The category of law known as *jus cogens* is among the most ambiguous and theoretically problematic of the doctrines of international law. At the same time, however, the ability of such peremptory norms to invalidate treaties and constrain non-treaty conduct — irrespective of traditional notions of state-sovereign consent — gives *jus cogens* enormous potential importance. This essay will trace the foundation and origins of this unique category of law, and attempt to explain how peremptory-law questions may be adjudicated by the International Court of Justice ("ICJ").

Section I explains the peculiar character of *jus cogens* as rules that set bounds upon the universe of (legally) permissible outcomes, and gives an account of their rather problematic doctrinal origins in the "conscience of the international legal community." In order to further illuminate the "bounding" role of these unusual rules of law, this article describes how the idea of peremptory norms developed in modern international jurisprudence, and recounts the many disputes over what substantive content to assign to such rules.

Section II suggests how the international community might deal with this perplexing category of law. Lacking both a grounding "constitutional" text, or "founding", and a strong system of *stare decisis*, international law leaves disputes over *jus cogens*, by default, to the jurisprudence of the International Court of Justice (ICJ) — while at the same time robbing international jurists of many of the resources with which domestic judges might approach such fundamental issues. Nevertheless, this article contends that the ICJ is indeed competent to decide such issues. Drawing lessons from the Court's approach to the exercise of judicial discretion for purposes of adjudicating "general principles" cases under Article 38(1)(c) of the Statute of the Court, this article contends that the structure and processes of the ICJ — which attempt to ensure that the world's principal legal communities are represented among the judges and which permit party-disputants to have their own representative on the bench — well suit its full bench to the determinations of the international community's "fundamental values" that would be required in a *jus cogens* case. If its judges understand the nature of their difficult task in adjudicating peremptory law, the structure of the Court will empower them to adjudicate *jus cogens* matters submitted for decision.

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I. THE CHARACTER OF PEREMPTORY LAW

The concept of *jus cogens* was first formally embodied in the text of the Vienna Convention on the Law of Treaties, Article 53 of which concerns "[t]reaties conflicting with a peremptory norm of general international law (*jus cogens)*":

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

Article 64, which addresses the "[e]mergence of a new peremptory norm of general international law (*jus cogens)*," provides further that "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." Because derogation from such rules is flatly prohibited, peremptory norms apparently bar not only treaties but also any legal act or situation inconsistent with their requirements. Absent an international consensus that it has been superseded by a replacement rule, *jus cogens* has such force that, even under Article 53, widespread contrary practice cannot corrupt the binding nature of a norm of *jus cogens*.

Traditional sovereign-consent theories of international obligation do not apply to peremptory norms: while states retain the freedom to "contract out" of other international rules (*jus dispositivum*) or to maintain the status of a persistent objector unbound by customary law, states appear to have no
freedom to adopt "an attitude apart" with respect to *jus cogens*. As Judge Fernandez observed in his dissenting opinion in the *Right of Passage* case, "[s]everal rules *cogentes* prevail over any special rules. And [these] general principles . . . constitute true rules of *jus cogens*, over which no special practice can prevail."

Peremptory norms are substantive norms that speak to sweeping issues of fundamental legality, such as slavery or genocide, regardless of whether a particular issue comes before the Court. Norms of *jus cogens* are ones which prohibit (or conceivably require) specific situational outcomes in world affairs: "it is the quintessence of norms of this character that they prescribe a certain, positive or negative behavior unconditionally." As Article 53 illustrates, peremptory norms can be substantive prohibitions against which, for example, the concrete provisions of a particular treaty — its object, most probably — may be measured. They form the foundation of the substantive principles that underlie international law. They are rooted in the basic requirements of international "public order," and they set boundaries beyond which situational outcomes may not legally stray.

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5 North Sea Continental Shelf Cases (F. R. G. v. Den., F. R. G. v. Neth.), 1969 I.C.J. 229 (Feb. 20) (dissenting opinion of Judge Lachs) ("Nor can a general rule which is not of the nature of *jus cogens* prevent some States from adopting an attitude apart."); see also Thirlway, *The Law and Procedure of the International Court: Part One*, supra note 4, at 102-03 (contrasting *jus dispositive* with *jus cogens* rules which "cannot be waived or excluded by agreement"); Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1954-1959: General Principles and Sources of International Law, 1959 BRIT. Y. B. INT'L L. 224, 225 [hereinafter Fitzmaurice, *The Law and Procedure of the International Court*] (*jus cogens* permits no contravention or "contracting-out"). Moreover, some writers have suggested that responsibility for the violation of *jus cogens* rules may not even be avoidable through conventional sovereignty-privileging legal principles like the act-of-state doctrine; see, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), self-executing agreement limitations, or restrictions upon party standing — though how, exactly, the jurisdiction of domestic courts would or could be affected by the existence of a peremptory norm is not clear. See Karen Parker and Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 445-56 (1988). In the international context, however, adherence to rules of *jus cogens* might well be said to rise to the level of *obligations erga omnes* in such a way as to surmount conventional standing-to-sue limitations. Cf. Case Concerning the Barcelona Traction, Light and Power Company, Ltd. (Belg. v. Spain), second phase, 1970 I.C.J. 4 (Feb. 5).

6 Case Concerning Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 6 (Apr. 12) (Fernandez, J., dissenting).

7 *Id.* at 136.

8 Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571, 571-72 (1937) [hereinafter Verdross, *Forbidden Treaties*]. See also remarks of Mustafa Kamil Yasseen (Iraq), in *Summary Records of the 15th Session, 683d Meeting*, [1963] 1 Y.B. INT'L L. COMM'N'N 63, para. 39, U.N. Doc. A/CN.4/156 and Addenda ("[T]he only possible criterion was the substance of the rule; to have the character of *jus cogens*, a rule of international law must not only be accepted by a large number of States, but must also be found necessary to international life and deeply rooted in the international conscience.").

Behavior contrary to such boundary norms is by definition lawless and illegal.

Though to this extent they somewhat resemble rules of natural law, peremptory norms may, in fact, develop and change over time, as do international conceptions of right and wrong. As Article 53 indicates, a rule with the character of *jus cogens* may only be superseded by a rule also acknowledged to have the character of *jus cogens*. Article 64 also makes clear that peremptory norms are not inalterable legal requirements like natural law, and in fact, can change over time. In the draft article that ultimately became Article 53 of the Convention, the commentary provided by the International Law Commission ("ILC") stated:

> [I]t would clearly be wrong to regard even rules of *jus cogens* as immutable and incapable of modification in the light of future developments. As any modification of a rule of *jus cogens* would today most probably be effected by the conclusion of a general multilateral treaty, the Commission thought it desirable to make it plain by the wording of the article that a general multilateral treaty establishing a new rule of *jus cogens* would fall outside the scope of the article.12

The drafters of Article 53 thus "emphasized that *jus cogens* was not immutable and that the concept of public order must be free to evolve."13 As

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10 Brownlie, for example, notes that "the major distinguishing feature of such rules is their relative indelibility. They are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect." [IAN BROWNLINE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 513 (1990)].

11 Michael Akehurst, following Grigori Tunkin, has suggested a standard for norm-supersession that is somewhat less stringent than the Vienna formulation, arguing that "a rule of *jus cogens* will cease to be *jus cogens* if the overwhelming majority of States decide that it is no longer *jus cogens*—even though it may still remain a rule of law." Michael Akehurst, The Hierarchy of the Sources of International Law, 1975 BRIT. Y. B. INT’L L. 273, 285 n.5. By this standard, a *jus cogens* norm could be abolished or modified without actual displacement by a different *jus cogens* norm, but it would still not be enough merely that the number of states feeling a rule to be *jus cogens* fell below "an overwhelming majority"; for a peremptory norm to be discarded such a majority would have to support its dissolution.


rules “necessary to international life and deeply rooted in the international conscience,”14 norms of jus cogens were expected to “[echo] the trends” of international life.15

As the Vienna Convention illustrates, despite its uncertain doctrinal origins, jus cogens is an important concept in international law. Peremptory law embodies in modern international jurisprudence the idea that states cannot simply do whatever they wish. The content of peremptory law changes over time, in step with the “conscience of the international community.” But at any given moment, norms of jus cogens are — in theory — the supreme commandments of international legal order. Thus, the jus cogens formulation is a modern, secular reincarnation of natural law theories, embodying the idea of a higher moral order against which ordinary actions and legal rules must be judged.

A. Sources of Jus Cogens

Although peremptory norms are capable of alteration, their precise source has yet to be entirely freed from “the mists which enveloped it in international law.”16 Scholars and jurists have disagreed sharply over the origin of jus cogens norms, seeing them as deriving, variously, from international custom, from express treaties, from natural law, or from some combination of such factors.17 The ILC rejected an apparently comparativist articulation of jus cogens doctrine when it declined to adopt an American proposal that jus cogens be defined to include rules “recognized in common


17 See, e.g., Akehurst, supra note 11, at 282.
by national and regional legal systems of the world.”18 As evidenced from
the ILC’s appended commentary, Article 53 of the Vienna Convention
contemplated that a multinational treaty could give rise to a rule of *jus
cogens*.19 Moral principles, the ICJ has further declared, may be considered
when given “sufficient expression in legal form”20 through formal
articulations such as UN Charter provisions, declarations, and conventions.21

Some scholars have suggested that peremptory norms might arise out of
customary practice even without general formal acceptance.22 At least three
ICJ decisions give support to the view that customary state practice may help
create norms of *jus cogens*, either in conjunction with formal UN declarations

18 Id. at 283. Judge Fernandez, dissenting in the *Right of Passage* case, seemed to endorse a
comparative approach to *jus cogens* norms, noting in a brief discussion of “rules cogens... over which
no special practice can prevail” that “the laws of all civilized nations recognized the right of access to
enclaved property in favor of the owner.” *Case Concerning Right of Passage Over Indian Territory* (Port. v. India), 1960 I.C.J. 6, 136 (Apr. 12) (Fernandez, J., dissenting). Fernandez, however, invoked this
apparently comparativist methodology under the authority of “general principles of law recognized by
civilized nations” pursuant to Article 38(1)(c) of the Statute of the Court. This conflation of the concepts
of Article 38’s “general principles” and the later concept of *jus cogens* makes it difficult to discern whether
or not Fernandez intended *jus cogens* to be comparatively derived. Judge Tanaka in his 1966 *South-West
Africa* cases dissent, also buttressed his *jus cogens* argument with reference to a study of domestic
constitutions finding that most of them embody some form of non-discrimination principle. He too,
however, referred to Article 38(1)(c) “general principles” and the “natural law” of *jus cogens*
indistinguishably. South West Africa Cases (Eth. v. S. Afr., Liber. v. S. Afr.), second phase, judgment,

19 Some Aspects of International *Jus Cogens* as Formulated by the International Law
at which such seemingly equivocal conventions become “compelling law” remains mysterious.

