JUS COGENS DEROGAT CUSTOMARY INTERNATIONAL LAW: A CONFLICT THAT NEVER WAS?

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Abstract

Every scholar and learner of international law knows that jus cogens is the highest norm in the international legal order; therefore assume that "all other" sources of international law are supposed to become null and void if they contradict jus cogens. However, scholars and international institutions (including the International Law Commission) seem to overlook customary international law (CIL), easily assuming it to be part of the "all other" that are derogated by jus cogens. If we easily forget that there is virtually no actual case example of CIL contradicting jus cogens, we naturally do not ask why that is so. Exploring relevant scholarly literature as well as international documents, we explore the relationship between CIL and jus cogens. We find that one of the elements of both CIL and jus cogens overlaps, i.e. acceptance by the international community (albeit different wording), making conflict logically impossible and questions on the consequence of conflicts illogically fallacious.

Keywords*: jus cogens, customary international law, international law, normative conflict.*

JUS COGENS DEROGAT HUKUM KEBIASAAN INTERNASIONAL: KONFLIK YANG TAK PERNAH ADA?

Intisari

Setiap cendikia dan pelajar hukum internasional mengetahui bahwa jus cogens adalah norma tertinggi dalam tatanan hukum internasional; oleh karena itu diasumsikan bahwa "semua sumber hukum internasional lainnya" seharusnya menjadi batal dan tidak berlaku jika bertentangan dengan jus cogens. Namun, para cendikia dan lembaga internasional (termasuk Komisi Hukum Internasional) tampaknya mengabaikan hukum kebiasaan internasional (CIL), dengan mudah menganggapnya sebagai bagian dari "semua sumber lainnya" yang dikesampingkan oleh jus cogens. Jika kita dengan mudah melupakan bahwa hampir tidak ada contoh kasus nyata CIL yang bertentangan dengan jus cogens, kita tentu tidak bertanya mengapa demikian. Dengan mengeksplorasi literatur ilmiah yang relevan serta dokumen internasional, kami mengeksplorasi hubungan antara CIL dan jus cogens. Kami menemukan bahwa salah satu elemen dari CIL dan jus cogens tumpang tindih, yaitu penerimaan oleh komunitas internasional (walaupun dengan kata-kata yang berbeda), membuat konflik secara logis tidak mungkin dan pertanyaan tentang konsekuensi konflik secara tidak logis keliru.

Kata Kunci: jus cogens, hukum kebiasaan internasional, hukum internasional, konflik normatif.

A. Introduction

The invention of *jus cogens*[1] as a novel concept in the post-World War international law was a very fascinating idea. While other sources of international law do not formally have a hierarchy among each other,[2] *jus cogens* is considered the highest (in hierarchy) source of international law that is non-derogable.[3] *Jus Cogens* is then, consequently, non-derogable: any other source of international law will be derogated when it contradicts *jus cogens*.[4]

Article 53 of the Vienna Convention 1969 is very clear in stipulating that treaties contradicting *jus cogens* will be null and void, and we have actual cases of this happening.[5] However, our present research discusses the interaction between *jus cogens* and customary international law (hereinafter, CIL), where matters are much less clear and, as our research shows, rather elusive.

Most, if not all, existing literature has deduced from the general notion that "anything contradicting *jus cogens* will be derogated" that CIL, too, is derogated upon contradiction with *jus cogens*.[6] As the primary (but not exclusive) focus of our research, the International Law Commission (hereinafter, ILC) also noted that *jus cogens* would derogate CIL in its reports of 2006 and 2022.[7] The train of thought behind this conclusion, at face value,

1 Sometimes referred to as Peremptory Norms.

2 Anthony Aust, *Handbook of International Law*, 2nd ed. (Cambridge: Cambridge University Press, 2010), 6. There is, however, a discussion regarding priority and general-special relations. See: Malcolm N Shaw, *International Law*, 8th ed. (Cambridge: Cambridge University Press, 2017), 92.

3 Shaw, *International Law*.

4 M Cherif Bassiouni, "International Crimes: Jus Cogens and Obligatio Erga Omnes," *Law & Contemporary Problems* 59 (1996): 63.

5 See, *inter alia*, International Court of Justice, *Jurisdictional immunities of the State* (Italy v. Germany), Judgment, 2012 (Italy v. Germany). Also see, Special Court of Sierrna Leone, *Prosecutor v. Kallon and Kamara,* Decision on Challenge to Jurisdiction, 2003 (Prosecutor v. Kallon and Kamara).

6 See *inter alia* Ulf Linderfalk, "The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?," *European Journal of International Law* 18, no. 5 (2007): 854. So far we are only aware of one dissenting voice which, apparently, is us: Fajri Matahati Muhammadin and Anis Muhammad Afla, "Sumber Hukum Internasional Kontemporer," in *Hukum Internasional*, ed. Fajri Matahati Muhammadin (Yogyakarta: Buku Belaka, 2023), 90–91.

7 International Law Commission, *Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens), with commentaries*, UN Doc. A/77/10, 56, 2022 (ILC Draft Conclusions); and International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, 156, 2006 (ILC Diversification).

might appear easy: if *jus cogens* is the highest norm, all other norms –including CIL—are lower and therefore are derogated by it.

However, to this date, there appear to be zero actual cases where CIL contradicts *jus cogens*. The precedents cited by the ILC in their reports were not case law where such cases happened; rather, they were simply courts mentioning CIL contradiction with *jus cogens* as a hypothetical and merely in passing.[8] One cannot help but wonder: can CIL and *jus cogens* really contradict each other?

Embarking upon a purely hypothetical realm of theoretical-doctrinal research, we find that it is incorrect to claim that *jus cogens* will derogate CIL when they contradict each other. It is also incorrect to claim that, in contrast, CIL will derogate *jus cogens*. Instead, we find that a normative conflict between *jus cogens* and CIL is an illogical impossibility. Therefore, questioning the consequence of such a normative conflict is also a logical fallacy in the form of a "loaded question".[9]

B. *Jus Cogens* and CIL: Nature, Status, and Building Blocks

The concept of CIL within international law has a long material history with practices from early civilizations and writings from the 16th and 17th centuries, notably with the work of scholars such as Hugo Grotius.[10] In modern international law, CIL has been enshrined within the Statute of the International Court of Justice as a formal source of international law. Its elements, status, and applications have since then been discussed a number of times in cases before the International Court of Justice (ICJ).[11]

Jus cogens, meanwhile, is a relatively recent development within

8 United States Court of Appeals for the Ninth Circuit, *Siderman de Blake v. Argentina,* 965 F.2d 699, 1992, p.716 (Siderman de Blake v. Argentina); Supreme Court of Argentina, Simón, Julio Héctor y otros privación ilegítima de la libertad, para. 48 (Supreme Court of Argentina, Simón) ; European Court of Human Rights, Al-Adsani v. the United Kingdom, para. 153 (Al-Adsani v. the United Kingdom); High Court of Kenya, The Kenya Section of the International Commission of Jurists v. the Attorney-General and Others, para. 75 (The Kenya Section of the International Commission of Jurists v. the Attorney-General and Others).

