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Identifying Jus Cogens Norms: The Interaction of Scholars and International Judges

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Abstract

In this paper I address the justifications and methods adopted by scholars and international judges for the identification of *jus cogens* norms. More specifically, I examine how the approaches taken by these two subsidiary sources of international law relate. In so doing, I seek to highlight and develop a clearer understanding of why, in spite of considerable scholarly and judicial attention, more progress on the doctrine of *jus cogens* identification has not been made. The analysis covers assessment of the practice of interaction, but also its underpinnings, which include the implications of *jus cogens* identification for the legitimacy of international courts. I argue that scholars have focused on justificatory theory at the expense of methodological considerations and that this has limited the scope for the development of a useful discourse with international judicial bodies on matters of *jus cogens* identification.

Although states have now generally accepted the existence of *jus cogens* (peremptory) norms in international law, they have provided little guidance on how such norms are to be identified. It is therefore to be welcomed that scholars and judges have been willing to engage with matters of *jus cogens* identification. As subsidiary sources of international law, scholars and judges are well situated to help with the development of a framework for the identification of *jus cogens* norms, including a justification for the concept and a method for determining whether or not a particular norm has *jus cogens* status. However, it is apparent from the recent *Belgium v. Senegal* case at the International Court of Justice (ICJ) that little advancement in the doctrine of *jus cogens* identification has occurred since the concept was established through the Vienna Convention of 1969.¹ Even though this

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1. See also Evan J. CRIDDLE and Evan FOX-DECENT, "A Fiduciary Theory of Jus Cogens" (2009) Yale Journal of International Law 331 at 346–7; on the general importance of clarity in the sources of

was the first time that the ICJ has identified the prohibition of torture as a norm with *jus cogens* status (albeit a point made in passing), the Court could do no better than to provide a somewhat ambiguous reference to customary law as the justification, and to make reference to a number of international treaties that prohibit torture as a potential indicator of method.²

A key issue that continues to surround the identification of norms with *jus cogens* status is about which justificatory theory is to be preferred. The most well-known candidates are natural law, public order theory, and customary law. But even if one has a preferred justificatory theory, the question of method still persists. Should a new methodological approach that takes account of the specificities of peremptory norms be developed, or can existing frameworks be harnessed? Or is this an area where the status of the norm, given the values at stake, should be treated as self-evident and identifiable on the basis of intuition?

This paper does not attempt to provide answers to these questions. Rather, it is interested in the related question of why, in spite of considerable scholarly and judicial attention, more progress on the doctrine of *jus cogens* identification has not been made. The answer to this question has a number of dimensions. In particular, the significance and complexity of the issues at stake and the continued lack of useful guidance from states must be central factors. But it is not unreasonable to think that the way in which the two subsidiary sources relate to each other on this topic could also be significant. Interaction between scholars and judges has the potential to help facilitate the development of doctrine on *jus cogens* identification, as it is an opportunity for ideas and insights generated in one context to be tested and refined in another. However, just because both groups are increasingly identifying *jus cogens* norms, it does not mean that they are interacting, or that they are interacting in a way that has the scope to aid progression on matters of doctrine.

By examining how the approaches taken by scholars and international judges to the identification of *jus cogens* relate, this paper seeks to develop a clearer understanding of why there has not been more progress on the question of justificatory theory and the method for determining whether a norm has *jus cogens* status.

The paper proceeds with consideration of the value of interaction between scholars and international judges as a means to norm development in international law. This includes reference to how other aspects of the *jus cogens* concept have been clarified through scholarly and judicial interaction. Subsequently, the contents of scholarly work and judicial output on *jus cogens* identification are examined. Attention is given to both the practice of interaction and the explanation for its current condition. This leads to an assessment of how *jus cogens* identification relates to the legitimacy of international judicial bodies, including the implications that emerge from this perspective for the future practice of interaction between scholars and judges. The main argument to be pursued is that scholars have focused on

public international law, see Michael WOODS, "What Is Public International Law? The Need for Clarity about Sources" (2011) 1 *Asian Journal of International Law* 205–16.

2. *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, [2012] I.C.J. Rep. at 9.

justificatory theory at the expense of methodological considerations and that this has limited the scope for the development of a useful discourse with international judicial bodies on matters of *jus cogens* identification.

The focus of the paper on international judicial bodies (including quasi-judicial bodies) might seem too narrow, as a range of national judicial bodies have also identified *jus cogens* norms,³ and the development of international law will be best achieved when the efforts of domestic and international bodies are co-ordinated.⁴ However, analysis is facilitated through the separation of the two levels. This is because the different contexts in which national and international judges operate exposes them to different socio-political pressures—such as a concern about the legitimacy of the institution—that can influence the way in which a potentially contentious issue like *jus cogens* identification is approached. Moreover, in contrast to national bodies, international (quasi-) judicial bodies have demonstrated a willingness to identify *jus cogens* status when the issue has little direct bearing on the case.⁵ This suggests that international judges could be more interested in the *jus cogens* concept than domestic judges, and thereby perhaps more likely to offer reasoning that can help with its development.

It is first important to consider the establishment of the *jus cogens* concept in international law. This is an opportunity to highlight the present condition of doctrine on *jus cogens* identification, but consideration of the traditional positions taken by states on the nature of *jus cogens* also provides a useful reference point for the analysis of the positions taken by scholars and international courts in subsequent sections.

I. THE ESTABLISHMENT OF THE *JUS COGENS* CONCEPT IN INTERNATIONAL LAW

The establishment of the concept of *jus cogens* norms (peremptory norms) in international law occurred through the 1969 Vienna Convention on the Law of Treaties (VCLT). Article 53 of the VCLT specifies that “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”.

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3. See e.g. (from the UK) *R v. Bow Street Metropolitan Stipendiary Magistrate*, ex p Pinochet Ugarte (No. 3) (Amnesty International intervening) [1999] 2 All ER 97 at 176; (from Kenya) *Kenya Section of the International Commission of Jurists v. Attorney General and Minister of State for Provincial Administration and Internal Security and Kenyans for Justice and Development Trust* (joining), Final Judgment, [2011] eKLR, ILDC 1804 (KE 2011), 28 November 2011, High Court; (from Colombia) Gallón Giraldo and 104 others representing themselves or non-governmental organizations, Constitutional Complaint, Judgment No C-370/2006, File D-6032, ILDC 660 (CO 2006), 18 May 2006, Constitutional Court; (from Australia) *R.*, DMJ Bennett QC (Solicitor General of the Commonwealth) (intervening) and SP Donaghue (on behalf of the Attorney General of the Commonwealth) (intervening) *v. Tang*, Appeal Decision, [2008] HCA 39, (2008), ILDC 1519 (AU 2008), 28 August 2008, High Court.
 4. Eyal BENVENISTI and George W. DOWNS, “National Courts, Domestic Democracy and the Evolution of International Law” (2009) 20 *European Journal of International Law* 59 at 68; also A. CASSESE, “For an Enhanced Role of Jus Cogens” in Antonio CASSESE, ed., *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012), 158 at 170.
 5. See, for example, two cases from the Inter-American Commission of Human Rights dealing with the right to life, *Victims of the Tugboat “13 de Marzo”*, Case 11.436, Report No. 47/96 (1997), para. 79 [*Tugboat case*]; *Mangas v. Nicaragua*, Report No. 52/97, Case 11.218, Report No. 52/97 (1998), para. 145.

The clearest indication of how *jus cogens* norms are to be identified is found in the (now famous) clause of Article 53 of the VCLT, “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted”. This suggests some role for indicators of acceptance from states in the emergence of a norm of *jus cogens*.⁶ However, Article 53 is far from specific on the explanation for *jus cogens* norms or on the method to be adopted in determining whether or not a norm has this status. The “acceptance” and “recognition” could be read as a reference to one of the established sources of international law listed in Article 38(1) ICJ statute.⁷ Yet the language of the “international community of States as a whole” is not traditionally associated with the formation of treaty law, customary law, or the general principles of law. Moreover, it is possible for Article 53 to be read as offering an indication of only how *jus cogens* norms are to be identified for the purpose of the VCLT, leaving open how *jus cogens* norms are to be identified as a general matter.⁸

The willingness of states at the Vienna Conference to agree to Article 53,⁹ in spite of a lack of clarity on how *jus cogens* norms are to be identified, is made more understandable by the inclusion of Article 66 VCLT.¹⁰ Article 66 specifies that “any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration”. To date, this facility has not been used, but as well as a safeguard against misuse¹¹ it can be read as representing the hopes of the participating states at Vienna that international courts might be able to provide insights on the way in which *jus cogens* status is to be afforded. In this respect, Article 66 has similarities with a suggestion from the International Law Commission (ILC) in its commentary on a draft of the convention. The ILC suggested that in the absence of agreement on key aspects of the concept, “the prudent course seems to be to ... leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals”.¹²

Since Vienna 1969, states have helped to further confirm the existence of the peremptory norm concept in a number of ways. The 1986 Vienna Conference included a renewal of support for Article 53 of the VCLT 1969, through adoption of

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6. For the drafting history of art. 53, see Lauri HANNIKAINEN, *Peremptory Norms (Jus Cogens) in International Law, Historical Development, Criteria, Present Status* (Helsinki: Finnish Lawyers' Publishing Co, 1988) 166–74.
 7. Gennady M. DANILENKO, “International *Jus cogens*: Issues of Law-Making” (1991) *European Journal of International Law* at 53.
 8. See Criddle and Fox-Decent, *supra* note 1 at 338; Dan DUBOIS, “The Authority of Peremptory Norms in International Law: State Consent or Natural Law?” (2009) 78 *Nordic Journal of International Law* 133 at 144; see also Ulf LINDERFALK, “The Creation of *Jus Cogens* – Making Sense of Article 53 of the Vienna Convention” (2011) 71 *ZaöRV* 359–78 (arguing that art. 53 should not be read as addressing the creation of *jus cogens* norms).
 9. When put to the vote at the Vienna Conference in 1969, the provision (then art. 50) was passed 87–8–12, Hannikainen, *supra* note 6 at 166.
 10. *Ibid.*, at 170–1.
 11. *Ibid.*, at 171.
 12. *Second Report on the Law of Treaties* (1963) 2 *International Law Commission Yearbook*, U.N. Doc. A/CN.4/156 at 53.

the same provision in the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organisations.¹³ The existence of *jus cogens* has also been endorsed by certain states in debates surrounding the negotiation of other treaties, such as the Third United Nations Conference on the Law of the Sea.¹⁴ States have also been willing to raise the *jus cogens* status of a norm as a relevant factor in submissions to international courts.¹⁵ However, this does not entail that states have become more forthcoming in the explanation for *jus cogens* norms, or how they are to be identified, than they were in the debates in Vienna leading to the adoption of Article 53.¹⁶

Consider, for example, the Netherlands submission to the ICJ in relation to the recent Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Advisory Opinion (2010). The Netherlands submitted that “the obligation to respect and promote the right to self-determination as well as the obligation to refrain from any forcible action which deprives peoples of this right is an obligation arising under a peremptory norm of general international law”.¹⁷ The explanation as to why the self-determination norm has this status is centred on quotes from the ICJ and reference to a quote from the ILC,¹⁸ none of which provide a clear explanation as to why self-determination should be accepted as a norm of *jus cogens*. It is, though, the reliance on the position of scholars and judges that is most noteworthy for present purposes. The willingness of states to endorse but not to explain the *jus cogens* concept places an onus on the subsidiary sources of international law, scholars, and judges, to help make the concept workable.