20 See supra text accompanying note 12. Nonetheless, the treaty-derived approach has been criticized.
Egon Schweb, for example, noted that the Genocide Convention — perhaps the most frequently-cited
example of a peremptory rule — included language providing that after an initial period of ten years the
convention would remain in force for successive five-year terms for those parties which did not denounce
it. Schweb also points out that the Slavery Conventions of 1926 and 1956, also commonly cited by *jus
cogens* theorists, did not provide for the immediate abolition of slavery but called for its eradication
“progressively and as soon as possible,” and did not automatically extend their provisions to dependent
territories. Such provisions, Schweb suggests, “make[] one doubt whether the authors of these texts were
aware of the fact that they were formulating *jus cogens* or whether they had the intention of doing this.”

21 Egon Schweb, *Some Aspects* of International *Jus Cogens* as Formulated by the International Law
at which such seemingly equivocal conventions become “compelling law” remains mysterious.

22 In the debates of the ILC surrounding the adoption of Articles 53 and 64 of the Vienna Convention,
for example, Soviet delegate Grigori Tunkin and others felt peremptory norms to be a subspecies of
customary law. See remarks of Grigori Tunkin (USSR), in Summary Records of the 15th Session, 684th
Nicaragua and the United States: Confrontation over the Jurisdiction of the International Court, 1991
BRIT. Y.B. INT’L L. 119, 277 (“[I]f some rules proscribing the use of force do constitute part of the *jus
cogens*, the reason for this being so is ultimately a matter of customary law.”); Thirlway, *The Law and
Procedure of the International Court: Part Two*, supra note 16, at 108-09 (*jus cogens* rules might arise
from widely supported convention, even without unanimous support). Cf. Akehurst, * supra* note 11, at 282
(noticing Soviet bloc scholars’ reluctance to admit any basis for peremptory norms that is not ultimately
rooted in treaty- or custom-based consent of sovereign states).
or on its own. In the Western Sahara case, the Court found that a series of General Assembly resolutions and the state practice of decolonization had enshrined the principle of self-determination as a peremptory norm of international law. Attached to this norm was a requirement of “free association” exercised through “a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes.” This finding in the Western Sahara case echoed the Court’s holding in the Namibia case, which ruled that the development of international practice in the years since South Africa acquired a mandate over that territory had produced a new rule requiring territorial independence.

[T]he subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all [peoples] . . . . The Court must take into account the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law . . . . In the domain to which the present proceedings relate, the last fifty years . . . have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust [of territorial administration] was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the corpus juris gentium has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.

Finally, in the 1986 Military and Paramilitary Activities case, the ICJ suggested that it had authority to pronounce upon the use of American force against Nicaragua because non-use of force had become a norm of customary law supplying jurisdiction in the absence of specific treaty provisions. To support this claim, the Court quoted statements by the parties before the Court and the ILC, in effect, that non-use of force was a norm of jus cogens. This has been taken to suggest a customary origin for peremptory norms: “[i]f it were accepted that a treaty could give rise to rules of jus cogens, it could not be likewise argued that a given rule of jus cogens is therefore a

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24 Id. at 32-33.
rule of customary law. Accordingly, the Court must have been ruling implicitly that only customary law can produce obligations of *jus cogens*.”

The precise source of peremptory norms remains ambiguous. If they are principles of international customary law, then they are curious. Rules of customary international law normally may be corrupted by contrary practice or persistent objection; a norm of *jus cogens* remains binding — in theory — even in the face of universal contrary practice, as long as there remains no general agreement upon a displacing rule. The “customary” origin of *jus cogens* norms thus seems inadequate. Nor can peremptory norms be purely treaty-derived requirements, as they bind signatory, non-signatory and objector alike. A broad multinational convention prescribing a certain rule might be compelling evidence of the existence of a norm of *jus cogens*, but it is not clear how it could be the formal source of that rule’s universal and non-derogable legal authority. Peremptory norms are creatures without definable legal pedigree or doctrinal grounding; we may not be able to explain them yet we think — to borrow a phrase — that we know them when we see them.

Ultimately, rules of *jus cogens* may derive from no conventional doctrinal “source” other than the “conscience” of the international community. As boundary norms, *jus cogens* rules are spoken in a moral and political “meta-language” defining the outer limits of the conduct legal rules may permit. Under public international law, most of the obligations upon a sovereign state actor depend upon some form of either explicit or implicit consent. The boundary norms of *jus cogens*: defy notions of international consent. Rather, *jus cogens* defines what the international community, as a whole, finds unacceptable. No positivist state “consent” can justify breaking a norm, short of general agreement upon a rule displacing that norm. The place of a *jus cogens* rule at the pinnacle of the international legal hierarchy derives from no more (and no less) than what one ILC member termed the “substance of the rule and its intrinsic value.”

As stated in an early ILC report on the subject, peremptory norms involve “not only legal rules but [also] considerations of morals and of international good order.” For the drafters of the Vienna Convention, “[t]he concept of *jus cogens* expressed some higher social need . . . . Ultimately,

27 Thirlway, *The Law and Procedure of the International Court: Part Two*, supra note 16, at 108. Thirlway felt it quite unconvincing to ground the existence of a rule of *jus cogens* merely upon a claim by the ILC and selected quotations from two governments. *Id.* at 109.

28 See supra notes 12, 19.


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it was more society and less the law itself which defined the content of *jus cogens*.”

The Commission found it difficult to imagine any society, whether of individuals or of States, whose law sets no limit whatever on freedom of contract. In every civilized community there are some rules of law and some principles of morality which individuals are not permitted by law to ignore or to modify by their agreements.

Similarly, every juridical order regulates the rational and moral coexistence of the members of a community. Therefore, no order can admit treaties between juridical subjects, which contradict the ethics of the common community.

Some hierarchy of norms is necessary in every legal system, including that of international law. The very concept of the Divine and then of the natural law was in fact meant to introduce a hierarchy of this kind, and it was only abandoned under the 19th-century positivist approach to the sources of international law. However, even then treaties were considered to be void if contrary to morals or equity, the principles of which were sometimes tantamount to the principles of natural law.

Though peremptory norms were capable of change over time, *jus cogens* served this naturalistic function in the international context. Its role, however, was particularly dramatic because previous conceptions of international law, unlike domestic jurisprudence, had traditionally regarded parties’ freedom to contract as genuinely absolute.

The formal articulation of *jus cogens* in the Vienna Convention should not imply its restriction to treaty instruments. Given, for example, the apparent agreement that its substantive content includes prohibitions upon genocide and slavery, however attempted or accomplished — peremptory law clearly has broader scope.

If *jus cogens* norms really exist, it would seem absurd for international law to condemn formal treaties prohibiting

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33 Verdross, Forbidden Treaties, supra note 8, at 572.

34 Nahlik, supra note 15, at 745.

35 See supra note 3. The Vienna Convention provides a positivist textual anchor for the concept of *jus cogens*, but the clear intentions of its drafters that the substantive content of *jus cogens* rules had to be found outside that document pull peremptory law out of the positivist universe.
violations of such rules, yet tolerating the same conduct undertaken by parties who had not predicated their action upon a written document.\textsuperscript{36}

Emerging as it did from a positivist international legal tradition exalting state sovereignty and seeing the origins of international legal rules in agreements explicitly or implicitly struck between sovereign actors, the development of a doctrine of substantive boundary norms was an extraordinary change. The next few pages will discuss the dynamics of its emergence, which should illuminate our understanding of the "bounding" character of these rules.

\textbf{B. The Emergence of Jus Cogens}

It is only recently — primarily since the Second World War — that international legal scholars have insisted that \textit{jus cogens} exists. Though it is said to derive from concepts found in Roman law, the term itself was not, apparently, used in Roman sources.\textsuperscript{37} \textit{Jus Cogens} has some antecedents in many municipal systems, however, where it is not uncommon to suggest that the requirements of public order or public policy form rules which cannot be set aside by contracting parties.\textsuperscript{38} Individual writers have, from time to time, addressed the notion of an international public order,\textsuperscript{39} but peremptory norms did not emerge as an important topic of international legal discourse until the present century.

Mid-20th century proponents of the idea of peremptory norms — from Verdross' early article on "forbidden treaties" in 1937\textsuperscript{40} through the opening for signature of the Vienna Convention itself in 1966 — purported to find foreshadowings of modern \textit{jus cogens} concepts in jurisprudence dating back

\textsuperscript{36} Limiting the doctrine to treaty instruments was unavoidable in the context of the Vienna Convention — for that was, of course, the subject at hand — but it seemed clear even then that the idea of peremptory law would be diminished if it meant no more than this. The U.S. member of the ILC put it somewhat disdainfully: "It costs States nothing to adopt a high moral tone and to condemn treaties that in any case they were unlikely to conclude, such as those promoting the use of force, traffic in slaves, or genocide." Remarks of Herbert Briggs (U.S.), in \textit{Summary Records of the 17th Session, 828th Meeting}, [1966] 1 \textit{Y.B. Int'l L. Comm'n} 40, para. 42, U.N. Doc. A/CN.4/183 and Addenda 1-3, A/CN.4/L.107.

\textsuperscript{37} Schwelb, \textit{Some Aspects}, supra note 19, at 948.

\textsuperscript{38} See, e.g., F.A. Mann, \textit{The Proper Law of Contracts Concluded by International Persons}, 1959 \textit{Brit. Y.B. Int'l L.} 34, 50 (hereinafter Mann, \textit{The Proper Law of Contracts}) (using the term \textit{jus cogens} to refer to the principles of municipal jurisprudence and public policy underlying contract law in Switzerland, England and Italy).


