

THE PEREMPTORY NATURE OF THE PRINCIPLE “NO PEACE WITHOUT JUSTICE” WITH RESPECT TO THOSE MOST RESPONSIBLE PERSONS FOR CRIMES AGAINST HUMANITY AND THE CONSEQUENCES FOR THE NOTION OF “TRANSITIONAL JUSTICE”

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Abstract:

The article discusses the *ius cogens* nature in International law of the prohibition to commit crimes against humanity, and the obligation to investigate, prosecute and punish those most responsible for such crimes. It also analyzes the complementary nature of the notion of transitional justice with regard to the said obligations. As a result, transitional justice processes have to be built around the paradigm “no peace without justice”, and not in substitution of it.

Keywords: *Imperative norms, ius cogens, crimes against humanity, international criminal law, obligation to investigate, obligation to prosecute, obligation to punish, transitional justice*

1. Introduction

At the close of the Second World War, the fear of a new global armed conflict that could completely destroy the planet prompted the international society to jointly recognize and declare the international criminal liability of the leaders of Germany and Japan for their roles in waging a war of aggression and undertaking campaigns of systematic and widespread violence against civilian populations, that ultimately led to millions of deaths. In doing so, the international society was sending the message that those who use power to perpetrate this type of behavior not only lose the ethical and moral legitimacy to continue to lead their respective nations but also, due to the damage caused to the international society as a whole, incur individual criminal liability. As stated years later in 1968,¹ this criminal liability cannot be extinguished under any circumstances.²

It is this legal framework that gives rise to the States’ duties (i) not to commit, through their agents, serious violations of human rights with respect to those who are under their jurisdiction (in particular, not to perpetrate campaigns of systematic or widespread violence against civilian

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¹ United Nations General Assembly, Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, A/RES/2391(XXIII), (1968).

² Héctor Olásolo, *Dignidad Humana, Derecho Internacional y Justicia Transicional*, 16(2) *Revista Estudios Socio-Jurídicos* 7 (2014) 13-20; reprinted in Hector Olasolo, *Introducción al Derecho Internacional Penal* (2014) pp. 27. *et seq.*

populations); (ii) to adopt all measures at their disposal to prevent such violations of human rights; and (iii) in the event that such violations of human rights do occur, to investigate these violations, to declare international criminal liability for such violations, to punish those responsible, and to ensure that victims receive reparations.³ In addition, this legal framework provides the victims of human rights violations with the rights to truth, justice and reparations.⁴

What was truly innovative about this new international criminal law was that, unlike national criminal law, which applies to the immense majority of human beings who are considered “normal citizens”, as that term was used by Hannah Arendt,⁵ or the doctrine of national security, which applies to “non-citizens”,⁶ the new international criminal law was specifically directed at those individuals who have operated above national laws by virtue of the concept of “reason of state”.⁷ The international society considered these individuals to be “the most responsible”⁸ because they used their power to cause “normal citizens” to perpetrate the most heinous atrocities against their peers without reproach.⁹

However, the emergence of international criminal law and its application did not prevent the near total impunity of those most responsible for campaigns of systematic or widespread violence against civilian populations during the Cold War that lasted from 1949 to 1989, and thus tens of millions of

³ Ana Isabel Pérez Cepeda (coord.), *El principio de justicia universal: fundamentos y límites* (2012); and Gerhard Werle, *Tratado de Derecho Penal Internacional* (2011) pp. 133-147.

⁴ Felipe González Morales, *Sistema Inter-Americano de Derechos Humanos: Transformaciones y Desafíos* (2013) pp. 264-291. See also Héctor Olásolo, *Los exámenes preliminares de la Corte Penal Internacional en América Latina: el caso colombiano y su impacto sobre futuras negociaciones de paz en la región*, 10 *Anuario de Derechos Humanos* (2014) 35-56.

⁵ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963).

⁶ This theory is discussed broadly in Günther Jakobs and Manuel Cancio Meliá, *Derecho penal del enemigo* (2006). An application of this concept is found in the Military Order issued on November 13, 2001 by President G.W. Bush, which provides that the government of the USA may arrest non-citizens when the President determines that there is “reason to believe” that the non-citizens are terrorists and that these non-citizens can be tried by military tribunals. The trials may be held in secret and prosecutors are not required to present evidence if this is “in the interest of national security”. These measures have kept the debate regarding the inherent tensions between national security and civil liberties as spirited as ever, giving rise to questions such as the following: To what extent does the need to prevent new terrorist attacks justify the erosion of certain fundamental civil liberties? Or, stated differently, to what extent does the need to protect basic civil liberties, which are the distinctive mark of democracy and which over the course of centuries has drawn millions of people to the USA, justify the rejection of additional anti-terrorist measures? See John Vervaele, *La legislación antiterrorista en Estados Unidos: inter arma silent leges*, 14 *Revista de Derecho y Proceso Penal* (2005) pp. 116 *et seq.* For a critical look at the doctrine of national security, see Juan Bustos Ramírez, *In-seguridad y la lucha contra el terrorismo*, in *El Derecho ante la globalización y el terrorismo, «cedant arma togae»* 403, 407 (Mario Losano & Francisco Muñoz Conde coords., 2004); Eugenio Raúl Zaffaroni, Alejandro Alagia & Alejandro Slokar, *Derecho penal. Parte General* 17 (2000); Francisco Muñoz Conde, *El nuevo Derecho penal autoritario*, in *Estudios penales en Recuerdo del profesor Ruiz Antón* (Emilio Cortes Bechiarelli, Emilio Octavio de Toledo & Manuel Gurdíel Sierra, coords., 2003); and Hector Olasolo, & Ana Isabel Pérez Cepeda, *Terrorismo Internacional y Conflicto Armado* Chapter II (2008).

⁷ According to Arendt, ‘dogmatic’ individuals (who compensate for their anxiety about living with uncertainty by adopting iron-clad ideals and subjugating all other values to the realization of those ideals) and ‘nihilists’ (who believe in nothing beyond themselves and thus do whatever is necessary to satisfy their own ambitions for social ascent and political and economic power) use the resources of power to cause “normal citizens” to perpetrate the most horrible atrocities against their peers without reproach. See Arendt, *supra* note 5.

⁸ The Office of the Prosecutor of the International Criminal Court (ICC) used the expression *most responsible persons* as criterion of criminal policy to delimit the situations in which it would investigate and prosecute the crimes of genocide, crimes against humanity, and war crimes. See Office of the Prosecutor of the ICC, *Paper on some policy issues before the Office of the Prosecutor* (September 2003), ICC-OTP 2003; Office of the Prosecutor of the ICC, *Report on Prosecutorial Strategy* (September 14, 2006) and; Office of the Prosecutor of the ICC, *Policy Paper on the Interests of Justice* (September 2007), ICC-OTP 2007. A similar expression (“most senior leaders”) had previously been used by the Security Council of the United Nations in paragraph 5 of its Resolution 1534 of March 26, 2004, to redefine the scope of the personal jurisdiction of the International Criminal Tribunals for the Former Yugoslavia and Rwanda in the context of the completion strategies for both tribunals.

⁹ Olasolo, *supra* note 2.

victims were systematically forgotten and left to their fate.¹⁰ This situation continued until 1993, when the Security Council of the United Nations decided for the first time since its creation in 1945 to establish international criminal tribunals to investigate and prosecute those responsible for genocide, crimes against humanity, and war crimes in various parts of the world.¹¹

The establishment of the International Criminal Court (ICC) during the first decade of the twenty-first century represents a fundamental step in this process because it creates a permanent institution to investigate and prosecute the political, military and economic leaders who, from a position of state or non-state power, plan, promote and encourage the perpetration of systematic or widespread violence amounting to genocide, crimes against humanity and war crimes.¹² Thus, it can be argued that since the mid-nineties until today, the international society has endorsed the paradigm that leaders who use their positions of power to perpetrate this type of violence not only lose all ethical and moral legitimacy to lead their respective states or organizations, but also incur international criminal liability.

The restatement of this paradigm, and of the related States' duties and victims' rights, has been challenged by demands that top leaders be exempt from criminal liability, despite of their inability to generate authentic social peace, as shown by the situation in Colombia.¹³

In this context, proponents of the notion of "transitional justice" argue that it is necessary to adopt a model that permits the state to address these demands. Colombia is an emblematic case in Latin America in this regard. Specifically, the so-called "Legal Framework for Peace" approved by Legislative Act 01 of 2012 introduces two articles addressing transitional justice (articles 66 and 67) into the Political Constitution of Colombia. These articles establish an entire "transitional justice strategy", which comprises the creation of a Truth Commission, the establishment of an administrative system for reparations, the definition of criteria for the selection and prioritization of cases, the suspension of sentences in selected cases, and the application of extrajudicial sanctions, alternative sentences or special regimes for the serving sentences.¹⁴

However, we find that the proposed measures for transitional justice are fundamentally inconsistent with the paradigm that those most responsible for campaigns of systematic or widespread violence against civilians must leave their positions of leadership and respond for their criminal liability to their own nations and to the international society as a whole.¹⁵

¹⁰ The number of deaths alone is estimated at approximately 18 million people.

