Regional *Jus Cogens*: Conceptual Difficulties and Practical Challenges

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Abstract

A regional value-based homogeny could lead to the formation of a regional public order constituted by certain non-derogable absolute norms called "regional *jus cogens*". However, due to the absence of any footing in positive international law and scarcity of state practice, only an extremely subjective approach could determine the defining criteria for regional peremptory and its legal consequences. Furthermore, the concept of regional *jus cogens* conflicts with an essential element of *jus cogens* paradigm i.e., universality. On a practical level, regional peremptory norms could adversely affect trans-regional legal relations. However, this article argues that under positive international law (particularly regional human rights conventions), there exists special non-derogable norms (such as the prohibition of death penalty in European regime of human rights) which are capable of performing functions assigned to regional *jus cogens* while benefiting from a more cohesive conceptual status and entailing more plausible practical consequences. In particular, as special non-derogable norms are firmly grounded in positive international law and state practice, determining their defining criteria and legal consequences would be more objective. Furthermore, they do not entail any major disruptive impact on transregional legal relations as special non-derogable norms conceptually depart from *jus cogens* paradigm preventing any conflict between *lex specialis* nature of these norms and universality of peremptory norms of general international law.

Keywords: regional jus cogens, peremptory norms, non-derogable norms, human rights, lex specialis.

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Introduction

Jus cogens is one of the most significant and pervasive concepts of international law. Since its emergence in positive international law[1] under the Vienna Convention on Law of Treaties[2] ("VCLT"), *jus cogens* has had a major and fundamental impact on the normative order of international law; it has gone beyond its scope under the VCLT and has spread into other areas of international law.[3] Furthermore, it has contributed to the emergence of new concepts previously unconceivable under international law. One of these concepts is known as "regional *jus cogens*" or "regional peremptory norms".

There may exists common fundamental values among a number of nation-states located within a specific geographical region. Such common values could create some sort of homogeny among these nation-states which could be referred to as "Regional Value-based Homogeny" or in short "Regional Homogeny". According to the proponents of regional *jus cogens*, any Regional Homogeny could be reflected in moral and legal norms within the geographical region in question, and could also establish a public order that sets mandatory rules for all subjects within the said region.[4] Under this order (like any other order), certain values (and therefore norms reflecting them)

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1. Positive international law is "… that part of law which is laid down by the tacit and expressed consent of the different states". Robert AGO, "Positive Law and International Law" (1957) American Journal of International Law (AJIL), Vol. 51, p 693.

2. Vienna Convention on Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980) [VCLT].

3. Robert KOLB, "The Formal Source of *Jus cogens* in Public International Law" (1998) *Zeitschrift für öffentliches Recht*, Vol. 53, p 101.

4. Reza HASMATH, "Utility of Regional Peremptory Norms in International Affairs", Paper Presented American Political Science Association Annual Meeting, Occasional Paper, 30 August 2012, pp 5-6.

would achieve a higher position and significance dictating absolute compliance in all circumstances; needless to say, any breach of these higher norms would entail more severe and serious consequences. Those norms positioned at the top of the normative hierarchy of any regional public order would achieve non-derogable status in respect of nation-states within a specific region.

According to the proponents of the concept of regional *jus cogens*, these regional non-derogable norms would fall within the scope of *jus cogens* and thus could be called "regional *jus cogens*".[5] They further add that the European human rights system[6] and jurisprudence of the Inter-American Court of Human Rights ("IACtHR") include various examples of regional peremptory norms which are binding on the states respectively within Europe and Central and South America.[7] The concept of regional *jus cogens* could be identified as a type of regionalism under which a legal norm would achieve regional validity binding only states located therein.[8] Accordingly, at first glance, regional *jus cogens* has clear geographical connotations.

This article examines the concept of regional *jus cogens* in an effort to identify its defining criteria, legal consequences, correlation with *jus cogens* paradigm and more importantly, its conceptual difficulties and practical challenges. In particular, this article argues that regional

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[5]. For a list of proponents of regional *jus cogens* see Kolb, supra note 3, p 98.

[6]. Alain PELLET, "Comments in Response to Christine Chinkin and in Defense of *Jus cogens* as the Best Bastion against the Excesses of Fragmentation" (2006) Finnish Yearbook of International Law, Vol. 17, p 89.

[7]. Diana CONTRERAS-GARDUNO, Ignacio ALVAREZ RIO, "A Barren Effort? The Jurisprudence of the Inter-American Court of Human Rights on *Jus Cogens*' in Yves HAECK *et al*, eds., The Realization of Human Rights: When Theory Meets Practice: Studies in Honor of Leo Zwaak (Cambridge: Intersentia (2013) 113-131, pp 122-24.

[8]. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission (ILC), finalized by Martti KOSKENNIEMI, UN Doc. A/CN.4/L/682 (2006), p 108, para. 211 [ILC Study Group Report].

peremptory norms suffer from certain conceptual difficulties and entail certain practical challenges. To be more precise, the concept of regional *jus cogens* has not been reflected in positive international law and, as a result, it would be extremely difficult to identify its defining criteria and legal consequences. Furthermore, this concept is in contrast with the universality of *jus cogens* under VCLT Article 53 and thus could disrupt legal relations between regional states and third states and international organizations that are not bound by regional peremptory norms.

Also, regional *jus cogens* could turn into a vehicle for reflecting and imposing ideological aspirations. This would challenge our perception of region as a geographical concept since ideologies could go well beyond geographical boundaries creating political regions based on shared political ideologies/alliances, while, at the same time, adding further difficulties in determining scope of application of regional peremptory norms.

In addition, this article argues that positive international law, particularly regional human rights treaties, include a legal fact potentially capable of replacing regional *jus cogens*. This legal fact is special non-derogable norms that are capable of performing functions assigned to regional peremptory norms while benefiting from a more cohesive conceptual status and entailing more plausible practical consequences. In light of the foregoing, this article will discuss special non-derogable norms as a potential normative alternative to regional *jus cogens*.

Section II explores the concept of regional *jus cogens* in order to obtain an overview of its identification criteria and essential characteristics while also making a parallel pathological assessment to identify any conceptual difficulty arising from such criteria and characteristics. In particular, in this section, it is argued that the concept of regional *jus cogens* would need to be considered as a

breakaway from overall *jus cogens* paradigm. Section III discusses legal consequences of regional *jus cogens* for legal relations among states and international organization and whether they are bound by a regional *jus cogens*. Ultimately, section IV examines the concept of special non-derogable norm, its origins, implications and, more importantly, its conceptual and practical advantages over regional *jus cogens*.

I. A Conceptual Breakaway From Jus Cogens Paradigm

a) Difficulties Pertaining to Identification of Regional Jus Cogens

It would be extremely difficult to identify or define the main criteria for regional *jus cogens*, because positive international law and state practice lack any serious reference thereto. Furthermore, this concept has not been mentioned in any judgment or advisory opinion rendered by the International Court of Justice ("ICJ").

Therefore, two different approaches could be considered for the identification of regional *jus cogens*; under the first approach, regional *jus cogens* are regarded as a concept fully independent of *jus cogens* under the VCLT ("VCLT-Independent Approach"). However, under the second approach, regional *jus cogens* are known as a concept originated from *jus cogens* under the VCLT which should be studied in its light taking into account any relevant jurisprudence and doctrine ("VCLT-Centric Approach").

1. VCLT-Independent Approach

It would be difficult to take the VCLT-Independent Approach since regional *jus cogens* has not been included in positive international law, ICJ's jurisprudence and state practice. In any case, this approach would be the choice of those who consider regional *jus cogens* as a

distinct and independent concept in terms of its origins and purposes.[9] Under this Approach, there could only be two identification criteria i.e., non-derogability and geographical scope of application; the former being the heart of the notion of *jus cogens*[10] while the latter being a factor distinguishing regional *jus cogens* from peremptory norms of general international law.