II. THE CURRENT POSITION

Since the Vienna Conference of 1969, there has been extensive scholarly debate on the nature of *jus cogens* norms. This debate has focused on three justificatory theories: natural law, public order theory, and customary international law.¹⁹ It is possible to find comments from states participating at Vienna²⁰—as well as in the

13. See Hannikainen, *supra* note 6 at 186–8.

14. See Danilenko, *supra* note 7 at 58.

15. See e.g. from Kosovo Advisory Opinion (No. 141), Jordan, Oral Statement, 9 December 2009 (CR 2009/31) at para. 24; and Albania, Oral Statement, 2 December 2009 (CR 2009/26) at para. 4.

16. See Danilenko, *supra* note 7 at 45; Hannikainen, *supra* note 6 at 169–78.

17. Kosovo Advisory Opinion, Written Statement of the Netherlands, 17 April 2009, 3.2.

18. *Ibid.*

19. For a recent survey of the field, see Karl ZEMANEK, “The Metamorphosis of Jus Cogens: From an Institution of Treaty Law to the Bedrock of the International Legal Order” in Enzo CANNIZZARO, ed., *The Law of Treaties Beyond the Vienna Convention* (Oxford: Oxford University Press, 2011), 381–410; see also Robert KOLB, “The Formal Source of Jus Cogens in Public International Law” (1998) 53 *Zeitschrift für öffentliches Recht* 69–105.

20. For comments at the First Session, United Nations Conference on the Law of Treaties, Official Records, 1969, pointing to natural law, consider, for instance, the statements made by Mexico (294) and Ecuador (320); for comments suggesting a link to the moral beliefs of mankind, consider the statements made by Uruguay (303) and Ivory Coast (320); for comments in support of a customary law basis, consider Greece (295) and Poland (302).

debates at the ILC that preceded the Vienna Conference²¹—that can support each of these explanations. This can help to explain the attraction of these justificatory theories to scholars.²² Another part of the explanation for the interest of scholars is that none of the three main justificatory theories provides a self-evidently coherent account for *jus cogens* status or the process for determining whether or not a norm has the status.

Attempting to harness natural law, a strand of moral philosophy, as a framework for according *jus cogens* status to legal norms comes with a number of difficulties. Not least, a natural law theory would need to be chosen or formulated.²³ And natural law theories are centred on the identification of certain fixed natural law values, including those related to innate human needs, whereas the number and nature of *jus cogens* norms is assumed to develop in accordance with the changing nature of the international community.²⁴ The public order theory proposes that exalted normative status should be derived through reference to the common values of the international community. Its utilization is supported through reference to a practice found in domestic legal orders whereby limits are set to contractual freedom on the basis of societal values.²⁵ Yet domestic legal orders include courts that have been entrusted to identify these values. At the international level there is no court that has clearly been entrusted with this role.²⁶ And uncertainty surrounds how these values should be identified, including how the concept of international community should be defined.²⁷ The customary international law basis might be more appealing to scholars of international law, not least because of its familiarity. Still, it also has difficulties. *Jus cogens* norms are supposed to be binding on all states. Yet customary international law permits persistent objectors to remain unbound.²⁸ And there is also a question about the feasibility of finding state practice to support the claim that a norm has *jus cogens* status on the basis of custom. Most purported *jus cogens* norms are about abstention from a

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21. See *Yearbook of the International Law Commission* (1963) at 63, 66–7; see also Alfred VERDROSS, “Jus Dispositivum and Jus Cogens in International Law” (1966) 60 *American Journal of International Law* 55.
 22. For important contributions that provide new insights by breaking away from the terms of the debate set at Vienna, see e.g. Criddle and Fox-Decent, *supra* note 1 at 347 and 354 (explaining the emergence of the *jus cogens* norm in terms of a fiduciary relationship between a state and its people); Fiona DE LONDRA, “The Religiosity of Jus Cogens: A Moral Argument for Compliance?” in Javaid REHMAN and Susan BREAU, eds., *Religion and Human Rights Law: A Critical Examination of Islamic Law and Practices* (The Hague: Martinus Nijhoff, 2007), 247 (highlighting the case for and consequences that follow from viewing *jus cogens* as a religion).
 23. See Mary Ellen O’CONNELL, “Jus Cogens: International Law’s Higher Ethical Norms” in Donald Earl CHILDRESS, ed., *The Role of Ethics in International Law* (Cambridge: Cambridge University Press, 2012) at 94.
 24. See Michael BYERS, “Conceptualizing the Relationship Between Jus Cogens and Erga Omnes Rules” (1997) 66 *Nordic Journal of International Law* 211 at 224.
 25. Zemanek, *supra* note 19 at 385.
 26. See *ibid.* at 388 (who argues that the closest is the ICJ); see also Christopher A. FORD, “Adjudicating Jus Cogens” (1994–95) 13 *Wisconsin International Law Journal* 145.
 27. See Andreas L. PAULUS, “Jus Cogens in a Time of Hegemony and Fragmentation: An Attempt at a Re-appraisal” (2005) 74 *Nordic Journal of International Law* 297–334; Joseph H.H. WEILER and Andreas L. PAULUS, “The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law” (1997) 8 *European Journal of International Law* 547.
 28. See Dubios, *supra* note 8 at 138; for a possible solution, see Byers, *supra* note 24 at 228.

certain conduct.²⁹ This leads to an absence of clearly meaningful state practice, which can make it difficult to establish that the rule exists at the level of ordinary custom. To find that it also has *jus cogens* status on the basis of custom could be a step too far for the traditional conception of custom, as it requires engagement with another abstention, abstention from creating a treaty to undertake the prohibited act.³⁰

The high level of attention that scholars have given to the *jus cogens* concept since Vienna is a reason to be hopeful that greater clarity on the doctrine of identification—both justification and method—will now have emerged. Such expectation is reinforced by the increased willingness of previously reluctant international courts to identify *jus cogens* norms. However, reference to a passage from the ICJ in the recent *Belgium v. Senegal* case (2012) can help to focus a more accurate picture:

99. In the Court's opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*).

That prohibition is grounded in a widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948; the 1949 Geneva Conventions for the protection of war victims; the International Covenant on Civil and Political Rights of 1966; General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora.”

With this passage, the ICJ is more forthcoming than it has previously been on the source and method for *jus cogens* identification. The Court appears to indicate that the justification for *jus cogens* status is found in customary international law.³¹ However, the Court is not precise on this source point, there is no clear attempt to distinguish the evidence necessary to make the case for the prohibition on torture to be treated as an ordinary norm of customary international law from that which is necessary to make the case for peremptory status. A review of the individual opinions of the judges might be hoped to provide guidance on the *jus cogens* identification process at the ICJ.

The fullest contribution is from Judge Cançado Trindade. Cançado Trindade identifies paragraph 99 as:

one of the most significant passages of the present Judgment. My satisfaction would have been greater if the Court dwelt further upon it, and developed its reasoning on this

29. See Jure VIDMAR, “Rethinking Jus Cogens after Germany v. Italy: Back to Article 53?” (2013) 60 *Netherlands International Law Review* 1 at 17.

30. See American Branch of the International Law Association, Committee on the Formation of Customary International Law, “The Role of State Practice in the Formation of Customary and Jus Cogens Norms of International Law” (19 January 1989) at 20; Bruno SIMMA and Philip ALSTON, “The Sources of Human Rights Law: Custom, Jus Cogens and General Principles” (1992) 17 *Australian Yearbook of International Law* 82 at 103; James GREEN, “Questioning the Peremptory Status of the Prohibition of The Use of Force” (2011) 32 *Michigan Journal of International Law* 215 at 244–52.

31. See also William A. SCHABAS, “Antigone, Jus Cogens and the International Court of Justice” (22 July 2012), online: PhD Studies in Human Rights <<http://humanrightsdoctorate.blogspot.no/2012/07/antigone-jus-cogens-and-international.html>>.

particular issue, as it could and should, thus fostering the progressive development of international law.³²

This underpins why Cançado Trindade expands at length on the importance of the concept and the way in which it has developed, and also includes pronouncements on the legal justification for *jus cogens* norms, such as: “[i]dentified with general principles of law enshrining common and superior values shared by the international community as a whole, *jus cogens* ascribes an ethical content to the new *jus gentium*, the International Law for humankind.”³³ This approach has similarities to one of the explanations that Verdross set out for *jus cogens* norms in an oft-cited paper from 1937.³⁴ Yet, as Cançado Trindade’s position does not find support in the opinions of the other judges (indeed, some judges were not in favour of the inclusion of the reference to *jus cogens*),³⁵ it is difficult to be convinced that this was what the Court meant at paragraph 99.

If the approach of the ICJ in *Belgium v. Senegal* is taken as an indicator of the present condition of international legal doctrine, it is apparent that after over forty years of scholarly and judicial attention, the source and method question for *jus cogens* identification has hardly progressed. This point is undergirded by the contradictions in the recent summaries that scholars have provided as to which school of thought on the nature of *jus cogens* is most dominant in the literature. Criddle and Fox-Decent write in 2009 that “[m]ost contemporary commentators continue to view *jus cogens* through the positivist prism of state consent”.³⁶ Zemanek writes in 2011 that “[t]his public order explanation has attracted the widest following amongst scholars”.³⁷ And O’Connell writes in 2012 that “[t]o explain the existence of the category and how the norms operate, most international lawyers turn to natural law theory”.³⁸

It is possible to foresee a number of factors that have hindered progress in the doctrine on *jus cogens* identification. In particular, there is the complexity of the issues raised and the continued absence of useful guidance from states. It is, though, also reasonable to contemplate that there could be something in the nature of the scholarly debate and/or the judicial approach that means that these efforts have not been as productive as might have been expected. One important consideration in this respect could be interaction. Part III draws attention to the role of interaction between scholars and courts in the development of international law. If scholars and judges are not interacting on the topic of *jus cogens* identification or are not doing so in a productive manner, this could help to explain why greater doctrinal clarity has not yet been realized.

