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SERIE

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Preserving jus cogens under Human Rights Law: structuring jus cogens norms as absolute prohibitions

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Presentación

Los *Documentos de Trabajo* son un espacio para la reflexión y el debate. A diferencia de otros formatos, esta serie ofrece un palco para los trabajos inacabados, para la discusión de las ideas en formación y el perfeccionamiento de los procesos de investigación. Se trata pues, de textos que salen a la luz para ser enriquecidos con la crítica y el debate antes de pasar por el tamiz editorial.

En esta colección se sumarán cinco grandes áreas del conocimiento: el derecho constitucional, el derecho internacional, la sociológica jurídica, la teoría y filosofía del derecho. Además, de poner a prueba nuestras ideas, el cometido principal de esta publicación es aportar a los debates actuales, tanto aquellos que se viven en la academia como los que resultan de la cada vez más compleja realidad nacional e internacional.

Esta publicación está abierta a todos los miembros de nuestra Casa de Estudios, profesores y estudiantes, así como a quienes nos visitan. Esperamos contar con el aporte de todos aquellos interesados en la construcción de academia.

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Preserving jus cogens under Human Rights Law: structuring jus cogens norms as absolute prohibitions

The concept of jus cogens has evolved in a very interesting way in the field of Human Rights Law. One of the major questions that arises regarding this concept is how to identify which norms are jus cogens norms ("JCN"). This question is of course of major importance. However, it seems like scholars and tribunals have neglected two other important questions: Does Human Rights JCN violations admit any kind of justification? And, how can we prevent Human Rights JCN from being overruled in the future? I will argue that JCN must be structured as absolute prohibition rules, which admit no exceptions and therefore are not subject to any proportionality test. With this hypothesis I intend to contribute to the three questions posed above by developing two related arguments. First, this absolute prohibition rule structure must be at least one of the criteria in identifying a jus cogens norm in Human Rights Law. Second, the structure of JCN as absolute prohibition rules will go some way in preventing (i) any proportionality test from justifying JCN violations and (ii) JCN from being overruled in the future. Although I am aware that we cannot hope to prevent entirely JCN from being overruled in practice, we have a responsibility to secure those norms as much as possible.

In this paper I focus only on the structure of JCN, as part of a broader research I am developing on the concept of jus cogens. Thus, I will only address JCN under the field of Human Rights Law, although I am aware that the concept has been contested in other issue areas of International Law. Second, as I will only focus on the question of the structure of the norms, I will not address other important questions such as the specific content of JCN; the possible conflict of JCN with cultural diversity; whether or not regional JCN exists or not; and who has the competence to determine what constitutes JCN.

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To develop my arguments, this paper will be addressed in four parts. Part I explains the nature of jus cogens norms as superior rules under International Law. Part II argues why any proportionality test must be precluded from analyzing JCN violations. Part III explains how structuring JCN as absolute prohibition rules may prevent JCN from being overruled. Part IV presents some conclusions and a proposal.

I. JUS COGENS NORMS: AT THE TOP OF A HIERARCHY OF RULES UNDER INTERNATIONAL LAW

The origins of the concept of JCN are contested.[1] However, our starting point will be the Vienna Convention on the Law of Treaties ("VCLT"), as it was the first international treaty which explicitly embodied the concept. Article 53 of the VCLT states that:

> Article 53: Treaties conflicting with a peremptory norm of general international law (jus cogens)
>
> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The concept of JCN has not been defined with precision under International Law[2]. Article 53 establishes the existence of JCN; yet, it does not tell us which norms belong to this category. This was intentional. Since the first drafts of the article, the International Law Commission ("ILC") decided to "leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals"[3]. This conception was later accepted by the majority of states throughout the Vienna Conference. Hence, Article 53 was intentionally constructed as an incomplete norm. Still, it has at least three important objectives: first, it secures the recognition of the existence

1. I agree that its origins are in classical publicists such as Hugo Grotius, Emer de Vattel, and Christian Wolff. They drew upon the Roman law distinction between jus dispositivum (voluntary law) and jus scriptum (obligatory law), to differentiate consensual agreements between states from the "necessary" principles of international law that bind all states as a point of conscience regardless of consent. Evan J. Criddle & Evan Fox-Decent, A Fiduciary Theory of Jus Cogens, 34 Yale J. Int'l L. 331, 334 (2009).

2. Carlos Villán Durán, Curso de derecho internacional de los derechos humanos, 227 (Trotta eds., 2002).

3. ILC Yearbook (1966), vol. II, at. 248.

of peremptory norms in the light of recent history, especially in the twentieth century[4]; second, it recognizes that the VCLT is only a codification of an already established customary international law rule regarding the existence of this kind of norm (as is clear from the interventions of the majority of states in the Vienna Conference)[5]; and third, it creates particular consequences in cases of collision of a peremptory norm with other conventional sources[6]. We must bear in mind that nullity is a consequence created only for the violations of JCN in the law of treaties. However, soon after the Vienna Conference it became evident that peremptory norms could not be limited to the law of treaties.[7] Thus, the concept has been developed in other issue areas of International Law such as the law of international responsibility of states,[8] Human Rights Law, International Law of Refugees[9] and International Humanitarian Law.[10] In fact, most of the case law in which the concept of jus cogens has been invoked concerns human rights.[11]

Perhaps the most important feature of JCN under international law is that these rules are superior to any other rule under international law. Therefore, while traditionally there is not a hierarchy between international law rules,[12] jus cogens seem to be an exception. As Bianchi affirms "[b]y postulating a hierarchy of rules, rather than sources, on the basis of their content and underlying values, jus cogens has made its way into the very heart of the system".[13]

4. A.A Cançado Trindade is of this view. See Audiovisual Library of International Law. Customary International Law: Jus Cogens in contemporary International Law (2008). http://untreaty.un.org/cod/avl/ls/Cancado-Trindade_IL.html

5. See for instance the interventions of the Union of Soviet Socialist Republic, Mexico, Finland, United States, Greece, Kenya, Lebanon, Arab Republic, Sierra Leone, Colombia, Poland, Uruguay, Sweden, and Argentina in United Nations Conference on the Law of Treaties. Official Records. The first (document A/CONF. 39/11, United Nations publication, Sales No.: E. 68.V.7) and second (document A/CONF. 39/1 I/Add. 1, Sales No.: E.70. V.6) contain the summary records of the plenary meetings and of the meetings of the Committee of the whole held during the first and second sessions of the Conference respectively; the third volume (A/CONF. 39/ll/Add.2, Sales No.: E.70.V.5) contains the documents of the Conference.