The VCLT-Independent Approach is compatible with Kolb's approach to regional *jus conges;* in his opinion, Article 53 of the VCLT merely corresponds to peremptory norms of general international law while regional *jus cogens* falls outside its scope. "Consequently, no negative assertion [rejecting the notion of regional *jus cogens*] follows from the wording of Article 53".[11] In general, Kolb believes in possibility of a regional public order of relative nature (*ratione personae*) under which states located within a specific region can bind themselves to a special non-derogable public order while it would be of no concern vis-à-vis third states.[12]

Furthermore, the VCLT-Independent Approach is also analogous to the methodology of legal idealism concerning identification and establishment of peremptory norms. Idealists believe that peremptory status of a given norm originates from certain values and ideals under international law, thus the process for identification of peremptoriness of a norm should be carried out independent of the provisions of VCLT Article 53.[13] It thus seems that, at least, some idealists are of the opinion that where peremptoriness of a given norm deems

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[9]. Cezary MIK, "*Jus cogens* in Contemporary International Law" (2013) Polish Yearbook of International Law, Vol. 33, p 38.
[10]. Dire TLADI, First Report on Jus Cogens, UN Doc. A/CN.4/693 (2016), p 38, para. 63.
[11]. Kolb, supra note 3, p 100.
[12]. Ibid., p 101.
[13]. Ulf LINDERFALK, "Understanding the *Jus Cogens* Debate: The Pervasive Influence of Legal Positivism and Legal Idealism" (2015) Netherland Yearbook of International Law, Vol. 46, pp 58-9.

necessary in order to maintain regional public order or realize a regional ideal, regional *jus cogens* would be admissible.[14] Hence, pursuant to application of the VCLT-Independent Approach, regional *jus cogens* could be defined as a non-derogable norm that binds states within a specific region to absolute compliance.

2. VCLT-Centric Approach

The VCLT-Centric Approach is obviously grounded in Article 53 of the VCLT. At first glance, this Approach has a relative advantage over the VCLT-Independent Approach since it considers regional *jus cogens* to be a concept originated from *jus cogens* which would sanction use of existing literature regarding *jus cogens* for the purpose of coming up with certain identification criteria.

It should be made clear at the outset that providing an accurate definition of *jus cogens* under international law has been a controversial and tough task. In other words, "[w]hile the idea of *jus cogens* as part of international law, that is, *lex lata*, is not seriously questioned,[15] the criteria for its identification and its content have been the subject of disagreement".[16] Nevertheless, "[a] formal, procedural definition of the international law concept of the *jus cogens* is found in the Vienna Convention on the Law of Treaties".[17]

In accordance with VCLT Article 53:

"[f]or the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international

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[14]. Ibid., p 72.
[15]. Pavel ŠTURMA, "Human Rights as an Example of Peremptory Norms of General International Law" in Pavel ŠTURMA and Narcisco LEANDRO XAVIER BAEZ, eds., International and Internal Mechanisms of Fundamental Rights Effectiveness (Bayern: 2015), p 12, in Tladi, supra note 10, p 23 para. 42.
[16]. Ibid.
[17]. Hilary CHARLESWORTH, Christine CHINKIN, "The Gender of Cogens" (1993) Human Rights Quarterly, Vol. 15, p 63.

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".[18]

The International Law Commission ("ILC") has provided the same definition (except for deletion of "for the purposes of the present Convention") when drawing one of its conclusions under the study of *jus cogens*.[19] Relying on VCLT Article 53 is compatible with the methodology of legal positivism with respect to *jus cogens* according to which peremptoriness should be determined in accordance with the provisions of said Article.[20]

In light of the above, the identification criteria of *jus cogens* are defined as (1) universality, (2) non-derogability, (3) acceptance and recognition by the international community of states as a whole, and (4) modifiability by a norm complying with all three previous criteria. Obviously, not all these criteria could be applied to regional *jus cogens*; thus certain choices would need to be made in respect thereof.

3. Dominance of Subjectivity and Arbitrariness

In order to provide certain identification criteria on regional *jus cogens*, it would be necessary to select either of the two approaches and there arises the first fundamental problem; what should be the underlying factors for such selection? Any response to the aforesaid query would be highly subjective and depend on the overall attitude of the international lawyer making the choice.

In this regard, according to Linderfalk, the entire *jus cogens* debate depends on whether lawyers take the position of a legal positivist or a

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[18]. VCLT, supra note 2, Art. 53.
[19]. Report of the International Law Commission, Peremptory Norms of General International Law (*Jus Cogens*), UN Doc. A/74/10**,** **(**2019), p 142, para. 56 [ILC 2019 Report].
[20]. Linderfalk, supra note 13, p 56.

legal idealist.[21] In the same line, it would be possible to state that the choice between either approaches would depend on one's inclination toward legal positivism or idealism. In other words, an idealist lawyer would in principle be inclined to the VCLT-Independent Approach, whereas a positive lawyer would in principle be inclined to the VCLT-Centric Approach. The foregoing creates a major challenge when ascertaining the identification criteria of regional *jus cogens.*

Nevertheless, it would be necessary to identify deficiencies of both approaches. The main deficiency of the VCLT-Independent Approach is that it cannot be corroborated by any positive source of international law. In other words, this Approach is entirely doctrinal and extremely prone to subjectivity and arbitrariness.

In contrast, the VCLT-Centric Approach is firmly grounded in positive international law (e.g., VCLT). No one could doubt that VCLT includes certain criteria even though there are many controversies and discussions regarding their sufficiency and accuracy (which are not subject of this article).[22] However, even the VCLT-Centric Approach would entail problems of its own; if Article 53 of the VCLT is to be applied in its entirety, regional *jus cogens* would be born dead as a result of the application of the universality criterion. This would mean that the only way to rely on VCLT Article 53 is to ignore its entirety and cherry-pick appropriate criteria which would in essence be a selective extraction.

If a selective extraction of certain criteria from Article 53 is accepted, universality would be the first criterion to be set aside as regional *jus cogens* by definition falls within *lex specialis*.

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[21]. Ibid.

[22]. See: e.g., Ulf LINDERFALK, "The Source of *Jus Cogens* Obligations – How Legal Positivism Copes with Peremptory International Law," (2013) Nordic Journal of International Law, Vol. 82, p 370; James A. GREEN, "Questioning the Peremptory Status of the Prohibition of the Use of Force" (2011) Michigan Journal of International Law, Vol. 32, p 219; Anthony D'AMATO, "It's a Bird, It's a Plane, It's *Jus Cogens*" (1990) Connecticut Journal of International Law, Vol. 6, p 4.

Necessarily, non derogability, as the heart of the notion of *jus cogens*, would need to be maintained. Modifiability is not of relevance for the purpose of providing certain identification criteria as it does not add anything of substantive defining character. It would only indicate that any regional *jus cogens* can be modified only by a subsequent norm of regional law having the same characters (whatever they are).

However, in connection with acceptance and recognition by the international community of states as a whole, there exists two options; the first option is to set aside this criterion in light of its obvious link to universality since any such acceptance and recognition represent a global general agreement on peremptory character of a given norm.

The second option is to apply "acceptance and recognition by the international community of states as a whole" *mutatis mutandis*; this would mean that, for the purpose of identification of a regional *jus cogens*, it should be read as "acceptance and recognition by states located within a given region". According to the ILC, the international community of states as a whole means "a very large majority of states".[23] Thus, in respect of regional *jus cogens*, acceptance and recognition of a very large majority of the states located within the relevant region would be required.

However, it is not clear:

> …why an individual State, in a region, perhaps a region hostile to that State, has to be bound, to the absolute extent that *jus cogens* norms bind States, to a norm that is not universal *jus cogens* and to which it has not consented (or if it has consented, has not consented to its peremptory status with the all attendant consequences).[24]

[23]. ILC 2019 Report, supra note 19, para 56.
[24]. Dire TLADI, Fourth Report on Peremptory Norms of General International Law (*Jus Cogens*), UN Doc. A/CN.4/727, (2019), p 14, para. 28.