32. *Belgium v. Senegal* case, Separate Opinion of Cançado Trindade, *supra* note 2 at 158.

33. *Ibid.*, at 182.

34. Alfred VON VERDROSS, “Forbidden Treaties in International Law” (1937) 31 *American Journal of International Law* 571 at 577.

35. See the Opinions of Judge Abraham (notes that the comments were *obiter dictum*); Ad hoc Judge Sur (points to the inclusion of *jus cogens* as superfluous).

36. Criddle and Fox-Decent, *supra* note 1 at 339; also Kolb, *supra* note 19 at 72.

37. Zemanek, *supra* note 19 at 383.

38. O’Connell, *supra* note 23 at 78.

III. THE INTERACTION OF SCHOLARS AND JUDGES

Two recent works on the nature of international law have both highlighted the importance of interaction amongst relevant actors for the viability of international law. Brunnée and Toope's "interactional account" has emphasized how the legitimacy of international law, and hence its compliance pull, "is built through broad participation [of social actors] in the construction and maintenance of legal regimes".³⁹ While Johnstone's work on the role of deliberation in international law has highlighted the significance for the creation of and compliance with international law of a series of concentric circles of interpretive communities (linked by a common means of thinking about norms),⁴⁰ which give meaning to norms through arguing about each other's interpretations of the norm in a deliberative process leading to a shared understanding.⁴¹ Both of the noted accounts draw attention to the importance of actors operating in different contexts sharing ideas and insights on disputed topics as a mechanism for reaching new shared understandings. Both accounts also have a role for the work of scholars and judges, but this is as part of a much broader set of actors that interact in a host of diverse, formal, and informal ways.

The particularities of the way in which scholars and international judges communicate in the development of international law are not given much attention in the two noted studies. This is understandable in the light of the reach of these studies beyond matters of legal development, to considerations of law creation and compliance. However, when the interest is specifically in the development of international law, one might contemplate separating scholars and international courts from other relevant actors; such as international civil servants, that are also included in Johnstone's second community circle on the basis of having expertise on international law.⁴² This is not just because scholars and judges are explicitly identified as subsidiary sources in the ICJ statute (to be clear, this does not entail that they make the law, rather "they are documentary 'sources' indicating where the Court can find evidence of the existence of the rules it is bound to apply").⁴³ It is also because scholars and judges tend to offer more detailed and more publicized reasoning, which can facilitate a more substantial, problem-solving orientated discourse.

39. Jutta BRUNNÉE and Stephen J. TOOPE, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010) 53.

40. Ian JOHNSTONE, *The Power of Deliberation: International Law, Politics, and Organizations* (Oxford: Oxford University Press, 2011) 40.

41. *Ibid.*, at 48–50.

42. Johnstone, *ibid.*, at 41–3, depicts three communities, the inner circle of government officials, the broader circle of those with expertise in international law, and the outermost circle of civil society.

43. Alain PELLET, "Article 38" in Andreas ZIMMERMANN *et al.*, eds., *The Statute of the International Court of Justice* (Oxford: Oxford University Press, 2006), 677–792 at 784; on the nature of international courts as a subsidiary source of international law, see Gleider I. HERNÁNDEZ, "International Judicial Law-Making" in Catherine BRÖLMANN and Yannick RADI, eds., *Research Handbook on International Law-Making* (Cheltenham: Edward Elgar, 2014, forthcoming); on scholars, see Jörg KAMMERHOFER, "Law-Making by Scholars" in Brölmann and Radi (2013, forthcoming).

To date, there has been little study of the nature of scholarly and judicial interaction and its influence on international law-making.⁴⁴ There is, though, a growing interest in interaction between international judicial bodies, both as part of a general interest in theories of transjudicial communication,⁴⁵ and in relation to concerns about the fragmentation of international law.⁴⁶

A prominent example of the latter is the recent edited volume by Fauchald and Nollkaemper. This study addressed formal interaction—“communication through citation, discussion, application, or rejection of decisions”⁴⁷—between judicial bodies of both an international and domestic nature on a number of thematic issues. The study provided evidence that interaction occurs (albeit to varying degrees), and that it has helped judges, in some instances, to come to common understandings of the nature and meaning of a legal norm or concept.⁴⁸ Given that part of the concern about fragmentation has been generated through the multiplication of international tribunals, it is understandable that this more practice-orientated strand of work has focused on the interaction between judicial bodies.⁴⁹ However, it is arguable that in many of the areas covered in the Fauchald and Nollkaemper volume, interaction between scholars and judicial bodies has also contributed to the clarification of international law. Support for this position can be found through consideration of how the *jus cogens* status of a norm relates to a claim of state immunity.⁵⁰

When the European Court of Human Rights (ECtHR) in the *Al-Adsani* case addressed *jus cogens* status vis-à-vis state immunity in 2001,⁵¹ there was a fledgling scholarly debate relevant to this issue,⁵² but the Court struggled to come to agreement. A narrow majority decided that immunity should prevail and prevent the

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44. Indeed, Kammerhofer, *supra* note 43, notes that “[a]s far as the present author is aware, there are as yet no studies on the influence that international legal scholarship wields over the making of international law”.
45. See e.g. Erik VOETEN, “Borrowing and Nonborrowing among International Courts” (2010) 39 *Journal of Legal Studies* 547–76.
46. See e.g. James CRAWFORD and Penelope NEVILL, “Relations between International Courts and Tribunals: The ‘Regime Problem’” in Margaret A. YOUNG, ed., *Regime Interaction in International Law Facing Fragmentation* (Cambridge: Cambridge University Press, 2012), 235.
47. Ole Kristian FAUCHALD and André NOLLKAEMPER, “Conclusions” in Ole Kristian FAUCHALD and André NOLLKAEMPER, eds., *The Practice of International and National Courts and the (De-) Fragmentation of International Law* (Oxford: Hart, 2012), 343 at 348.
48. *Ibid.*, at 349 (although the authors note that communication might sometimes be to the disadvantage of the coherence of international law, at 363); and see also Yuval SHANY, “One Law to Rule Them All: Should International Courts Be Viewed as Guardians of Procedural Order and Legal Uniformity?” in Fauchald and Nollkaemper, *supra* note 47, 15 at 34: “in their current configuration most international courts have only a limited appetite for coordination and harmonisation across legal regimes, other—non-judicial—methods for institutional coordination and normative harmonisation ought to be explored.”
49. Although the vast increase in scholarly output relative to earlier times has also informed concerns about fragmentation, Gillian TRIGGS, “The Public International Lawyer and the Practice of International Law” (2005) 24 *Australian Year Book of International Law* 201–18 at 203.
50. For an account that is focused only on judicial interaction, see Philippa WEBBS, “Immunities and Human Rights: Dissecting the Dialogue in National and International Courts” in Fauchald and Nollkaemper, *supra* note 47, 245–65.
51. *Al-Adsani v. The United Kingdom*, 35763/97, European Court of Human Rights, 21 November 2001.
52. See e.g. Andrea BIANCHI, “Immunity Versus Human Rights: The Pinochet Case” (1999) 10 *European Journal of International Law* 237.

case from proceeding (9:8). The reasoning of the Court was criticized, in particular, for its reliance upon a distinction between civil and criminal actions to justify respect for immunity (the claim at stake was a civil one, and the suggestion was that while there might be state practice supporting removal of immunity in criminal cases, this was clearly not the case for civil claims), on the basis that it did not give enough attention to the nature of the *jus cogens* concept which (in the interest of logical clarity) called for a focus on the underlying act rather than the nature of the claim.⁵³ Still, the struggle of a prominent international court to explain its decision in a fully convincing manner provided a basis and a motivation for scholars to consider alternative ways of reading the relationship between state immunity and *jus cogens* status.⁵⁴ The ensuing debate provided a reference point for subsequent judicial decisions at the domestic and international levels, which adopted various explanations.⁵⁵ And these decisions, in turn, informed further scholarly consideration.⁵⁶ By the time the issue of *jus cogens* and state immunity was raised before the ICJ in the recent *Germany v. Italy* case, it was relatively easy to predict the outcome.⁵⁷ The ICJ relied upon a distinction between procedural norms (state immunity) and substantive norms (the *jus cogens* norms)—an approach which has come to be popular with certain scholars and other courts⁵⁸—to explain why there was not a normative conflict that might justify overriding state immunity. Whether or not the *Germany v. Italy* Decision will represent the end of the debate remains to be seen,⁵⁹ but the willingness of judges and scholars to engage with and refine each other's views has clearly had a role in facilitating progress in the debate.

This overview of the development of international law on how the *jus cogens* status of a norm relates to state immunity stands as support for more attention to be given to the nature of the interactive process between scholars and judges as a general

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53. See *Al-Adsani* case, *supra* note 51, Joint Dissenting Opinions, Judges Rozakis, Cafilisch, Wildhaber, Costa, Cabral Barreto, and Vajic, 29–31; Redress (L. McGregor), “Immunity v. Accountability: Considering the Relationship between State Immunity and Accountability for Torture and other Serious International Crimes” (2005) at 38–9, online: <www.redress.org/downloads/publications/Immunity_v_Accountability.pdf>.
54. See e.g. Lee M. CAPLAN, “State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory” (2003) 97 *American Journal of International Law* 741; A. ORAKHELASHVILI, “State Immunity and International Public Order” (2002) 45 *German Yearbook of International Law* 227.
55. See e.g. *Jones v. Saudi Arabia* (2006) UKHL at para. 22; *Ferrini v. Federal Republic of Germany*, Italian Court of Cassation (2004).
56. See e.g. Dapo AKANDE and Sangeeta SHAH, “Immunities of State Officials, International Crimes, and Foreign Domestic Courts” (2011) 21 *European Journal of International Law* 815 at 828.
57. See also Andrea BIANCHI, “On Certainty” *Blog of the European Journal of International Law* (16 February 2012), online: EJIL Talk <<http://www.ejiltalk.org/on-certainty/#more-4504>> (suggesting other factors that might help to explain why the approach of the ICJ in this case was predictable, such as the concern the ICJ has traditionally shown for the systemic effects of its rulings, and a concern not to offend its broader audience of states).
58. See Stefan A.G. TALMON, “Jus Cogens after *Germany v. Italy*: Substantive and Procedural Rules Distinguished” (2012) 25 *Leiden Journal of International Law* 979–1002.
59. See Riccardo PAVONI, “An American Anomaly? On the ICJ’s Selective Reading of United States Practice in Jurisdictional Immunities of the State” (2011) 21 *Italian Yearbook of International Law* 143–59; Markus KRAJEWSKI and Christopher SINGER, “Should Judges be Front-Runners? The ICJ, State Immunity and the Protection of Fundamental Human Rights” (2012) 16 *Max Planck Yearbook of United Nations Law* 1–34.

