Goettingen Journal of International Law 12 (2022) 1, 219-239

An Unlikely Duo? Regionalism and *Jus Cogens* in International Law*

Lucas Carlos Lima** and Loris Marotti***

Table of Contents

* While this paper is the result of a joint work of the authors, Lucas Carlos Lima is the author of Sections C and D, and Loris Marotti wrote Sections A and B. The authors would like to thank Paolo Palchetti, Mads Andenas, the anonymous reviewers from GoJIL and all the participants in the conference "Regionalism in International Law" held on 10 and 11 February 2020 at the Paris 1 Pantheon Sorbonne University.

** Universidade Federal de Minas Gerais.
*** University of Naples Federico II.

This contribution is licensed under the Creative Commons Licence Attribution – No Derivative Works 3.0 Germany and protected by German Intellectual Property Law (UrhG).

doi: 10.3249/1868-1581-12-1-lima-marotti

A. Introduction

Recent years have witnessed a renewed interest in peremptory norms of international law (*jus cogens*) in the international legal discourse. The ongoing works of the International Law Commission (ILC or Commission) on the topic[1], also prompted by the increasing relevance such norms have gained in the case law of national and international courts, is refreshing the long-standing debate about the scope, nature and content of peremptory norms[2]. Against this background, less attention is being paid to the possible relations between *jus cogens* and regionalism, as well as to the legal and political implications such relations may have in the international realm.

There is no doubt that, at least at first sight, the juxtaposition of the two idea(l)s of regionalism and peremptoriness appear as counter-intuitive in international law. If one moves from the definition of peremptory norms included in Article 53 of the 1969 *Vienna Convention on the Law of Treaties* (VCLT), referring to a norm "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted", there seems to be little room for any regional perspective in this context. The universalistic stance underlying the idea of *jus cogens* has long influenced judicial and scholarly elaborations. It is not entirely clear, however, whether and why speaking of "regional *jus cogens*" today is controversial in States and ILC's perspectives, as well as whether "regional approaches to *jus cogens*" play some role in defining the relations between peremptoriness and regionalism in international law. These concepts – regional *jus cogens* and regional approaches to *jus cogens* – express two different ways of assessing the relations between regionalism and peremptoriness. Regional *jus cogens* refers to the possibility of peremptory norms having a regional character, thus lacking the universal scope that commonly attaches to the notion of *jus cogens*. Regional approaches to *jus cogens*, on the

1 International Law Commission Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*) (With Commentaries), *Report of the International Law Commission*, Seventy-First Session, General Assembly Official Records, Supp No 10 (A/74/10), Chapter iv, para. 57. See D. Tladi, 'The International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*): Making Wine From Water or More Water Than Wine', 89 *Nordic Journal of International Law* (2020) 2, 244.

2 See among others K. Gastorn, 'Defining the Imprecise Contours of *Jus Cogens* in International Law', 16 *Chinese Journal of International Law* (2017) 4, 643-62; U. Linderfalk, '*Understanding Jus Cogens in International Law and International Legal Discourse*' (2020); E. de Wet, '*Entrenching International Values Through Positive Law: The (Limited) Effect of Peremptory Norms'*, KFG Working Paper No. 25, (2019).

other hand, refer to the attitude taken by regional actors, and particularly by regional international courts such as the European Court of Human Rights (ECtHR) or the Inter-American Court of Human Rights (IACtHR), as to the identification of *jus cogens* norms as traditionally conceived.

This paper looks at these two regional perspectives of *jus cogens* with a view to discuss how the relations between peremptoriness and regionalism are perceived in the current debate pertaining to *jus cogens*. While these two perspectives express different ways of considering the relations between regionalism and peremptoriness, this paper shows that they are somehow interconnected: regional *jus cogens* may indeed represent a useful tool to capture and give meaning to certain regional (and controversial) approaches to *jus cogens*.

This paper is organized into two parts. In the first part, the paper takes stock of the recent position adopted by States and the ILC on regional *jus cogens*. As with many other issues about the legal nature of *jus cogens* and its core elements, there is no generally accepted view on the admissibility of regional *jus cogens*. A rather firm stance has however been recently taken by the Special Rapporteur of the ILC on the subject of *jus cogens*. Besides concluding that the notion of regional *jus cogens* does not find support in the practice of States, the Special Rapporteur has identified several conceptual and practical difficulties with the concept. This stance followed the even more radical positions taken by States on the matter. This paper appraises in particular the alleged reasons why regional *jus cogens* is met with skepticism. It does not aim to demonstrate that, contrary to the ILC's position, there is room, in theory and practice, for regional *jus cogens*. The question remains open to debate and its understanding is subject to the "pervasive influence" of legal positivism and legal idealism approaches to the issue[3]. Rather, this paper claims that the debate on regional *jus cogens* displays approaches that say something as to the ways regionalism is currently perceived in international law.

In the second part, this paper explores the second regional perspective of *jus cogens* – that of regional approaches to *jus cogens* – taking as a case study the judicial practice of the IACtHR. Over the years, the Court has shown particular activism in dealing with the question of *jus cogens*. The way the IACtHR approaches the topic is illustrative especially because it depicts a tension between the universalism that traditionally lies behind the idea of *jus cogens* and a latent regionalism that also emerges from that body of judicial practice. The main

[3] U. Linderfalk, 'Understanding the *Jus Cogens* Debate: The Pervasive Influence of Legal Positivism and Legal Idealism', in M. den Heijer & H. van der Wilt (eds), 46 *Netherlands Yearbook of International Law* (2015), 51.

argument here is not to demonstrate that that Court is, as a matter of fact, identifying and applying regional *jus cogens*. On the contrary, the aim is to demonstrate that the Court is developing a practice that is difficult to square with the idea of universalism underlying the traditional conception of *jus cogens*. Resorting to the notion of regional *jus cogens*, it is submitted, may ultimately help in understanding and conceptualizing this controversial practice.