In other words, opposition to a regional *jus cogens* by one or several states precisely represents the absence of the Regional Homogeny with respect to the norm in question and its underlying value(s).

Furthermore, if acceptance and recognition of all the states located within the region is required for the purpose of identification of a regional *jus cogens*, it would be a manipulative and arbitrary interpretation of the meaning ascribed to the international community of states as a whole by the ILC,[25] though such general consent with respect to a regional *jus cogens* would be more plausible for regional peremptoriness purposes.

The above analysis reveals that the first conceptual difficulty concerns the creation (or formation) of a regional *jus cogens*.[26] In other words, it is not clear under what criteria a regional norm can achieve peremptory status, and any effort to come up with such criteria would either be extremely subjective and unfounded in positive international law (VCLT-Independent Approach) or would be based on a manipulative and arbitrary interpretation of the positive sources of international law (VCLT-Centric Approach). Thus, "[t]he criteria used for identification of such norms are not clear". [27]

(b) *Difficulties Arising from Regional Scope of Applicability*

The applicability scope of a regional *jus cogens* is considered a specific geographical area. Regional *jus cogens* establishes a regional public order reflecting values and ideals of the nation-states located therein. The regional characteristic of regional *jus cogens* can be discussed from two points of view; the first corresponds to the feasibility of determining boundaries of a region governed by a given

[25]. ILC 2019 Report, supra note 19, para 56.
[26]. Tladi, supra note 24, p 14, para 28.
[27]. Mik, supra note 9, p 38.

regional *jus cogens* which would lead to identification of the states subject thereto. The second relates to its conflict with the universality of *jus cogens* paradigm.

1. Boundary Determination Difficulty

In general, the notion of *jus cogens* presupposes the existence of an international public order. It is believed that "[t]he notion of *jus cogens* as a new factor in international law, potentially suggestive of an underlying constitutional order…".[28] The constitutive element of any such "minimum world legal order", a term coined by Pellet,[29] is *jus cogens*.

A similar position has also been taken with respect to regional *jus cogens*; for example, Kolb points out that "…there is today in Europe, insofar as the democratic principle, human rights or other like matters a wider vision of public order and thus of imperative law than on the larger scale". [30] He further adds that "…how unacceptable it would be to negate the value of such regional orders on the basis of dogmatic analyses, and how this would weaken the notion of public order at any level, be it regional or universal".[31] In a similar statement, Pellet states that "…there is a European system of peremptory human rights which is certainly more elaborate and more demanding than the very loose network of '*cogens*' human rights at the world level...".[32]

Any regional public order should naturally have a geographical regional scope of applicability. For example, when Kolb or Pellet mention Europe, they should be able to identify a single well-defined geographical region. If said geographical regional scope is identified,

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[28]. Paul B. STEPHAN, "The Political Economy of Jus Cogens,, (2011) Vanderbilt Journal of Transnational Law, Vol. 44, p 1089.
[29]. Pellet, supra note 6, p 90.
[30]. Kolb, supra note 3, p 102.
[31]. Ibid.
[32]. Pellet, supra note 6, p 89.

states bound by the relevant regional *jus cogens* could also be identified. As Europe has been recognized as the perfect example of a region governed by regional peremptory norms, it is necessary to identify the scope of applicability of the European public order established by such regional peremptory norms. In this regard, human rights, as an area of international law with highest number of peremptory norms, is chosen for the purpose of identification of the regional public order of Europe at least in terms of human rights.

The European Convention for the Protection of Human Rights and Fundamental Freedoms[33] ("European Convention on Human Rights" or "ECHR") has 47 parties and its scope of applicability commences in Greenland and extends to the eastern borders of Russia in the Pacific Ocean.[34] The ECHR and its subsequent protocols include certain European human right-related peremptory norms that should be applicable to the entire region under the ECHR and its protocols. Nevertheless, the following facts would adversely affect such a conclusion regarding the scope of applicability of any European *jus cogens*:

1. Large parts of regions under the ECHR are located in Asia (Armenia, Azerbaijan, Georgia and Asian parts of Russia,) and North America (Greenland). Therefore, any European peremptory norm under the European human rights regime would apply beyond Europe's geographical borders.
2. The Republic of Belorussia and Republic of Kosovo are not parties to the ECHR.[35] Therefore, no treaty-based norm under

33. European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 005 (entered into force 3 September 1953) [ECHR].

34. Council of Europe Website, "Chart of Signatures and Ratifications of ECHR" (19 February 2021), Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=AI3IwPru; Council of Europe Website, "ECHR Member List" (19 February 2021), Available at: https://www.coe.int/en/web/portal/47-members-states.

35. Ibid.

the European human rights regime (and peremptory norm thereunder) would be binding for these two Republics.

3. The Protocol No. 13 to the ECHR concerning the Abolition of the Death Penalty in All Circumstances ("Protocol No. 13")[36] has not been signed by the Russian Federation and Republic of Azerbaijan and has not been ratified by Armenia.[37] Therefore, the prohibition on capital punishment, as a perfect candidate for a regional *jus cogens*, would not apply to these states.[38]

In light of the above, if we assume that the European human rights regime is mainly originated from the ECHR and its subsequent protocols, we would need to deal with the complications arising from the above paragraphs (b) and (c) above. The boundaries of the European public order and applicability scope of any regional peremptory thereunder would depend on and, for the most part, require the agreement on the part of the states for the particular purpose.[39] In particular, Belorussia and Kosovo, by refusing to accede to the European human rights regime and Russia, Azerbaijan and Armenia, by refraining from accession to an element of the same regime, have in fact challenged the notion of a fundamental regional public order established by certain trans-consensual regional peremptory norms and have vetoed the same, at least, with respect to themselves. In other words, (1) Belorussia and Kosovo are within

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[36]. Protocol No. 13 to the ECHR concerning the Abolition of the Death Penalty in All Circumstances, 3 May 2002, ETS 187 (entered into force 1 July 2003) [Protocol No. 13].

[37]. Council of Europe Website, "Chart of Signatures and Ratifications of Protocol No. 13 to ECHR" (19 February 2021), Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/signatures?p_auth=AI3IwPru.

[38]. Another examples of such selective acceptance of a (possibly) regional peremptory norm is provided under section IV.A.1 in respect of the Protocol No. 7 to the ECHR.

[39]. Tladi, supra note 24, para 29.

Europe's geographical regional boundaries but outside of its legal order in terms of human rights under the ECHR, and (2) Russia, Azerbaijan and Armenia have accepted Europe's general legal order in terms of human rights under the ECHR but have refused to accept one of its most fundamental non-derogable norms i.e. prohibition of death penalty, placing them outside the scope of applicability of said non-derogable norm. This is admittedly confusing because when it comes to the general framework of ECHR, Russia, Azerbaijan and Armenia are within Europe's regional legal order but, when it comes to the prohibition of death penalty (the perfect example of a regional *jus cogens*, if not the only one), these countries are outside of said legal order. These facts challenge the feasibility of a single unified geographical region under Europe's legal order in terms of human rights.

Furthermore, it would appear that unlike *jus cogens*, states are entitled to prevent the applicability of regional peremptory norms. As a result, a regional peremptory norm could be applicable to, and binding for, certain states within the region. This means that the geographical boundaries of the European regional public order and any *jus cogens* thereunder could change on a case-by-case basis. In other words, the regional *jus cogens* "A" could be applicable to all 47 members of the ECHR while the regional *jus cogens* "B" (for example, the prohibition on the death penalty) could be applicable to a smaller number of the states simply because certain states have not consented thereto. In light of the foregoing, it would be difficult to determine the boundaries of the European regional public order since any regional *jus cogens* thereunder may be rejected by any number of states that would undermine and threaten the very existence of such order.

