

Jus cogens: An european concept? An emancipatory conceptual review from the inter-american system of human rights*

Jus cogens: Um conceito europeizado? Uma proposta de revisão conceitual libertadora a partir do sistema interamericano de direitos humanos

Tatiana de A. F. R. Cardoso Squeff **

Marina de Almeida Rosa***

ABSTRACT

The main subject of this paper is to investigate in Latin American international law the existence of a more comprehensive list of jus cogens rules, to the detriment of the one existing in general/Europeanized international law. To do so, through a descriptive and exploratory bibliographical and jurisprudential research, the concept of jus cogens in the field of international law will be investigated in the light of the knowledge forged in the inter-American human rights system, beyond those places considered as traditional, precisely because they are exclusive and dominating. The conclusion reached is that, based on libertarian theses, especially in the area of human rights, it is possible to note the important role of the inter-American plan by offering a counter-hegemonic voice with regard to the understanding of the concept of jus cogens on the basis in its decisions, proving to be a possibility of resistance of the South in the present time, in search of its space in the construction of the international right, from its own knowledge.

Key-words: Jus cogens. Inter-American System of Human Rights. Coloniality. North-South. Emancipation.

RESUMO

O objetivo central do presente trabalho é averiguar no âmbito do direito internacional latinoamericano a existência de um rol mais abrangente de regras de *jus cogens*, em detrimento daquele existente no direito internacional geral/europeizado. Para tanto, por intermédio de uma pesquisa bibliográfica e jurisprudencial, de cunho descritivo e exploratório, averiguar-se-á o conceito de *jus cogens* no plano do direito internacional à luz do conhecimento forjado no Sistema Interamericano de Direitos Humanos, para além daquelas localidades tidas como tradicionais, justamente por serem excludentes e dominadoras. A conclusão que se chega é que, a partir das teses libertárias, especialmente na seara dos direitos humanos, é possível notar o importante papel do plano interamericano ao oferecer uma voz contra-hegemônica no

* Recebido em: 13/10/2017
Aprovado em: 19/12/2017

The authors would like to thank Ms. Maria Eduarda Gasparotto De Azevedo Bastian, Specialist in International Law at UFRGS, Ms. Elisa Soledade Iaconi, Bachelor in International Relations at UniRitter, and Ms. Valentina Borcker Junqueira, undergraduate student in International Relations at UniRitter, for the translation of the present article.

** Doutoranda em Direito Internacional (UFRGS). Mestre em Direito Público (UNISINOS). Especialista em Relações Internacionais (UFRGS), Direito Internacional (UFRGS), Língua Inglesa (UNILASALLE). Professora da graduação em Direito e em Relações Internacionais (UNIRITTER e UNIFIN). Pesquisadora convidada da Universidade de Toronto. Email: tatiafc Cardoso@gmail.com

*** Mestranda em Direito Público pela UNISINOS, bolsista CAPES/PROEX. Especialista em Direito Internacional Público, Privado e da Integração Regional pela UFRGS (2016). É professora de Direito Internacional na Graduação em Direito e em Relações Internacionais do Centro Universitário Ritter dos Reis (UniRitter). Advogada. Email: marinaalrosa@gmail.com

que tange o entendimento do conceito de *jus cogens* com base em suas decisões, demonstrando ser uma possibilidade de resistência do Sul na atualidade, em busca do seu espaço na construção do direito internacional, a partir do seu próprio conhecimento.

Palavras-chave: Jus cogens. Sistema Interamericano de Direitos Humanos. Colonialidade. Norte/Sul.

1. INTRODUCTION

International law is a field of law which, although comprises the various States that compose the international society, is also extremely excluding regarding the (re)production of its norms, rarely allowing subjects outside the European/Western/North axis to determine or to corroborate to the regeneration of its laws, always seeking – even remotely – in its “Westphalian origins” the answers for its problems. It means that international law is clearly regulated by oligarchical forces that dominate the power and, consequently, the knowledge of this plan, consubstantiating itself in a dominant and excluding sphere, which usually rejects the contributions made by those that are not in the central axis of the international system.

This situation reflects directly in the ascertainment of the sources of international law, whose purpose is to forge the basis for the maintenance of social order in international relations, adjusting the conducts of the numerous parts that compose it. After all, in the absence of a harmonious and open participation among the various subjects, the determination of the actions accepted (or not) in social life will be unilaterally conceived and may lead to the suppression of regionally common practices. In this sense, the attribution of the cogent character to certain rules is an example, especially when they are accepted and recognized only by part of the international community of States, disregarding developments of other places that are equally relevant, which could be equally recognized as cogent norms.

Therefore, throughout a descriptive-exploratory bibliographical and jurisprudential research, the concept of *jus cogens* in international law will be investigated in light of the knowledge forged in various places, especially regarding the decisions of the Interamerican System of Human Rights. After all, the main objecti-

ve of the present study is to investigate the existence of a broader range of *jus cogens* rules within the Latin-American international law, instead of those existing in the general/European international law, in order to demonstrate the role that the Global South presents to the consolidation of the obligations that contribute to the improvement of human rights, denoting the importance of a ‘libertarian view’ of that concept, which is echoed in the anti-hegemonic discourses that the decolonial thought presents.

2. JUS COGENS: A EUROPEANIZED CONCEPT

The imperative rules of international law, usually referred to as *jus cogens* norms or peremptory norms, are inalienable legal precepts, and therefore cannot be suspended at any time, not even in extreme situations. They are understood as directives deriving from Natural Law,¹ and therefore they would form the fundamental basis of the normative system of the international level.² After all, *jus cogens* standards are set aside to the right that States have in determining their own norms and conducts,³ being typically of *ordre publique*.⁴ In other

1 The origins of the *jus cogens* rules can be found in classic works of International Law dating from the eighteenth century, as in Christian Wolf and Emmerich de Vattel, suggesting that they would be derived from Natural Law. CZAPLINSKI, Wladyslaw. *Jus cogens and the law of treaties*. In: TOMUSCHAT, Christian; THOUVENIN, Jean-Marc (Ed.). **The fundamental rules of the international legal order: jus cogens and obligations erga omnes**. Leiden: Martinus Nijhoff Publishers, 2006. p. 83. However, as André Gonçalves Pereira and Fausto de Quadros point out, those rules would have been cited by Hugo Grotius in his 1625 book “*War and Peace Law*”, while a ‘*jus strictum*’ derived from ‘God’ as a specific category of rules of the ‘right of the peoples’ (PEREIRA, André G.; QUADROS, Fausto de. **Manual de direito internacional público**. 3. ed. Coimbra: Almedina, 2009. p. 278). Still, according to Paulo Borba Casella, the origin of the peremptory rules would go back to the writings of Francisco de Vitória, who, inspired by Roman law, gave the idea that people would be obliged to obey the rules common to the globe (ACCIOLO, Hidelbrando; SILVA, Geraldo Eulálio N.; CASELLA, Paulo B. **Manual de direito internacional público**. 15. ed. São Paulo: Saraiva, 2008, p. 109).

2 BROWNLIE, Ian. **Public international law**. 6. ed. New York: Oxford University Press, 2003, p. 488; JANIS, Mark W. **An introduction to international law**. 4. ed. New York: Aspen Publishers, 2003. p. 65.

3 RAGAZZI, Maurizio. **The concept of international obligations erga omnes**. New York: Oxford Monographs in International Law, 1997. p. 57.

4 Justifying that sovereignty is not inalienable, based on The S.S. *Wimlendon* case of the Permanent Court of International Justice, judged in 1923. BASINOUNI, M. Cherif. **Crimes against human-**

words, *jus cogens* rules are norms that impose a restriction on the sovereignty of nations while carrying out their activities, imposing a limit to states' voluntarism, whether in the internal or external sphere.

This way, *jus cogens* can be understood as being basic norms of a natural order formed by common interests, which have an objective character, being imposed by the international order to its participants, independently of their will.⁵ And precisely because they have this imposing characteristic, some judges of the International Court of Justice characterize them as being higher law, that is, rules that are beyond the reach of States, which would always have priority in their application when in contrast to any other normative sources of (International) Law,⁶ being them either *lex specialis* or *lex generalis*.⁷

As far as it is known, these rules were used for the first time in the nineteenth century as a possible way of invalidating international agreements contrary to them, despite the impossibility of identifying such pre-existing "standardized" precepts at the time.⁸ However, there was an attempt to set a common ground about what the rules of *jus cogens* would become in the twentieth century, since the Cold War environment became somewhat less fierce not only because of the implementation of a newer political strategy known as Détente by the Americans, but also because of the progress of

the discussions towards the negotiation of a new convention contemplating rules concerning international treaties.

