

Is War a Crime? Yes. Are there Exceptions to the Right to Life? No. Is War Legally Permissible? No.

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Abstract

Is war a crime? Are there exceptions to the right to life? Is war legally permissible? The answer to all three questions is ambiguous (i.e. you will find legal scholarship answering “yes”; legal scholarship answering “no”; and legal scholarship answering “maybe”). However, there is a way out of this ambiguity. There are three sources of law: national law (national constitutions being the supreme law thereof); regional and international conventions (i.e. treaties between States); and customary international law and jus cogens. The first two sources of law debatably will lead to ambiguities, even the third. But here, the article argues that in actual fact the third source of law provides for war to be a crime; that there are no exceptions to the right to life; and that war is not legally permissible. This article sets out to expound this.

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I. Introduction

Is war a crime? Yes. Are there exceptions to the right to life? No. Is war legally permissible? No. The present article sets out to demonstrate and exhibit these three answers.

There is no doubt that if you peruse current legal scholarship, you will find ambiguous and contradictory answers to these three questions. For each

question, you will find legal scholarship answering “yes”, “no”, or “maybe yes, maybe no; it depends.” The vast majority will state that “it depends; in some circumstances yes; in some circumstances, no.” That does not mean they are right. The present article takes the provocative stance that the answer is a straight-forward answer for each of the three questions.

First, a few preliminaries. If you are to answer any of the three questions (just as for any legal question), you must first answer which law you will use as a basis. National law? In that case, which country? International law? In that case, what part of international law? Do you choose international humanitarian law (*jus in bello*)¹? Or, do you choose *jus ad bellum*² (including international criminal law)? Together, *jus in bello* and *jus ad bellum* form the two components of the laws of war, governing all aspects of armed conflicts. However, if you use these two sources of law, you already start from the assumption that war is legal, under certain circumstances (e.g. type of weapons). But, what if you choose human rights law? Or, other sources of international law, such as customary international law, or *jus cogens*? You might come to a very different conclusion.

So, which law do you choose? You must turn to all pertinent law. Moreover, not all laws are equal. There is a hierarchy; some laws trump other laws. And here is the crux of the present article.

There are three sources of law: national law (national constitutions being the supreme law thereof); regional and international conventions (i.e. treaties between States); and customary international law and *jus cogens*. The first two sources of law debatably will lead to ambiguities, even the third. However, there is a way out of this ambiguity, the article argues. According to the article, in actual fact, the third source of law provides for war to be a crime; that there are no exceptions to the right to life; and that war is not legally permissible.³

Namely, norms of *jus cogens* are the highest and non-derogable norms of international law, binding States regardless of consent. The present article points out that constitutional law and treaties are no longer the supreme law of the land; they are bound by higher legal norms, such as *jus cogens*.⁴ Thus, in the opinion of this author, every lawyer (e.g. constitutional lawyer, EU lawyer, environmental lawyer, World Trade Organization lawyer, economist lawyer) ought to be fluent in the norms of *jus cogens* (i.e. their normative meaning; the

¹ i.e. Laws of war. The law that regulates the conduct of armed conflicts. In other words, the law, which seeks to limit the effects of armed conflict by protecting people who are not, or no longer, participating in hostilities, and by restricting and regulating the means and methods of warfare available to combatants.

² i.e. Right to war. The law that regulates the conduct of engaging in war or armed conflict and includes crimes against peace and of war of aggression; in other words, the law that concerns acceptable justifications to engage in war.

³ The present article asks: Is war a crime? Is war legally permissible? The two questions reflect the distinction between criminal liability and civil liability.

⁴ The principal characteristics of *jus cogens* norms are their normative superiority and universality (Article 53 Vienna Convention on the Law of Treaties (VCLT), 1969). VCLT, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679, 1969.

legal consequences that follow from a violation of these norms by State and non-State actors; and what happens when other hierarchically lower laws contradict norms of *jus cogens*), since these norms trump all other norms. Indeed, in the opinion of this author, every human being ought to know, or be told, about these norms of *jus cogens*.

So then, which norms are *jus cogens*? Given their status as the highest legal norms, they are highly contested. Not only is their normative meaning debatable (e.g. Are they justiciable, suable, in national and international courts? What is the applicable compensation for a violation of these norms?), but also the complete list of *jus cogens* norms is unclear. Despite on-going disagreements over the accuracy of these lists (e.g. whether any given list is under-inclusive or over-inclusive), there is nonetheless, and importantly, a consensus that the following norms are *jus cogens*: the right to life, the prohibition of torture,⁵ and the prohibition of genocide.⁶

It is in this sense, that in order to answer the three questions of the article (or *any* legal question for that matter, according to the author), it is illogical to start with other hierarchically lower norms, since they will be trumped (invalidated) by the highest norms (*jus cogens*), if the lower norms contradict them. Moreover, it is not only about contradiction, and conflicts of laws. It is about the fact that *jus cogens* norms are immediately applicable, unlike other hierarchically lower norms, which are not and are less urgent to be enforced.⁷ Thus the article argues, instead of starting with, for example *jus in bello* and *jus ad bellum*, it is imperative to start with a norm of *jus cogens* (in particular, one over which there is consensus that it qualifies as *jus cogens*).

Let us start with the right to life, a *jus cogens* norm, and central to the issue of war and its illegality or legality. By definition, war is an armed conflict⁸ between States and/or non-State actors, within a nation or State or between them. Here we are concerned with human life and whether war is a crime; or (if not a crime), whether war is still legally permissible. It is true that crimes may also be committed against the environment,⁹ but that would be the subject of a different article. This article is uniquely concerned with the *human* right to life, given its importance. Apart from the obvious and important question of self-

⁵ There are disagreements about what constitutes torture, but there is an international consensus that it is a norm of *jus cogens*.

⁶ See, e.g., Tomuschat, C., *Human Rights: Between Idealism and Realism*, Oxford, New York, Oxford University Press, 2008 (arguing that there is a consensus).

⁷ The principal characteristics of *jus cogens* norms are their normative superiority and universality (Article 53 Vienna Convention on the Law of Treaties (VCLT), 1969). VCLT, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679, 1969.

⁸ International humanitarian law classifies two types of armed conflicts: (1) international armed conflicts, opposing two or more States; (2) non-international armed conflicts, between governmental forces and non-governmental armed groups, or between such groups only.

⁹ Environmental crime covers acts that breach environmental legislation and cause significant harm or risk to the environment and human health. These crimes result from the “knowing” breach of environmental law.

defence, there are other important ones, too, with regards to the right to life, such as: When does life start? Are abortion, euthanasia or suicide legal? These are interesting questions and will be returned to. The point here is that the article is uniquely concerned with the right to life, within the context of war (i.e. armed conflict).

Many alternative approaches could have been taken to answer the article's three questions. Just to mention a few: a human security approach,¹⁰ the four freedoms approach (i.e. freedom from fear, freedom from want, freedom of speech and expression, and freedom of worship),¹¹ or a right to peace approach. Is peace a legal obligation?¹² Is there a right to peace?¹³ You can create more laws. That's nice. And explicit ones, to boot, for instance providing for a clear right to peace. Then people will ask what peace is. But our current laws, the article argues, suffice already to qualify war as illegal and a crime. This does not mean that more, explicit, clear laws on peace are not a good idea. It just means there are sufficient laws outlawing war.

So, let us look at the right to life, see how strong this right is. The article follows this outline: first, it analyzes the right to life under national constitutions (sources, normative meaning, exceptions); second, it analyzes the right to life under international conventions (sources, normative meaning, exceptions); third, it analyzes the right to life under customary international law and *jus cogens* (sources, normative meaning, exceptions). It is true that norms of *jus cogens* are the highest and non-derogable norms of international law. Still, in order to elaborate on the normative meaning of the right to life under *jus cogens*, we must analyze the other sources of law: to understand their similarities and their differences, which set *jus cogens* apart.

Lastly, the article examines three crucial points, with regards to the right to life. First, it investigates whether war may be legal in the event of self-defence. (In other words, whether there are situations where you must choose between the right to life of one group of people over the right to life of another group of people.) Or, whether this is a false dilemma. (In other words, whether in actuality, there are alternatives to war, even in the event of self-defence). Second, it investigates *jus cogens* as a way out of this dilemma (or false dilemma). The article proposes that, if certain *jus cogens* norms are enforced seriously, then

¹⁰ United Nations Development Programme's (UNDP) 1994 Human Development Report defines human security in this way: (1) economic security; (2) food security; (3) health security; (4) environmental security; (5) personal security; (6) community security; (7) and political security.

¹¹ Based on former USA President Franklin D. Roosevelt's State of the Union Address 1941, in which he stated, "Necessitous men are not free men. [...] People who are hungry and out of job are the stuff of which dictatorships are made."

¹² Even if you define peace as more than just the absence of war, the absence of war is a *sine qua non* (i.e. a necessary condition, even if arguably not a sufficient condition) for peace. So the answer to this question depends, in part, on whether war is illegal – indeed the subject-matter of this article.

¹³ There is a United Nations Declaration on the Right of Peoples to Peace (1984). Declarations are not legally-binding.

these (false) dilemmas might disappear. Third, the article investigates Ronald Dworkin's right-answer-thesis and his question about Hercules. His metaphor of Judge Hercules (i.e. an ideal judge, fair and just, with a complete knowledge of legal sources) hypothesizes that Hercules, when faced with any legal question, will always arrive at the one right answer.¹⁴ (In mythology, Hercules is the Roman name for the Greek divine hero Heracles, famous for his strength and adventures.)¹⁵ But, is there only one right answer? In line with Ronald Dworkin's metaphor, what might Judge Hercules say about war and peace? I would add to Ronald Dworkin's question: What would the Greek goddess of peace (Irene) have to say about Hercules' answer about war?

Thus, with these two mythological heroes in mind (Irene, the Greek goddess of peace) and Hercules (the divine hero, famous for his strength), let us start answering the article's three questions.

II. *The right to life under national constitutions*

a. Sources

All national constitutions (written or unwritten)¹⁶ provide for a right to life. It is true that the normative meaning of the constitutional right to life varies between States (e.g. some States allow for the death penalty).¹⁷ In addition to the right to life, it is interesting to note that 46 States provide for a broader constitutional right, such as the right to an adequate standard of living or the right to a dignified life.¹⁸

These 46 States are: Bangladesh (Article 18); Belgium (Article 23.1); Bolivia (Article 158); Brazil (Article 170); Canada (Article 7); Colombia (Article 46); Dem. Rep. of Congo (Article 48); Cyprus (Article 9); Dominican Republic (Article 8); El Salvador (Article 101); Eritrea (Preamble and Article 10); Ethiopia (Article 89); Finland (Article 19); Germany (Article 1); Ghana (Article 36); Guatemala (Article 119); Honduras (Article 150); India (Articles 21 and 47);

¹⁴ Dworkin, R., *Law's Empire*, Cambridge, MA, Harvard University Press, 1986.