B. Regional *Jus Cogens* and Its Discontents

I. The ILC...

The first regional perspective pertains to the idea of regional *jus cogens*. It is worth recalling that such an idea has been advanced and discussed by many scholars over the years. It is sufficient to recall here that, according to Gaja,

> "[n]o convincing reason has ever been given for ruling out the possibility of the existence of non-universal, or 'regional' peremptory norms. Values prevailing in regional groups do not necessarily conflict with values operating in a larger framework. There may be norms which acquire a peremptory character only in a regional context. [...] the Vienna Convention appears to use an unjustifiably restricted concept of peremptory norm".[4]

While admitting the theoretical possibility of regional *jus cogens*, several scholars have also attempted to substantiate the concept. Reference has been made, for instance, to a "European system of peremptory human rights"[5] a

4 G. Gaja, 'Jus Cogens Beyond the Vienna Convention', 172 *Collected Courses of the Hague Academy of International Law* (1981), 284. See also R. Hasmath, *The Utility of Regional Peremptory Norms in International Affairs*, paper presented at the American Political Science Association Annual Meeting (New Orleans, United States), 30 August-2 September 2012 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1366803 (last visited 21 September 2022); and more recently P. Fois, 'Sui Caratteri Dello Jus Cogens Regionale nel Diritto Dell'Unione Europea', *Rivista di diritto internazionale* 103 (2020) 3, 635; Further references are included in the *Fourth Report on Peremptory Norms of General International Law (Jus Cogens) by Dire Tladi, Special Rapporteur*, UN Doc. A/CN.4/727, paras 21 [*Fourth Report*].

5 A. Pellet, 'Comments in Response to Christine Chinkin and in Defense of Jus Cogens as the Best Bastion Against the Excesses of Fragmentation' in (XVII) *Finnish Yearbook of International Law* (2006), 89.

"European public order"[6], and, in a historical perspective, to "*jus cogens* norms among socialist countries"[7]. Probably the most famous and much-quoted reference to regional *jus cogens* comes from the Inter-American Commission of Human Rights, which in 1987 held that "in the member States of the [Organization of American States] there is recognized a norm of *jus cogens* which prohibits the State execution of children"[8]. Most of these examples of regional *jus cogens* have been dismissed by other authors, and by the same Special Rapporteur at the ILC, as presenting several conceptual difficulties and, most importantly, as not really supported by State practice[9].

As stated above, it is not our intention to engage in the debate whether regional *jus cogens* is theoretically and practically conceivable, least of all whether this or that regional norm has acquired the status of *jus cogens*. The debate is open, and even admitting the logical possibility of regional *jus cogens*, one has to acknowledge that the concept remains "largely untested in practice and not in line with the universal aspirations of peremptory norms"[10]. Rather, aside from the absence of practice, our focus is placed on the reasons why there is a general distrust towards the possibility of regional *jus cogens* in the Commission and States' views.

6 R. Kolb, *Peremptory International Law – Jus Cogens: A General Inventory* (2015), 97. Reference to the concept of "European public order" can be found in the case law of the European Court of Human Rights; See e.g. *Loizidou v. Turkey (preliminary objections)*, ECtHR Application No. 15318/89, Judgement of 23 March 1995, paras 37, 75, 93.

7 G.I. Tonkin, *Theory of International Law* (1974),158, 444-445; see also Hasmath, *supra* note 4 for other examples.

8 R*oach and Pinkerton v. United States*, IACHR Petition 12-439, No. 3/87.

9 Fourth Report, *supra* note 4, referring to the difficulties of the establishment (or formation) of a regional *jus cogens* (with the problem of the applicability of the persistent objector rule), the question of definition of "region", the question of the link between regional *jus cogens* to an existing regional treaty regime, the exceptional character of *jus cogens,* and the difficulties relating to the consequences of regional *jus cogens*; See more recently R. Santolaria, 'The Treatment of Peremptory Norms of General International Law (*Jus Cogens*) in the Inter-American Human Rights System', in D. Tladi (ed.) *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (2021), 320, 323, criticizing the idea of an "American *jus cogens*" or "African *jus cogens*".

10 D. Costelloe, *Legal Consequences of Peremptory Norms in International Law* (2017), 20. See more recently, on this debate, P. Šturma, 'Is There any Regional Jus Cogens in Europe? The Case of the European Convention of Human Rights', in D. Tladi (ed.) *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (2021), 302, 318, who concludes that the ECHR as a whole "is not an example of regional *jus cogens*".

It is submitted that such skepticism reflects a combination of two factors: on the one hand, the universal assumptions that generally inspire the Commission's works, which are fostered in our case by the traditional universalistic narrative of peremptory norms; on the other hand, the attitude of States in rejecting this concept. This attitude may be traced back to the uncertainties pertaining to the formation and impact of peremptory norms in general, and regional peremptory norms in particular. Since States are largely the makers of international law, some may actually have genuine legal concerns about an additional legal category that could curtail their normative leeway.