\textsuperscript{40} Alfred von Verdross, \textit{Forbidden Treaties}, supra note 8.
to before the First World War. The preamble to the Fourth Hague Convention on the Laws and Customs of War on Land of 1907, for example, included the comment that, until a more complete code of warfare could be drawn up, "the inhabitants and belligerents remain under protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience." The most frequently-cited pre-1945 antecedents, however, occurred after the unprecedented European carnage experienced in the 1914-18 war. In his dissent to the S.S. *Wimbledon* case in 1923, Judge Schüicking, the German jurist on the Permanent Court of International Justice, argued that it was impossible to undertake by treaty a valid obligation to perform acts violating the rights of third parties. More significantly still, Schüicking later dissented in the *Oscar Chinn* case, arguing that certain rules had a quality such that any act adopted in contravention of them would be void. Citing Schüicking's *Oscar Chinn* dissent and developing further the idea of peremptory norms, Alfred von Verdross argued that certain treaties *contra bonos mores* would be void.

*Jus cogens* thinking only became widespread, however, after the convulsive horrors of World War II and genocide in 1939-45. The U.S. Military Tribunal at Nuremberg, for example, declared that any treaty between Germany and the Vichy government of France which approved the use of French prisoners of war in the German armaments industry would have been void under international law as *contra bonos mores*. The 1949 Geneva Conventions on the Protection of War Victims, echoing the Hague

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42 Judgments, PCJ Series A, No.1 (1923) (dissenting opinion of Judge Schüicking).


45 He gave as examples: (1) treaties binding one state to reduce its police or court system to the point that it would be unable to protect its citizens, (2) treaties binding a state to reduce its army to the point of defenselessness, (3) treaties binding a state to close its hospitals or schools, and (4) treaties barring a state from protecting its citizenry abroad. Verdross, *Forbidden Treaties*, supra note 8, at 574-76. Verdross, who had become a member of the ILC representing Austria by the time of the *jus cogens* debates of the Vienna Convention, was subsequently cited by the Afghani delegate to the Commission in 1963. See remarks of Abdul Hakim Tabibi (Afghanistan), *in Summary Records of the 15th Session, 683d Meeting*, [1963] 1 Y.B. Int'l L. Comm'n 63-64, para. 46, U.N. Doc. A/CN.4/156 and Adenda.

formulation of 1907 — declared that no country's denunciation of the Conventions would impair the parties' obligations. "[T]he Parties to the conflict shall remain bound to fulfill by virtue of the principles of the law of nations, as they result from usages established among civilized peoples, from the laws of humanity and [from] the dictates of the public conscience." The ICJ itself invoked something like *jus cogens* when it stated that "elementary considerations of humanity" mandated that Albania had a duty to warn approaching British ships of a minefield.

Most of all, however, the Holocaust and the Nuremberg trials have led to the acceptance of a peremptory norm banning "crimes against humanity," primarily the ban on genocide. Though some scholars have questioned the precedential value of the Nuremberg proceedings in technical legal terms, these trials, and the reaction to Nazi barbarity, more than anything else, breathed life into the idea of *jus cogens* in international law.

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47 Schwelb, Some Aspects, supra note 19, at 957.
49 The first apparent usage of the phrase occurred in 1915, when France, Britain and Russia issued a declaration denouncing "crimes against humanity and civilization" committed by the Turkish government against, among others, its Armenian population, "for which all the members of the Turkish Government will be held responsible for its agents implicated in the massacres." A 1919 commission documented these abuses in some detail, and the Treaty of Sevres provided that Turkey would surrender those responsible (while the Allied Powers reserved the right to try them before a tribunal established for that purpose). The treaty, however, was not ratified and never came into force: it was replaced with the Treaty of Luxanne, which did not contain these provisions and included a "Declaration of Amnesty" for wartime offenses. At the insistence of the American delegation, which felt that acts consistent with the laws of war should not be punished, even if otherwise barbarous, references to the "laws of humanity" were also deleted from the Treaties of Versailles, Saint-Germain-en-Laye, and Neuilly-sur-Seine. See generally Schwelb, Crimes Against Humanity, supra note 41, at 181-82. The episode had nothing of the popular impact of the Nuremberg trials that followed the next war.
50 For example, Schwelb has noted that the Nuremberg hangings do not clearly establish that "crimes against humanity" superseded conventional international legal concerns for state sovereign borders and principles of non-interference because Germany, during the occupation, had temporarily disappeared as a sovereign state. Furthermore, the Military Tribunal was in a technical sense "hierarchically subject to the Control Council for Germany and therefore . . . in substance, an occupation court for Germany" rather than an organ of the community of nations as a whole. Even if it the Tribunal a proper international tribunal, Article 59 of the Statute of the International Court of Justice provides that decisions bind only formally bind the parties to the dispute before the Court — so that the precedential value of Nuremberg result might only bind the participants (and perhaps not even Germany itself, not actually in existence as a sovereign state at the time). Most fundamentally, perhaps, Article 6(c) of the London Charter which established the Tribunal appears to have linked the category of "crimes against humanity" with those crimes within the jurisdiction of the Tribunal, in other words those perpetrated in connection with the war itself. It defines a "crime against humanity" as including "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal. . . ." [emphasis supplied]. This, Schwelb wrote, appears to make a "crime against humanity" merely "an ‘accompanying’ or ‘accessory’ crime to either crimes against peace or violations of the laws and customs of war." See generally Schwelb, Crimes Against Humanity, supra note 41, at 178, 205-11.
The idea of making peremptory norms a part of the codification of the Law of Treaties appears to have originated with Sir Hirsch Lauterpacht, then Special Rapporteur of the ILC. He suggested in 1953 that "a treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice." The test of such an illegal treaty, he felt, was its inconsistency with such overriding principles of international law which may be regarded as constituting principles of international public policy (ordre international public). These principles need not necessarily have crystallized in a clearly accepted rule of law such as [the] prohibition of piracy or aggressive war. They may be expressive of rules of international morality so cogent that an international tribunal would consider them as forming part of those principles of law generally recognized by civilized nations . . . ."52

Lauterpacht's successors as ILC Rapporteur, Gerald Fitzmaurice and Humphrey Waldock, steered this concept into the final text of the Vienna Convention in 1966. It was Fitzmaurice, in fact, who apparently introduced the actual term jus cogens, when distinguishing between those [rules] which are mandatory and imperative in any circumstances (jus cogens) and those (jus dispositivum) which merely furnish a rule for application in the absence of any other agreed régime, or, more correctly, those the variation or modification of which under an agreed régime is permissible, provided the position and rights of other States are not affected.53

From this formulation it was a short step to the final text of the Convention.

51 H. Lauterpacht, First Report on the Law of Treaties, March 24, 1953, in Documents of the 5th Session, [1953] 2 Y.B. Int'l L. Comm'n 90, 155-56, U.N. Doc. A/CN.4/63. Lauterpacht also wrote that "[t]he binding force of treaties is independent of the will of the State which conclude them in the exercise of their sovereignty. Their binding force and other basic conditions of their operation are grounded in customary international law . . . . States are free to shape their treaty relations and the conditions of their performance in accordance with their will, [but] they can do so only subject to the overriding principles of international law, the general principals of law and the principals of good faith." Id. at 106.

52 Id. at 155, para. 4. Lauterpacht here tried to give jus cogens principals a doctrinal basis in Article 38(1)(c) of the Statute of the ICJ which authorizes the consideration of "general principles of law recognized by civilized nations." With some exceptions, this has not been widely followed. The jus cogens provisions of the Vienna Convention apply to treaties between signatories of that document, while the Statute of the Court deals with the law and procedure of the ICJ itself. Tying peremptory norms to Article 38(1)(c) "general principles" doctrine made sense with Lauterpacht's original formulation of the jus cogens clause of the Law of Treaties, which provided for treaty illegality only if it is declared as such by the ICJ. With the subsequent deletion of that phrase, specific reference to a means of determining jus cogens norms disappeared. Since the Court no longer possesses a monopoly of peremptory law identification, ICJ-specific Article 38(1)(c) "general principles" can no longer ground jus cogens doctrine.

Although they took great pains to cite historical antecedents to *jus cogens* in, for example, the *Oscar Chinn* dissent and the *Corfu Channel* holding, the drafters of the *jus cogens* provisions of the Convention freely admitted that a peremptory norms doctrine was a new phenomenon in international jurisprudence which they were expressing for the first time. ILC Rapporteur Waldock wrote that *jus cogens* "was not an entirely new concept in international law and was touched upon in the work of certain writers . . . but had not yet been at all fully developed."54 Both Lauterpacht and Waldock characterized the *jus cogens* draft articles as *lex lata*, a new development of the law brought about by recent global experiences and by the work of the ILC in articulating such an idea: "existing law was no longer what it had been prior to the First World War."55 In Lauterpacht's characterization, new norms of "international public policy" superceded important aspects of traditional international law.56 The Vienna Convention exemplified the new norm. Because warfare had previously been a permissible instrument of foreign relations, treaties coerced by the use or threat of war had been permitted. This, it was said, was true no longer: "[t]he cumulative result of developments since the First World War has been to remove the foundations of the traditional rule of international law which recognize the validity of treaties imposed by force."57 The thrust behind the *jus cogens* provisions of the Convention was simple. “According to modern ideas, the will of the contracting parties is no longer the sole criterion by which to determine what can lawfully be contracted.”58

Though some scholars criticized the idea that "a *jus cogens* rule of customary law [could have] miraculously emerged between 1946 and 1948,"59 the ILC and many governments accepted the peremptory norm


57 Id. at 147, para. 2.


59 Id. at 955. Georg Schwartzbenberger went further, criticizing the *jus cogens* formulation not for failing to provide a mechanism for dispute resolution but for its basic incoherence as long as international law lacked a commanding sovereign: "International law on the level of unorganized international society does not know of any *jus cogens*." Georg Schwartzbenberger, *International Jus Cogens?*, 43 TEx. L. REV. 455, 476 (1964-65). He felt the formulation to be "a system of power politics in disguise," in which apparent 'progressiveness' can readily be made to serve hidden sectional interests, not apparent at first sight. In this particular case, the beauty of a general, as distinct from a more specific, formula of international *jus cogens* is that it leaves everybody absolutely free to argue for or against the *jus cogens* character of any particular rule of international law. *Id.* at 477. Herbert Briggs, the U.S. delegate on the ILC when the *jus cogens* articles of the Vienna Convention were drafted, was also unenthusiastic about the indeterminacy of the *jus cogens* formulation. Remarks of Herbert Briggs (U.S.), in *Summary Records of the 17th Session*, 828th Meeting, [1966] 1 Y.B. Int'l L. Comm'n 40, para. 42, U.N. Doc. A/CN.4/183
Adjudicating Jus Cogens

The Commission posited that, when codifying the law of treaties, "there are certain rules and principles from which states are not competent to derogate by a treaty arrangement." Recent world experiences necessitated a doctrine of peremptory norms in international law. Some things, it now appeared, the law simply could not legitimately fail to condemn.