9 Todd M. Furman, *Critical Thinking and Logic: A Philosophical Workbook* (New York: Gegensatz Press, 2024), 132; 'Ādil Musṭafa and Marḍī ibn Mashūḥ Al-'Anzī, *Mukhtaṣar Al-Mughālaṭāt Al-Manṭiqiyyah* (Riyadh: Al-Ḥaḍārah Lil-Nashr wa al-Tawzī', 2022), 57.

10 Bardo Fassbender and Anne Peters, eds., *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2013), 810.

11 Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (London: Routledge, 1997), 39.

international law. Early writings suggest that the concept was created by international publicists in an attempt to develop a theory that would serve to constrain the claimed unlimited State discretion in the exercise of sovereignty.[12] These classical publicists then distinguish between *jus dispositivum* (voluntary law) and *jus naturale necessarium* (necessary natural law) to differentiate consensual agreements between States from the peremptory norms of international law that are binding upon all states irrespective of consent.[13] Primacy is given to the latter with Grotius even ranking it higher than divine law: "Now the Law of Nature is so unalterable, that it cannot be changed even by God himself. Measureless as is the power of God; nevertheless, it can be said that there are certain things over which that power does not extend."[14] Thus, while States could create consent-based law, such laws could not override natural law. This was, of course, contrary to the emerging notion of international law that was based strictly on the consent of states in the 19th century. However, publicist from the beginning of the 20th century asserts the existence of fundamental norms, often contending that States themselves had acknowledged the existence of those norms with a peremptory nature.[15]

The concept of *jus cogens* in positive international law was established by Article 53 of the Vienna Convention on the Law of Treaties (VCLT). The article stipulates that a treaty is void if it conflicts with a peremptory norm of general international law at the time of its conclusion. It defines peremptory norms as a norm accepted and recognized by the international community of States as a whole from which no derogation is allowed, and which can only be modified by a new, equally authoritative norm. The VCLT also states that a new peremptory norm will render any conflicting existing treaty void.

A few observations should be pointed out on how the VCLT approaches the issue of *jus cogens*. First, the reason the article was drafted was that the ILC argued that it is increasingly untenable to claim that states can freely derogate from all international laws; more specifically, it seeks to limit the creation of treaties that may otherwise be in violation of those *jus cogens*

12 Dinah Shelton, *Jus Cogens* (Oxford: Oxford University Press, 2021), 3.
13 Valeza Ukaj-Elshani, "Historical Overview of Jus Cogens Norms, Their Applicability by International Courts and Necessity for Unification," *SOCRATES* 3, no. 15 (2019): 70.
14 Hugo Grotius, *On the Law of War and PEace* (Batoche Books, 2001), 10.
15 Shelton, *Jus Cogens*.

norms.[16] It did not seek to become the definitive criteria in identifying the elements of jus cogens, nor did it endeavour to identify which norms can be considered as *jus cogens*.[17] The drafters left the full content of this rule to be worked out in State practice and in further works of the publicist.[18] Secondly, while the article did specify the legal consequence of a treaty conflicting with *jus cogens,* no mention was made in the treaty or its commentaries regarding conflict with CIL. The ILC would illustrate the conflict between CIL and *jus cogens* in its later draft conclusion, which will be discussed in the following section.

In spite of the drafter's intention, Article 53 did become the starting point in determining the status and elements of *jus cogens* within international law, with further works by the ILC referencing it as a foundation.[19] In its draft conclusions on *jus cogens,* the ILC clarifies further on the status of *jus cogens,* and here we can reflect on the contrast between it and CIL as follows. First, while CIL do not have primacy compared to other sources of international law, *jus cogens* does.[20] It is for this reason that clear and logical descriptions of the legal consequences are necessary whenever a source of international law conflicts with *jus cogens.* The VCLT is very clear in stipulating that treaties contradicting *jus cogens* will be null and void; however, conflicts between CIL and *jus cogens* are much less clear despite the ILC's recent draft conclusion. Secondly, while both have universal application, the peremptory nature of *jus cogens* creates differing effects compared to CIL.[21] For instance, the persistent objector rule does not apply to *jus cogens*, stemming from its non-derogable nature and hierarchical superiority.[22] Another difference of the universal application of *jus cogens* is that such norms do not apply on a regional or bilateral basis.[23] While the ILC acknowledges that regional CIL

16 International Law Commission, *Report of the International Law Commission on the Work of the Second Part of Its Seventeenth Session*, UN Doc. A/6309/Rev.1, 3–28 January 1966, 247.
17 ILC, *Report on the Work of the Second Part of Its Seventeenth Session*, 248.
18 ILC, *Report on the Work of the Second Part of Its Seventeenth Session*, 248; Ulf Linderfalk, *Understanding Jus Cogens in International Law and International Legal Discourse* (Massachusetts: Edward Elgar Publishing, 2020), 7.
19 Dire Tladi, *Second Report on Jus Cogens, Special Rapporteur, International Law Commission*, UN Doc. A/CN.4/706, 16 March 2017, 16-17.
20 ILC, Draft Conclusions, 24.
21 ILC, Draft Conclusions, 22.
22 ILC, Draft Conclusions, 55.
23 Shelton, *Jus Cogens*.

is possible, it argues that the same doctrine cannot be applied to regional *jus cogens*. The ILC contends that regional *jus cogens* would undermine its peremptory nature because, unlike regional CIL, which can be subject to the persistent objector rule, regional *jus cogens* cannot be contested in this way without losing its essential peremptory status.[24]

Aside from its status, there is also the contrast between *jus cogens* and CIL with respect to its formative criteria. As confirmed by the ICJ in a number of cases, CIL is formed by two criteria: one of "a general practice", and "accepted as law", the so-called *opinio juris*.[25] The identifying criteria for *jus cogens,* on the other hand, are less straightforward. It begins again with Article 53 of the VCLT, which actually says very little about the particular properties of *jus cogens* norms.[26] Instead, scholars have criticized that "*jus cogens* rules are defined by their effect, but the effect is the consequence and not the cause of the quality of the rules".[27] Nevertheless, reading Article 53, for a norm to reach the status of *jus cogens* it must first be "a norm of general international law", and second be "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". Unsurprisingly, this vague way of wording led to differing opinions about precisely what identifying criterion or criteria are to be applied.[28] As mentioned previously, the drafters never intended for Article 53 to become the definitive criterion in identifying the elements of *jus cogens;* the criteria simply have to be found elsewhere.[29]

The ILC would later attempt to clarify the identifying criteria for *jus cogens* with its draft conclusions and commentaries. The important criterion to be discussed here is the "acceptance and recognition" which are to a certain extent present within both the formation of CIL and *jus cogens,* albeit with

24 Shelton, *Jus Cogens*.

25 See: International Court of Justice, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America*), Merits, Jusgement, I.C.J. Reports 1986, p.14, para. 97; International Court of Justice, *Continental Shelf* (Libya v. Malta) I.C.J. Reports 1985, para. 29; International Court of Justice*, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, International Legal Materials 35 (1996), 809, at 826.