6. Alicia Cebada Romero, Los conceptos de obligación erga omnes, ius cogens y violación grave a la luz del nuevo proyecto de la CDI sobre responsabilidad de los Estados por hechos ilícitos, 1, en Revista Electrónica de Estudios Internacionales (2002), www.reej.org (citing Schwelb).

7. A.A Cançado Trindade, Supra note 4.

8. International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts. G.A. Res. 56/83 (2001), Article 26.

9. Examples of jus cogens in this issue area are for instance the non-refoulemont principle.

10. Examples of jus cogens in this issue area are for instance the prohibition of torture of prisoners of war.

11. Andrea Bianchi. Human Rights and the Magic of Jus Cogens. EJIL, Vol. 19 No. 3, 491, 491 (2008).

12. Traditionally there is mutual flexibility between the sources of International Law. Treaty and customary law rules could derogate from one another. Andrea Bianchi. Id, at 491.

13. Id, at 495.

This jus cogens hierarchy seems to even surpass the only other example of hierarchy under international law: that of article 103 of the Charter of the United Nations[14]. This was particularly evidenced by the Court of First Instance of the European Communities, which indirectly reviewed the legality of Security Council´s anti-terrorism resolutions against the background of human rights peremptory norms. The Court held that it was:

> "empowered to check, indirectly, the lawfulness of the resolutions of the [Security Council] in question with regard to jus cogens, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible . . . International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of jus cogens. If they fail to do so, however improbable that may be, they would bind neither the member states of the United Nations nor, in consequence, the Community"[15]

Indirectly, the Court is saying that jus cogens norms are superior to the Security Council's interpretation of the United Nations Charter. In other words, as Bianchi affirms, "human rights peremptory norms have in some sense performed as 'constitutional' parameters against which the legality of SC anti-terror measures has been tested"[16]. Regardless of the analysis of the structure of JCN that the Court of First Instance of the European Communities embraced – one with which I differ – the underlying hierarchy of jus cogens norms is pretty strong in this type of arguments.

This hierarchical interpretation finds support in the Vienna Conference discussions, reflected in the non-derogability character of JCN. Though it is debatable whether there was really a consensus of the states that participated in the Vienna Conference with regard to JCN (including issues such as the content of JCN; the procedures by which these norms ought to be recognized; and whether these norms arise from the recognition of the International Community or from natural law) the great majority of states agreed to the existence of these norms as norms from which no derogation is permitted. Mexico stated that the "character of those norms was beyond doubt"; Finland affirmed that those were "universal rules recognized by the International Community"[17]; Kenya affirmed that JCN were fundamental for the existence

14. Article 103 of the United Nations Charter states that members' obligations under the UN Charter override their obligations under any other treaty.

15. Yusuf and another v European Council and another. Court of first instance of the European Communities (Second chamber, extended composition). (Case T-306/01), [2006] All ER (EC) 290. 14 October, 2003. 21 September, 2005.

16. Bianchi, supra note 11, at 499

17. United Nations Conference on the Law of Treaties. Official Records, supra note 5, at

of International Law, and the United States asserted that no derogation was permitted from JCN, among other interventions. This meant also that JCN could not be overruled by the contractual autonomy of the states[18]. Therefore, non-derogability is perhaps the most important characteristic of JCN. The ILC affirmed in its comments that:

> "[I]f some Governments in their comments have expressed doubts as to the advisability of this article unless it is accompanied by provision for independent adjudication, only one questioned the existence of rules of jus cogens in the international law of to-day. Accordingly, the Commission concluded that in codifying the law of treaties it must start from the basis that to-day there are certain rules from which States are not competent to derogate at all by a treaty arrangement, and which may be changed only by another rule of the same character"[19].

The non-derogability feature was so important for states in the Vienna Conference, that many states supported an amendment proposed by Romania and the USSR "[w]hich introduced into the text an expression which would eliminate any possibility of interpreting the rule as signifying that there were peremptory norms from which derogation was permitted"[20]. In sum, as the non-derogability feature is the essence of JCN, separating it from the other International Law sources, the hierarchy of JCN must be preserved.

It is important to recognize that this hierarchy has practical consequences: Not only nullity, which is an explicit conventional consequence, but also the prohibition of invoking the persistent objector rule and the prohibition of invoking circumstances that preclude wrongfulness in the field of international state responsibility.

In Human Rights Law, this hierarchy is reflected in some prohibitions that are superior within human rights. Thus, the hierarchy within human rights norms operates not as certain rights structured as principles over others, but as certain prohibitions structured as rules over (i) rights structured as principles, and (ii) rights structured as rules but admitting exceptions. I deepen this analysis in the next chapter.

II. JUS COGENS IN HUMAN RIGHTS LAW AND PROPORTIONALITY TESTS

In the field of Human Rights Law, "no derogation permitted" means not only that JCN are superior norms – as stated in chapter I - but also that

294. Similar expressions were affirmed by Greece, Lebanon and Colombia.

18. In this regard see interventions from Iraq, Kenya, and Greece. Id.

19. ILC Yearbook (1966), vol. II, at. 247.

20. Rumania's intervention in United Nations Conference on the Law of Treaties. Official Records, supra note 5, at 312.

JCN have no exceptions. Goldman for example affirms that the expression "non-derogable", means that a norm cannot be suspended for any reason[21]. Charney affirms that exceptions from JCN "cannot be tolerated"[22]. Article 26 of the Project of Responsibility of States for International Wrongful Acts also supports the view that JCN have no exceptions. Article 26 affirms that nothing precludes the wrongfulness of any act of a State "which is not in conformity with an obligation arising under a peremptory norm of general international law". This includes even self-defense and distress. The ILC comments on this article conclude that:

> It is, however, desirable to make it clear that the circumstances precluding wrongfulness in chapter V of Part One do not authorize or excuse any derogation from a peremptory norm of general international law. For example, a State taking countermeasures may not derogate from such a norm: for example, a genocide cannot justify a counter-genocide. The plea of necessity likewise cannot excuse the breach of a peremptory norm[23].