¹¹ The International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) and the Special Tribunal for Lebanon (STL) were created by the UN Security Council. Furthermore, the Secretary General of the United Nations actively participated in the creation of the Special Tribunal for Sierra Leone (STSL), the Extraordinary Chambers of the Courts of Cambodia (ECCC) and the War Crimes Chambers for East Timor, Bosnia-Herzegovina, and Kosovo. In addition, special United Nations commissions, such as the International Commission against Impunity in Guatemala have been created to support national prosecutorial efforts.

¹² See the Preamble and Article 1 of the Statute of the ICC.

¹³ See the concerns expressed by the Office of the Prosecutor of the ICC in its most recent reports (November 2012 and November 2013) regarding the "Legal Framework for Peace" established by Articles 66 and 67 of the reformed Constitution of Colombia in 2012. See Office of the Prosecutor of the ICC, *Situation in Colombia, Interim Report*, para. 201 (14 November 2012), at <http://www.icc-cpi.int/NR/rdonlyres/3D3055BD-16E2-4C83-BA85-35BCFD2A7922/285102/OTPCOLOMBIAPublicInterimReportNovember2012.pdf>; and Office of the Prosecutor of the ICC, *Policy Paper on Preliminary Examinations* (November 2013), at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20-%202013.pdf.

¹⁴ In this respect, see *Situation in Colombia, Interim Report*, *supra* note 13.

¹⁵ The measures of particular concern to the Office of the Prosecutor are those relating to the selection and prioritization of cases. In particular, it is important to emphasize that the Congress of the Republic of Colombia has the authority to focus its investigative and prosecutorial efforts on those most responsible for crimes of genocide, crimes against humanity, and war crimes that were committed systematically, have sufficient gravity, and are representative of incidents of violence occurring in Colombia (selection of cases). This authority is accompanied by the power of the Colombian Congress to preclude by statute the bringing of criminal charges in all non-selected cases. Further, the Colombian General Prosecutor is empowered to establish any criteria for prioritization that it considers appropriate for the cases selected by the Congress.

It is within this context that the present study analyses the development of this paradigm and its implications for general and customary international law. In addition, this work seeks to determine the extent to which this regulatory framework has become a peremptory or *ius cogens* norm. Finally, this study analyses the notion, manifestations and normative support of transitional justice within international law, to determine whether it must be redirected towards a search for formulas that are epistemologically based on the paradigm “no peace without justice” and aim at alleviating some of the tensions we observe in current peace processes.

2. The prohibition of crimes against humanity and its legal implications in general and customary international law

After the Nuremberg Tribunal announced its verdicts on October 1, 1946,¹⁶ the General Assembly of the United Nations adopted resolution 95 (I) of December 11, 1946. This resolution affirmed the principles of international law recognized in the charter and judgment of the International Military Tribunal (the “Nuremberg principles”).¹⁷ Among these principles is the recognition of the international character of crimes against humanity.¹⁸ Resolution 95 (I) was followed by resolution 177

Addressing these measures, the Office of the Prosecutor of the ICC emphasized that the above-mentioned criteria for selection and prioritization increase the risk of impunity for lower-ranking perpetrators of crimes against humanity and war crimes. The Office of the Prosecutor of the ICC also expresses concern about the process by which Congress will determine which cases are eligible for alternative sentences (such as the 5 to 8 years imprisonment provide for by the Peace and Justice Law 975), suspended sentences and special regimes for serving sentences (such as permitting convicts to serve their sentences in their homes). In this regard, the Office of the Prosecutor emphasizes its concern with the authority of the Congress to determine the criteria and conditions in which suspended sentences may be imposed in the selected cases (that is, cases against those most responsible for crimes of genocide, crimes against humanity, and war crimes, that were committed systematically and with sufficient gravity and that are representative of the violence occurring in Colombia). The Office of the Prosecutor also sees with concern the power given to the Colombian Congress to establish the circumstances in which the application of alternative sentences or special regimes for serving sentences are appropriate. Consequently, the Office of the Prosecution of the ICC concludes that “[t]he Legal Framework for Peace will likely impact the conduct of national proceedings relating to crimes falling under the ICC’s jurisdiction and the admissibility of cases before the ICC, and thus, is of direct relevance for the ongoing preliminary examination of the Situation in Colombia.” See Office of the Prosecutor of the ICC, *Situation in Colombia. Interim Report*, *supra* note 13, paras. 201-204. For a more detailed study, see Héctor Olásolo, *supra* note 4.

¹⁶ Judgment of the International Military Tribunal of Nuremberg (October 1, 1946). Two years later, on November 4, 1948, the International Military Tribunal for the Near East announced its judgment.

¹⁷ UN General Assembly, Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal, (A/RES/95(I)).

¹⁸ *Ibid.* The earliest antecedent of the category of crimes against humanity dates back to 1915, when the governments of France, the United Kingdom and Russia issued a joint declaration stating that Turkey had committed crimes against approximately 800,000 Armenian residents of Turkey that shocked the “conscience of humanity”. This declaration was included in the Armenian memorandum presented on March 14, 1919, by the Greek delegation to the *Commission on the Responsibilities of the Authors of the War and on the Enforcement of Penalties* (known as the *Commission on Responsibilities*), which was formed by the Allies at the end of the First World War. This memorandum is found in Egon Schwelb, *Crimes Against Humanity*, 23 Brit. Y.B. Int’l L (1946) pp. 178 and 181. See also, e.g., Vahakn Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, 14 Yale J. Int’l L. 221 (1989); James F. Willis, Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War 27 (1982), citing Henry Morgenthau, *Ambassador Morgenthau’s Story* 359 (1918); and James Bryce & Arnold Toynbee, *The Treatment of Armenians in the Ottoman Empire* (2000). Later, at the end of the First World War in 1918, the Treaty of *Sevres* affirmed the right of the Allied Powers to indict those responsible for such crimes and the obligation of Turkey to surrender the members of its government and armed forces who had incited these crimes. See David Matas, *Prosecuting Crimes Against Humanity: The Lessons of World War I*, 13 Fordham Int’l L.J. 86 (1990). However, the provisions of the Treaty of *Sevres* were never implemented due to the opposition of the United States and Japan, which argued that the category of crimes against the laws of humanity had not been defined at an international level prior to the violence committed in Turkey against Armenians. See M. Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* 88-89 (2011). However, it was the United States that pushed for the creation of the International Military Tribunal of Nuremberg (IMT), which was established in 1945 by the Treaty of London and judged the highest-ranking political and military leaders of the Nazi regime for crimes of aggression, war crimes and crimes against humanity committed during the Second World War.

(II) of November 21, 1947, which instructed the recently-created International Law Commission (ILC) to formulate the Nuremberg principles and to prepare an International Code of Crimes.¹⁹

In 1950, the ILC presented its report on the Nuremberg principles to the General Assembly. The ILC report recognized that the commission of multiple acts of systematic or large-scale violence against the civilian population of a State is no longer a purely internal matter for the State but a matter for the international society as a whole because this conduct offends the basic values on which society is built.²⁰ Accordingly, those who engage in such behavior become “enemies of humanity”, and the territorial State, as well as the State of nationality of the alleged perpetrators, must exercise their criminal jurisdiction over them. If such States fail to exercise their criminal jurisdiction, those responsible may be investigated and prosecuted by any state acting in the name of the international society.²¹ Furthermore, when an international criminal tribunal is created, the states concerned are obligated to cooperate with its efforts.²²

As crimes against humanity were originally committed through state institutions, which gave these activities a varnish of legality, the ILC report also incorporated the principle that the legality of this type of conduct does not depend on its prohibition by the internal norms of the concerned State; rather, national legislation is considered irrelevant for the purposes of determining whether leaders have committed crimes against humanity.²³

Although the General Assembly’s resolution (V) of December 12, 1950,²⁴ did not formally adopt the more elaborate version of the Nuremberg principles presented by the ILC (it merely invited States to make observations on the ILC’s report),²⁵ Bassiouni notes that the majority of the doctrine cites the ILC report as key evidence that the Nuremberg principles were part of general international law as a matter of international custom or general principles of law as early as 1950.²⁶ It is for this reason that the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity was adopted in 1968.²⁷

The definition of crimes against humanity and their legal implications that are set forth in Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY),²⁸ Article 4 of the Statute of the International Criminal Tribunal for Rwanda (ICTR),²⁹ Article 7 of the Statute of the ICC³⁰ and Article 2 of the Statute of the Special Court for Sierra Leone (SCSL),³¹ are consistent with

¹⁹ UN General Assembly, Formulation of the principles recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal, A/RES/177(II).

²⁰ ILC Commission Report “Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal”, U.N. Doc. No. A/1316 (A/5/12), paragraphs 95–127, which can be found in volume 2 (1950) of the *Yearbook of the International Law Commission*.

²¹ M. Cherif Bassiouni, Crimes against Humanity - Historical Evolution and Contemporary Application 177-204, (2011). The Institute of International Law affirmed the universal jurisdiction over crimes against humanity in its 2005 session in Krakow. As one author observed, “General International Law is permissive in this point because it is a question of each State’s legislative sovereignty to adopt the principle of universality, adjust its scope, and condition its application in light of its implications for the protection of human rights and its external policy, particularly its impact on the fulfillment of other goals”. See Antonio Remiro Brotons, Rosa Riquelme Cortado, Javier Díez Hochleitner, Esperanza Orihuela Calatayuda, and Luis Pérez-Prat, *Derecho Internacional* 134 (2007).