26 Linderfalk, *Understanding Jus Cogens*.

27 Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006), 44.

28 Linderfalk, *Understanding Jus Cogens*.

29 Linderfalk, *Understanding Jus Cogens*.

different wordings and different purposes. For *jus cogens,* the second criterion is composed of two different elements. First, they indicate who must do the accepting and recognizing, being the "international community of States as a whole".[30] Second, it stipulates what must be "accepted and recognized", namely that the "norm is one from which no derogation is permitted and that it can only be modified by a norm having the same character"[31]

With regards to the "quantitative" criteria of "international community as a whole", the ILC stipulates a few points. First, that the position of States is the primary indicator for the formation of *jus cogens* norm, despite the usage of "international community as a whole" and calls from scholars for the inclusion of other actors.[32] Second, the phrase "as a whole", contrary to its literal meaning, does not necessarily mean that a norm has "to be accepted and recognized…by all States" to become *jus cogens*; rather, a "very large majority" proven through a *qualitative* assessment is sufficient.[33] While no further details are given on how a qualitative assessment should be made, it would not be too far to assume that it should at least be higher than the CIL standard of "extensive and virtually uniform" found in *the North Sea Continental Shelf Cases*.[34] Third, the acceptance must be found across various regions, legal systems, and cultures, in other words, widespread.[35]

The ILC clarifies that the concepts of "acceptance and recognition" in *jus cogens* differ from acceptance as law (*opinio juris*) and recognition as general principles of law.[36] While both CIL and *jus cogens* are similar in having qualitative requirements (despite using different wordings for it), a rule to be accepted and recognized internationally, they differ in the strength of said accepted and recognized rule. In determining *CIL, opinio juris* pertains to whether States recognize and accept a practice as a legal obligation.[37] In contrast, in the case of *jus cogens,* the acceptance and recognition pertain to

30 ILC, Draft Conclusions, 36.
31 ILC, Draft Conclusions, 36.
32 ILC, Draft Conclusions, 38.
33 ILC, Draft Conclusions, 40.
34 International Court of Justice, *North Sea Continental Shelf Cases*, Judgement, I.C.J. Reports 1969, p.3, para. 43.
35 ILC, Draft Conclusions, 40.
36 ILC, Draft Conclusions, 36.
37 Malanczuk, *Akehurst*.

a norm being a legal obligation so high that it has peremptory status.[38] This involves whether the international community collectively recognizes a rule as having a peremptory character, adding an extra criterion beyond those for both CIL and general principles of law.[39] It should be noted that acceptance and recognition in this context are a singular element; thus, it is not necessary to prove that a norm has been both accepted and recognized separately as having peremptory status.[40] More importantly, similar to CIL, where its *opinio juris* is typically determined from a number of evidence, *jus cogens* requires direct evidence proving that States position a certain norm as such.[41] Interestingly, the ILC acknowledges that the evidence used for the identification of *opinion juris* in the context of CIL overlaps with that used to identify the subjective element of *jus cogens*.[42]

C. *Jus Cogens* and CIL: The ILC and Others

Unlike a centralized domestic legal system with a clear hierarchy of laws, international law, with its idea of sovereign equality of states and the formulation of Article 38 of the ICJ Statute, views each source of law as being equivalent.[43] However, because of the contents and non-derogable nature of *jus cogens* norm, some scholars, along with the ILC, have concluded that hierarchy does exist in international law with *jus cogens* being superior to other sources.[44] Because of this, it is only logical that any conflict between *jus cogens* and other sources would lead to the former prevailing.[45] This is stipulated as much under Article 53 of the VCLT, along with its legal consequence to the contravening article or treaty. However, its dynamic with CIL has been rather elusive.

Most scholars and courts have suggested that a conflict between the

38 ILC, Draft Conclusions, 36.
39 ILC, Draft Conclusions, 37.
40 ILC, Draft Conclusions, 37.
41 Such as reports of actions taken by states, statements made by government, press release, statements at international conferences and at meetings of international organizations; state's laws and judicial decisions; See Malanczuk, *Akehurst*.; ILC, Draft Conclusions, draft conclusion 8.
42 ILC, Draft Conclusions, 41.
43 James Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford: Oxford University Press, 2019), 179.
44 International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, para 31– 32.
45 Bassiouni, "Jus Cogens And."

two would lead to the customary norm being invalidated.[46] In *Prosecutor v Furundžija*, the ICTY Trial Chamber argued that "on account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio".[47] The European Court in *Al-Adsani v. the United Kingdom* considers *jus cogens* as "a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules".[48] A number of domestic courts also support the notion. The United States Court of Appeals in *Siderman de Blake v. Argentina* states that "norms that have attained the status of jus cogens prevail over and invalidate international agreements and other rules of international law in conflict with them".[49] Interestingly, the ICJ in *Jurisdictional Immunities of the State* considered Italy's argument that "jus cogens rules always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law"; however, the Court came to the conclusion that no *jus cogens* conflict existed before weighing in on the argument.[50]

From the sample of cases and scholarly opinions, a general sense can be captured that the customary law in question becomes invalid. However, it is still rather unclear how the subjective elements of *opinio juris* and States believing a norm to be *jus cogens* would interact in conflict. Additionally, would the crystallization of the *jus cogens* norm occurring before or after the CIL affects the dynamic?

The ILC would clarify this matter in draft conclusion 14. Paragraph (1) of the conclusion provides that "a rule of customary international law does not come into existence if it would conflict with an existing peremptory norm of general international law" and paragraph (2) states that "a rule of customary international law not of a peremptory character ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international

46 See for example: Mary Ellen O'Connell, *Jus Cogens: International Law's Higher Ethical Norms* (Cambridge: Cambridge University Press, 2011), 78; Linderfalk, "The Effect."

47 International Criminal Tribunal for the Former Yugoslavia*, Prosecutor v Furundžija*, Trial Judgment, 10 December 1998, para 155.

48 European Court of Human Rights*, Al-Adsani v. the United Kingdom,* Application No. 35763/97, Judgment, 21 November 200, Reports of Judgments and Decisions 2001-XI, para. 60.

49 United States Court of Appeals for the Ninth Circuit*, Siderman de Blake v. Argentina*, 965 F.2d 699, 1992, p. 716.

50 International Court of Justice, *Jurisdictional Immunities of the State*, (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p. 99; p. 140, para. 92-97.

law".

