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247. KELSEN, *supra* note 216, at 11.

248. *Id.*

249. *Id.* at 27.

250. *Id.* at 41.

251. *Id.* at 35.

252. *Id.* at 62.

The position upheld by Kelsen regarding sanctions is better understood when analyzing the works of John Austin, a 19th century positivist who greatly influenced Kelsen.[253] In Austin's positivist manifesto, *The Province of Jurisprudence Determine*, he lays the foundations for his theory and inaugurates legal positivism in academia.[254] Austin categorizes these as "imperfect laws" which voice the desires of a political superior but which their authors have not provided with sanctions.[255] He adds that in the sense of "roman jurists, an imperfect obligation is exactly equal to no obligation at all, for the term imperfect denotes that the law wants the sanction appropriate to laws of the kind."[256] Therefore, a genuine threat of sanction for failure to comply with an obligation is necessary for a law to be perfect in the legal sense. Conclusively, this means that law without sanction is not law.

In Kelsen's 1935 pamphlet *The Legal Process and International Order*, the author writes important remarks about his view on sanctions and the international legal order. Reflecting the pessimistic feeling of the time, in a Europe that was arming itself for a future great war, Kelsen wrote about sanctions, the international legal order, and war. At the start of the pamphlet, Kelsen announces that "all law is, in essence, a system of compulsion."[257] He adds that law is an instrument of social technology of quite a specific coercive character, and it is always a means and not an end—bringing about or maintaining a specific social condition.[258] Importantly, echoing Austin's considerations, he states that:

253. Mitchell, *supra* note 224, at 261.

254. Brian Bix, *John Austin*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2021), https://plato.stanford.edu/archives/spr2021/entries/austin-john/ (last visited Aug. 13, 2021).

255. JOHN AUSTIN, AUSTIN: THE PROVINCE OF JURISPRUDENCE DETERMINED 33 (Wilfrid E Rumble ed., Cambridge Univ. Press, rev. ed. 1995).

256. *Id.* at 33.

257. HANS KELSEN, THE LEGAL PROCESS AND INTERNATIONAL ORDER 8 (1935).

258. *Id.*

> [I]f international law is authentic law, law in the same sense as the juridical systems of individual States, then it must, just like these systems, be a system instituting compulsion; it must obligate the States which are subject to this law to a specific rule of conduct, and lay down a definite sanction to meet the case that a State may not proceed in that fashion…If in the international system which exists already in a positive form there were no such act of coercion in evidence…then indeed there could be no question of an international law in the real sense of the term.[259]

Kelsen adds that an international law without a system of sanctions would amount to a system that had not reached the first step of evolution—in the pattern of the development of States, necessary to attain a "state of peace."[260] He concludes that, fortunately, there are two types of sanction in international law: war and reprisals.[261]

Traditionally, in international legal scholarship, reprisals were seen as a response by one State to a breach of international law made by another State. Therefore, it was considered an exceptional breach of international law under this very specific circumstance.[262] Kelsen was drawn to this notion of an act that had the character of a legal instrument—employed by a State whose legally protected interests had been violated—and harmonized it with his theory.[263] In the logic of the pure theory of law, reprisals were seen as an instrument of enforcement of international law—flowing as a sanction to an illegal act. This was important for Kelsen to prove that international law was "law"—a coercive order. Conclusively, Kelsen defines a reprisal as a limited interference in the normally protected sphere of interests of another State, only admissible as a reaction against a wrong committed by the latter that has been universally accepted and forms an

259. *Id.* at 8-9.

260. *Id.* at 9.

261. *Id.*

262. BERNSTORFF, *supra* note 218, at 87.

263. *Id.*

undisputed part of positive international law—constituting a sanction against a delict that breaches international law.[264]

For undertaking the theoretical backing for justifying wars as sanctions, Kelsen had a more challenging task. To do this, the jurist formulated the just war (bellum justum*)* doctrine in his Oliver Wendell Holmes Lectures of 1940-41. Since this theory was mostly rejected by positive scholars of the time, he dedicated himself to producing five arguments that would defend the theory from further scrutiny.[265] The first argument is quite controversial since it comes from outside of Kelsen's pure theory of law. Kelsen proposes that it is important to analyze historical manifestations of the will of the States, such as diplomatic documents, especially declarations of war and treaties between States. In Kelsen's words, "All of these [documents] show quite clearly that the different States, that is to say, the statesmen representing them, consider war an illegal act, in principle forbidden by general international law, permitted only as a reaction against a wrong suffered."[266] Therefore, such a proposition would prove the existence of a "legal conviction" of the theory of just war. He adds that the justification of a State waging war is very important for the theory. For the justification of a State to wage war, it needs to consider the act of war for a good and just cause—showcasing that on the whole, national and international public opinion disapproves of war and permits it exceptionally under a "just" cause.[267]

Needless to say, such appeal (which Kelsen classifies as of a moral nature)—and its important place as the first argument of the theory, showcases a very radical rupture from the tenants of the pure legal theory of law, which always emphasized the relative character of morality— goes so far as to claim that relative morals cannot render the function to provide a standard for a positive legal order.[268] This appeal for morality is even more exposed when Kelsen concludes his first argument by stating that "even if such justification is of a moral rather

264. KELSEN, *supra* note 14, at 33-34.

265. Rigaux, *supra* note 13, at 335.

266. KELSEN, *supra* note 14, at 36-37.

267. *Id.* at 37.

268. KELSEN, *supra* note 216, at 67.

than strictly legal significance it is of great importance; for, in the last analysis, international morality is the soil which fosters the growth of international law."[269] Further in this article, this position will be analyzed to better understand the influence of jusnaturalism in Kelsenian positivism and its effects on a possible understanding of jus cogens.

The second argument for the just war theory is a more familiar positivistic argument. Kelsen claimed that under Article 231 of the Treaty of Versailles, it was recognized that Germany and its allies were responsible for an act of aggression.[270] This article shows how an act of war "imposed" without sufficient reason, against the Allied and Associated Governments, was considered illegal.[271] The consequence was that Germany had the duty to make "reparations" for illegally causing damages—without it having been wronged by the Allied powers. Kelsen also mentions Article 15, paragraph 7, of the Covenant of the League of Nations, which permitted "members of the League, under certain conditions, to proceed to war against other League members, but only 'for the maintenance of right and justice.'"[272] Kelsen also mentions the Kellogg Pact, which would forbid war, "but only as an instrument of national policy."[273] Thus, by exposing these instruments, Kelsen had the intention of showing indications of a bellum justum trend in general international law.[274] With the advent of the Charter of the United Nations, Kelsen ended up adjusting his theory—while still regarding war as lawful only when constituting a sanction, the nature of the delict has changed; lawful war had to be a response against an illegal war, a counterwar.[275]

Kelsen's last arguments relied on notions alien to the theory of pure law. Namely, they were products of sociological investigations made by Kelsen in another work of the same period, *Society and*

269. KELSEN, *supra* note 14, at 37-38.

270. *Id.*

271. *Id.* at 38.

272. *Id.* at 39.

273. *Id.*

274. Rigaux, *supra* note 13, at 336.

275. YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 69 (2012); HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 33-34, 377 (1952).

Nature.[276] These were the law of primitive communities and the concept of international law as a primitive legal order. These arguments are important to elaborate on the modifications of Kelsen's positivism and their consequences on natural law concepts such as jus cogens.

B. *The International Legal order as Primitive Law*

To better understand Kelsen's conception of international law and the importance of morality and sanction, it is necessary to examine his socio-juridical conception of the international legal order as a type of "primitive law." In his view, international law was primitive compared to domestic law, since the former did not possess a centralized binding organ for the emission of sanctions.[277] Therefore, as a product of his sociological writing *Society and Nature* and inspiration from the writings of anthropologists Arthur S. Thompson and A. R. Radcliff-Brown about the Maori people of New Zealand and Australia, Kelsen elaborates on the theory of just war being present in primitive law.[278]

Kelsen starts by noting how primitive societies do not possess the dualism of nature and society—thus, a violation of social order will not be vindicated by the group itself through a socially organized reaction.[279] If a murder is committed within one's group, the first sanction applied is a "transcendental sanction," the idea that the spirit of the murdered individual would punish the murder by sickness or death.[280] However, if the murder of the victim was caused by a member of another group, then his relatives would feel obligated to avenge his soul. According to Kelsen, this would be the origin of the concept of "vendetta."[281] Consequently, a war between tribes or groups, an act of vendetta as a reaction against what was considered a wrong, is considered by Kelsen as the original form of a socially organized sanction.[282]

276. Rigaux, *supra* note 13, at 336.

277. BERNSTORFF, *supra* note 218, at 91.

278. KELSEN, *supra* note 14, at 42.

279. *Id.* at 41.

280. *Id.*

281. *Id.*

282. *Id.* at 42.

He adds that if the "original form of law must have been inter-tribal law, and, as such a kind of international law…the original inter-tribal law, was in its very essence, the principle of "just war."[283] For this conclusion, Kelsen cites the already referred anthropologists, claiming that for the Maoris "every war has an apparent just cause.[284] The motive may have been slight, but there was lawfulness for it."[285] Citing Radcliff-Brown, he writes that "the waging of war in some communities, as among the Australian hordes, carried out by one group against another that is held responsible for an injury suffered, and the procedure is regulated by a recognized body of customs which is equivalent to the international law of modern nations."[286] Kelsen concludes his first argument about primitive law by stating that these exposures prove that the principle of bellum justum (war as a sanction) have been conserved in this legal order—since it is primitive.[287]

The principle of self-help plays an important role in his argument of international law being primitive. In this sense, Kelsen repeats that international law lacks a coercive centralized organ charged with the application of legal norms to concrete instances—thus, an individual "whose legally protected interests have been violated is himself authorized by the legal order to proceed against the wrongdoer."[288] This is the definition of the principle of self-help. Every individual takes "the law into their own hands." [289] That is, international legal order neither has an executive power nor a binding court with powers of execution; organs able to establish the existence of delict and the enforcement of a sanction.[290] That does not mean that the individual is permitted to commit another crime to avenge his parent—the difference between murdering as a sanction and as a delict is very important

283. *Id.*

284. *Id.*

285. *Id.*; ARTHUR S. THOMPSON, THE STORY OF NEW ZEALAND 123 (1859).