It thus appears that regional *jus cogens* suffers from the difficulty of determining the boundaries of its overlord regional public order. While the "[u]niversal application is easily defined as all States,

regional *jus cogens*, as a matter of law, is, however, indeterminate".[40] Borders of any region under a regional public order is dynamic as it differs depending on the peremptory norm in question. Thus, it would be impossible to envision a single stable well-defined geographical region and regional public order in which certain regional peremptory norms could be applied to all states therein. It should be noted that the difficulty of identifying the region and states within which has been a challenge under regionalism as well.[41]

2. Incompatibility with Universality of Jus Cogens Paradigm

Perhaps the most significant argument against the concept of regional *jus cogens* is its incompatibility with the universality of *jus cogens* paradigm. It is believed that a peremptory norm is by definition universal and a norm of general international law. According to the ILC, "[p]eremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable".[42]

Certain ILC members referring to the practice of the Inter-American Commission on Human Rights and the European human right regime, stated that the notion of regional *jus cogens* should not *a priori* be rejected as "…there might be no reason, in principle, to limit the concept to rules of universal applicability".[43] Furthermore, as mentioned above, in Kolb's view, "[a]ssimilating universality and peremptoriness *a priori*, and deducing therefrom that a regional *juris*

[40]. Ibid.
[41]. ILC Study Group Report, supra note 8, p 109, para 212.
[42]. ILC 2019 Report, supra note 19, p 142, para. 56.
[43]. Jus Cogens, Report of the International Law Commission, UN Doc. A/71/10 (2016), p 302, para 120 [ILC 2016 Report].

cogent is norm cannot exist, is indeed begging the question".[44] Certain proponents of regional *jus cogens* while making a distinction between universality and peremptoriness, have implicitly subjected its emergence to the absence of any conflict with the values operating in a larger framework, e.g., globally.[45]

However, it should be noted that, as concluded by the ILC, peremptory norms of general international law are linked to the international community of states as a whole since they protect their fundamental values and interests while regional peremptory norms have a regional function. According to Orakhelashvili, "…the notion of regional *jus cogens* would not be compatible with the definition of *jus cogens* in article 53 of the 1969 Vienna Convention…"[46] Tomuschat also believes that "…*jus cogens* could never exist as a purely 'bilateral' norm since it derives its authority from the interest of the international community".[47] In addition, legal positivists reject the idea of regional *jus cogens* relying on the identification criteria laid in VCLT Article 53 (which categorizes *jus cogens* as general international law, and requires acceptance and recognition by the international community of States as a whole) and absence of state practice.[48] Moreover, certain members of the ILC have also casted doubt in regard to the possibility of regional peremptory norms in light of its contrast with universality of *jus cogens*.[49]

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[44]. Kolb, supra note 3, p 101.
[45]. Giorgio GAJA, "*Jus cogens* beyond the Vienna Convention" (1981), Collected Courses of the Hague Academy of International Law, Vol. 172, p 284, in Tladi, supra note 24, p 13 para. 24.
[46]. Alexander ORAKHELSHVILI, Peremptory Norms of General International Law (Oxford, New York: Oxford University Press, 2006), p 39, in Ibid., para. 27.
[47]. Christian TOMUSCHAT, "The Security Council and Jus Cogens" in Enzo CANNIZZARO, ed., The Present and Future of Jus Cogens (Roma: Sapienza University Editrice, 2015), p 28.
[48]. Linderfalk, supra note 13, p 70.
[49]. ILC 2016 Report, supra note 43, p 302 para 119.

In light of the above, the regional public order could not be grounded in a concept (*jus cogens*) that is by definition universal in accordance with positive international law, the ILC's literature and states practice (as detailed below). Thus:

"[*Jus cogens*] possesses huge power, but at the same time, very shaky foundations. By allowing for regional *jus cogens*, *jus cogens* as a whole loses a level of philosophical underpinning and appeal. Part of the attraction of *jus cogens* is that it is universal, this is also a core characteristic of the doctrine".[50]

3. States Opposition to Regional Jus Cogens

Another difficulty associated with regional *jus cogens* is that it does not find support in state practice.[51] Furthermore, those states that have provided their opinion with respect to regional *jus cogens*, have mainly rejected the possibility of such norms. The following statements made by the representatives of certain states in connection with regional *jus cogens* are of relevance and indeed significant:

1. Speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), Finland's delegation announced that "[as] to the Special Rapporteur's plans for future work on the topic, the Nordic countries … remained unconvinced about the possibility of reconciling regional *jus cogens* with the notion of *jus cogens* as peremptory norms of general international law".[52]
2. According to Thailand's delegation, "…acceptance of the existence of regional *jus cogens* norms would contradict and

[50]. Stefano CONGUI, "Jus Cogens: the History, Challenges and Hope of 'a Giant on Stilts" (2015) Plymouth Law and Criminal Justice Review, Vol. 7, p 56.
[51]. Tladi, supra note 24, pp 17-8, para 37.
[52]. Summary Records, Sixth Committee, UN Doc. A/C.6/73/SR.24 (2018), p 18, para. 126.

undermine the notion of *jus cogens* being norms "accepted and recognized by the international community as a whole". Regional *jus cogens* therefore would not be possible under international law."[53]

3. According to Portugal's delegation, "…the Commission must proceed with caution in its debate on the identification of regional *jus cogens*. The integrity of peremptory norms of general international law as norms that were universally recognizable and applicable should not be jeopardized".[54]
4. According to Greece's delegation:

"[t]he concept of so-called regional jus cogens ran contrary to the very notion of jus cogens, which was by definition universal. Peremptory norms of general international law reflected the fundamental values of the international community and, according to article 53 of the 1969 Vienna Convention, had been accepted and recognized by the international community of States as a whole".[55]

5. According to the delegation of South Africa:

"[t]he concept of regional jus cogens should not be entertained or considered, as it would undermine the supreme and universal nature of jus cogens norms as peremptory norms that should be equally applicable to all States, regardless of the region in which they were located".[56]

6. According to the statements made by the Malaysian delegation, in respect of regional *jus cogens*:

"…her delegation was of the view that it might not be consistent with the very concept of jus cogens norms, which implied acceptance and recognition

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[53]. Summary Records, Sixth Committee, UN Doc. A/C.6/73/SR.26 (2018), p 14, para. 96.
[54]. Ibid., p 17, para. 119.
[55]. Summary Records, Sixth Committee ,UN Doc. A/C.6/73/SR.27 (2018), p 3, para 9.
[56]. Ibid., p 8, para 46.

by the community of States as a whole. Regional jus cogens might also create confusion and should therefore be avoided".[57]

7. The United Kingdom's delegation declared that "…it was doubtful as to the utility of considering 'regional' *jus cogens*". In its view, the "concept of 'regional' *jus cogens* would undermine the integrity of universally applicable *jus cogens* norms".[58]
8. The United States delegation "… questioned the utility of considering regional *jus cogens* and agreed with other delegations that that concept appeared to be at variance with the view that *jus cogens* norms were accepted and recognized by the international community as a whole."[59]

In conclusion, it may be argued that in spite of its links to the *jus cogens* paradigm, the concept of regional *jus cogens* is a breakaway from the common understanding of *jus cogens* that is based on the VCLT, ILC's literature and states practice according to which universality is the essential element of *jus cogens* paradigm. Thus, any effort to define regional *jus cogens* and identify its characteristics would need to be made *outside* the common understanding of *jus cogens*, though such effort would not lead into any considerable success in light of the above-mentioned conceptual difficulties.

II. Undermining Efficacy Of Normative Order Of International Law

a) Absence of Positive Ground for Identification of Legal Consequences

[57]. Ibid., p 16, para 104.
[58]. Tladi, supra note 24, p 18, para 37.
[59]. Summary Records, Sixth Committee, UN Doc. A/C.6/73/SR.29 (2018), p 6, para 34.