¹⁵ To attain immortality, Hercules had to perform 12 labors (which he did, successfully): (1) slay the Nemean Lion; (2) slay the nine-headed Lernaean Hydra; (3) capture the Golden Hind of Artemis; (4) capture the Erymanthian Boar; (5) clean the Augean stables in a single day; (6) slay the Stymphalian Birds; (7) capture the Cretan Bull; (8) steal the Mares of Diomedes; (9) obtain the girdle of Hippolyta, Queen of the Amazons; (10) obtain the cattle of the monster Geryon; (11) steal the apples of the Hesperides; and (12) capture and bring back Cerberus.

¹⁶ The following States can be considered to have an unwritten constitution: Israel, New Zealand, Saudi Arabia, United Kingdom of Great Britain and Northern Ireland, all Canadian provinces except British Columbia.

¹⁷ So far, only 95 States have abolished the death penalty. Several States have not used the death penalty in many years; 58 States retain the death penalty in active use. See website at <http://www.amnesty.org>.

¹⁸ See Vidar, M., *State recognition of the right to food at the national level*, FAO, August 2005.

Indonesia (Article 28); Ireland (Article 45); Liberia (Article 8); Mozambique (Article 41); Netherlands (Article 20); Nigeria (Articles 16 and 17); Norway (Article 110 c); Pakistan (Article 38); Paraguay (Article 53); Peru (Article 2); Puerto Rico (Article 2); Republic of Korea (Article 34); Romania (Article 43); Russian Federation (Article 7); Sierra Leone (Article 8); Slovakia (Article 39); Spain (Preamble); Sudan (Article 11); Sweden (Article 2); Switzerland (Article 12); Syrian Arab Republic (Article 44); Tajikistan (Article 1); Macedonia (Article 40); Trinidad and Tobago (Preliminary, Sec. I); Turks and Caicos Islands (Article 2); United Republic of Tanzania (Articles 8 and 11); Vanuatu (Article 5); and Venezuela (Articles 3 and 299).¹⁹

The next section will deal with the normative meaning of the right to life under national constitutions. Suffice it to say here, that the provision of the right to a dignified life in national constitutions is interesting because there have been many attempts to identify the highest of all fundamental rights, as well as to identify a single principle that encompasses them all. Different candidates have been proposed, including: the right to dignity,²⁰ right to freedom of conscience,²¹ right to equality,²² and Kant's categorical imperative (the duty to treat people as ends, and never as means).²³ This is interesting because the right to dignity of human beings has been used as an argument against the use of deadly force of a State's military.²⁴ Nevertheless, it is true that the normative meaning of the constitutional right to a dignified life varies greatly from State to State.²⁵ We now turn to the normative meaning of the constitutional right to life.

b. Normative meaning

Two points may be made about the normative meaning of the right to life under national constitutions.

The first is that: certainly, it varies from State to State. Just to mention a few examples, there is the question of: whether military service in a State is obligatory for women and men (Also, can you legally be a conscientious objector

¹⁹ *Ibidem*.

²⁰ Segado, F., *Dignidad de la persona, derechos fundamentales, justicia constitucional*, Madrid, Dykinson, 2008 (arguing that the human right to dignity is the "highest of human rights" and the "source of rights").

²¹ Haarscher, G., *Can Human Rights be Contextualized?*, in Sajo, A., (ed.), *Human Rights with Modesty – the Problem of Universalism*, Martinus Nijhoff Publishers, p. 107, 2004.

²² Sadurski, W., *Universalism, Localism and Paternalism in Human Rights Discourse*, in Sajo, A., (ed.), *Human Rights with Modesty – the Problem of Universalism*, Martinus Nijhoff Publishers, p. 156, 2004.

²³ Kant, I., *Groundwork of the Metaphysic of Morals*, translated and analyzed by Paton, H., London, New York, Harper & Row, 1964.

²⁴ *Judgement of the Constitutional Court 1 BvR 357/05, declaring void part of the Aviation Security Act*, 15 February 2006.

²⁵ E.g. In March 2009, the German government banned the game of laser tag (a game where you shoot with harmless laser guns), citing that it violates the right to dignity. It is interesting that the government believes fake guns are against the right to dignity, but not real guns.

and refuse to participate in war?); when life starts and whether abortion is legal; whether suicide, euthanasia, or the death penalty are legal; what constitutes murder (If a head of State engages in a war, is she or he a serial killer?); what constitutes self-defence (Can an individual or State legally kill another human being in self-defence, or does this violate the right to life? Is it possible that in some circumstances killing another human being is the one and only way to defend oneself? In other words, can one person's right to life conflict with another person's right to life, such that you necessarily must choose between one or the other? Or to put it differently, is it possible to have a dilemma of conflicting fundamental rights?²⁶).

Every State answers these questions differently. Some are truly hard to answer, for example with regards to self-defence. Are there really situations where you must choose between the right to life of one group of people over the right to life of another group of people? Or, is this a false dilemma? It is about weighing one person's right to life against another person's right to life. The present article argues that some instances give rise to dilemmas that are very hard to resolve: there is no way out; someone's life will have to prevail over someone else's life. For instance, let us say a mother gives birth to a child, but because of health complications, the doctor can only save either the mother's life or the child's. It is possible that improvements in medical science in the future might make such choices less frequent, but they do exist.

Our focus in this article is on the right to life, in the context of armed conflict. The present article insists that there are alternatives to war.²⁷ That is the wealth of work called peace studies.²⁸ Conflict resolution concerns finding non-violent ways to resolve armed conflict. Peace by peaceful means.²⁹

What about the situation of an individual's right to self-defence? For instance, let us say, you are walking down the street, and someone tries to kill you. Do you have a right to defend yourself, in such a way as to kill the other person? You have a right to use reasonable force, in order to defend your own life, or the lives of others, but do you have a right to use deadly force? A criminal lawyer of any State might answer "yes" right away. In this sense: a perfect claim of self-defence occurs when there is a reasonable need for deadly force to protect one's life and involves no wrong-doing on the part of the defendant; an imperfect self-defence claim involves an unreasonable belief that deadly force is necessary, some bad behavior on the part of the defendant (for example, the defendant was the aggressor in the first place), or both; in a murder case, a successful perfect self-defence claim will result in an acquittal, whereas an imperfect claim will usually result in a reduction to a manslaughter charge.

²⁶ See the sections below in the article, on "False dilemmas: there are alternatives to war" and "Hercules and the right-answer-thesis" question.

²⁷ See the section below in the article on "False dilemmas: there are alternatives to war".

²⁸ E.g., see works of Johan Galtung, founder of peace studies.

²⁹ See Galtung, J., *Peace by Peaceful Means, Peace and Conflict, Development and Civilization*, Sage, 1996.

Why is the article mentioning this? The reason is that an individual's and State's right to use deadly force in self-defence arise in similar circumstances. The key word is "necessary". A criminal lawyer, according to the article, ought to be well-versed in *jus cogens* norms, since they trump all other contradictory norms (whether those hierarchically lower norms are provided for under a national constitution, criminal law, or civil law, etc.). By definition, *jus cogens* norms are non-derogable (except by another *jus cogens* norm) and bind all States, and everyone. Thus, theoretically, a person's right to life (a *jus cogens* norm) could be "derogated" by another person's right to life (a *jus cogens* norm) – if this were necessary. This brings up the principle of "state of necessity". By definition, a "state of necessity" refers to situations of such overwhelming urgency that a person must be allowed to respond by breaking the law.

It is true that the normative meaning of the right to life under national constitutions varies from State to State, as discussed above. However, since *jus cogens* norms trump all other norms, so does its normative meaning. Under the normative meaning of *jus cogens*, where use of deadly force is necessary in self-defence, the right to life may be "derogated". In fact, it has not really been derogated: in such a situation, there is no real choice. Indeed, there are no exceptions to the right to life under *jus cogens*; it is non-derogable. Here, a "state of necessity" forces one life to prevail over another life. (The principle of "state of necessity" will be discussed further in the next section.) It applies to situations mentioned above (e.g. the doctor who has to choose between saving either the mother's life or the child's). With regards to war, the article repeats, that there are alternatives to war; a "state of necessity" does not apply. With regards to difficult questions (e.g. When does life start? At conception? At 3months? Is abortion legal?), and other seeming dilemmas of conflicting fundamental rights, the article proposes that these (false) dilemmas might disappear, if certain *jus cogens* norms are enforced seriously. (The article elaborates on this in the section on "The way out: *jus cogens*".)

In this article, we are concerned with armed conflict, but an exploration of the right to life cannot escape these important and difficult questions (e.g. Is suicide legal? Is euthanasia legal, intentionally ending a life in order to relieve pain and suffering?). The point is, the principle of "state of necessity" can answer many of these questions. And where there are gaps (e.g. When does life start? Is abortion legal?), the normative meaning of the *jus cogens* norm on the right to life can fill in the gap: in other words, these dilemmas and questions about the right to life look difficult and perplexing to answer (indeed, different States resolve these questions differently through a variety of national laws), but the answers might become much clearer, if certain *jus cogens* norms are enforced seriously; some dilemmas might disappear, and those difficult and contested questions that remain (where consensus is hard to find from one national law to another), might start to have clearer answers; the grey areas (contested areas in law on the right to life) becoming clearer, if you start with the urgent black and white areas of law, of certain *jus cogens* norms.

It is a bit like building a house and discovering that the walls and ceiling are crooked; one tries desperately to make them straight, while failing to address

the issue that the foundation of the house, the base, is crooked. Law is similar. *Jus cogens* norms take priority over other norms. As mentioned previously, they are immediately applicable, unlike other hierarchically lower norms, which are not and are less urgent to be enforced. So long as certain urgent *jus cogens* norms are not enforced seriously, we will continue to have these (false) dilemmas, with different national laws providing for different answers, on such a central issue as the right to life, for example. So, what are these “certain” *jus cogens* norms that need to be enforced seriously? This will be dealt with in the section of the article on “The way out: *jus cogens*”.

The second point that may be made about the normative meaning of the right to life under national constitutions is that: some States have attached to the right to life a broad meaning. For instance, the Indian Supreme Court has held that the right to life implies a broad meaning, which includes (besides the right to food and water), the right to clothing, the right to a decent environment, and the right to a reasonable accommodation to live in.³⁰ Thus, the normative meaning of the *jus cogens* norm on the right to life, is not only about mere survival; there is a dignity aspect attached to it. Indeed, as pointed out in the previous section of the article (on the sources under national constitutions), 46 States provide for the right to an adequate standard of living or dignified life.³¹ But even for States that lack this additional right in their constitutions, *jus cogens* fills in the gap. Indeed, the *jus cogens* norm on the right to life has a broad meaning.

National law tries to limit the meaning of the right to life. But, the *jus cogens* norm fills in the gap (i.e. the missing parts to the law), protecting the right to life fully, which some States have tried to exclude through national laws or (regional and international) treaties. *Jus cogens* norms are applicable under national, regional and international law, since they are the highest and peremptory (non-derogable) norms.