²² *Ibid.*

²³ *Ibid.*

²⁴ U.N. General Assembly, Formulation of the Nurnberg principles, (A/RES/488(V)).

²⁵ *Ibid.*

²⁶ Bassiouni, *supra* note 21, p. 174.

²⁷ U. N. General Assembly, Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, A/RES/2391(XXIII).

²⁸ The chapeau of Article 5 of the ICTY Statute defines “crimes against humanity” as “the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population”.

²⁹ The chapeau of Article 4 of the ICTR Statute defines “crimes against humanity” as “the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds”.

³⁰ Paragraph 1 of article 7 of the Statute of the ICC defines “crime against humanity” as “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the

the content of general international law at the conclusion of the Second World War.³² The complementary character of the ICC reinforces this conclusion, as the ICC is empowered to (i) remind Member States of their duties to investigate and prosecute those most responsible for campaigns of systematic or widespread violence against a civilian population and to ensure reparation for the victims; (ii) give Member States incentives to perform these duties; and (iii) assume these duties when a Member State demonstrates inaction, lack of willingness or lack of ability to perform these duties itself.³³

This conclusion is also consistent with the limited discretion granted by the Statute of the ICC to the Office of the Prosecutor to exercise criminal jurisdiction in conformity with the “interests of justice”.³⁴ As the Office of the Prosecutor states in its Policy Paper on the Interests of Justice, the Office of the Prosecutor may decline to investigate or prosecute those “most responsible” based on “the interests of justice” only if the situation lacks sufficient gravity, access to evidence is precluded, or is not possible to adequately protect the safety of witnesses or victims.³⁵

Finally, Article 16 of the ICC Statute empowers the Security Council of the United Nations³⁶ to request that the ICC suspend any investigation or prosecution for an extendable period of twelve months if necessary to preserve the efficacy of those measures adopted by the Security Council in the performance of its duties to maintain international peace and security.³⁷

In summary, it can be stated that the following elements of crimes against humanity and their legal implications are today clearly established in both general international law and customary law: (i) serious acts of systematic or widespread violence against any civilian population are expressly prohibited; (ii) those most responsible for this conduct are criminally liable to the international society; and (iii) statutes of limitations and amnesty laws are non-applicable to this type of international criminal liability.

3. The notion and development of *ius cogens* in international law

In the previous section, we established that the prohibition of crimes against humanity and their legal implications are part of general and customary international law. In this section, we analyze whether this prohibition has acquired the status of *ius cogens*. For this purpose, we will first study the origin and development of the notion of peremptory norms or *ius cogens*.

attack”. Paragraph 2 of the same article states that “attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”.

³¹ The chapeau of Article 2 of the SCSL Statute defines “crimes against humanity” as “the following crimes committed as part of a widespread or systematic attack against any civilian population”.

³² See in this respect, among others, M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, in M. Cherif Bassiouni, *Post-conflict Justice* (2002) pp. 3 *et seq*; and Farid Benavides Vanegas, *Justicia en Épocas de Transición*, *Conceptos, Modelos, Debates, Experiencias* 24-25 (2011).

³³ In this respect see Mohamed El Zeidy, *The Principle of Complementarity in International Criminal Law. Origin, Development and Practice* 157-158 (2008). See also, Héctor Olásolo, *supra* note 4, pp. 35-56.

³⁴ Articles 53 (1) and (2) of the Rome Statute.

³⁵ Office of the Prosecutor of the ICC, *Policy Paper on the Interests of Justice* (September 2007), ICC-OTP 2007. See also Carter Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, 3 *Journal of International Criminal Justice* (2005) pp. 695 *et seq*.

³⁶ Articles 24, 25, 39 and 103 of the Charter of the United Nations establishes the Security Council as the agency with primary responsibility for the maintenance of international peace and security.

³⁷ Gabriël Oosthuizen, *Some Preliminary Remarks on the Relationship between the Envisaged International Criminal Court and the UN Security Council*, 46 *Netherlands International Law Review* 313 (1999); Ademola Abass, *The Competence of the Security Council to Terminate the Jurisdiction of the International Criminal Court*, 40 *Texas International Law Journal* 263 (2005) pp. 263 *et seq*; and Hector Olasolo, *Corte Penal Internacional: ¿Dónde Investigar?* (2003) chapter II, section IV.

3.1 The notion of ius cogens

In international law, the concept of peremptory norms that are non-derogable in character can be traced back to the writings of Francisco de Vitoria.³⁸ For this author, ius cogens norms encompass norms derived from natural or divine law, which are considered truly non-derogable. In contrast to ius cogens norms, Vitoria refers to a law of nations or 'just law' that is promulgated by "the entire world" and binding on everyone.³⁹ The law of nations comprises a set of generally accepted and binding norms that nations may modify, which is similar to the modern concept of erga omnes norms.⁴⁰

The expression "norms of ius cogens" was first used in the sense that we know it today by Verdross in 1937, when he asked whether the freedom of States to enter into treaties was subject to any limitations derived from general international law. Verdross concluded that the creation of treaties is subject to certain conditions, such as the type of entities that have the capacity to enter into treaties, the intrinsic and extrinsic conditions that must be fulfilled for the treaty to be effective, and the consequences of termination. All of these norms are contained within an unwritten general international law that is valid despite being unwritten.⁴¹ Another element of this general international law is the principle that prohibits the creation of treaties against good customs,⁴² which are derived from a tacit consensus among States regarding the minimum common ethics common to all legal orders.⁴³

In the following years, international doctrine gradually came to accept the concept of ius cogens. Thus, in 1950, Yepes stated at a meeting of the ILC that every treaty must have a lawful purpose that respects the superior morality of international law.⁴⁴ In 1963, Waldock proposed that the ILC codify the concept of ius cogens in the Convention on the Law of Treaties.⁴⁵ In the debate following this proposal, Commissioner Briggs proposed that the norms of ius cogens not be enumerated in a treaty, to avoid the inference that the list was exhaustive or that new peremptory norms were less important than those already established.⁴⁶ In turn, Commissioner Tunkin offered a more positivist vision, stating that peremptory norms could be created by both conventional and customary law because their establishment as peremptory norms did not obey any natural law.⁴⁷

As Gómez has highlighted, the commissioners readily accepted the notion of peremptory norms proposed by Waldock. However, their justification for doing so was unclear. Three classes of arguments were subsequently advanced. According to natural-law positions, peremptory norms were derived from the very nature of human beings and could only be reached through reason. Thus, peremptory norms were unique and immutable norms that protected universally valid laws.⁴⁸

³⁸ Francisco de Vitoria was a Spanish Dominican (1480-1546) and is known as one of the fathers of international law. His principal works relate to the treatment of the indigenous people of the New World and to the theory of just war.

³⁹ Antonio Gómez Robledo, *El ius cogens internacional* 14 (1982).

⁴⁰ *Case Concerning Barcelona Traction, Light and Power Company* (Belgium v. Spain), 1970 ICJ Rep. 1970, p. 3.

⁴¹ Alfred von Verdross, *Forbidden Treaties in International Law*, 31 *American Journal of International Law* 571-72 (1937).

⁴² *Ibid.*

⁴³ *Ibid.*, p. 574. This leads Verdross to criticize positivism because every positive legal order has its roots in the ethics of a community. Thus, a norm cannot be understood in the absence of these roots.

⁴⁴ Gómez Robledo, *supra* note 39, p. 34.

⁴⁵ *Ibid.*, p. 40.

⁴⁶ *Ibid.*, p. 41.

⁴⁷ *Ibid.*, p.45.

⁴⁸ The understanding of ius cogens norms, as derived from natural law, implies the existence of basic norms of justice that are inherent to human nature. These norms have been set forth at various times through the centuries. Particularly relevant is the conception of Jacob Bossuet, who maintains that ius cogens norms are derived from the designs of divine providence. For Bossuet "there is no chance in the progress of human events; fortune – this blind divinity of Machiavelli – is no more than a word without meaning". Thus, providence governs men and States, not in a vague and general way, but in a very particular way: this is true "divine guidance". See Jean-Jacques Chevallier, *Los Grandes Textos Políticos* 69 (1980). The notion that values of universal justice can lead to the condemnation of conduct as crimes committed against humanity as a whole, has been broadly developed. One of the most notable contributions to the subject prior to the codification of international crimes in international law was made by the philosopher Edmund Burke before the British

Positivists argued that *ius cogens* was derived from social facts manifested in the creation of peremptory norms through well-established methods, such as international law. Thus, peremptory norms have a dynamic nature and are subject to change based on new social circumstances and new normative structures.⁴⁹

Finally, a third group shared the positivists' view of the dynamic nature of *ius cogens* but identified this dynamic nature with the international public order, which they viewed as the sole limitation for the creation of international law by the subjects of this legal order.⁵⁰

These three approaches were put forward in 1968 and 1969 at the Conference of Vienna during the debate on the final text proposed by the ILC, which defined peremptory norms based on the following two characteristics: (i) they are non-derogable by means of treaties or international customs and (ii) they can be modified only by a subsequent norm having the same character. Further, although the delegation from Mexico maintained that peremptory norms were related to the public interest in international order and stemmed from the human condition itself,⁵¹ other delegations proposed that a third element be included in the definition of *ius cogens*, namely, the requirement of a consensus among the international society regarding the existence of such peremptory norms, to avoid any subjectivity in their definitions.⁵²