According to the ILC debates surrounding the drafting of the *jus cogens* clause of the Vienna Convention, three interrelated "developments" were felt to compel the articulation of a theory of peremptory law. First, the international community was rapidly diversifying with the emergence of new states carved out of former European colonial empires or previously excluded from the European-dominated world of "international law." The "international community" was becoming increasingly heterogeneous. International law has once been the "product of the special civilization of modern Europe . . . a highly artificial system of which the principles cannot be supposed to be understood or recognized by countries differently civilized." As long as a homogeneous cluster of European powers dominated international relations, the ILC members seemed to assume, explicit articulation of fundamental moral or legal boundary principles was less necessary. Peremptory norms were to a large degree unspoken, but intuitively understood by reference to a common social reservoir of understanding which delineated the crucial line between civilization and barbarity.

With a rapidly-expanding international community that included increasing numbers of non-European states, however, the boundary norms of international law — indeed, even the fact that boundary norms *existed* in international law — had to be made more explicit. As the Indian Commissioner put it,


60 See, e.g., remarks of Sir Humphrey Waldock (UK), in *Summary Records of the 17th Session, 828th Meeting*, [1966] 1 Y.B. Int'l L. Comm'n 37, para. 4, U.N. Doc. A/CN.4/183 and Add. 1-3, A/CN.4/L.107 (recounting that the draft *jus cogens* article had "attracted a considerable amount of attention from governments, the great majority of which approved of it in principle"). To Senjin Tsuruoka, the Japanese member of the ILC, textual specificity in *the jus cogens* articles was not necessary because "the idea of *jus cogens* was so clear in itself that it did not need to be elaborated." Remarks of Senjin Tsuruoka (Japan), in *Summary Records of the 15th Session, 684th Meeting*, [1963] 1 Y.B. Int'l L. Comm'n 67, para. 3, U.N. Doc. A/CN.4/156 and Addenda.


63 Scholars of international relations, for example, have found a crucial stabilizing mechanism in the distinctive operations of the "classical" balance-of-power system. This stabilizing mechanism appears in Western Europe in the form of the relative cultural homogeneity of diplomatic and aristocratic elites. See, e.g., Stanley Hoffman, *Primacy or World Order: American Foreign Policy Since the Cold War* 168-77 (1978).
the events of the two World Wars had brought about the birth of gigantic forces in Asia and Africa and the world community was now confronted with the question of the principal co-existence of over a hundred States, and with the problem of co-ordinating different social systems in the international order. That situation demanded a mental adjustment as an actual condition of survival.\(^6\)

For members of the ILC, "the international public order was merely the superstructure of the international community which resulted from the evolution of international society. It was the minimum of rules of conduct necessary to make orderly international relations possible."\(^6\)

In a rapidly decolonizing world, the existence of such rules could no longer remain unspoken, but needed concrete expression.

[W]hatever might have been the position when the international community was geographically more limited, there could be no doubt that an international public order existed now and that certain principles of international law had the character of *jus cogens*. The whole perspective of United Nations policy could be characterized as a value-oriented jurisprudence, directed towards the emergence of a public order in the international community under the rule of law. The Charter sought to establish a process by which the world community could regulate the international abuse of naked force and promote a world public order embodying values of human dignity in a society dedicated to freedom and justice.\(^6\)

According to Spain’s Commissioner Antonio de Luna, every society was based on a *Weltanshauung* [world-view] which was held in common by all its members. The positivist doctrine had been feasible in practice because the groups which had successively been in power in the nineteenth century had shared the same *Weltanshauung*. The international society of the period had been able to accept the idea of the unlimited will of the State because it had been relatively stable . . . . The contractual conception of international law, which did not recognize *jus*

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cogens, belonged to the time when international law had been only a law for the Great Powers. But modern international law [has] become universalized and socialized.  

It was unimaginable to him that a “world community” with such sweeping ambitions would fail to declare the existence of a category of law serving as fundamental boundary norms.

A second, related factor was the obvious importance of preventing further catastrophic bloodletting in a culturally and ideologically heterogeneous, as well as a technologically advanced world. Any breakdown of order could produce carnage on a scale hitherto inconceivable. “The modern ideologies, of which there were at least three, must be co-ordinated if peaceful co-existence [were] to be achieved,” declared one Commissioner, “for if they were not, mankind had no future. The notion of jus cogens ought to set bounds to the autonomy of the will of States . . . .”

The Soviet member of the Commission felt that the emergence of jus cogens had become of interest to all. “[It] was an innovation brought about by historical changes and by the fact that certain aspects of relations between States — even purely bilateral ones, but first and foremost [by] those relating to the maintenance of peace.”

Third, the atrocities of the Second World War apparently left little doubt that jus cogens boundary norms had to exist. Some deeds were so wrong that no legitimate legal order could fail to proscribe them. As Antonio de Luna put it, the purely contractual conception of international law had been acceptable in the European-dominated, comparatively stable world of the 19th century, “[b]ut when a phenomenon such as Naziism appeared, the


So powerful was the peremptory energy produced by the events of the war that even Gen. Alfred Jodl’s defense counsel at Nuremberg, Prof. Hermann Jahrreis, found himself unable to assert a truly absolute defense in the plea of superior orders:

The functionaries had neither the right nor the duty to examine the orders of the monocrat to determine their legality. For them these orders could never be illegal at all, with [the] single exception . . . of those cases in which the monocrat placed himself, according to the indisputable axioms of our times, outside every human order and in which a genuine question of right or wrong did not arise, so that no genuine examination was called for, either . . . . The tremendous power, the unlimited authority was vested in . . . Hitler. As in every state, this might include harsh orders. But it was never intended as giving full power to be inhuman. Here lies the boundary line, [though] this line has at no time and nowhere been quite clearly drawn.

Remarks of Prof. Dr. Hermann Jahrreiss, counsel for defendant Jodl, July 4, 1946, at 489-91[emphasis supplied].
theory became questionable." By his actions, Adolf Hitler had convinced the Commission that *jus cogens* must exist, even if no one could fully explain its doctrinal origins or spell out all of its substantive content.

The existence of peremptory law as a category of law was proven, in effect, by the sheer "unimaginability" of believing otherwise. For example, the Commission believed that a treaty designed to promote slavery, or to prepare for aggression, ought to be declared void. "All [this] was difficult to explain without recognizing the concept of *jus cogens* in international law." The existence of *jus cogens* was "unchallengeable and should not be disputed" because "[n]o specialist in international law could contest the proposition" that states could not legally contract to such effect. "Those two examples *proved* that there was such thing as *jus cogens* and that States could not derogate from it, even by agreement *inter se*." Peremptory law, in this context, was literally self-evident.

Can the *lex contractus* created by the parties validate a contract which is not only contrary to elementary demands of a domestic *ordre public*, but also violates fundamental human rights? If Nazi Germany had granted to a Ruritanian corporation the contractual right to carry on commercially some of her opprobrious activities, would that contract really have been sovereign and could no legal system have condemned it?

Or, as Judge Tanaka asked in the 1966 *South-West Africa* cases, "[w]ho can believe . . . that the existence of human rights . . . can be validly abolished or modified [merely] by the will of the State?"

To ask such questions was also to answer them: some things no legitimate system of law could fail to condemn. "The abstract notions of absolute [state contractual] freedom and absolute sovereignty" had been shown "not compatible with the existence of international society." The

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71 Remarks of Antonio de Luna (Spain), in *Summary Records of the 15th Session, 684th Meeting*, [1963] 1 Y.B. Int'l L. Comm'n 72, para. 61, U.N. Doc A/CN.4/156 and Addenda. Though the image of Hitlerian *jihad* recurred frequently in the Commission debates, the war against Japanese militarism in East Asia and the Pacific was not mentioned.


74 Mann, *The Proper Law of Contracts*, supra note 38, at 50.


law had changed because "the legal conscience of the international community had progressed."\textsuperscript{77}

For a world which had experienced Blitzkrieg and Holocaust, peremptory norms received support simply because, as a species of law, they "appropriately crowned [the] theoretical structure"\textsuperscript{78} of international jurisprudence. In this new context, an international legal order would have been inconceivable without some such boundary principles.\textsuperscript{79} \textit{Jus cogens}, therefore, tried to address the upheavals of world war and genocide. A prophylactic legal naturalism, \textit{jus cogens} gave international law a voice to condemn the insupportable which traditional sovereignty-based positivism might have denied it.

\textbf{C. The Content of Peremptory Law}

If norms of \textit{jus cogens} act as a legal trump card, prohibiting even widespread derogating conduct, what is it that they actually demand? Not surprisingly, the specific content of peremptory international law is a subject of considerable debate. As Ian Brownlie has noted, "more authority exists for the category of \textit{jus cogens} than exists for its particular content."\textsuperscript{80}

Understandably, as codified in the Convention on the Prevention and Punishment of the Crime of Genocide, genocide is the least controversial of the norms commonly cited as examples of \textit{jus cogens}.\textsuperscript{81} As it was described in the ICJ's \textit{Reservations} case,

The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving 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 the spirit and aims of the United Nations . . . . The first consequence arising from this conception


\textsuperscript{79} Lauterpacht, for example, professed himself convinced that \textit{jus cogens} existed and must be given "a place in a codification of the law of treaties" despite the fact that "there are no instances, in international judicial and arbitral practice, of a treaty being declared void on account of the illegality of its object." Hirsch Lauterpacht, \textit{Report on the Law of Treaties}, March 24, 1953, \textit{in} [1953] 2 Y.B. Int'l L. Comm'n 90, 155, para. 5, U.N. Doc. A/CN.4/L.63.

\textsuperscript{80} BROWNLE, supra note 10, at 515.