Let us look at this broader meaning. Although disputed, the article insists that all rights give rise to positive and negative obligations.³² Under any given right, a State must respect, protect, facilitate and fulfill the right.³³ Obligations to protect, facilitate and fulfill are positive obligations; the obligation to respect is a negative obligation. Positive obligations oblige States to act, i.e. they legislate State responsibility for acts of omission. Negative obligations oblige States to

³⁰ *Shantistar Builders v. Narayan Khimatal Tomtame (Supreme Court of India, Civil Appeal No. 2598/1989, 31 January 1990)*. See Langford, M., Porter, B., Nolan, A., *The Justiciability of Economic and Social Rights: An Updated Appraisal*, Center for Human Rights and Global Justice Working Paper, NYU School of Law, No. 15, 2007.

³¹ See Vidar, M., *State recognition of the right to food at the national level*, FAO, August 2005.

³² See, e.g., Alexy, R., *A Theory of Constitutional Rights*, Oxford, New York, Oxford University Press, 2002 (arguing that all rights give rise to positive and negative obligations).

³³ Eide, A., *Right to Adequate Food as Human Right*, United Nations Human Rights Study Series N.1, Geneva, Centre for Human Rights, p.23, Para. 109, 1989 (defining State obligations to respect, protect and fulfill human rights).

refrain from acting, i.e. they legislate State responsibility for acts of commission. In other words, States must both refrain from violating a right (negative obligation), and establish institutions that enforce a right (positive obligation). An important example is the following. The (civil and political) right not to be tortured gives rise to the (negative) obligation to refrain from such conduct; and, to the (positive) obligations to implement criminal law in such a way as to ensure the prohibition of torture is effective,³⁴ and to investigate claims of torture.³⁵

In the context of the right to life, States must respect, protect, facilitate and fulfill the right. First, States must respect the right to life of human beings within their jurisdiction, and also beyond their jurisdiction.³⁶ They must not take measures, which prevent the right to life (e.g. States must refuse to go to war, especially since there are alternatives to war).³⁷ Second, States must protect the right to life. They must ensure that private actors, such as individuals or transnational corporations (TNCs), over which they exercise control, do not deprive individuals of their life. Third, States must facilitate the right to life. They must take steps by all appropriate means, including the adoption of legislative and administrative measures. And fourth, States must fulfill the right to life. Besides refraining from killing, for example, States must ensure access to food and water, to ensure the right to life. Hence, in emergencies, States must provide free food (“fulfill the right to life”). Emergencies include, *inter alia*, situations of armed conflicts, extreme poverty, forced displacements and natural disasters.³⁸

It is true that States are not the only duty-bearers towards the right to life. But, they are the primary ones. That is why we started with State obligations. Let us also examine the other duty-bearers.

³⁴ E.g., *A v UK* (100/1997/884/1096, ECtHR, 23 September 1998). (There was a violation of Article 3 European Convention on Human Rights (ECHR), which provides for the prohibition of torture. Article 3 ECHR states, “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” A step-father had beaten his stepson to such an extent that the treatment amounted to inhuman and degrading treatment. Yet, he was acquitted of assault. This was because the law at that time in the UK permitted a defence of lawful chastisement. The European Court of Human Rights (ECtHR) held that, even though the treatment was perpetrated by one private person against another, the State was still responsible because there was no adequate system of law in place to protect against such treatment.)

³⁵ E.g., as part of the positive obligations under Article 3 European Convention of Human Rights (ECHR) (on the prohibition of torture), all claims of torture, inhuman or degrading treatment must be properly investigated by an independent tribunal (*Assenov v Bulgaria* (Application No. 90/1997/874/1086, ECtHR, 28 October 1998); *Matko v. Slovenia* (Application No. 43393/98, ECtHR, 2 November 2006, Para.84-97).

³⁶ States have extra-territorial obligations under human rights. E.g., The International Court of Justice (ICJ) held that human rights norms create obligations *erga omnes*, i.e. towards all States, and enforceable in all States (*Barcelona Traction, Light and Power Co. (Belgium v. Spain)* 2nd Phase, ICJ, Reports, 1970, p.3 ff. Para. 33 and 34).

³⁷ See the section below in the article on “False dilemmas: there are alternatives to war”.

³⁸ UN General Comment 12 on “The Right to Adequate Food”, UN Doc. E/C.12/1999/5, 1999, Para.15.

There are two significant topics in the context of duty-bearers. The first is that, according to the article, every right gives rise to corresponding duty-bearers, right-holders and agents of accountability.³⁹ By definition, right-holders are actors with a claimable right against duty-bearers; duty-bearers are actors legally obliged to fulfill obligations under the right to right-holders; and, agents of accountability are procedures of monitoring and correction to ensure duty-bearers fulfill their obligations to right-holders.⁴⁰ In the context of the right to life, right-holders are all human beings within their jurisdiction, and also beyond their jurisdiction.⁴¹ Duty-bearers are State and non-State actors (e.g. individuals and TNCs must also refrain from depriving other people of their lives).⁴² Agents of accountability include courts.⁴³

The second significant topic in the context of duty-bearers (which is intrinsically linked to the first topic) is that, according to the article, the right to life is justiciable (i.e. suable, claimable) in court.⁴⁴ Obviously, the right to life is justiciable in national, regional and international courts, and there is a lot of case law to prove it. It is, nonetheless, an important topic. It is important because – if all wars are a crime, and legally not permissible – then one can sue those responsible. Court cases are certainly not the only option for redress for violations of the right to life, nor are they necessarily always the best option, but they are an option. That is the difference between a strong wish or a goal (with no legal value), and a right – the latter is justiciable.

What this means is that violations of the right to life give rise to legal remedies. For every right, there is a remedy (*ubi jus ibi remedium*). The maxim was first articulated by William Blackstone, “It is a settled and invariable principle [...], that every right when with-held must have a remedy, and every injury its proper redress.”⁴⁵ The question then is: What is the appropriate

³⁹ See, e.g., Wellman, C., *An Approach to Rights: Studies in the Philosophy of Laws and Morals*, Kluwer Academic Publishers, Dordrecht, Boston, 1997 (applying Wellman’s general theory of norms. According to this theory, every human right has a “core element” (i.e. the right-holder has a right to X; and the duty-bearer must not interfere with the right to X) and a “protective element” (i.e. the court, as agent of accountability, must punish the duty-bearer if the right to X is interfered with).)

⁴⁰ See Kent, G., *Freedom from Want*, Georgetown University Press, Washington D.C., 2005.

⁴¹ E.g., The International Court of Justice (ICJ) held that human rights norms create obligations *erga omnes*, i.e. towards all States, and enforceable in all States (*Barcelona Traction, Light and Power Co. (Belgium v. Spain)* 2nd Phase, ICJ, Reports, 1970, p.3 ff. Para. 33 and 34).

⁴² See, e.g., Clapham, A., *Human Rights Obligations of Non-State Actors*, Oxford, New York, Oxford University Press, 2006.

⁴³ They can include legal and extra-legal action (such as alternative dispute resolution, non-violent protests and civil disobedience).

⁴⁴ See, e.g., Alston, P., Steiner, H., Goodman, R., (eds.), *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, Oxford, New York, Oxford University Press, Edition. 3rd ed., 2008 (arguing that justiciability is a *sine qua non* for a human right to be called a right).

⁴⁵ Blackstone, W., *Commentaries on the Laws of England* 23, Vol. 1, 1765. See also *Marbury v. Madison* 5 US (1 Cranch) 137, 162-163 (1803).

compensation for violation of the *jus cogens* norm of the right to life (in armed conflicts, as well as in other situations)? Or, to put it differently, what is the appropriate compensation in criminal law? What is the appropriate compensation in civil law? Just as in civil law, where some States allow for punitive damages,⁴⁶ what is the appropriate compensation for war? The article deals with these questions in the section on the normative meaning under *jus cogens*.

c. Exceptions

So, what are the exceptions to the right to life under national constitutions? Good question.

Under national law, we see that States answer this in a variety of ways, legislating for different laws (e.g. regarding the death penalty, abortion, euthanasia, military). Some States have a volunteer military (as opposed to conscription or mandatory forces). Some States allow for a person of the armed forces to be tried in court and punished, for abandoning a military duty or post without permission, when this is done with the intention of not returning (i.e. a “deserter”). In some States, a person cannot legally be a conscientious objector and refuse to kill people and to go to war. Some States, on the contrary, have no military forces; however, many of these States have had a long-standing agreement of protection with a former occupying country.⁴⁷

If war is a crime, and it is legally not permitted, and the right to life is non-derogable, then is it illegal for a State to have a military? For example, Japan, in accordance with Article 9 of its Constitution, has no military, but it does have the Japan Self-Defense Forces (SDF) (a military force for national territory defence that may only be deployed outside Japan for UN peacekeeping missions). Since 9/11, SDF forces have been deployed for the first time (to Afghanistan and Iraq). However, Japan was forced to provide for this provision in its Constitution in 1947 (Article 9 forbids Japan from maintaining a military or from using force internationally for any reason); it was not a voluntary decision. So, is it generally illegal for a State to have a military? This question brings us back to the principle of “state of necessity”. According to the concept of the prisoner’s dilemma,⁴⁸ everyone would benefit if no one (State and non-State actors) has a military

⁴⁶ E.g. *McDonald’s coffee case (hot coffee lawsuit)*. In 1994, a New Mexico civil jury awarded \$2.86 million, in a product liability lawsuit, to Stella Liebeck, a woman who suffered third-degree burns when she accidentally spilled hot coffee on herself after buying it from McDonald’s (*Liebeck v. McDonald’s Restaurants*, Bernalillo County, N.M. Dist. Ct. 1994).

⁴⁷ There are 15 such States: Andorra, Costa Rica, Grenada, Kiribati, Liechtenstein, Marshall Islands, Federated States of Micronesia, Nauru, Palau, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Solomon Islands, Tuvalu and the Vatican City.

⁴⁸ In game theory, the prisoner’s dilemma is a situation in which two players each have two options whose outcome depends crucially on the simultaneous choice made by the other (this situation is often depicted in terms of two prisoners separately deciding whether to confess to a crime).

force; you can put down your arms, but the others have to, too, or else you risk your life; or you can bravely put your arms down anyway; or you can destroy all your weapons. The article insists that there are alternatives to war, even if we live in a world where some States have offensive militaries, some have defensive militaries, and some have no militaries. Also, as mentioned above, the article proposes that many of these dilemmas might disappear, if certain *jus cogens* norms were enforced seriously.⁴⁹

Although it is true that States legislate different laws, and provide for a wide variety of normative meanings for the constitutional right to life, this right is a norm of *jus cogens* (it is non-derogable). There are no exceptions to the right to life.