Finally, some developments of International Law do not permit a persistent objector regarding JCN, whereas it is a possibility in customary international law[24]. It is also clear that "a state cannot exempt itself from a peremptory norm of international law by making a reservation to [a] Covenant"[25].

If JCN have no exceptions, they must be structured as absolute prohibition rules, because only absolute prohibitions do not permit any exceptions[26]. Norms formulated in absolute terms allow no room for limitation or nuanced application[27].

21. Making reference to the prohibition of torture. He states also that while torture is clearly a jus cogens norm, "although cruel, degrading, or inhuman treatment is also clearly prohibited by customary law, its status as jus cogens remains unclear". Robert K. Goldman, Trivializing Torture: The Office of Legal Counsel's 2002 Opinion Letter and International Law Against Torture, 12 Hum. Rts. Brief 1, 2 (2004).

22. Jonathan I. Charney, Universal International Law, 87 Am. J. Int'l L. 529, 542 (1993)

23. ILC commentary on the Draft of Responsibility for International Wrongful Acts, at 85

24. See Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992). See also Lawrence Friedman, On Human Rights, the United States and the People's Republic of China at Century's End, 4 J. Int'l Legal Stud. 241, 245 (1998).

25. Unites States comments on the General Comment 24 of UN Committee. In Lori F. Damrosch, Louis Henkin, Sean D. Murphy and Hans Smit, International Law, Cases and Materials 158 (West eds., 5th ed. 2009)

26. Benjamin G. Davis, Refluat Stercus: A Citizen's View of Criminal Prosecution in U.S. Domestic Courts of High-Level Civilian Authority and Military Generals for Torture and Cruel, Inhuman or Degrading Treatment, 23 ST. JOHN'S J. LEGAL COMMENT. 503, 654 (2008).

27. Yuval Shany, The Prohibition Against Torture and Cruel, Inhuman, and Degrading Treatment and Punishment: Can the Absolute Be Relativized Under Existing International Law?, 56 Cath. U. L. Rev. 837, 842 (2007).

Although JCN have no exceptions, there is a lack of jurisprudence, doctrine and scholarly work regarding the applicability of the proportionality test to alleged violations of JCN. If JCN are superior and have no exceptions, then there is no sense in balancing this type of rule with other principles or values. As JCN are a manifestation of the most important values in the international community, the proportionality test should be conceptually precluded as an analytic tool when there has been a violation of human rights JCN. I am aware that this analysis excludes rights structured as principles from the category of JCN. However, I believe that this theory, instead of reducing the protection of human rights, strengthens the protection of the core of these rights, for the following reasons.

Nowadays JCN have been trivialized in the context of Human Rights Law. State practice and international jurisprudence have misunderstood the concept.

> Proponents have argued for the inclusion of all human rights, all humanitarian norms (human rights and the laws of war), or singly, the duty not to cause transboundary environmental harm, freedom from torture, the duty to assassinate dictators, the right to life of animals, self determination, the right to development, free trade, and territorial sovereignty (despite legions of treaties transferring territory from one state to another). *** In most instances, little evidence has been presented to demonstrate how and why the preferred norm has become jus cogens.[28]

International Human Rights Courts, and constitutional domestic courts have been dealing with the concept, without analyzing it deeply, affirming (as the above citation shows), that (i) all human rights (even those structured as principles) belong to the field of JCN[29]; or (ii) that entire international instruments belong to that category[30]. Other courts simply combine these theories[31]. Although none of these tribunals have fully dealt with the formal

28. Lori F. Damrosch, Louis Henkin, Sean D. Murphy and Hans Smit, supra note 25, at 109

29. See for example Judge Tanaka Opinion in South West Africa: Second Phase, Judgment (1966) I.C.J. Rep. 6, 296

30. See for example, Colombian Constitutional Court, C-225/95. MP: Alejandro Martínez Caballero.

31. See for example Anna Gekht, Shared but Differentiated Responsibility: Integration of International Obligations in Fight against Trafficking in Human Beings, 37 Denv. J. Int'l L. & Pol'y 29, 33, 47 (2008). "The domain of human rights under the international law includes two categories of rights: fundamental and secondary rights. The fundamental human rights category includes the rights that are non-derogable. They form the peremptory norms of general international law, embodied in the notions of jus cogens and erga omnes. The norms of jus cogens introduce a category of imperative uncontestable international law existent in contrast to jus dispositivum, and include the right to life, prohibition of torture, "genocide, slavery, racial discrimination, aggression, the acquisition of territory by force, and the forcible suppression of the right of peoples to self-determination".

structure of JCN, we will analyze and criticize the structure of the norms that positions (i) and (ii) imply.

On the one hand, some scholars, domestic and international tribunals affirm that some rights structured as principles, as opposed to prohibitions structured as rules,[32] are JCN. These theories are divided over which rights are JCN: some think that all human rights are JCN[33], others affirm that the most fundamental rights, those that cannot be suspended under any circumstances[34] are JCN, and others state that all civil and political rights are JCN[35], while economic, social and cultural rights are not[36].

Notwithstanding what theory we embrace, to consider rights structured as principles as JCN raises several problems. I agree with some of the content of these theories, but only if the essential core[37] of some of those rights is re-constructed not only as rules, but as rules structured as absolute prohibitions, which allow no exceptions. Although this may seem as a jus cogens minimalist and retrogressive theory, it is not so.

While I believe that a hierarchy of Human Rights does not exist, I argue that some prohibitions in Human Rights Law are superior. Thus, the hierarchy within human rights norms operates not as certain rights structured as

32. According to Dworkin, rules and principles differ for the following reasons: "Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision [...] But this is not the way [...] principles [...] work. Even those which look most like rules do not set out legal consequences that follow automatically when the conditions provided are met [...] Principles have a dimension that rules do not - the dimension of weight or importance. When principles intersect [...] one who must resolve the conflict has to take into account the relative weight of each [...] Rules do not have this dimension." Ronald Dworkin, Taking rights seriously 24 (1977).