Starting from the attitude that generally emerges from the work of the Commission, it is worth recalling what Crawford summarized when describing the "resolute universalism" of the ILC:

> "the Commission's record reveals not merely an absence of reference to the issues of regionalism but even a deliberate attempt to eschew any such ideas [...] [I]f one could write a history of normative developments at the international level in terms of the tension or dialectic between universalism and regionalism, the point is that a history of the contribution of the Commission to those developments would be one-sided, or even wholly lacking. In conformity with its Statute and mandate, the Commission has worked entirely on the assumption of universalism"[11].

This attitude has been sustained over the years by the Commission and it is evident that it can be found even more so in works relating to a category of norms which, since their first acknowledgments in official codification works, have always been considered as inherently universal by States and by the ILC itself.

Indeed, the idea of universal aspirations and the applicability of peremptory norms is clearly reflected in the works of the ILC on peremptory norms. Draft conclusion 3, adopted on first reading, provides that "Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are *universally applicable*"[12]. In the commentary to

[11] J. Crawford, 'Universalism and Regionalism From the Perspective of the Work of the International Law Commission' in United Nations, *International Law on the Eve of the Twenty-first Century. Views From the International Law Commission* (1997), 113.

[12] Emphasis added.

this conclusion, it is noted that the characteristic of universal applicability of peremptory norms of general international law implies that such norms do not apply on a regional or bilateral basis[13]. Thus, the ILC seems to have closed the doors for the possibility of regional *jus cogens* moving from the idea that *jus cogens* norms are universally applicable by their very nature. This idea denotes a strong attachment to the spirit of Article 53 VCLT and enjoys wide support in practice, even if it is mainly referred to practice pertaining to norms of universal character (such as the prohibition of genocide, or aggression). In other words, the ILC has drawn from such practice an inherent feature of *jus cogens*, which is its universal applicability. In his first report the Special Rapporteur even stated that regional *jus cogens* would be an exception to the "general principle of universal application of *jus cogens* norms"[14].

At the same time, however, there is some ambiguity in the ILC approach to the question of the possibility of regional *jus cogens*. While the passages just mentioned show a somewhat radical position as to the possibility of regional *jus cogens* in international law, other passages suggest a more permissive approach which seems at least to acknowledge the logical possibility of such norms. In the commentary to draft Conclusion 1, dealing with the scope of the work, it is stated that

> "[t]he phrase 'peremptory norms of general international law (*jus cogens*)' also serves to indicate that the topic is concerned only with norms of general international law. *Jus cogens* norms in domestic legal systems, for example, do not form part of the topic. Similarly, norms of a purely bilateral or regional character are *also excluded from the scope of the topic*".[15]

In this case the exclusion from the topic does not seem to completely rule out at least the logical possibility of regional *jus cogens*[16].

13 *Report of the International Law Commission Seventy-First Session*, UN Doc A/74/10, 9 August 2019, 156, para. 15.

14 *First Report on Jus Cogens by Dire Tladi, Special Rapporteur* (2016), UN Doc A/CN.4/693, para. 68.

15 *Report of the International Law Commission Seventy-First Session, supra*, note 13, 148, para. 7 (emphasis added).

16 At the end of the fourth report dealing with the issue, the Special Rapporteur observed that "it can be concluded that the notion of regional jus cogens does not find support in the practice of States. While a draft conclusion explicitly stating that international law does not recognize the notion of regional jus cogens is possible, the Special Rapporteur

It should be noted, in passing, that a similar and more permissive approach – which does not seem to exclude the possibility of regional *jus cogens*, but simply leaves such category out of the scope of the work – can also be found in an earlier work of the ILC. The reference goes to the 2011 *ILC Guide to Practice on Reservation to Treaties*[17], whose Special Rapporteur, Alain Pellet, has supported the idea of regional *jus cogens* in scholarly writings[18]. In the commentary to Article 4.4.3 on the absence of effect of a reservation to a treaty provision which reflects a peremptory norm of general international law[19] the reference to peremptory norms, which, in the ILC's words, "*ex hypothesi* [are] applicable to all States and international organizations", is accompanied by the caveat "subject to the possible existence of regional peremptory norms, which the Commission did not address"[20].

Ultimately it seems that the Commission's "resolute universalism" has been confirmed in recent work on peremptory norms, particularly in light of the influence played by the universalistic stance coming from the VCLT and practice relating to *jus cogens* norms of universal character. Yet, apart from the absence of significant practice, the logical possibility of regional *jus cogens* does not seem to have been completely ruled out by the ILC. It is simply something that goes beyond the assumptions of the ILC.

II. ...and States.

In addition to the Commission's approach, which confirms the universalism underlying its work, it is to be noted that, in its recent work on peremptory norms, the Commission has been faced with the even more resolute position taken by States with respect to the concept of regional *jus cogens*.

is of the view that such a conclusion is not necessary, and an appropriate explanation could be included in the commentary. For this reason, no draft conclusion is proposed in relation to *regional* jus cogens". See *Fourth Report*, supra note 4, para. 47.

17 The provision reads as follows: "1. A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such between the reserving State or organization and other States or international organizations. 2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law".

18 Pellet, *supra* note 5, 89.

19 *Yearbook of the International Law Commission* (2011), Vol. II, Part 3, UN Doc A/CN.4/SER.A/2011/Add.1 (Part 3), 294.

20 *Ibid,* p. 294, fn. 2324.