In general, human rights law applies to peacetime, war, and (natural and human-made) emergencies. However, there are provisions in human rights law instruments, which limit these rights. First, the provisions limit the scope of protected human rights. Second, they provide for suspension of, or derogation from, certain rights in time of public emergencies. Notwithstanding these limitations, they do not apply to the human right to life (and the human right to non-discrimination).⁵⁰ Moreover, *jus cogens* norms are the highest norms and non-derogable.

At the same time, as stated earlier, the principle of “state of necessity” provides that there are situations of such overwhelming urgency that a person must be allowed to respond by breaking the law. The principle is well-established in the common law and civil law of many States; also in international law.⁵¹ For instance, the French criminal code (Articles 122-7) provides that one may not be held liable for an act, which under normal circumstances would constitute a crime, if the conduct was necessary to avoid a threat to oneself, or a third person, and if that conduct was proportionate to the seriousness of the danger.⁵² The Canadian criminal law also allows for the defence of necessity. In *Perka v. The Queen* (1984), the Supreme Court of Canada affirmed that, “a liberal and humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether of self-

⁴⁹ See the section in the article “The way out: *jus cogens*”.

⁵⁰ On the one hand, Articles 26 and 2(1) International Covenant on Civil and Political Rights (ICCPR) explicitly provide for a non-derogable human right to non-discrimination; and Article 2 International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for the human right to non-discrimination in the enjoyment of all the rights provided for under ICESCR. On the other hand, the human right to life is a supreme right from which no derogation is allowed, not even in time of public emergency, which threatens the life of the nation (Article 4(2) ICCPR).

⁵¹ See Ziegler, J., *Report by the Special Rapporteur on the Right to Food*, submitted in accordance with General Assembly resolution 61/163, UN Doc. A/62/289, Para.67, 22 August 2007, para. 60.

⁵² For example, In the French case *Dame Menard* (1898), a mother too poor to buy bread, was not sentenced for stealing it because she acted out of a state of necessity (Cour d’Amiens, *Dame Menard*, 22 April 1898). In Germany, the principle is called “Mundraub”. Literal translation: mouth stealing.

preservation or of altruism, overwhelmingly impel disobedience.”⁵³ Responding to a “state of necessity” does not violate the right to life: there is no real choice; one is forced into a position.

III. The right to life under international conventions

a. Sources

The human right to life is provided for under several international conventions: Article 6 International Covenant on Civil and Political Rights (ICCPR), Article 6 Convention on the Rights of the Child (CRC), Article 2 European Convention on Human Rights (ECHR), and Article 4 African Charter on Human and Peoples’ Rights (ACHR).⁵⁴ The human right to life is a supreme right from which no derogation is allowed, not even in time of public emergency, which threatens the life of the nation (Article 4(2) ICCPR). Interestingly, despite the prime importance of the right to life, it is actually the right to food and water that is the most affirmed right⁵⁵ (it is also the most violated right; more people die of hunger every year than of any other cause, including war, AIDS and other diseases combined.)⁵⁶

International conventions, coupled with customary international law and general principles, constitute the primary sources of international law (Article 38 ICJ Statute (1945)); judicial decisions are subsidiary sources.⁵⁷ This is true; but simultaneously, *jus cogens* norms (and their normative meanings) are actually the highest (and non-derogable) norms, trumping all other norms, including international conventions if they conflict with *jus cogens*.⁵⁸

b. Normative meaning

Four points may be made about the normative meaning of the right to life under international conventions (i.e. treaties).

The first is that: the human right to life has a broad meaning. As stated above, the human right to life is a supreme right from which no derogation is

⁵³ Supreme Court of Canada (1984), 2 S.C.R. 232.

⁵⁴ The human right to life is also provided for under Article 3 Universal Declaration of Human Rights (UDHR), which is non-legally binding, unless you consider the UDHR customary international law, or *jus cogens*.

⁵⁵ Alston, P., *International Law and the Human Right to Food*, in Alston, P., Tomasevski, K., *The Right to Food*, Martinus Nijhoff Publishers, p. 9, 1984.

⁵⁶ Burden of Disease Unit Harvard University, *The Global Burden of Disease and Injury Series. Executive Summary*, Cambridge, Mass., Volume 1, 1996.

⁵⁷ Article 38 ICJ Statute (1945) has long been accepted as providing the authoritative statement of the sources of international law (59 Stat. 1055 (1945), adopted 26 June 26 1945, entered into force 24 October 1945 (ICJ Statute)).

⁵⁸ The principal characteristics of *jus cogens* norms are their normative superiority and universality (Article 53 Vienna Convention on the Law of Treaties (VCLT), 1969). VCLT, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679, 1969.

allowed, not even in time of public emergency, which threatens the life of the nation.⁵⁹ At the same time, the human right to life is not only about mere survival. In fact, the United Nations General Comment 6 (UN GC6) on “The Right to Life” states that the (civil and political) right to life includes the State obligation to prevent widespread and serious malnutrition leading to extensive child mortality; in this way, the right to life includes the (economic and social) right to food.⁶⁰ UN GC6 States that, “[The right to life] should not be interpreted narrowly.”⁶¹ It is true, however, that UN General Comments⁶² are non-legally-binding. Nevertheless, they are authoritative texts on the normative meaning of different human rights, and litigants have invoked them before national courts.⁶³ In addition, the normative meaning of the right to life under *jus cogens* (which also has a broad meaning) is legally-binding, and takes precedence over the (sometimes more restrictive) normative meaning of the right to life under hierarchically lower laws (such as treaties and national laws).⁶⁴

The second point that may be made about the normative meaning of the right to life under international conventions is that: conventions are only legally-binding on ratifying States that have implemented them into national law. Just as an example, some States have taken steps to incorporate the entire International Covenant on Economic, Social and Cultural Rights (ICESCR),⁶⁵ while others have enforced single rights alone.⁶⁶ Indeed, under international law, States have the option between choosing monist and dualist legal systems. This option is a further procedural limit to human rights. In a monist legal system, ratified conventions are part of national law and are directly invocable in national courts, unless otherwise specified. (A small minority of States are monist, such as: Argentina, Netherlands and Mexico). In a dualist legal system, separate legislation must first be enacted into national law, since under this system, national and international law are separate legal systems.

However, the article points out that this procedural limit does not matter

⁵⁹ Article 4(2) International Covenant on Civil and Political Rights (ICCPR).

⁶⁰ UN General Comment 6 on “The Right to Life”, UN doc., Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 127 (2003), 1982, para.5.

⁶¹ Ibidem, para.1. See also para. 5, “The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.

⁶² Each of the United Nations treaty bodies (e.g. Human Rights Committee) publishes its interpretation of the provisions of its respective human rights treaty (e.g. International Covenant on Civil and Political Rights (ICCPR)) in the form of “general comments” or “general recommendations”.

⁶³ See Iwasawa, Y., *The Impact of the Work of the UN Human Rights Treaty Bodies on Japanese Courts*, in Iwasawa, Y., *International Law, Human Rights, and Japanese Law: The Impact of International Law on Japanese Law*, 116-122, 1998.

⁶⁴ The principal characteristics of *jus cogens* norms are their normative superiority and universality (Article 53 Vienna Convention on the Law of Treaties (VCLT), 1969). VCLT, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679, 1969.

⁶⁵ E.g., Norway (the Human Rights Act of 21 May 1999 No.30 gave ICESCR, ICCPR and ECHR the force of Norwegian Law); and Argentina (the 1994 Constitutional amendment included ICESCR into the National Constitution).

⁶⁶ E.g., the protection of single rights through constitutional provisions.

so much. First, there is a general principle called *pacta sunt servanda* (i.e. agreements must be kept). It provides that, “Every treaty in force is binding upon the parties to the treaty and must be performed by them in good faith.”⁶⁷ This general rule was reiterated by the ICJ⁶⁸ and by legal scholars.⁶⁹ In other words, in case of conflict with national law, these human rights conventions must take precedence. Second, *jus cogens* norms are the highest norms – binding States, regardless of consent. With regards to such an important right, as the right to life, it is therefore irrelevant whether a State has provided for this right under its constitution, or ratified the relevant treaty; the right to life under *jus cogens* binds all States, anyway.

The third point that may be made about the normative meaning of the right to life under international conventions is that: there are multiple duty-bearers, right-holders and agents of accountability. Human rights treaties (e.g. ICCPR, CRC, ECHR, ACHR) provide that States have legal obligations (to respect, protect, facilitate and fulfill the right), but non-State actors do, too;⁷⁰ territorially within the jurisdiction of the State, but also extra-territorially outside the jurisdiction of the State.⁷¹ Hence, duty-bearers under the human right to life include: States (territorial and extra-territorial obligations), trans-national corporations (TNCs), International Governmental Organizations (IGOs), and non-State actors (such as individuals).⁷² Right-holders, as already mentioned, are all human beings within a State’s jurisdiction, but also outside their jurisdiction.⁷³ Agents of accountability, as mentioned above, include courts, but also the wealth of experience and ideas of peace work (e.g. conflict resolution, prevention of war).

The fourth and final point that may be made about the normative meaning of the right to life under international conventions is that: there is also

⁶⁷ Article 26 Vienna Convention on the Law of Treaties (1969), 23 May 1969, 1155 UNTS 331.

⁶⁸ See Permanent Court of International Justice, Advisory Opinion No 23, *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, February 4th, 1932, Twenty-Third Session; and Article 27 Vienna Convention on the Law of Treaties (1969).

⁶⁹ See Brownlie, I., *Principles of Public International Law*, Oxford, New York, Oxford University Press, 2008.

⁷⁰ See, e.g., Clapham, A., *Human Rights Obligations of Non-State Actors*, Oxford, New York, Oxford University Press, 2006.

⁷¹ E.g., The International Court of Justice (ICJ) held that human rights norms create obligations *erga omnes*, i.e. towards all States, and enforceable in all States (*Barcelona Traction, Light and Power Co. (Belgium v. Spain)* 2nd Phase, ICJ, Reports, 1970, p.3 ff. Para. 33 and 34).

⁷² See, e.g., Narula, S., *The Right to Food: Holding Global Actors Accountable under International Law*, Columbia Journal of Transnational Law, 44:691-800, 5/9/2006.

⁷³ E.g., The International Court of Justice (ICJ) held that human rights norms create obligations *erga omnes*, i.e. towards all States, and enforceable in all States (*Barcelona Traction, Light and Power Co. (Belgium v. Spain)* 2nd Phase, ICJ, Reports, 1970, p.3 ff. Para. 33 and 34).

international humanitarian law (*jus in bello*, i.e. “laws of war”)⁷⁴ and international criminal law (both deal with armed conflict), provided for under international conventions. Let us look at both.