Drawing on a proposal from the socialist countries, on that occasion "jus cogens was seen as a political opportunity to crystallize once and for all the 'rules of the game' concerning peaceful coexistence between East and West."⁹ Despite having received some support from Latin American and Afro-Asian countries,¹⁰ many Western countries remained reluctant to do so, given that it would limit their actions - their 'willingness'¹¹ - at the international level. Only a concept was achieved,¹² thus highlighting the role of the International Court of Justice in "endorsing" the attribution of such a characteristic to a particular rule,¹³ which undeniably "left all States absolutely free to argue for or against the jus cogens character under any circumstances at the international level."¹⁴

Consequently, *jus cogens* rules are, thus, defined in Article 53 of the Vienna Convention on the Law of Treaties:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character (emphasis added).¹⁵

ity in international criminal law. 2. ed. Hague: Kluwer Law International, 1999. p. 213.

Referring to the Serbian and Brazilian Loans case of 1929, in which the Permanent Court of International Justice used the concept of *jus cogens* as 'a rule recognized in most legal systems and identified as being of public order'. CZAPLINSKI, Wladyslaw. *Jus cogens and the law of treaties*. In: TOMUSCHAT, Christian; THOUVENIN, Jean-Marc (Ed.). **The fundamental rules of the international legal order: jus cogens and obligations erga omnes**. Leiden: Martinus Nijhoff Publishers, 2006. p. 84.

5 TOMUSCHAT, Christian. Obligations arising for States without or against their will. **Recueil des cours de l'Académie de droit international de la Haye**, v. 241, p.195-374, 1993. p. 227.

6 INTERNATIONAL COURT OF JUSTICE. **Case concerning the right of passage over Indian territory**. Merits - Dissenting Opinion Judge Fernandes. 1960. p. 135; INTERNATIONAL COURT OF JUSTICE. **Legal consequences for States of the continued presence of South Africa in Namibia**. Advisory Opinion - Separate opinion Judge Ammoun. 1971. p. 66.

7 AKENHURST, Michael. Custom as a source of international law. **British yearbook of international law**. v. 41, n. 1, p. 1-53, 1974.

8 CZAPLINSKI, Wladyslaw. *Jus Cogens and the Law of Treaties*. In: TOMUSCHAT, Christian; THOUVENIN, Jean-Marc (Ed.). **The fundamental rules of the international legal order: jus cogens and obligations erga omnes**. Leiden: Martinus Nijhoff Publishers, 2006. p. 83.

9 CASSESE, Antônio. **International law**. 2. ed. New York: Oxford University Press, 2005. p. 200.

10 The support of the countries of the global South was limited since they imposed a condition for accepting such a proposal, that is, "that some mechanism for the judicial determination of a peremptory rule be built". CASSESE, Antônio. **International law**. 2. ed. New York: Oxford University Press, 2005. p. 200.

11 For a debate on voluntarism, cf.: SQUEFF, Tatiana de Almeida Freitas Rodrigues Cardoso. *As relações entre o direito internacional e o Estado soberano na visão de Georg Jellinek*. **Revista campo jurídico**, Barreiras, v. 4, p. 136-151, 2016.

12 CASSESE, Antônio. **International law**. 2. ed. New York: Oxford University Press, 2005. p. 200.

13 VERHOEVEN, Joe. *Jus cogens and reservations or 'counter-reservations': to the jurisdiction of the International Court of Justice*. In: WELLENS, Karel (Ed.) **International law: theory and practice**. The Hague: Martinus Nijhoff Publishers, 1998, p. 197.

14 SCHWARZENBERGER, Georg. *The problem of international public policy*. **Current legal problems**, London, v. 18, n. 1, p. 191-214, 1965, p. 213.

15 (cf. also Article 64 of the same document). UNITED NATIONS. *Vienna convention on the law of treaties*: Vienna, 23 May 1969. **Treaty series**, v. 1155, p. 331 Available at: <https://

From the reading of this definition established in 1969 (and in force in the international level since the middle of the 1980s)¹⁶, it is understood that this is a rule that should be *accepted by the totality of the participants of the international order*, anticipating the need for this to be a rule of *universal interest*. This rule would allow no derogation, even in times of crisis, and could only be modified when replaced by a supervening general rule of international law that addresses the same matter and that has at least the same protective value.¹⁷

Nevertheless, in view of the discussions at the Plenipotentiary Conference, it was already noticeable that, after all, it would not be possible to list such rules and, much worse, that it would be very unlikely to reach a consensus on what would be a ‘universal interest’, particularly considering the moment interstate relations were at that time, and due to the very position of Western countries (nowadays, of the global North), especially for their “tradition” regarding the formation of the international legal order and their constant struggle for gaining (more) power in international relations^{18, 19}.

Even because, it was not for any reason other than by their position that the negotiations have not advanced in order to set and insert in the Vienna Convention

treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtmsg_no=XXIII-1&chapter=23&Temp=mtmsg3&lang=en.

16 UNITED NATIONS. Vienna convention on the law of treaties: Vienna, 23 May 1969. **Treaty series**, v. 1155, p. 331 Available at: <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtmsg_no=XXIII-1&chapter=23&Temp=mtmsg3&lang=en>.

17 It is worth remembering that in rules containing jus cogens norms that were replaced by others afterwards, only the provisions concerning peremptory norms will be annulled. and not the treaty as a whole. DINH, Nguyen Quoc et al. **Direito internacional público**. Tradução Vítor Marques Coelho. Lisboa: Fundação Calouste Gulbenkian, 1999, p. 287-288; VIEGAS, Vera Lúcia. Jus cogens e o tema da nulidade dos tratados. **Revista de informação legislativa**. Brasília, ano. 36, n. 144, p. 181-196 out./dez. 1999.

18 On this, cf.: MORGENTHAU, Hans. **Política entre as nações**. Tradução Oswaldo Biato. São Paulo: UnB/IPRI, 2003. p. 21, 51, 89-90, 98-99, 120.

19 Valério de Oliveira Mazzuoli, on the other hand, is optimistic about the results of such a conference by saying that the recognition of the rules of jus cogens “by the Vienna Convention of 1969 represented another factor of crisis of voluntarism, as well as a strengthening of the foundation of Public International Law”. MAZZUOLI, Valerio de O. **Direito dos tratados**. São Paulo: RT, 2011. p. 269. André de Carvalho Ramos follows up this positioning. For him, the Vienna Convention of 1969 “moved away from the voluntarist paradigm”. RAMOS, André de Carvalho. Art. 53. In: SALIBA, Aziz Tuffi (Coord.). **Direito dos tratados: comentários à convenção de Viena do direito dos tratados (1969)**. Belo Horizonte: Arraes, 2011. p. 452.

on the Law of Treaties a specific list of rules considered as *jus cogens* at the time. And it follows from this the fact that imperative rules currently “are not a new formal category of sources of international law, but they [only] describe a particular quality that certain rules hold.”²⁰ The rules already considered *jus cogens* gain “only” a special adjective, which attributes to it peculiar characteristics such as non-derogability, superiority (superior law) and permanence (they are only replaced by equal or more protective rules) - not being a normative source in itself. In fact, this is why Ricardo Monaco affirms that *jus cogens* norms do not have direct normative effectiveness.²¹

According to Valério de Oliveira Mazzuoli,²² there would already be rules that have this characteristic. For the author, some of them have customary origin, while others are conventional. Moreover, it is not possible to say that these would be the only two plausible sources of the constitution of peremptory norms. In addition to international courts pointing this characteristic to certain norms,²³ as Salem Nasser points out,²⁴ “in the work of the International Law Commission and in the writings of publicists it is possible to find examples of norms presented as jus cogens.” Among the most commonly cited rules, according to the author, there is:

[...] the pacta sunt servanda principle; prohibition of the use or threat of use of force; the prohibition of acts that violate the sovereignty and equality of States; the principle of self-determination of

20 Referring to the position of the International Court of Justice in the Nuclear Weapons case, judged in 1996, when they read in paragraph 83 that “the question of whether or not the jus cogens is related to a feature of the norm”. PELLET, Alain. Article 38. In: ZIMMERMANN, Andreas et al. **The statute of the International Court of Justice: a commentary**. 2. ed. Oxford: Oxford University Press, 2012. p. 846.