\textsuperscript{81} In the collective international undertaking to prevent genocide, the ICJ has declared, states have no purely individual interests: "they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the \textit{raison d'etre} of the convention." Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 23. See also Verdross, \textit{Jus Dispositivum and Jus Cogens}, supra note 9, at 132.
is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge . . .".82

If anything were to be a true norm of jus cogens, this would seem so to be. The general prohibition upon slavery probably also falls into this category of uncontentiously peremptory rules. But beyond these true norms of jus cogens, commentators disagree.

Sir Humphrey Waldock, who served as Rapporteur of the ILC when the jus cogens provisions of the Vienna Convention were debated, argued strongly for the inclusion of a peremptory norm barring "the use or threat of use of force in contravention of the principles of the [United Nations] Charter . . .".83 In its draft of Article 53,84 the ILC adopted this suggestion.85 The norm prohibiting the use of force in contravention of the U.N. Charter is widely accepted — in theory — as a peremptory rule, but its application remains bitterly contentious in practice, since the "self-defense" provisions of that document are as frequently and loosely invoked as the non-use principle itself.

Many other candidates for peremptory norm status have been propounded by jurists and publicists alike, with varying degrees of acceptance. They include the prohibition of racial discrimination, the illegality of mass murder or imprisonment, freedom of the seas, the

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84 United Nations Report of the Int’l L. Comm’n covering the work of its 15th Session, May 6-July 12, 1963, 58 Am. J. Int’l L. 241, 265 (1964). The ILC also suggested as jus cogens norms prohibitions upon slavery, piracy, genocide, other “criminal” acts under international law, and such other acts “in the suppression of which every state is called upon to cooperate.” “Other members expressed the view that, if examples were given, it would be undesirable to appear to limit the scope of the [jus cogens] article to cases involving acts which constitute crimes under international law; treaties violating human rights or the principle of self-determination were mentioned as other possible examples.” Id. at 265.

85 This suggestion was implicitly followed in the ICI’s Nicaragua (Paramilitary Activities) case in 1986. See 1986 I.C.J. at 100-01, para. 190. This implicit holding, however, has its critics. See, e.g, Thirlway, The Law and Procedure of the International Court: Part Two, supra note 16, at 109 (arguing that Court’s reasoning “appears to be putting the cart before the horse”); Gordon A. Christenson, The World Court and Jus Cogens, 81 Am. J. Int’l L. 93, 100 (1987) (attacking Court’s use of claims to jus cogens status in making characterization of non-use of force as customary law).
prohibition of piracy, the protection of basic human rights, the prohibition upon non-genocidal "crimes against humanity," the non-refoulement of refugees, the illegality of unequal (or "leonine") treaties, and (somewhat circularly) the concept of the existence of non-derogable jus cogens rules.\(^6\) Apart, however, from the comparatively uncontroversial genocide and slavery prohibitions — which still have their doctrinal critics\(^7\) — nothing approaching a general consensus has developed regarding the substantive content of peremptory international law.\(^8\)

The International Law Commission debated at some length whether or not to explain the doctrinal basis of jus cogens more clearly, and agonized over whether or not to list illustrative examples of conduct prohibited by peremptory law. Ultimately, the Commissioners decided that such specificity was neither possible nor desirable. As Gerald Fitzmaurice, then Special Rapporteur to the ILC, recognized in 1958, while there was support for the idea that an international tribunal "would be entitled to refuse to apply a treaty considered by it to be 'contrary to public morality,'" but the actual

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\(^6\) See, e.g., Parker and Neylon, supra note 5, at 429-31 (quoting Gerald G. Fitzmaurice); BROWNLEE, supra note 10, at 513; Crawford, supra note 4, at 147; Schwelb, Some Aspects, supra note 19, at 966; remarks of Grigori Tunkin (USSR), in Summary Records of the 15th Session, 684th Meeting, [1963] I Y.B. Int'l L. Comm'n 69, para. 27, U.N. Doc. A/CN.4/156 and Addenda. Brownlie suggests further that the principle of permanent sovereignty over natural resources and the principle of self-determination are also "probably" peremptory norms. BROWNLEE, supra note 10, at 513. In his dissent in the Right of Passage case, Judge Fernandez continued to conflate jus cogens norms and various sorts of "general principles of law" by listing as peremptory norms the principle of "mutual respect for sovereignties," the "legal rule that he who sanctions an act sanctions also the foreseen and necessary consequences which logically flow therefrom," "the principle of interpretation of legal rules and acts in accordance with their purpose," and the principle of good faith or pacta sunt servanda, "which is the most general and the most essential of the general principles of law." Case Concerning Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 6 at 136-39 (Apr. 12)(Fernandez, J., dissenting).

\(^7\) See supra note 19.

\(^8\) Waldock expected that "the more the international community becomes integrated, the more its attention would be directed to the position of the individual. Significant jus cogens developments could therefore be expected in the direction of the protection of the right of the individual in the interests of the world community as a whole." Summary Records of the 17th Session, 828th Meeting, [1966] 1 Y.B. Int'l L. Comm'n 40, para. 56, U.N. Doc. A/CN.4/183 and Add. 1-3, A/CN.4/L.107. Although some authors have suggested that "the whole of human rights law" is part of jus cogens, such broad conceptions have received little support from government concerned about possible invasions of sovereignty. Parker and Neylon, supra note 5, at 430. Many may worry that the murkiness of jus cogens doctrine encourages its invocation as a partisan tool rather than as a considered expression of the "international conscience." Such was the Western reaction to Soviet suggestions that unequal or "leonine" treaties were prohibited by a norm of jus cogens. This idea, also adopted by the Afro-Asian Jurists' Conference in 1957, would have held invalid treaties signed by Western governments with their former overseas colonies. See, e.g., remarks of Grigor Tunkin (USSR), in Summary Records of the 15th Session, 684th Meeting, [1963] 1 Y.B. Int'l L. Comm'n 69, para. 27, U.N. Doc. A/CN.4/156 and Addenda; remarks of Manfred Lachs (Poland), in Summary Records of the 15th Session, 684th Meeting, [1963] 1 Y.B. Int'l L. Comm'n 68, para. 10, U.N. Doc. A/CN.4/156 and Addenda; Schwelb, Some Aspects, supra note 19, at 966. Lachs also felt that treaties establishing spheres of influence should be void for violation of a rule of jus cogens.
requirements of such public morality were so disputed they could not be delineated in advance.\textsuperscript{89}

The basic problem, as one member put it, was that "the Drafting Committee had been compelled to refrain from giving any definition of \textit{jus cogens} whatever, because two-thirds of the Commission had been opposed to each formula proposed."\textsuperscript{90} The French representative, for example, felt that it would not be "sound procedure" to submit a detailed text of the \textit{jus cogens} article along with "a definite position regarding the theory of the law" to a body as diverse as the United Nations.\textsuperscript{91} While the members of the Commission generally acknowledged that \textit{jus cogens} existed as part of positive law, the agreement over the content of positive law caused the difficulty." They possessed "widely different views of the . . . philosophical bases of \textit{jus cogens},"\textsuperscript{92} including the "reasons for its existence, and the foundations upon which it rested."\textsuperscript{93}

Some members, in fact, had never expected such agreement in the first place: as the Soviet delegate predicted, "[m]embers would not, of course, be able to agree on theoretical or philosophical issues; still less could they expect States to agree on such issues."\textsuperscript{94} As Fitzmaurice had anticipated, "[i]t was] not possible — nor for present purposes necessary — to state exhaustively what are the rules of international law that have the character of \textit{jus cogens}."\textsuperscript{95}

In the end, those who had supported listing examples of \textit{jus cogens} norms came to agree that the Commission should "frame the article in general terms, especially as the concept of \textit{jus cogens} would be subject to further interpretation and extension as time went on."\textsuperscript{96} "[T]he full extent of \textit{jus cogens}," it was decided "would only be determined ultimately by practice, the decisions of international tribunals and the pronouncements of

political organs."

The Commission's report on the draft *jus cogens* article observed that

The formulation of the rule... is not free from difficulty, since there is not as yet any generally recognized criterion by which to identify a general rule of international law having the character of *jus cogens*... The Commission considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of this rule to be worked out in state practice and in the jurisprudence of international tribunals. The Commission, however, decided against including any examples of rules of *jus cogens* in the article for two reasons. First, the mention of some cases of treaties void for conflict with a rule of *jus cogens* might, even with the most careful drafting, lead to misunderstanding as to the position concerning cases not mentioned in the article. Secondly, if the Commission were to attempt to draw up, even on a selective basis, a list of the rules of international law which are to be regarded as having the character of *jus cogens*, it might find itself engaged in a prolonged study of matters which fall outside the scope of the present articles.

Though it formally introduced the concept of peremptory norms to international jurisprudence and declared forthrightly that any treaty in conflict with such a rule was void, the ILC, by its own admission, would not or could not elaborate upon the doctrinal basis or upon the substantive content of *jus cogens*.

Conceivably, the drafters of the Convention, having taken their principled stand that *jus cogens* really did exist, did not thereafter care if a meaningful peremptory jurisprudence ever really developed. Indeed, the *jus cogens* clause has been greatly criticized on such grounds. Egon Schwelb, for example, criticized the drafters of the Convention for failing to provide a more effective decision-making mechanism for determining when a treaty would be void for conflicting with a peremptory norm. He compared the *jus cogens* article to

a penal code which would provide that crimes shall be punished without saying which acts constitute crimes. The text leaves everything to be worked out in state practice and by the jurisprudence of international tribunals if and when such tribunals

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have jurisdiction. Where there is no tribunal having jurisdiction, the ‘working out’ is left to . . . ‘auto-interpretation’ by the interested state, which in this case is made not only the judge but also the legislator in its own cause. [The *jus cogens* article of the Convention] amounts to a complete abdication of the legislative function.  

Whether abdication or a necessary concession to the jealous sovereignties of those national governments which would shortly be asked to vote on the Convention’s text, the Commission’s silence was deliberate. Acknowledging Schwelb’s frustration with the lack of more certain mechanism for adjudication, the ILC’s refusal to say more about the content of peremptory law, at least, is less of an abdication than it first might appear. Indeed, the Commission’s decision not to elaborate upon the substance of *jus cogens* is almost certainly doctrinally correct. As we have seen, norms of *jus cogens* are defined as being capable of change over time as the “conscience of the international community” progresses. Although composed of eminent jurists carefully selected to represent their countries of origin and to advance the interests of international jurisprudence as a whole, the ILC was not competent to suggest rules of *jus cogens* to succeeding generations. The substance of peremptory law may appropriately be addressed — through international practice and the decisional law of the International Court in binding or advisory opinions — but *jus cogens*, by its nature, is resistant to codification in an instrument like the Vienna Convention on the Law of Treaties.