First, we start with *jus in bello* (“laws of war”). This is also called international humanitarian law. *Jus in bello* concerns the question of whether a war is conducted justly (regardless of whether the initiation of hostilities was just). It concerns how you fight, rather than the reasons you fight. Humanitarian law does not apply to emergency situations, other than armed conflicts. This means it does not apply to, *inter alia*, natural disasters, internal tensions, and disturbances, unless they arise to the level of internal armed conflict within the meaning of Protocol II (1977) to the Geneva Conventions (1949). On the contrary, human rights law applies both in peace and war, in ordinary and emergency situations, subject to possible limitations and suspensions provided for by human rights law.

However, as already mentioned, the human right to life (a *jus cogens* norm) cannot be derogated. The rules of international humanitarian law are complex – and they mask the fact that, according to the author of this article, they are illegal, in and of themselves. It is a bit like genocide, which is now considered a crime (under international criminal law), and the prohibition of which is now considered a norm of *jus cogens*. It does not matter how you commit genocide (once an act qualifies as genocide), e.g. which weapons you used. Genocide is illegal and a crime, under all circumstances. Indeed, the prohibition of genocide is a norm of *jus cogens* and non-derogable. In the same way, war is legally not permitted, and is a crime: it violates the *jus cogens* norm of the right to life (and crucially, there are alternatives to war).⁷⁵

As we shall see, the rules of international humanitarian law are complex. It is generally agreed that the Geneva Conventions (1949) are customary international law, whereas it is debatable whether this holds true also for the Additional Protocols. Customary international law binds all States, except for persistent objectors. In non-international armed conflicts, a distinction must be made between conflicts under Common Article 3 and conflicts under Additional Protocol II of the Geneva Conventions (1949). Common Article 3 is binding not only for ratifying States, but also for all armed groups fighting within their territory (Article 3(1)). Additional Protocol II has stricter requirements for application. The conflict must be between a State and dissident, or other organized armed groups; the dissident, or other organized armed group, must control a relevant (though not quantified) part of the territory of the State; the dissident, or other organized armed group, must be under “responsible command”, and must be able to carry out “sustained and concerted military operations” and to implement the provisions of the Protocol (Article 1(1)). Once these requirements are met, Additional Protocol II and Common Article 3 apply cumulatively. In international armed conflicts, the four Geneva Conventions (1949) and Additional Protocol I, apply. When elements of both internal and international armed conflicts are combined, applicability of rules governing

⁷⁴ For a definition, see n.1 and 2 above.

⁷⁵ See the section in the article on “False dilemmas: there are alternatives to war”.

international and non-international armed conflicts to the parties involved must be established depending on the facts of each case.⁷⁶

But here is the point, it does not matter. Whether international humanitarian law is considered customary international law (and thus, binding all States, except for persistent objectors), or treaty law (thus, binding only Parties to the treaty), it is not *jus cogens*. The “laws of war” (i.e. whether the war is conducted justly) can be trumped by norms of *jus cogens*, such as the human right to life, prohibition of torture, and prohibition of genocide.

Second, we look at international criminal law. This is the part of international law that deals with the criminal responsibility of individuals for international crimes. As mentioned previously, crimes can also be committed against the environment,⁷⁷ but that would be the subject of a different article. International criminal law concerns crimes against human beings.

Under international criminal law, punishable crimes include genocide, crimes against humanity, war crimes and the crime of aggression.⁷⁸ By definition, genocide is “the deliberate and systematic destruction, in whole or in part, of an ethnic, racial, religious, or national group”.⁷⁹ Crimes against humanity are defined as, “widespread or systematic attacks against the civilian population carried out with knowledge of the attack”.⁸⁰ A “widespread or systematic attack” may be committed either in peacetime or in war. A war crime is a serious violation of international humanitarian law, giving rise to individual criminal responsibility.⁸¹ And, the crime of aggression includes, among other things, invasion, military occupation, and annexation by the use of force, blockade of the ports or coasts, if it is considered being, by its character, gravity and scale, a manifest violation of the Charter of the United Nations.⁸² All these crimes are also punishable under customary international law.⁸³

Particularly serious violations of international law give rise to international criminal responsibility. This is true for those who commit, or order, the commission of grave breaches of its rules, such as war crimes.⁸⁴ Punishment first lies with national courts; jurisdiction rules vary according to the crime. For

⁷⁶ See FAO, *The Right to Adequate Food in Emergencies*, FAO Legislative Study 77, Rome, p. 8, 2003.

⁷⁷ Environmental crime covers acts that breach environmental legislation and cause significant harm or risk to the environment and human health. These crimes result from the “knowing” breach of environmental law.

⁷⁸ Rome Statute of the International Criminal Court (Rome Statute) (1998).

⁷⁹ Article 2 Genocide Convention (1948); and Article 6 Rome Statute (1998).

⁸⁰ Article 7 Rome Statute (1998).

⁸¹ Article 8 Rome Statute (1998).

⁸² Article 8 bis ICC Statute (1998).

⁸³ By virtue of the fact that the right to life is a *jus cogens* norm, too, in addition to being a customary international norm.

⁸⁴ E.g. Fourth Geneva Convention (1949) Articles 146 and 147, and Additional Protocol I, Article 11 and 85. See FAO, *The Right to Adequate Food in Emergencies*, FAO Legislative Study 77, Rome, 2003.

war crimes, there is universal jurisdiction and the rule *aut dedere aut iudicare* (i.e. extradite or prosecute).⁸⁵ For genocide, the universality principle is not mandatory under Article 6 Genocide Convention (1949); but it is recognized as a rule of customary international law. With regards to the crime of aggression, cases of lawful individual or collective self-defence, as well as action authorized by the United Nations Security Council are excluded.

As mentioned above, under international criminal law, punishable crimes include genocide, crimes against humanity, war crimes and the crime of aggression; they give rise to penal sanctions imposed on individuals. Three things come to mind.

First, all wars (whether in self-defence or not) arguably can fit within the definitions of, one or more, punishable crimes under international criminal law (i.e. genocide, crimes against humanity, war crimes and the crime of aggression). Indeed, it is difficult (perhaps impossible) for a war not to qualify as genocide, or a crime against humanity. All wars kill part of a “national group”, “systematically” and “deliberately” (in line with the definition of genocide). Today, all wars are a “widespread” attack against the civilian population “carried out with knowledge of the attack” (in line with the definition of crimes against humanity).

Ironically, the Rome Statute of the International Criminal Court (ICC Statute) (1998) recognizes apartheid now as a crime against humanity.⁸⁶ It is ironic, because not so long ago, apartheid legislation (drafted by lawyers) legalized this crime against humanity; but now, it is qualified as an obvious crime against humanity, explicitly listed in the ICC Statute. As the present article points out, apartheid is not the result of physical “attacks” (in line with the definition of crimes against humanity), but government policies and laws.⁸⁷ If apartheid is a crime against humanity, how can all wars not be qualified as crimes against humanity, where people are killed? Indeed, the article argues that all wars can fit within the definitions of, one or more, punishable crimes under international criminal law.

The second notion that comes to mind concerns the definition of international criminal law, itself. It clearly defines those acts that amount to punishable crimes. That also means, that all acts that fall outside of these definitions are not punishable crimes under international criminal law. Here the article asserts, that even if you were to argue that not all wars fit within the above-mentioned definitions of genocide, crimes against humanity, war crimes and the crime of aggression, it does not matter. The *jus cogens* norm of the right to life is non-derogable. Moreover, the principle of “state of necessity”, as the article argues, does not apply to wars: there are alternatives; there are non-violent solutions.

⁸⁵ E.g. Fourth Geneva Convention (1949) Article 146(2).

⁸⁶ Article 7(1)(j) Rome Statute of the International Criminal Court (Rome Statute) (1998).

⁸⁷ In effect, the ICC defines the crime of apartheid as “inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.”

The third notion that comes to mind concerns the fact that, under international criminal law, these punishable crimes give rise to penal sanctions imposed on individuals. However, as pointed out earlier, human rights law recognizes now that duty-bearers can include State and non-State actors.⁸⁸ Indeed, duty-bearers under human rights law can include: States (territorial and extra-territorial obligations), trans-national corporations (TNCs), International Governmental Organizations (IGOs), and non-State actors (such as individuals).⁸⁹ For instance, corporate crime exists under national law; and there is no reason why there could not also be corporate criminal liability, under international criminal law. At the moment, in this context, penal sanctions are only imposed on individuals.

c. Exceptions

What are the exceptions to the human right to life under international conventions? According to the article, there are no exceptions to the human right to life.

The main provision of the human right to life under international conventions is Article 6 International Covenant on Civil and Political Rights (ICCPR). It has 168 State Parties.⁹⁰ Article 6(1) ICCPR states that, “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his [or her] life.” “Inherent” means existing as an essential or characteristic attribute; and “arbitrary” means based on individual judgment or preference. Articles 6(2) to (6) provide that States are not obliged to abolish the death penalty; they must limit its use, and abolish it for other than the most serious crimes. Article 6(2) to (6) seem to contradict Article 6(1) on the “inherent” right to life.

Two things may be said. First, the right to life is here defined in a treaty (ICCPR), which will be invalidated by the *jus cogens* norm of the right to life, if they conflict. Second, Article 6(2) gives States the right to choose whether to implement the death penalty or not – and this, in fact, contradicts the *jus cogens* norm of the right to life, which is non-derogable. There are no exceptions to the right to life.

With what regards war and armed conflict, the previous section looked at, on the one hand, *jus in bello* (“laws of war”, also called international humanitarian law), and on the other, punishable crimes under international criminal law. The article argued that there are no exceptions to the right to life, that there are alternatives to war: this will be dealt with in the section below (“False dilemmas: there are alternatives to war”).

⁸⁸ See, e.g., Clapham, A., *Human Rights Obligations of Non-State Actors*, Oxford, New York, Oxford University Press, 2006.

⁸⁹ See, e.g., Narula, S., *The Right to Food: Holding Global Actors Accountable under International Law*, *Columbia Journal of Transnational Law*, 44:691-800, 5/9/2006.

⁹⁰ As of June 2014. See website at <https://treaties.un.org>.

IV. The right to life under customary international law, and jus cogens

a. Sources

What are the sources of the human right to life under customary international law? Under *jus cogens*?

Let us start with the first of the two. As mentioned above, international conventions, coupled with customary international law and general principles, constitute the primary sources of international law (Article 38 ICJ Statute (1945)); judicial decisions are subsidiary sources.⁹¹ Customary international law is formed by general practice accepted as law (i.e. *opinio juris*, the belief that the practice is obligatory), combined with State practice (Article 38(1)(b) ICJ Statute (1945)). Having said this, the actual issue of how to determine State practice and *opinio juris* is highly debated.⁹²

By definition, customary international law (i.e. custom) binds all States, except for persistent objectors.⁹³ Without a doubt, the list of human rights considered customary international law is unclear. It is debatable whether any given list is under-inclusive or over-inclusive. Some legal scholars argue that all human rights under the Universal Declaration of Human Rights (UDHR, 1948) are custom;⁹⁴ some legal scholars argue that all current human rights are custom.⁹⁵

Despite this vague content of custom (i.e. no court or lawyer has been able to point with certainty at an exhaustive (up-to-date) list of human rights under customary international law), it is easy to show that the right to life is custom. The provision of the right to life under national constitutions (the fact

⁹¹ 59 Stat. 1055 (1945), adopted 26 June 26 1945, entered into force 24 October 1945 (ICJ Statute).