33. See for example Yusuf and another v. European Council and another, supra note 15.

34. BUT see Jeremy Waldron, Torture and Positive Law: Jurisprudence for the White House, 105 Colum. L. Rev. 1681, 16 (2005) (stating that two distinct categories are those of norms that cannot be suspended in times of emergency and jus cogens norms).

35. Anna Gekht, Shared but Differentiated Responsibility: Integration of International Obligations in Fight against Trafficking in Human Beings, 37 Denv. J. Int'l L. & Pol'y 29, 33, 49 (2008). "Although the international community has given a lot of attention to the rights of the 'third generation' such as freedom from poverty, right to development, etc., these rights do evoke binding obligations of the states and retain their political, recommendatory character. Recognized as important in achieving high standards of living and preventing such massive human rights violations, as human trafficking, they are non-universal, non-binding or justiciable on international level. Their justiciability remains within the discretion of state sovereignty and state margin of appreciation."

36. Lawrence Friedman, On Human Rights, the United States and the People's Republic of China at Century's End, 4 J. Int'l Legal Stud. 241, 246 (1998).

37. As we are not discussing the content of JCN, we do not need to go deeper on the discussion regarding the essential core of rights. Nonetheless, it can be a very useful criterion to identify which absolute prohibitions may belong to the category of JCN.

principles over others, but as certain prohibitions structured as rules over (i) rights structured as principles and even (ii) rights structured as rules but admitting exceptions. One might say for example that the prohibition of slavery protects several and different kinds of rights structured as principles: the right to liberty, the right to property and even the right to life; this prohibition also protects economic and social rights structured as principles such as the right to rest[38]. Also, the absolute prohibition of forceful disappearances protects many rights structured as principles, such as the right to liberty, the right to personal integrity and the right to life. It may even protect new conceptions of rights such as the right to truth of the families[39]. This is because principles are necessarily reasons for rules[40]. Thus, almost all the essential core of rights structured as principles can be reconstructed as absolute prohibition rules.

Second, the fact that not all rights structured as principles should be categorized as JCN, does not mean that rights structured as principles are not part of customary international law. I actually believe that almost all of the most fundamental rights are today part of customary international law and that therefore all states (whether or not parties to human rights treaties), must respect and protect human rights.

However, all rights structured as principles have exceptions. Thus, all of them may be suspended under certain circumstances, even if they are included in the non-suspension clauses of treaties. Consider the right to life[41]. A.A. Cançado Trindade, former President of the Inter-American Court of Human Rights has affirmed in various occasions that right to life is a jus cogens norm[42]. Nonetheless, the right to life has various exceptions: from self-defense (which is the most obvious one), to International Humanitarian Law legitimate uses of lethal force. If we then embrace the right to life as a jus cogens norm, we would then have to say that article 26 of the Draft of Articles of Responsibility of States is mistaken: we can preclude wrongfulness from peremptory norms. Instead we could say that some absolute prohibitions that protect the right to life can be JCN: for example the absolute prohibition of genocide or the absolute prohibition of extrajudicial killings.

38. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, Article 24 (III 1948).

39. For further developments of the right to truth see I/A Court H.R., Case of Blanco-Romero et al v. Venezuela. Merits, Reparations and Costs. Judgment of November 28, 2005. Series C No. 138. Concurrent opinion of A.A Cançado Trindade. See also Constitutional Court of Colombia, C-228/02, MP: Manuel José Cepeda y Eduardo Montealegre.

40. Robert, Alexy, On the Structure of Legal Principles, Ratio Juris. Vol. 13 No. 3; 294, 297 (2000).

41. Included as a non-suspendible right in article 4 of the International Covenant on Civil and Political Rights and in article 27 of the American Convention of Human Rights.

42. See for example his concurrent opinion in I/A Court H.R., Case of Baldeón-García v. Peru. Merits, Reparations and Costs. Judgment of April 06, 2006. Series C No. 147.

The Inter-American Court has also pointed out that other rights structured as principles, like access to justice,[43] are JCN. Access to justice, however, might also have exceptions in certain circumstances[44]. Again, certain absolute prohibitions rules regarding this right structured as a principle might be JCN. As Bianchi affirms:

> In what may be considered by many as an odd reversal of perspectives, it is submitted that one of the major threats posed to the concept of jus cogens is the tendency by some of its most fervent supporters to see it everywhere. To illustrate this risk, reference could aptly be made to the Inter-American Court of Human Rights' Advisory Opinion on the juridical condition and rights of undocumented migrants . . . The Court unanimously found that the principles of non-discrimination, equality before the law, and equal protection before the law qua peremptory norms impose on all states respect for workers' human rights once an employment relationship is established, regardless of the fact that workers are undocumented . . . the somewhat axiomatic reasoning of the Court, linked with fairly vague notions of natural law, is unlikely to foster the cause of jus cogens.[45]

As Shany affirms "many IHR rights can be limited, subject to conditions such as necessity, proportionality, non-arbitrariness, resource availability, and the like. In addition, derogation clauses in human rights treaties permit states to suspend many human rights protections in times of emergency, subject to a number of requirements"[46]. Also, to suggest that the full package has crystallized when there is controversy over many of the norms is neither reasonable nor necessary to establish the global reach of human rights[47].

Finally, to suggest that human rights structured as principles are all JCN is problematic because every day new human rights are recognized in several countries, and they might belong to some specific cultures but not to the International Community as a whole. Take for example the right to a grand jury trial in the United States, or the right to love, that was recently discussed by the Mexican Parliament as part of women's rights[48]. "A national constitu-

43. See e.g. I/A Court H.R., Case of Goiburú et al. v. Paraguay. Merits, Reparations and Costs. Judgment of September 22, 2006. Series C No. 153; I/A Court H.R., Case of La Cantuta v. Peru. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162 (Stating that without access to justice there is no legal system at all).