286. A. R. RADCLIFF-BROWN, 2 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 179 (1930).

287. *Id.*

288. KELSEN, *supra* note 14, at 49.

289. *Id.*

290. *Id.*

to primitive society. Killing is only permitted if the "killer" acts as an organ of society—thus, the coercive measure is reserved to the group, being a monopoly of the tribe, though the application is decentralized.[291] Although it is considered a crude social order by Kelsen, it still is classified as a legal order, for it can be interpreted that coercive measures are the monopoly of the community. Curiously, Kelsen states that in the first step of evolution, blood revenge gives way toward the institution of courts and the development of a centralized executive power—like the "embryo in a woman's womb is from the beginning a human being, so the decentralized coercive order of primitive self-help is already law, law in status nascendi."[292]

Kelsen concludes that general international law, with its main legal technique based on self-help, can be interpreted in the same manner as primitive law is characterized by the institution of blood revenge or vendetta.[293] Thus, as the primitive man distinguishes between killing as a delict and killing as a sanction, it is necessary to distinguish between war as a delict and war as a sanction in order to understand international law. Notably, Kelsen declares that this distinction in a concrete instance might be difficult, and in some cases even impossible. He adds that, "war, like vendetta, is technically insufficient as a sanction," without adding the technical content of such admission.[294] Furthermore, in the end of his second lecture of the Oliver Wendell Holmes series, he admits that the preference to the bellum justum theory is a "political decision," acknowledging that scientifically, a "diametrically opposite evolution of international relations is not absolutely excluded," adding that this theory promotes "the evolution we desire."[295] This recognition of a political desire for the defense of the bellum justum theory also marks the radical departure from the epistemological foundation of his pure theory of law.

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291. *Id.* at 50.

292. KELSEN, *supra* note 14, at 51.

293. *Id.*

294. *Id.* at 52.

295. *Id.* at 55.

C. *The Importance of International Morality as a Source of Law*

Naturalists such as Verdross strongly criticized positive law for its treatment of morality. Other naturalists like Lauterpacht understood that morality always played an important role in the positive legal system—filling gaps, giving direction to legal development, and understanding that positivist jurists were wrong to ignore this important concept and its influence on law.[296] Kelsen's initial relativistic approach was very cautious of the idea of morality. Because of the lack of absolute or universal morality, he considered it impossible to acquire an objective meaning to what ought to be moral.[297] Therefore, he concluded that the use of such a concept for international morality could be used to disguise ulterior motives and justify "ideological distortions of positive law by way of the moral argument." [298]

After the beginning of the Second World War, Kelsen started to devote more of his time to an "ideal of peace" and an "ideal of justice," as evidenced by his first presentation at the annual meeting of the American Society of International Law in 1941.[299] This devotion would continue onward and materialize in his 1944 book *Peace Through Law* where Kelsen had a goal to complete a "legal-institutional strategy" to attain a stable and universal peace among nations.[300] This pacifist idea is explicitly borrowed from Kant's ideal of perpetual peace, the federalist model, and "world citizenship" (Weltburgerrecht).[301] There, he innovated on the model of the League of Nations, proposing a world federation of States with its first members being the victors of the war, including the Soviet Union. The priority would be the central role of a binding international court of justice which would

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296. BERNSTORFF, *supra* note 218, at 253.

297. *Id.*

298. *Id.*

299. Andrea Gattini, *Kelsen's Contribution to International Criminal Law*, 2 J. OF INT'L CRIM. JUST. 795, 798 (2004); Hans Kelsen, *The Essential Conditions of International Justice*, in PROCEEDINGS OF THE 35TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 70, 72 (1941).

300. Danilo Zolo, *Hans Kelsen: International Peace through International Law,* 9 EUR. J. OF INT'L LAW 306, 317 (1998).

301. *Id.*

prevent States from having de facto competence to decide who is in breach of international law and to create access to recourse for war or reprisals—something that the League of Nations did not possess and was considered a "fatal error of design" by Kelsen.[302] Thus, the role of the superpowers would be to ensure the execution of the decisions of this international court with their inevitable superiority, within the convention of international law.[303]

Therefore, when Kelsen developed his theory of bellum justum, defending the role of war as sanction in international law, he defended a pacifist view and viewed as necessary a proactive belligerent approach to stop the illegalities of the Axis regimes in the Second World War. That is why he admits in his lectures that the theory of "just war" is a product of political preference and not a scientific, pure positivist one.[304] However, he consistently claimed when defending his theory that such doctrine validates general international law as a legal order, stating that "whether or not international law can be considered as true law depends upon whether it is possible to interpret international law in the sense of the theory of *bellum justum.*"[305] Thus, the premise that validates the international legal order is a political one, not a positive legal one. This is quite a blow to the epistemological foundation of the pure theory of law.

On his approach to morality, Kelsen is strongly influenced by naturalist ideas and early positivists. Austin once again is influential in this development, as one can see what the author wrote about international morality in his book *The Province of Jurisprudence Determined*. For Austin, because international law could not meet the essence of law being "command, duty and sanction," the latter could only constitute "positive morality."[306] A rule of positive morality is a norm generally observed by citizens or subjects which derives its only force from "the general disapprobation falling on those who transgress

302. *Id.*

303. Hans Kelsen, *Peace Through Law*, 2 J. LEGAL & POL. SOC. 52, 66-67 (1944).

304. KELSEN, *supra* note 14, at 54.

305. *Id.* at 52.

306. Mitchell, *supra* note 224, at 261.

it."[307] According to Austin, customary laws are rules of positive morality arising from the "consent of the governed, and not from the position or establishment of political superiors…but when turned into positive laws, customary laws are established by the State: directly when customs are promulgated in statutes or circuitously when customs are adopted by its tribunals."[308] Defining the concept of "positive international morality," Austin claims that they mean rules "actually obtained among civilized nations in their mutual intercourse, with their own vague conceptions of international morality as it ought to be; rather than the "wrong assumption" made by Grotius and Puffendorf that define it as an "indeterminate something which they conceived it would be if it conformed to that indeterminate something which they call the law of nature."[309] Austin opposes the naturalists' claim to determine international morality, asserting that the primary interpreters of this concept should be the States themselves in their practical interactions with one another, possibly through treaties, international relations, and diplomacy.[310] In that sense, Austin goes as far as to say that university departments of "positive international law" should be named "positive international morality."[311]

Surprisingly, when Kelsen defends his theory of bellum justum, he cites naturalist authors that greatly influenced Verdross's theory of jus cogens such as Grotius, Thomas Aquinas, Saint Augustine and Isidoro de Sevilla; mostly catholic authors heavily influenced by a Christian concept of morality in their views of "just war."[312] Kelsen emphasizes that Grotius considered a just cause for war in natural law, being a wrong or injury received—something that Kelsen notes disappeared from positive international law during the nineteenth century, "although it still formed the basis of public opinion and of the political ideologies of the different governments."[313]

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307. AUSTIN, *supra* note 240, at 35.

308. *Id.* at 36.

309. *Id.* at 160.

310. *Id.*

311. *Id.*

312. KELSEN, *supra* note 14, at 44.

313. *Id.* at 44-45.

When Kelsen emphasizes the role of State governments' manifestations and public opinion on the justification of a "just war," he is clearly referencing Austin's definition of "positive international morality," since he is using as a source the mutual intercourse of States and their abstract conceptions of morals as justification for bellum justum. That is why he admits that although his defense of the just war doctrine might be a moralist argument, international morality determines the direction of the development of international law through States in the Austinian logic.[314] This conception will be considered later when analyzing State natural law influences on the United Nations Convention against Torture (UNCAT) and the consequent impact on the jus cogens character of the prohibition of torture.

Conclusively, Kelsen's pure theory of law when faced with the validity of the theory of bellum justum can be threatened in its theoretical foundations, since the just war doctrine opens itself to the influence of morals and politics for the validity of the international legal order. In an attempt to protect the foundations of his pure theory with this shift, Kelsen relied on the modified version of his grundnorm, "[s]tates ought to behave as they have customarily behaved" (emphasizing customary law) and conflated the idea of morality and customary law (just causes for war accepted by custom).[315] This way the reception of metalegal norms could be explained by customary law, paving its way to the future acceptance of peremptory norms grounded on international morality—the source of international law.

VI. THE UNITED NATIONS CONVENTION AGAINST TORTURE

A. *The Positive Interpretation of Torture*

This subchapter illustrates how the legal positive interpretation of law is important for the identification of human rights violations. Although its restrictive wordings can limit the protective scope of a human rights convention, it gives legal certainty for due process obligations in judicial proceedings of possible prosecutions or defense of perpetrators. In this case, the subchapter will define the elements that

314. *Id.* at 38.

315. *Id.*

constitute the act of torture, and posteriorly, how the sources of such prohibition do not possess the same positive nature. Additionally, the example of the peremptory norm prohibiting torture will be assessed for metalegal influences on its interpretation through case law and general comment. This chapter will aim to answer the following sub-question: How does the Prohibition of Torture exemplify the international moral source of the International Legal System? Posteriorly, the research question that investigates whether Kelsen's or Schwarzenberger's interpretations better explain jus cogens principles in relation to the prohibition of torture, will be answered based on the information found in this and the next chapter.

In its first article, the UNCAT defines the act of torture as the following:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
>
> This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.[316]

The mentioned article is considered the first provision in an international treaty which defines torture.[317] It was used as a model for Article 2 of the Inter-American Convention to Prevent and Punish Torture adopted in 1985. It lists as the three main elements of the definition of torture as: (1) pain or suffering that must be severe; physical or mental; (2) inflicted for a certain kind of purpose, that is, the

316. UNCAT, *supra* note 16, art. 1.

317. NOWAK & MCARTHUR, *supra* note 17, at 28.

sort of public purpose traditionally associated with torture; and (3) inflicted by or under the aegis of public officialdom.[318]

Regarding the first criteria, for an act to be considered "torture," it must cause a considerable amount of pain (mental or physical) and suffering. This was the case at the drafting of the UNCAT, as the word "severe" was utilized by both the Swedish and IAPL drafts.[319] While the US and UK Governments wished to distinguish even more the threshold of torture by adding the word "extremely" before "severe," the Swiss government advocated that there should be no distinction between torture and inhuman treatment as to the severity of the suffering.[320] This latter position echoed the approach made by the European Commission of Human Rights in the *Greek Case,*[321] where the Commission found that the purpose of conduct distinguishes "torture" from " inhuman suffering" and not the severity of pain. Utilizing the same rationale, the Commission defined the British interrogation techniques used against suspected terrorists in the *Northern Ireland Case* as torture.[322]

The more cautious approach of the US and UK during the draft sessions represented the same approach used by the European Court of Human Rights (ECtHR) in the 1978 judgment of the *Northern Ireland Case*.[323] In that decision, the ECtHR understood that to be defined as torture, an act of particular intensity and cruelty "implied by the word torture as so understood" must be realized.[324] When defining torture, the Court made reference to the 1975 Declaration's use of the

318. NIGEL S. RODLEY, INTEGRITY OF THE PERSON, IN INTERNATIONAL HUMAN RIGHTS LAW 170 (Daniel Moeckli et al., eds., . 2018).