With regards to the first paragraph, the ILC in its commentaries would later specify the words "does not come into existence" to mean that even if the elements of CIL were to be present (State practice and *opinio juris*), it would not come into existence if it conflicted with a *jus cogens* norm.[51] Additionally, since the CIL is considered not to have formed into existence, the terms "invalid" or "void" are not appropriate. For the second paragraph, the ILC explains that it functions similarly to a separability provision with the term "if and to the extent" to maintain those parts of the CIL norm that are consistent with the newly developed *jus cogens* norm.[52] However, the qualifier does not apply to paragraph 1 since the CIL in question does not crystallize in the first place.

Draft Article 14 is remarkable in two ways. It attempts to provide the much-needed clarity on the question of how *jus cogens* interacts with a conflicting CIL, more specifically, the legal consequence to the elements of CIL in question. At the same time with the way the conclusion is formulated, it created more questions than it answered. The primary issues lay in the first paragraph, where a number of States have voiced their concern over it through their comments in the 73rd session of the ILC.

The United States, for example, noted that the situation described in conclusion 14 is "(un)likely to arise, given the "extensive and virtually uniform" State practice undertaken out of a sense of legal obligation that is required for customary international law".[53] Italy argued that conclusion 14 "describes an impossible scenario of a conflict between a non-existent rule (of customary international law) and an existent peremptory norm".[54] Spain views the scenario as unlikely because "if the customary rule does not come into existence, the normative conflict (conflict between norms) would not be possible".[55] Russia shared similar views by stating that "It is not possible for

51 ILC, Draft Conclusions, 56.
52 ILC, Draft Conclusions, 58.
53 United States, *Comments on the International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens) and Draft Annex*, Provisionally Adopted by the Drafting Committee on First Reading, International Law Commission, June 30, 2021, 11.
54 Italy, *Observations on the International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (Jus cogens*), 6.
55 Spain, *Comments and observations of the Kingdom of Spain on the draft conclusions on*

something that has not yet come into existence to conflict with something else".[56] The Netherlands, in its comments, "finds it difficult to imagine how a peremptory norm of international law may be revised by a developing rule of customary international law" as it would "imply that the required state practice with respect to the developing rule of customary international law would derogate from an already existing norm of *jus cogens*".[57] France maintains that "the existence of a "conflict" necessarily implies the existence of the conflicting norms, if one of them does not exist, then there can be no conflict" and further saying that "for a hierarchy to exist, there must be norms at the various levels of the legal order… the nonexistence of conflicting norms, as the Commission suggests, means paradoxically erasing any idea of normative hierarchy".[58] The Czech Republic said that it is difficult to grasp how "parallel with an existing peremptory norm of general international law (accepted and recognized by the international community of States as a whole), an antithetical process could take place giving rise to a conflicting norm of the general international law".[59]

It is not difficult to grasp why many of the comments were critical towards the formulation of paragraph one compared to paragraph two. While a number of the States insisted that evidence of State practice is still lacking, the situation in the second paragraph can still be a logical conclusion should the evidence of State practice increase.[60] Although, can it still be considered a conflict, assuming that the State Practice and *opinio juris* of the old CIL is abandoned in favour of an emerging *jus cogens*?

Returning to the first paragraph, the formulation also raises the question on how a *jus cogens* norm can be modified by any subsequent CIL as referenced by the comments from the Netherlands, even with the inclusion of

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peremptory norms of general international law (jus cogens) adopted by the International Law Commission, 12.

56 Russia, *Comments by the Russian Federation on the topic "Peremptory norms of general international law (jus cogens)*, 5.

57 Netherlands, *Comments of the Kingdom of the Netherlands on the International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens)*, para 9.

58 France, *Comments and observations of France on the draft conclusions on peremptory norms of general international law (jus cogens) adopted by the International Law Commission*, 3.

59 Czech Republic, *Comments of the Czech Republic on the International Law Commission's draft conclusions on peremptory norms of general international law (jus cogens)*, adopted on first reading, 2.

60 In particular comments made by the United States, the Netherlands, and United Kingdom.

the sentence "without prejudice to the possible modification of a peremptory norm of general international law (jus cogens) by a subsequent norm of general international law having the same character" in conclusion 14. The United States further elaborates on this by arguing that paragraph one "necessarily raises the question of how, if a conflicting customary international law norm does not come into existence or is otherwise void ab initio, a jus cogens norm may be modified by a subsequent norm of general international law having the same character".[61] This issue is further exacerbated when we recall that the evidence used for the identification of *opinion juris* in the context of CIL overlaps with that used to identify the subjective element of *jus cogens*.[62]

In short, the conclusion offered in the draft articles is one of a paradox. However, perhaps rather than focusing on how a conflict between *jus cogens* and CIL might play out, the inquiry should focus on other questions. For instance, how did the ILC reach their paradoxical conclusion, and can a norm of CIL conflict with a *jus cogens* norm in the first place?

D. Logical Impossibility of Normative Conflict and the Loaded Question

1. Issues with the ILC's Approach

Taking into account the similar element of "State belief" between the CIL and *Jus Cogens*, one could question how the ILC would imagine a scenario where both norms would exist at the same time and thus require norm conflict resolution.

To briefly recall, draft conclusion 14 presents two scenarios where *jus cogens* might conflict with CIL: the first scenario involves a *jus cogens* norm that exists before the creation of the conflicting CIL, while the second scenario involves a *jus cogens* norm that is established despite the existence of a conflicting CIL. In the first scenario the ILC asserts that "a rule of customary international law does not come into existence if it would conflict with an existing peremptory norm of general international law"; while in the second scenario, "a rule of customary international law not of a peremptory character ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law".[63] In the subsequent comments by States, several expressed concerns about the formulation, particularly focusing on

61 U.S., *Comments on ILC Draft Conclusions on Jus Cogens*, 12.
62 ILC, Draft Conclusions, 41.
63 ILC, Draft Conclusions, 56-58.

the existence of "State belief" in both CIL and *jus cogens,* which makes it difficult to accept the idea of States simultaneously holding two contradictory obligations.[64] Additional issues were raised on the ILC's conclusion that, in a conflict between the two, one solution would entail the CIL not crystallizing despite its elements being fulfilled, while the other eliminates the contravening CIL. As France puts it, "the existence of a "conflict" necessarily implies the existence of the conflicting norms; if one of them does not exist, then there can be no conflict".[65]

The issue with draft Article 14 likely began when the ICL started its analysis, departing from the notion that *jus cogens* norms are non-derogable and have superior hierarchical status in international law; therefore, any other sources of law must yield to it.[66] In other words, they began their legal reasoning from a deductive approach. The deductive approach starts with two premises, one general and one particular, and derives its persuasiveness from the possibility that certain premises lead to a certain conclusion.[67] An example of deductive reasoning could begin with the premise that all mammals have backbones, followed by a more specific premise that a whale is a mammal. Therefore, if all mammals have backbones and a whale is a mammal, then whales must have a backbone. On the other hand, an inductive approach does not compel any specific conclusions but is based on empirical observation. The inductive approach is not compelled by its premises but derives its persuasiveness from empirical observations.[68]