21 MONACO, Ricardo. Cours général de droit international publique. **Recueil des cours de l'academie de droit international de la Haye**, v. 125, n.3, p. 93-336, 1968. p. 209.

22 MAZZUOLI, Valerio de O. **Direito dos tratados**. São Paulo: RT, 2011. p. 268

23 reporting several judgments that attribute the peremptory characteristic to rules of international law. Cf. FRIEDERICH, Tatyana Sheila. **As normas imperativas de direito internacional público: jus cogens**. Curitiba: Forum, 2004, p. 121-146.

For comments on cases that go back to the Permanent Court of International Justice. RAMOS, André de Carvalho. Art. 53. In: SALIBA, Aziz Tuffi (Coord.). **Direito dos tratados: comentários à convenção de Viena do direito dos tratados (1969)**. Belo Horizonte: Arraes, 2011. p. 449-450, 463-465.

24 NASSER, Salem Hikmat. Jus cogens: ainda esse desconhecido. **Revista direito GV**, São Paulo, v. 1, n. 2, p. 161-178, jun./dez. 2005. p. 165.

peoples; the principle of sovereignty over natural resources; prohibition of trafficking in human beings; the prohibition of piracy; the prohibition of genocide; the prohibition of acts classified as crimes against humanity and the principles of humanitarian law codified in the Four Geneva Conventions, fundamental principles of human rights and the law of the environment²⁵

In any case, with regard to the customary nature of *jus cogens* rules, it is important to emphasize first that while customary rules must obtain a minimum consensus of the States, being repeatedly practiced in the international level and presenting *opinio iuris* regarding its obligatoriness; those rules should exceed such consensus, reaching an absolute agreement among all the nations.²⁶ Thus, *jus cogens* rules would be in the roots of the international consciousness, being considered an intrinsic, universally accepted value of a certain rule.²⁷

André de Carvalho Ramos disagrees with this position.²⁸ For him, unanimity among the States would not be necessary for the existence of *jus cogens* rules, and “the new consensus necessary, then, for the consecration of an imperative norm, could be erected among the essential representatives of the international community.” However, for the author, these essential representatives would be “those that comprise the countries representative of the great economic, political and geographical currents of the planet”, expressing that, in this way, no culture or current political system would be excluded.²⁹

Similarly, as the author himself points out, this would be a weak point of this concept, since there is a tendency that the wills of the strong and medium States overlap with the will of the smaller States, thereby “denying the pluralism inherent in society of States.”³⁰

Regardless of whether the acceptance should be comprehensive (Janis) or be a majority (Ramos), it is thought that the need of having a rule merely accepted by the international community as a whole goes back to the very “oligarchic” bases - to dialogue with Antônio Remiro-Brotons³¹ - of International Law. This community will exclude the countries that are not within what it is perceived as the traditional base of its structure, even if in the ideal plan it is desired to allow and to consider the speech of all those that compose the international relations.

In any case and beyond consensus, it must be said that imperative norms could not be the object of the *persistent objector*³², since, when determined as such, these norms would possess a general international precept of natural origin which would bind indistinctly all of the world community, being it impossible to disassociate a State through “denial”.³³ After all, peremptory norms would be universal, applicable to all, and would constitute the foundation of international public order in which the defense of the general interest would overlap with a particular interest of a particular country.³⁴

Therefore, the rules which would already present the characteristic of *jus cogens* by reason of their originally customary nature would be:

[...] the prohibition of the use of force outside the framework of self-defense; the norms on peaceful co-operation in the protection of common interests, such as the freedom of the seas, the rules

25 NASSER, Salem Hikmat. *Jus cogens: ainda esse desconhecido*. *Revista direito GV*, São Paulo, v. 1, n. 2, p. 161-178, jun./dez. 2005, p. 165.

26 JANIS, Mark W. *An introduction to international law*. 4. ed. New York: Aspen Publishers, 2003. p. 66.

27 RAGAZZI, Maurizio. *The concept of international obligations erga omnes*. New York: Oxford Monographs in International Law, 1997. p. 54.

28 RAMOS, André de Carvalho. Art. 53. In: SALIBA, Aziz Tuffi (Coord.). *Direito dos tratados: comentários à convenção de Viena do direito dos tratados* (1969). Belo Horizonte: Arraes, 2011. p. 454.

29 RAMOS, André de Carvalho. Art. 53. In: SALIBA, Aziz Tuffi (Coord.). *Direito dos tratados: comentários à convenção de Viena do direito dos tratados* (1969). Belo Horizonte: Arraes, 2011. p. 454.

30 RAMOS, André de Carvalho. Art. 53. In: SALIBA, Aziz Tuffi (Coord.). *Direito dos tratados: comentários à convenção de Viena do direito dos tratados* (1969). Belo Horizonte: Arraes, 2011. p. 445-455.

31 REMIRO-BROTOS, Antônio. *Derecho internacional público: principios fundamentales*. Madrid: Tecnos, 1982, p. 66 apud RAMOS, André de Carvalho. Art. 53. In: SALIBA, Aziz Tuffi (Coord.). *Direito dos tratados: comentários à convenção de Viena do direito dos tratados* (1969). Belo Horizonte: Arraes, 2011. p. 455

32 Persistent objector is the term used for the attitude of a State to a customary norm of international law. If a State refrains from protesting against an agreement, it is implicitly understood that it agrees to such a rule. The opposite occurs when a state has the consciousness of refraining from or opposing the fulfillment of a rule, proceeding in this way repeatedly. In this case, the rule would not apply to this State. SHAW, Malcolm N. *International law*. 4. ed. United Kingdom: Cambridge University Press, 1997. p. 70-72.

33 RAGAZZI, Maurizio. *The concept of international obligations erga omnes*. New York: Oxford Monographs in International Law, 1997. p. 68-69; DANILENKO, Gennady. *Law-making in the international community*. Boston: Martinus Nijhoff Publishers, 1993. p. 221-222; RAMOS, André de Carvalho. Art. 53. In: SALIBA, Aziz Tuffi (Coord.). *Direito dos tratados: comentários à convenção de Viena do direito dos tratados* (1969). Belo Horizonte: Arraes, 2011. p. 453

34 ACCIOLY, Hidelbrando; SILVA, Geraldo Eulálio N.; CASSELLA, Paulo B. *Manual de direito internacional público*. 15. ed. São Paulo: Saraiva, 2008. p. 22-23

prohibiting slavery, piracy, genocide and racial discrimination; the protective rules of religious freedom; the rules of humanitarian law [...], as well as the norms prohibiting aggression; the norms protecting the rights of States and peoples (such as those relating to equality, territorial integrity, self-determination of peoples).³⁵

However, some treaties would also assign the “*jus cogens* attribute” to some of their rules.³⁶ The most accepted example beyond the principles cited in the Charter of the United Nations³⁷ is the International Covenant on Civil and Political Rights, which lists rules that could not be suspended in any event – the basic characteristic of a peremptory rule.³⁸ Article 4(2) of the International Covenant on Civil and Political Rights (ICCPR)³⁹ states that, even in extraordinary situations, certain rights can not be suspended. They are the right to life (Article 6), the prohibition of torture or cruel, inhuman or degrading treatment or punishment (Article 7), the prohibition of slavery or servitude (Article 8 (1) and (2)), opposition to arrest for breach of contract (Article 11), the refusal to condemn someone for a crime not provided for by national or international order (Article 15), the right of the individual to have recognized his or her legal personality (Article 16) and, finally, the right to freedom of thought, conscience and religion (Article 18).⁴⁰

35 MAZZUOLI, Valerio de O. **Direito dos tratados**. São Paulo: RT, 2011. p. 268.

36 Regarding this, in spite of the use of the terms “to assign” and “to recognize”, it is understood that the rules considered *jus cogens* already have this characteristic in themselves, given their origin in Natural Law. Therefore, it is important to say that treaties and jurisprudence carry out “declaratory acts” and not “constitutive acts” by giving the imperative adjective to a given source of international law.

37 In the UN charter are referred to as being *jus cogens* “the principles of the peaceful settlement of conflicts, the preservation of international peace, security and justice”. MAZZUOLI, Valerio de O. **Direito dos tratados**. São Paulo: RT, 2011. p. 268.