The Convention of Vienna dedicated various provisions to peremptory norms. Specific peremptory norms of international law were not established at this Convention so that the norms of *ius cogens* would be preserved regardless of the fate of the Convention. Rather, the requisite elements of peremptory norms were defined, including the two elements originally proposed by the ILC and the requirement that there be a consensus among the international society. In this way, the dynamic nature of *ius cogens*— and thus the possibility of supervening norms—was implicitly recognized.⁵³

3.2 Development of the notion of *ius cogens* in international practice

After the Vienna Convention, the international society overcame their differences regarding the existence of *ius cogens* and accepted this notion, although its scope of application was rather vague.⁵⁴ This situation was exacerbated by the ICJ's timidity in formulating the concrete aspects of peremptory norms in international law. Indeed, it was only in the case of the Military and Paramilitary Activities in and against Nicaragua that the ICJ formulated an entire series of principles (particularly, principles that prohibit aggression) deemed fundamental or essential for international

Parliament. Burke accused Warren Hastings, the commander of the British Armies in India, of committing abuses and atrocious crimes, which Burke characterized as an attack on the conscience of humanity and on the concept of justice. See John Nimmo, *The Works of the Right Honourable Edmund Burke* 144-45 (1899). The notion of a conscience of humanity is the fundamental pillar of the modern naturalist belief that human rights are an essential part of the international order, and that some human rights are provided for in peremptory norms of international law. See Augusto Cançado-Trindade, *La Ampliación Del Contenido Material Del Jus at* <http://www.oas.org/dil/esp/3%20-%20cancado.DM.MR.1-16.pdf> (visited January 27, 2015).

⁴⁹ Some doctrines currently advocate the creation of a strong *ius cogens* doctrine within the framework of international law, which implies active participation by the States. See Anthony D'Amato, *It's a bird, It's a Plane, It's Ius cogens*, 6(1) *Connecticut Journal of International Law* 1-6, (1990). In international criminal law, authors such as Bassiouni consider that peremptory norms are created by States' practice, which means that these norms are adopted by the will of the primary actors in international law, and are not derived from highest natural values. In: M. Cherif Bassiouni, *International Crimes: Ius cogens and Obligatio Erga Omnes*, 59(4) *Law and Contemporary Problems* 66 (1996).

⁵⁰ For a comprehensive study of the notion of public order in the context of peremptory norms, see Antonio Varón, *Orden Público Internacional y Normas Ius cogens: Una Perspectiva Desde la Comisión de Derecho Internacional y La Convención De Viena De 1969*, 32 *Diálogo de Saberes* 221 *et seq.* (2010).

⁵¹ Gómez Robledo, *supra* note 39, p. 58.

⁵² *Ibid.*, p. 60.

⁵³ Anthony D'Amato, *supra* note 49, p. 3.

⁵⁴ Anthony Aust, *Handbook of International Law* (2007).

relations.⁵⁵ As Brotons has emphasized, the ICJ has avoided referring to the notion of *ius cogens* in the remainder of its cases, limiting itself to the affirmation of the universal scope of certain principles, which contain *erga omnes* obligations.⁵⁶

International criminal tribunals and regional human rights tribunals have delved deepest into the notion and characteristics of *ius cogens* norms. In particular, the ICTY defined an *ius cogens* norm as:

A norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.⁵⁷

Doctrine unanimously affirms that the formulation of peremptory norms may occur through customary means.⁵⁸ However, opinions differ with respect to the creation of peremptory norms through treaties. For example, Marek asserts that "general international law exists only and exclusively as customary law" because it "adheres much more closely to the infrastructure which it governs, that is to say, that, in the long run, it corresponds better to the genuine needs of the international community".⁵⁹ Similarly, Barberis states that a distinction must be made between the creation of peremptory norms and their codification.⁶⁰ International treaties are capable only of codifying peremptory norms that were created previously through custom. However, Barberis concedes the possibility that peremptory norms may be also generated by a treaty to which all States in the world are parties.⁶¹

Conversely, Gómez argues that peremptory norms may be created through an international treaty. In his opinion, there are certain norms that do not have the rank of *ius cogens* at the time of their conventional development—such as the people's right of self-determination and the prohibition against the use of force—and only manage to acquire the normative force of peremptory norms after their inclusion in an international treaty.

With respect to the international consensus required for the establishment of *ius cogens* norms, Ricardo Abello notes that it is difficult to delimit the areas of international law that should be governed by *ius cogens* norms due to the difficulty of defining the notion of "international society as a whole".⁶² In particular, he states that although international tribunals do not formulate *ius cogens* norms, the tribunals do play a very important role in the identification and recognition of such norms.⁶³

⁵⁵ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, ICJ Rep. 1986, p. 14. For a detailed analysis of the contribution of this judicial decision, see Vincent Chetail, *The Contribution of the International Court of Justice to the International Humanitarian Law*, 85 *International Review of the Red Cross*, No. 850, 235-268 (2003).

⁵⁶ Remiro Brotons, *supra* note 21, p. 69 (referring to the case of East Timor and the case for the Prohibition and Sanction of the Crime of Genocide).

⁵⁷ *Prosecutor v. Anto Furundzija*, Judgment, No. IT-95-17/1-T (December 10, 1998).

⁵⁸ M. Cherif Bassiouni, *International Crimes: Ius cogens and Obligatio Erga Omnes*, 59(4) *Law and Contemporary Problems* 66 (1996).

⁵⁹ Krystyna Marek, *Thoughts on codification*, 31 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 487 (1972).

⁶⁰ Julio Barberis, *La liberté de traiter des Etats et les ius cogens*, 18 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 44 (1970).

⁶¹ Gómez Robledo, *supra* note 39, p. 101.

⁶² Ricardo Abello, *Introducción al estudio de las Normas de Ius Cogens en la Comisión de Derecho Internacional*, 123 *Universitas* 91 (2011).

⁶³ *Ibid.*, p. 96. The question that arises from this position is whether a regional tribunal that operates within a regional legal system can identify peremptory norms within the applicable regional law.

Finally, with respect to their content, Petsche believes that the excessively theoretical focus of the notion of *ius cogens* has prevented it from having a greater impact in international practice.⁶⁴ Thus, he proposes to view *ius cogens* from the perspective of the values that it protects, because these values constitute the ultimate foundation of the international legal order.⁶⁵

4. The *ius cogens* nature of the norms that prohibit crimes against humanity and regulate their legal implications

In the prior section, we elucidated various elements related to the content and formulation of *ius cogens*. In this section, we analyze whether the norms that prohibit crimes against humanity and regulate their legal implications are *ius cogens* norms. With respect to their content, we must ask ourselves whether the societal value protected by the norms that prohibit crimes against humanity is part of the very foundations upon which the international society is built. With respect to their formulation, it is necessary to analyze the degree of consensus in the international society regarding the peremptory nature of the said norms. Finally, as the jurisprudence of international criminal tribunals, regional human rights tribunals, and the International Court of Justice has to a great extent pioneered the development of the concept of *ius cogens*, we must analyze this jurisprudence due to its fundamental role in the identification and recognition of peremptory norms.

4.1 The nature and content of the societal value protected by those norms that prohibit crimes against humanity

Defining the societal value that the international society seeks to protect by prohibiting crimes against humanity is not a simple task, because these crimes are characterized by a variety of serious acts (“attack”) of systematic or widespread violence, against a civilian population, in furtherance of a policy of a State (at the national, regional or local level) or of an organization with sufficient capabilities to implement it.⁶⁶

Each one of these acts of violence⁶⁷ affects with particular intensity one or more essential interests of the victims, including life, physical integrity, health, or liberty.⁶⁸

However, to constitute a crime against humanity, each individual act must be part of a broader phenomenon of violence against a civilian population and must have certain specific characteristics, including a systematic or widespread nature and the participation of the reigning political and/or socio-economic power in the region in which the events take place.

The preamble of the ICC Statute recognizes that crimes against humanity threaten the very foundations upon which the international society is built,⁶⁹ when it highlights that crimes against

⁶⁴ Markus Petsche, *Ius cogens as a Vision of International Legal Order?*, 20 *Pennsylvania State International Law Review* 258 (2011).

⁶⁵ *Ibid.* The author states that this position is consistent with the manner in which the legal order of any society operates, given that such legal orders enshrine society’s fundamental values through their protection of norms of the highest rank.

⁶⁶ Alicia Gil Gil, *Los crímenes contra la humanidad y el genocidio en el Estatuto de la Corte Penal Internacional a la luz de “Los elementos de los Crímenes”*, in *La nueva justicia penal supranacional* 94 (Kai Ambos Coord., 2002).

⁶⁷ See Gerhard Werle, *supra* note 3, pp. 371 *et seq.*; and Kai Ambos, *La Corte Penal Internacional* 271 (2007).

⁶⁸ Ultimately, crimes against humanity are acts that show utter contempt for some of the most precious rights of the victim, including rights that are necessary for self-realization and social development. Thus, the systematic or widespread character of crimes against humanity does not dilute the nature and consequences of each act taken individually. See Mauricio Vanegas Moyano, *De los delitos de lesa humanidad y de los delitos contra las personas y bienes protegidos por el Derecho Internacional Humanitario*, in *Manual de Derecho Penal, Parte Especial-Tomo I* 60 *et seq.* (Carlos Castro Cuenca ed., 2011).