matter, as a means of gaining insights on how its productive potential might be most usefully harnessed. But it also draws attention to the scope for a similar process to be occurring, or to have the potential to occur, in relation to the doctrine on *jus cogens* identification. In this respect, it should be noted that a comprehensive understanding of the way in which scholars and judges interact on *jus cogens* identification will not be achieved through simply focusing on citation patterns. In particular, this is because of the approach international judicial bodies take to the explanation of international law. The dominant evidence for contemporary international tribunals consists of “treaties, the practice of states and of international organisations, and judicial precedents”.⁶⁰ International judicial bodies do on occasion cite scholarly work directly (albeit to varying degrees, and more freely in separate opinions than in main judgments), but they are unlikely to ever do so in a manner that reflects the full extent to which scholarly work has informed the thinking of the court.⁶¹ This means that a complete idea of the level and nature of interaction on *jus cogens* identification will need to move beyond instances where scholars have been directly cited, to employ other research strategies, such as tracing connections between changes in reasoning and/or interviewing judges. Still, for present purposes, a useful indication of the extent and nature of interaction can be gained from identifying and examining those instances where there has been direct citation of judicial outputs in scholarly work and scholarly work in judicial outputs.⁶² It is to this issue that attention is now turned.

IV. INTERACTION ON *JUS COGENS* IDENTIFICATION

Given that the cases noted above in relation to the effects of *jus cogens* status on immunity have involved identification of *jus cogens* norms, one might expect to see a similar interactive process unfolding on the doctrine on *jus cogens* identification (both justificatory theory and method). This view is supported by the recent general upturn in the willingness of international courts to identify *jus cogens* norms.

Although scholars have been frequent identifiers of *jus cogens* norms ever since, but also in some instances before, the Vienna Conference of 1969,⁶³ international courts have been slower to demonstrate a willingness to afford a norm *jus cogens* status. One reason for this must be the narrow way in which the VCLT identified a role for peremptory norms in international law. By identifying only that “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”, the VCLT limits the situations in which there will be a clear onus on a court to pass comment on whether or not a norm has *jus cogens* status. That there has been an absence of such

60. Triggs, *supra* note 49 at 205; see also Alan E. BOYLE and Christine M. CHINKIN, *The Making of International Law* (Oxford: Oxford University Press, 2007) 297; Voeten, *supra* note 45 at 572–3.

61. Kammerhofer, *supra* note 43.

62. The main interest is in the plenary judgment of a court, as this is most likely to attract the attention of scholars. However, reference is also made to separate opinions of judges, as these are often more open on sources consulted and thereby offer a useful means of gaining insight into the thinking and resources that have underpinned the main judgment.

63. See e.g. Verdross, *supra* note 34.

instances is understandable from the fact that it is a struggle to find examples of treaties that might be seen as in conflict with a potential *jus cogens* norm,⁶⁴ as states do not tend to make such treaties.⁶⁵ Consequently, when submissions that a norm has *jus cogens* status have been made to a court, it has been possible for this point to be overlooked.⁶⁶ Still, it is noticeable that international courts are, to varying degrees, increasingly willing to seize opportunities to make reference to the *jus cogens* status of a norm.

In the recent case-law of the Inter-American Court for Human Rights (IACtHR), for instance, *jus cogens* status has been accorded to the prohibition of torture; the prohibition of cruel, inhuman, or degrading treatment; the principle of equality before the law, equal protection before the law, and non-discrimination; the prohibition of a pattern of extra-legal executions fostered or tolerated by the state; the prohibition to commit crimes against humanity; access to justice; the prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible.⁶⁷ The IACtHR is the most striking example of this trend for *jus cogens* identification, but it is also important to draw attention to the apparent change in attitude at the ICJ.

The ICJ has traditionally been thought of as deliberately avoiding any engagement with the *jus cogens* concept.⁶⁸ This perception is supported by the Court's refusal to mention *jus cogens* even in cases where it could be seen as particularly pertinent, such as the *Arrest Warrant* case, which concerned issues of immunity and international crimes. Yet more recently the ICJ has become more willing to identify *jus cogens*, a point exemplified by the willingness of the Court to clarify, retroactively, that the rules at stake in the *Arrest Warrant* case "undoubtedly possess the character of *jus cogens*".⁶⁹ Has the increased willingness of international courts to identify *jus cogens*

64. See, though, Annalisa CIAMPI, "Invalidity and Termination of Treaties and Rules of Procedure" in Enzo CANNIZZARO, ed., *The Law of Treaties Beyond the Vienna Convention* (Oxford: Oxford University Press, 2011), 360 at 374–6; Sandesh SIVAKUMARAN, "Impact on the Structure of International Obligations" in Menno T. KAMMINGA and Martin SCHEININ, eds., *The Impact of Human Rights Law on General International Law* (Oxford: Oxford University Press, 2009), 133 at 147.

65. See also Hannikainen, *supra* note 6 at 176.

66. See e.g. *Boumediene and Others v. Bosnia and Herzegovina* (2008), ECtHR, para. 60; *Judgment on Preliminary Objections (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 24 May 2007, [2007] I.C.J. Rep at 28, in Ahmadou Sadio Diallo.

67. Frédéric VANNESTE, *General International Law Before Human Rights Courts: Assessing the Specialty Claims of Human Rights Law* (Cambridge: Intersentia, 2010) at 431–2; see also Gerald L. NEUMAN, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights" (2008) 19 *European Journal of International Law* 101 at 118 (and at 117 identifying the role of *jus cogens* identification in relevant cases); Antonio Augusto CANÇADO TRINDADE, "Jus Cogens: The Determination and the Gradual Expansion of its Material Content in Contemporary International Case-Law", XXXV *Course of International Law*, organized by the OAS Inter-American Juridical Committee, Rio de Janeiro, Brazil, August 2008, 3–29, online: <http://www.oas.org/publications_digital_catalogue_course2008.htm>; Dinah SHELTON, "International Law and Relative Normativity" in Malcolm D. EVANS, ed., *International Law* (Oxford: Oxford University Press, 2010), 141 at 149–54.

68. See Shelton, *supra* note 67 at 150.

69. *Case Concerning Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment of 3 February 2012, [2012] I.C.J. Rep. at para. 95 (although, in *Germany v. Italy*, the ICJ assumed only for the purposes of analysis of the relationship between *jus cogens* norms and state immunity "that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*", para. 93, it did dismiss the scope for "a rule requiring the payment of full compensation

norms been accompanied by an interactive discourse with scholars that also identify *jus cogens* norms?

In this respect, it should be stressed that it is possible to find evidence of interaction. In particular, scholars cite judicial decisions in which a norm has been afforded *jus cogens* status to support a claim that a norm has *jus cogens* status.⁷⁰ Courts appear more reticent to rely directly on a scholar in support of a position on the status of a norm. Instead, they prefer, where a citation in support of a norm's *jus cogens* status is proffered,⁷¹ to refer to another judicial decision.⁷² Still, it is noticeable that the norms that have been identified by the widest range of international courts as *jus cogens*—the prohibitions on genocide, torture, and crimes against humanity—are also amongst those most commonly identified by scholars. Moreover, separate opinions of judges who sit on courts that have identified *jus cogens* norms do, on occasion, include direct reference to a scholar in support of a claim that a norm has *jus cogens* status.⁷³ As such, there is a basis upon which to claim that scholars and international judges interact in the process of *jus cogens* identification.

However, it is difficult to find evidence in published materials that there is generally anything more than low-level interaction. That is, it is difficult to find evidence that either side is moving beyond simple repetition of the claim that a norm has *jus cogens* status to scrutinize the reasoning that underpins the claim.⁷⁴ This has implications for the persuasiveness of the claim being made, as one is left wondering about how carefully the original claim has been considered before being accepted as authoritative. But the apparent lack of deeper interaction also has implications for the development of doctrine. In particular, it means that the challenging questions that persist about justificatory theory and the method for identifying *jus cogens* norms have not benefited from the cross-context sharing of ideas and insights,

to each and every individual victim” to be seen as *jus cogens* on the basis of extensive contrary practice, para. 94); see also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment of 3 February 2006, [2006] I.C.J. Rep at para. 64; *Prohibition on Torture (Belgium v. Senegal)*, Judgment of 20 July 2012, [2012] I.C.J. Rep, at para. 99; also note A. PELLET, “Comments in Response to Christine Chinkin and in Defense of Jus Cogens as the Best Bastion against the Excesses of Fragmentation” (2006) XVII Finnish Yearbook of International Law 83 at 88.

70. E.g. Alexander ORAKHELASHVILI, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006) at 54; Sivakumaran, *supra* note 64 at 145.
71. Often no reference to another judicial body is provided; see e.g. *Maritza Urrutia* case, Inter-American Court of Human Rights, Series C, No. 103 (2003), at para. 92; *Congo v. Rwanda*, Judgment of 3 February 2006, para. 64.
72. See e.g. *Al-Adsani* case (citing International Criminal Tribunal for the former Yugoslavia (ICTY) and UK House of Lords); the *ICTY Furundžija* case (10 December 1998) para. 153 note 170 (citing the UN Human Rights Committee and United States Court of Appeals for the Ninth Circuit).
73. E.g. *Case Of Hirsi Jamaa And Others v. Italy* (Application no. 27765/09), February 2012, ECtHR, Concurring Opinion of Judge Pinto De Albuquerque, at 65; *Case of the Pueblo Bello Massacre v. Colombia*, Judgment of 31 January 2006, IACtHR, Separate Opinion of Judge Cançado Trindade, at para. 64.
74. Although the approach set out by the IACtHR in *Juridical Condition and Rights of the Undocumented Migrant Workers*, Advisory Opinion OC-18/30, 17 September 2003, at paras. 97–101, has been the subject of a number of critiques, this has not generally been in the context of scholars working on the method for *jus cogens* identification; see e.g. Neuman, *supra* note 67 at 118–22 (in the context of an assessment of the Court's general working practices); Andrea BIANCHI, “Human Rights and the Magic of Jus Cogens” (2008) 19 *European Journal of International Law* 491–508 at 506 (in the context of a general assessment of the role and condition of the *jus cogens* concept in international law).

which has been identified in Part III as an important part of the process for the clarification and development of international law. This raises the question of why there has not been deeper interaction. This is the focus of Part V.