38 It is important to note that even though they are provided for in treaties, the recognition of these rules as *jus cogens* norms theoretically would not be limited to the contracting parties, after all *jus cogens* are rules formed from the collective interest that come from the Natural Law, therefore being of public order. MONACO, Ricardo. **Cours général de droit international public. Recueil des cours de l'Académie de Droit International de la Haye**, v. 125, n.3, p. 93-336, 1968. p. 209; ACCIOLY, Hidelbrando; SILVA, Geraldo Eulálio N.; CASELLA, Paulo B. **Manual de direito internacional público**. 15. ed. São Paulo: Saraiva, 2008. p. 22-23).

39 UNITED NATIONS. **International covenant on civil and political rights**: adopted by the General Assembly of the United Nations on 19 December 1966. v. 999, n. 14668. Available at: <<https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>>.

40 Despite the rights of due process of law (Article 14) and per-

It is interesting to note that there is little discussion in the literature about a similar rule existing in the regional protection domains,⁴¹ notably in the Inter-American System for the Protection of Human Rights, which through Article 27(2) of the American Convention of Human Rights equally provides for rights unavailable to States,⁴² however, in a much broader role than that the one foreseen by the ICCPR. Those would be: Article 3 (right to recognition of legal personality), article 4 (right to life), article 5 (right to humane treatment), article 6 (prohibition of slavery and servitude), article 9 (principle of legality and retroactivity), article 12 (freedom of conscience and religion), article 17 (protection of the family), article 18 (right to name), article 19 (rights of the child), article 20 (right to nationality) and article 23 (political rights). In this sense, the great question that arises is whether these rules would also have a peremptory character, given the direct mention of their unavailability, even in times of exception.⁴³

After all, as previously stated, the definition of *jus cogens* contained in the Vienna Convention on the Law of

sonal liberty (Article 9) being defeasible in exceptional cases, the former United Nations Human Rights Committee has already made restrictions on the right to suspend such rules even in emergency situations, taking into account the existence of other protections involved in those articles that are considered to be irrevocable. JINKS, op cit, p. 109-111.

41 The European plan for the protection of human rights will not be addressed, which, however, provides in Article 15 (2) of the European Convention on Human Rights and Fundamental Freedoms a list of rights unavailable to States. Nevertheless, it is noted that the European Court of Human Rights is inconsistent with regard to the protection of the rights there prescribed as truly superior and non-derogable rules, based largely on the analysis of the specific case and the thesis of the margin of appreciation of the States. For a debate, cf.: SQUEFF, Tatiana de Almeida Freitas Rodrigues Cardoso. **A violação de jus cogens pelo Estado em casos de terrorismo: uma análise do caso Jean Charles de Menezes**. **Revista de direitos humanos em perspectiva**, Belo Horizonte, v. 2, p. 170-191, 2016.

42 Considering that States are limited to *jus cogens* rules when they have written obligations at the international level and cannot distance themselves from a rule with a peremptory characteristic by means of *opinio iuris* or their practice, it can be said that States cannot unilaterally create laws in the domestic plane that exclude the applicability of rights that contain this adjective. RAGAZZI, Maurizio. **The concept of international obligations erga omnes**. New York: Oxford Monographs in International Law, 1997. p. 58-59. Thus, imperative norms have the same essence in domestic law, that is, they are inviolable, superior and permanent. DANILENKO, Gennady. **Law-making in the international community**. Boston: Martinus Nijhoff Publishers, 1993. p 223.

43 ORGANIZATION OF AMERICAN STATES. Department of International Law. Secretariat for Legal Affairs. **American convention on human rights “Pact of San Jose, Costa Rica” (B-32)**. Available at: <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf>.

Treaties of 1969 establishes that the rules, in order to be recognized, must be rules accepted and acknowledged by the international community of States as a whole. Could it, therefore, be possible to extend the list of *jus cogens* rules parting from a regional system? In addition, would it be admissible for these rules to originate from countries of the global South?

According to what is addressed in national and foreign doctrine, this is not a straightforward or outdated question, but unfortunately open and present in international society, which does not present any consistent study in which we can support ourselves. Such an understanding is aligned to the consideration made by the Third World Approaches to International Law (TWAIL) that the colonial reality of international law ends up forging its own foundations by marginalizing non-European knowledge⁴⁴, as does the non-acceptance of the concept of *jus cogens* established locally/elsewhere.

Perhaps this is due to the fact that resistance to the traditional standards of international law (which are imposed on the countries of the South) is still incipient, or perhaps due to the very lack of space that these States have in the framework of international relations today to expose their positions, due to the existence of a true oligarchy in this field, as pointed out the formerly quoted Antonio Remiro-Brotos. At last, the discourse that surrounds the United Nations and elsewhere in this field is fundamentally Eurocentric (especially in the field of Human Rights), focusing on the problems of the North to the detriment of the concerns of less expressive States, which are commonly set as “invisible spaces of humanity” for this reason.⁴⁵

However, if the discussion about the *jus cogens* characterization of a rule is practically non-existent in relation to its customary or conventional nature, it is essential to emphasize the role played by the Inter-American Court of Human Rights in this matter. After all, its precedents have distanced themselves from the “rectilinear” standards of the international (Europeanized)

level, bringing new interpretations of *jus cogens* rules in the field of human rights.

Such interpretations can even be considered a flag of the South, which began with the entry of Third World countries in the international interest, and which may (continue) to provoke the rupture of the balance of the international order hitherto called equitable, given the discrepancy of the conditions to act within international relations, requiring international law to adapt itself to fit this new reality, since its instruments are not seen as ideal to deal with all these new variables any more.⁴⁶ Such precedents, hence, are a way of putting the Third World present in international law, by exposing other sets of values that are equally relevant to the international community as a whole, and which have been considered as peremptory rules regionally⁴⁷, even though they have not been defended as such in other circles.

3. THE EXPANSION OF THE JUS COGENS CONCEPT PROMOTED BY THE INTER-AMERICAN COURT OF HUMAN RIGHTS.

The Inter-American Court of Human Rights is the competent court, within the framework of the Inter-American System for the Protection of Human Rights, to recognize any international responsibility of the States Parties to the American Convention on Human Rights and to interpret this treaty⁴⁸. It is the organ responsible for protecting human rights in America, whose institution and action take into account not only the geographical and social situations of the South, but also the historical circumstances that built the States of that region⁴⁹. In this sense, according to Antônio Augusto Cançado Trindade, it is the Court that has contributed

44 FRANCO, Fernanda Cristina de Oliveira. Oportunidades e desafios das TWAIL no contexto latino-americano a partir de perspectivas dos povos indígenas ao direito internacional. *Revista de direito internacional*, Brasília, v. 12, n. 2, 2015 p. 226-244.

45 BRAGATO, Fernanda Frizzo. Para além do discurso eurocêntrico dos direitos humanos: contribuições da descolonialidade. *Revista novos estudos jurídicos*, Itajaí, v. 19, n. 1, p. 201-230, jan./abr. 2014. p. 215-220.

46 FRANCO, Fernanda Cristina de Oliveira. Oportunidades e desafios das TWAIL no contexto latino-americano a partir de perspectivas dos povos indígenas ao direito internacional. *Revista de direito internacional*, Brasília, v. 12, n. 2, p. 226-244, 2015.

47 For a discussion regarding the execution of Inter-American Court sentences, see: RESENDE, Augusto. A executividade das sentenças da Corte Interamericana de Direitos Humanos no Brasil. *Revista de direito internacional*, Brasília, v. 10, n. 2, p. 226-236, 2013.

48 PASQUALUCCI, J. M. *The practice and procedure of the inter-american court of human rights*. 2. ed. New York: Cambridge University Press, 2013. p. 07-09.

49 TRINDADE, Antônio Augusto Cançado. *Tratado de direito internacional dos direitos humanos*. Porto Alegre: S. A. Fabris Editor, 2003. v. 3. p.28

most to the evolution of the concept of *jus cogens*⁵⁰.

In the first instance, the Inter-American Court only reaffirms the Europeanized concept of *jus cogens*, considering that it is a mandatory norm that prohibits physical, psychological and moral torture⁵¹. However, the first extension of the concept occurs in the judgment of *the Case of the Brothers Gómez Paquiyauri vs. Perú*⁵², when the Court expressly acknowledges that the violation of *jus cogens* is prohibited in any situation, whether in times of peace, wartime or during the State of Emergency or Suspension of constitutional guarantees. Likewise, the understanding of the content of *jus cogens* is extended to include all conduct prohibited by Article 5(2) of the American Convention, namely, cruel, inhuman and degrading treatment⁵³.