319. NOWAK & MCARTHUR, *supra* note 17, at 67.

320. *Id.*

321. *The Greek Case* (Den. v Greece, App. No 3321/67, Nor, v. Greece, App. No. 3322/67, Swed. v Greece, App. No. 3323/67, Neth. v Greece, App. No. 3344/67), Eur. Comm'n on H.R. (1969).

322. Ir. v. U.K., App. No. 5310/71, Eur. Comm'n H.R. Dec. & Rep. 410 (1976).

323. Ir. v U.K., App. No. 5310/71 (Jan. 18, 1978).

324. *Id.* ¶ 167.

term "aggravated."[325] However, the UNCAT deleted the term, defeating the US and UK positions.[326]

Therefore, although constituting an essential element of the definition of torture, the severity of the pain or suffering is not a criterion distinguishing torture from cruel and inhuman treatment.[327] As a result, for cruel and inhuman treatment to be considered torture, the other criterion needs to be analyzed. The *Dragan Dimitrijevic Case* applied this rationale when the CAT found "severe pain or suffering intentionally inflicted by [Serbian] public officials in the context of the investigation of a crime" while under detention.[328] Without analyzing the severity of the pain inflicted, the Committee found that the applicant had been subjected to torture in violation of Article 2(1) in connection with Article 1 since it also filled the other criterion.[329]

The second criterion required for the classification of torture is purpose, meaning that the severe pain or suffering applied must serve a specific purpose for the agent. The text of the UNCAT has the words "for such purposes as" being understood as a narrow interpretation of the purpose, characterized by the examples set in the text.[330] These include: (1) extracting a confession; (2) obtaining information from the victim or a third person; (3) punishment; (4) intimidation and coercion; and (5) discrimination. These stated purposes are linked to the interests or policies of the State and its organs because, as the following criterion sets out, public officials must carry them out under the guise of public officialdom.[331] Therefore, in theory, sadistic reasoning

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325. NOWAK & MCARTHUR, *supra* note 17, at 68.

326. *Id.*

327. Nigel S. Rodley, *The Definition(s) of Torture in International Law*, 55 CURRENT LEGAL PROBS. 491 (2002).

328. *Dragan Dimitrijevic v. Serbia & Montenegro*, CAT/C/33/D/207/2002, U.N. Comm'n Against Torture, ¶ 5.3 (2004).

329. *Id.* ¶ 6.

330. NOWAK & MCARTHUR, *supra* note 17, at 75.

331. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 119 (1988).

for the infliction of severe pain in a detainee by a public official would not constitute torture. However, such behavior would probably be found within the scope of the UNCAT "if there was an additional element of punishment or intimidation, and acquiescence by the State."[332]

The third criterion utilized by the committee to define torture is the involvement of a public official. The rationale of the 1975 Declaration and originally the Swedish draft was written as "by or at the instigation of a public official," reflecting the classical view that States could only be found in breach for human rights violations when committed by State actors.[333] Several States such as Barbados, France, Panama, and Spain defended an extension of the definition to include private individuals—since the purpose of the Convention was to pressure State parties to use their domestic criminal law to punish perpetrators of torture.[334] The pressure from other governments, represented by the United States, the United Kingdom, Morocco, and Austria, on the traditional view of State responsibility, compelled the Working Group to propose a compromise. This proposal extended State responsibility to encompass the "consent or acquiescence of a public official."[335]

The Committee understood that factions that have set up quasi-governmental institutions and "negotiate the establishment of a common administration" were persons acting in an official capacity.[336] While the term "instigation" offers a quite narrow interpretation of the act of inciting directly or indirectly, by a public official, in the act of torture, the terms "consent" or "acquiescence" are more controversial.[337] In the interpretation of the United States, the term requires that a public official, prior to the act of torture, have knowledge of this act and therefore, breach his responsibility to intervene or prevent such action.[338] The term "other person acting in an official capacity"

332. *Id.*

333. NOWAK & MCARTHUR, *supra* note 17, at 77.

334. *Id.* at 77.

335. *Id.*

336. *Id.* ¶ 6.5.

337. *Id.* at 78.

338. *Id.*

resembles the de facto authorities which, according to Article 7(2)(i) of the ICC Statute, can be held responsible for the crimes of enforceable disappearance. In the *Elmi Case*, the Committee Against Torture (CAT) decided that the return of a Somali national to his home country was a breach of the UNCAT since he had a substantial risk of being tortured by the rival Hawiye clan.[339]

Although the criteria for the interpretation of torture is defined by the UNCAT and the case law of the CAT, there is still great uncertainty regarding other natural law concepts of the UNCAT. This is the case of the source on the prohibition of torture in the UNCAT: the principle of the inherent dignity of the human person.

B. *The Principle of Human Dignity and Historical Interpretations*

The preamble of the UNCAT reads as follows:

> The States Parties to this Convention,
>
> Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
>
> Recognizing that those rights derive from the inherent dignity of the human person,
>
> Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,
>
> Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

339. *Sadiq Shek Elmi v. Austl.*, CAT/C/22/D/120/1998, U.N. Committee Against Torture (CAT), May 25, 1999, available at https://www.refworld.org/cases,CAT,3f588eda0.html.

> Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,
>
> Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,
>
> Have agreed as follows[340]

It has been stated in Article 31 of the VCLT that the general rule of interpretation of a treaty shall be the principle of good faith "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[341] Featuring in Article 31(2) of the VCLT, preambles are given the status of primary interpretative resources of Article 31, conclusively defining them as part of the text: "the main focus of its interpretative approach and an obligatory factor in the text-and-context analyses."[342] Although they are considered part of the text of treaties for interpretational reasoning, preambles are used mostly for the analysis of a treaty's object and purpose. This analysis is considered by the VCLT in the same Article 31 as a legitimate and mandatory interpretative approach for treaty evaluation and is readily accepted by international tribunals.[343]

In the UNCAT, the working group unanimously adopted an extensive preamble proposed by the Swedish draft of 1980.[344] The preamble exposes the obligations of State parties in the context of the principles found in the Charter of the United Nations and it showcases the natural law influences of its human rights contents. It is mostly

340. UNCAT, *supra* note 16, at preamble.

341. Vienna Convention on the Law of Treaties, *supra* note 6, at art. 31.

342. Max Hulme, *Preambles in Treaty Interpretation*, 164 UNIV. OF PENN. L. REV. 1282, 1298 (2016).

343. *Id.* at 1300.

344. NOWAK & MCARTHUR, *supra* note 17, at 18.

based on the preamble of the Declaration against Torture from 1975.[345] It reiterates the absolute prohibition of torture and cruel, inhuman, and degrading treatment contained in Article 5 of the Universal Declaration of Human Rights (UDHR) and Article 7 of the International Covenant on Civil and Political Rights (ICCPR).

The second paragraph contains an important passage for the identification of natural law's influence on the prohibition of torture. It defines the source of "the equal and inalienable rights" shared by all human beings as the "inherent dignity of the human person."[346] According to Nowak and McArthur, the scope of the UNCAT was defined by the Swedish delegation as being the same as the mandate given by the commission when drafting the principles of the 1975 Declaration against Torture.[347] This position was confirmed by the UN General Assembly's Resolution 32/62 which requested a draft of the UNCAT "in the light of the principles embodied in the 1975 Declaration." [348] Article 2 of the 1975 Declaration against Torture connected the act of torture to the principle of human dignity with the following words:

> Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.[349]

This means that the source for the jus cogens obligation to protect individuals from torture is the metalegal and non-positive concept of "human dignity" important for the analysis undertaken in this investigation. Therefore, any act of torture constitutes a direct and deliberate attack on the dignity of the human person according to Article 2 of the 1975 Declaration and the Preamble of the UNCAT. But how should this "inherent dignity of the human person" be understood?

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345. *Id.*

346. UNCAT, *supra* note 16, at preamble.

347. NOWAK & MCARTHUR, *supra* note 17, at 18.

348. *Id.*at 22; G.A. Res. 32/62 (Dec. 8, 1977).

349. G.A. Res. 32/62 (Dec. 8, 1977) at art. 2.

When the Universal Declaration of Human Rights was being drafted, Eleanor Roosevelt hosted a tea party in her New York apartment, attended by several members of the U.N. committee charged with producing the Declaration. As written in her diary, Chang, a philosophy professor from China, and Charles Malik, a Lebanese Christian philosopher, launched into a vigorous debate about the philosophical foundation of human rights contained in the document.[350] While Chang defended a pluralist approach, Malik took a more universalist stance. The debate proceeded to include a deep discussion on Aquinas and Confucius, while Roosevelt admitted that she was completely lost and turned her attention to refilling tea cups.[351] This episode came to illustrate how these debates could actually endanger the making of such a revolutionary declaration, showcasing Roosevelt's political pragmatism, who understood that all could be lost if the delegates had to figure "who got it right."[352]

However, such a decision had long-lasting consequences on the definitions of sources of human rights and the universalist-pluralist debate. Cass Sunstein, a legal scholar, wrote that these accords were "incompletely theorized agreements" based on vague and undefined notions that could properly explain them.[353] Similarly, in a UNESCO-led symposium on the philosophical interpretations of human rights, Jacques Maritain, a French philosopher, claimed that philosophers from radically different traditions had agreed on a list of common human rights as long as nobody asked them "why."[354] This issue arose once more when several Latin American delegates proposed inserting a reference in the UDHR about God in the Declaration's preamble.[355] The majority of the delegates refused the proposal, claiming that it

350. ELEANOR ROOSEVELT, ON MY OWN 77 (1958).

351. *Id.*

352. David Luban, *Human Dignity, Humiliation, and Torture*, 19 KENNEDY INST. OF ETHICS J. 211, 212 (2009).

353. *Id.*

354. JACQUES MARITAIN ET AL., FORWARD OF HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS 1 (Columbia Univ. Press 1949).

355. Luban, *supra* note 324, at 212.

could divide nations on religious grounds.[356] Instead, the foundation of the UDHR would be: human dignity. Other important treaties, such as the UN Charter and the Charter of Human Rights of the European Union, also invoke human dignity as the main element in which human rights are based and supposed to protect.[357]

According to Luban, human dignity is not a culturally-neutral term that means the same thing in different traditions—it is primarily a European conceptualization.[358] Historically, the first instance of human dignity, conceptualized as dignitas hominis in the Roman tradition, meant status.[359] Thus, it corresponded to an accorded quality of honor and respect conferred upon someone who was worthy of that treatment due to status. For example, an appointment to some public offices brought dignitas with it. This quality was not only confined to humans but to institutions and the State itself.[360] Only in secondary fashion, found in *Cicero*, did a broader concept of dignitas exist.[361] The term referred to the dignity of Men based on human nature and not on status. The contrast was made with animals, whose natural instincts were deemed inferior to the human capacity to rationalize their surroundings.[362]

During the medieval period, there were many debates regarding the relationship between Man and God. The idea of dignitas here took a similar position as in *Cicero*, differentiating humans from other animals.[363] Humanists emphasized that mankind possessed dignity because according to Jewish and Christian religion, Man was made in the image of God.[364] In a more practical application, Hugo Grotius

356. *Id.*

357. *Id.* at 213.