V. EXPLAINING THE PRACTICE OF INTERACTION

In thinking about why there has not been deeper interaction, it is important to note the main finding of Petersen's study on why certain decisions of the ICJ come to have greater influence in the scholarly discourse than others. Petersen has argued that it is the substantive outcome that matters—the endorsement of an ethically appealing concept, for instance—rather than the depth and quality of the underlying legal reasoning.⁷⁵ This argument can help to explain why a scholar might be willing to cite a judicial identification of *jus cogens* status even if it has not been reasoned, as a basis for furthering an argument that is ethically appealing. But it should not be read as suggesting that scholars will necessarily overlook judicial reasoning in a situation where it has been provided. In terms of the motivation of both scholars and judges to engage with each other's reasoning, important insights can be gained from the general literature on norm development.

In particular, it has been contended that disputes are a key prompt for the argumentative discourse that can lead to normative change.⁷⁶ Interested actors take sides and attempt to persuade others that their interpretation of the relevant aspect of the normative framework is the most persuasive. Accordingly, it is significant that there has been a general absence of disputes before international judicial bodies that have centred on the question of whether or not a norm has *jus cogens* status. This means that there has not been a clear focal point that could provide an impetus for deeper interaction on issues of *jus cogens* identification. This might account for a difference in the intensity of the debate in comparison to that on immunity and *jus cogens* noted above, which was central to a number of international judicial disputes. However, scholars and judges have hardly been waiting for a dispute of the type envisaged in Article 66 VCLT to emerge as a cue to start identifying *jus cogens* norms. Both groups have been engaged in identifying and thereby thinking about the nature of *jus cogens* identification, sometimes with considerable implications for a dispute (think of *Al-Adsani*). As such, it is difficult to see the lack of a dispute squarely centred on the identification of a *jus cogens* norms as a decisive factor in why there has not been deeper interaction.

These considerations point towards the possibility that it is the nature of the information that is provided by both scholars and judges when identifying *jus cogens* norms that is holding back a potentially more productive discourse. The rest of this section addresses the nature of the information that is provided.

75. Niels PETERSEN, "Lawmaking by the International Court of Justice—Factors of Success" (2011) 12 German Law Journal 1295–316 at 1316; see also Christian J. TAMS and Antonios TZANAKOPOULOS, "Barcelona Traction at 40: The ICJ as an Agent of Legal Development" (2010) 23 Leiden Journal of International Law 781 at 796.

76. Wayne SANDHOLTZ, "Dynamics of International Norm Change: Rules against Wartime Plunder" (2008) 14 European Journal of International Relations 101.

A. Scholarly Output

It is important to note that international legal scholars do not always explain why they take the view that a particular norm has *jus cogens* status. As Conklin has noted, “[m]ore often than not, jurists are satisfied with a list of norms which are continually repeated as peremptory in international law rhetoric: the right to state self-determination and the prohibitions against the use of force, torture, enslavement, mass internal displacement, and mass disappearances.”⁷⁷ This trend for the positing of *jus cogens* status is understandable, not least because it is often a point made in passing, without an intention to educate on the source of peremptory norms or the method for identification. Indeed, it potentially has some merit, as a comparison of the different norms that have been posited as having *jus cogens* status can help to develop an idea of the strength of a claim that a particular norm has this status.⁷⁸ Still, the absence of reasoning means that this sort of scholarly approach offers little assistance to judges who are interested in explaining the process of *jus cogens* identification.⁷⁹

In contrast, one might expect the main debate on the nature of *jus cogens* norms, given the extent of this literature, to include guidance that could be useful for judges interested in reasoning *jus cogens* identification. A review of this literature reveals a strong focus on the exploration of the legal consequences of *jus cogens* status.⁸⁰ In terms of the doctrine on identification, there are few different types of work. There are studies with a strong emphasis on charting the favoured position of particular scholars and states on justificatory theory.⁸¹ There is also work that has sought to substantiate and promote one of the three main justificatory theories.⁸² Further, there is a small category of scholars who have put forward new ways of thinking about *jus cogens* norms.⁸³ What is striking in relation to the body of literature as a whole is the general absence of detailed exploration of the methodological process that should be undertaken to determine whether or not a norm has *jus cogens* status.⁸⁴

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77. William E. CONKLIN, “The Peremptory Norms of the International Community” (2012) 23 *European Journal of International Law* 837–61 at 840.
78. See, for instance, Sivakumaran, *supra* note 64 at 143; there are also potentially more problematic consequences, see Bianchi, *supra* note 74 at 507 (noting that positing encourages the perception that *jus cogens* status is simply a rhetorical label, employed purely on the basis of opinion to emphasize the importance of a particular norm).
79. Indeed, it arguably encourages judicial bodies to adopt a similar approach to *jus cogens* identification; see Conklin, *supra* note 77 at 843.
80. See e.g. Orakhelashvili, *supra* note 70; Erika DE WET, “The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law” (2004) 15 *European Journal of International Law* 97; Vidmar, *supra* note 29; Ulf LINDERFALK, “Normative Conflict and the Fuzziness of the International Jus Cogens Regime” (2009) 69 *ZaöRV* 961.
81. E.g. Zemanek, *supra* note 19; Kolb, *supra* note 19; Stefan KADELBACJ, “Jus Cogens, Obligations Erga Omnes and Other Rules: The Identification of Fundamental Norms” in C. TOMUSCHAT and J.-M. THOUVENIN, eds., *The Fundamental Rules of International Legal Order* (Leiden: Martinus Nijhoff, 2006), 21.
82. E.g. Byers, *supra* note 24; Dubois, *supra* note 8; Karl ZEMANEK, “How to Identify Peremptory Norms of International Law” in Pierre M. DUPUY *et al.*, eds., *Völkerrecht als Wertordnung/Common Values in International Law: Essays in Honour of Ch. Tomuschat* (Kehl: Engel, 2006), 1103.
83. E.g. Criddle and Fox-Decent, *supra* note 1; de Londras, *supra* note 22.
84. In this respect, it should be noted that work that includes a specific focus on the method for identification often goes little beyond a collection of broad directives, for instance, Levan ALEXIDZE, “The Nature of Jus Cogens” 172 *Recueil des Cours* (1981-III) 227–70 at 261; but it should also be

Consider, for instance, some recent work on the nature of the international community that the VCLT implicates in the generation of *jus cogens* status. Drawing on the work of MacIntyre, Retter has argued that community should be understood as a co-operative practice that generates common goods that provide the basis for peremptory norms.⁸⁵ Drawing on the work of Hegel, Conklin has argued that “the international community is nested in the social-cultural assumptions of an ethos. Such an ethos is analytically and experientially prior to a state’s consent or a rational justification to approaches to a community. Peremptory norms are situated in just such an ethos.”⁸⁶ Both arguments have important implications for how *jus cogens* identification should be approached. For Retter, the focus should be on determining the common good,⁸⁷ for Conklin the issue would seem to be about delimiting the social ethos. Yet neither scholar gives particular attention to what their favoured rendering of community would actually entail for an actor who seeks to determine whether or not a norm has *jus cogens* status. This could reflect a perception that resolution of the debate about the meaning of community is necessarily prior to a consideration of method. Still, there is no fundamental reason why methodological aspects should not be added to inchoate justificatory theory.⁸⁸ Indeed, it could be advantageous for the development of justificatory theory.

Support for this view is found through reference to some examples where scholars pursuing traditional lines of enquiry have linked consideration of justificatory theory with implementation. In contemplating how a natural law theory for *jus cogens* identification would translate to a judicial context, O’Connell has found support for the view that extant natural law theories based on the innate nature of humankind are at risk of being deployed in an overly subjective manner in the judicial context.⁸⁹ This underpins why O’Connell has started to craft a new, community-based natural law theory, linked to a survey of state values to determine the key values of international community.⁹⁰ Similarly, in considering public order theory, Tomuschat endorses a deductive approach, but suggests that to avoid the risk of *jus cogens* status being imposed against the will of the international community, it should not be seen as totally based on deduction; there should be an evidentiary role for the regular customary law criteria.⁹¹ Moreover, in contemplating how a customary law theory would work in practice, Simma and Alston

noted that certain specific issues related to method have been explored in depth, for example Linderfalk’s study on the potential for difficulty to arise in the specification of the content of the target norm: Ulf LINDERFALK, “The Effect of Jus Cogens Norms: Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences?” (2007) 18 *European Journal of International Law* 853.

85. Mark RETTER, “Jus Cogens: Towards an International Common Good” (2011) 2 *Transnational Legal Theory* 537–71, 564; (drawing on Alasdair MACINTYRE, *After Virtue* (Notre Dame, IN: University of Notre Dame Press, 2007) 187–225).
86. Conklin, *supra* note 77 at 860 (drawing on Hegel’s theory of international law—see William E. CONKLIN, *Hegel’s Laws: The Legitimacy of a Modern Legal Order* (Palo Alto, CA: Stanford University Press, 2008) at 270–298).
87. Retter, *supra* note 85, at 569–70.
88. See e.g. Criddle and Fox-Decent, *supra* note 1 at 367.
89. O’Connell, *supra* note 23 at 94.
90. *Ibid.*, at 95; for an alternative natural law based approach, see Dubois, *supra* note 8 at 166.
91. Christian TOMUSCHAT, “Obligations Arising for States Without or Against Their Will” (1993-IV) 241 *Recueil des Cours* 209 at 307.

come to favour a general principles theory, where the evidentiary demands would be of a different nature, centred on identification of the views of states, and potentially more susceptible to implementation.⁹² These three examples stand as support for more attention being given to method, as a means of gaining new insights and making progress in the explanation for *jus cogens* norms.

Still, the three noted examples do not provide a detailed account of the method to be undertaken for determining whether a norm has *jus cogens* status. Simma and Alston, for instance, highlight resolutions from the UN General Assembly as a potentially useful resource that could be utilized in the search for evidence of a belief on behalf of states that a norm has *jus cogens* status.⁹³ This is a useful idea, not least because the General Assembly is a forum in which all states are represented, and issues that touch upon mooted *jus cogens* norms are often debated. Yet without further elaboration it is susceptible to the challenge, raised by Gaja, that simple statements of a state should not be treated as sufficient to provide a basis for *jus cogens* status because it is not certain that in a concrete situation the state would act the same way.⁹⁴ If a court were to adopt a statement-based method as it stands, it would be required to address questions such as: What sort of terminology would support a view in favour of *jus cogens* status? What significance should be placed in the voting record on a resolution? What weight should be given to comments made in the preceding debate? What significance should be given to comments made by states in other venues? How significant is the time period over which a particular position is maintained?