From this extension, an adaptation of the concept of **jus cogens** to the particularities of the inter-American system is initiated, contradicting a possible closed list of such norms and opening the way for the foundation of new bases for international law, that meets the needs of humanity⁵⁴ and of the particularities of each region of the world. It follows, therefore, from the premise that, even though these rules are considered basic norms, with characteristics that go back to the natural order, they are formed by common interests, which are not rectilinear in all localities, so that, at the end, it is the courts that determine whether the content of a rule may have the characteristic of a 'cogent norm'.⁵⁵ After

all, these rules carry fundamental values of the international community, and international tribunals would interpret such values in light of the context of States in a particular region.

Thus, in the examination of *Advisory Opinion*⁵⁶ No. 18/03 (Legal status and rights of undocumented migrants), requested by the Mexico, the Inter-American Court examines for the first time the concept of *jus cogens*. The Court, thus, acknowledges that, although the concept is linked to the law of treaties – specifically the Vienna Convention on the Law of Treaties – its evolution is not limited to the law of treaties and its area has been extended, now encompassing all branches of international law⁵⁷, such as international human rights law and matters relating to the international responsibility of States.

Once these parameters are established, the Court examines the obligation of States to respect and gua-

50 TRINDADE, Antônio Augusto Cançado. **El ejercicio de la función judicial internacional**: memorias de la Corte Interamericana de Derechos Humanos. 3. ed. Belo Horizonte: Del Rey, 2013, p.75

51 CORTE INTERAMERICANA DE DERECHOS HUMANOS. **Caso Cantoral Benavides Vs. Perú**. Fondo. Sentencia de 18 de agosto de 2000. Serie C, n. 69, Parágrafos 102 e 103.

52 CORTE INTERAMERICANA DE DERECHOS HUMANOS. **Caso de los Hermanos Gómez Paquiyauri Vs. Perú**. Fondo, Reparaciones y Costas. Sentencia de 8 de julio de 2004. Serie C, n. 110, Parágrafos 111-112.

53 CORTE INTERAMERICANA DE DERECHOS HUMANOS. **Caso del Penal Miguel Castro Castro Vs. Perú**. Fondo, Reparaciones y Costas. Sentencia de 25 de noviembre de 2006. Serie C, n. 160

54 TRINDADE, Antonio Augusto Cançado. **El ejercicio de la función judicial internacional**: memorias de la Corte Interamericana de Derechos Humanos. 3. ed. Belo Horizonte: Del Rey, 2013. p. 80.

55 It should be noted that the problem would not be the discretionary power international adjudicators might have in determining/declaring which rules have such cogent characteristic; after all, judges from the Inter-American Court of Human Rights are "locally" chosen, that is, from the countries that accepted the jurisdiction of the Court. However, judges from the International Court of Justice

(ICJ) are chosen among all 193 states that are part of United Nations, being rather difficult to evoke local values in a sentence (and not in a separate/dissenting opinion) without being contradicted. As an example of such difficulty, it may be pointed the work of Cançado Trindade at the ICJ, which, for instance, tried to establish a precedent regarding the acts perpetrated by nazi forces during World War II (slavery and deportation) as actions that, as being violations of *jus cogens* of a *delicti imperri* nature, should not be trumped by state immunity – what was not upheld in the main decision, but only in his dissenting opinion (see INTERNATIONAL COURT OF JUSTICE. **Case of jurisdictional immunities of the State: Germany v. Italy**. Judgment of Feb. 3, 2012. Merits – Dissenting Opinion Judge Cançado Trindade. 2012, part. V).

56 Pursuant to Article 2 of its Statute, the Court has a jurisdictional and advisory function. Without prejudice to contentious jurisdiction, it exercises advisory jurisdiction which allows OAS Member States - or the bodies listed in Chapter X of the Charter of the Organization -, even if they do not recognize the Court's contentious jurisdiction, to consult it on the interpretation of the Convention or other treaties relating to the protection of human rights under Article 64 (1) of the American Convention. The Consultative Opinions, resulting from the exercise of this competence, constitute an authorized interpretation of the norms of the Convention and the basis for future interpretations, not implying the necessary binding of the States to them, since there is no obligation of observance of their content. (MEDINA QUIROGA, Cecilia. **The american convention**: life, personal integrity, personal liberty, due process and judicial recourse, Center for Human Rights, University of Chile School of Law, San José: Mundo Gráfico, 2003, p.04). This characteristic does not, however, detract from the relevance of advisory opinions, which have given uniformity and consistency to interpretations of the Convention and been a mechanism of doctrinal and judicial influence on the part of the Court.

57 CORTE INTERAMERICANA DE DERECHOS HUMANOS. **Condición jurídica y derechos de los migrantes indocumentados**. Opinión Consultiva OC-18/03 de 17 de septiembre de 2003. Serie A n.18, parágrafos 98-99.

rantee all the rights provided for in the *American Convention without discrimination (Article 1[1]) and the right to equality before the law (Article 24)*. These rights are defined as real obligations of States to the international community as a whole, not only to the individuals under their jurisdiction⁵⁸, being inseparable from human dignity, not only permeating the Inter-American Human Rights System, but also *all corpus juris* of guardianship of the human person⁵⁹, so that they must govern *all* the state performance⁶⁰.

Thus, it is established that the principles of equality before the law of non-discrimination belong to the set of norms *jus cogens*, which gives them imperative character and entails *erga omnes* obligations of protection that bind all the States and generate effects with respect to third parties, including between individuals due to its horizontal and vertical efficacy breadth⁶¹. In addition, these are principles that influence not only national and international public order, but also the legal system as a whole, making discriminations related to gender, race, color, language, religion or belief, political opinion and of any other nature, nationality, ethnic or social origin, age, economic status, marital status, birth or any other

58 MOECKLI, Daniel; SHAH, Sangeeta; SIVAKUMARAN, Sandesh (Org.). **International human rights law**. New York: Oxford University Press, 2010. p. 194.

59 The rights to equality and non-discrimination are enshrined in the Charter of the United Nations (Article 1 [3]); in the Universal Declaration of Human Rights (Articles 1, 2. [1] and 7); in the International Covenant on Civil and Political Rights (articles 2, 3 and 26); in the International Covenant on Economic, Social and Cultural Rights (Articles 2. [2] and 3); in the Convention on the Elimination of All Forms of Racial Discrimination (article 2); in the Vienna Declaration and Program of Action (articles 19-24); in the European Convention on Human Rights (Articles 1 [1] and 4); in the Charter of Fundamental Rights of the European Union, which also expressly refers to the prohibition of discrimination on grounds of sexual orientation (Article 21); in the African Charter on Human and Peoples' Rights (Articles 2 and 3); in the Arab Declaration on Human Rights in Islam (Article 1). It is also contained in the OAS Charter (Article 3 [1]); in the American Declaration of the Rights and Duties of Man (Article 3); in the American Convention on Human Rights (Articles 1 [1] and 24); and its Additional Protocol on Economic, Social and Cultural Rights ("Protocol of San Salvador") (Article 3).

60 CORTE INTERAMERICANA DE DERECHOS HUMANOS. **Condición jurídica y derechos de los migrantes indocumentados**. Opinión Consultiva OC-18/03 de 17 de septiembre de 2003. Serie A, n. 18, parágrafo 100.

61 CORTE INTERAMERICANA DE DERECHOS HUMANOS. **Condición jurídica y derechos de los migrantes indocumentados**. Opinión Consultiva OC-18/03 de 17 de septiembre de 2003. Serie A, n. 18, parágrafo 100.

human condition or characteristic impossible⁶².

In compliance with this *jus cogens* obligation, States must: (1) refrain from any actions that directly or indirectly create situations of *de facto discrimination* (which occurs when the State favors actions and practices that discriminate against a particular group of persons) or **de jure** (which takes place when the state creates laws that discriminate a certain group of persons), as well as (2) adopting positive measures that may modify historical and social situations of inequality between certain groups and individuals within their jurisdiction⁶³. In other words, recognition of the right to equality and non-discrimination as non-derogable implies a requirement for States to eradicate discrimination by implementing measures that legitimately promote equity among all citizens.