44. Consider for example exceptions regarding nationality to file certain judicial resources.

45. Andrea Bianchi, supra note 11, at 506.

46. Yuval Shany, supra note 27, at 841.

47. Amin B. Sajoo, Islam and human rights: tradition and politics, 2d ed. ann elizabeth mayer. boulder/san francisco: westview--london: pinter publishers, 310, 314 (1996).

48. As Joseph Raz affirms "an ever growing number of rights are claimed to be human rights, for example, the rights to sexual pleasure; the right to sexual information based upon scientific inquiry; the right to comprehensive sexual education". Joseph Raz, Human Rights without foundations, Oxford, 1, 1 (2007)

tion might continue to guarantee a particular right for historical reasons that have no contemporary resonance even within the national society"[49]. Some absolute prohibitions, however, might protect these principles, but those rights, structured as principles, will mostly have exceptions.

Now, rules may also have exceptions. A conflict between two rules can only be resolved by either introducing an exception clause into one of the two rules or declaring at least one of them invalid[50]. Thus, JCN must be structured not only as rules, but as absolute prohibition rules that permit no exceptions.

On the other hand, some tribunals have stated that entire instruments are JCN. For instance, the Colombian Constitutional Court affirmed that Protocol II to the Geneva Conventions as an instrument was entirely a JCN. Although our paper is not studying International Humanitarian Law JCN, this helps to illustrate our norm-structure problem. Also, in the field of Human Rights Law we may consider some other instruments as jus cogens: the Universal Declaration of Human Rights for example. It is interesting, but it raises several problems. Some of Protocol II or the Universal Declaration of Human Rights' explicit or implicit prohibitions may be JCN, but we cannot say that the whole of these instruments is JCN. The same problems that arise in considering rights structured as principles as JCN, arise also from this type of argument. As some scholars have pointed out, this is not to say that there is no relation between peremptory norms and treaties. However, "the mere fact that a multilateral convention codifies international norms is insufficient to identify the norms as peremptory"[51].

Finally, I am not restricting my hypothesis to those absolute prohibition norms that are already in positive international law. Absolute prohibition JCN also include absolute prohibition rules that are implied from the essential core of rights that are now structured as principles. This is the main reason why structuring JCN as absolute prohibitions does not imply a retrogressive approach for human rights' protection. On the contrary, while we can apply a proportionality test in order to analyze if any State has justifiably violated rights structured as principles, it will not be possible conceptually to apply a proportionality test to justify an absolute rule violation. Thus, the essential core of rights will be protected more strongly.

49. Gerald L. Neuman. Human Rights and Constitutional Rights: Harmony and Dissonance. 55 Stan. L. Rev. 1863, 1868 (2002-2003).

50. Robert Alexy, supra note 40, at 295.

51. Evan J. Criddle & Evan Fox-Decent, A Fiduciary Theory of Jus Cogens, 34 Yale J. Int'l L. 331, 341 (2009)

III. PREVENTING JUS COGENS FROM BEING OVERRULED

The structure of JCN as absolute prohibitions not only responds accurately to the non-derogation requirement of article 53 of the VCLT, but is also the best way to prevent JCN from being overruled: if JCN have no exceptions, then we could not add an exception to the rule and say it will be modified, because the subsequent norm will violate the non-derogable character of JCN.

However, article 53 also affirms that JCN can be modified by a subsequent norm of general international law having the same character. This may seem like a contradiction. If the major characteristic of JCN is that no derogation is permitted, then how is it possible that those norms may be modified by other subsequent norms? In the Vienna Conference Chile stated that:

> Article 50 [draft of jus cogens norms] as at present worded seemed to go round and round. It began by saying that a treaty was void if it conflicted with a peremptory norm of general international law from which no derogation was permitted, but it then went on to say that the norm from which no derogation was permitted could itself be modified by a subsequent norm of general international law having the same character. That sounded like a contradiction in terms. The only help given by the commentary was an indication that what it meant was that those peremptory norms from which no derogation was permitted might be modified by general multilateral treaties (…) (The emphasis is mine)

The ILC explanation regarding multilateral treaties does not seem satisfactory for human rights JCN. If the International Community agreed to recognize such important values that cannot be ignored under any circumstances, it would not seem logical that they can be repealed, even if the new norm has brought together the features of a JCN[52]. For instance, a multilateral treaty that stated today that genocide is permitted among nations will obviously violate JCN. Would it be accurate to say that an international tribunal would have to accept it because it is a norm in a multilateral treaty? The obvious answer is no. That is precisely the core of the issue. On the same matter, Oppenheim has affirmed that:

> Presumably no act done contrary to such a rule [a jus cogens rule] can be legitimated by means of consent, acquiescence or recognition; nor is a protest necessary to preserve rights affected by such an act; nor can such an act be justified as a reprisal against a prior illegal act; nor can a rule of customary international law which conflicts with a rule of ius cogens continue to exist or subsequently be created (unless it has the character of ius cogens, a possibility which raises questions – which no firm answer can yet be given – of the relationship between rules

52. For a deeper analysis on this, see Juana Inés Acosta-López - Ana María Duque-Vallejo Int. Law: Rev. Colomb. Derecho Int. Bogotá (Colombia) N° 13: 13-34 (2008).

> of ius cogens, and of the legitimacy of an act done in reliance on one rule of ius cogens but resulting in a violation of another such rule).[53] (The emphasis is mine)

If we interpret the word modified according to articles 31 and 32 of the VCLT[54], especially in its ordinary meaning[55], three possibilities arise: modified can mean an extension of the norm, an exception to the norm, or an overruling of the norm. On the one hand, we have seen that it cannot mean an exception to the norm, because the subsequent JCN will lack of the character of non-derogability.