358. *Id.*

359. Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights,* 19 EUR. J. OF INT'L LAW 656 (2008).

360. *Id.* at 657.

361. MARCUS TULLIUS, CICERO, DE OFFICIIS BOOK I 33-35 (1887).

362. McCrudden, *supra* note 330, at 657; MARCUS TULLIUS, CICERO, DE OFFICIIS BOOK I 33-35 (1887).

363. McCrudden, *supra* note 330, at 658.

364. Luban, *supra* note 324, at 213.

wrote about the protection of the inherent dignity of man when handling the remains of slain enemies, emphasizing the importance of funeral rites to protect the human body from being "devoured by beasts of prey" since the "dignity of man" surpassed other creatures.[365]

The further development in the concept of human dignity occurred in an environment influenced by the rational ideas of the Enlightenment. During that time, man's autonomy became the essential premise of modernity, with his capacity to be the "lord of his fate and the shaper of his future."[366] This is further illustrated in Kant's usage of the term, which associated dignity with treating individuals as an "end in himself" and not as "means to ends."[367] Kant represented a resolutely secular view of dignity, providing morality with a non-theistic foundation and focusing on the autonomy of the individual.[368] Later on, it was Republicanism that endorsed this concept, with the French Revolution of the 18th century extending "dignities" (once the monopoly of the aristocracy) to every citizen with the important principle of equality in Article 6 of the 1789 Declaration of the Rights of Man and of the Citizen.[369] It was later used as the basis for the abolition of slavery in the Americas, exemplified by Simon Bolivar, who claimed that slavery was a violation of human dignity.[370]

During the 19th century in Europe, the constant usage of the concept of dignity in the political discourse was met with criticism. Schopenhauer condemned the use of human dignity as contentless.[371] Karl

365. McCrudden, *supra* note 330; HUGO GROTIUS, DE JURE BELLI AC PACIS, BOOK II 655, 658 (A. C. Campbell trans., London, 1814).

366. *Id.* at 659; Bognetti, *The Concept of Human Dignity in European and U.S. Constitutionalism,* in EUROPEAN AND US CONSTITUTIONALISM 75, 79, (G. Nolte ed., Science and Technique of Democracy No. 37 2005).

367. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 90, 96-97 (Herbert James Paton ed. & trans., Hutchinson 1976) (1948/1785).

368. Meir Dan-Cohen, *A Concept of Dignity*, 44 ISR. L. REV. 11 (2011).

369. Declaration of the Right of Man and the Citizen, Art. 6 (Aug. 26, 1789).

370. Simón Bolivar, Message to the Congress of Bolivia (May 25, 1826).

371. McCrudden, *supra* note 330, at 661; ARTHUR SCHOPENHAUER, THE BASIS OF MORALITY, PT. II, CRITIQUE OF KANT'S BASIS OF ETHICS. (A. B. Bullock trans., 2005).

Marx denounced the use of the concept of dignity as an obstacle to socialism, stating that it was a "refuge from history in morality."[372] As a response to these critiques, the Catholic Church decided to adopt the notion of human dignity as a guiding concept for its social teaching at the end of the 19th century. This formulation was seen as a reaction to the threat posed by communism, class war, and totalitarianism. Its content was mostly the emphasis on the "limits of rights in being able to capture the full range of what was necessary to human well-being," the threat of conflictual politics, and the need for solidarity between all the different interests in society, ensuing in a collective concept of human dignity.[373] This conception, however, still held as its starting point, the creation of Man in the image of God as a key element—drifting away from the more secular view of Man as a political and social animal.

According to McCrudden, an influential scholar who espoused this doctrine was the already mentioned Jacques Maritain, a French Catholic philosopher and constant presence at the drafting of the United Nations Charter and the UDHR.[374] His philosophy promoted "a vision of Aquinas fit for modern society."[375] Thus, a central element of his doctrine was the concept of human dignity, which was understood by Maritain as an undisputable metaphysical fact and moral entitlement important to the political and relational spheres of human life, not just its essence.[376] This view characterized human rights as not of radical ethical individualism but as essential for the promotion of communal good.

Currently, the concept is used to justify main human rights texts after the horrors of the Holocaust perpetrated during World War II. It has been used as a basis for the fight against poverty, reproductive rights, genetic manipulation, and the critique of totalitarian communist

372. KARL MARX, MORALISING CRITICISM AND CRITICAL MORALITY, A CONTRIBUTION TO GERMAN CULTURAL HISTORY CONTRA KARL HEINZEN (Deutsche-Brüsseler-Zeitung Nos. 86, 87, 90, 92, & 94, 1847).

373. McCrudden, *supra* note 330, at 662.

374. *Id.*

375. *Id.*

376. *Id.*

States.[377] Therefore, it still holds great importance in the legal and political discourse of today.

C. *Human Dignity and its Legal Content*

Although initially considered a Western legal creation, there have been attempts to consider non-European and North American views of the concept, to rebuke a Western-centric imposition of the concept and assess its efficacy elsewhere. The doctrine of ius commune, as elaborated by Carozza, is an emerging global communal law of human rights represented by the concept of human dignity, with universal usage by State domestic courts serving as a "common currency of transnational judicial dialogue and borrowing in matters of human rights."[378] Carozza adds that this global ius commune has a symbiotic relationship with the domestic law of each jurisdiction, translating this universal value of human dignity into concrete relations with the positive laws of a given State—taking into consideration local law and culture due to its informal, flexible and pluralistic character.[379] Therefore, the author claims that its purpose is not to identify the best approach for a supposed universal application, but to embody the value of subsidiarity with its characteristic pluralism instead of uniformity.[380] In this way, encouraging a flexible adaptation of common principles to local scenarios in the service of universality instead of "by virtue of ideologies of transnational elites."[381]

377. *Id.* at 663.

378. Paolo G. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply,* 19 EUR. J. OF INT'L L. 931, 932 (2008).

379. Paolo Carozza, *"My Friend Is a Stranger": The Death Penalty and the Global Ius Commune of Human Rights,* 81 TEX. L. REV. 1082-1084, 1043 (2003).

380. Carozza, *supra* note 346, at 934.

381. Carozza, *supra* note 347, at 1085.

As Steinmann[382] and McCrudden[383] make clear, scholars such as Neuman,[384] Feldman,[385] and Schachter[386] have identified three basic elements to the concept of dignity in the adjunction of individual rights claims, regardless of cultural and geographic differences. These are the (1) ontological claim, (2) the relational claim, and (3) the limited-state claim. The ontological element refers to Man's unique qualities that are priceless, irreplaceable, and constitute the core of every individual's inherent dignity.[387] The relational claim correlates to the kind of treatment that is inconsistent with the inherent dignity, as proscribed by international and domestic legal systems.[388] Therefore, it emphasizes the relationship between the individual and the perceptions of his community, the social dimension of dignity, or the dignity of recognition. The third element is known as the limited-state claim, and it embodies the Kantian idea that the State should exist for the individual and not the opposite. Consequently, for the State to recognize the inherent human dignity, it is required to progressively provide existential minimum living conditions embodied in the second-generation social and economic human rights.[389]

McCrudden concludes with two findings: first, that the minimum core provides a relatively "empty shell" when facing different communities through their legislature and judges— each using the findings that are better for their understanding of the world.[390] However, the

382. Rinie Steinmann, *The Core Meaning of Human Dignity,* 19 POTCHEFSTROOM ELEC. L. J. 6 (2016).

383. McCrudden, *supra* note 330, at 679.

384. Gerald Neuman, *Human Dignity in United States Constitutional Law*, in ZURE AUTONOMIE DES INDIVIDUUMS: LIBER AMICORUM SPIROS SIMITIS 250 (Dieter Simon & Manfred Weiss eds., 2000).

385. David Feldman, *Human Dignity as a Legal Value: Part I,* PUB. L. 682 (1999).

386. Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. OF INT'L L. 848, 849-52 (1983).

387. Steinmann, *supra* note 350, at 6.

388. McCrudden, *supra* note 330, at 679.

389. Steinmann, *supra* note 350, at 7.

390. McCrudden, *supra* note 330, at 698.

examples utilized by the author are of highly contested issues in the adjudication of rights, such as abortion, the distribution of economic and social benefits, hate speech, euthanasia, and pornography.[391] Noting his limited array of examples, as Carozza would later point out, he concludes that there is no common substantive conception of dignity in judicial interpretation of human rights.[392]

Carozza replied to McCrudden's positions in a subsequent article and brought some findings of great value for the theme of the prohibition of torture. First, the content of the minimum elements contained in the

> [M]ost broad and general statement of the status and basic principle of human dignity have some important traction and are sufficient to exclude from reasonable consideration many political and social systems that, for instance, engage in gross and systematic violations of the life, liberty, integrity, and equality of their people.[393]

Therefore, the efficacy of this minimum core is better suited for issues that are extremely close to the inviolable core of human dignity such as uncontestable violations of human dignity: extrajudicial killings, systematic discrimination, arbitrary detentions, torture, disappearances, or inhumane prison conditions.[394] That is the reason why the minimum core provides an important toolbox for the analysis of cases involving torture, inhuman, and degrading treatment. Cases that bring legal and ethical dilemmas surrounding, for example, the end of life, are more present in jurisdictions where there are other advanced human rights concerns involved and where mostly minimal human dignity issues have already been surpassed.

D. *Human Dignity and the CAT: possible interpretations*

In case law, the definition of human dignity is something rarely seen in the CAT, although there is some information on issued general

391. *Id.* at 699-705.

392. *Id.* at 712.

393. Carozza, *supra* note 346, at 936.

394. *Id.*

comments and State reports. The *Northern Ireland Case* which greatly influenced the UNCAT, dealt with the concept of human dignity in its decision.[395] In a separate opinion, Judge Sir Gerald Fitzmaurice tackles the issue when defining the idea of degrading treatment under Article 3 of the European Convention of Human Rights (ECHR). He claimed that it:

> [I]ntended to denote something seriously humiliating, lowering as to human dignity, or disparaging, like having one's head shaved, being tarred and feathered, smeared with filth, pelted with muck, paraded naked in front of strangers, forced to eat excreta, deface the portrait of one's sovereign or head of State, or dress up in a way calculated to provoke ridicule or contempt.[396]

In this sense, the idea of breaching human dignity would amount to acts of humiliation which would intend to lower an individual's inherent qualities that constitute the core of their dignity, as ontologically argued in the core claims of dignity.