⁶⁹ It was in the Justice Case that the exclusion of isolated crimes from the category of crimes against humanity was first established. See, *Trial of War Criminals before the Nuremberg Military Tribunals under Control Council Law, Volume I*, October 1946- April 1949, pp 973-974. See also Ambos, *supra* note 67, p. 221.

humanity constitute a threat to the peace, security and well-being of humanity. Consequently, the societal values protected by those norms that prohibit crimes against humanity have two dimensions: one belonging to the individual victims (life, physical integrity, health, or liberty); another one belonging to the international society as a whole (peace, security and well-being of humanity).⁷⁰

4.2 The jurisprudence of international criminal tribunals

International criminal tribunals have referred to the norms of *ius cogens* and, more specifically, to the prohibitions of certain categories of criminal conduct that have acquired the character of peremptory norms. In the Tadic case, the Appeals Chamber of the ICTY expressly referred to the section of the Report of the UN Secretary General, in which the latter highlighted the power of the UN Security Council to depart from customary international law in defining those international crimes included in the ICTY material jurisdiction, as long as such definitions were consistent with *ius cogens* norms.⁷¹

In the Kupreskic case, the Trial Chamber of the ICTY, referring to International Humanitarian Law (“IHL”), stated that the prohibition to commit genocide, crimes against humanity and war crimes constitute a *ius cogens* norm. One consequence of characterizing these prohibitions as imperative norms is that, if such prohibitions are embodied in a IHL treaty, the breach of this treaty by one party would not entitle the other party to invoke that breach in order to terminate or suspend the operation of the treaty, so long as the breached provision relates to the protection of human beings.⁷²

International jurisprudence has particularly developed the crime of torture. The ICTY dealt with this crime for the first time in the case of Delalic et al, in which the Trial Chamber, mentioning the prohibition against torture, and quoting the UN Special Rapporteur against torture, stated the *ius cogens* nature of this crime.⁷³

One month later, in December 1998, Trial Chamber II of the ICTY in the Furundzija case reaffirmed that the prohibition against torture is a norm of *ius cogens*, this time with greater analysis. It also explained that *ius cogens* nature of this prohibition was due to “the importance of the values that are protected”⁷⁴ by it. Trial Chamber II then specified the consequences of characterizing the prohibition of torture as *ius cogens*. First, the Chamber indicated that being characterized as an *ius cogens* norm implied that this prohibition “has become one of the fundamental standards of the international community”.⁷⁵ Second, Trial Chamber II indicated that this characterization was designed to produce a deterrent effect by sending a message of absolute prohibition.

Trial Chamber II also emphasized the effects of characterizing the prohibition of torture as an *ius cogens* norm at the international and individual levels. With respect to the international realm, the Chamber stated that its proclamation de-legitimized “any administrative, legislative, or judicial acts” that authorize torture, including any amnesty laws that “authorize, condone or absolve perpetrators of torture”.⁷⁶ In addition, it recognized the rights of potential victims to initiate proceedings before any national or international judicial body to obtain a declaration that any

⁷⁰ David Luban, *Una teoría de los crímenes contra la humanidad* 21 (2011), where he states that crimes against humanity fulfill the double requirement of offending the quality of being human (human-ness) and affecting the interests of all of humanity. That is, there is an attack on the human being as an individual and on the group of which he is a part. See also Kai Ambos, *Crímenes de lesa Humanidad y la Corte Penal Internacional in Cuadernos de Derecho Penal* 99 (2013).

⁷¹ Prosecutor v. Dusko Tadic, Appeal Judgment, No. IT-94-1-A (July 15, 1999) para. 296, quoting the UN Secretary General Report at para. 48.

⁷² Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drogan Papić, Trial Judgment, No. IT-95-16-T (January 14, 2000) para. 520.

⁷³ Prosecutor v. Zejnir Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo, Trial Judgment, No. IT-96-21-T (November 16, 1998) para. 454. Three years later, this position was restated by Trial Chamber II in the case of Kunarac et al, which specifically quoted the case of *Delalic et al.* See Prosecutor v. Dragoljub Kunarac, Radomir Kovac, Zoran Vokovic, Trial Judgment, No. IT-96-23-T & IT-96-23/1-T (February 22, 2001) para. 466.

⁷⁴ Prosecutor v. Anto Furundzija, Trial Judgment, No. IT-95-7/1-T (December 10, 1998) para. 153.

⁷⁵ *Ibid.*, para. 154.

⁷⁶ *Ibid.*, para. 155.

national measure authorizing torture is internationally illegal, and to obtain a favorable verdict in a civil suit for damages before a foreign court.

With respect to the individual level, that is, criminal liability, Trial Chamber II stated that “every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction”.⁷⁷ In addition, it affirmed States’ universal jurisdiction over torture based on the universal character of the crime.⁷⁸ The Chamber also mentioned that torture is not covered by statutes of limitations and must not be excluded from extradition under any political offence exemption.⁷⁹

Subsequently, the Trial and Appeals Chambers of the ICTY in the Celebici,⁸⁰ Naletilic & Martinovic,⁸¹ and Simic⁸² cases, have expressly upheld the *ius cogens* nature of the prohibition against torture. Moreover, in the Gbao case, the Appeals Chamber of the Special Tribunal for Sierra Leone, referred to the above-mentioned trial judgment in the Furundzija case for the proposition that the prohibition against torture was a norm of *ius cogens*.⁸³

In conclusion, although the contribution of the international criminal tribunals is significant, it is considerably more limited than the contribution of the Inter-American Court of Human Rights (Inter-Am. Ct. H.R.), both in terms of the number of judgments, and with respect to those conducts that have been considered as being prohibited by *ius cogens* norms.

4.3 The jurisprudence of the Inter-American Court of Human Rights

Due to the nature of human rights violations over which the Inter-Am. Ct. H.R. has jurisdiction, it has decided various cases, in which the alleged violations took place as part of a systematic or widespread attack against a civilian population that was conducted pursuant to government policy.

The case of *Almonacid Arellano et al. v. Chile* involved the political repression that followed the coup d’état by General Augusto Pinochet in Chile in 1973, which led to the detention, torture, enforced disappearance and execution of hundreds of people by the Chilean Armed Forces. Mr. Luis Alfredo Almonacid Arellano was one of the individuals killed during this period. In its judgment of 2006, the Inter-Am. Ct. H.R. not only confirmed that these acts constituted crimes against humanity, but stated that the commission of these crimes in 1973 violated *ius cogens* because the prohibition against torture was already at that time a *ius cogens* norm.⁸⁴

In addition, the Inter-Am. Ct. H.R. affirmed that the norms prohibiting amnesties, as well as the establishment of any statute of limitations, for crimes against humanity, are also *ius cogens* norms. Hence, the Inter-Am. Ct. H.R. stated that the content of these norms cannot be altered by conventional means, and compliance with it is mandatory for any State.⁸⁵ Finally, the Inter-Am. Ct. H.R. asserted that, if the norms prohibiting a conduct and attaching criminal liability are *ius cogens*

⁷⁷ *Ibid.*, para. 156.

⁷⁸ On this point, the Chamber cites the Supreme Court of Justice of Israel in the Eichmann case. The Eichmann case was also cited by the United States Court of Appeals for the Sixth Circuit in the Demjanjuk case in 1985.

⁷⁹ Prosecutor v. Anto Furundzija, Trial Judgment, No. IT-95-/7/1-T (December 10, 1998) para. 157.

⁸⁰ Prosecutor v. Zejnil Delalic, Zdravko Mucic (aka “PAVO”), Hazim Delic and Esad Landžo (aka “ZENGA”), (“Celebici Case”), Appeals Judgment, No. IT-96-21-A (February 20, 2001) footnote 225.

⁸¹ Prosecutor v. Mladen Naletilic, aka “TUTA” and Vinko Martinovic, aka “ŠTELA”, Trial Judgment, No. IT-98-34-T (March 31, 2003) para. 336, citing “Celebici case” *supra* note 80, para. 454.

⁸² Prosecutor v. Milan Simić, Trial Judgment, No. IT-95-9/2-S (October 17, 2002) para. 34.

⁸³ Prosecutor v. Augustine Gbao, Special Court of Sierra Leone (SCSL hereinafter), Decision on the Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, SCSL-2004-15-AR72 (E), (May 25, 2004) para. 9.

⁸⁴ Case of *Almonacid Arellano et al. v. Chile*, Merits, Reparations and Costs, Judgment, Preliminary Objections, Inter-Am. Ct. H.R., Series C No. 154, para. 99 (September 26, 2006).