On the other hand, if we consider that JCN have no exceptions, and that therefore those must be structured as absolute prohibition rules, then it will be difficult to consider an extension to the norm. How could one be structured? For instance, from the norm "no one shall be subject to torture" we could add "no one can be subject to torture or to degrading treatment". However, it seems that this inclusion is really a new JCN. New JCN can be recognized by the International Community. Yet, those new rules are governed by Article 64 of the VCLT that contemplates the emergence of new jus cogens norms in the future, and not by article 53. Article 64 states that "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates". In my opinion, any extension of JCN must be covered by this article and not by article 53. This is because only JCN recognized by the International Community at the moment the VCLT entered into force, are governed by article 53[56]. This was clarified by the ILC in its comments to the Vienna Conference, considering there were particular concerns of states regarding the non-retroactive principle. As the ILC affirmed:

> The second matter is the non-retroactive character of the rule in the present article. The article has to be read in conjunction with article 61 [now article 64] (Emergence of a new rule of jus cogens), and in the view of the Commission, there is no question of the present article having retroactive effects. It concerns cases where a treaty is void at the time of its conclusion by reason of the fact

53. Oppenheim in Lori F. Damrosch, Louis Henkin, Sean D. Murphy and Hans Smit, supra note 25, at 107.

54. Vienna Convention on the Law of Treaties. 1155 U.N.T.S. 331, U.N. Doc. A/CONF.39/27, 8 I.L.M. 679 (1969), Article 31. General rule of interpretation. "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (…)".

55. It means "A change to something; and alteration", according to the Blacks Law Dictionary. Ninth Edition.

56. Michael Byers, Book Review, 101 Am. J. Int'l L. 913 (2007). "The Vienna Convention states that a treaty conflicting with a "peremptory norm of general international law (jus cogens')" is void, regardless of whether the norm came into existence before (Article 53) or after (Article 64) the treaty".

> that its provisions are in conflict with an already existing rule of jus cogens. The treaty is wholly void because its actual conclusion conflicts with a peremptory norm of general international law from which no States may derogate even by mutual consent. Article 61 [now 64], on the other hand, concerns cases where a treaty, valid when concluded, becomes void and terminates by reason of the subsequent establishment of a new rule of jus cogens with which its provisions are in conflict. The words "becomes void and terminates" make it quite clear, the Commission considered, that the emergence of a new rule of jus cogens is not to have retroactive effects on the validity of a treaty. The invalidity is to attach only as from the time of the establishment of the new rule of jus cogens. The non-retroactive character of the rules in articles 50 [now 53] and 61 [now 64] is further underlined in article 67, paragraph 2 of which provides in the most express manner that the termination of a treaty as a result of the emergence of a new rule of jus cogens is not to have retroactive effects.[57]

All in all, if modified cannot mean an exception or an extension to the norm, it must mean overruling. Now, although the risk of overruling a JCN exists in principle because the VCLT authorizes it, at least in the context of Human Rights Law, there is a responsibility of the International Community to prevent JCN from being overruled. Of course International Law is mutable, that is a fact. But structuring JCN as absolute prohibitions may prevent overruling from happening or at least from happening in an easy way.

If we require JCN to be structured as absolute prohibition rules we will prevent their overruling in the framework of article 53 of the VCLT. To illustrate my point, consider the following norm: No one shall be subject to torture. This norm is structured as an absolute prohibition rule. I will use an exercise in mathematical logic in order to explain my hypothesis:

No one shall be subject to torture - We can equate this norm as a universal quantification, as follows:

P = be tortured
x = human being
$\forall x \ \sim P$ For all x, not P

This equation can only be annulled by an existential quantification, as follows:

$\exists x \ P$ There is at least one x such that P is true.

Thus, an absolute prohibition rule cannot be replaced or overruled by another absolute prohibition rule. The only way to void such premise is by means of a concession or an exception. Therefore, if all JCN are structured as absolu-

57. ILC comments on VCLT. p. 80.

te prohibitions, then they will not be overruled. Why? Consider Article 53 replacing some terms with absolute prohibitions.

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

Certainly we will not be able to replace "No one shall be subject to torture" by "No one shall be subject to torture, except for . . .", because we will not be replacing the first norm by a second of the same character: the first one is an absolute prohibition, the second one is an exception to the rule. Then, if we require all JCN to be structured as absolute prohibition rules, it will be almost impossible to overrule them by another absolute prohibition rule, unless under article 53 of the VCLT. Although it is true that the International Community cannot prevent overruling in practice (even article 53 may be overruled by a subsequent convention), at least it is imperative to do the best efforts to prevent it. Only by structuring JCN as absolute prohibition rules, will this prevention be effective.

There are still two compelling counterarguments to be addressed. First, if only absolute prohibitions can be JCN, then the last phrase of article 53 regarding possible modifications of the rule does not have any effet util, because in practice there is not a chance to modify the rule. Second, you can restructure every right into an absolute prohibition, and the new norm can imply a proportionality test: for instance, one could say that "no one can be disproportionately deprived of life" may be an absolute prohibition JCN.

My response to the first counterargument is that in the context of Human Rights Law, general practice and jurisprudence have shown that the purpose is in fact that these norms should not be overruled. Then, as a matter of fact, in Human Rights Law lex specialis this last part of article 53 must be either interpreted in a way that prevents the overruling of the norm (by structuring JCN as absolute prohibition rules), or else just excluding from article 53 the possibility of modification in Human Rights Law lex specialis. I agree with Orakhelashvili in that Article 53 of the Vienna Convention requires "the community recognition of peremptory norms --as opposed to the norms requiring community recognition"[58]. I think this is really the rule that applies at least in Human Rights Law.

58. In Michael Byers, Book Review, 101 Am. J. Int'l L. 913, 913 (2007).

Consider examples such as the prohibition of torture, the prohibition of genocide or the prohibition of slavery. The last two were common examples in the Vienna Conference discussion[59] and have further developed in state practice and jurisprudence[60], the first one is a common example in today's national and international jurisprudence[61] and doctrine[62]. The International Community should take all possible measures to prevent such prohibitions from being overruled. Is it possible that current or future generations may consider that torture or genocide may be permitted in certain circumstances? Yes, unfortunately it is. But our responsibility is to take a stand on this issue: we do not want any generation to take this path and we must do everything we can to prevent it. As Waldron says JCN are precisely a "proof against the vagaries of consent that dominate treaty-based international law"[63]. This is partly the reason why this discussion is so important. We may say that today no nation will stand up and explicitly and openly say that torture must be permitted. Nonetheless, we cannot prevent them from applying justification processes, particularly proportionality tests. Structuring JCN in a way that may prevent overruling, seems necessary to strongly protect such superior rules.