II. ADJUDICATING *JUS COGENS*

The drafters of the Vienna Convention appear to have intended the International Court to hear *jus cogens* questions. Hirsch Lauterpacht’s original ILC formulation of the *jus cogens* clause provided that a treaty would be deemed void for conflict with a peremptory norm only where the ICJ declared it void.  

To be sure, the ILC did not adopt this formulation, perhaps for a reason similar to that given for not providing illustrative examples of *jus cogens* prohibitions — namely, the fear that by expressly providing for ICJ adjudication the Commission might be taken to have implicitly excluded any other means of decision. Accepting, however, that treaties are not void on *jus cogens* grounds only when declared so by the ICJ,

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99 Schwelb, Some Aspects, supra note 19, at 964.
the drafters of the Convention seem to have contemplated the mechanism of Court adjudication. Even Schweb’s exasperated critique of the *jus cogens* provisions of the Convention concedes this much. Indeed, if we reasonably suspect “auto-interpretation” to be a fairly unreliable means of enforcing peremptory law, virtually the only adjudicatory mechanism to which we can look is the Court itself.

The responsibility of the ICJ to develop a jurisprudence of *jus cogens* is doubly great as modern international jurisprudence typically has assumed that the Court must not return findings of *non liquet* — in which the Court declares itself unable to pronounce upon a certain matter because that issue falls into a gap or *lacuna* in existing law. So strongly has twentieth-century international jurisprudence dedicated itself to preventing *non liquet* that by mid-century many leading scholars had come to think the prohibition upon *non liquet* to be in itself virtually an *a priori* axiom of law. It was, in fact, said to be firmly entrenched as “one of the most undisputably established rules of positive international law as evidenced by an uninterrupted continuity of international arbitral and judicial practice.”

It is the contention of this article that the ICJ is not merely expected to make *jus cogens* decisions through the exercise of its judicial discretion but is also competent to do so by a vote of its members in the adjudication of a particular dispute. Determining a norm to be one with the character of *jus cogens* is no mean task, and the nature of the question is such that evaluating such a claim would require the most searching and honest inquiry — a sort

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101 Presumably, parties to a treaty would be unlikely to declare that instrument void on grounds of conflict with a norm of *jus cogens*, except as a purely expedient means to claim relief from an obligation for other reasons now wished to escape. Conceivably, other states might join together to prevent the parties from carrying out a treaty violating *jus cogens* — or, if peremptory law restricts non-treaty conduct, to constrain the behavior of a would-be violator. For reasons that will become clear as we review the ICJ’s “systemic-representative” structure, however, *jus cogens* interpretations by individual states or even groups of states, may be problematic. While the Court is carefully structured to give the international bench insight into (and judicial advocacy of) the world’s major legal systems, individual states or groups of states would have much more difficulty fairly considering a *jus cogens* issue.


103 Hersch Lauterpacht, *Some Observations on the Prohibition of Non Liquet and the Completeness of the Legal Order*, [1958] Sympolae Verzel 199, quoted in Stone, supra note 102, at 128. Why *non liquet* should have become such a cardinal value of international legal publicists is somewhat mysterious. It is easy to understand how scholars and jurists dedicated to the development of international law into a jurisprudence as coherent and effective as domestic law might wish to empower to Court to make decisional law by filling *lacunae* with new precedents. The present Court, however, despite being authorized by Article 38(1)(c) of its Statute to consider “general principles of law recognized by civilized nations,” is unable to lay down rules binding on non-parties and in any context other than the specific dispute submitted for resolution. On its face, the prohibition upon *non liquet* would seem an affront to the positivist traditions of international jurisprudence. Leaving the extraordinary prohibitions of *jus cogens* out of the equation, if everyday international law consists only of those rules expressly or tacitly consented-to by sovereign states, what could be more natural than for the Court simply to abstain when presented with a question to which existing law does not speak?
of "strict scrutiny" at the international level. Nevertheless, the unique structure and process of the international bench give it the ability to tackle the problems it faces in this regard. The following pages will explore the difficulties of this endeavor and explain how the Court has been structured in a way that helps overcome them.

A. The Problems of Judicial Discretion

International judges are confronted with problems in many ways more acute than their domestic counterparts. Specifically, the international system largely lacks: (1) a legislature with law-making authority; (2) a written textual anchor analogous to a constitution; or (3) a well-developed system of *stare decisis* through which particular case holdings can articulate general rules binding upon future, similarly-situated parties. Not surprisingly, these deficiencies hinder judicial decisionmaking, leaving the burden of filling lacunae in the law to the immediate exercise of judicial judgment. Indeed, far from encouraging recourse to some grounding text or to the intent of its drafters, international law sometimes requires bald judicial judgments about the prevailing values of the international community. One of these occasions is the adjudication of "general principles of law recognized by civilized nations," as authorized as a source of decisional law by Article 38(1)(c) of the Statute of the International Court of Justice.

From the Court's approaches to Article 38(1)(c) we can learn much about its ability to decide questions of peremptory law.

Article 38(1)(c) is the ICJ's analogue to authorizations for the use of judicial discretion to fill legal lacunae given by statute to domestic courts in

104 Article 59 of the Charter of the ICJ provides that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case." Statute of the International Court of Justice, Art. 59, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179 [hereinafter ICJ Statute]. According to Article 38(1)(d), judicial decisions — along with "the teachings of the most highly qualified publicists of the various nations" — may be treated as "subsidiary means for the determination of rules of law." Thus a Court ruling on a particular question may have some later force as precedent (but not, apparently, any more than a good article!). This may be as close as international law gets to a system of *stare decisis*. But see KENNETH KEITH, THE EXTENT OF THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 27-29 (1971) (arguing that Art. 59 "relates solely to the operative part of the judgment" binding upon parties in contentious — as opposed to advisory — opinions and "accordingly is not concerned, in any way with the value of earlier cases as authoritative statements of law").

105 So-called "interpretivist" methodologies of only enforcing "norms that are stated or clearly implicit" the grounding documents of a legal system will not do, because international law cannot point to a "constitutional" foundation. The UN Charter itself is a document that might in certain circumstances invite a constitutionalist's exegesis, but as Article 38 of the Statute of the ICJ suggests, see ICJ Statute, Art 38, supra note 104, the sources of international law go considerably beyond even comprehensive instruments such as the UN Charter. In particular, norms of *jus cogens* — which can invalidate a treaty text — seem by their nature to reach beyond textual grounding.

106 ICJ Statute, supra note 104, Art. 38(1)(c).
many jurisdictions. Article 38 merely extended this concept to the ICJ, providing the Court with authority, through the use of judicial discretion, to invoke "general" principles — not elsewhere found in international law — in order to prevent non liquet. The drafters of Article 38 deliberately empowered future judges “to develop and refine the principles of international jurisprudence.”

As we shall see shortly, Article 38 doctrine can teach us much about adjudicating jus cogens — and other areas in which international law cries out for the exercise of the Court’s discretion in ways not necessarily guided by judicial precedent, steered by textual interpretation nor suggested by legislative intent. To understand peremptory law to be a body of fundamental bounding rules springing from the “conscience” of the international legal community — and to hypothesize a jus cogens case...
coming before the ICJ — is to ask the Court to embark upon the challenging task of assessing the dictates of this international conscience. Modern theorists of judicial discretion, such as Aharon Barak, have discussed this task of assessing the international conscience. For example, Barak suggests that a judge faced with such a task “give expression to what appears to him to be the basic conception of the society (the community) in which he lives and acts.” In the “hard” cases which from time to time demand the exercise of judicial discretion, the jurist must use his judgment to reach the result he thinks to be most faithful to the values of the legal system as a whole, balancing the conflicting values presented and formulating a new judicial policy by articulating a new norm. Such a decision must be made — insofar as possible — without reference to the judge’s own values. A judge must, Barak writes, make a deliberate transition from his personal perspective as “the judge” to that of “the Court,” a process which is intended to enable him to apply the standards of the broader legal community of which he is a part. He must be capable of “looking at himself from ‘the outside’” and of exercising his judgment in the way that he believes is most faithful to the ideals of the legal community of which he, as judge, is the authoritative representative.

Barak’s exhortation to represent the values of the legal community “as a whole” poses particular difficulties where the relevant legal community is divided on the subject, or where no clear values can be identified. The domestic judge takes his legal community as a given: Barak’s “legal community test” saddles him with representing, in his judicial norm-articulation, the values of a legal community possessing particular geographic and/or jurisdictional frontiers. Though the boundaries of such a domestic community are clear, the application of this methodology is made much more problematic with size: the larger and more diverse the population falling within its borders, the greater the likelihood of value-heterogeneity on a particular issue and the more difficult it becomes for the judge to identify a “basic conception” capable of guiding his articulation of a new legal norm. In effect, diseconomies of scale exist in all exercises of judicial discretion.

These problems are most acute, of course, at the international level. The ICJ has a jurisdictional constituency encompassing virtually the entirety of

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110 AHARON BARAK, JUDICIAL DISCRETION 12 (Yadin Kaufmann, trans., 1987).
111 *Id.* at 125. Barak consistently uses the masculine third-person singular to indicate an unspecified individual; this convention will thus be followed herein in order to avoid confusion in juxtaposing textual material and quoted matter.
112 No pretense is made to “objectivity” in any “absolute” sense. What is clearly meant is not that a judge should pretend to any a priori truth, but merely that his personally-held values (“subjective”) should be replaced for decision-making purposes by those of the legal community whose authority his office embodies (“objective”).
113 BARAK, supra note 110, at 125-26.
114 *Id.* at 127.
humanity: the value-diversity within its “legal community” by definition, is maximal. Thus, international jurists cannot be expected to act exactly like domestic jurists, as the application of Barak’s test is difficult indeed.

**B. The Structure and Process of the Court**

Fortunately, however, ICJ judges are different from domestic judges in some helpful ways. The structure and procedures of the ICJ are, in fact, remarkably well adapted to cope with the challenges of exercising judicial discretion in this manner — and thus for adjudicating “general principles” or *jus cogens* questions.