⁸⁵ *Ibid.*, paras. 114 and 153.

norms, the norms imposing on States the obligations to investigate such conduct, prosecute those allegedly responsible, and enforce the sentences imposed upon them, are also *ius cogens* norms.⁸⁶

Similarly, in the judgments of Miguel Castro Prison (2005)⁸⁷ and La Cantuta (2006),⁸⁸ both of which involved repression by state agents during Alberto Fujimori's presidency in Peru between 1992 and 2001, the Inter-Am. Ct. H.R. (i) asserted the *ius cogens* nature of the norms prohibiting crimes against humanity, (ii) attached international criminal liability to those who engaged in such crimes, (iii) declared that such liability was not subject to any statute of limitations, and (iv) prohibited the application of amnesty laws. The Inter-Am. Ct. H.R. has repeatedly emphasized in dozen of cases the *ius cogens* nature of the international norms that prohibit extrajudicial executions,⁸⁹ torture,⁹⁰ other

⁸⁶ *Ibid.*, para. 114. Judge Cançado Trindade had previously developed this position in his concurring opinion in Advisory Opinion 18/03. First, he clarified that not all *erga omnes* obligations imply a *ius cogens* character, but rather that any *erga omnes* obligation of a *ius cogens* character will always have an *erga omnes* scope. Then, he highlighted the *ius cogens* nature of the *erga omnes* protection (including the duties to investigate and to punish) against any conduct prohibited by *ius cogens* norms. Moreover, Judge Cançado Trindade added that this *erga omnes* protection has two dimensions: one horizontal (i.e., it applies to the International Community as a whole), and one vertical (i.e., it applies to the State with respect to the individuals who are subject to its jurisdiction). *See also*, Juridical condition and rights of undocumented migrants, Advisory Opinion, concurring opinion of Judge Cançado Trindade, Inter-Am. Ct. H.R., OC-18/03, Series A No.18, pp. 1-36 (September 17, 2004).

⁸⁷ Case of the Miguel Castro Prison v. Peru, Judgment, Inter-Am. Ct. H.R., Judgment, 2 August 2008, paras. 402 and 404.

⁸⁸ Case of La Cantuta v Peru, Judgment, Inter-Am. Ct. H.R., Series C No. 162, para. 168 and para. 225 (November 29, 2006).

⁸⁹ In the Case of Villagrán Morales et al. v Guatemala, although the Inter-Am. Ct. H.R. did not expressly refer to the prohibition of extrajudicial executions as a *ius cogens* norm, Judges Cançado Trindade and Abreu Burelli asserted in their concurring opinion in this case (which involved a police officer and a former officer of the same entity who killed five children living in the streets of Guatemala) that the right to "life belongs to the domain of the *ius cogens*." *See* Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala, Merits, Judgment, Opinion of Judges Cançado Trindade and Abreu Burelli, Inter-Am. Ct. H.R., (November 19, 1999).

Two years later, the judgment in the Case of Barrios Altos v. Peru (in which self-amnesty laws were promulgated by the State for those who were presumed responsible for committing extrajudicial executions on November 3, 1991, in the "Barrios Altos" neighborhood in Lima) was issued. The concurring opinion of Judge Trindade Cançado explicitly highlighted the *ius cogens* character of the right to life. Specifically, he stated that self-amnesty laws in this case ignore "non-derogable rights" (such as life) "that fall within the scope of the *ius cogens*." Moreover, in paragraph 41 of the judgment in this case, when addressing the incompatibility of these amnesty laws with the American Convention, the Inter-Am. Ct. H.R. asserted that, among other conduct, "summary, extrajudicial or arbitrary executions, [violate] non-derogable rights recognized by international human rights law." Accordingly, although the notion of *ius cogens* was not explicitly mentioned, the court noted the "imperative" nature of those laws recognized as such by International Human Rights Law. This must be understood as a recognition of the *ius cogens* character of the norm embracing the right to life. *See* Case of Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R., (March 14, 2001).

Beginning in 2004, the Inter-Am. Ct. H.R. has expressly declared in various contexts that extrajudicial executions violate *ius cogens* norms, including cases involving alleged counterinsurgency operations during internal armed conflicts, state operations against organized crime, and general undercover operations. The cases of Gómez Paquiyauri (2004), Miguel Castro Prison (2006) and La Cantuta (2006), all versus Peru, belong to the first category. In these cases, the State was found internationally liable for violations of rights and obligations enshrined in the American Convention on Human Rights based on systematic and serious human rights violations that occurred during alleged counterinsurgency operations. In these operations, "extrajudicial killings of suspected members of armed groups, carried out by state agents under orders of military leaders and police officials" were committed, among other acts. The Inter-Am. Ct. H.R., in the first two cases, and Judge Cançado Trindade, in his concurring opinion in the third case, highlighted that this conduct is a violation of international *ius cogens*. *See* Case of the Gómez Paquiyauri Brothers v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., Series C No. 110, p. 76 (July 8, 2004); Miguel Castro Prison, p.203; Case of La Cantuta, Cançado's concurring opinion p. 54.

The Case of Zambrano Vélez v Ecuador (2007) involved the second category (state operations against organized crime). In this case, the Inter-Am. Ct. H.R., investigated violations of the American Convention that were committed by members of the Armed Forces and the National Police when they extra-judicially killed three people under a state of emergency declared in the year 1992, due to a "serious internal disturbance". On page 96 of its judgment, the Inter-Am. Ct. H.R., asserted that "no matter the condition of each State, there is an absolute prohibition (...) of extrajudicial and summary executions, (...) which constitutes a non-derogable norm of International Law". The Case of Huilca Tecse v Peru (2005) involved an extrajudicial execution during undercover operations fostered or tolerated by the State. In its judgment, the Inter-Am. Ct. H.R., stated on page 65 that the perpetration of this conduct constituted a disregard of *ius cogens* in a context or "pattern of human rights violations." *See* Case of Zambrano Vélez et al. v. Ecuador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., , Series C No. 166 (July 4, 2007); Case of Huilca Tecse v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., Series C No. 121, p. 65 (March 3, 2005).

cruel, inhumane or degrading treatments or punishments,⁹¹ enforced disappearances⁹² and slavery.⁹³ It has done so, even when such acts were committed in isolation and not as part of a widespread or

⁹⁰ In its first approaches to the prohibition of torture, the Inter-Am. Ct. H.R., was not so emphatic and used expressions other than *ius cogens*. For example, on page 95 of its judgment in the Case of Cantoral Benavides v Peru (2000), it referred to an "absolute prohibition of torture", citing a decision of the European Court of Human Rights. In its subsequent judgments in the Cases of García Asto and Ramírez Rojas v. Peru, p. 222 (2005), Caesar v. Trinidad and Tobago, p. 59 (2005) and Zambrano Vélez et al. v. Ecuador, p. 96 (2007), the Inter-Am. Ct. H.R., referred to the prohibition of torture as an absolute and non-derogable norm, or "prohibited (conduct) as it violates non-derogable rights recognized by the International Law on Human Rights", as previously stated in the case of Barrios Altos v. Peru (2001). See Case of Cantoral Benavides v. Peru, Merits, Judgment, Series C No. 69, p. 95 (August 18, 2000); Case of García Asto and Ramírez Rojas v. Peru, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., Series C No. 137, p. 222 (November 25, 2005); Case of Caesar v. Trinidad and Tobago, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., Series C No. 123, p. 59 (March 11, 2005).

However, the Inter-Am. Ct. H.R., now expressly acknowledges the *ius cogens* nature of norms prohibiting torture and attaching international criminal liability to its commission. See the Cases of Maritza Urrutia v. Guatemala, p. 92 (2003), Gómez Paquiyauri Brothers v. Perú (2004), Tibi v. Ecuador (2004), Lori Berenson v. Peru (2006), Baldeón- García v. Peru (2006), Almonacid Arellano et al. v. Chile (2006), Goiburú et al. v. Paraguay (2006), Miguel Castro Castro Prison v. Peru (2006), La Cantuta v. Peru (2006), La Rochela v. Colombia (2007), Bueno Alves v. Argentina (2007), González et al. v. Mexico (2009), Cabrera García and Montiel Flores v. Mexico (2010), Fleury et al. v. Haiti (2011), El Mozote and surrounding areas v. El Salvador (2012), and Mendoza et al. v. Argentina (2013).

The Inter-Am. Ct. H.R., judgment in the case of Caesar is of particular interest because in that case, the norms prohibiting inhuman or degrading treatments are explicitly referred to as *ius cogens* norms, whereas those prohibiting torture are not. Nonetheless, because the Inter-Am. Ct. H.R.'s characterization of the prohibition of torture as "absolute and non-derogable" is based on previous judgments in which the Inter-Am. Ct. H.R., explicitly describes this norm as *ius cogens* (See Case of Lori Berenson Mejía v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., Series C No. 119, para. 100 (November 25, 2004); Case of De la Cruz Flores, Judgment, Inter-Am. Ct. H.R., Series C No. 115, para. 125 (November 18, 2004); and Case of Tibi v. Ecuador, Judgment, Inter-Am. Ct. H.R., Series C No. 114, para. 143 (September 7, 2004)) one can presume that the Inter-Am. Ct. H.R., did not intend to reject the *ius cogens* character of the prohibition of torture in the case of Caesar.

⁹¹ Initially, in the case of Benavidez v Peru (2000), the Inter-Am. Ct. H.R., referred to the prohibition of other cruel, inhuman or degrading treatments or punishments as absolute, but not specifically as *ius cogens*. However, in subsequent cases, the Inter-Am. Ct. H.R., stated that in addition to torture, other cruel, inhuman or degrading punishments or treatments are considered to belong "to the domain of the *ius cogens*." See the Judgments in the cases of Caesar v. Trinidad and Tobago (para.100), Ximenes Lopes v. Brazil (para.126), Servellón García et al. v. Honduras (para.97) Barrios family v. Venezuela (para.50) and El Mozote and surrounding areas v. El Salvador (para.147).