In its General Comment no. 3, the CAT aimed at explaining and clarifying the content and scope of the State obligation to ensure that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation, under Article 14 of the UNCAT.[397] The obligation to provide redress seeks to rehabilitate the victim of torture, identified in the relational claim as the social aspect of dignity. It serves as an attempt to repair the damage done to the individual's fundamental sense of dignity, as indicated in the initial element of the minimum claims. Thus, under item 4 of the General Comment, the CAT emphasizes the importance of victim participation in the redress process and its ultimate objective of restoring the victim's dignity—the concept of

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395. Ir. v U.K., App. No. 5310/71 (Jan. 18, 1978), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57506%22.

396. Ir. v. U.K., App. No. 5310/71, Eur. Ct. H.R., ¶ 27 (1978) (Separate Opinion of Judge Sir Gerald Fitzmaurice).

397. *See* U.N. Comm. Against Torture, General Comment no. 3, 2012: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: implementation of Article 14 by States Parties, U.N. Doc. CAT/C/GC/3 (Dec. 13, 2012).

dignity as understood by the Committee, although implicitly noted that "total" restoration is sometimes impossible.[398] This is further detailed in item 12, where the CAT states that the harm may never be fully recovered, but it shall be done as fully as possible irrespective of available resources of State parties and without postponement.[399]

Under item 16 of General Comment no. 3, the CAT discusses further satisfactions made to victims of torture, also encompassing the "right to truth."[400] It obligates the State to investigate the facts of the breach, to immediately cease any continuing violations, and to release a full and public disclosure of the truth to the extent that "such disclosure does not cause further harm or threaten the safety and interests of the victim" and people directly involved in the ordeal.[401] It also obligates the State to issue an official declaration or judicial decision mentioning the concept of restoring dignity, as well as the reputation and rights of the victim and persons directly connected to the case.[402] Similar to item 4, this disposition aims to restore the social aspect of human dignity—the "dignity of recognition," by apologizing and acknowledging responsibility of the human rights breach, thereby, symbolically humanizing the victim of a dehumanizing procedure.

In the same General Comment, the CAT directly mentions the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (Basic Principles and Guidelines) as a direct influence of the document, stating that it recognized the elements outlined there.[403] Indeed, in the *Basic Principles and Guidelines*, there are the typical mentions of human dignity within its preamble as the source of universal protection of human rights. However, under Item 10, there is a similar provision of the mentioned general comment, stating that victims should be "treated with humanity and respect for their dignity and

398. *Id.* at item 4.

399. *Id.* at item 12.

400. *Id.* at item 16.

401. *Id.*

402. *Id.*

403. *See* G.A. Res. 60/147, (Dec. 16, 2005).

human rights," ensuring their (and their family's) safety, physical and psychological well-being, and privacy).[404] Additionally, States are obligated to ensure that its domestic laws provide victims of trauma and violence with special consideration and care to avoid "re-traumatization."[405] Furthermore, under item 22(d), the *Basic Principles and Guidelines* define "satisfaction" as an official declaration or a judicial decision (as in item 16 of General Comment no. 3) restoring dignity and the reputation of the victim, once again echoing the relational claim of dignity or its social aspect.[406]

General Comment no. 4 of the CAT, which concerns itself with Article 3 (Non-Refoulement) of the UNCAT, barely mentions the concept, instead choosing to mention the breach of Additional Protocol I to the Geneva Convention as an example of an indication of a risk of torture when States are considering the removal of a person from their territory.[407] Article 75, paragraph 2, of the Additional Protocol I, prohibits civilians or military agents from committing "outrages upon personal dignity" exemplifying humiliation and degrading treatment, such as enforced prostitution and any form of indecent assault.[408] This provision seems quite similar to Judge Sir Gerald Fitzmaurice's interpretation of degrading treatment under the *Northern Ireland Case*, showing a humiliating and disparaging treatment worthy of lowering one's dignity.[409]

In the concluding observations of the CAT to the State report of Chad, the committee once again utilized the concept of dignity. The CAT welcomed the fact that the State party promulgated legislation to

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404. *Id.* at item 10.

405. *Id.*

406. *Id.* at item 22(d).

407. *See* U.N. CAT, General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, item 29(j), (Feb. 9, 2018).

408. *See* Int'l Comm. of the Red Cross [ICRC], *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* (Protocol I), 1125 UNTS 3, art. 75, para. 2(b) (June 8, 1977).

409. *See* Ir. v. U.K., App. No. 5310/71, Eur. Ct. H.R., ¶ 27 (1978) (Separate Opinion of Judge Sir Gerald Fitzmaurice).

eradicate female genital mutilation, early marriage, domestic violence, and sexual violence (which the CAT noted that a severe form of female genital mutilation, infibulation, was practiced in Eastern Chad).[410] However, the CAT demonstrated concern that there was widespread occurrence of traditional practices which violate the physical integrity and human dignity of women and girls; and that the legislation in question did not provide penalties or a decree giving effects to this norm.[411] In that case, the CAT showed concern to the ontological element of human dignity inherent to the women of Chad, which seem to be continuously threatened by traditional practices and weak legislation.[412] For this reason, the CAT requested that the State party focus on the "limited-State" claim of the minimum elements of dignity.[413] This requires the State party to progressively provide existential minimum living conditions to its female citizens, translating into the principle of equality. Thus, providing women the same legal protections as men through protective legislation to gender-discriminatory practices.

In the *Adam Harun v. Switzerland Case*, the CAT had to decide on a possible breach of Articles 3, 14, and 16 of the UNCAT as a consequence of Switzerland's attempt to deport an Ethiopian political advocate to Italy.[414] In the text of its decision, the CAT interprets the principle of non-refoulement as encompassing individuals exposed to risks other than torture, such as cruel, inhuman, and degrading treatment.[415] The source for this interpretation, according to the CAT, is the preamble of the UNCAT which justifies the prohibition of such acts as protection of human dignity. Furthermore, it explicitly

410. *See* U.N. CAT, Considerations of Reports Submitted by States Parties Under Article 19 of the Convention – Concluding observations – Chad, CAT/C/TCD/CO/1, item 30 (June 4, 2009).

411. *Id.*

412. *Id.*

413. *Id.*

414. *See Harun v. Switzerland,* U.N. CAT, Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 758/2016*, CAT/C/65/D/758/2016, ¶¶ 1.1-2.1 9 (Feb. 8, 2019).

415. *See id.* at ¶ 8.6.

mentions Article 5 of the UDHR and Article 7 of the ICCPR.[416] The Committee also directly mentions jurisprudence of the ECtHR in the *Saadi Case*[417] and the *Ramzy Case*[418] as exemplifying the mandatory nature of the prohibition of the transfer of an applicant to a State where he is at risk of torture or ill-treatment.

In the mentioned examples, it is possible to identify the concept of dignity as two different approaches: the first is the concept of human dignity as an abstract natural law justification for the human rights protection of the convention. This concept is used mostly in preambles, such as in the UNCAT, the *Basic Principles and Guidelines* but can be seen in the *Adam Harun v. Switzerland Case*, where the CAT uses it as a justification for the widening of the principle of non-refoulement. The second concept is present in individual rights claims as the object to be legally protected by the treaty. The three minimum concepts are used as interpretation tools in this case, encompassing the ontological, social, and developmental aspects that the State needs to fulfill. This is seen in the interpretation of Judge Sir Gerald Fitzmaurice in the *Ireland v. United Kingdom Case*[419], in the CAT's General Comment no. 3, item 16 and Article 75, paragraph 2, of the Additional Protocol I to the Geneva Convention.

Although the source on the prohibition of torture is not clearly defined by the Committee, the concept of dignity is used both as metalegal justification for the protection of individuals and as the object that requires restoration of victims. Therefore, it is possible to recognize that dignity plays an important role in the rehabilitation of a victim of torture in the form of redress. It is acknowledged that the dignity of the victim has been damaged and requires holistic restoration, be it through health care, official admission of guilt, an official apology, or long-term integrated monitoring of the victim. Furthermore, the metalegal aspect contained in the preamble exemplifies the natural law justification of the prohibition, meticulously cited when the CAT aims

416. *Id.*

417. *See Saadi v. U. K.*, App. No. 13229/03, Eur. Ct. H.R. (2008).

418. *See Ramzy v. Neth.*, App. No. 25424/05, Eur. Ct. H.R. (2008).

419. *See Ir. v U.K.*, App. No. 5310/71.

at justifying a wider interpretation of a concept, such as the principle of non-refoulement or the concept of redress.

VII. THE UNITED NATIONS GENOCIDE CONVENTION

A. *Historical Precedents*

The next prohibitive norm of jus cogens nature analyzed in this work is the prohibition of genocide. This instance of the peremptory norm will be assessed on its metalegal sources and case law interpretation. This will be done to examine if non-positive elements influence the consolidation of such norms, be it through case law or advisory opinions. Therefore, this chapter will aim to answer, "How does the Prohibition of Genocide exemplify the international moral source of the International Legal System?" The research question that investigates whether Kelsen's or Schwarzenberger's interpretations better explain jus cogens principles concerning the prohibition of genocide, will be answered based on the information found in this and the last chapter.

Similar to torture, the act of genocide is found in the history of ancient civilizations. For instance, during the Peloponnesian War, in 415 BC, the Athenians massacred "all the men of military age" on the island of Melos, a Spartan ally, selling all women and children into slavery.[420] In the 20th century, Raphael Lemkin, a Polish lawyer of Jewish descent, used the term "genocide" for the first time in his 1944 book *Axis Rule in Occupied Europe*.[421] He had recently immigrated to the United States due to World War II—in which he lost 49 members of his own family to the Holocaust.[422] An earlier response to genocide

420. William Schabas, *Genocide in International Law and International Relations Prior to 1948,* in THE GENOCIDE CONVENTION SIXTY YEARS AFTER ITS ADOPTION 8 (Eckart Conze and Christoph Safferling eds., 2010).

421. *See generally* RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS (The Lawbook Exchange, Ltd, 2nd ed. 2008).

422. Steven Leonard Jacobs, *Definitions and Concepts of Genocide: Lemkin and the Concept of Genocide,* in MULTIDISCIPLINARY PERSPECTIVES ON GENOCIDE AND MEMORY 12 (Jutta Lindert & Armen T. Marsoobian eds.,

was made in a declaration written on May 24, 1915 by three European powers (Great Britain, France, and Russia) concerning the systematic massacre of Armenians in the Ottoman Empire during World War I.[423] In the text of the declaration, the three powers pledged to hold the Ottoman Government "personally responsible" for the "new crimes" against "humanity and civilization" committed against Armenians.[424]

Greatly upset with the verdict of the Nuremberg trial, which limited its judgment to "wartime genocide" and did not include the notion of "peacetime genocide," Lemkin focused his efforts on expanding this interpretation.[425] He successfully launched a campaign in the first session of the United Nations General Assembly that led to the adoption of a resolution to condemn genocide as an international crime.[426] This resolution eventually launched the process that concluded two years later with the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide. The Convention entered into force in 1951, but remained obscure for several decades, due to the geopolitical tensions of the Cold War.[427] It was only in the 1990s that, due to a renewed interest in International Criminal Law, a "revival" of the Genocide Convention occurred.[428] This influenced new ideas and institutions such as the International Criminal Tribunal for the former Yugoslavia and the Rome Statute of the International Criminal Court.[429]

Springer Int'l Pub. 2018), https://doi.org/10.1007/978-3-319-65513-0_2 (accessed Oct. 27, 2021).