Legal relations among the states bound by a regional *jus cogens* could be categorized into two groups. The first group is legal relations among the states and international organization located within the region ("Intra-Regional Relations"). The second group is legal relations between states/international organization within the region and states/international organization located outside the region which have no commitment or obligation under regional peremptory norms ("Transregional Relations").

1. Intra-Regional Relations: An Extension of VCLT's Provisions

In the context of the Intra-Regional Relations, regional peremptory norms are situated at the top of the normative hierarchy voiding any conflicting norm. However, at the beginning, it should be noted that there exists no positive source of international law that spells out legal consequences of regional peremptory norms in the context of the Intra-Regional Relations. Thus, the only way to identify its consequences is to fall back to the VCLT and its related literature.

By extending the provisions of VCLT Articles 53 and 64 to regional peremptory norms, we could argue that, in case of any conflict between a treaty-based norm governing the Intra-Regional Relations and a regional peremptory norm, the former would be void. In light of the VCLT, we would need to argue that, in case of any such conflict when a treaty is concluded, the entire treaty would be rendered void and no separation would be permissible.[60] Moreover, where a treaty conflicts with a newly-emerged regional peremptory norm, it would become null and void in whole, unless:

> (a) the provisions that are in conflict with a new regional peremptory norm are separable from the remainder of the treaty with regard to their application, (b) it appears from the treaty or is otherwise established that acceptance of the said provisions was not an essential basis of the consent of

[60]. VCLT, supra note 2, Art. 44.5.

any party to be bound by the treaty as a whole, and (c) continued performance of the remainder of the treaty would not be unjust.[61]

In addition, any reservation to "…a treaty provision that reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such".[62]

In respect of custom, it should be said that "A rule of customary international law does not come into existence if it conflicts with a regional peremptory norm" unless deemed a possible modification of the regional peremptory norm in question".[63] Furthermore, "[a] rule of customary international law not of a peremptory character ceases to exist if and to the extent that it conflicts with a regional new peremptory".[64]

But perhaps the most important issue concerns the impact of persistent objection on applicability of regional *jus cogens*. According to the ILC, "[t]he persistent objector rule does not apply to peremptory norms of general international law (*jus cogens*)".[65] This raises the question whether the persistent objector rule applies to regional peremptory norms. The response would appear to be in the affirmative; if any state, such as Russia and Azerbaijan, can prevent application of a regional non-derogable norm, such as prohibition of death penalty in all circumstances under the Protocol No. 13 (which is one of the most viable candidates of regional *jus cogens),* by not acceding to an agreement, e.g. the Protocol No. 13, why a persistent objector should not be able to prevent applicability of a regional peremptory norm? In other words, if states are entitled to willfully reject application of a perfect example of regional peremptory norms

[61]. ILC 2019 Report, supra note 19, p 144, para. 56.
[62]. Ibid.
[63]. Ibid., p 145, para 56.
[64]. Ibid.
[65]. Ibid.

by not acceding the Protocol No. 13, they should also be entitled to reject application of such norm through persistent objection.

In this regard, it is necessary to reiterate that:

> … why an individual State, in a region, perhaps a region hostile to that State, has to be bound, to the absolute extent that *jus cogens* norms bind States, to a norm that is not universal *jus cogens* and to which it has not consented (or if it has consented, has not consented to its peremptory status with the all attendant consequences).[66]

The impact of states' will on applicability of a regional *jus cogens* would challenge the idea of region wide applicability of regional peremptory norms.

Although it would be possible to include additional consequences of regional peremptory norms in light of those of peremptory norms of general international law, the foregoing would not make sense as extending the consequences of *jus cogens* to its regional offspring is unfounded and perhaps arbitrary[67] (especially, if one, like Kolb[68], believes that the VCLT only corresponds to peremptory norms of international law and has nothing to do with regional norms).

2. Disruption of Transregional Relations

One of the most important practical challenges arising from the application of regional peremptory norms is its adverse and disruptive impact on the Transregional Relations since any regional *jus cogens* would have implications for legal relations with states or international organizations beyond the relevant region. Thus, proponents of regional peremptory norms would need to provide solutions for the following scenarios.

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66. Tladi, supra note 24, p 14, para. 28.

67. The legal consequences mentioned herein, particularly the issue of persistent objection, are to demonstrate that the consent of all states within a region would be required for establishing peremptoriness of a regional norm that would demonstrate the breakaway from "a very large majority of states" threshold required for jus cogens.

68. Kolb, supra note 3, p 100.

First Scenario: In the event of any conflict between a regional *jus cogens* and a norm under a treaty binding on states within and outside the region, what should happen? Tladi responses:

> Yet, it is inconceivable to think that such treaties concluded with third States would also be void. It may, of course, be argued that a peculiar consequence of regional *jus cogens* is that it does not affect treaties concluded with States that are not members of the region. Yet, that would suggest that such norms do permit derogation and could thus not qualify as a peremptory norm in the manner we have thus far understood.[69]

In other words, if the treaty becomes void (even only in respect of the states bound by the relevant regional *jus cogens*), this would mean that a regional peremptory norm has gone beyond its region of applicability and affected third states. However, if the treaty is to remain in full force for all the parties thereto, this would mean that the relevant regional peremptory norm has been derogated by its subjects in the context of the Transregional Relations while it remains absolutely non-derogable in the context of the Intra-Regional Relations.

Second Scenario: In the event of any conflict between a regional *jus cogens* and a customary norm binding on states within and outside the region, again, the dilemma and problems mentioned under the First Scenario would rise.

Third Scenario: In the event of any conflict between a regional *jus cogens* and any binding obligation under the Charter of the United Nations ("Charter"), which one would prevail. If, for example, a binding decision of the United Nations Security Council ("UNSC") conflicts with a regional *jus cogens*, the states bound by both would have to either refrain from compliance with said UNSC decision in breach of Articles 25 and 103 of the Charter or to comply with it derogating and deviating from the regional *jus cogens* in question.[70]

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[69]. Tladi, supra note 24, p 17, para 34.
[70]. Ibid., p 17, para 36.

Ultimately, in light of the above, by application of regional peremptory norms, the Transregional Relations of regional states could reach an impasse as they would be in a position to make an impossible choice between two options both having unacceptable legal consequences.

b) Potentials for Emergence of Ideological Law

The international community consists of independent nation-states. All nation-states equally benefit from sovereignty and no nation-states is superior to others in terms of their sovereignty. These states do not answer any higher authority unless previously agreed thereto. Thus, the structure of international community is mostly horizontal, decentralized and relatively unorganized. As a result, no value system or ideology of any nation-state/s enjoy/s primacy over others and certainly no nation-state is permitted to impose or force its own way of life. Accordingly, international law is value-neutral, ideology-free and, in a sense, secular which would guarantee its impartiality and objectivity.[71]

However, since mid-twentieth century, human rights have affected this secular posture because many human rights-oriented values made their way into international law impacting it considerably in the following manners:

1. The "substantive impact" pursuant to which human rights norms emerged into the positive instruments of international law, including but not limited to *Universal Declaration of Human Rights*[72], *International Covenant on Civil and Political Rights*

71. See: e.g., Prosper WEIL, "Towards Relative Normativity in International Law" (1983) AJIL, Vol. 77, p 420; Paul GUGGENHEIM, "Traite De Droit International Public" (Genève: Librairie de l'Université, 2nd ed., 1967), p 41, in Ibid.
72. Universal Declaration of Human Rights, GA Res. 217A, UN Doc. A/810 (1948).

("ICCPR")[73], *International Covenant on Economic, Social and Cultural Rights*[74], ECHR *and American Convention on Human Rights*[75] ("ACHR"), under its classic normative order. Pursuant to the substantive impact, human rights, in the form of behavior-setting norms, binds states and other subjects of international law to comply with certain standards.