⁹² From its creation (Velásquez Rodríguez (1988), Fairén Garbí and Solís Corrales (1989) and Godínez Cruz (1989) all versus Honduras) until today (Río Negro Massacres v. Guatemala (2012) and Osorio Rivera and Family v. Peru (2013)), the Inter-Am. Ct. H.R., has examined cases involving enforced disappearances, particularly in the context of counter-insurgency warfare, such as the extrajudicial operations against armed groups in Peru (Shining Path and the Tupac Amaru Revolutionary Movement) from the 1980s to the late 2000s. Pursuant to these operations state agents systematically committed human rights violations. Similarly, the Brazilian Army violated the human rights of the civilian population during operations to thwart the Araguaia guerrilla movement during the years 1972-1975. See cases such as La Cantuta (2006) and Osorio Rivera and Family (2013), both versus Peru, and Gomes Lund et al. v. Brazil (2010). During the internal armed conflict in Guatemala between 1960 and 1996, enforced disappearances were systematically conducted by the State as part of its fight against insurgency members and against people who, according to the State, were suspected to be part of it. See, e.g., Chitay Nech et al. (2010), Gudiel Álvarez et al. (2012), and García and Family (2012). In systems of oppression and persecution of the opposition during dark periods and dictatorships in Latin America, enforced disappearances were part of a pattern implemented by the States. Enforced disappearances also occurred in the 1960s and 1970s during the "dirty war" in Mexico, the "scorched earth" campaign against the Mayan people in Guatemala (1981 - 1983), and the "Condor Operation" in the 1970s and 1980s, in which governments, armies, police forces and intelligence agencies of the States of the southern cone of South America united to implement a system of oppression. See Radilla Pacheco v. Mexico (2009), Río Negro Massacres v. Guatemala (2012), Goiburú et al. v. Paraguay (2006) and Gelman v. Uruguay (2011). Since its judgment in the case of La Cantuta (para. 157), the Inter-Am. Ct. H.R., has asserted that the norms prohibiting enforced disappearances and the norms attaching international criminal liability to those responsible for enforced disappearances both have *ius cogens* status. See also the judgments in the cases of Osorio Rivera and Family (para. 112), Gomes Lund et al. v. Brazil (para. 105); Chitay Nech et al. (para. 86) Gudiel Álvarez et al. v. Guatemala (para. 92), García and Family v. Guatemala (para. 96) Radilla Pacheco v. Mexico (para. 139), Río Negro Massacres v. Guatemala (para. 114), Goiburú et al. v. Paraguay (para. 84, 93, 128), and Gelman v. Uruguay (para. 99).

systematic attack against a civilian population. The cases of Barrios Altos, Goiburú, Vargas Areco, Almonacid Arellano, Penal Miguel Castro, La Cantuta, Ibsen Cárdenas and Ibsen Peña, Chitay Nech, Gomes Lund, El Mozote Massacre, Gelman and Río Negro Massacres are prime examples of this jurisprudential approach.⁹⁴

In the last years, there have been certain revisionist movements that disagree with the settled jurisprudence of the Inter-Am. Ct. H.R., and with the manner in which crimes against humanity have been treated for decades under international law. Of a particular note is the concurring opinion of the former President of the Inter-Am. Ct. H.R., Diego García Sayán, in the judgment in the case of El Mozote massacre v El Salvador. In this case, Judge García Sayán asserted the need to make a balanced judgment between the interests of peace and the interests of justice in cases involving crimes against humanity that occur during internal armed conflicts.⁹⁵ His position was based on Article 6.5 of Additional Protocol II, which provides that "[a]t the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

The other six Inter-Am. Ct. H.R. judges responded to Judge García Sayán in the judgment, by noting that although this provision applies to ordinary crimes committed in non-international armed conflicts, its application cannot be extended to international crimes prohibited by *ius cogens* norms, such as war crimes or crimes against humanity. As the majority of the Inter-Am. Ct. H.R. put it:

Consequently, it may be understood that Article 6.5 of Additional Protocol II refers to extensive amnesties in relation to those who have taken part in the non-international armed conflict or who are deprived of liberty for reasons related to the armed conflict, provided that this does not involve facts, such as those of the instant case, that can be categorized as war crimes, and even crimes against humanity.⁹⁶

The issue addressed in the 2012 judgments in the cases of Gudiel Álvarez et al., and García and Family, both versus Guatemala, is slightly different. In these decisions, the Inter-Am. Ct. H.R. stated that if the prohibition of the conduct at issue is a norm of *ius cogens*, "the correlative obligations to investigate and to prosecute and punish, as appropriate, those responsible, becomes particularly strong and important, owing to the gravity of the crimes committed and the nature of the rights harmed".⁹⁷

A literal interpretation of this passage may be viewed by some as evidence that, notwithstanding the established jurisprudence of the Inter-Am. Ct. H.R. on this issue, the Inter-Am. Ct. H.R. rejected the

⁹³ In 1993, in the case of *Aloeboetoe et al. v. Suriname* (paragraph 57), the Inter-Am. Ct. H.R. nullified a slavery treaty because it violated *ius cogens* norms. Although the Inter-Am. Ct. H.R. did not cite international jurisprudence as the basis for its decision, it reiterated the statement made by the International Court of Justice two decades earlier in the case of *Barcelona Traction* regarding the imperative nature of the prohibition of slavery. Specifically, the Inter-Am. Ct. H.R. asserted that pursuant to Article 64 of the Vienna Convention, a treaty is void if it contains a provision that is contrary to a new *ius cogens* norm. Although slavery was not prohibited by international law when the treaty between the Kingdom of the Netherlands and Suriname (1762) was adopted, the prohibition against slavery had emerged as a peremptory norm by the time the Inter-Am. Ct. H.R. ruled on the issue (1991 Merits and 1993 Reparations and Costs), and thus the Inter-Am. Ct. H.R. acknowledged the existence of "*ius cogens superveniens*" norms.

⁹⁴ Inter-Am. Ct. H.R. *Case of Barrios Altos v. Peru*, Inter-Am. Ct. H.R., para. 41; *Case of Almonacid Arellano et al. v. Chile*, Inter-Am. Ct. H.R., para. 114; *Case of La Cantuta v. Peru*, Inter-Am. Ct. H.R., Merits, Reparations and Costs. Judgment 29 November 2006, Series C No. 162, para. 168; *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., Series C No. 209, para. 147, (November 24, 2010); *Case of Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R., Series C No. 221, paras. 225-229 and 232 (February 24, 2011); *Case of the Massacres of El Mozote and surrounding areas v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., Series C No. 252, para. 286, (October 25, 2012).

⁹⁵ *Case of the Massacres of El Mozote and surrounding areas v. El Salvador*, Inter-Am. Ct. H.R., concurring opinion of Judge Diego García-Sayán, paras. 20-40.

⁹⁶ *Case of the Massacres of El Mozote and surrounding areas v. El Salvador*, Inter-Am. Ct. H.R., para. 285.

⁹⁷ *Case of Gudiel Álvarez et al. v. Guatemala*, Inter-Am. Ct. H.R., para. 232; and *Case of García and Family, v. Guatemala*, Inter-Am. Ct. H.R., para. 131.

ius cogens character of the norm requiring the State to enforce the criminal liability derived from the crime of enforced disappearance. However, although the language used by the Inter-Am. Ct. H.R. was not the most apposite, when it is read in the context of the consolidated jurisprudence of the Inter-Am. Ct. H.R., this interpretation must be rejected. The rejection of this interpretation was reinforced by the Inter-Am. Ct. H.R.'s subsequent discussion of the peremptory nature of the State's obligation to enforce such criminal liability in the case of *García Lucero et al. v Chile* (2013),⁹⁸ which also concerned a crime of enforced disappearance.

4.4 The jurisprudence of the International Court of Justice and the European Court of Human Rights

Unlike the Inter-Am. Ct. H.R. jurisprudence, the jurisprudence of the International Court of Justice ("ICJ") and the European Court of Human Rights ("Eur. Ct. H.R."), has been quite timid with regard to States' obligations to investigate, prosecute and punish international crimes, particularly crimes against humanity. This is due to the fact that both Courts have addressed the notion of ius cogens norms, and its relationship with crimes against humanity, in cases in which such norms are in conflict with the principle of State immunity.

In its 2002 judgment in the *Arrest Warrant* case (*Democratic Republic of the Congo ("DRC") v. Belgium*), the ICJ endorsed the position of the DRC, which claimed that the person accused for crimes against humanity and war crimes was his Minister of Foreign Affairs, and therefore, due to the nature of his position, he enjoyed personal immunity, regardless of the type of crimes charged.⁹⁹

Subsequently, in 2012, the ICJ endorsed the position of Germany, which claimed State immunity in several proceedings for civil claims carried out against Germany in Italy. The claimants in these proceedings aimed at obtaining a declaration of the responsibility of Germany for the commission of international crimes during World War II.¹⁰⁰

In the *Al-Adsani* case (2001),¹⁰¹ the Eur. Ct. H.R. - after considering the ICTY jurisprudence stating that the prohibition of torture is a peremptory norm of international law,¹⁰² and in light of the decisions in the case of Chilean ex-dictator Augusto Pinochet and the amendment to the United States Foreign Sovereign Immunities Act (FSIA) - found that in 2001 there was no exception under international law to State immunity in cases of serious violations of human rights.¹⁰³ This position

⁹⁸ Case of *García Lucero et al. v Chile*, Inter-Am. Ct. H.R., para.123.