Both are legitimate tools of legal persuasion and are often employed by international tribunals such as the ICJ. It is also quite common to combine both methods to further strengthen a proposition.[69] However, in the case of the ILC's draft conclusion 14, it is apparent that it strongly relied on a deductive approach to reach its conclusion. This brings a certain weakness: a deductive

64 See for example United States, France, Spain, Netherlands comments to conclusion 14.
65 France, Comments on the Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens), 3.
66 ILC, Draft Conclusions, 18.
67 Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978), 13–14.
68 Massimo Fabio Lando, "The Limits of Deduction in the Identification of Customary International Law," *Asian Journal of International Law* 14, no. 2 (2024): 273.
69 Stefan Talmon, "Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion," *European Journal of International Law* 26, no. 2 (2015): 417.

approach is formally valid if the premises compel a conclusion regardless of the truth of the premises, meaning that the truth of the premises is a separate empirical question. However, legal syllogisms can only be entirely persuasive if they are formally valid *and* empirically correct.[70] In this case, it is formally valid to say that due to the superior status of *jus cogens,* CIL must yield to it. However, it is empirically incorrect to say that *jus cogens* can conflict with a rule of CIL due to them sharing a similar element of "State belief".

Had the ILC given more weight to the inductive approach, it might have been able to consider more deeply the lack of cases involving a direct conflict between *jus cogens* and CIL. Indeed, in its commentary, the evidence provided was courts and tribunals mentioning in passing and merely as hypothetical that, should both of these norms come into conflict, *jus cogens* would prevail.[71] Although it could be for this very reason that the drafters favored a more deductive approach in their commentaries, it is difficult to empirically observe something which lacks precedents. Yet, by focusing the draft conclusion on a deductive approach, it may have led the ILC away from other conclusions which could have been more logical, including the possibility that a conflict between *jus cogens* and CIL is an impossibility.

2. *Jus Cogens* versus Customary International Law in Cases: Conflict?

The deductive approach the ILC took in formulating its draft conclusions on conflict between CIL and *jus cogens* leads to an inherently paradoxical dynamic. It is difficult to imagine a situation where States fulfil the element of *opinion juris* for a CIL while simultaneously holding the belief that a *jus cogens* prohibits it, and this is precisely why there are little to no precedents or State practice on the matter. However, there are notable cases in international law where questions were asked regarding potential conflict between the two. This section seeks to examine and analyse whether there ever was a potential for conflict to occur in these cases.

a. House of Lords Judgement in Pinochet

The Pinochet Case involving the former Chilean dictator is one of the first instances where a legal proceeding considered a potential conflict

70 Lando, "The Limits."

71 Cited cases such as: Siderman de Blake v. Argentina; Supreme Court of Argentina, Simón; Al-Adsani v. the United; The Kenya Section of the International Commission of Jurists v. the Attorney-General and Other.

between CIL and jus cogens. The case unfolded against the backdrop of the dictator's 17-year presidency, a period marked by the arbitrary arrest, forced disappearance, and torture of thousands of Chileans and foreign nationals.[72] This led to Spanish authorities issuing an international arrest warrant years later for the dictator and requesting that the United Kingdom extradite Pinochet, who was in the country at the time for medical treatment.[73]

In the following legal proceedings, the High Court of Justice and the House of Lords had to consider, among other things, the interaction between immunity granted to (former) Heads of State and the prohibition of torture. Heads of State immunity is generally considered a customary norm under international law.[74] This principle holds that Heads of State enjoy immunity from prosecution in foreign courts for official acts performed in their capacity as leaders, which Pinochet argues he is entitled as his actions were taken in an official capacity.[75] On the other hand, the Lords considered that "(the) jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed", and that "the issue is whether international law grants state immunity in relation to the international crime of torture".[76] In short, the core legal question asked is whether the former president is entitled to immunity (a CIL norm) as a former Head of State in respect of the charges of torture (a jus cogens norm) that are advanced against him?

In its 1999 judgment, the House of Lords ruled in a 6 to 1 decision that Pinochet did not enjoy immunity from criminal proceedings in respect of allegations of torture.[77] The majority of the Lords agreed, albeit with slight variations in their reasoning, that the prohibition of torture takes primacy over immunity. [78] The majority, relying on the Convention Against Torture (CAT), reasoned that torture cannot be considered as official acts of a Head of State,

72 Susan Waltz, "Prosecuting Dictators: International Law and the Pinochet Case," *World Policy Journal* 18, no. 1 (2001): 102.
73 Waltz, "Prosecuting Dictators."
74 House of Lords (United Kingdom), *R v. Bow Street Magistrate's Court, ex parte Pinochet Ugarte,* 3 All ER 97 (HL 1999), 15-16. (Pinochet Ugarte (HL 1999)).
75 Pinochet Ugarte (HL 1999), 16.
76 Pinochet Ugarte (HL 1999), 18.
77 Andrea Bianchi, "Immunity versus Human Rights: The Pinochet Case," *European Journal of International Law* 10, no. 2 (1999): 243.
78 Bianchi, "Immunity."

as such a definition would grant immunity, thereby frustrating the universal nature of the norm by preventing proceedings unless the official's State was willing to waive immunity.[79]

In this line of reasoning, the Lords considered the jus cogens nature of the prohibition against torture within the CAT and took into account that jus cogens will derogate any other sources of law. Hence, it should be correct to say that immunity from criminal jurisdiction does not apply in situations where it will contradict jus cogens, with some scholars arguing further against civil jurisdictions as well.[80] This conclusion is what gave the Pinochet case a reputation of being one of the instances of where a norm of CIL conflicted with a norm of jus cogens. Legal scholars at the time were certain that egregious international crimes committed even while in office were exempted from immunity.[81] However, later developments by the ILC and ICJ with regard to the topic of immunity took a less ambitious approach.[82] What happened then to the notion that jus cogens would always prevail over CIL?

A closer analysis of the Pinochet ruling offers three alternative interpretations that reveal no conflict between the CIL and the jus cogens prohibition against torture. In the first interpretation, it could be argued that the Lords denied immunity primarily because both the UK and Chile are parties to the Convention Against Torture (CAT).[83] Although they acknowledged the importance of the jus cogens nature of the prohibition against torture, the key argument was that Chile could not claim immunity for Pinochet in order to block UK criminal jurisdiction due to its obligations under the convention.[84] Ultimately, the Lords based their decision on treaty obligations rather than the jus cogens status of the norm.[85]

In the second interpretation, while the customary norm of immunity did confer civil and indeed criminal inviolability to State officials for ordinary

79 Bianchi, "Immunity."
80 Naomi Roht-Arriaza, "The Pinochet Precedent and Universal Jurisdiction," *New England Law Rev.* 35 (2000): 311–12; Bianchi, "Immunity"; Waltz, "Prosecuting Dictators."
81 Joanne Foakes, "Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts," *Chatham House IL BP 2011/02*, 2011, 2.
82 Foakes, "Immunity For."
83 Bianchi, "Immunity."
84 Xiaodong Yang, *State Immunity in International Law* (Cambridge: Cambridge University Press, 2012), 437.
85 Yang, *State Immunity*.

crimes, it is possible that the CIL norm itself never intended for immunity to protect from the violations of extraordinary crimes such as torture.[86] In other words, rather than having the jus cogens norm and CIL norm conflict, thereby resolving their conflict similarly to treaty severability (as the ILC argues it should in draft conclusion 14), the concept of immunity stipulates its limitation within its own norm. Alternatively, it is also possible to argue that a new separate CIL has developed, which removes immunity for violations of extraordinary crimes.[87] Though later on, the ICJ's judgment in the Arrest Warrant case seems to discredit these possibilities.