In sum, a judicial body that turns to the literature for ideas in the process of *jus cogens* identification is essentially offered three options. One is to publicize only the outcome of the identification process, the ‘just posit’ approach. Another is to concentrate on an exposition of the favoured justificatory theory for the *jus cogens* status rather than the explanation for why a particular norm has the status. A third option is to adopt a justificatory theory and read the absence of attention to method in the scholarly literature as a prompt for a judicial body to work out the methodological details. It is to how international judicial bodies approach the issue and the information that they are providing in turn for scholars that attention is now turned.

B. Judicial Outputs

The most prominent approach to the identification of *jus cogens* norms that is found in judicial practice is to accord a norm the status without further explanation; to just posit that a norm has *jus cogens* status. One of the most high-profile examples is found in the decision of the then European Court of First Instance (CFI) in the *Kadi* case, in which the CFI found it had the authority to review the legality of the freezing of assets of individuals pursuant to the UN terrorist sanction regime only in respect

92. Simma and Alston, *supra* note 30 at 107.

93. *Ibid.*, at 102; see also Ronald St. John MACDONALD, “Fundamental Norms in Contemporary International Law” (1987) 25 Canadian Yearbook of International Law 115 at 130–1.

94. Giorgio GAJA, “Jus Cogens Beyond the Vienna Convention” (1981-III) 172 *Recueil des Cours* 279 at 287.

of *jus cogens* norms. In this case, the CFI posited that denial of aspects of the right to property (specifically, arbitrary deprivation of the right) and the right of access to a court would be contrary to *jus cogens* norms (although neither was infringed in this case),⁹⁵ but provided little indication as to the basis upon which this status had been identified.⁹⁶

It is possible to find examples of judicial bodies moving beyond the just posit approach to highlight aspects of justificatory theory. For instance, the IACtHR has explained “that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws”.⁹⁷ And the Inter-American Commission has explained, after identifying the right to life as a *jus cogens* norm, that “[t]hese [*jus cogens* norms] are the rules that have been accepted, either explicitly in a treaty or tacitly by custom, as necessary to protect the public interest of the society of nations or to maintain levels of public morality recognized by them”.⁹⁸ These comments give some indication of the way in which the judges were thinking about the source of *jus cogens*. Yet the lack of precision and detail means that they can be read in different ways.⁹⁹ For instance, one might read the quote from the Inter-American Commission as an endorsement for a public order theory of *jus cogens* identification,¹⁰⁰ but the mention of treaty and custom might also be read to suggest that in fact it is these sources that underpin the view of the Commission.¹⁰¹

Ultimately, it is difficult to escape the view that international judicial bodies are not approaching the identification of *jus cogens* norms in a manner that helps to shed light on the nature of the process.¹⁰² Keeping the reasoning as to the legal justification and method largely hidden from view entails that it is difficult to tell the manner and

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95. Examples of just posit from other international judicial bodies that have identified *jus cogens* include: the ICTY, *Delalić et al. case* ((I.T-96-21) (November 1998), para. 454; the ICJ in the *Congo v. Rwanda* case (although see Separate Opinion of Judge Ad Hoc Dugard, para. 10); the ECtHR in *Case of Jorgic v. Germany*, (Application no. 74613/01), Judgment, 12 July 2007, para 68; Human Rights Committee, General Comment 24 (U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), at para. 10; Committee Against Torture, General Comment 2, CAT/C/GC/2 24 January 2008, at para. 1; *Maritza Urrutia case*, Inter-American Court of Human Rights, Series C, No. 103 (2003), at para. 92.
96. Case T-315/01 *Yassin Abdullah Kadi v. Council of the European Union & Commission of the European Communities*, Judgment of 21 September 2005, [2005] ECR II-3649; see also Erika DE WET, “Jus Cogens and Obligations Erga Omnes” in Dinah SHELTON, *Oxford Handbook on Human Rights* (Oxford: Oxford University Press, 2014) 541 at 547 (categorizing it as a natural law approach).
97. IACtHR, *Juridical Condition and Rights of the Undocumented Migrant Workers*, *supra* note 704 at para. 101 (see also paras. 97–101); see also the Separate Opinion appended by the Court’s President, Judge A.A. Cançado Trindade, esp. at para. 87.
98. *Tugboat case*, *supra* note 5 at para. 79.
99. See also Bianchi, *supra* note 74 at 506, describing the IACtHR’s approach as based on the “somewhat axiomatic reasoning of the Court, linked with fairly vague notions of natural law”.
100. See e.g. Orakhelashvili, *supra* note 70 at 48.
101. The Commission has been more specific that it favours a customary law approach in other cases, see *Domingues*, *infra* note 129, and *Roach and Pinkerton*, *infra* note 130.
102. See also Manuel VENTURA and Dapo AKANDE, “Mothers of Srebrenica: The Obligation to Prevent Genocide and Jus Cogens—Implications for Humanitarian Intervention” *Blog of the European Journal of International Law* (6 September 2013), online: European Journal of International Law Talk <<http://www.ejiltalk.org/ignoring-the-elephant-in-the-room-in-mothers-of-srebrenica-is-the-obligation-to-prevent-genocide-jus-cogens/>>.

extent to which courts have engaged with scholarly debate. It also means that there is little basis for scholars to engage with and to build on the work of judges. But it is not the case that scholars are providing a host of relevant ideas that are simply being overlooked by judges. As scholars who address *jus cogens* identification are mostly concerned with justificatory theory, their work can be of little assistance to judges interested in guidance on the steps to be taken to make a case that a norm has *jus cogens* status. If a more interactive discourse is to emerge, one that has the potential to give rise to new ideas and insights that could lead to developments in doctrine, both sets of actors will need to be more forthcoming with their reasoning on *jus cogens* identification. To develop a clearer idea of the prospects of a move to fuller reasoning on *jus cogens* identification from international judges, Part VI turns attention to how the *jus cogens* identification relates to the judicial context.

VI. THE JUDICIAL CONTEXT: A PROBLEM OF LEGITIMACY?

International courts have different subject areas, jurisdictions, powers, and workloads, which subject them to differing forms and intensities of sociopolitical pressures. Such variations help to explain why it is important to be cautious with generalizations about the operation of international courts as law-makers (in the sense of helping the law to develop through reasoned interpretations).¹⁰³ Even courts with similar subject areas and infrastructure can vary in terms of how progressive they are prepared to be in terms of positions taken, and how much reasoning they are prepared to provide to support the position.¹⁰⁴ This can help to explain the extent to which different international courts have employed different approaches in relation to the level of engagement with the *jus cogens* concept as a general matter. However, given the range of international courts that have been involved in *jus cogens* identification, one might still have expected there to have been greater variation in the approaches taken to the reasoning of *jus cogens* identification than has in fact been the case. The trend for a lack of reasoning across a range of international courts and types of case supports the idea that there could be a deeper factor of general relevance that influences the approach taken to *jus cogens* identification.

In this respect, one might contemplate whether international courts have come to share a view raised by Koskenniemi in a review of Meron's book *Human Rights and Humanitarian Norms as Customary Law*.¹⁰⁵ This is the idea that certain unwritten norms are of such importance that they should be accepted as legal on the basis of

103. See Karen J. ALTER and Laurence R. HELFER, "Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice" (2010) 64 *International Organisation* 563–92; for other significant variations that can affect how a court approaches its work, see Fauchald and Nollkaemper, *supra* note 47 at 348.

104. Alter and Helfer, *supra* note 103; see also the concern expressed by certain judges in the *Al-Adsani* case that it was not the role of the ECtHR to be a leader in the progressive development of the law, *Al-Adsani* case, Concurring Opinion of Judge Pellonpää, Joined by Judge Sir Nicolas Bratza.

105. Martti KOSKENNIEMI, "The Pull of the Mainstream" (1990) 88 *Michigan Law Review* 1946 (at 1948, Koskenniemi paraphrases Meron as seeking to "utilize irreproachable legal methods" to enhance 'the credibility of the norms' for which he argues (at 81, 246)"; T. MERON, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989).

intuition, rather than only after satisfying a rigorous scientific method. A key reason why Koskenniemi identifies value in this idea is that however a method for determining unwritten international law is formulated, it will risk excluding certain vital norms on the basis that they do not in a sense fit the mould of the specified method.¹⁰⁶ However, the prospects of intuition being explicitly adopted by an international court as a basis for according ordinary customary status on a norm are seen by Koskenniemi to be slim. This is because the conception of reason and justice that would guide the intuition “seem to be historically and contextually conditioned, so that imposing them on a nonconsenting state seems both political and unjustifiable as such”.¹⁰⁷ This point is even more compelling with regard to *jus cogens* norms, given the legal effects that can attach to the status. Yet, if international courts have not come to the view that intuition is sufficient to ground the *jus cogens* status of a norm, why have they not made more effort to distinguish their approach in practice?

The rest of this section addresses the idea that a concern for legitimacy might actually (in contradiction to what the noted comments of Koskenniemi might lead one to expect) be a significant part of the explanation for why international courts have not been more forthcoming on the explanation for affording a norm *jus cogens* status. The section concludes with consideration of the implications of this legitimacy perspective for the scholarly debate surrounding the nature of *jus cogens* norms.

A. *Jus Cogens Identification and the Legitimacy of International Courts*

As the workload of international courts and their impact on the discretion of states has increased, the legitimacy of international courts is increasingly being questioned.¹⁰⁸ One strand of critique is normative, in the sense that it asks: What gives an institution its authority? Another strand is social in its orientation, it asks: Why does the audience think that the institution has authority? There is scope for there to be overlap between the two strands, but what will be deemed to legitimize an institution from a social perspective will depend on the nature of the actors targeted and the context within which they operate.¹⁰⁹ In terms of understanding the scope for legitimacy to impact on *jus cogens* identification, it is the perceived legitimacy of the judges and hence a sociological understanding that is most significant.¹¹⁰

Attempts to investigate the legitimacy of international courts from a social perspective remain limited.¹¹¹ Still, drawing on this fledgling body of work, and work focused on national courts, it is reasonable to assume that international judges are

106. *Ibid.*, at 1952–3.