⁹⁹ This case deals with a warrant of arrest issued by the Belgium authorities against the Minister of Foreign Affairs of the Democratic Republic of the Congo, due to his alleged participation in the commission of war crimes and crimes against humanity. See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 2002 ICJ Rep. 314, para. 59 (February 14).

¹⁰⁰ Italy claimed that State immunity was not applicable in this case, because the case was based on the violations of peremptory norms occurred in Italian territory. Hence, according to Italy, the ius cogens nature of norms that had been violated should make State immunity inapplicable. However, the ICJ rejected the position of Italy and restated that State immunity was part of international customary law. Moreover, the ICJ highlighted that, according to international customary law, the nature of the violated norm does not provide the basis for an exception to State immunity. See, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 ICJ Rep. 99, paras. 62, 88-89, 92 (February 3).

¹⁰¹ In 1991, Mr Al-Adsani, a citizen of the United Kingdom and Kuwait, went to Kuwait to serve as a pilot in the Kuwaiti armed forces. During his stay in that country, he came into possession of sex videotapes involving a Sheikh who was related to the Emir of Kuwait. Somehow, these tapes were made public. This situation led to the Sheikh and several other men kidnapping the petitioner and torturing him for several days on two separate occasions after the conclusion of the Gulf War. After his second release, Mr Al-Adsani returned to the UK and was treated for various burns and psychological disorders caused by the torture inflicted upon him. After his return to the UK, the petitioner filed a series of civil actions against the Sheikh and the State of Kuwait, but all actions were dismissed based on the principle of State immunity.

¹⁰² Case of *Al-Adsani v the United Kingdom*, 2001-XI Eur. Ct. H.R., No. 35763/97, paras. 59 and 60 (2011).

¹⁰³ *Ibid.*, para. 66.

was confirmed in the decision in *Jones et al. v the UK* (2014). In this case, the Eur. Ct. H.R. reiterated that, under customary international law, there is no exception to State immunity based on violations of *ius cogens* norms.¹⁰⁴

After analyzing the ICJ judgments in the cases of the *DRC v Belgium* (2001) and *Germany v Italy* (2012), the Eur. Ct. H.R. concluded that there was no conflict between the rules of State immunity and the *ius cogens* nature of the prohibition of torture. For the Eur. Ct. H.R., as for the ICJ, the rules of State immunity are purely procedural in nature and relate to the jurisdiction's authority to investigate and punish acts of torture, whereas the *ius cogens* nature of the prohibition against torture has a substantive nature and establishes a peremptory norm in international law.¹⁰⁵

The dominant critical theories on justice relate the notion of justice to rules of conduct for human beings or to guiding principles for such conduct. Events outside the scope of human behavior cannot be considered just or unjust.¹⁰⁶ In this regard, Amartya Sen states that the determination of what is just and unjust is based on a complex rational exercise involving different types of argumentative dynamics, not on preconceived ideas that lack sufficient foundation to reach an answer. Nevertheless, he emphasizes the inherent difficulty of reaching a consensus on what is just or unjust.¹⁰⁷

5. The Notion of Transitional Justice is not part of *ius cogens*

The notion of transitional justice has been developed in this context.¹⁰⁸ It can be defined as a society's efforts or processes to resolve situations involving large scale abuses, including the identification of those responsible and contributions to the reconciliation process.¹⁰⁹ It is not limited to a return to democracy or achieving peace in the midst of conflict. As Benavides has stated, the notion of transitional justice "is burdened by strong ambiguity, because it applies equally to transitions from authoritarian governments to democracy, thereby being part of democracy studies, and to transitions from international and non-international armed conflicts to situations of peace, thereby being part of peace studies".¹¹⁰

Reátegui has highlighted that "the challenges and duties of societies emerging from authoritarianism or armed conflicts are not limited to the achievement of an effective transition in terms of political institutions; they also, and centrally, include the provision of measures of justice for victims of human rights violations, the explanation and collective and critical recognition of past events, and ultimately the creation of conditions for a sustainable peace".¹¹¹ Thus, it should be emphasized that the concept of transitional justice extends beyond the scope of law and is influenced by the universe of variables that surrounds the situation in which it must be implemented, including political, social, and economic factors and the cultural dynamics of the concerned State.

Given the characteristics of the notion of transitional justice, its implementation is not part of customary international law (much less of *ius cogens*) because its content is still vague, and there is no consensus on it. Consequently, the standards promoted by transitional justice with regard to the

¹⁰⁴ Case of *Jones et al. v. the United Kingdom*, Reports of Judgments and Decisions 2014, Eur. Ct. H.R., Nos. 34356/06 & 40528/06, para. 79 (2014). The facts of this case are as follows. In 2001, while Mr. Jones was living in Saudi Arabia, he suffered injuries caused by the explosion of a bomb outside a bookstore. Several days later, security agents of that State kidnapped and tortured him for nearly 67 days. The Eur. Ct. H.R. simultaneously considered the cases of three other petitioners who were tortured during their detention in Saudi Arabia. British authorities had dismissed all four cases based on the principle of State immunity.

¹⁰⁵ *Ibid.*, para. 93.

¹⁰⁶ Anca Gheaus, *The Feasibility Constraint on The Concept of Justice*, 63 *The Philosophical Quarterly* 446 (2013).

¹⁰⁷ Amartya Sen, *La Idea de Justicia* 34-36 (2010).

¹⁰⁸ For further information Kerry L. Clamp and Jonathan Doak, *More than Words: Restorative Justice Concepts in Transitional Justice Settings*, 12 *International Criminal Law Review* 339-360 (2012).

¹⁰⁹ Juan C. Cárdenas, Andrés Casas-Casas & Nathalie Méndez M, *The Hidden Face of Justice: Fairness, Discrimination and Distribution in Transitional Justice Processes*, 20 *Peace Economics, Peace Science and Public Policy* 34 (2014).

¹¹⁰ Farid Benavides, *Justicia en Épocas de Transición* 9 (2013) (authors' translation).

¹¹¹ Félix Reátegui, *Introducción in Justicia Transicional. Manual para América Latina* 36 (Félix Reátegui ed., 2011) (authors' translation).

fight against impunity, reparation for victims and the determination of the truth, must be consistent with the principle of international criminal liability for the commission of international crimes, and the associated duties of the States to investigate the facts, punish those responsible, provide reparations and fulfil the rights of the victims to truth, justice and reparations.

6. Conclusion: the need for redefining the scope of the notion of transitional justice in light of the "no peace without justice" paradigm

The supra-individual dimension of the societal value protected by crimes against humanity (peace, security and well-being of humanity), is part of the very foundations of the current international legal order. Furthermore, the prohibition against crimes against humanity and their legal implications are well established in both general international law and customary international law, and include: (i) the express prohibition of serious acts of systematic or widespread violence against civilians; (ii) the attachment of international criminal liability to those most responsible for such conduct; and (iii) the non-applicability of statutory limitations and amnesties to such criminal liability.

The jurisprudence of international criminal tribunals, regional human rights courts and the International Court of Justice has also consistently declared the peremptory nature of the norms that expressly prohibits acts of systematic or widespread violence against civilians.

However, such jurisprudence has been uneven in declaring the peremptory nature of customary norms relating to the attachment of international criminal liability to those most responsible for crimes against humanity, and the non-applicability of statutory limitations and amnesties to such criminal liability.

The Inter-Am. Ct. H.R. and, to an important extent, the international criminal tribunals have been more vocal on this issue. As a result, in the cases *Almonacid Arellano et. al. v. Chile*, *Penal Miguel Castro Castro* and *La Cantuta*, the Inter-Am. Ct. H.R. has also affirmed the *ius cogens* nature of those norms that (i) attach international criminal liability to those responsible for crimes against humanity; (ii) state the non-applicability of statutory limitations for such crimes; and (iii) prohibit the application of amnesty laws. In turn, the jurisprudence of international criminal tribunals, particularly the ICTY, has highlighted the peremptory nature of the norms that attach international criminal liability to those responsible for genocide, crimes against humanity and war crimes.

In contrast, the jurisprudence of the ICJ and the Eur. Ct. H.R. has been more timid on this issue. As such, when analyzing the normative conflict between the two sets of norms that regulate crimes against humanity and the principle of State immunity. Both Courts have been silent on the issue of the nature of the norms dealing with the consequences of international crimes. The reason behind this silence is that both the ICJ and the Eur. Ct. H.R. have focused their conclusions on the alleged procedural nature of the principle of State immunity, which would prevent it from entering in any conflict with the substantive regulation of international crimes.

Finally, concerning the notion of transitional justice, it is important to highlight that it is not currently part of general or customary international law, much less of peremptory law, because its content lacks sufficient specificity and does not enjoy the necessary consensus regarding its normative force.

Consequently, the notion of transitional justice does not enjoy the same normative status of the prohibition against crimes against humanity and their legal implications. As a result, any redefinition of its content and scope of action triggered by the need to alleviate some of the tensions observed in the current peace processes, must be based on the respect for the well-established "no justice without peace" paradigm, as epistemological condition of validity.