423. THE UN GENOCIDE CONVENTION: A COMMENTARY 5 (Paola Gaeta ed., Oxford University Press, 1st ed. 2009).

424. *Id.*

425. Schabas, *supra* note 378, at 20.

426. Schabas, *supra* note 378, at 20; G.A. Res. 95 (I), Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Trial, UN Doc. A/RES/1/96(1) (Dec. 11, 1946).

427. Schabas, *supra* note 378, at 21.

428. *Id.*

429. *Id.*

B. *The Genocide Convention and its Interpretative Developments*

In its preamble, the Genocide Convention states:

> Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world,
>
> Recognizing that at all periods of history genocide has inflicted great losses on humanity, and
>
> Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required.[430]

Echoing General Assembly's Resolution 96(I), the Preamble of the Genocide Convention gives away its main goal: the coordination of international response to genocide and the facilitation of a mixture of preventive and repressive acts to be undertaken by States.[431] However, according to Gaeta, a closer look at the State parties' obligations under the convention show that the mechanism put in place for curbing genocide was ineffective and could not eradicate this "odious scourge."[432] Most of the substantive provisions deal excessively with criminal suppression (Articles IV to VII) and only two provisions focus on the prevention of genocide.[433] Article I defines a generic obligation for States "to prevent and to punish" crimes of genocide, and Article VIII gives State parties the right to call upon the UN for appropriate "prevention and suppression" against acts of genocide.[434] Therefore, the focus of the Genocide Convention was on the ex-post

430. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 276 (entered into force Jan. 12, 1951).

431. NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION: A COMMENTARY 122 (1960).

432. THE UN GENOCIDE CONVENTION: A COMMENTARY, *supra* note 381, at 12.

433. *Id.*

434. *Id.* at art. I, VIII.

suppression over prevention including both political and military intervention.

Even as a criminal law tool, the convention has its shortcomings. Article VI of the Convention establishes that the territorial State or an international court shall prosecute the perpetrators of genocide.[435] Since it isn't uncommon for State parties to be unwilling or unable to prosecute (in the events of active participation by the territorial State or when the State lacks control over its territory during the act of genocide), this dispositive already has a weak arrangement. Moreover, the nonexistence of international criminal courts for almost 50 years greatly weakened the practical scope of the Convention.[436]

There was, however, a great interpretative change from the more positivist meaning of genocide when the ICJ rendered its Advisory Opinion on the legal effects of reservations to the Convention.[437] Of great importance to the naturalist conception of human rights, the Court held that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation."[438] And that because of the special characteristics of the Convention and the will expressed by the States and the United Nations General Assembly to punish genocide, a "denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations,"[439] the Convention possesses a universal

435. *Id.*

436. *Id.* at 13-14.

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

438. *Id.* at 23.

439. UN G.A. Res. 96(I), U.N. Doc. A/RES/96(I) (Dec. 11, 1946);

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

nature.[440] This moralist justification paved the way for the development of the erga omnes doctrine in international law obligations.[441] Furthermore, the Court held that the object of the Convention was "humanitarian and civilizing," justifying the expansive interpretation of other key provisions in order to maximize the effectiveness of the Convention.[442]

Another development relating to the interaction between the Genocide Convention and customary international law is found in the *Eichmann Case* decided by an Israeli District Court[443] and subsequently by the Israeli Supreme Court.[444] In its reasoning, the District Court stated:

> [T]here is no doubt that genocide has been recognized as a crime under international law in the full legal meaning of this term, *ex tunc*; that is to say: The crimes of genocide committed against the Jewish People and other peoples were crimes under international law. It follows, therefore, in the light of the acknowledged principles of international law, that the jurisdiction to try such crimes is universal.[445]

In its explanation, the Court stated that the convention had the function of codifying certain norms of customary international law, which emerged after World War II, and introduced new "contractual" obligations requiring State parties to prevent and punish perpetrators,

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440. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. Reports 15 (May 28) at 21.

441. Gaeta, *supra* note 381, at 15.

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

443. *The Att'y-Gen. of the Gov't of Isr.l v. Adolf, the Son of Karl Adolf Eichmann,* Crim. Case No. 40/61, Judgment (Dist. Ct. of Jerusalem, Dec. 11, 1961).

444. *The Att'y Gen. v. Adolf Eichmann,* Crim. App. 336/61, Judgment (Sup. Ct. of Isr., May 29, 1962).

445. *Adolf, the Son of Karl Adolf Eichmann*, Crim. Case No. 40/61, ¶ 19.

and to pass necessary domestic legislation.[446] Therefore, Article VI (jurisdictional competence) would have been one of these formal obligations whose creation did not negate the parallel existence of customary international legal norms (the Court regarded genocide as an international crime subject to universal jurisdiction). The same article did not apply to crimes that were practiced before 1948. Additionally, the Court stated that Article VI established a duty of the territorial State to prosecute and did not regulate the right of other States to bring criminal procedures.[447] Conclusively, the judgment proposed that the entry into force of the Convention did not prevent the parallel international custom existing in the matter, illustrating the potential effects that customary law had to complement "blind spots" of the Convention.

The 2005 Report of the International Commission of Inquiry on Darfur, entrusted by the UN Secretary-General as stated in Security Council Resolution 1564, further developed the interpretation of genocide away from the positive conception when determining whether acts of genocide occurred in Darfur.[448] The Commission concluded that interpretations made by ad hoc international criminal tribunals on the definition of protected groups under the Genocide Convention represented customary international law.[449] This showed once again the gap-filling approach that innovative interpretations had to the original text.[450]

Finally, the 2007 *Bosnian Genocide Case* decision issued by the ICJ was of extreme importance to the analysis of genocide. In that case, the Court had to analyze if the text of the Convention imposed directly on State parties a direct prohibition against committing genocide, and not just the obligation to prevent and punish relevant

446. Gaeta, *supra* note 381, at 17.

447. *Id.*

448. S.C. Res. 1564 (Sept. 18, 2004).

449. *Id.*

450. Gaeta, *supra*, note 381, at 18-19.

perpetrators.[451] The Court understood that a broad reading of Article I (prevention and punishment of genocide) was required and that other specific obligations did not make it a narrow interpretation— thus, complying with the purpose of the Convention. Furthermore, the Court found that the obligation to prevent and punish genocide is not restricted to the territory of the State party.[452] Echoing the universalistic tone of its 1951 Advisory Opinion, every State in the world can be considered under an obligation to exercise due diligence to prevent genocidal acts, exposing a controversial interpretative possibility of support to some humanitarian interventions.[453]

C. *The Naturalist Content of the widened scope of the Convention*

The already cited ICJ's Advisory Opinion on Reservations to the Genocide Convention showcased the move from a traditional consent-based system of international treaty law to a value centered one. In a very naturalist charged opinion, the Court stated that the object pursued by the convention is to prohibit a wrong that goes against moral law. The Court claimed that such principles were recognized as essential by civilized nations and had a universal character due to its moral importance to "liberate mankind from such an odious scourge"—citing the preamble of the Convention in its decision.[454] Claiming that it would detract from its "moral and humanitarian principle," the Court states that the possibility of reservations would "sacrifice the very object of the Convention in favor of a vain desire to secure as many participants as possible."[455] The ICJ directly mentions the consent-based doctrine of international law based on State sovereignty. Specifically, the ICJ claims that the Court "cannot share [that] view," and such doctrine would completely disregard the object and purpose of the

451. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. V. Serb. and Montenegro) Judgment, 2007 I.C.J. G.L. 91 (Feb. 26, 2007).

452. *Id.* ¶ 185.

453. Gaeta, *supra*, note 381, at 24.

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

455. *Id.* at 24.

treaty.[456] In other words, this view would implicitly state that such object and purpose held more importance than classical State sovereignty. According to Klaus, this recognition would leave it open to "curtail the principle of consensus in public international law, rooted in the 1648 Peace of Westphalia."[457] Moreover, "[n]ot only are all States bound by the genocide prohibition, but they are even barred from derogating or modifying it in the context of a treaty—a situation perfectly falling under the definition of jus cogens."[458]

In the 1970 *Barcelona Traction Case*, the ICJ dove deeper into the erga omnes concept by analyzing the nature of the laws that Spain had allegedly violated according to Belgium.[459] In the decision, the Court differentiated collective obligations, toward the international community, from individual State obligations. In the first type of obligation, all States had a legal interest in their enforcement, because of the importance of the rights concerned.[460] These were called the erga omnes obligations.[461] The Court proceeded to list the prohibition of genocide as one such obligation, classifying it as an erga omnes obligation, as part of general international law.[462] Specifically, the Court quoted the already mentioned paragraph of the 1951 Advisory Opinion which justifies the universality of the convention in moral law.[463]

In the 1996 *Nuclear Weapons Advisory Opinion*, the ICJ had to define whether the threat or use of nuclear weapons was prohibited by

456. *Id.* at 20.

457. *See* Julia Klaus, *The Evolution of the Prohibition of Genocide: From Natural Law Enthusiasm to Lackadaisical Judicial Perfunctoriness – And Back Again?,* 11 GOETTINGEN J. OF INT'L L. 89, 126 (2021).

458. *Id.*

459. *See Barcelona Traction, Light and Power Company, Ltd.* (Bel. v. Spain), Second Phase - Judgment, 1967 I.C.J. Report of Judgments ¶ 2 at 7, 201 (Feb. 5, 1970).

460. *Id.*

461. *See id.* at 32, ¶ 34.

462. *Id.*

463. *Id.*

international law.[464] More important for this investigation, however, is the importance of the definitions of *jus cogens and erga omnes in relation* to the prohibition of genocide. The decision cited a statement by the UN Secretary-General on the established customary law applied by the International Criminal Tribunal for the Former Yugoslavia (ICTY), which included the whole Genocide Convention.[465] Separate opinions written by judges helped clarify if that was an unconscious unification of jus cogens and customary law. Judge Ranjeva cited the prohibition of genocide as an example of customary law being formed by repeated State proclamations of "merely moral…[and] irreversible nature of their acceptance…."[466] Judge Weermantry considered the prohibition of genocide to be one of the fundamental rules of humanitarian character that did not permit derogation due to the negation of basic considerations of humanity that were meant to be protected.[467] Thus, norms of jus cogens would be legal norms of moral quality determined to be basic considerations of humanity. Judge Koroma proposed that it was the task of the ICJ to determine legal standards for the entire international legal system. Citing the 1951 Advisory Opinion, Judge Koroma stated that it was an example of how to exercise judicial legislating.[468] Thus, the ICJ would advance international law through naturalistic inquiries to determine moral facts that would ultimately become law.[469]

The *1996 Bosnian Genocide* judgement on preliminary objections saw the Court once again try to sharpen its interpretation of the

464. *See Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. Report of Judgments, Advisory Opinion and Orders ¶ 1 at 226, 227 (July 1996).