The second counterargument is a difficult one to overcome. It is true that every principle, including those that may admit a proportionality test, may be restructured as an absolute prohibition, by simply adding the proportionality element within the rule. The only answer to this is that if we admit that the very reason for structuring rules as absolute prohibitions is to avoid any kind of proportionality test, then we must add a criterion that establishes that absolute prohibition rules that involve proportionality analysis in their structure must not be considered as JCN. This answer may seem difficult in theory, but in practice, I think courts will be able to identify which kind of absolute prohibition rules do not implicitly contain any proportionality test

59. See for example interventions of Lebanon, Chile, Finland, United States, Sierra Leone, Ghana, Poland, Uruguay, Cyprus in United Nations Conference on the Law of Treaties. Official Records, supra note 5.

60. See e.g. Advisory Opinion Reservations to the Genocide Convention, I.C.J. Reports (1951). Also Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), 11 July 1996, I.C.J. Rep. 1996 (II) (stating that principles of genocide are erga omnes). For differences between the concept of jus cogens and the concept of erga omnes see Juana Acosta; Ana María Duque, supra note 52.

61. See e.g. I/A Court H.R., Case of Maritza Urrutia v. Guatemala. Merits, Reparations and Costs. Judgment of November 27, 2003. Series C No. 103; I/A Court H.R., Case of the Gómez-Paquiyauri Brothers v. Peru. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C No. 110; I/A Court H.R., Case of Tibi v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004. Series C No. 114.

62. See, e.g., Gabriella Blum, The Laws of War and the 'Lesser Evil", 35 Yale J. Int'l L. 1, 12 (2010); Jeremy Waldron, Torture and Positive Law: Jurisprudence for the White House, 105 Colum. L. Rev. 1681, 31 (2005)

63. Jeremy Waldron, Torture and Positive Law: Jurisprudence for the White House, 105 Colum. L. Rev. 1681, 16 (2005).

within their structure. So, while "no one shall be subject to torture" or "no one shall be subject to forcefully disappearances" must be considered as JCN; "no one shall be subject to any disproportionate ill treatment" or "no one shall be subject to any disproportionate deprivation of liberty" shall not be considered as JCN. The latter does not mean that those rules are not part of customary international law.

Is there room for new JCN under my hypothesis? Certainly there is. New absolute prohibitions may arise with time. For example, it is possible that future generations may consider that we cannot under any circumstances kill an animal. Certainly that is not a jus cogens prohibition now, but might be in the future. What we on the other hand cannot permit, is to overrule what evolution of standards of humanity has led us to recognize as jus cogens prohibitions today. Of course, as Jiménez de Aréchaga has affirmed, "the substantive contents of jus cogens are likely to be constantly changing in accordance with the progress and development of international law and international morality"[64]. For example, the meanings of torture or cruelty may broaden with time. Thus, the International Community should recognize new jus cogens prohibitions, or allow broader interpretations ofexisting ones, but we must not narrow jus cogens prohibitions or their interpretations.

It is interesting to notice how states in the Vienna Conference were concerned not to make International Law immutable. I think we should worry about the fact that it is mutable, at least in some respects. Future generations will always find a way to change things. What is important is limiting that flexibility in International Law when historical events have taught us that egregious things might be done by Governments. If article 53 was intended to prevent genocide from ever happening again in the future, it would be surprising for the prohibition to be left open for discussion by the International Community again.

Now there is a final concern: if JCN are structured in a way that overruling will be almost impossible, at least under article 53 of the VCLT, this theory can be subject to abuse by the International Community. There is risk that other norms becoming structured as absolute prohibitions, and affirmed as JCN, simply according to state preferences. While I think this risk is real, I believe that the danger posed by trivializing JCN greatly outweighs the benefits of allowing a more flexible structure. Moreover, it is unlikely that the International Community will extend absolute prohibitions, because it implies more limits than benefits to states. Also, this is a question that must be analyzed jointly with the problem of who decides which norms constitute JCN: although we might argue which courts have jurisdiction to decide it,

64. In Lori F. Damrosch, Louis Henkin, Sean D. Murphy and Hans Smit, supra note 25, at 109.

it is clear that this determination will always be subject to judicial scrutiny. Thus, the possibilities for abuse will be controlled by the courts.

IV. CONCLUSION AND PROPOSAL

As I have sustained in previous work[65], the trivialization of JCN poses several dangers. The trivialization of the concept may danger not only its essence, but also its effectiveness and even its independent existence, disjointedly from other Human Rights norms. This trivialization has even led some to believe that jus cogens is an unnecessary concept[66]. As Dinah Shelton has affirmed, "concerns about jus cogens's uncertain basis and uneasy coexistence with state sovereignty have diminished the concept's influence in transnational dispute resolution"[67]. Also, as Bianchi affirms:

> At a time when many uncertainties remain as to who will identify the fundamental values [of the international community] and by what process, any excess in characterizing rules as peremptory ones, without carefully considering whether or not such characterization is shared by the international community, risks undermining the credibility of jus cogens as a legal category, distinct from natural law and apt to perform important systemic functions.[68]

At the Vienna Conference, Jimenez de Aréchaga, representative of Uruguay, affirmed that "care must be taken not to exaggerate [jus cogens] scope, either in a positive direction, by making of it a mystique that would breathe fresh life into International Law, or in a negative direction, by seeing in it an element of the destruction of treaties and of anarchy"[69].

As I have stated, at least some important consequences arise from considering JCN only as absolute prohibitions. First, JCN will not be subject to any kind of proportionality test. It is possible, for example, that a Government may show that it has a legitimate purpose for torturing someone. Even if the Government can demonstrate that torture is the only way to reach that legitimate purpose and may not be disproportionate to obtain the result, it ought never to be permitted. The consequence will be similar to the treatment of human dignity in Germany, where the "principle of proportionality does not come into play as long as an intrusion upon human dignity has been established"[70].