107. *Ibid.*, at 1948.

108. See Andreas FØLLESDAL, “The Legitimacy Deficits of the Human Rights Judiciary: Elements and Implications of a Normative Theory” (2013) 14 *Theoretical Inquiries in Law* 339–60.

109. Daniel BODANSKY, “The Concept of Legitimacy in International Law” in Rüdiger WOLFRUM and Volker RÖBEN, eds., *Legitimacy in International Law* (New York: Springer, 2008), 309 at 314.

110. On the legitimacy of the *jus cogens* concept, see Robert P. BARNIDGE Jnr, “Questioning the Legitimacy of ‘Jus Cogens’ in the Global Legal Order” (2008) 38 *Israel Yearbook on Human Rights* 199–225.

111. See, though, Basak ÇALI *et al.*, “The Legitimacy of the European Court of Human Rights: The View from the Ground” *The Project Report* (2011), online: <<http://ecthrproject.files.wordpress.com/2011/04/ecthrlegitimacyreport.pdf>>.

affected by a concern for the legitimacy of the court.¹¹² It is also possible to identify factors that are likely to influence the way that legitimacy will be perceived by one of the important audiences for an international court, the constituting states that help to sustain it through the provision of resources and utilization. These include considerations related to the source of the authority of international courts, the procedures that are followed, and outcomes that are produced.¹¹³

Source legitimacy is about the explanation for the authority for the court.¹¹⁴ Although it is increasingly queried,¹¹⁵ the main explanation for the authority of an international court remains the consent of the states that have created it. On this basis, an international court will be more likely to be seen as legitimate if it operates within the terms of the mandate it has been given. Provided that an international court is mandated to apply international law, highlighting the consent of states as a basis for the legitimacy of the court does not preclude *jus cogens* identification. However, the importance of remaining within the mandate given by states could lead a court to be cautious with regard to how it approaches *jus cogens* identification. Although states are generally agreed on the existence of *jus cogens* norms, they are not agreed on the justification for the status, or which norms have the status. As such, in identifying that a norm has *jus cogens* status, a court is at risk of overstepping its mandate to impose a theory of *jus cogens* on the states. It is also at risk of overstepping its mandate to impose on states an elevated normative status for a norm, with consequent implications for the treaty-making freedom of the states in question. Similar concerns might be raised in relation to the identification of unwritten international law in general.¹¹⁶ Still, the effects that attach to *jus cogens* status (such as that states are not able to contract out of adherence to *jus cogens* in their relations, whereas it is possible for a standard customary norm) mean that the allocation of *jus cogens* status can result in a more rigid curtailment of the discretion of states. This, in turn, can mean that *jus cogens* identification is more likely to gain the attention of the broader audience of states whose perception of legitimacy matters for the court.

Procedural legitimacy is about how the work of the court is undertaken. It is often measured in terms of fairness vis-à-vis how the court deals with the parties before it.¹¹⁷ To the extent that a court is perceived to unduly favour one of the parties,

112. See Çali *et al.*, *supra* note 111 at 32–4; Sandholtz, *supra* note 76 at 106; Shai DOTHAN, “How International Courts Enhance Their Legitimacy” (2013) 14 *Theoretical Inquiries in Law* 455–78 at 477; Alec STONE-SWEET, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000) at 50.

113. See R. WOLFRUM, “Legitimacy in International Law from a Legal Perspective: Some Introductory Considerations” in Wolfrum and Röben, *supra* note 109 at 6–7.

114. *Ibid.*, at 6

115. See Armin VON BOGANDY and Ingo VENZKE, “In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification” (2012) 23 *European Journal of International Law* 7 at 8; Geir ULFSTEIN and Helen KELLER, “Introduction” in Helen KELLER and Geir ULFSTEIN, eds., *UN Human Rights Treaty Bodies. Law and Legitimacy* (Cambridge: Cambridge University Press, 2012), at 7.

116. See Jean D’ASPREMONT, *Formalism and the Sources of International Law* (Oxford: Oxford University Press, 2011) at 170; Koskenniemi, *supra* note 105 at 1947.

117. Wolfrum, *supra* note 113 at 6.

through allowing it special privileges in relation to the provision of expert evidence, for instance, its legitimacy is likely to reduce.¹¹⁸ The simple fact that a court identifies a norm with *jus cogens* status is not likely to have an impact on how its fairness is perceived. Yet if it goes on to base the outcome of the case on the *jus cogens* status, there is a risk that the court will be perceived as identifying the status on the basis of a preference for one of the parties. This concern is applicable to some extent with regard to how the meaning of any law is determined during a case.¹¹⁹ Still, the lack of clarity that surrounds the *jus cogens* concept means that a court can be perceived as having a greater discretion as to whether or not to invoke the concept than it does with other aspects of international law. This increases the likelihood that an instance when it is relied upon will be read as driven by a preference for one of the parties to a case.

Outcome legitimacy is about what follows from the work of a court. Although not the only function,¹²⁰ one important function of a court in international law is to settle the dispute before it. To the extent that a court is perceived to be fulfilling these functions, its legitimacy can be expected to increase.¹²¹ The identification of *jus cogens* status need not hinder the settling of a dispute. But the uncertainty that surrounds the concept introduces the scope for a losing party to be more circumspect of a decision based on the *jus cogens* status of a norm than might be the case with other aspects of international law. This, in turn, might reduce the inclination of a party to abide by a ruling of the court, with consequent implications for the reputation of the court as a dispute settlement body.

How significant these considerations are likely to be in practice will depend upon a host of factors connected to the nature of the court in question that can influence the way the court operates and that remain under-researched, such as its positioning in relation to stakeholders, the identity of the judges, its functions, and history.¹²² The main point for present purposes is that there are grounds to think that in many cases *jus cogens* identification has the potential to be problematic for the legitimacy of international courts in a number of ways, and that this can be expected to exert some influence on the approach the court takes.

B. *Strategies for Preserving Legitimacy*

It is the uncertainty surrounding the basis for affording *jus cogens* status, combined with the legal effects of the status, that underpin and link the legitimacy risks that arise in relation to *jus cogens* identification (and why the risks are arguably of greater significance than other elements of unwritten international law). On this

118. Stone-Sweet, *supra* note 112 at 15.

119. *Ibid.*

120. See Von Bogandy and Venzke, *supra* note 115 at 18; also Steven WHEATLEY, "On the Legitimate Authority of International Human Rights Bodies" in Geir ULFSTEIN *et al.*, eds., *The Legitimacy of International Human Rights Regimes* (Cambridge: Cambridge University Press, 2013) 84–116 at 84.

121. Wolfrum, *supra* note 113 at 7.

122. See also Fauchald and Nollkaemper, *supra* note 47 at 351.

basis, it is possible to envisage general strategies that courts might adopt to try and preserve legitimacy.

One strategy would be to avoid *jus cogens* identification wherever possible (such as in cases where it is not raised directly by the parties as central to the case). Another strategy would be to identify only the norms that most readily appear in the literature as *jus cogens* (so a more cautious approach than simply going with intuition that a norm should have the status).¹²³ Making the assertion in line with common positions found in the literature would reduce the likelihood that the assertion would be seen as controversial, and thereby also help to avoid perceptions of imposition, lack of fairness, and a hindrance to dispute settlement.¹²⁴ This strategy could perhaps be most effective if it was used in combination with a strategy of not relying upon any of the mooted effects of the status for the determination of a case,¹²⁵ as relying on effects increases the likelihood that the approach taken will be scrutinized by the broader state audience. Neither of these two strategies bodes particularly well in terms of the credibility or the development of the concept of *jus cogens*. In this respect, a third strategy is potentially more promising.

This is a reference to the potential of reasoning by the court to help reduce the potential risks of *jus cogens* identification. The provision of the details of the justification and method that has been implemented to determine that a norm has *jus cogens* status could be a means to aid the legitimacy of the court in a number of ways. In terms of concerns about law being imposed on states by courts beyond its mandate, the provision of reasoning could help to demonstrate the viability of the approach taken by the court (both with regard to the nature of the concept and the specific norm identified as *jus cogens*), with the potential that states would then be persuaded to recognize it as a plausible legal position.¹²⁶ In terms of procedural fairness, the provision of reasoning could help to demonstrate that the position taken was not simply the opinion of the court, but rather an objective assessment based on legal requirements.¹²⁷ It would allow the court to remain in accordance with the general principle for an adjudicator to maintain an image of neutrality, which requires a demonstration that the “decision is the inevitable result of an exhaustive, inherently normative, deliberation”.¹²⁸ This could also be hoped to make it more likely that the decision passed would actually serve to settle the dispute, through reducing the scope for the losing party to be circumspect of the outcome.

123. See also Byers, *supra* note 24 at 222.

124. See also Stone-Sweet, *supra* note 112 at 15 (suggesting that a dispute resolver can help to preserve legitimacy by anticipating the disputants and the community’s reaction to the decision, through attempting to adapt the process and content of a decision to be in line with what would be acceptable to both).

125. Debated effects of *jus cogens* status beyond the VCLT include those directly within a human rights regime (such as non-derogability, no reservation, and precedence over conflicting norms (human rights or otherwise)), as well as beyond (such as limits on the authority of the UN Security Council, direct limits on national legislative authority, and an obligation on all states to “cooperate to bring to an end through lawful means any serious breach” (ILC *Articles on State Responsibility*)); see Cassese, *supra* note 4 at 160–3; Orakhelashvili, *supra* note 70; Vidmar, *supra* note 29 at 24.

126. See also Von Bogandy and Venzke, *supra* note 115 at 15–16.

127. See also Stone-Sweet, *supra* note 115 at 74.

128. Stone-Sweet, *supra* note 112 at 17; see also Dothan, *supra* note 112 at 14.

C. Does a Concern for Legitimacy Encourage Judicial Reasoning of *Jus Cogens* Identification?

In the light of this line of thinking, it can appear strange that the practice of international courts includes a general lack of reasoning on *jus cogens* identification. Insight into why reasoning might have been avoided in spite of the potential for it to aid legitimacy can be gleaned from reference to the *Domingues* case at the Inter-American Commission.¹²⁹

The *Domingues* case represents one of the fullest discussions of *jus cogens* identification in any international judicial or quasi-judicial forum.¹³⁰ To make the case that the norm prohibiting the execution of children (with adulthood set at eighteen) had *jus cogens* status, the Commission went through a process of consideration of treaties, UN resolutions and standards, and domestic practice that were considered relevant to the issue at hand. The approach taken, flagging up developments in practice that supported the existence of the purported norm and explaining away apparent contradictions (such as reservations to relevant treaty provisions), could potentially support the existence of a rule of customary law. However, the analysis provided little indication as to how the key part of the test the Commission set out for *jus cogens* status—"evidence of recognition of the indelibility of the norm by the international community as a whole"—had been satisfied. One is thus left wondering about the exact basis upon which the Commission thought that this norm, as opposed to other norms of customary law, had come to have an elevated normative status. It is possible that the US, the respondent state, would still have objected to the presentation of the norm in question as *jus cogens* regardless of the approach taken to justification and method.¹³¹ Yet, if the Commission had been less forthcoming with its reasoning, the problems with the method that was employed would have been less prominent; onlookers could at least have hoped that a reasonable method had been implemented.