In fact, States' statements reflect a rather radical position as to the impossibility of regional *jus cogens*. For example, according to Greece the idea of regional *jus cogens* "runs contrary to the very notion of *jus cogens*, which was by definition universal". To the United Kingdom the concept of regional *jus cogens* "would undermine the integrity of universally applicable *jus cogens* norms". For South Africa entertaining a concept such as regional *jus cogens* would have "a watering-down effect on the supreme and universal nature of *jus cogens*".[21] In essence, States – virtually all States according to the ILC[22] – have shown skepticism, if not hostility to the concept of regional *jus cogens*. The recognition of such a concept, in States' perception, would be at the detriment to the the integrity of the universal concept of *jus cogens*.

It would be interesting to investigate the reasons behind such hostility by States towards this concept. It is not easy to find the legal and policy reasons underlying such a resolute stance. What States here strongly oppose is the very idea of regional *jus cogens*. From a value-based perspective this may sound strange as there seems to be nothing fundamentally wrong with the possibility that peremptory norms emerge only in regional contexts as aiming at protecting fundamental values in those particular contexts. After all, to recall again Gaja's words "[v]alues prevailing in regional groups do not necessarily conflict with values operating in a larger framework"[23]. More generally, similar to the narrative often employed for regionalism in general, it has been submitted that, even if, contrary to universal *jus cogens*, regional *jus cogens* does not seem to respond to the idea of formal equality among sovereign States, it may nevertheless foster "substantive equality" among States by encouraging what has been defined as a "pluralistic approach marked by diversity and respect for differences"[24].

Why then do States do not appreciate the idea of a regional *jus cogens*? A closer look suggests that in the States' perspectives there may be plausible

21 Fourth Report, *supra* note 16, para. 22.

22 *Report of the International Law Commission Seventy-First Session, supra* note 13, 156, para. 15, fn. 736.

23 Gaja, *supra* note 4, 284.

24 Hasmath, *supra* note 4, 14. As the author notes, "the existence of regional *jus cogens* through the promotion of regional divisions and variations in international law is an affront to our general sensibilities and intuition. Even so, in a contemporary international community whereby nation-States are characterized by unprecedented heterogeneity, norms of regional *jus cogens* are demanded in limited situations; in the hopes of promoting substantive equality and differential treatment, in spite of perpetuating greater sovereign inequality. Denying a regional group of nation-States their collective legal thought – embodied as a regional *jus cogens* only invites the maintenance of privileged perspectives. This should likewise be an affront to our sensibilities and intuition".

reasons to react against the idea of regional *jus cogens*, or at least to leave this idea to scholarly speculations and not to the work of a body such as the ILC. States' disaffection toward the concept of regional *jus cogens* may indeed be explained by the uncertainties relating to the role of consent, and by the process of identifying *jus cogens* norms in general. These kinds of norms are perceived as exceptional and the process for their identification is particularly stringent. That is so because *jus cogens* has the capacity to bind without consent. The persistent objector rule does not apply to peremptory norms of general international law[25]. As has also been acknowledged by the ILC, the rationale for this power of *jus cogens* to bind without consent can be found in the fact that these norms are fundamental to the international community and so are universal in nature[26]. This may seem to be a *petitio principii* but, from the States' perspective, this universal character represents a sort of safety valve – only when universal fundamental values are at stake is there the possibility of *jus cogens*. Otherwise, States seek to retain their freedom to possibly object to custom, whether it is universal or regional. It is therefore understandable that States perceive the idea of regional *jus cogens* as something which could unexpectedly and excessively constrain their sovereign space. If not an expression of universal values, *jus cogens* would escape what States perceive as a guarantee against such a deep constraint on sovereignty. More generally, aside from the capacity of *jus cogens* to bind without consent, the process for its formation remains somewhat mysterious and less subject to States' "control" if compared with the formation of custom[27]. In addition, it is well known that the effects of *jus cogens* may go well beyond the law of treaties, entailing consequences also in terms of State responsibility[28].

A further factor that might have driven States to radically exclude the possibility of regional *jus cogens* relates to the uncertainties as to the "external" normative impact of regional *jus cogens*. It has been stated that "the passage at the regional level can be the entrance door for wider recognition"[29]. Indeed, if one considers the very limited and controversial practice available in the field of regional *jus cogens*, one may notice a tendency towards the universalisation of such norms. This is the case of the already mentioned rule prohibiting juvenile executions which has been declared "universalized" by the same regional system

25 *Report of the International Law Commission Seventy-First Session, supra* note 13, 182.
26 Fourth Report, *supra* note 4, para. 28.
27 B. Simma & P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' in *Australian Year Book of International Law* (1992), 103-106.
28 See generally Costelloe *supra* note 10.
29 Pellet, *supra* note 5, 89.

after some years following the declaration of its status as a regional peremptory norm[30]. The factors behind this alleged expanding force are not clear and it cannot be excluded that States "outside the region" might fear this force that can make them subject to peremptory norms whose origins were extraneous to them.

C. Regional Approaches to *Jus Cogens*

I. The Use of Peremptoriness by the Inter-American Court of Human Rights

The current general distrust towards the possibility of regional *jus cogens* in the ILC and States' views finds resonance in the IACtHR, one of the most active organs in resorting to this category of norms. As the Special Rapporteur recognized

> "[w]hile the Inter-American Court and Commission have been more open to recognizing norms of *jus cogens*, those norms of *jus cogens* have not been characterized as regional *jus cogens*. Thus, the inter-American human rights system does not provide support for the notion of regional *jus cogens*".[31]

However, one might wonder whether the reasons leading the ILC to embrace the "resolute universalism"[32] are the same guiding the American organs or whether the IACtHR has preferred to adhere to the universalistic aspect of peremptoriness due to other reasons of judicial policy.