The ICJ’s greatest advantage exists in its structural differences. Unlike a domestic judge of first impression, who may find herself alone on a bench, the international bench is plural — and each judge is carefully representative of relatively well-defined legal constituencies. Under Article 2 of the Statute of the ICJ, no more than two of the Court’s 15 judges may be of the same nationality. Under Article 4 of the Statute, they are to be elected by the General Assembly and the Security Council from a list of persons “nominated by the national groups in the Permanent Court of Arbitration.” These Articles help ensure considerable national diversity.

More importantly, however, a judge’s election is not intended simply to be a majoritarian process: important values of “representativeness” are also to be served. According to Article 9 of the Statute of the Court, the electors in the General Assembly and the Security Council must “bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world be assured.”

The members of the Court are intended to play a considerably different role in the legal system than that played by domestic judges. While it is the job of the Court as a whole to decide legal questions and to exercise judicial discretion as the legal embodiment of the entire international community, individual judges are expected to be, in a sense, value-partisans. They represent the values of their “home” legal communities on the Court. The Court’s internal decision-making, therefore, effectively incorporates a quasi-comparativist methodology; majority approval from the representatives of the world’s “main forms of civilization and . . . principal legal systems” is required before any decision can be reached. The difficulties facing an individual judge are thus reduced to a much more manageable level.

Because a legal community of any size might still be divided internally on a particular issue, exercising discretion according to the “legal community test” may still be quite difficult. The “representative partisanship” expected of ICJ judges, however, allows the global value-constituency of the Court to be subdivided. Each single judge must reflect the values of the legal
community he represents, be it “systemic” (e.g. “socialist” or “liberal-democratic”) or more narrowly national-geographic (e.g. France, China, or Algeria).

The ICJ’s adjudicative procedures also differ sharply from domestic courts, where a judge with an interest in the outcome is generally expected to withdraw. Under Article 31 of the Statute of the Court, a party to a dispute whose nationality is not represented on the bench is in fact entitled to appoint its own judge ad hoc.\(^{115}\) This measure assaults the classical prohibition against judging one’s own case,\(^{116}\) but it accomplishes the important international jurisprudential role of ensuring that the legal perspectives of those most interested in the disputed question are considered in the Court’s deliberations.\(^{117}\) This procedure also highlights the peculiar value-partisanship expected of international jurists: selected on the basis of their ability to represent constituencies of the “main forms of civilization and . . . principal legal systems,” it is part of the job of ICJ judges to ensure that the values of their “home” system are considered in the Court’s decision-making.\(^{118}\)

This is not to suggest that international jurists’ only responsibility is as a partisan of their own domestic legal values. Because the values and policies served by legal principles in the international and domestic arenas may vary considerably, a Court made up of jurists each pursuing only fidelity to his own domestic legal conceptions would surely fail to live up to its obligation to exercise discretion with attention to the unique values and policies of international (as opposed to domestic) jurisprudence. An ICJ judge must wear two hats: that of a representative of his legal “civilization” and that of a member of a bench having special responsibilities within the system of international legal order.

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\(^{115}\)“Judges of the nationality of each of the parties [to a dispute before the Court] shall retain their right to sit in the case before the Court.” *ICJ Statute,* supra note 104, Art. 31(1) “If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge . . . .” *Id.* at Art. 31(2). “If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge . . . .” *Id.* at Art. 31(3).


\(^{117}\)Not insignificantly, it is useful to ensure the perceived political and doctrinal legitimacy of any “general principles” thereafter relied upon in decisions. Also useful in allaying the fears of any concerned about willful “judicial legislation” is the provision of Article 38(2) stipulating, in effect, that whatever the Court’s power to invoke “general principles,” it does not extend to the point of administering traditional equity upon the parties without their express consent. “This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono* ["what is equitable is good"] if the parties agree thereto.” *ICJ Statute,* supra note 104, Art. 38(2).

\(^{118}\)This procedure for the *ad hoc* appointment of litigant-selected judges, however, may make the Court poorly-suited for complex litigation involving multiple parties with non-congruent interests. The appointment of multiple *ad hoc* judges might greatly distort the system-representative nature of the bench.
The problems of discerning guiding values from a potentially-divided "legal community" still bedevil international jurists both at the "micro" and at the "macro" levels: in discerning the "fundamental conceptions" of their home constituencies, and in deciding whether the international legal order itself contains guiding values applicable to the case at hand. Their role is perhaps more challenging — at least in terms of the exercise of judicial discretion — than that of domestic judges. Nevertheless, the peculiar membership structure of the ICJ represents an ingenious approach to mitigating the value-diversity problems that complicate international judicial life.

The Committee of Jurists that drafted the Statute of the Permanent Court of International Justice (PCIJ) — from which the present ICJ Statute directly descends — included these provisions in order to ensure that "whenever a particular legal system is involved in a case . . . the other systems of law [will] be brought into line with it, so that the Bench may really and permanently represent the legal conceptions of all nations."119

C. Deciding Jus Cogens

In exercising judicial discretion in matters such as the application of "general principles of law recognized by civilized nations," the Court has been satisfied with a coincidence of opinion amongst its own judges. Such a method affords sufficient safeguards, the judges having been elected so as to ensure "the representation of the main forms of civilization and the principal legal systems of the world." . . . [I]n view of this it may be conceded that anything which all the judges of the Court are prepared to accept as a "general principle of law" must in fact be "recognized by all civilized nations."120

This article contends that the unique structure of the ICJ bench — as one carefully representative of "the legal conceptions of all nations" — makes the Court as capable of adjudicating matters of peremptory law as it is of adjudicating "general principles" questions under Article 38(1)(c).

The idea that a carefully-picked representative sample of the international community might be competent to assess the general "consensus" of that community is not new. In a more overtly political context, it has long been suggested that one might judge the universality of a particular rule by looking to whether it received the support of

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120 Michel Virally, The Sources of International Law, quoted in MANUAL OF PUBLIC INTERNATIONAL LAW 116, 146 (Sorensen ed., 1968).
representative states from the principal systemic clusters of countries (e.g., the leading states of each of the world’s capitalist, socialist and so-called “non-aligned” blocs).  

For purposes of deciding *jus cogens* cases, the legal constituency-representative character of the international bench perhaps gives it unique competence to assess whether a treaty instrument or a particular state practice affronts the “conscience” of the international legal community in such a way as to violate a norm of *jus cogens*. Finding a particular norm to be one with the character of peremptory law, of course, is no small matter. Peremptory laws possess the status of the highest and most compelling commandments of the international legal system. Only a very few claimant rules would surely survive such scrutiny, but the Court clearly has the competence so to decide.

Because decisions of *jus cogens* can be more momentous determinations than ordinary rulings, it might be argued that only an extraordinary majority of judges should be able to declare a particular rule to be a fundamental boundary norm of the international legal system. Only in this fashion could the international community be confident that the decision represented the overwhelming balance of international legal opinion. A supermajority requirement, however, would be inconsistent with the provisions of Article 55(1) of the Statute of the Court providing for majority voting on all matters considered by the bench. The structure of the Court ensures that the

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121 This was, for example, the position of many Soviet scholars such as Tunkin. See, e.g., GRIGORI TUNKIN, THEORY OF INTERNATIONAL LAW, 170-72 (Butler trans., 1974); cf. Edward McWhinney, Contemporary Soviet General Theory of International Law: Reflections on the Tunkin Era, 25 CANADIAN Y.B. INT’L L. 187, 195-201 (1987). A representative-comparativist method was also employed in the Texaco Overseas Petroleum arbitration. In this case, an arbiter found UN Resolution 1803 (XVII) of Dec. 14, 1962 to govern the dispute in question because — in contrast to two other resolutions on the subject — it had been supported by a systemic cross-section of the international community:

It is particularly important to note that the majority voted for this text, including many States of the Third World, but also several Western developed countries with market economies, including the most important one, the United States. The principles stated in this Resolution were therefore assented to by a great many States representing not only all geographic areas but also all economic systems.


Echoes of this idea also appear in the decision-making process of the UN Commission for International Trade, which attempted to ensure “an adequate representation of countries of free enterprise and centrally-planned economies, and of developed and developing countries . . . .” T.O. ELIAS, NEW HORIZONS IN INTERNATIONAL LAW 387 (2d ed. 1992); Compare North Sea Continental Shelf (F. R. G. v. Den., F. R. G. v. Neth.), 1969 I.C.J. 3 (Feb. 20), at 228 (Lachs, J., dissenting) (advocating standard for judging “general acceptance of a given instrument” by “representativeness” of support among states “considered as having a special and immediate interest” in the subject matter).

122 Article 55(1) requires that “[a]ll questions shall be decided by a majority of the judges present.” ICJ Statute, supra note 104, Art. 55(1).

[Placing] a requirement of judicial unanimity upon the existence of a norm of *jus cogens* would effectively rob peremptory law of adjudicable content. Since party-disputants are entitled, under Article 31 of the Statute of the Court, to place a judge of their own on the bench (if they do not have one already), a consensus voting requirement would make any contested finding impossible. This
collective decision-making of the bench would take into account the views of the world's principal legal communities as considered from the perspective of jurists selected from within those communities but also responsible for serving the distinctive values and requirements of the international legal system as a whole. Beyond this, however, a simple majority should suffice. (The majority-vote requirement of the Court, of course, long preceded the drafting of the \textit{jus cogens} clause of the Vienna Convention.)

One qualification should be added, however. Given the importance of including the insights of all the Court's various judges when making a \textit{jus cogens} finding, it might be unwise to commit \textit{jus cogens} questions either to the three-judge "chambers" formed by the Court pursuant to Article 26(1) of the Statute for the purpose of adjudicating particular categories of cases, or to the five-judge chamber authorized by Article 29 to adjudicate cases by speedy summary procedure.\textsuperscript{123} Article 27 provides that the judgment of one of these chambers "shall be considered as rendered by the Court,"\textsuperscript{124} but for \textit{jus cogens} purposes, a sub-chamber of three (or even five) judges would seem an inadequate way to determine the fundamental prohibitive "conscience" of the international legal community.\textsuperscript{125}

Because of the peculiar character of peremptory norms, the exercise of the Court's collective decision-making discretion in \textit{jus cogens} matters can little rely upon standard legal approaches to statutory interpretation and conventional legal analysis. Nevertheless, an understanding of the informal requirements of good judicial reasoning should improve the quality of the Court's judgments by the very process of encouraging each judge to think through the process of "stepping outside himself" in order to consider the values both of his legal-community constituency and of the international system as a whole.