65. See, Juana Acosta and Ana Duque, supra note 52, at 13-34

66. Dinah Shelton, Normative Hierarchy in International Law, 100 A.J.I.L. 291, 297 (2006).

67. In Evan J. Criddle & Evan Fox-Decent, A Fiduciary Theory of Jus Cogens, 34 Yale J. Int'l L. 331, 346 (2009).

68. Andrea Bianchi, supra note 11, at 507.

69. In United Nations Conference on the Law of Treaties. Official Records, supra note 5, at 303.

70. Cristopher McCrudden, Human Dignity and Judicial Interpretation of Human Rights.

Second, as we reduce the scope of JCN, we may apply other consequences without fear. A.A Cançado has proposed for example, aggravated responsibility and stronger remedies (even punitive damages or stronger satisfaction remedies).

Of course there is always the possibility of further interpretations. Indeed, "a pluralist world will always have differences in interpreting and applying international human rights law, even when it comes to 'non-derogable' rights", and "no matter how hard one tries, it appears to be difficult to avoid subjectivity in articulating universal rights"[71]. For example, one might conceive an absolute prohibition against torture, but there is always the possibility of interpreting what torture means. This is indeed a problem. However, we should prevent as much as possible states getting around JCN prohibition by means of interpretation. If we consider JCN as absolute prohibitions at least some helpful standards will prevent that from happening: first, as Ghana stated in the Vienna Conference, interpretations may vary, but the nature of violations will normally be obvious[72]; second, a government or official will have to prove why the conduct is not torture; third, once we have defined that torture was committed, then there will be no possibility for further arguments. Moreover, once tribunals have defined that some conducts are torture[73], then a tribunal must only look at whether the facts were true or not. If they were, then there is no discussion left. There has been a violation, and a gross one, to Human Rights Law.

JACQUES MARITIAN for example advised that:

> "[I]n order to get agreement on any international declaration of human rights, those negotiating it should concentrate on what particular practices they could agree were necessary or should be prohibited. They should agree, for example, that torture should be prohibited but should put to one side any consideration of why torture was wrong. To go further than simply agree on the prohibition of the practice was to court interminable delays and ultimate failure"[74]

EJIL 19, 655, 699 (2008) (citing Klein).

71. BALAKRISHNAN RAJAGOPAL, The Allure of Normativity, 11 Harv. Hum Rts. J. 363, 369 (1998) (reviewing Philip Alston, Human Rights Law (1996))

72. In United Nations Conference on the Law of Treaties. Official Records, supra note 5, at 301.

73. For several examples of what constitute torture in international human rights jurisprudence see ROBERT K. GOLDMAN, Trivializing Torture: The Office of Legal Counsel's 2002 Opinion Letter and International Law Against Torture, 12 Hum. Rts. Brief 1, 3 (2004).

74. In CRISTOPHER MCCRUDDEN, Human Dignity and Judicial Interpretation of Human Rights. EJIL 19, 655, 678 (2008) (making reference to human dignity as representing a set of values and worldview).

In other words an agreement exists "where individuals can agree on a specific result, even if they do not agree on all the aspects of the specific theory justifying that result"[75].

My proposal is the following: the ILC must endeavor a new project to propose the criteria for identifying which norms are JCN in the context of Human Rights Law[76]. One reasonable and necessary criterion could be that JCN must be structured as absolute prohibition rules. One of the reasons why the Vienna Conference decided not to codify criteria for JCN was precisely that they were codifying another issue area at the time (law of treaties)[77]. Other reasonable criteria for identifying JCN will be developed in further research work and should also be developed by the ILC. For now it is important to say that developing criteria to identify JCN is a vital project for the International Community. In the only case that the International Court of Justice explicitly recognized the existence of a jus cogens norm in the field of Human Rights Law (the prohibition of genocide[78]), the Court "did not offer any reference, evidence or analysis that might help to establish criteria for identifying other peremptory norms or the consequences of such a characterization"[79]. In fact, "the lack of determinate criteria for specifying peremptory norms has undermined jus cogens real-world impact"[80]. In the Vienna Conference, various states affirmed the need to identify criteria[81].

75. Cristopher McCrudden, Human Dignity and Judicial Interpretation of Human Rights. EJIL 19, 655, 678 (2008) (citing Sunstein, although MacCrudden does not agree with this view).

76. "While the ICJ recently endorsed the jus cogens concept for the first time in its 2006 Judgment on Preliminary Objections in Armed Activities on the Territory of the Congo (Congo v. Rwanda), it declined to clarify jus cogens's legal status or to specify any criteria for identifying peremptory norms . . . Similarly, the European Court of Human Rights has addressed jus cogens only once, in Al-Adsani v. United Kingdom, when it famously rejected the argument that jus cogens violations would deprive a state of sovereign immunity. Neither the U.N. Tribunal on the Law of the Sea nor the international claims tribunals for Iran or Iraq have ever mentioned jus cogens. In short, while the jus cogens concept has achieved widespread acceptance across the international community, its unsettled theoretical foundation has impeded its implementation and development. For jus cogens to achieve full legal standing, it will need to be reframed in a way that both illuminates its normative basis and explains its relationship to state sovereignty". Evan J. Criddle & Evan Fox-Decent, A Fiduciary Theory of Jus Cogens, 34 Yale J. Int'l L. 331, 347 (2009)

77. See for example intervention of the Bielorussian Soviet Socialist in United Nations Conference on the Law of Treaties. Official Records, supra note 5, at 307.

78. See ICJ Armed Activities on the Territory of Congo (Democratic Republic of Congo v. Ruanda) I.C.J., 1999. Application 23, Par. 64.

79. Shelton in Lori F. Damrosch, Louis Henkin, Sean D. Murphy and Hans Smit, supra note 25, at 110.

80. Evan J. Criddle & Evan Fox-Decent, A Fiduciary Theory of Jus Cogens, 34 Yale J. Int'l L. 331, 333 (2009)

81. See interventions of Uruguay, Turkey, Madagascar, Colombia, United Kingdom, and Cyprus. See specially France, only negative vote. In United Nations Conference on the Law of Treaties. Official Records, supra note 5.

Thus, the International Community – in this case through the ILC – must concretize the concept, if we really want it to survive.

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