At the outset, two queries can be raised in relation to the remark of the Special Rapporteur as to the IACtHR. First, while it is true that the system has been open to recognize certain rules as peremptory, one can at least cast doubt whether the *jus cogens* rules identified by the Court are really universally accepted. The Court may well recognize as *jus cogens* a rule – as may be, for instance,

30 See Fourth Report, *supra* note 4, para. 39, quoting *Michael Domingues v. United States*, Petition 12-185, Report No. 62/02, para. 85 ("the Commission is satisfied, based upon the information before it, that this rule has been recognized as being of a sufficiently indelible nature to now constitute a norm of *jus cogens*, a development anticipated by the Commission in its *Roach and Pinkerton* decision").

31 Fourth Report, *supra* note 4, para. 40.

32 See Crawford, *supra* note 11.

the principle of "indirect non-refoulement"[33] – that is not yet consensus in the international community. It may also be that the Court identifies, interprets and applies a well-established universal *jus cogens* rule, while promoting a different interpretation of that rule. A possible reading of these approaches could be that the Court is in fact dealing with different rules, perhaps regional ones. No guidance on these highly theoretical questions can be found in the ILC's work. The Special Rapporteur seems to avoid these questions either by not examining the practice of the IACtHR or by insisting on the absence of references to regional *jus cogens* by the Court.

Second, is it possible to exclusively rely on the open admission of the (non)existence of regional *jus cogens* rules by a certain group of States or a given judicial organ to determine the existence of these rules? If the final criterion for determining the existence of regional *jus cogens* is the open admission by the Court that the rule it applies has the nature of regional *jus cogens*, the legal category is destined to non-existence. In this fashion, the Special Rapporteur's search for examples of regional practice is destined to come up empty-handed.

The relationship between regionalism[34] and peremptoriness is particularly controversial if seen through the lens of the IACtHR's judicial practice. As we shall see, the Court embraces a resolute universalism, and, for different reasons, it nominates some rules that need to gain particular importance within the system as *jus cogens*. On the other hand, the Special Rapporteur and the ILC are satisfied with the fact that the inter-American system does not create difficulties for the universalistic project on *jus cogens* and holds on to the silence of the Court on regional peremptory rules. However, the ultimate difficulty of reconciling what lies in the middle is something that the ILC project seems only to postpone and we seek to highlight it here: the fragile harmony between peremptoriness, regionalism, and universalism is under tension. The consistency

[33] *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion of 19 August 19, IACtHR Series A, No. 21, 88, para. 225; and *The Institution of Asylum, and its Recognition as a Human Right Under the Inter-American System of Protection*, Advisory Opinion of 30 May 2018, IACtHR Series A, No. 25, 58, para. 181.

[34] The question of regionalism in the American continent has regained attention in recent times. See, in this regard, G.R.B. Galindo, 'Direito Internacional Costumeiro Regional (Em Especial no Contexto Americano)' in *Comité Jurídico Interamericano y Departamento de Derecho Internacional de la Secretaría de Asuntos Jurídicos de la Organización de los Estados Americanos*' (2020) 13-27; L.C. Lima, 'Regionalism in the Codification of International Law: the Experience of the Inter-American Juridical Committee' in A. Annoni, S. Forlati & F. Salerno (eds), '*La Codificazione Nell'Ordinamento Internazionale e Dell'Unione Europea*' (2019) 393, 407.

of the universalistic project of the ILC on *jus cogens* rests on the fact that States are not prone to recognize regional *jus cogens*, nor do regional international courts want to make use of it. However, the tension between these three legal concepts has the potential to taint any coherent legal project. Some wrinkles can already be perceived at the IACtHR.

On the one hand, the universalistic approach taken by the ILC associates *jus cogens* norms with rules that necessarily convey the values of the international community as a whole. Any threat to the universality of these values undermines their peremptoriness. Thus, the obvious solution is to rule out any kind of exceptionality (expressed here by regionalism) and emphasize the requirement of the universality of peremptory rules. At the other end of the spectrum, however, there are regional bodies which, for historical arguments, special needs or other reasons, aspire to give certain rules a superior character. Such rules have not yet reached universal recognition, yet the need to give them peremptoriness remains. To summarize, there is demand from regional bodies to use peremptoriness in their practice. Consequently, peremptoriness does not become just a requirement of the universalistic project but a tool for regional aspirations.

Throughout its jurisprudence, the IACtHR has already recognized at least eight different rules as *jus cogens*.[35] However, on rare occasions these recognitions have been accompanied by specific effects. In the case *Aloeboetoe et al. v. Suriname*, the Court considered that a treaty "would today be null and void because it contradicts the norms of jus cogens *superveniens*".[36] This was the only occasion on which the Court drew specific effects in accordance with Article 64 of the VCLT. In most cases, the declaration of the peremptory character of a rule has a purely rhetorical effect, with a view to reinforce the importance of the rule in the specific context in which it is applied. It is used especially to reinforce the duty to respect international obligations when they might conflict with domestic obligations. Put differently, the recourse to the peremptory character of a rule by the IACtHR serves to assert the hierarchically superior character of the rule in relation to the domestic legal orders. For instance, in *Yatama v. Nicaragua*, the IACtHR has observed that

35 See *The Obligations in Matters of Human Rights of a State That Has Denounced The American Convention on Human Rights And The Charter of The Organization of American States*, IACtHR Advisory Opinion of 9 November 2020, Series A, No. 26, 37, para. 106.