2. The "structural impact" of human rights affected and altered the very classic normative order of international law and contributed to emergence and development of concepts such as peremptory norms, *erga omnes* obligations, etc. Pursuant to the structural impact, the form, configuration and correlation among constituent elements of international law were profoundly altered. In this regard, *jus cogens*, among others, contributed to the emergence of a value-oriented hierarchy in international law gradually changing the value-free, neutral, horizontal structure of international community.[76] To put it another way, human rights were (and are) the driving force pushing the international community towards a more vertical and value-oriented structure. That is why it is not a coincidence that most, if not all, of the peremptory norms are human rights norms.

In this regard, Bianchi has stated:

By fostering a political and normative project, clearly at odds with the paradigms of the past, *jus cogens* has produced a moral force of unprecedented character. A less idealistic portrait would cause one to

73. International Covenant on Civil and Political Rights, 19 December 1966, 999 U.N.T.S 171, 6 I.L.M. 368 (entered into force 23 March 1976) [ICCPR].
74. International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S 3 (entered into force 3 January 1976) [ICESCR]. .
75. American Convention on Human Rights, 22 November 1969, 1144 U.N.T.S 17955 (entered into force 18 July 1978) [ACHR].
76. Teraya KOJI, "Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights" (2001) European Journal of International Law (EJIL), Vol. 12, p 936.

highlight *jus cogens'* ideologically charged connotations, the materialization of which has turned out to be much more difficult than expected. By imposing shared values and aspirations applicable to all on a global scale, it has also unleashed opposite forces aimed at fostering parochial interests.[77]

These shared values and aspirations are more or less of human rights nature, though:

> "[f]or many the idea of jus cogens along with international human rights standards seems to embody European values which poses a secondary problem. Perhaps these are values that are being foisted on other States without their consent - a sort of legal imperialism".[78]

Both substantive and structural impacts of human rights have contributed to the promotion of, and compliance with, fundamental human rights and freedoms. In other words, these impacts have assisted human rights to become the predominant value system of international law. However, human rights have opened and gone through a gate through which also others can pass. Put differently, once the secular posture of international law is undermined or diminished, proponents of all other value systems and ideologies could hope to enter into the realm of international law and perhaps to force human rights out. Turning back to regional *jus cogens*, the most ideal disguise for such value systems and ideologies would be the Regional Homogeny and its normative tool i.e. regional peremptory norms. This would mean that our perception of region as a geographical concept may no longer be of use as ideologies and value systems could go well beyond geographical boundaries. Accordingly, the word "regional" in the term "regional peremptory norms" could

77. Andrea BIANCHI, "Human Rights and the Magic of *Jus Cogens"* (2008) EJIL, Vol. 19, p 496.

78. Congiu, supra note 50, p 55.

also mean political regions that may or may not be compatible with geographical boundaries.

A clear example of efforts made toward establishing an ideological regional law is Tunkin's theory on a peremptory norm entitled "Proletarian Internationalism" (also known as "Brezhnev Doctrine"). According to this theory, every socialist nation has a duty to assist its brother socialist nation upon occurrence of any type of threat to the socialist political system as it was invoked for invasion of Czechoslovakia in August 1968.[79] Tunkin believed that such norm constitutes a norm of peremptory nature predominantly applicable to socialist nation-states.[80] This is a conspicuous example of a regional *jus cogens* not based on geography but on an ideology shared by many nation-states around the world (though Tunkin has not used the word "regional").[81]

Furthermore, the above example suggests that ideological capacity of regional *jus cogens* could significantly complicate the prevalent perception of region as a geographical concept. This complication would also make it more difficult than it was to determine the scope of applicability of a regional *jus cogens*. In other words, one may commence its study on regional *jus cogens* based on the geographical perception of "region" but may end up with the political or ideological perception of the same term due to the fact that regional jus cogens is capable of reflecting ideological and political aspirations or even political alliances.

In conclusion, if and when human rights' grip on international law is loosen, theoretically it would be possible for other value systems to fill the vacuum, for example, in the form of regional *jus cogens*, while it remains to be seen what these value systems would pursue and to

79. Hasmath, supra note 4, p 8.
80. Ibid, p 9.
81. Tladi, supra note 24, p 19, para 41.

what extent they are compatible with human rights. Accordingly, regional peremptory norms offer an opportunity to attach ideological values to international law, at least on a regional level, which could pose a grave danger. Thus, "…the idea of regional *jus cogens* could be the start of a slippery slope by which *jus cogens* becomes relative and moves away from this basis".[82]

"While the emergence of international law as a 'normative order' is due to the need to fulfill certain functions, it will not be capable of actually fulfilling them unless it constitutes a normative order of good quality".[83] Thus, should any concept, institution or norm causes challenge, ambiguity and complication in creation, identification, interpretation and application of international law, the quality and efficacy of this normative order would definitely be adversely affected leading to its failure to perform functions assigned thereto.

On the one hand, the absence of any positive ground for regional peremptory norms makes identification of its legal consequences challenging and subjective. On the other hand, notwithstanding the arbitrariness of extending consequences of peremptory norms of general international law to regional norms, such extension would grant the latter a power that could seriously harm cohesion and integrity of the Transregional Relations of the states bound by the relevant regional *jus cogens*. Furthermore, regional peremptory norms offer an opportunity for emergence and development of value systems under cover of regional law which may or may not be compatible with human rights, though, according to Weil, ideological neutrality of international law is a necessity guarantying the coexistence of heterogeneous entities in a pluralistic society.[84]

82. Congiu, supra note 50, p 56.
83. Weil, supra note 71, p 413.
84. Ibid., p. 420.

IV. Special Non-Derogable Norms; A Normative Alternative For Regional Jus Cogens

a) Identification of Special Non-Derogable Norms

In light of the conceptual difficulties and practical challenges under and arising from the concept of regional *jus cogens*, its admission in international law would cause many difficulties and problems, as mentioned above. However, positive international law (particularly regional human rights conventions) includes a normative alternative for regional *jus cogens* that is special non-derogable norms which are capable of better performing functions assigned to regional peremptory norms.

1. Tracking Special Non-Derogable Norms

In order to identify special non-derogable norms, it is necessary to assess two important regional human rights conventions, i.e., the ECHR and ACHR and their subsequent protocols, given that they include certain non-derogable rights/norms.

ECHR: Under Article 15.1 of the ECHR:

> [i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.[85]

In light of the above, rights/norms provided in the ECHR are in principle derogable. Subsequently, its Article 15.2 provides certain exceptions declaring non-derogability of Articles 2, except in respect of deaths resulting from lawful acts of war, 3, 4.1 and 7.[86]

85. ECHR, supra note 33, Art. 15(1).
86. Ibid., Art. 15(2).

Article 2 concerns the right to life[87], Article 3 concerns the prohibition of torture[88], Article 4.1 concerns the prohibition of slavery and servitude[89] and Article 7 provides that:

> "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed".[90]

Of course where an act or omission, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations, then one may be held guilty.[91] Except for Article 2, the other three non-derogable rights/norms have been also declared non-derogable under the ICCPR;[92] thus, these three non-derogable rights/norms fall under general law and do not constitute special non-derogable norms.

However, the right to life or the absolute prohibition of death penalty does not constitute a non-derogable (and thus peremptory) norm under general international law[93] as indicated by ICCPR Article 6.2[94] and Article 2.1 of the Second Optional Protocol to the ICCPR which provides for a reservation for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.[95]Article 2.1 of

87. Ibid., Art. 2.
88. Ibid., Art. 3.
89. Ibid., Art. 4(1).
90. Ibid., Art. 7(1).
91. Ibid., Art. 7(2).
92. Ibid., Art. 4(2).
93. Jure VIDMAR, "Rethinking *Jus cogens* after Germany V. Italy: Back to Article 53" (2013) Netherlands International Law Review, Vol. 60, p 10.
94. ICCPR, supra note 73, Art. 6(2).
95. Second Optional Protocol to the International Covenant on Civil and Political Rights, 15 December 1989, 1642 U.N.T.S 414, Art. 2.1 (entered into force 11 July

the ECHR also permitted the use of death penalty[96], though it has been repealed by Article 1 of the Protocol No. 13 according to which "[t]he death penalty shall be abolished. No one shall be condemned to such penalty or executed".[97] Articles 2 and 3 of this Protocol prohibit respectively any derogation from Article 1 under Article 15 and any reservation thereto under Article 57 of the ECHR.[98] In light of the foregoing, the prohibition of death penalty in all circumstances is a special non-derogable norm under the European human rights regime.