Lastly, there may have existed a CIL of immunity for any crime, including those considered as extraordinary crimes by international law; however, the opinio juris for that absolute level of immunity has shifted in favor of a more restrained idea of immunity. Taking into account the formation and history of the law of immunity during the age of absolutism, the prevailing position of international law during the period was that a State or its monarch was completely immune from any foreign national court, whatever the nature or type of legal proceedings.[88] With the development of international relations and State function, absolute immunity became less absolute, with restrictions on commercial actions taken by States slowly developing during the 20th century.[89] It would not be too difficult to say that the opinio juris for absolute immunity has begun to shift with regard to immunity from certain crimes as well. The ILC, for example, attempted to argue in draft Article 7 on immunity, albeit with great resistance from certain States, that exceptions exist for immunity ratione materiae with regard to certain extraordinary crimes under international law, signalling a shift in the belief of absolute immunity for all crimes.[90]

In light of these alternative interpretations, it can be argued that no real norm conflict was present within the Pinochet case. An inductive rather than a

86 Adam Day, "Crimes against Humanity as a Nexus of Individual and State Responsibility: Why the ICJ Got Belgium v. Congo Wrong," *Berkeley Journal of International Law* 22 (2004): 499–504.

87 See for example Belgium's Memorial in *Arrest Warrant*.

88 Yang, *State Immunity*.

89 Yang, *State Immunity*.

90 Dire Tladi, "The International Law Commission's Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World in International Law?," *Leiden Journal of International Law* 32, no. 1 (2019): 19.

deductive approach reveals ways in which the respective CIL and jus cogens norms can be compatible and resolves "conflicts" without eliminating the CIL norm of immunity.

b. ICJ Judgement in Congo v Belgium (Arrest Warrant)

The Congo versus Belgium case (The Arrest Warrant) before the ICJ concerns the issue of the immunity of a sitting government official and allegations of crimes of *jus cogens*. The issue began when a Belgian judge sanctioned an international arrest warrant against the then Congolese Foreign Minister, Abdoulaye Yerodia, for violations of the Geneva Conventions and crimes against humanity.[91] The Congo brought the matter of the arrest warrant before the ICJ, arguing that Belgium, in issuing the warrant, violated the CIL of immunity afforded to Yerodia through its actions.[92] Belgium, in its part, agreed that CIL does afford foreign government officials immunity while in office. However, the conclusion differs in that Belgium contends that there are exceptions in the event of *jus cogens* crimes.[93]

While the case at first glance seems similar to the Pinochet case, a number of factors differentiate it. First, the subject of immunity in the Arrest Warrant case concerns a sitting government official as opposed to a former Head of State, meaning a more complete form of immunity is being contended.[94] Second, the forum and the parties in contention involve the ICJ and two disputing States, meaning that the applicable laws do not focus primarily on domestic legislation with reference to international law, but rather use international law as its primary source. Third and most importantly, in the Arrest Warrant case, the Court ruled in favor of immunity as opposed to the *jus cogens* norm involved.[95] What then led the ICJ to this conclusion?

It must be noted beforehand that the discussion surrounding *jus cogens* within the Arrest Warrant case was brought solely by Belgium's arguments in its memorials. As noted, Belgium maintains that immunity under international

91 International Court of Justice. Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 14 February 2002, 6 (Arrest Warrant Case (Dem. Rep. of the Congo v. Belgium)).
92 Arrest Warrant Case (Dem. Rep. of the Congo v. Belgium), 6.
93 Counter-Memorial of the Kingdom of Belgium, Arrest Warrant Case (Democratic Republic of the Congo v. Belgium), 28 Sept. 2001, 128.
94 Arrest Warrant Case (Dem. Rep. of the Congo v. Belgium), 6.
95 Arrest Warrant Case (Dem. Rep. of the Congo v. Belgium), 26.

law is exempted in the event of a violation of *jus cogens.* It relied on the decision of both national cases, such as Pinochet and other international tribunals, to show that there are strong "legal justification of the refusal of immunity to persons suspected of having committed grave breaches of international humanitarian laws."[96] They did not, however, argue that this exception has reached the status of *jus cogens*, merely that a new custom has formed to give exceptions towards immunity when conflicting with *jus cogens*.

It is for this reason that the Court viewed the matter as CIL against CIL, rather than CIL against peremptory norms. More precisely, the Court seeks to clarify the extent of immunity and determine if the existence of a new custom of exception, as argued by Belgium, holds weight. In determining the extent of a Minister for Foreign Affairs' immunity, the Court considered the functions exercised by the office. It concluded that in order to effectively undertake their task, the person enjoys full immunity from criminal jurisdiction and inviolability throughout the duration of their term.[97] The Court also blurred the lines between acts taken in an "official capacity" and "private capacity" by stipulating that immunity covers acts of both nature, departing from prior developments in Pinochet.[98] Lastly, after considering the list of evidence Belgium presented, the Court was unable to deduce that a rule of CIL existed which exempted immunity from an incumbent Minister of Foreign Affairs when they are suspected of having committed a *jus cogens* crime.[99]

In short, the Arrest Warrant case did not establish that the CIL norm of immunity supersede *jus cogens* norms. Rather, the Court rejected Belgium's assertion that a distinct CIL norm exempting immunity in instances of *jus cogens* crimes existed. Thus, no conflict between CIL and *jus cogens* arose in this case.

c. The Jordan Appeals at the ICC

The ICC debacle with head of state immunity can perhaps be said as the "next episode of the Arrest Warrant drama". Most of the controversy

96 Counter-Memorial of the Kingdom of Belgium, Arrest Warrant Case (Democratic Republic of the Congo v. Belgium), 28 Sept. 2001, 185.
97 Arrest Warrant Case (Dem. Rep. of the Congo v. Belgium), 22.
98 Arrest Warrant Case (Dem. Rep. of the Congo v. Belgium), 22.
99 Arrest Warrant Case (Dem. Rep. of the Congo v. Belgium), 24.

surrounds the arrest warrant for Sudan's Omar Al-Bashir that many states, including ICC members, are refusing to entertain due to Al-Bashir's immunity. This culminates in the Jordan Referral case in the ICC Appeals chamber, on Jordan's refusal to arrest Al-Bashir during his visit to Jordanian territory.[100] When the *Arrest Warrant* case judges mentioned that exceptions to the head of state immunity at the time were only found for international courts, the ICC brings in a different kind of problem.