36 *Aloeboetoe et al. v. Suriname*, Judgment of 10 September 1993, IACtHR Series C, No. 15, 14, para. 57.

> "at the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens* […] Consequently, States are obliged not to introduce discriminatory regulations into their laws, to eliminate regulations of a discriminatory nature, to combat practices of this nature, and to establish norms and other measures that recognize and ensure the effective equality before the law of each individual."[37]

It is difficult to understand why these obligations are derived from the peremptoriness of the rule rather than from the need to respect international obligations. Examples also abound in the case law of the Court.[38] Thus, the recourse to peremptory rules appears to reiterate the primacy of the inter-American order over national legal orders, offering an additional tool to the first with a view to fostering compliance by the second.

A second particularity of the *jus cogens* rules in the IACtHR's case law pertains to its method of ascertainment. The Court has frequently taken a comprehensive approach with several norms, deducing the peremptory character merely from the same character of other norms, an approach that could be described as a "cascade effect". This exercise has resulted in extending the number of rules having such an effect. This occurred with the declaration of *non-refoulement* and the prohibition of enforced disappearances as rules of *jus cogens*. In essence, the logic of the Court would be that

> "since [non-refoulement] is an obligation derived from the prohibition of torture, the principle of non-refoulement in this

[37] *Yatama v. Nicaragua*, Judgment of June 23, 2005, IACtHR Series C, No. 127, 82, paras 184 and 185. See, in this regard, M. Duarte & F.S. Lima, 'O Princípio da Igualdade e não Discriminação Como Norma Jus Cogens na Corte Interamericana de Direitos Humanos', 8 *Caderno de Relações Internacionais* (2017) 15, 151-180.

[38] See, for instance, R. Abello Galvis, 'La Jurisprudence de la Cour Interaméricaine des Droits de l'Homme et le Jus Cogens (2013-Fevrier 2016)', in J. Crawford *et al.* (eds), *The International Legal Order: Current Needs and Possible Responses: Essays in Honour of Djamchid Momtaz* (2017) 533–543; R. Abello Galvis, 'La Jerarquía Normativa en la Corte Interamericana de Derechos Humanos: Evolución Jurisprudencial del Jus Cogens (1993-2012)', 12 *Revista do Instituto Brasileiro de Direitos Humanos* (2012) 12, 357-375; see also Gastorn, *supra* note 2, 643, 643–662.

area is absolute and also becomes a peremptory norm of customary international law; in other words, of *ius cogens*".[39]

II. The Proneness to Universality of the Inter-American Court of Human Rights

The Inter-American Court uses *jus cogens* rules for specific purposes and is particularly prone to elevating certain rules (or connected rules) to peremptoriness. The Court's particularism seems to depart from what would be a "traditional" approach to *jus cogens*, or at least the general approach adopted by the Special Rapporteur of the ILC which puts emphasis on its universal dimension. This seems to go against the idea that the practice of the IACtHR completely rules out the idea of regional *jus cogens*.

There are at least two reasons of judicial policy that one can sketch to explain why the Inter-American Court is so prone to identify *jus cogens* rules. The first has to do with its mission and the perception of its role as guardian and promoter of human rights in the Americas.[40] Thus, the recognition of a hierarchically superior rule, in the Court's logic, serves to guarantee greater protection for the victims of serious violations of human rights. The second reason why the Inter-American Court makes recourse to the argument of peremptoriness relates to the general resistance to international law and to the Court itself in the Americas. National judges and public agents are not particularly open to outside legal orders and recent literature has pointed to cases of resistance to the Court.[41] Accordingly, the Court reacts by refining the legal discourse and resorting to the peremptoriness of the rule in question. This

39 *Rights and guarantees of children in the context of migration and/or in need of international protection*, *supra* note 33, 88, para. 225. As to the enforced disappearances, the reference is *Osorio Rivera and Family Members v. Peru*, Judgment of 26 November 2013, IACtHR, Series C, No. 274, 41, para. 112.

40 There is a rich literature in this regard, but, generally, see L. Hennebel, 'The Inter-American Court of Human Rights: The Ambassador of Universalism', *Hors-série Revue Québécoise de Droit International* (2011) 1, 57; L. Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law', 21 *European Journal of International Law* (2010) 3, 585; L. Burgorgue-Larsen, '"Decompartmentalization": The Key Technique for Interpreting Regional Human Rights Treaties', 16 *International Journal of Constitutional Law* (2018) 1, 187.

41 J. Contesse, 'Resisting the Inter-American Human Rights System', 44 *Yale Journal of International Law* (2019) 2, 180; A.V. Huneeus, 'Courts Resisting Courts: Lessons From the Inter-American Court's Struggle to Enforce Human Rights', 44 *Cornell International Law Journal* (2011) 3, 494.

can be verified, by way of illustration, when the Court decided to declare not only that the prohibition of crimes against humanity was a rule of *jus cogens* but also the "associated obligations to prosecute, investigate and punish such crimes".[42] In these cases, and given the earlier resistance of national law due to amnesty laws, the tool that the Court uses to increase enforcement of its decision is to extend the scope of the *jus cogens* rule. In other words, the Court resorts to peremptoriness for the sake of a regional need, which can be described as a factual or legal situation particular to the members of the American Convention that prompts the Court to adopt a specific legal strategy. As shown above, the Court felt the need to "promote" certain categories of rules not universally recognized as *jus cogens* in order to increment their force *vis-à-vis* domestic legal orders. Either to reinforce its role as a protector of human rights, or to increase the respect and effectiveness of its decisions in domestic legal orders, the discursive use of *jus cogens* rules is a reality in the jurisprudence of the Inter-American Court and it is based on a regional dynamic – not a universal one – aimed at increasing the effectiveness of the American Convention.