Here again, a lesson may be learned from the Court's adjudication of "general principles of law recognized by civilized nations" under Article 38(1)(c) of the Statute of the Court. For some theorists of Article 38(1)(c), a principle of law is "general" if "it is recognized in substance by all the main systems of law."\textsuperscript{126} This approach has been taken to suggest the need for

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\item \textsuperscript{123} See \textit{ICJ Statute}, supra note 104, Arts. 26, 29.
\item \textsuperscript{124} \textit{Id.} at Art. 27.
\item \textsuperscript{125} A sitting bench of nine judges, the minimum permissible for a sitting of the full Court under Article 25(3) of the Statute, would technically suffice — but more is certainly better.
\item \textsuperscript{126} \textit{H.C. GUTTERIDGE, COMPARATIVE LAW} 65 (2nd ed., 1949), quoted by Wolfgang Friedmann, \textit{The Uses of "General Principles" in the Development of International Law}, 57 \textit{AM. J. INT'L L.} 279, 285 (1963); see also Mann, \textit{Reflections on a Commercial Law of Nations}, 1957 \textit{BRIT. Y.B. INT'L L.} 20, 34-39 (defining "general" principle as one which "pervades the municipal law of nations in general").
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massive comparative law projects in order to ferret out "sub-stratum of institutions and concepts" so common to the various national legal systems of the world that they compose, independently of custom or treaty, general international law. A rival approach disdains mechanical comparativist inquiry, seeking "general" principles by reason alone, as requirements "so firmly grounded in reason as to form part of . . . [a] 'modern law of nature.'"

A third approach to Article 38(1)(c) combined the insights of these comparativist and categorist camps, consulting the views of the world's legal systems as a means to aid the exercise of judicial discretion. The perspectives of municipal legal systems could provide "indication[s] of policy and principles," but need not be dispositive in an international context. A comparativist mental process could thus serve as a useful "corrective to any tendency there may be . . . to employ concepts or rules

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127 Wolfgang Friedmann, for example, called for

[A]n examination of these principles means a pragmatic attempt to find from the major legal systems of the world the maximum measure of agreement on the principles relevant to the case at hand . . . . [T]he aim is to use comparative law as a guide . . . . This will, in most though by no means in all cases, involve a comparison of the relevant principles of the most representative systems of the common-law and the civil law world. In certain cases it may be necessary to examine some of the non-Western legal systems, such as Muslim or Hindu law, now actively represented in the family of nations.

Friedmann, supra note 126, at 284-85.

A litigation-driven example of this thrust occurred in the Right of Passage Case, when Portugal undertook a survey of 64 municipal legal systems in order to show the general acceptance of rules recognizing a right of passage for enclaved territory: its finding that 61 of these systems recognized such a right prompted it to conclude that "the municipal laws of the civilized nations are unanimous" in recognizing such a right. Portuguese Final Submissions, 1960 I.C.J. at 11-12. Because Portugal's argument was based primarily upon general and special practice rather than upon "general principles," however, the Court did not reach this issue. See generally Thirlway, Law and Procedure: Part Two, supra note 16, at 120.


130 "There is no need to undertake a quest for that which forms the basis of all law." Frances T. Freeman Jalet, The Quest for General Principles of Law Recognized by Civilized Nations — A Study, 10 UCLA L. REV. 1041, 1086 (1963).

131 As Bin Cheng put it, "[t]his part of international law does not consist, therefore, in specific rules formulated for practical purposes, but in general propositions underlying the various rules of law which express the essential qualities of juridical truth itself, in short of Law." CHENG, supra note 107, at 24.

132 In the Matter of an Arbitration Between Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi, supra note 107, at 251. Judge Fernandez, in the Right of Passage case, may also have reasoned in this fashion, concluding that the principle of "mutual respect for sovereignties . . . necessarily implies, as a logical consequence," the recognition of a right of passage between the constituent parts of an enclaved territory. Case Concerning Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 6 at 136-37 (Fernandez, J., dissenting).

which either belong exclusively to a single system or are only to be found in a few such systems.\textsuperscript{134}

This third approach to “general principles” law can best inform the Court’s consideration of \textit{jus cogens} questions. The Court is carefully structured so as to incorporate the perspectives of the world’s principal legal systems, but a judge’s inquiry cannot end with merely a census-taking of municipal principle. This is especially so with respect to matters of peremptory law, for which domestic law provides few clear analogues. Norms of \textit{jus cogens} provide bounding values for a system otherwise governed — for legal purposes — by tacit and explicit agreements between sovereign state-governmental powers without meaningful legislative or executive institutions of the sort possessed by even the least developed systems of municipal law.

\textit{Jus cogens} cases will probably rarely arise, and may even more rarely be litigated (at least through party-instigated suits\textsuperscript{135} which are legally binding upon the participants). Indeed, few lawyers appearing before the international bench would feel comfortable advancing an argument based \textit{purely} in peremptory law given: (1) the paucity of prior \textit{jus cogens} case law before the ICJ; (2) the contentiousness of its content; and (3) the awkwardness of such questions within an international system of states jealous of their sovereignty and sensitive to the dangers of judicial overreaching. However, \textit{jus cogens} claims might be useful as supplemental arguments, much as “crimes against humanity” convictions were obtained before the Nuremberg tribunal only with respect to defendants who were also found guilty of other crimes.\textsuperscript{136} Rather than through party-instigated litigation, a more likely avenue through which \textit{jus cogens} will reach the Court may be through requests for advisory opinions\textsuperscript{137} by the UN General


The object seems to be . . . to provide the judge, on the one hand, with a guide to the exercise of his choice of a new principle and, on the other hand, to prevent him from “blindly following the teaching” of jurists with which he is most familiar “without first carefully weighing the merits and considering whether a principle of private law does in fact satisfy the demands of justice” if applied to the particular case before him . . .


\textsuperscript{135}“Few norms in international law give rise to as little controversy as the one which states that the basis or source of the jurisdiction of international courts is the consent of the states which are parties to a given dispute.” Renata Szafarz, \textit{The Compulsory Jurisdiction of the International Court of Justice} 3 (1993).

\textsuperscript{136}See, e.g., Schwelb, \textit{Crimes Against Humanity}, supra note 41, at 205-11.

\textsuperscript{137}The Court is not deprived of jurisdiction, when properly presented with a request for an advisory opinion, by the fact that a question is merely “abstract,” “theoretical,” or “hypothetical” — though it may be less willing, in such circumstances, to exercise its discretion to issue an opinion. See, e.g., Dharmap Pratap, \textit{The Advisory Jurisdiction of the International Court} 169-72 (1972). Nor do advisory opinions appear to be of any less precedential value to the Court than prior judgments. \textit{Id.} at 257. Generally recognized is the Court’s role in the development of international law through its advisory
Assembly or Security Council pursuant to Article 65(1) of the Statute of the Court and Article 96(1) of the U.N. Charter — or by specialized UN agencies or other organs authorized by the General Assembly to do so “on legal questions arising within the scope of their activities” pursuant to Article 96(2) of the Charter.138

When cases do arise,139 however, the peculiar character of preemptory norms as rules originating in the basic values of the international community will ensure that the mere application of domestic legal analogies will be inadequate. Judges will be required to fulfil both of their institutional roles: that of representative of their own legal communities and that of jurists entrusted with enforcing the values of international law itself. Though the exercise of judicial discretion in such cases would be an inherently demanding task, the structure and decision-making processes of the Court are crafted with this sort of task in mind. Moreover, suited as it is to the exercise of Barakian discretion in a world of maximal human value-diversity, the institutional architecture of the ICJ might prove a useful model for other international tribunals which might face issues of peremptory law, not least those which might be established to handle international prosecutions arising out of atrocities committed in Rwanda or the former Yugoslavia.140

III. CONCLUSION

The International Court of Justice is well equipped for the rigors and subtleties of adjudicating jus cogens. Agreement upon a particular point of

opinions and through its judgments in contentious cases. Id. at 260.

138 Cf. ICJ Statute, supra note 104. Advisory opinions are not, of course, binding in the formal sense provided between parties under Article 59, but they might prove a useful vehicle for spelling out “subsidiary means for the determination of rules of law” within the terms of Article 38(1)(d). Some international agreements may include provisions designed to overcome the normal procedural incapacity of international organizations to appear before the ICJ by providing that in certain disputes with signatory states a specified international organization and the disputant state may request an opinion of the Court and that both parties agree to abide by the outcome. See, e.g., PRATAP, supra note 137, at 47-49. The binding character of such provisions, however, derives from the contractual force of the secondary written instrument, rather than from the freestanding jurisdiction of the Court.

139 Even requests for advisory opinions are exceedingly rare, with the General Assembly having requested opinions only in a handful of cases, and the Security Council having done so only once (with respect to South Africa’s occupation of Namibia). See PRATAP, supra note 137, at 59 n.3, 271. Though more than a dozen specialized agencies have been authorized to request advisory opinions of the Court, very few actual requests have been lodged. Id. at 80 n.1. Moreover, should an advisory opinion actually be requested, there are no “formal rules [for] determining the legal consequences in terms of permissible conduct for States arising out of a judicial pronouncement cast in the form of an advisory opinion,” (quoting SHABTAI ROSENNE, 2 THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 756 (1965)), and such questions are the object of some disagreement. Id. at 744-54.

140 In such circumstances, however, the procedures for appointing an ad hoc judge to represent the legal community of a state-litigant otherwise lacking representation on the bench would have to be either abandoned or altered to reflect the individual status of defendants.
peremptory law may be very difficult, even for a simple majority of the Court’s judges, and boundary norms are likely rarely to be presented in a form amenable to binding resolution. Nevertheless, especially given the availability of advisory opinions upon request by majority vote of the UN General Assembly or Security Council, *jus cogens* cases may arise. Doctrinally problematic as peremptory law may be, this article argues that the Court is competent to decide peremptory-law issues.

The international legal community has been able to agree that *jus cogens* exists as a category of law. However contentious future disputes over its substantive content may be, our understanding of the Court’s ability to adjudicate such claims — and of the ways in which judges should approach the exercise of such judicial discretion — may help make it possible for the ICJ to begin to develop a coherent jurisprudence of peremptory law.