⁹² See Moeckli, D., Shah, S., Sivakumaran, S., (eds.), *International Human Rights Law*, Oxford, Oxford University Press, 2010 (pointing out that, although torture is prevalent, custom may be asserted by reference to States' words rather than the reality of their actions).

⁹³ A persistent objector is a dissenting State. Such a State is not bound by the customary rule if the objection is clear and persistent, *Fisheries (UK v. Norway)* (ICJ Reports 116, 13, 18 December 1951).

⁹⁴ *Nota Bene*, the Universal Declaration of Human Rights (UDHR) is a declaration, not a treaty; declarations are non-legally binding. However, see, e.g., Buckingham, D., *A Recipe for Change: Towards an Integrated Approach to Food under International Law*, 6 Pace Int'l L. Rev. 285, 293, 1994 (arguing that UDHR is customary international law. He points out that: UDHR is an authoritative interpretation of the United Nations Charter (Articles 1(3), 55 and 56); it illustrates UN Member States' practice; and, it is constantly spoken of as a legal instrument.).

⁹⁵ The article points out that human rights are referred to as "inalienable rights of all members of the human family" (e.g. UDHR, ICCPR, ICESCR). If they are not universal (provided for under custom and *jus cogens*), then they cannot be inalienable. Then they are subject to State consent, and a State can choose to opt out of being legally obligated under a particular human right; thus the right is not inalienable.

that, as mentioned above, all constitutions (written or unwritten) provide for a right to life) has been taken as evidence of custom.⁹⁶

Let us now turn to the second of the two. What are the sources of the human right to life under *jus cogens*? By definition, *jus cogens* norms are non-derogable (except by another *jus cogens* norm) and bind all States, and everyone.⁹⁷ They are peremptory (i.e. final; not open to appeal or challenge). It is clear that the list of *jus cogens* norms may be expanded (Article 64 VCLT) and modified (Article 53 VCLT). Given their status as the highest legal norms, the list of *jus cogens* norms is highly contested. Legal scholars draw up varying lists of human rights considered *jus cogens*.⁹⁸ For instance, it can be argued that only those rights, which are necessary for human life, are *jus cogens*. In that case, many socio-economic human rights would be *jus cogens*. It can also be argued that all current human rights are *jus cogens*.⁹⁹ Disagreements continue.

One may, as mentioned above, speak of a consensus nonetheless with respect to these *jus cogens* norms: the right to life, the prohibition of torture, and the prohibition of genocide.¹⁰⁰ In addition to this list, one may add the human right to non-discrimination as a norm of *jus cogens*: State obligations under the human right to non-discrimination are immediate and non-derogable.¹⁰¹

⁹⁶ E.g., USA case of *Filartiga v. Pena-Irala* (630 F.2d 876 (2d Cir 1980)). The court had to decide whether torture is contrary to customary international law. The court looked, *inter alia*, to national constitutions to find evidence of custom.

⁹⁷ (Vienna Convention on the Law of Treaties (VCLT), 1969, Article 53). May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679, 1969.

⁹⁸ See, e.g., Hannikainen, L., *Peremptory Norm (Jus Cogens) in International Law*, Finnish Lawyers' Publishing Company, Helsinki, pp. 425-520, 1988.

⁹⁹ *Nota Bene*, the Universal Declaration of Human Rights (UDHR) is a declaration, not a treaty; declarations are non-legally binding. However, see, e.g., Buckingham, D., *A Recipe for Change: Towards an Integrated Approach to Food under International Law*, 6 Pace Int'l L. Rev. 285, 293, 1994 (arguing that UDHR is customary international law. He points out that: UDHR is an authoritative interpretation of the United Nations Charter (Articles 1(3), 55 and 56); it illustrates UN Member States' practice; and, it is constantly spoken of as a legal instrument.).

¹⁰⁰ Tomuschat, C., *Human Rights: Between Idealism and Realism*, Oxford, New York, Oxford University Press, 2008.

¹⁰¹ UN General Comment 18 on "Non-discrimination", Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 146 (2003), 1989. In addition, Articles 26 and 2(1) International Covenant on Civil and Political Rights (ICCPR) explicitly provide for a non-derogable human right to non-discrimination; and Article 2 International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for the human right to non-discrimination in the enjoyment of all the rights provided for under ICESCR. In addition, Article 4(2) ICCPR lists as non-derogable: the right to life; the prohibition of torture or cruel, inhuman, or degrading treatment or punishment; the prohibition of slavery; the prohibition of imprisonment because of inability to fulfill a contractual obligation; the principles of legality in criminal law; the recognition of everyone as a person before the law; and the freedom of thought, conscience and religion. Oddly, the UN Human Rights Committee (HRC) has held that not all these rights are *jus cogens*, only some, e.g. the right to life and the prohibition of torture (UN General Comment 29 on "Article 4, Derogations during a state of emergency", HRC, HRI/GEN/1/(Vol 1) 234, 2001). Yet, as

A last point about the sources of *jus cogens* is the following. The crucial question is *who* decides *jus cogens*. In other words, how do certain legal norms “succeed” at being accepted as norms of *jus cogens*? The present article calls this the “club” of *jus cogens*.¹⁰² The metaphor conveys the image of an elite, with the power to decide on membership, graciously permitting new members into the club, and kicking old members out if they turn out to be undesirable. The article insists that the metaphor does not diminish the value of existing peremptory norms of *jus cogens*. It merely highlights the fact that membership requires – connections, so to speak.

The “club” of *jus cogens* is a useful metaphor. It is true that principles, in reality, cannot form a “club”. Yet, the present article argues that *jus cogens* norms are like a “club”, where members (i.e. peremptory norms) might come and go, in the sense that the “membership list” (i.e. normative content of these norms) is expanded or restricted. “Membership” to the “club” of *jus cogens* is envisioned “for life”, although, even this is debatable, for example, by restricting the content of rights.¹⁰³ It is unclear which human rights are included, and which excluded. Some human rights might be on a “waiting list” – and, until the moment of acceptance, the present article argues, there are, in a sense, no “precautionary visiting rights” to the “club” of *jus cogens*, in case it would have been a good idea to accept a particular emerging *jus cogens* norm. As stated above, it is clear that the list of *jus cogens* norms may be expanded (Article 64 Vienna Convention on the Law of Treaties (VCLT, 1969)) and modified (Article 53 VCLT). This is not the issue. The issue is *who* decides *jus cogens*. The three *jus cogens* norms cited above (i.e. the right to life, the prohibition of torture, and the prohibition of genocide), over which there is a consensus, are all civil and political rights. What about socio-economic human rights?

There is support for the view expressed here that, the recognition of human rights as *jus cogens* norms may be paralleled to that of joining a “club”. Both a structural critique approach, and gender analysis, shed light on the issue. Although the principal characteristics of *jus cogens* norms are their normative superiority and universality (Article 53 VCLT), a gender analysis of *jus cogens* highlights another perspective.¹⁰⁴ Hence, it has been pointed out “the category of human rights often designated as norms of *jus cogens* – privileges the experiences of men over women by giving differential protection.”¹⁰⁵ This is not to say that women’s civil and political rights do not need to be protected, but that

the article points out, if the other human rights are not *jus cogens*, as the HRC argues, then how can they simultaneously be non-derogable? This can only be contradictory. At the same time, ICCPR is only a treaty, unless you argue that it is also customary international law (and *jus cogens*) in its entirety. The point is, the list of *jus cogens* is highly contested. But there are some norms of *jus cogens* over which there is international consensus (e.g. the right to life).

¹⁰² See, Galtung, Irene., *Lawyers or Liars? Is World Hunger Suable in Court?*, PhD, European University Institute (EUI), Florence, Italy, 2011.

¹⁰³ See, e.g., Human Rights Watch Report, *Getting Away with Torture? Command Responsibility for the US Abuse of Detainees*, April 2005.

¹⁰⁴ Charlesworth, H., Chinkin, C., *The Gender of Jus Cogens*, 15 Hum. Rts. Q. 63, 1993.

¹⁰⁵ *Ibidem*.

women need protection especially from violations of economic and social rights.¹⁰⁶ After all, for instance, world hunger/starvation affects females more than males.¹⁰⁷ As mentioned previously, more people die of hunger every year than of any other cause, including war, AIDS and other diseases combined.¹⁰⁸ Indeed, the right to food and water is the most violated right; it is also the most affirmed right.¹⁰⁹

In other words, the acceptance of human rights as *jus cogens* norms is biased. Few human rights are undisputedly included (and all are civil and political rights, as opposed to economic, social and cultural rights).

b. Normative meaning

What is the normative meaning of the right to life under customary international law? Under *jus cogens*?

Let us start with the first of the two. First, if the human right to life is custom, then it is legally-binding on all States, regardless of whether they are Parties to a specific treaty. It also binds States that enter into conflicting treaty regimes with the human right to life. The exception to this rule is the persistent objector.¹¹⁰ Importantly, however, there is an exception to this exception, namely, *jus cogens* norms are exempt from the persistent objector rule.¹¹¹ This means that when a norm of *jus cogens* is created, there is a thin line between defining States as persistently objecting a customary international norm, or as violating a new norm of *jus cogens*.¹¹²

Second, if the human right to life is custom, then claimants have access to remedies not necessarily provided for under conventions, such as the possibility to sue before the International Court of Justice (ICJ), as provided for under the ICJ Statute (the standing to sue before the ICJ is addressed in Articles 34-36 ICJ Statute (1945)).¹¹³ Having said this, only claimant States may sue before the ICJ.

¹⁰⁶ *Ibidem*.

¹⁰⁷ See, International Food Policy Research Institute (IFPRI), The Global Hunger Index. See website at <http://www.ifpri.org>.

¹⁰⁸ Burden of Disease Unit Harvard University, *The Global Burden of Disease and Injury Series. Executive Summary*, Cambridge, Mass., Volume 1, 1996.

¹⁰⁹ Alston, P., *International Law and the Human Right to Food*, in Alston, P., Tomasevski, K., *The Right to Food*, Martinus Nijhoff Publishers, p. 9, 1984.

¹¹⁰ A persistent objector is a dissenting State. Such a State is not bound by the customary rule if the objection is clear and persistent, *Fisheries (UK v. Norway)* (ICJ Reports 116, 13, 18 December 1951).

¹¹¹ See Stein, T., *The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law*, 26 Harv.Int'l L.J. 457, 1985 (stating that the persistent objector rule has been invoked rarely).

¹¹² Hathaway, J., *The Rights of Refugees under International Law*, Cambridge University Press, 2005.

¹¹³ Articles 34-36, 59 Stat. 1055 (1945), adopted June 26, 1945, entered into force Oct.24, 1945.