In a recent pronouncement, the Court found an opportunity to elaborate and clarify some questions about its approach to these rules. In the Advisory Opinion 26 of 2020, requested by Colombia, the Court was called upon to express its view on the obligations of States that withdrew from the American Convention and the OAS Charter. Among the remaining obligations, the Court was stark in pinpointing that "some obligations stipulated by the American Convention coincide with those pertaining to customary norms of international law. The same applies to the general principles of law and to *jus cogens* norms".[43] In an ode to universalism, the Inter-American Court makes a declaration particularly aligned with the views of the Special Rapporteur and the ILC when it declared that

> "*jus cogens* is presented as the legal expression of the international community as a whole, based on universal and superior values, which embodies basic standards that guarantee essential or fundamental human values related to life, human dignity, peace and security".[44]

42 See, for instance Case of *Almonacid Arellano et al. v. Chile*, Judgment of 26 September 2006, IACtHR Series C, No. 154, 8, para. 40b and *Herzog et al. v. Brazil*, Judgment of 15 March 2018, IACtHR Series C, No. 353.

43 The Obligations in Matters of Human Rights of a State That Has Denounced The American Convention on Human Rights And The Charter of The Organization of American States, *supra* note 35, para. 100.

44 *Ibid.*, *supra* note 35, para. 105.

These two passages seem to reveal a certain ambiguous attitude of the IACtHR. While reaffirming that *jus cogens* rules express values of the general community as a whole, at the end of the day the Court places itself as the guardian of a regional treaty whose obligations "coincide" with the *jus cogens* norms. The Court does not expressly recognize it, but it seems to justify its expansive approach in relation to *jus cogens* precisely because it is the interpreter of the Convention. What is interesting to note, though, is that the Court has the last word in determining which situations might require declaring a certain rule possesses a peremptory character. The Court defines (1) when a rule has reached such character; (2) the specific methods to identify *jus cogens* rules in the Americas (including the abovementioned approach based on "cascade effects") and; (3) defines which situations are particularly important to resort to these norms. Thus, within the system, it is the Court that has the last word on peremptory rules, but it seems convenient for the Court to adhere to a universalistic discourse because it serves to legitimize its exclusive role as identifier and interpreter of *jus cogens* rules.

Another possible explanation for this resolute adherence to universalism by the IACtHR is that, by resorting to universalism, the Court reinforces its own case law on the identification and interpretation of *jus cogens*. By embracing the idea of *jus cogens* as general rules representing universal values, and at the same time being one of the most active identifiers of these rules, the inevitable consequence of the Court's reasoning is to bolster its own previous findings on *jus cogens* – something that it does in the following paragraph of the Opinion.[45] In other words, the Court embraces the idea that certain rules have "universal and superior values" but establishes itself as one of the authentic interpreters of these values. This comes not without difficulties.

III. Difficulties Arising From the Use of *Jus Cogens* by the Inter-American Court of Human Rights.

It is not easy to reconcile the Court's universalist rhetoric on *jus cogens* and its effective practice that emphasizes regional elements or its regional authority. An attempted reconciliation might create at least two problems worth exploring. The first is the potential non-correspondence between the universalist project of *jus cogens* and the IACtHR rulings on *jus cogens*. The second regards the relationship between regional and universal rules of *jus cogens*.

[45] *Ibid*. paras 106-107.

The first problem is particularly well-illustrated in a recent advisory opinion (OC-26/20) of the Inter-American Court. In that instance, the Court offers a list of eight jus cogens rules recognized in its case law.[46] If one compares the list with the non-exhaustive list of peremptory norms of general international law prepared by the Special Rapporteur of the ILC, some issues become evident. The first is that the IACtHR list is significantly more inclusive than the ILC list. This is not surprising, given the aforementioned reasons. Additionally, even when they have similar rules listed, the content of the rules in the IACtHR's list tends to be more expansive, such as the "prohibition of slavery and *any other* similar practice" or the "prohibition of crimes against humanity *and* the associated obligation to prosecute, investigate and punish those crimes". Interestingly, the Special Rapporteur treats as "*jus cogens* candidates"[47] at least two rules that the IACtHR recognizes as *jus cogens* rules: the non-refoulement rule and the prohibition of enforced disappearances. One understands that the ILC's list is exemplificative and that the

> "report (and any possible conclusions and commentaries adopted by the Commission) may serve as impetus for the generation of further evidence of acceptance and recognition by the international community of States as a whole of the peremptory character of additional norms".

However, this statement and the ILC project in general does not address the challenge presented when one of the "candidate rules" has been treated by a regional court within a specific treaty regime as having a peremptory character. State parties to that treaty might have begun treating it accordingly.