465. *See id.* at 258, ¶ 81.

466. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Reports at 294, 297 (Ranjeva, J. separate opinion).

467. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Reports at 429, 433 (Weeramantry, J. dissenting opinion).

468. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Reports 556, 573 (Koroma, J. dissenting opinion)).

469. Klaus, *supra* note 404, at 130.

prohibition of genocide.[470] In a moral approach, Judge Weeramantry determined that the prohibition had at its roots, the convictions of humanity in which the legal form was merely a reflection.[471] He proceeded to ground the universal binding nature on the prohibition of genocide on the right to life as the most fundamental human right on the "irreducible core of human rights."[472]

Therefore, in this chapter, it could be observed a quite important metalegal influence of natural law on the scope of the Genocide Convention. This is assessed through the advisory opinions and case law of the ICJ. The importance of this jus cogens prohibition is given through concepts out of the legal realm and highly value-oriented, such as "moral law" of the "civilized nations," which would serve as a justification for a superior normative, non-derogating, and universal convention for the whole international community.

VIII. THE SHIFT FROM CONSENT-BASED SYSTEM TO A VALUE-BASED SYSTEM

A. *The Inability of the Inductive Approach to Justify Peremptory Norms.*

In this chapter, the investigation will turn to the research questions and goals that guided this study. Through these reflections, it will be assessed (1) if the inductive approach familiar to traditional positivism can justify the developments of peremptory norms; (2) the importance of western morality as a source to norms of jus cogens nature and its reception by the Kelsenian doctrine of positive law, and (3) how the prohibition of torture and genocide exemplify this value-based system of international law.

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470. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), Preliminary Objections, 1996 I.C.J. Report of Judgments 595, ¶ 32 (July 11, 1996).

471. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 1996 I.C.J. Reports at 648 (Weeramantry J. separate opinion).

472. *Id.* at 652.

Foremost, Schwarzenberger's conception of the classical consent-based system of international law is quite clear. For the author, consensual understandings that materialize through legal treaties are the primary law-creating process in the international legal system, with its binding effects being a consequence of the principle of consent.[473] The evidence for that would be Article 38 of the Statute of the ICJ and the universal recognition of the so-called "operative rules of international law" or primary rules.[474] According to Schwarzenberger's view, principles could only be an overriding rule if they had been abstracted from these primary rules made by consent, and only if supported by empirical evidence.

The supremacy of consent for Schwarzenberger is illustrated when he argues that a treaty making piracy or slave-trading lawful between two States would be valid.[475] Although he contends that its effects would be extremely limited—as other States bound by international customary law could still sanction actors involved in such trades outside of their jurisdictions.[476] However, in their relations among the parties in the treaties, such effects would be valid. This position is defeated by the ICJ during the mentioned Advisory Opinion on Reservations to the Genocide Convention when the Court stated that the concept of State sovereignty could not lead to a complete disregard of the object and purpose of the Genocide Convention.[477] This meant that some objects and purposes were to be seen even above the classical concept of State consent and sovereignty. According to Klaus, this decision signifies a limitation on the principle of consensus in public international law, originally established by the Peace of Westphalia.[478] This change results from the impossibility of derogation or modification under the Genocide Convention, rendering the unlimited supremacy of consent a thing of the past.

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473. SCHWARZENBERGER & BROWN, *supra* note 151, at 24.

474. *See id.* at 34-35.

475. Schwarzenberger, *supra* note 12, at 464.

476. *Id.*

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

478. Klaus, *supra* note 404, at 126.

Strangely enough, when faced with the mentioned example of the treaty on piracy and slave trading, Schwarzenberger turns to a naturalistic condemnation of such a possibility. He contends that if a State would be a part of such treaties, it would be a symptom of a deeper malaise and it would no longer be regarded as part of the civilized community.[479] This value-driven argument, however, does not change the fact that his inductive approach permits such outcomings. Furthermore, it goes against his own approach to reject vague principles of subjectivism employed by naturalists and Grotians.[480]

Additionally, when criticizing the VCLT, Schwarzenberger alerts that dominant States were playing "power politics in disguise," creating a concept of peremptory norms that could be manipulated at their disposal to serve hidden interests and to diminish the efficacy of the traditional consent-based form of international law.[481] He also claimed that States could unilaterally invoke a jus cogens justification to not comply with burdensome treaties, thus, further restricting the consent of States.[482] Nevertheless, a logical problem affects the inductive approach when the author concedes that "power politics" are capable of creating new norms. The three primary law creating processes of the inductive approach do not contain the possibility of power politics for the conception of new norms—instead, it considers in its premise that every State is formally and materially equal when practicing consensual understandings. Therefore, for the inductive approach, a State cannot be made to consent by decision of third parties, irrespective of their geopolitical standings. The admission of this political phenomenon as law creating and the subsequent approval of the VCLT (which according to Schwarzenberger did not have any rationally verifiable criteria nor was it a possible abstracted principle) is a fatal blow to the inductive approach.

Finally, Schwarzenberger's concluding argument is that the lack of a centralized organ in an international society to exercise sanctions with compulsory jurisdiction, like municipal law, would render jus

479. Schwarzenberger, *supra* note 12, at 463.

480. Schwarzenberger, *supra* note 148, at 553.

481. Schwarzenberger, *supra* note 12, at 477.

482. *Id.*

cogens norms ineffective.[483] It is true that a more decentralized international order contains a greater political sensitivity for courts when defining a peremptory norm (thus its limited number) and tends to prioritize a conservative stance on Article 38 of the Statute of the ICJ in many cases—however, as practice shows, there is an increasing number of international decisions that define and utilize international jus cogens norms and are binding.[484] That became more evident when analyzing the case-law of the UNCAT, the metalegal principles of human dignity, and the widened scope of the prohibition of genocide in international case law. Furthermore, the existence of courts such as the ICTY and the International Criminal Tribunal for Rwanda and their subsequent sanction of perpetrators, shows that Schwarzenberger's idea of the total inefficacy of international courts is not valid anymore. It is undeniable that international agencies and courts possess efficacy with their rulings and sanctions on jus cogens violations.

Conclusively, it is possible to ascertain that the inductive critique of peremptory norms is incapable of explaining the existence and evolution of the norms of jus cogens in treaties and international case law. It was shown that even when recognizing a non-positive source of the law creation phenomenon, namely power politics, Schwarzenberger succeeded only in undermining the inductive approach's premises—still failing to justify the existence of this type of norm.

B. *Morality and Custom as the Possible Sources of Jus Cogens in the Kelsenian Theory*

It is beyond doubt that the concept of jus cogens was created by Verdross as a naturalist phenomenon influenced by the universalistic approach of the School of Salamanca—a Christian scholastic group headed by Francisco de Vitoria.[485] Therefore, the very foundation of these norms presupposed a universalistic metalegal reality alien to most positivist schools of thought. That is why Verdross criticized positivism as a dogma that wished to separate law from its "ethical mother soil," neglecting its moral basis and "realistic" analysis of

483. *Id.* at 476.

484. Gagnon-Bergeron, *supra* note 61, at 58.

485. Simma, *supra* note 52, at 38.

law.[486] However, when grounding the validity of peremptory norms, the naturalist author used the traditional conceptions of customary international law and Article 38 of the Statute of the ICJ.[487] His interpretation of the general principles of law found in the Statute, nevertheless, found harsh criticism by positivist authors such as Schwarzenberger and the early Kelsen, since it would not pass the empirical evidence requirement in contrast to customary international law.

Verdross called this type of jus cogens, the "general principle prohibiting States from concluding treaties *contra bonos mores*" (against good morals).[488] This prohibition would limit States from concluding treaties between juridical subjects, which are "obviously in contradiction to the ethics of a certain community," or in contradiction with the general principles of law recognized by civilized nations.[489] This prohibition currently finds its place in Article 53 of the VCLT, which makes a treaty void if at the time of its conclusion, it conflicts with a peremptory norm of general international law. The same article, like Verdross's conception, informs that this type of norm requires acceptance and recognition by the international community of States as a whole. This, of course, is no coincidence, as it was seen that Sir Lauterpacht decided for the reception of the concept and Sir Fitzmaurice accepted the moral contents—paving its way to the Draft Article on the Law of the Treaties.[490]

Interestingly, this naturalist concept is compatible with Hans Kelsen's later doctrinal developments reflected in the Pure Theory of Law, his departure from a consent-based approach of international law, and his Oliver Wendel Holmes lectures. This change of position is symbolized by Kelsen's modification of the Grundnorm of international law from the classical positivist pacta sunt servanda to the proposition that "States ought to behave as they have customarily behaved," a customary maxim that gained the position as the first stage

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486. Verdross, *supra* note 43, at 576.

487. *Id.* at 572.

488. *Id.*

489. *Id.* at 573.

490. Lange, *supra* note 39, at 831-32.

of international legal order.[491] However, it is in the Wendel Holmes lectures that Kelsen set the tone for a doctrine that seceded from the legal positivist school and embraces metalegal concepts for the understanding of international law.

When justifying the validity of his bellum justum doctrine, Kelsen develops an argument to explain how "general international law forbids war in principle," thus, relying on this prohibition in an abstract explanation.[492] To classify the act of war as a delict in international law, Kelsen begins by first examining historical manifestations of the will of the States—such as diplomatic documents, declarations of war, and treaties between States.[493] These manifestations could be compared nowadays with the opinio juris element of customary law, as it regards state practice to a legal obligation or the subjective belief of States that such behavior is law.[494] These manifestations would show that the different States, or the international community, would consider war an illegal act, in principle forbidden by general international law and permitted according to the author, only as a reaction (self-defense). Going even further, he adds that the press and other documents expressing popular opinion could also serve as proof that war was viewed as a delict. He admits that this criteria reflected on a moral element of the community, but justified it as crucial, since international morality would be the "soil which fosters the growth of international law," claiming that whatever is considered "just" in a sense of international morality has a tendency of becoming international law.[495] Surprisingly, this position is similar to Verdross's stance on the role that morality played in international law when criticizing the positivist school of law, as he claimed that morality was the ethical soil that could not be separated from law for a realistic analysis of the legal field.