States that violate custom may be held accountable at the international level, if accountability fails at the national level. In addition, with regards to war and armed conflict, there is the International Criminal Court (ICC), a permanent tribunal to prosecute individuals for genocide, crimes against humanity, war crimes and the crime of aggression (although jurisdiction for the crime of aggression will not be active until 2017 at the earliest). However, the ICC only has jurisdiction over cases: if the accused is a national of a State party to the Rome Statute of the International Criminal Court (Rome Statute) (1998); if the alleged crime took place on the territory of a State Party; if a situation is referred to the Court by the United Nations Security Council; or if a State not a party to the Statute “accepts” the Court’s jurisdiction. The ICC may only exercise its jurisdiction when national courts are unwilling or unable to investigate or prosecute such crimes.

We now turn to the second of the two: the normative meaning of the right to life under *jus cogens*. If the human right to life is *jus cogens*, then several legal consequences follow. Then, this right under *jus cogens* is non-derogable (except by another *jus cogens* norm) and binds all States, regardless of whether they ratified the treaties that contain it (VCLT (1969), Article 53).¹¹⁴ Crucially, conventions that violate *jus cogens* are void (VCLT (1969), Articles 53 and 64).¹¹⁵ Thus, *jus cogens* norms are binding, regardless of State consent or objection.¹¹⁶ They are the highest norms of international law, trumping all other norms, including the persistent objector rule.¹¹⁷ Thus, *jus cogens* norms have the status of positive law, as provided for under Article 53 VCLT (1969).¹¹⁸

Non-derogable means non-derogable. Otherwise, it would be an “almost non-derogable” legal norm. An “almost completely inalienable” right. An “almost inherent” right.

Here, an important point comes to the surface. It has been argued, contrarily to the present article, that a distinction can be made between, on the one hand, the mandatory character of a norm in international law, and on the other, the justiciable character of the norm in national law. Hence, it is alleged that a binding rule or international law, even a peremptory norm of *jus cogens*, which is mandatory for States and between States, can be non-justiciable in national courts.¹¹⁹ In other words, the issue is what effect *jus cogens* norms have

¹¹⁴ 23 May 1969, 1155 UNTS 331, 1969.

¹¹⁵ *Ibidem*.

¹¹⁶ Article 53 Vienna Convention on the Law of Treaties (VCLT), 1969). VCLT, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679, 1969.

¹¹⁷ See, e.g., Sinclair, I., *The Vienna Convention on the Law of Treaties*, 203, Manchester University Press, 2d ed., 1984.

¹¹⁸ Bianchi, A., *Human Rights and the Magic of Jus Cogens*, EJIL, Vol. 19, N.3, 2008 (arguing that codifying “in a treaty a normative category with an open-ended character, the content of which could become intelligible only by reference to some natural law postulates, was tantamount to dignifying the latter’s otherwise uncertain foundation by granting it the status of positive law”).

¹¹⁹ Thus, it is argued, for example, that even a peremptory norm of *jus cogens* can be international law, but not domestically applicable (e.g. it has been argued the

in national law.

A key question, therefore, is whether a judge is bound *not* to apply national law when it is deemed contrary to *jus cogens*.¹²⁰ The present article insists that national judges are, indeed, bound to uphold the *jus cogens* norm of the human right to life (and all other *jus cogens* norms). Norms of *jus cogens* are, after all, peremptory (i.e. final; not open to appeal or challenge). Common sense tells us that, if they are really the *highest* legal norms, then they must be justiciable in all courts (national, regional or international). The law tells us the same, since *jus cogens* norms are non-derogable (except by other *jus cogens* norms) and bind all States, regardless of consent or objection (VCLT (1969), Article 53).

There are two more points to be made with regards to the normative meaning of the right to life under *jus cogens*. The first concerns universal jurisdiction. (By definition, universal jurisdiction allows States, or international organizations, to claim criminal jurisdiction over an accused person, regardless of where the alleged crime was committed, and regardless of the accused's nationality, country of residence, or any other relation with the prosecuting entity.) Crimes prosecuted under universal jurisdiction are considered crimes against all, too serious to tolerate jurisdictional arbitrage. Clearly *jus cogens* norms (giving rise to obligations *erga omnes*) can be claimed under universal jurisdiction. Moreover, the ICJ held that human rights norms create obligations *erga omnes*, i.e. towards all States, and enforceable in all States.¹²¹ As a matter of fact, under the "normative hierarchy theory"¹²² (i.e. the recognition that *jus cogens* norms are the highest legal norms), a State's immunity¹²³ is abrogated when the State violates human rights considered *jus cogens*.¹²⁴ State immunity is not a *jus cogens* norm! Notwithstanding the resistance to universal jurisdiction, there is a recent landmark case in USA, litigated under universal jurisdiction,

prohibition of use of force and aggression has been cited as a norm of *jus cogens*, but it is not actionable by individuals; and the *jus cogens* prohibition against torture is not always justiciable to get compensation). But, as the article points out, the right to life is actionable by individuals.

¹²⁰ See, e.g. the *Scilingo* case in Spain (*Alfredo Scilingo* (Spanish National Court, Criminal Chamber, Spain, 19 April 2005, sentence increased 4 July 2007). The case applies the notions crimes against humanity and universal jurisdiction. It concerns Argentine military officer Adolfo Scilingo, convicted and sentenced by the Spanish National Court to 640 years of imprisonment for attempted genocide and other crimes committed during Argentina's "dirty war" in the 1970s.

¹²¹ *Barcelona Traction, Light and Power Co. (Belgium v. Spain)* 2nd Phase, ICJ, Reports, 1970, p.3 ff. Para. 33 and 34.

¹²² Caplan, L., *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, Am.J.Int'l L., Vol. 97:741, 2003.

¹²³ State immunity concerns the protection, which a State is given from being sued in the courts of other States.

¹²⁴ E.g., The International Court of Justice (ICJ) held that human rights norms create obligations *erga omnes*, i.e. towards all States, and enforceable in all States (*Barcelona Traction, Light and Power Co. (Belgium v. Spain)* 2nd Phase, ICJ, Reports, 1970, p.3 ff. Para. 33 and 34).

under custom and *jus cogens*.¹²⁵

Jus cogens norms are, and remain, the highest legal norms. Lawyers must have the honesty and bravery to uphold this.

c. Exceptions

What are the exceptions to the right to life under customary international law? As mentioned above, the exception is the persistent objector rule. A persistent objector is a dissenting State. Such a State is not bound by the customary rule if the objection is clear and persistent. However, as mentioned above, *jus cogens* trumps the persistent objector rule: all States are bound by *jus cogens*, regardless of consent or objection.¹²⁶

What are the exceptions to the right to life under *jus cogens*? That's easy. There are no exceptions to the right to life.

Jus cogens norms are non-derogable and trump all other norms that are not *jus cogens*. However, a *jus cogens* norm may be derogated by another *jus cogens* norm. So here we return to a major question in the article. Is it possible to have a dilemma of conflicting fundamental rights? Is it possible for a *jus cogens* norm to conflict with another *jus cogens* norm, such that one necessarily must choose between one or the other?

This article proposes that it is not necessary to choose between realizing one *jus cogens* norm or another. This concept will be elaborated in the next two sections of the article (i.e. "False dilemmas: there are alternatives to war", and "The way out: *jus cogens*"). Indeed, Article 28 Universal Declaration of Human Rights (UDHR) (1948) provides for the *right* to an international social order that permits the realization of all human rights under UDHR. Not only does the UDHR envision that it is possible to realize all the rights under UDHR, but it provides for a *right* to such a social order that permits the realization of all these rights. It is true that UDHR is a declaration and thus, not legally-binding (unless you consider the rights under UDHR custom and *jus cogens*). But, even though the UDHR is not legally-binding, the article proposes that there is a way out, i.e. a way to avoid having to necessarily choose between realizing one *jus cogens* norm or another.¹²⁷

¹²⁵ In *Kadic v. Karadzic* (1995), the USA Court of Appeals, Second Circuit, held that rape constituted genocide. A civil action was brought by Kadic and two other women under the Alien Tort Claims Act (ATCA) (1789) against Karadzic, former Bosnian-Serbian President, on behalf of relatives and similarly situated. The cause of action was violation of international law, regardless of whether a State or non-State actor had committed it. The Court awarded millions of dollars as punitive damages.

¹²⁶ The principal characteristics of *jus cogens* norms are their normative superiority and universality (Article 53 Vienna Convention on the Law of Treaties (VCLT), 1969). VCLT, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679, 1969.

¹²⁷ See the next section of the article.

Although the concept will be elaborated later in the article, a few points will be made here about whether war is a crime – and whether war is legally permissible – under *jus cogens*. (With regards to an individual’s right to deadly use of force in self-defence, the article already mentioned the principle of “state of necessity” above). The reason the article mentions crime – and legal permissibility – with regards to war, is that one may envision civil liability, as well as criminal liability.

Let us turn to *jus ad bellum* (“right to war”). As mentioned above, this refers to a set of criteria to be consulted before engaging in war, in order to determine whether entering a war is – permissible. The main legal source is Chapter VII United Nations Charter. Article 2(4) UN Charter provides for the prohibition of threat or use of force in international relations. At the same time, Article 51 UN Charter provides for the right of States to engage in self-defence, including collective self-defence, against an armed attack. In addition, the UN Security Council (SC) can also take action; its decisions are binding if they are resolutions under Chapter VII UN Charter; after determining the existence of a threat to, or breach of, the peace, the SC can decide which measures are to be taken to maintain, or restore, international peace and security (Article 39 UN Charter). The SC alone has the power to determine there is a threat to the peace.

It is true that the UN Security Council (SC) “can” decide which measures are to be taken to maintain, or restore, international peace and security. That does not mean that law is valid. The arbitrary rule that the SC (15 States!), only, can make such an important decision, is a rule – but it is not a *jus cogens* rule. In addition, *jus cogens* norms are the highest norms. According to the right to life (which is non-derogable), there is an obligation to search for alternatives to war – to try alternatives to war – in order not to violate the non-derogable right to life.

Thus, norms under *jus in bello* and *jus ad bellum*, are invalid if they conflict with *jus cogens* norms, such as the right to life.

i. False dilemmas: there are alternatives to war

At this point, the article turns to three crucial points, with regards to the right to life. The first concerns false dilemmas (i.e. there are alternatives to war). The second concerns *jus cogens* as a way out of these dilemmas. And the third concerns Ronald Dworkin’s right-answer-thesis and question about Hercules. In this section, we start with the first.

Here we return to the question of whether war may be legal in the event of self-defence. In other words, whether there are situations where you must choose between the right to life of one group of people over the right to life of another group of people. Or, whether this is a false dilemma. That is to say, whether in actuality, there are alternatives to war, even in the event of self-defence.