46 The Obligations in Matters of Human Rights of a State That Has Denounced The American Convention on Human Rights And The Charter of The Organization of American States, *supra* note 35, para. 106; The Court recognizes the following rules, making references to the judgments and advisory opinions where the recognition occurred; Principle of equality and prohibition of discrimination; Absolute prohibition of all forms of torture, both physical and psychological; Prohibition of cruel, inhuman or degrading treatment or punishment; Prohibition of enforced disappearance of persons; Prohibition of slavery and other similar practices; Principle of non-return (non-refoulement), including non-rejection at borders and indirect refoulement; Prohibition to commit or tolerate serious, massive or systematic human rights violations, including extrajudicial executions, forced disappearances and torture; and Prohibition of crimes against humanity and the associated obligation to prosecute, investigate and punish those crimes.

47 Fourth Report, *supra* note 4, para. 123.

The point here is not to say that these "candidate rules" are necessarily regional *jus cogens* rules or that our effort aims at understanding their real legal status. One could even perceive the difference of opinion between the IACtHR and the ILC as a divergence of opinion between progressives and conservatives as to the universal level, rather than a difference between the universal and the regional level. Notwithstanding, we are merely arguing that the legal category of regional *jus cogens* rules was ruled out of the ILC project too early and could have received more attention from the Commission. Moreover, as a legal category, regional *jus cogens* could at least serve as an accommodating middle-ground which could shelter rules that exhibit some features of *jus cogens* rules but did not yet consolidate as such.

At the end of the day, one is left with the impression that both the ILC and IACtHR are pushing in different directions while both advocating a resolute universalism. The anxieties of States and the ILC about potential fractures in the project by admitting regional *jus cogens* are rather theoretical than practical. However, although one cannot exclude that the recognition of regional *jus cogens* might prove coherent with a universalist project of *jus cogens*, the Inter-American Court does not take this hypothesis into consideration. One possible reason for this fact adheres to the same logic by which the IACtHR resorts to peremptoriness: the rhetoric of universal *jus cogens* resonates better with the domestic audiences with which it needs to develop credibility. Indeed, perhaps the Court would do well to pursue the path of universalism because this could lend greater weight to its decisions in terms of the formation of the universal *jus cogens*. However, this lack of resort to regional *jus cogens* could be perceived as a missed opportunity for the Court, which could have its rules allocated to a more appropriate category than "candidates" to *jus cogens*.

The second issue on which the practice of the IACtHR can offer insights relates to the potential relationship between regional and universal rules of *jus cogens*. One of the resistances in accepting regional peremptory rules is the potential conflict with universal peremptory rules. The question is which should prevail in case of a conflict.[48] For the sake of our purposes in this section, we shall hypothetically assume that the identification of *jus cogens* rules in the OC 26/20 of the IACtHR corresponds to regional *jus cogens*: they correspond to values shared by all State parties to the *American Convention on Human Rights*, they were properly identified by the monitoring judicial organ, and they have particularities that do not correspond to the general recognition required by the ILC Special Rapporteur in the Fourth Report in relation to certain rules. Even

[48] This case is not unknown in the scholarship. See in this regard Gaja, *supra* note 4, 284.

with this assumption, the case law related to these eight rules is revealing. No conflicts appear and the regional particularities seem to detail the rules already existent at the universal level. Put differently, it does not undermine universal peremptory rules; on the contrary, it seems to enrich them. The absence of apparent conflict reveals a crucial logic behind regionalism: the freedom of certain States from different regions to protect specific values and use peremptoriness as an instrument to protect such values. Moreover, the lack of conflict indicates another potential dimension of the legal category of regional *jus cogens*: the fact that it might constitute an intermediate stage for the formation of universal *jus cogens*.[49]

D. Conclusion

The debate on regional peremptory rules shows that the idea of universality is deeply rooted in the very notion of peremptory norms as understood by States and the ILC. In the recent works of the ILC, following the radical position of States in this respect, this idea has been even more accentuated. These works have added to the common view that universality is an inherent feature of *jus cogens*. This suggests that, even assuming its logical possibility, regional *jus cogens* would fall under a normative category that differs from that of peremptory norms of international law and which, in the ILC and States' perspective, should not be taken into account when it comes to assessing the concept of peremptoriness in international law. Therefore, the story so far confirms the impression that, at least in the perception of States and the ILC, regionalism and peremptoriness in international law remain apparently not mutually compatible when it comes to the first regional perspective we have analyzed, which is that of regional *jus cogens*.

On the other hand, the analysis of the second regional perspective of *jus cogens* – that of regional *approaches* to *jus cogens* – calls into question this "principled" incompatibility between peremptoriness and regionalism. It is also true that the inter-American system upholds a universalistic notion of peremptoriness that apparently leaves little room for regional rules. However, the Court's approach to *jus cogens* is essentially prompted by local needs.

The paradox is precisely this: even if regional *jus cogens* may be logically conceivable and potentially useful, the Court seems to have no interest in developing it. As shown, the Court declares the *jus cogens* character of a number of rules but it does so in a specific context and for a specific purpose.

[49] Pellet, *supra* note 5, 89.

Perhaps these two elements (context and purpose) could be better weighed when identifying whether the "universal and superior values" are that of the international community as a whole or of the community of American States.

These two regional perspectives on *jus cogens* ultimately show that, notwithstanding the general distrust of States and the ILC towards the idea of regional *jus cogens*, regional approaches to *jus cogens* may call into question a uniform understanding of these norms and may also pave the way to properly understanding the significance of the idea of regional *jus cogens* in international law.