The ICC is no doubt an international court; hence, the ICC Appeals Chamber rules that there is an immunity exception and, therefore, Jordan has breached her obligation. However, as argued by Jordan (and other states),[101] if it is states that are demanded to execute arrest warrants, then they –being states—are still bound by the head of state immunity. This ICC judgment has been criticized by scholars.[102] However, our focus here is on how the ICC discusses customary international law and *jus cogens*.[103]

There are two limbs in how the ICC characterizes the relationship between the customary international law rule of head of state immunity and *jus cogens*. First limb, the ICC notes that the obligation for states to cooperate with the ICC is a *jus cogens*-level obligation.[104] Second limb, however, the ICC also explains that there is no customary international law providing immunity for heads of state from another state's arrest upon warrants issued by international courts.[105] We therefore find ourselves in a similar situation with the *Arrest Warrant* Case as far as customary international law and *jus cogens* are concerned: no normative conflict exists between the two. The *jus cogens* norm in question reaches areas where no customary international law

100 International Criminal Court, *Prosecutor v. Omar Al-Bashir*, Appeals Chamber Judgment in the Jordan Referral re Al-Bashir Appeal No. ICC-02/05-01/09 OA2, 6 May 2019 (Jordan Appeals Judgment).

101 Such as South Africa. See: International Criminal Court, *Prosecutor v. Omar Al-Bashir*, Pre Trial Chamber II Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09, 6 July 2017 (South Africa Decision).

102 See *inter alia*: Kevin Jon Heller, "A Thought Experiment About Complementarity and the Jordan Appeal Decision," Opinio Juris, 2019; Dapo Akande, "ICC Appeals Chamber Holds That Heads of State Have No Immunity Under Customary International Law Before International Tribunals," EJIL:Talk!, 2019; Asad Kiyani, "Elisions and Omissions: Questioning the ICC's Latest Bashir Immunity Ruling," Just Security, 2019.

103 Something the South Africa Decision did not touch on; hence we only discuss the Jordan Appeals Judgment.

104 Jordan Appeals Judgment, para 123.

105 Jordan Appeals Judgment**,** para 115.

exists.

d. ICJ Judgment in Germany v Italy (Jurisdictional Immunities of the State)

The question of immunity conflicting with *jus cogens* would come up again in the Germany versus Italy case (Jurisdictional Immunities). The issue arose when the Italian Supreme Court entertained civil claims to be brought against Germany for injuries caused by the Third Reich during World War 2.[106] In December 2008, Germany instituted proceedings against Italy before the ICJ requesting the Court find that Italy have failed its international obligation to respect Germany's jurisdictional immunity.[107] Italy, on its part, argues that the crimes committed by the Third Reich constitute a grave violation of *jus cogens* norm, a norm which has a peremptory nature within the hierarchy of international law.[108] As such, they take precedence over the customary rule of immunity afforded to Germany.[109]

It is simple to see the similarities between the Jurisdictional Immunities case and the Arrest Warrant. The arguments between the applicant and respondent in both cases mirror each other, with the primary difference being the subject of immunity changing from individuals to States. However, the ICJ would shed new light regarding the "conflict" between *jus cogens* and the CIL of immunity in its judgment.

In rendering its judgment, the Court clarified that the question which it was to decide was not whether the acts committed by Germany were in violation *jus cogens* norm, but whether, in a proceeding against it, the Italian courts were obligated to grant Germany immunity under international law.[110] It then again inquired as to whether the customary law of immunity has developed to the point at which exceptions to immunities were granted due to violations of *jus cogens*, and concluded that "there is almost no State practice which might be considered to support the proposition that a State is deprived

106 Francesco Moneta, "State Immunity for International Crimes: The Case of Germany versus Italy before the ICJ," *The Hague Justice Portal* 4, no. 2 (2009): 139.

107 Moneta, "State Immunity for International Crimes: The Case of Germany versus Italy before the ICJ."

108 International Court of Justice, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgement, February 3, 2012, 41 (Jurisdictional Immunities of the State, 2012).

109 Jurisdictional Immunities of the State, 2012, 41.

110 Jurisdictional Immunities of the State, 2012, 41.

of its entitlement to immunity in such a case."[111] This line of reasoning and judgment reinforces the Court's prior decision in *Arrest Warrant*.

The Court then considered Italy's second argument, which claims a norm conflict exists between its obligation to follow *jus cogens* and granting immunity to Germany. In particular, Italy argued that it is prohibited from granting immunity as that amounts "to recognizing as lawful a situation created by the breach of a *jus cogens* rule"; and that since *jus cogens* rules take precedence over inconsistent international law, the customary rule of immunity must yield.[112]

The Court, in answering this question, is forced to elaborate what it considers as a conflict of norm. It clarified that immunity and *jus cogens* address different aspects of law, stating that "the rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful."[113]

It is evident that the Court does not see a conflict when two norms govern different issues. The Court noted that a rule hindering the enforcement of another does not constitute a conflict between norms. However, issues arise in how the Court defines norm conflict, such as in distinguishing between procedural and substantive norms, and the idea that procedural norms can never conflict with substantive ones.[114] Despite this, it remains clear that no conflict exists between *jus cogens* and CIL in this case.

However, for the sake of argument, if we assume that a conflict of norms does exist, the conflict resolution framework between CIL and *jus cogens* proposed by the ILC raises its own issues. First, if we consider immunity as a whole to be in conflict with *jus cogens*, it would imply the complete elimination of immunity as a customary practice, which would be highly problematic. Second, if only certain aspects of immunity are in conflict, specifically the granting of immunity for crimes that violate jus cogens, this still creates a

111 Jurisdictional Immunities of the State, 2012, 42.
112 Jurisdictional Immunities of the State, 2012, 45.
113 Jurisdictional Immunities of the State, 2012, 46.
114 François Boudreault, "Identifying Conflicts of Norms: The ICJ Approach in the Case of the Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)," *Leiden Journal of International Law* 25, no. 4 (2012): 1007.

norm that the International Court of Justice (ICJ) has acknowledged lacks significant state practice or *opinio juris*. This raises the question: can a *jus cogens* norm create or alter customary law due to a conflict, even if it does not accurately reflect state behavior? In claiming that a conflict does not exist between the two norms, the Court may have avoided answering this question.

3. The Loaded Question of a *Jus Cogens* and CIL Conflict

This all boils down to a question of logic. For one to ask what happens if there is a contradiction between *jus cogens* and customary international law, one should first ask if such a contradiction can happen in the first place.

For the answer to be 'yes', there must be rules from each *jus cogens* and customary international law with positive-negative relations in a way that requires one to be true while the other is false. If both are false or both are true, they are not contradictions.[115] For example, the following two statements cannot be both true or both false: "this manuscript is rejected by Journal X" and "this manuscript is accepted by journal X", only one can be true.