The concept of *jus cogens* is again amplified in the judgment of the *Goiburú case and others vs. Paraguay*, related to 'Condor Operation'. While examining the crime of forced disappearance⁶⁴, the Court confirmed that, in view of the seriousness of the crime and the nature of the rights implied in the injury, *the prohibition of forced disappearance and the related duty to investigate and punish those responsible are jus cogens norms*, since forced disappearance violates multiple rights of non-derogable character and constitute a transgression of the nature of human rights, and the abandonment of the essential principles underlying the inter-American system⁶⁵ (and the international system itself after 1945⁶⁶). Such

62 CORTE INTERAMERICANA DE DERECHOS HUMANOS. **Condición jurídica y derechos de los migrantes indocumentados**. Opinión Consultiva OC-18/03 de 17 de septiembre de 2003. Serie A, n. 18, parágrafo 101.

63 CORTE INTERAMERICANA DE DERECHOS HUMANOS. **Condición jurídica y derechos de los migrantes indocumentados**. Opinión Consultiva OC-18/03 de 17 de septiembre de 2003. Serie A, n. 18, párrafos 103-105.

64 Forced disappearance, according to Article II of the Inter-American Convention on Forced Disappearance of Persons, "... privation of liberty of a person or persons, in any form, practiced by agents of the State or by persons or groups of persons acting with the consent, support or consent of the State, followed by a lack of information or a refusal to acknowledge the privation of liberty or to report on the person's whereabouts, thus preventing the exercise of legal remedies and procedural guarantees relevant."

65 CORTE INTERAMERICANA DE DERECHOS HUMANOS. **Caso Goiburú y otros Vs. Paraguay**. Fondo, Reparaciones y Costas. Sentencia de 22 de septiembre de 2006. Serie C, n. 153.

66 TRINDADE, Antonio Augusto Cançado. **El derecho internacional de los derechos humanos en el siglo XXI**. Santiago: Editorial Jurídica de Chile, 2006, p. 41.

an understanding takes into account the gravity and the continuing and/or permanent character⁶⁷ of forced disappearance⁶⁸, which is a mark of the dictatorships that Latin American states subsisted in the 1970s and 1980s.

From this decision, it can be affirmed that not only the prohibition to disappearance constitutes rule of *jus cogens*, but also the correlative duty to investigate this crime. The obligation to investigate, in accordance with the jurisprudence of the Inter-American Court of Human Rights, corresponds to the obligation of means (and not of result), which includes, among other things, prosecution and punishment of those responsible for human rights violations, especially in view of the gravity of the crime of forced disappearance⁶⁹. However, it is necessary to say that only in case of forced disappearance the obligation to investigate (and due process) becomes *jus cogens* norm; in other cases of violation of human rights, the duty to investigate, for the Inter-American Court, is not *jus cogens*, but a “common” violation of human rights.

Thus, it is possible to say that the expansion of the material content of *jus cogens* by the Inter-American Court points in the opposite direction to the static and Europeanized concept established by the Vienna Convention on the Law of Treaties of 1969 and other international tribunals that are not in the South global. Although this development is still embryonic, the text’s purpose is to demonstrate the consolidation of international obligations that contribute to the advancement of human rights, since they are considered fundamental principles and values of the international order, and not merely the inter-American order, as it may seem.

In this sense, recognizing the right to equality and non-discrimination as a *jus cogens* norm, as well as other advances, such as the abovementioned prohibition on disappearance and the related duty to investigate this crime, which emerge at the Inter-American level, is

central to the contemporary scene of international law, which is evidently more heterogeneous (and is gradually becoming more concerned with the particularities of peripheral regions beyond the traditional central axis). At least that is what is absorbed in the attribution of *jus cogens* character to rules other than those traditionally recognized by “ordinary” international law from a non-Eurocentric tribunal.

In one word, from these judgments, the (even though incipient) change in international law patterns is demonstrated, evidencing that human rights, in fact, can be an area of resistance within Law, against domination and oppression imposed by the North, initiated in 1492 with the dis(cover)y (up) of America⁷⁰.

4. THE ANTI-HEGEMONIC DISCOURSE: FUNDAMENTALS FOR A CRITICISM OF THE CLOSED CONCEPT OF *JUS COGENS*.

The supposed “discovery” of America and its subsequent colonization mark the beginning of modernity, being the moment from which, for the first time, a mechanism of intercommunication was established, that is, a common ground was established: colonialism and the “European rationality”⁷¹. From this process, a mechanism of domination was set in the political-economic level, from which the colonality derived – a hierarchical pattern of power and knowledge that maintains, in the ideological-discursive level and at the level of intersubjective relations, a domination of the peoples of the South.⁷²

Besides the “economic revolution” established by modernity (throughout a political-economic domain of the peoples of the Global South), this process was

67 It is a continuing crime, since enforced disappearance is an offense that begins with the privation of liberty of the victim and with the subsequent lack of information about their destination and remains until the whereabouts of the missing person are known and determined with sure your identity.

68 CORTE INTERAMERICANA DE DERECHOS HUMANOS. **Caso Anzualdo Castro vs. Perú**. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 22 de septiembre de 2009. Serie C, n. 202, parágrafo 59.

69 CORTE INTERAMERICANA DE DERECHOS HUMANOS. **Caso Gelman Vs. Uruguay**. Fondo y Reparaciones. Sentencia de 24 de febrero de 2011. Serie C, n. 221.

70 DOUZINAS, Costas. **Human rights and empire**. The Political philosophy of cosmopolitanism. Oxford: Routledge, 2007, p. 08; DUSSEL, Enrique. **1492**. El encubrimiento del Otro. Hacia el origen de “mito de la modernidad”. Colección Academia número uno. La Paz: Plural Editores, Facultad de Humanidades y Ciencias de la Educación – UMSA, 1994. p. 13-22

71 DUSSEL, Enrique. **1492 el encubrimiento del otro**: hacia el origen de “mito de la modernidad”. Colección Academia número uno. La Paz: Plural Editores, Facultad de Humanidades y Ciencias de la Educación – UMSA, 1994. p. 13-22

72 QUIJANO, Aníbal. **Colonialidade do poder, eurocentrismo e América Latina**. In: LANDER, Edgardo (Org.). **A colonialidade do saber: eurocentrismo e ciências sociais**. Buenos Aires: Consejo Latinoamericano de Ciências Sociais – CLACSO, 2005. p. 117-142.

accompanied by a “epistemological revolution” that, although introduced in the and by Europe, influences the whole world, once it becomes the subsidy for the legitimation of the classification and subjugation of the “non-European”.⁷³ From coloniality on, the “cover-up of the other”⁷⁴ begins, it means, the suppression and domination of cultures and knowledge of the non-European peoples⁷⁵. On one hand, modernity established parameters to determine who is the individual, who is the subject of rights; on the other hand, in the epistemological level, it consolidated the overpowering of European discourse as universal.⁷⁶

In this context, the expression “coloniality of power” stands out to explain the continual domination existent from the North in relation to the South. According to this view, even if the end of the colonial administration itself (the colonialism) has already happened, the matrix built in 1492 is still present in the today’s society, so that the exploration and domination of the other throughout the capitalist system and the international division of labor still subsist.⁷⁷ However, besides the structure strictly related to the abuse of power through the economic domination, this coloniality translates itself, in fact, in a complex structure, which encompasses various levels of oppression carried out today by Europeans and north-Americans⁷⁸, among which is the

coloniality of knowledge.

This way of coloniality refers to the epistemological legacy of the Europeans in the South peoples, so that they would not be “authorized” to think and create their own knowledge, but only to reproduce the Eurocentric epistemology, becoming a real impediment to the comprehension “[of] the world from the own world”.⁷⁹ It means that since that coloniality dimension, the epistemological diversity would be inexistent, as would any other experience that escaped the European standard, since only “one way of producing knowledge” would exist, which must be globally repeated.⁸⁰

In this sense, coloniality propitiates the division, through an abysm, of the world between metaphoric North and South, in which the first represents the epistemological dominant, rational paradigm, whose knowledge is the only valid, scientific and useful; the second would be that underdeveloped one, primitive, savage, whose subaltern knowledge is not scientific and that, therefore, is relegated to the academic and political marginality.⁸¹ It is from this abyssal division that the forms of knowledge developed from Europe have become the only valid, objective and universal forms of knowledge; in universal categories of analysis applicable to any reality; in “normative propositions that define the duty to be for all the peoples of the planet”.⁸²

This way, this reductionism allows that, in the case of human rights, although their emancipatory potential, they may have their language manipulated by the hegemonic powers, being necessary to be aware of the oppressive potential of its universality.⁸³ This because

73 MIGNOLO, Walter D. La opción descolonial. *Revista Ietral*: Editorial Universidad de Granada. Granada, n. 01, p. 03-22, 2008. p. 07.