The *Domingues* case brings into focus the difficult position that judicial bodies are in with regard to reasoning *jus cogens* identification. On the one hand, reasoning *jus cogens* identification has the potential to help maintain the legitimacy of a judicial body. In particular, it has the potential to help bring states around to the court's way of thinking on the nature of the *jus cogens* concept and the norms that have status. On the other hand, if the judicial body is not able to offer a convincing account of the

129. *Michael Domingues/United States*, Report No. 62/02, Merits, Case 12.285, 22 October 2002; at para. 50, the Commission (citing scholarly work) explained that: "while based on the same evidentiary sources as a norm of customary international law, the standard for determining a principle of *jus cogens* is more rigorous, requiring evidence of recognition of the indelibility of the norm by the international community as a whole. This can occur where there is acceptance and recognition by a large majority of states, even if over dissent by a small number of states."

130. See also *Roach and Pinkerton* 1987 Resolution N° 3/87, Case 9647, United States, 22 September 1987, para. 55.

131. See US response, *Domingues*, paras. 93–107. Para. 101: "The State claimed in this regard that the only argument presented in favor of this finding in the Commission's report is the assertion that the execution of Mr. Domingues would 'shock the conscience of humankind.' The State considered this assertion to be 'specious at best,' and argued to the contrary that the 'acts of Mr. Domingues should shock the consciousness of humankind, not the punishment those acts have earned him.'"

process it has undertaken, the attempt at reasoning can serve to draw attention to flaws in its process that might otherwise have been overlooked and thereby actually be more detrimental for legitimacy.

The general absence of reasoning on *jus cogens* identification in international case-law is support for the view that international courts presently take the view that they do not yet have the tools to offer an account of *jus cogens* identification that will be to the advantage of the legitimacy of the court. Instead, courts can appear to be adopting other strategies for reducing the risk for their legitimacy of *jus cogens* identification. These include an apparent preference for referring to *jus cogens* status in relation to norms that are often cited as such in the literature (e.g. ICJ, prohibition of genocide, torture, crimes against humanity), and a general absence of invocation or reliance upon the various mooted effects of *jus cogens* status to help determine a case (e.g. the ICJ approach to how *jus cogens* relates to immunity and reservations).¹³² This line of thinking has implications in terms of the prospects of interaction between scholars and judges on the doctrine of *jus cogens* identification.

D. Implications for the Scholarly Debate

Interaction between scholars and judges has been identified in this paper as having the potential to lead to the cross-fertilization of insights and ideas that can help the debate on the doctrine of *jus cogens* identification to progress. However, it appears from contemplation of the judicial approach from a legitimacy perspective that the level of judicial engagement with the debate is not likely to increase until the scholarly debate makes advances of its own accord. That is, until the scholarly debate advances to a position that it is able to provide an approach to *jus cogens* identification that is deemed by international courts to be sufficiently coherent and workable so that it at least has the potential of convincing states that an objective process has been undertaken.

Given that reasoning is an opportunity for courts to convince states of the plausibility of the position taken, there is no reason to suggest that international courts that are concerned about legitimacy will necessarily wait on a definitive position to arise before commencing more reasoning on *jus cogens* identification. Still, it is realistic to suspect that, given the differences in the make-up and self-perceptions of courts, and the contexts within which they operate,¹³³ what will be deemed to suffice as a coherent and workable approach will likely vary amongst courts.¹³⁴ This can make it difficult to suggest general strategies that interested scholars might deploy to enhance the prospects of judicial engagement with doctrine on *jus cogens* identification.

132. See also De Wet, *supra* note 96 at 7.

133. See also Fauchald and Nollkaemper, *supra* note 47 at 351.

134. Relevant factors could include the extent to which a court counts individuals amongst its main audience (so even if legitimacy is reduced from the perspective of states, it might still remain legitimate for individuals and thereby continue to be utilized); the nature of the audience of states (broader audience, more careful, as harder to predict reception); length of operation of the court (longer existence, able to build up more legitimacy); the powers of the court (e.g. just recommendatory, might see more value in including *jus cogens* in the decision to help strengthen the compliance pull); the level of entrenchment of the court (e.g. easily closed down, might lead court to be more cautious).

Nevertheless, one consideration that all courts should have in common, when determining whether or not they have a sufficiently coherent and workable approach to *jus cogens* identification, is an emphasis on the details of the method to be employed. That is, a concern to be able to show the steps that have been gone through to ascertain that a norm has *jus cogens* status, rather than an emphasis on the explanation of the theoretical underpinnings. This is because it is the method that will be most visible in the decision, and thereby most likely to be scrutinized.¹³⁵ Strikingly, this is opposite to the way in which the main debate on the nature of *jus cogens* norms is presently organized, where the emphasis is on the details of justificatory theory. More scholarly attention to the specific details of methods associated with the various justificatory theories can help courts to assess from the outset whether they will be able to offer a viable account of the identification process, and thereby go some way to improving the prospects of an interactive dialogue developing on the doctrine of *jus cogens* identification.

VII. CONCLUSION

In spite of extensive scholarly attention and an increased willingness of courts to identify *jus cogens* norms, little progress has been made on the doctrine of *jus cogens* identification since the concept was established in international law through the Vienna Convention of 1969. Both the justification for the status, and the method for determining whether a norm has this status, remain inchoate. To help develop a clearer understanding of why more progress has not been made, this paper has addressed the topic of interaction between scholars and judges on the identification of *jus cogens* norms. This has included attention to why interaction between scholars is important in international law, the present condition of the practice of interaction, and assessment of its underpinnings.

It has been argued that interaction between scholars and judges is an important feature of norm development in international law. In particular, the different contexts within which they operate can lead to new insights that would perhaps not have arisen had a debate proceeded in only one setting. However, it has also been argued that, in spite of the increased willingness of judges to identify *jus cogens* norms, there has not been a corresponding increase in the sort of interaction with scholars that would be most useful for norm development, in the sense of reflection on and refinement of the reasoning that underpins a particular approach. A key reason for this absence of productive interplay has been argued to be the lack of reasoning in judicial decisions to support the identification of a particular norm as *jus cogens*.

To understand why courts have not generally offered more reasoning to support the identification of *jus cogens* status, the paper has considered how the identification of *jus cogens* status might affect the legitimacy of a court. This has highlighted that,

135. To be clear, the suggestion here is not that it will be possible to find a satisfactory method, but that it might be possible. The suggestion is also not that method is detachable from the underlying theory, but rather that having a theory does not entail a self-evident, workable method; see also d'Aspremont, *supra* note 116 at 14 and 24.

because of the effects that attach to the status and the uncertainty surrounding the concept, *jus cogens* identification has the potential to be problematic in a number of ways. In particular, it has been suggested that it comes with the risk that it will be perceived as the courts imposing law on states; the courts favouring one of the parties; and the court not settling the dispute. The provision of reasoning by a court has been contended to represent a potentially useful strategy for a court that is interested in identifying *jus cogens* status, but that wants to reduce the risks for legitimacy, particularly because it holds the potential of convincing states of the prudence of the approach taken. Yet it has also been argued that this will be linked to the ability and capacity to produce a plausible account of the process undertaken. To the extent that it is not, then it can be more detrimental for legitimacy, as it risks drawing attention to the failings of a process. The present general lack of reasoning suggests that, overall, courts do not consider that they have the tools to produce a sufficiently coherent and workable account.

This line of argumentation has implications for how scholars and judges should approach matters related to *jus cogens* identification. In particular, it suggests that if a more productive dialogue is to be generated between scholars and judges, there is a need for courts to show a greater willingness to engage with doctrine on *jus cogens* identification. However, to facilitate a change in judicial policy, the scholarly focus should also turn to supplement consideration of the explanation for *jus cogens* norms with more attention to the details of the method that would follow from a particular justificatory position. This is because it is method rather than the details of justificatory theory that is likely to be most visible and most subject to scrutiny in a decision of a court, and thereby most likely to feature in the assessment of a court when determining whether or not it would be to its advantage to offer reasoning for *jus cogens* identification.

As a final point, it is important to highlight an act of the late Antonio Cassese in his capacity as President of the Special Tribunal for Lebanon. In an order assigning a matter—related to the release of evidentiary material requested by the applicant for the purpose of a libel case to be brought before domestic jurisdiction—to the trial judge, Cassese identified the right of access to a court as a norm of *jus cogens*.¹³⁶ The normative status of the right was not central to the matter before the President,¹³⁷ but Cassese did not simply posit the *jus cogens* status. Instead, Cassese argued, on the basis of analogy with a perceived relaxation in the rules for the formation of customary humanitarian and human rights law, that the requirement of state practice should also be relaxed in the formation of preemptory status, with the emphasis instead placed on *opinio juris* through reference to “international declarations,

136. Special Tribunal for Lebanon, *In the Matter of El Sayed*, Case No. CH/PRES/2010/01, Order of the President Assigning Matter to Pre-Trial Judge, 15 April 2012, paras. 28–9; see also Cassese, *supra* note 4 at 165–6; H. RUIZ FABRI, “Enhancing the Rhetoric of Jus Cogens” (2012) 23 *European Journal of International Law* 1049.

137. As Cassese notes, *supra* note 4 at para. 35: “Whether or not it is held that the international general norm on the right to justice has been elevated to the rank of *jus cogens* (with the consequence that States may not derogate from it either through treaties or national legislation), it is axiomatic that an international court such as the STL may not derogate from or fail to comply with such a general norm.”

treaties and statements". One might query whether the reference to the human rights instruments and General Assembly Resolutions that Cassese makes is sufficient to establish the right of access to justice as a *jus cogens* norm. Still, the raising of the idea in a judicial forum that the emphasis in the identification process should be on *opinio juris* is in itself significant. It can be hoped that this will be a prompt for further scholarly attention of the details of such a method.