To further justify his bellum justum doctrine, Kelsen tried to prove that humanity held these values ever since the existence of the

491. KELSEN, *supra* note 221, at 369.

492. KELSEN, *supra* note 14, at 36.

493. *Id.*

494. HERNÁNDEZ, *supra* note 1, at 35.

495. KELSEN, *supra* note 14, at 37-38.

most primitive societies, mentioning the customs of the Maoris from New Zealand and the Aboriginals of Australia as written by anthropologists of his time, namely Arthur S. Thompson and A.R. Radcliff-Brown.[496] Through this social reasoning, Kelsen concluded that through cultural and customary analysis it could be possible to substantiate a universal belief that human society did assume that war was prohibited and only accepted it as self-defense or a sanction. This argument was also a radical departure from his positivist stance on law.

Additionally, Kelsen explores the idea of bellum justum throughout the antiquity, Middle Ages, and modern times of Western civilization. Citing Greek and Roman historical and legal concepts, he claims that the concept of the prohibition of war holds a common moral element between different cultures.[497] Kelsen then specifically mentioned the importance of the writings of Christian authors such as Saint Augustine, Isidoro de Sevilla and Thomas de Aquinas along with their subsequent influence on Grotius and naturalists.[498] The Austrian jurist believed that the writings of these naturalist and scholastic writers still formed the basis of public opinion and of the political ideologies of the different governments before the first world war, even if these thoughts had lost importance in legal scholarship of the time. This proposition meant that the universalist naturalist conceptualization of international law, for Kelsen, had acquired the status of relevant custom or a shared moral source which would have shaped values possessing legal effects in the international legal system—thus, why war would have been defined as a delict under international law.

Under this rationale, Kelsen's theory of bellum justum seems applicable to the understandings of the theory of jus cogens as proposed by Verdross. It would be possible to justify certain prohibitions or universal delicts as consequences on manifestations of the will of States as moral and cultural values alongside an abstract interpretation of international positive law. This proposition is like Verdross's conception of the two types of jus cogens norms, namely, the compulsory

496. *Id.* at 42.

497. *Id.* at 43.

498. *Id.* at 44.

norms of customary international law and the prohibition contra bonos mores.[499]

This development is also characterized in Kelsen's new definition of the basic norm of international law as being custom. According to Mitchell, this shift was a response to the quickly changing international legal scenario provoked by the Nuremberg trial, which placed a metalegal value such as substantive justice above consent.[500] Therefore, Kelsen established the pacta sunt servanda principle as subsidiary to international custom, to preserve his pure theory amid rapid changes. Additionally, by accepting the possibility of retroactivity in a system of law based on custom, Kelsen accommodated the outcomes of the Nuremberg and Tokyo trials in his theory.[501]

Conclusively, by modifying the premise of his international legal doctrine from consent to a metalegal approach, Kelsen adapted to the new value-based international legal order that would bring forth the concept of jus cogens. That is the reason why Schwarzenberger's inductive approach could not explain the emergence of these norms, as it had become locked to a pre-war reality that could not explain the subsequent developments of international law.

C. *Torture and Genocide, international moral understandings solidified as norms?*

The prohibition of torture is aimed at protecting the human dignity of victims and positive rights prescribed by the Charter of the United Nations and the Universal Declaration of Human Rights, as exposed in Article 2 of the 1975 Declaration on the Protection of All Persons from Torture.[502] This definition is to be read together with the UNCAT according to the UN General Assembly Resolution 32/62.[503]

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499. Verdross, *supra* note 43, at 572.

500. Mitchell, *supra* note 224, at 275.

501. *Id.* at 277.

502. G.A. Res. 3452 (XXX), Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/3452(XXX), Dec. 9, 1975.

503. G.A. Res. A/RES/32/62 (Dec. 8, 1977).

It is impossible to understand the concept of "human dignity" as a purely legal construction— since it is a value-charged term and has a rich historical development as seen in this investigation. Initially a Roman term for status, the definition of dignitas, as human nature in *Cicero*, prepared the concept for its posterior development under Christian medieval scholars, representing a link between the image of God the 'creator' and Man the 'creation.'[504] The usage of the term by the influential scholar Hugo Grotius, introduced its concept to the then new field of International Law and Humanitarian Law. Its subsequent employment by the Catholic Church during the 19th century as a reaction to totalitarianism, while proposing human solidarity, possibly influenced the legal naturalists of the 20th century which Verdross was part of.

Following Kelsen's Bellum Justum rationale, the concept of human dignity has historical manifestations that could evidence a supposedly shared moral source that could shape the direction of international law. Coupled together with UN General Assembly resolutions, State manifestations and treaties such as the UNCAT, could certainly serve as evidence that the concept of dignity exists in international law as custom. However, like the concept of jus cogens, it does not mean that it has been conclusively defined.

The CAT's General Comment no. 3 does recognize the concept as an inherent component of an individual, declaring that it can be reduced as a result of damage committed by the act of torture; it also adds the hypothesis that it can even be permanently damaged.[505] That is also encountered in the State report of Chad when the CAT was concerned with the human dignity of woman and girl victims of genital mutilation.[506] This objective meaning of the concept was seen in the interpretation of Judge Sir Fitzmaurice when defining degrading treatment. He defined it as something "seriously humiliating," indicating various examples of acts that objectify individuals: reducing their

504. Luban, *supra* note 324, at 213.

505. U.N. CAT, General Comment no. 3, 2012, *supra* note 397, at 4, 12.

506. Considerations of Reports Submitted by States Parties Under Article 19 of the Convention – Concluding observations – Chad, *supra* note 372, at 30.

human nature, and in that sense "lowering as to human dignity."[507] From these examples, it is clear that even when applied through a more objective meaning in individual cases, the naturalist idea of the inherent quality of Man provided with a special nature—deserving obligatory protection, is still present.

Regarding the prohibition of genocide, it was seen that initially, the Genocide Convention had important limitations on its effects, mainly the inability or omission of territorial States to prosecute the delict of genocide and the long period of nonexistence of international criminal courts. However, the 1951 Advisory Opinion on the legal effects of reservations to the Genocide Convention radically changed the scope of the Convention and the possibility to make reservations to it—paving the way for the creation of the erga omnes concept and the acceptance of the prohibition of genocide as a norm of jus cogens. With premises such as that genocide is contrary to "moral law and to the spirit and aims of the United Nations," the Convention had a higher "civilizing purpose" endorsing "elementary principles of morality,"[508] and that the exclusion of one or more States from the treaty would detract from the "authority of the moral and humanitarian principles which are its basis,"[509]—it is quite evident that its justification is metalegal. Further, as it was stated before, the ICJ directly challenged the traditional consent-based approach of international law in this opinion, inaugurating a value-based shift that justified the proposed universality of the object of the Genocide Convention.

The *Barcelona Traction Case* served to crystallize the concepts developed in the Advisory Opinion into case law, classifying the universality of the prohibition as erga omnes.[510] Subsequently, in the 1996 Nuclear Weapons Advisory Opinion, the ICJ cites a 1993 Report of the Secretary-General of the UN that classified the Genocide

507. Ir. v. U.K., App. No. 5310/71 (Mar. 20, 2018).

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

509. *Id.* at 24.

510. Barcelona Traction, Light and Power Co., (Belg. v. Spain) Second Phase, Judgment, 1970 I.C.J. 32, ¶ 34 (Feb. 5).

Convention as being certainly part of customary international law.[511] The Court also claimed that the prohibition of Genocide was a norm of jus cogens nature. Importantly, in the separate and dissenting opinion, Judges Ranjeva and Weeramantry confirmed the universal moral quality and acceptance of such prohibition,[512] and Judge Koroma suggested that the ICJ should be the organ entrusted into turning moral facts into international law.[513]

These developments regarding the prohibition of torture and genocide seem to evidently point to a universal moral prohibitive norm that overshadows and enlarges the positive content of the Genocide Convention and of the UNCAT. This enlargement clearly contravenes the principle of consent and classical State sovereignty— thus, why the 1951 Advisory Opinion directly attacks such Westphalian principles. The preponderance of the value-based approach appears to diminish the importance of States as the sole actors of international law to recognize a universal human collective invested with a higher degree of protection. However, these protected legal interests can only be understood with the reception of moral concepts into the study of the sources of law, since a purely positivistic approach could never accept peremptory norms or principles such as human dignity.

IX. CONCLUSION

This article has analyzed the challenge that Positivist schools of law faced when accommodating the concept of jus cogens in their systematic view of law. Throughout this investigation, it is shown that Positivism cannot be regarded as a monolithic representation of the old international regime of consent, represented by the maxim pact sunt servanda. This is explicit when comparing Schwarzenberger's theory of functionalist law and Kelsen's latter theory. The first is

511. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 258 ¶ 81 (July 8).

512. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Reports 297 (Ranjeva, J., separate opinion); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 496 (Weeramantry, J., dissenting).

513. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. (Koroma, J., dissenting).

mainly based on a literal reading of the Statute of the ICJ's closed category of sources, rejecting a meta legal interpretation, and viewing principles as limited categories shadowed by norms. Kelsen's pragmatic position is shown by his ability to include external elements to his theory, foreseeing the changes to the international legal order and the great possibility of his pure theory becoming obsolete.

The concept of jus cogens has been explored, showing its roots in post-war Germany and Austria—used consequently by national socialist jurists to denounce the "immoral" and "unjust" Treaty of Versailles. Under close inspection, the conceptualization cannot be separated from its universalist Stoic-Christian roots, which initially grounded morality on the respect of God's creation of Man. This was shown in the development of norms of jus cogens nature in its reception by the ILC and discussion among philosophers such as Jacques Maritain, where the moral contents of peremptory norms were always known.

The doctrinal and case law analysis on the prohibition of torture and genocide assessed whether these peremptory norms reflected an international moral source of the international legal system. The answer in that instance was positive, as exemplified by the metalegal construction of the concept of human dignity by the CAT for use as an abstract naturalist justification of the rights conferred by the Convention and as an object protected by the convention in individual applications. Furthermore, in the examination of the Genocide Convention, the ICJ changed the formalist status quo of the international legal system when positioning itself against the possibility of reservations to the Convention. Additionally, in its Nuclear Weapons Advisory Opinion and *1996 Bosnian Genocide Case*, the Court cited abstract metalegal principles to justify the greater importance of such prohibition when compared to other norms of international law.

This contribution did not intend to investigate how a European moral construction could bind non-western cultures into the hierarchical concept of peremptory norms. Nor did it try to understand how foreign legal doctrines, other than western positivism, could accept the idea of a value-based hierarchy of norms. Further research would be needed to understand the impact of a category of meta legal norms on other traditions. Additionally, different schools that criticize the norms of jus cogens nature, besides the inductive theory, were not

investigated. These other doctrines should be further scrutinized for a more complete picture of the limitations and capabilities of peremptory norms.