In addition, in accordance with Article 4.1 of the Protocol No. 7 to the ECHR ("Protocol No. 7") which stipulates "Prohibition of Retrial":

> "[n]o one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State".[99]

Of course "…if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case", retrial may be possible.[100] Article 4.3 provides that no derogation from the provisions of this Article shall be made[101] making it another example of a special non-derogable norm under the European human rights regime.[102]

1991). The mere inclusion of said Article 2.1 renders the prohibition of death penalty under this Protocol derogable in spite of its Article 6.2.

96. ECHR, supra note 33, Art. 2(1).

97. Protocol No. 13 to the ECHR, supra note 36, Art. 1.

98. Ibid., Arts. 2 and 3.

99. Protocol No. 7 to the ECHR, 22 November 1984, ETS No. 117, Art. 4(1) (entered into force 1 January 1988) [Protocol No. 7].

100. Ibid., Art. 4(2).

101. Ibid., Art. 4(3).

102. This Protocol has entered into force for 44 European states. The United Kingdom has not signed the Protocol and Germany and Netherland have not ratified it. This constitutes another example of difficulty for identification of the scope of

ACHR: Article 27.1 of the ACHR, as Article 15 of its European counterpart, generally permits derogation from rights thereunder.[103] However, its Article 27.2 prohibits derogation from the following rights: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.[104] The aforesaid rights/norms that exclusively apply to the states parties to the ACHR constitute special non-derogable rights/norms under the ACHR.

Furthermore, the practice of the IACtHR may also include certain examples of special non-derogable norms although they are mostly categorized as universal *jus cogens*. According to Contreras-Garduno, the IACtHR has established peremptory nature of non-discrimination and equality before the law, forced disappearance's crime, failure to punish perpetrators of grave violations of human rights and non-applicability of statutes of limitations to crimes against humanity (prohibition of self-amnesties).[105] Without commenting on the methodology used in this practice, if it could be established that these norms have achieved non-derogablity for the states bound by the

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applicability of a regional public order, as mentioned in section II.B.1 above.
Council of Europe Website, "Chart of Signatures and Ratifications of Protocol no. 7", Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/117/signatures?p_auth=YY9Cvstb.
103. ACHR, supra note 75, Art. 27(1),
104. Ibid., Art. 27(2).
105. Contreras-Garduno, Alvarez-Rio, supra note 7, pp 122-23.

ACHR regime, we would be facing with a rich source of special non-derogable norms.[106]

2. Conceptual Distinction Between Special Non-Derogable Norms and Jus Cogens

As indicated above, no doubt special non-derogable norms exist as they are grounded in positive international law giving them an advantage over the concept of regional peremptory norms. In spite of functional similarity, special non-derogable norms and regional peremptory norms are conceptually distinct and entail different normative consequences.

Special non-derogable norms are conceptually different from peremptory norms and they should be seen as a departure from peremptoriness paradigm. This paradigmatic departure would mean that non-derogable norms do not necessarily (a) entail legal consequences similar to *jus cogens* whether general or regional, and (b) benefit from a moral or philosophical or humanistic force or underpinning enjoyed by most cases of *jus cogens.* As an illustration, if two or several states agree on a non-derogable norm according to which any type of fishing over a shared lake is prohibited for environmental purposes, it would be impossible to argue that said norm enjoys a moral underpinning such as the prohibition on torture. Thus, the examples of special non-derogable norms, as provided in section IV.A.1, merely represent their examples under human rights law meaning that special non-derogable norms can in principle be found in all areas of international law.

Furthermore, although non-derogability lies at the heart of *jus cogens* paradigm, these two are not two side of the same coin meaning mere non-derogability of a norm does not indicate its peremptoriness.

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[106]. See also: Gerald L. NEUMAN, "Import, Export and Regional Consent in the Inter-American Court of Human Rights" (2008) EJIL, Vol. 19, p 101.

According to Article 53 of the VICLT, 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.[107] Absence of any of the identification criteria enshrined in said VCLT Article inhibits any norm from achieving peremptory status under positive international law.

Koji agrees likewise that a non-derogable norm does not necessarily constitute a peremptory norm in the sense provided by the VCLT as it may not be a norm of general international law or may not have been accepted and recognized by "the international community of states as a whole".[108] According to Tladi:

[t]o the extent that norms of regional *jus cogens* are deemed to flow from the free exercise of the will of States to constrain their sovereignty, then these are not norms of *jus cogens* properly so called. Such rules, in which States agree to constrain themselves, are similar to non-derogability provisions in treaties that do not constitute *jus cogens*, at least not in the manner understood in the 1969 Vienna Convention.[109]

There exists another point of view whereby derogation or non-derogability has different meanings; according to this viewpoint, derogation in the context of human rights conventions does not have the same meaning for *jus cogens* purposes.[110] "In the human rights treaty context, derogation typically refers to a factual situation – e.g. a public emergency threatening the life of the nation – justifying a temporary and partial suspension of the treaty provision by the state in question"[111] while "…in the *jus cogens* context, derogation is

107. VCLT, supra note 2, Art 53.
108. Koji, supra note 76, p 928.
109. Tladi, supra note 24, p 16, para 32.
110. Asif HAMEED, "Unraveling the Mystery of *Jus cogens* in International Law" (2014) British Yearbook of International Law, Vol. 84, p 70.
111. Ibid.

generally understood to refer to legal acts or rules which depart partially or fully from the requirements of a *jus cogens* rule".[112] Under this view, no distinction between non-derogability and peremptoriness is made; instead, it focuses on different implications of derogation in different contexts. However, we take the view that the relativity of non-derogability could add further ambiguities to the *jus cogens* paradigm that, as it now stands, is not a symbol of clarity and accuracy.

In any case, if one reads the analyses provided in support of regional *jus cogens* in light of the distinction between non-derogability and peremptoriness, they could offer a sound defense of special non-derogable norms. As an illustration, according to Kolb, states may mutually agree on peremptoriness of certain norms exclusively for the purpose of establishment of a public order among themselves while such norms may not benefit from a high degree of "ethical" or "moral" density.[113] States can achieve such goal (establishment of a public order) using special non-derogable norms. In other words, *jus cogens* is not the only tool in the toolbox. Pursuant to this line of reasoning, one can simultaneously hold that *jus cogens* by mere definition is applicable to all states and still subscribe to a conception of international law that that emphasizes the will of states avoiding seemingly contradictory conceptions of the function of *jus cogens*, at least in respect of special norms of absolute nature.[114]

In light of the above, if, instead of peremptoriness, non-derogability is used, a special public order could be established among the relevant states, while, at the same time, none of the conceptual difficulties and

112. Ibid.
113. Kolb, supra note 3, p 101.
114. Ulf LINDERFALK, Understanding Jus Cogens in International Law and International Legal Discourse (UK: Cheltenham and Northampton: Edward Elgar Publishing, 2020), p 36.

practical challenges arising from regional peremptory norms would be encountered. Furthermore, it should be noted that there exists no legal restriction barring homogenous states from establishing a set of non-derogable norms among themselves for any regulatory, political or economic purpose, while the foregoing would not require use of the concept of *jus cogens*.

b. Compatibility Of Special Non-Derogable Norms With International Law

In section IV.A, the existence of special non-derogable norms was confirmed and its position within international legal system was identified in light of their distinction from peremptory norms. This section is to evaluate conceptual quality and practical efficacy of the notion of special non-derogable norms in comparison with regional peremptory norms.