74 DUSSEL, Enrique. **1492 el encubrimiento del outro**: hacia el origen de “mito de la modernidad”. Colección Academia número uno. La Paz: Plural Editores, Facultad de Humanidades y Ciencias de la Educación – UMSA, 1994. p. 35.

75 Within coloniality, a civilization process begins, from which the European society, legitimized by discourses of evangelization, civilization, modernization, development, globalization, established itself as a symbolic center of what came to be known as the modern-colonial world system. LANDER, Edgardo. *Ciencias sociales: saberes coloniales y eurocéntrico*. In: LANDER, Edgardo (Org.). **A colonialidade do saber: eurocentrismo e ciências sociais**. Buenos Aires: Consejo Latinoamericano de Ciências Sociais – CLACSO, 2005. p. 04-23. p. 11.)

76 QUIJANO, Aníbal. *Colonialidad y modernidad/racionalidad*. In: BONILLA, Heraclio (Org.). **Los conquistados: 1492 y la población indígena de las Américas**. Ecuador: Libri Mundi, Tercer Mundo Editores, 1992. p. 437-448.

77 QUIJANO, Aníbal. *Colonialidad y modernidad/racionalidad*. In: BONILLA, Heraclio (Org.). **Los conquistados: 1492 y la población indígena de las Américas**. Ecuador: Libri Mundi, Tercer Mundo Editores, 1992. p. 437-448. p. 448; QUIJANO, Aníbal. **Colonialidade do poder, eurocentrismo e América Latina**. In: LANDER, Edgardo (Org.). *A colonialidade do saber: eurocentrismo e ciências sociais*. Buenos Aires: Consejo Latinoamericano de Ciências Sociais – CLACSO, 2005. p. 117-118.

78 MIGNOLO, Walter. **Desobediencia epistémica**: retórica de

la modernidad, lógica de la colonialidad y gramática de la descolonialidad. Argentina: Ediciones del signo, 2010, p. 12.

79 PORTO-GONÇALVES, Carlos Walter. In: LANDER, Edgardo (Org.). **Colonialidade do saber: eurocentrismo e ciências sociais: Perspectivas Latino-americanas**. Buenos Aires: CLACSO, 2005, p. 3.

80 QUIJANO, Aníbal. *Colonialidad y modernidad/racionalidad*. In: BONILLA, Heraclio (Org.). **Los conquistados: 1492 y la población indígena de las Américas**. Ecuador: Libri Mundi, Tercer Mundo Editores, 1992. p. 446.

81 SANTOS, Boaventura de Sousa. *Para além do pensamento abissal: das linhas globais a uma ecologia de saberes*. *Revista crítica de ciências sociais*, n. 78, p. 03-46, out. 2007,.

82 LANDER, Edgardo. *Ciencias sociales: saberes coloniales y eurocéntrico*. In: LANDER, Edgardo (Org.). **A colonialidade do saber: eurocentrismo e ciências sociais**. Buenos Aires: Consejo Latinoamericano de Ciências Sociais – CLACSO, 2005. p. 10.

83 GALINDO, George Rodrigo Bandeira. *A volta do terceiro mundo ao direito internacional*. **Boletim da sociedade brasileira de direito internacional**, v. 1. n. 119-124. ago./dez. 2013. p. 67-96.

that conception turns impossible a foundation of rights other than that one of the Eurocentric paradigm⁸⁴. It is precisely this the case of the traditional concept of **jus cogens**, that, as the dominant theory of human rights, it also has a well-known Eurocentric historical-geographical and anthropological-philosophical foundation.

5. FINAL CONSIDERATIONS

The present text had as its main objective to expose the **jus cogens** as a concept originated from the North, once not only its definition has been largely forged because of the yearnings of the nations that compose such global axis, but also by the very systematics of the international plan be directed to the maintenance of the **status quo** regarding the production of norms that compose the legal system, excluding the possibility of other regions, especially those ones that do not participate of the oligarchy of the system, to agree and contribute for the recognition of the peremptory character of a certain rule. It was therefore argued hereby that this would be a clear example of the domination exercised by the North in relation to the Global South, which reproduces itself by the epistemic closure imposed by the Europeans, which end up promoting a real silence of the South, preventing it to be a (re) producer of any knowledge – what includes the determination of rules with cogent characteristics.

However, from the ‘libertarian thesis’, particularly in the area of the human rights, it is possible to note the important role of the Inter-American System of Human Rights, especially the Inter-American Court of Human Rights, by offering a counter-hegemonic voice as regards to the understanding of the *jus cogens* concept from its decisions. After all, if “the search for alternatives to the profoundly excluding and unequal conformation of the modern world requires an effort of deconstruction of the universal and natural character of the capitalist- liberal [Eurocentric] society” as Edgardo Lander⁸⁵ affirms, this effort has been done by the Inte-

american Court, which has been obtaining certain success as regards to the attribution of the cogent character to certain rules, which escape the pattern nowadays conjectured in the international level.

REFERENCES

ACCIOLY, Hidelbrando; SILVA, Geraldo Eulálio N.; CASELLA, Paulo B. **Manual de direito internacional público**. 15. ed. São Paulo: Saraiva, 2008.

AKENHURST, Michael. Custom as a source of international law. **British yearbook of international law**, v. 41, n. 1, p. 1-53, 1974.

BASINOUNI, M. Cherif. **Crimes against humanity in international criminal law**. 2. ed. Hague: Kluwer Law International, 1999.

BRAGATO, Fernanda Frizzo. Para além do discurso eurocêntrico dos direitos humanos: contribuições da descolonialidade. **Revista novos estudos jurídicos**, Itajaí, v. 19, n. 1, p. 201-230, jan./abr. 2014.

BROWNLIE, Ian. **Public international law**. 6. ed. New York: Oxford University Press, 2003.

CASSESE, Antônio. **International law**. 2. ed. New York: Oxford University Press, 2005.

CORTE INTERAMERICANA DE DERECHOS HUMANOS. **Caso Anzualdo Castro vs. Perú**. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 22 de septiembre de 2009. Serie C, n. 202.

CORTE INTERAMERICANA DE DERECHOS HUMANOS. **Caso Cantoral Benavides Vs. Perú**. Fondo. Sentencia de 18 de agosto de 2000. Serie C, n. 69.

CORTE INTERAMERICANA DE DERECHOS HUMANOS. **Caso del penal Miguel Castro Castro vs. Perú**. Fondo, Reparaciones y Costas. Sentencia de 25 de noviembre de 2006. Serie C, n. 160.

CORTE INTERAMERICANA DE DERECHOS HUMANOS. **Caso Gelman vs. Uruguay**. Fondo y Reparaciones. Sentencia de 24 de febrero de 2011. Serie C, n. 221.

CORTE INTERAMERICANA DE DERECHOS HUMANOS. **Caso Goiburú y otros vs. Paraguay**. Fondo, Reparaciones y Costas. Sentencia de 22 de sep-

84 ROSILLO MARTÍNEZ, Alejandro. **Fundamentación de los derechos humanos desde América Latina**. México: Editorial Itaca, 2013. p. 39-40.

85 LANDER, Edgardo. Ciencias sociales: saberes coloniales y eurocéntrico. In: LANDER, Edgardo (Org). **A colonialidade do saber: eurocentrismo e ciências sociais**. Buenos Aires: Consejo Latinoamericano de Ciências Sociais – CLACSO, 2005. p. 23.

tiembre de 2006. Serie C, n. 153.

CORTE INTERAMERICANA DE DERECHOS HUMANOS. **Condición jurídica y derechos de los migrantes indocumentados**. Opinión Consultiva OC-18/03 de 17 de septiembre de 2003. Serie A, n. 18.

CZAPLINSKI, Wladyslaw. Jus cogens and the law of treaties. In: TOMUSCHAT, Christian; THOUVENIN, Jean-Marc [Ed.]. **The fundamental rules of the international legal order: jus cogens and obligations erga omnes**. Leiden: Martinus Nijhoff Publishers, 2006.

DANILENKO, Gennady. **Law-making in the international community**. Boston: Martinus Nijhoff Publishers, 1993.

DINH, Nguyen Quoc et al. **Direito internacional público**. Tradução Vítor Marques Coelho. Lisboa: Fundação Calouste Gulbenkian, 1999.