If customary international law dictates "there is head of state immunity against foreign jurisdictions in all situations" while *jus cogens* dictates "there is no head of state immunity against foreign jurisdictions for *jus cogens* breaches", this is a contradiction. In *manṭiq* terms, the former is a "positive universal" and the latter is a "negative particular", which are considered opposites and therefore contradictory.[116] The reason for this is that such a situation would necessitate a "positive particular" and a "negative particular", because the proposition "there is head of state immunity against foreign jurisdictions in all situations" would necessitate "there is head of state immunity against foreign jurisdictions in *jus cogens* breaches".

However, there are two problems with such a characterization.

The first problem relates to the predicate. One of the requirements for contradiction is that the predicates need to be the same.[117] So, for example, our manuscript being "processed by Journal X" and "accepted by Journal X"

115 Muḥammad Al-Amīn Al-Shinqīṭī, *Ādāb Al-Baḥth Wa Al-Munāẓarah* (Riyadh: Dar 'Aṭā'āt Al-'Ilm, 2019), 89. See also: Satya Sundar Sethy, *Introduction to Logic and Logical Discourse* (Singapore: Springer Nature Singapore, 2021), 65–66.

116 Al-Shinqīṭī, *Ādāb Al-Baḥth*.

117 Al-Shinqīṭī lists nine requirements of contradictions. See: Al-Shinqīṭī, *Ādāb Al-Baḥth*. However, we shall discuss only two relevant to our paper as crucial point of contention, namely the "union of predicate" and the "union of time".

are not contradictory.

In our present case pertaining to head of state immunity, some case laws highlight that customary international law and *jus cogens* do not contradict because they govern different things. In the *Arrest Warrant* case, for example, the judges submitted that immunity is a matter of procedural law while *jus cogens* is a matter of substantive law; therefore, they do not contradict each other. However, this is a matter specific to the case of head of state immunity, so it is not necessarily an issue with regard to *jus cogens* and customary international law generally.

The second problem, which appears to be the more crucial one, relates to the "union of time" being also among the requirements of contradictions.[118] Meaning, the two opposing statements need to occur at the same time, otherwise it would not be a contradiction. Using the earlier example of the fate of our manuscript, to say that "our manuscript was rejected by Journal X in February 2024" and "our manuscript was accepted by Journal X in December 2024" can both be true and therefore not contradictory. While both propositions are opposite to each other (negative and positive), they do not contradict each other because they occur in different times.

Applied to our example on head of state immunity, for a union of time to occur, there must be the following:

- Uniformity of state practice and opinio juris (as customary international law requires) gives head of state immunity against foreign jurisdictions for jus cogens breach, and
- The international community of states as a whole (as jus cogens requires) does not give head of state immunity against foreign jurisdictions in a situation of jus cogens breach.

Now, in terms of propositions, they are indeed oppositions as a positive and a negative. The subjects are written differently ("uniformity of state" and international community of states as a whole"), but they effectively refer to the same thing.[119] The international community of states consists of states of whose uniformity of practices and *opinio juris* are considered for customary

118 Al-Shinqīṭī, *Ādāb Al-Baḥth*.

119 Note that "union of subject" is also a requirement for contradictions. See: Al-Shinqīṭī, *Ādāb Al-Baḥth*.

international law, unless we are referring to different planets or alternate realities.[120] Let us just summarize the subject of the two propositions as "all states".

However, it is precisely because the two aforementioned propositions are opposing each other that there is no possibility for both to occur at the same time. It is impossible for all states to agree on something to be legal, while at the same time also agreeing on something to be illegal. That said, considering the above discussion, the only logical possibilities are as follows:

- Customary international law gives head of state immunity against foreign jurisdiction in non-*jus cogens* breaches, but does not give head of state immunity in *jus cogens* breaches.
- J*us cogens* denies head of state immunity against foreign jurisdictions in *jus cogens* breaches, but does not deny head of state immunity against foreign jurisdictions in non-*jus cogens* breaches.

The two premises above are not contradictory. This is similar to what many of the case laws allude to, where it is argued that there is no customary international law for head of state immunity specifically in the case of *jus cogens* breaches.

Now, unlike the first problem regarding the union of predicate, this second problem pertaining to the union of time is a problem that applies generally to the question of customary international law and *jus cogens*. After all, it reveals how, in any case, there can never be a norm of customary international law contradicting *jus cogens*.

This brings us back to the question we had at the beginning: what happens if there is a contradiction between *jus cogens* and customary international law?

When a question is flawed because it is based on an unwarranted/ incorrect proposition in such a way that answering the question necessitates acceptance towards said proposition, it falls under the fallacy of a loaded question (or "complex question").[121] For example, if we ask, "What did Journal X do about the plagiarism in your manuscript?" when in fact you did not have any plagiarism in your manuscript. If all you answer is "nothing", it

120 Our manuscript is indeed theoretical, but we are not going as far as science fiction.
121 Furman, *Critical Thinking*; Musṭafa and Al-'Anzī, *Mukhtaṣar*.

would mean that you affirmed the plagiarism in your manuscript, but Journal X did nothing about it.[122]

Applied to the case at hand, we have shown how there can be no contradiction between customary international law and *jus cogens*. This is an illogical possibility with no possibility to be materialized. Consequently, to ask "which one prevails when customary international law contradicts with *jus cogens*" is to ask a loaded question.

E. Conclusion

How old are your grandchildren? This question, if asked to someone who does not have any grandchildren, cannot be answered because it stands on a problematic premise. Instead, one must respond by breaking out of the question construct and call out the problematic premise: I do not have any grandchildren.

It is perhaps instinctive to say that *jus cogens* reigns supreme when in conflict with customary international law. After all, by definition, *jus cogens* is the highest norm of international law that all others would be null and void if contradicting it. Customary international law is often easily considered as part of 'all others,' so one would be forgiven for thinking it a closed case. It is therefore understandable that the ICJ judges and ILC scholars concluded this way. However, we have not managed to find an actual case where such a conflict happens and it appears that very few, if any, wonder why.

We have shown that asking about the consequence of *jus cogens* contradicting customary international law is also an illogical question. It is simply impossible for *jus cogens* and customary international law to, in any circumstances, contradict each other. This is not a matter of statistical unlikeliness. Instead, it is an illogical impossibility. The only correct response to such a question is, as shown above, to break out of the question construct and call out the problematic premise: *jus cogens* and customary international law do not contradict each other.

Our research endeavors to answer a largely unquestioned theoretical premise regarding *jus cogens*, and we hope that this opens more discussions

122 Side note: This is beside the point made (i.e. what a fallacy of "loaded question" is). But if confronted in such a situation, if you did not plagiarize your manuscript, the correct response to this question is not to answer what was asked. Instead, attack the incorrect premise as follows, "There is no plagiarism in my manuscript."

on the subject. In the end, there are many unfinished discussions regarding *jus cogens* awaiting to be explored.

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