1. Conceptual Quality of Special Non-Derogable Norms

Unlike regional peremptory norms, positive international law includes many examples of special non-derogable norms. This article discusses briefly the relevant human rights treaties and practice of the IACtHR. "Both regional-local law and particular treaties may have rules prohibiting a violation of their content by subsequent treaties concluded by subjects of the regional-local law or by parties to the particular treaties carrying peremptory norms".[115] In light of the foregoing, the first conceptual advantage of special non-derogable norms over regional peremptory norms is that the former is well-founded in positive international law.

The next issue is the identification or defining the criteria for special non-derogable norms. At the outset, it must be noted that

115. Christos L. ROZAKIS, The Concept of Jus cogens in the Law of Treaties **(**New York: Oxford, 1976), p 56, in Linderfalk, supra note 13, p 70.

positive international law does not provide a specific definition of the aforesaid concept. However, the existence of many examples of these norms in every area of international law could compensate for the absence of a specific definition to some extent in that it would be possible to identify special non-derogable norms governing any area of international law without resorting to a general definition. As illustrated above, the prohibition of death penalty under the European human rights regime and the "Prohibition of Retrial" under the ACHR norms are examples of special non-derogable norms.

It would therefore be possible to provide certain defining characteristics of special non-derogable norms; these norms are of more significance (whether due to moral underpinnings or practical use) and therefore are located at a higher level compared with ordinary norms of any special area. Their significance *may* be originated from philosophical and moral values such as non-derogable rights which have been referred to as the "core human rights"[116] the compliance with which is mandatory even in the state of emergency. In addition, their significance may be of practical or political nature meaning that a group of states may grant non-derogability to a norm so as to serve a political purpose in international affairs [117] or accomplish certain political tasks.[118]

These norms are absolute in their scope of applicability as set by the relevant states; thus no derogation or deviation from them would be permissible. Accordingly, the non-derogable norms under either the ECHR or ACHR must be followed and protected by all relevant states under any circumstances in the context of their Intra-Regional Relations or domestic affairs.

116. Koji, supra note 76, pp 920-21.
117. Hasmath, supra note 4, pp 1-2.
118. Ibid., p 6.

These norms are *lex specialis* and are binding only for the states that have accepted them. Thus, if any state rejects or persistently objects to a special non-derogable norm, it would not have any obligations thereunder despite sharing borders or fundamental values with states subject thereto. In other words, special non-derogable norms do not benefit from peremptory status and thus may not be applicable to all subjects. This is the direct result of departure from peremptoriness paradigm. Furthermore, another conceptual advantage of special non-derogable norms is that they are not at odds with the universality of peremptory norms. The foregoing is another result of departure from peremptoriness paradigm.

Given this, although a specific definition is absent, it is possible to identify special non-derogable norms using their various positively-rooted examples in each area of international law. This means that they are less prone to conceptual difficulties arising from the lack of clear identification or defining criteria. Additionally, special non-derogable norms could be reconciled with universal applicability of *jus cogens* under the VCLT, states practice and ILC literature. Thus, the notion of special non-derogable norm is conceptually superior to the notion of regional *jus cogens*.

2. Relative Efficacy of Special Non-Derogable Norms

While, in the context of the Intra-Regional Relations, identifying legal consequences of regional peremptory norms is problematic given the absence of any positive ground, legal consequences of special non-derogable norms could, in most cases, be easily identified in accordance with the provisions of their positive source. As an illustration, the consequences of the special human rights non-derogable norm mentioned could be identified by referring to either the ECHR or ACHR as the case may be. These consequences include *inter alia* absolute consistent compliance with any non-derogable norms in the context of domestic affairs and Intra-Regional Relations

of the states subject to such norms. Any derogation, deviation or discordant act would be null and void; accordingly it would need to be compensated in accordance with the provisions of either Conventions.

It is worth emphasizing that the states bound by a special non-derogable norm are entitled to terminate or modify said norm through, for example, another mutual agreement. Any norm promoted by certain states to the non-derogability status could be demoted by the same states. For example, if the parties to the ACHR agree to exclude a norm/right under Article 23 (Right to Participate in Government) from the list of non-derogable norms/rights, there would be no bar legally prohibiting them from said exclusion. Similarly, where states sharing a lake mutually decide to eliminate a non-derogable prohibition on fishing (previously set for environmental purposes), how (and indeed why) should they be legally stopped?

Of course, there may exist bars legally prohibiting such demotion on certain specific cases; for example, if re-introduction of death penalty is prohibited under general international law, the parties to Protocol No. 13 to the European Convention on Human Rights and Fundamental Freedoms on the Abolition of the Death Penalty in All Circumstances[119] would be barred from its termination. However, any such prohibition could not be attributed to the content or hierarchical status of the prohibition of death penalty.

In relation to the Transregional Relations, it should be reiterated that special non-derogable norms do not enjoy peremptory status and as a result, in the event of their conflict with a customary or treaty-based norm governing the Transregional Relations, special non-derogable norms would not be applicable to any third state. Any such conflict should be resolved using the conventional techniques of conflict resolution. Furthermore, in case of any conflict between any

119. Protocol No. 13 to the ECHR concerning the Abolition of the Death Penalty in All Circumstances, 3 May 2002, ETS 187 (entered into force 1 July 2003)

special non-derogable norm and any obligation under the Charter, including UNSC's binding resolutions, the latter would take precedence over the former in accordance with Article 103 of the Charter, because special non-derogable norms do not apply to the UNSC.

It would thus appear that the notion of special non-derogable norms is less problematic and challenging in terms of its application when compared with regional *jus cogens*. In this way, they would contribute to a higher level of efficacy and accordingly enable international law to better performing its functions.

Conclusion

The concept of regional *jus cogens* suffers from many conceptual difficulties; it has not been reflected in positive international law, while there is scarce state practice in this respect. Additionally, many states have expressed their disagreement with it. As a result of the foregoing, any attempt to identify or define the major criteria for regional peremptory norms would be extremely subjective and arbitrary. Furthermore, the idea of regional *jus cogens* conflicts with universality of *jus cogens* paradigm, though universality is a constituent essential element of *jus cogens* paradigm. Subjecting *jus cogens* to relativity would diminish its position within international law. In addition, as identification of the region subject to a regional *jus cogens* is problematic, any attempt to justify regional *jus cogens* under the regional public order theory could be seriously challenged.

Apart from the conceptual difficulties, the concept of regional *jus cogens* entails certain practical challenges. As regional *jus cogens* is not grounded in any positive source of international law, any determination of its consequences for the Intra-Regional Relations would be subjective and arbitrary. Also, any application of this concept could disrupt the Trans-Regional Relations of the states bound

by a regional jus cogens. Moreover, this concept provides value systems and ideologies with a unique opportunity to infiltrate international law (at least, at regional levels) which would undermine its impartiality and objectivity and could adversely affect human rights influence on international law. Therefore, the notion of regional *jus cogens* would diminish quality of normative order of international law adversely affecting its efficacy.

In contrast, the concept of special non-derogable norms is firmly rooted in positive international law and states practice. All areas of international law would likely include norms of this sort. This article merely identified the special non-derogable norms in the context of the European and American human rights systems. Thus, it would appear that a list of these norms could be drawn up which in turn would assist us in objective reasoned identification of its defining criteria, characteristics as well as its consequences.

Lastly, it is worth reiterating that special non-derogable norms are conceptually different from peremptory norms. As a result, they would entail none of the legal consequences envisaged for peremptory norms. The foregoing will allow that the Trans-Regional Relations of states bound by special non-derogable norms remain unaffected preventing many practical challenges. Therefore, any legal order constituted by special non-derogable norms would better integrated in the international legal system.