DOUZINAS, Costas. **Human rights and empire: the political philosophy of cosmopolitanism**. Oxford: Routledge, 2007.

DUSSEL, Enrique. **1492 el encubrimiento del outro: hacia el origen de “mito de la modernidad”**. Colección Academia número uno. La Paz: Plural Editores, Facultad de Humanidades y Ciencias de la Educación – UMSA, 1994.

FRANCO, Fernanda Cristina de Oliveira. Oportunidades e desafios das TWAIL no contexto latino-americano a partir de perspectivas dos povos indígenas ao direito internacional. **Revista de direito internacional**, Brasília, v. 12, n. 2, p. 226-244, 2015.

FRIEDERICH, Tatyana Sheila. **As normas imperativas de direito internacional público: jus cogens**. Curitiba: Forum, 2004.

GALINDO, George Rodrigo Bandeira. A volta do terceiro mundo ao direito internacional. **Boletim da sociedade brasileira de direito internacional**, v. 1, n. 119 -124. ago./dez. 2013.

INTERNATIONAL COURT OF JUSTICE. **Case concerning the right of passage over indian territory**. Merits – Dissenting Opinion Judge Fernandes. 1960.

INTERNATIONAL COURT OF JUSTICE. **Case of jurisdictional immunities of the State: Germany v. Italy**. Judgment of Feb. 3, 2012. Merits – Dissenting Opinion Judge Cançado Trindade. 2012.

INTERNATIONAL COURT OF JUSTICE. **Legal**

consequences for States of the continues presence of South Africa in Namibia. Advisory Opinion – Separate opinion Judge Ammoun. 1971.

JANIS, Mark W. **An introduction to international law**. 4. ed. New York: Aspen Publishers, 2003.

LANDER, Edgardo. Ciencias sociales: saberes coloniales y eurocéntrico. In: _____. (Org.). **A colonialidade do saber: eurocentrismo e ciências sociais**. Buenos Aires: Consejo Latinoamericano de Ciências Sociais – CLACSO, 2005.

MAZZUOLI, Valerio de O. **Direito dos tratados**. São Paulo: RT, 2011.

MEDINA QUIROGA, Cecilia. **The american convention: life, personal integrity, personal liberty, due process and judicial recourse**, Center for Human Rights, University of Chile School of Law, San José: Mundo Gráfico, 2003.

MIGNOLO, Walter D. **Desobediencia epistémica: retórica de la modernidad, lógica de la colonialidad y gramática de la descolonialidad**. Argentina: Ediciones del signo, 2010 .

MIGNOLO, Walter D. La opción descolonial. **Revista Ietral**. Editorial Universidad de Granada, Granada, n. 01, 2008.

MOECKLI, Daniel; SHAH, Sangeeta; SIVAKUMARAN, Sandesh (Org.). **International human rights law**. New York: Oxford University Press Inc., 2010.

MONACO, Ricardo. Cours général de droit international publique. **Recueil des Cours de l'Académie de droit international de la Haye**, v. 125, n.3, p. 93-336, 1968.

MORGENTHAU, Hans. **Política entre as nações**. Tradução Oswaldo Biato. São Paulo: UnB/IPRI, 2003.

NASSER, Salem Hikmat. Jus Cogens: ainda esse desconhecido. **Revista direito GV**, São Paulo, v. 1, n. 2, p. 161 – 178, jun./dez. 2005.

ORGANIZATION OF AMERICAN STATES. **American convention of human rights**. 1969.

PASQUALUCCI, J. M. **The practice and procedure of the Inter-American Court of Human Rights**. University of South Dakota, School of Law. 2. ed. New York: Cambridge University Press, 2013.

PELLET, Alain. Article 38. In: ZIMMERMANN, An-

- dreas et al. **The statute of the International Court of Justice: a commentary**. 2. ed. Oxford: Oxford University Press, 2012.
- PEREIRA, André G.; QUADROS, Fausto de. **Manual de direito internacional público**. 3. ed. Coimbra: Almedina, 2009.
- PORTO-GONÇALVES, Carlos Walter. Apresentação. In: LANDER, Edgardo (Org.). **Colonialidade do saber: eurocentrismo e ciências sociais: Perspectivas Latino-americanas**. Buenos Aires: CLACSO, 2005.
- QUIJANO, Aníbal. Colonialidad y modernidad/racionalidad. In: BONILLA, Heraclio (Org.). **Los conquistados: 1492 y la población indígena de las Américas**. Ecuador: Libri Mundi, Tercer Mundo Editores, 1992.
- QUIJANO, Aníbal. **Colonialidade do poder, eurocentrismo e América Latina**. In: LANDER, Edgardo (Org.). *A colonialidade do saber: eurocentrismo e ciências sociais*. Buenos Aires: Consejo Latinoamericano de Ciências Sociales – CLACSO, 2005.
- RAGAZZI, Maurizio. **The concept of international obligations erga omnes**. New York: Oxford Monographs in International Law, 1997.
- RAMOS, André de Carvalho. Art. 53. In: SALIBA, Aziz Tuffi (Coord.). **Direito dos tratados: comentários à convenção de Viena do direito dos tratados (1969)**. Belo Horizonte: Arraes, 2011.
- REMIRO-BROTONS, Antônio. **Derecho internacional público: principios fundamentales**. Madrid: Tecnos, 1982.
- RESENDE, Augusto. A executividade das sentenças da Corte Interamericana de Derechos Humanos no Brasil. **Revista de direito internacional**, Brasília, v. 10, n. 2, p. 226-236, 2013.
- ROSILLO MARTÍNEZ, Alejandro. **Fundamentación de los derechos humanos desde América Latina**. México: Editorial Itaca, 2013.
- SANTOS, Boaventura de Sousa. Para além do pensamento abissal: das linhas globais a uma ecologia de saberes. **Revista crítica de ciências sociais**, n. 78, out. 2007.
- SCHWARZENBERGER, Georg. The problem of international public policy. **Current legal problems**, London, v. 18, n. 1, p. 191-214, 1965.
- SHAW, Malcolm N. **International law**. 4. ed. United Kingdom: Cambridge University Press, 1997.
- SQUEFF, Tatiana de Almeida Freitas Rodrigues Cardoso. As relações entre o direito internacional e o Estado soberano na visão de Georg Jellinek. **Revista campo jurídico**, Barreiras, v. 4, p. 136-151, 2016.
- SQUEFF, Tatiana de Almeida Freitas Rodrigues Cardoso. A violação de jus cogens pelo Estado em casos de terrorismo: uma análise do caso Jean Charles de Menezes. **Revista de direitos humanos em perspectiva**, Belo Horizonte, v. 2, p. 170-191, 2016.
- TE INTERAMERICANA DE DERECHOS HUMANOS. **Caso de los Hermanos Gómez Paquiyauri vs. Perú**. Fondo, Reparaciones y Costas. Sentencia de 8 de julio de 2004. Serie C, n. 110.
- TOMUSCHAT, Christian. Obligations arising for States without or against their will. **Recueil des cours de l'Académie de droit international de la Haye**, v. 241, p.195-374, 1993.
- TRINDADE, Antonio Augusto Cançado. **El derecho internacional de los derechos humanos en el siglo XXI**. Santiago: Editorial Juridica de Chile, 2006.
- TRINDADE, Antonio Augusto Cançado. **El ejercicio de la función judicial internacional: memorias de la Corte Interamericana de Derechos Humanos**. 3. ed. Belo Horizonte: Del Rey, 2013.
- TRINDADE, Antonio Augusto Cançado. **Tratado de derecho internacional dos direitos humanos**. Porto Alegre: S. A. Fabris Editor, 2003. v.3.
- UNITED NATIONS. **International covenant on civil and political rights**. 1966.
- UNITED NATIONS. **Treaty collection: Vienna convention on the law of treaties status**. 2016. Available at: <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&lang=en>.
- UNITED NATIONS. **Vienna convention on the law of treaties**. 1969.
- VERHOEVEN, Joe. Jus Cogens and reservations or 'counter-reservations': to the jurisdiction of the International Court of Justice. In: WELLENS, Karel (Ed.). **International law: theory and practice**. The Hague: Martinus Nijhoff Publishers, 1998.
- VIEGAS, Vera Lúcia. Jus cogens e o tema da nulidade dos tratados. **Revista de informação legislativa**. Brasília, ano. 36, n. 144, p. 181-196 out./dez. 1999.