According to the principle of “last resort” (a principle and criteria under both *jus ad bellum* and *jus in bello*), all non-violent solutions must first be exhausted before the use of force can be justified. (It is an obvious principle and criteria, since the right to life is non-derogable and of such paramount importance that it is *jus cogens*, a highest legal norm trumping all other hierarchically lower norms). The principle of “last resort” and “state of necessity” are similar.

In war, how can you say there are no alternatives (no non-violent solutions), if you have not studied the alternatives? *Jus in bello* and *jus ad bellum* (drafted by lawyers) are in essence about ways to kill in war; ways to get around the non-derogable right to life. But what if there are alternatives to war? Then the principle of “last resort” has not been exhausted, and the war is illegal and a crime, and violates the right to life.

Since the right to life is a *jus cogens* norm, the burden of proof is not on people proposing peaceful solutions, but on people committing war to show that they have tried every other non-violent option/possibility. There are vast amounts of work in peace studies, conflict resolution; lots of ideas for non-violent solutions. The burden of proof is on people wishing to commit war to show they tried different non-violent solutions. “I didn’t know there were alternatives” is not a justified excuse or legal defence. Just like you study war studies, war strategy, you can study peace studies. Just like in karate (for example), you can learn to use your body as a weapon, or for defence. It is the same for the brain. You can fill you head with war strategy, or with peace strategy.

According to the article, hence, the “right to war” (*jus ad bellum*) is an oxymoron. A legal impossibility. Legal nonsense. You cannot simultaneously have a right to life and a non-right to life. You cannot simultaneously have a right to life and a right to war. The right to life is *jus cogens*. There is no right to war; that is trumped by the right to life. It is true that in some situations, as mentioned above, it might be necessary for an individual to use deadly force in self-defence (in a “state of necessity”). That is not the case for war – there are alternatives. It is a false dilemma.

ii. The way out: jus cogens

We now turn to the second crucial point, with regards to the right to life. As the article has described, there are situations that pose difficult questions regarding the right to life and its non-derogability (e.g. When does life start? Is abortion legal? What is the appropriate compensation for a violation of the right to life in war? What is the right compensation, in general, for taking a human life?). Depriving human life is an action that cannot be undone.

The article proposes a way out of these truly difficult legal questions, regarding the right to life. It has to do with world hunger, starvation. This might

at first glance seem irrelevant for this article, but it is relevant – for the right to life, war, *jus in bello*, *jus ad bellum*, armed conflict, peace, etc.

And it is this: according to the author of this article, so long as world hunger exists, it is no surprise that other injustices exist (war, corruption, rape, torture, sexual harassment, etc.). So long as world hunger exists, peace does not exist. There is more than enough food¹²⁸ and water¹²⁹ for everyone, and for the future. As mentioned above, the right to food and water is the most affirmed right (it is also a norm of *jus cogens*). It is the most violated right – more people die from hunger than from war.¹³⁰ 1 billion people do not have access to food; 1 billion people do not have access to safe drinking water.¹³¹ So long as we allow other people to die from lack of food and water, it is not wonder that we allow/commit war, corruption, rape, torture, sexual harassment, etc.

It is as the article mentioned previously. It is a bit like building a house and discovering that the walls and ceiling are crooked; one tries desperately to make them straight, while failing to address the issue that the foundation of the house, the base, is crooked. Law is similar. *Jus cogens* norms take priority over other norms. As mentioned previously, they are immediately applicable, unlike other hierarchically lower norms, which are not and are less urgent to be enforced. Furthermore, *jus cogens* norms are a key component of general principles, filling any gap in the law (i.e. *non liquet*, a situation where there is no applicable law), in an important manner – as the highest legal norms in our legal systems.

All human rights are important. All *jus cogens* norms are important. But, the article suggests the “base” of the metaphorical house mentioned above, is like world hunger. So long as we do not solve this first, it is no wonder the rest of law (and human behavior) is crooked. According to this article, many of these legal dilemmas (such as whether you have to choose between seemingly conflicting

¹²⁸ Report of the Special Rapporteur on the right to food, Ziegler, J., *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, Human Rights Council, 7th Session, Agenda item 3, p.2, UN Doc. A/HRC/7/5 of 10 January 2008. (There is enough food in the world to provide a healthy diet of 2,100 kcals per person, per day, to twice the world's population.)

¹²⁹ UNDP, Human Development Report 2006, *Beyond Scarcity: Power, Poverty and the Global Water Crisis*, p.3, 2006. (“There is more than enough water in the world for domestic purposes, for agriculture and for industry. The problem is that some people – notably the poor – are systematically excluded from access by their poverty, by their limited legal rights or by public policies that limit access to the infrastructures that provide water for life and for livelihoods.”)

¹³⁰ Burden of Disease Unit Harvard University, *The Global Burden of Disease and Injury Series. Executive Summary*, Cambridge, Mass., Volume 1, 1996. (More people die of hunger every year than of any other cause, including war, AIDS and other diseases combined.)

¹³¹ Respectively, figures from United Nations World Food Programme (see website at <http://www.wfp.org>); and UNDP, Human Development Report 2006, *Beyond Scarcity: Power, Poverty and the Global Water Crisis*, p.2, 2006.

jus cogens norms) might disappear if the *jus cogens* norm of the right to food and water is enforced seriously. This is because human beings might behave differently in a world where there is no world hunger; and the dilemmas, legal questions that do not disappear and remain, might become clearer, have clearer answers in a world where this *jus cogens* norm is enforced.

iii. Hercules and the right-answer-thesis

Finally, we turn to the third crucial point, with regards to the right to life. This concerns Ronald Dworkin's right-answer-thesis and his question about Hercules.

As mentioned above, in his metaphor of Judge Hercules (i.e. an ideal judge, fair and just, with a complete knowledge of legal sources), Ronald Dworkin hypothesizes that Hercules, when faced with any legal question, will always arrive at the one right answer.¹³² But, the present article asks, is there only one right answer? And furthermore, in line with his metaphor, what might Judge Hercules say about war and peace?

This leads to the topic of the correct interpretation of the law (and whether the law is determinate or indeterminate). Indeterminacy is the debate over whether, every single legal question has a single legal answer, or whether (if the law is indeterminate) there might be several legal answers (mutually-exclusive or mutually-inclusive, depending on the case at hand), each as valid as the other. Various theories of rights exist on the subject. According to Ronald Dworkin's "right answer article", there is always a right answer to every legal dilemma.

This topic might seem irrelevant for the article, but that is not so. As stated in the very beginning of this article, the vast majority of legal scholars will assert that: war is sometimes legal, sometimes a crime, sometimes not; the right to life is sometimes derogable, sometimes not, it depends. The article stated that does mean these legal scholars are right. But, how do we know if this article is correct? This is why the question about the right-answer-thesis, in this section of the article, is important.

Let us try to solve this. The article points out that the "right answer article" must deal with two separate problems.¹³³ First, there is the problem of whether the law is mathematically coherent (i.e. absence of contradiction). This is arguably true, in the sense that, even where there are contradictions between existing rights, the hierarchy of legal sources (under national and international law) ensures that higher norms trump lesser norms. But, there is a second problem. What about situations (as mentioned in this article) where fundamental constitutional rights (or norms of *jus cogens*, for that matter) conflict with each other? Can there be irresolvable incompatibilities between

¹³² Dworkin, R., *Law's Empire*, Cambridge, MA, Harvard University Press, 1986.

¹³³ See, Galtung, Irene, *Lawyers or Liars? Is World Hunger Suable in Court?*, PhD, European University Institute (EUI), Florence, Italy, 2011.

such conflicting rights? Or, is there only one right answer to such legal disputes? Dworkin argues there is. The article argues against this. However, the article's position needs to be clarified. The article is simply *agnostic* with regards to the "right answer" question (i.e. it emphasizes that it simply cannot know the right answer/answers to that question, and remains open to possibilities: perhaps there is always a single right answer to *every* legal question; perhaps not; in a sense, "your guess is as good as mine"). If two competent lawyers reach different legal conclusions to a legal dispute, the article argues that there is no way to know whether either lawyer hit the nail and reached the right answer, nor whether a right answer even exists. Equally, Judge Hercules (despite being wise, just and fair) might reach one answer or several answers. Dworkin guesses Hercules would reach one. It is a guess, like any other.

The article is agnostic with regards to the "right answer" question for two reasons. First, there are legal dilemmas that are truly tricky (for example, deciding in a given case, the degree to which the right to freedom of speech violates another individual's right to privacy).¹³⁴ One cannot, therefore, exclude the possibility of a scenario with two, or more, equally convincing and logical legal answers. Second, however, one can *also* not exclude the possibility that there is only one right answer to every legal dispute. Judge Hercules (with a complete knowledge of legal sources) might sift through the countless sources under national, regional and international law (not omitting a single source), and reach a single legal conclusion every time for every legal dispute.

But, here lies the crux of the subject on the "right answer" question. According to the article, the question is uninteresting. On the one hand, if there is one right legal answer to every legal question, there is no way to know if we have succeeded in finding this answer. It might later be shown that the proposed answer was mistaken. In the meantime, we have blindly followed the legal answer as the one, and only, correct answer, with a multitude of legal consequences. A case in point is slavery: if slaves are considered a slaveholder's property, then they are a part of a slaveholder's right to property; if, on the contrary, slaves are protected by the right to non-discrimination, then slavery is illegal; indeed this is a historical, and not hypothetical, example.¹³⁵ It would seem

¹³⁴ See, e.g., Zucca, L. *Constitutional Dilemmas – Conflicts of Fundamental Legal Rights in Europe and the USA*, Oxford, OUP, 2007 (exploring how fundamental constitutional rights can clash, such as the conflict between free speech and privacy. Zucca questions the role of law in settling such ethical dilemmas, and elaborates on the limitations of a rights discourse.) To the contrary, the article argues that the law is appropriate to settle such ethical dilemmas; as a matter of fact, all of law has ethical ramifications, from so-called easy cases to hard cases. But more importantly, the article argues that many of these legal dilemmas might disappear if human rights (in particular, *jus cogens*, the highest legal norms) are enforced seriously.

¹³⁵ E.g., in USA in 1857 (*Dred Scott v. Sandford* 60 US 353 (1857)), the Supreme Court held that the USA Bills of Rights (1791) protected the right of slaveholders to their property, which included slaves; the Supreme Court held that Congress had illegally outlawed slavery in the Northern states; thus, the decision upheld slavery. But, in 1954 (*Brown v. Board of Education* (347 US 483 (1954))), the Supreme Court held that the same USA Bills of Rights (1791) protected black people against discrimination; the decision put an end to segregation in public schools and the "separate but equal"

that only Judge Hercules (all-wise) would know whether there is one right legal answer to every legal dispute. On the other hand, if there can be two, or more, (mutually-exclusive or mutually-inclusive) legal answers, then the search for one right legal answer is useless.

Granted, the question is interesting from an argumentation point of view. Puzzles and dilemmas tend to fascinate intellectually. Certainly, legal dilemmas are fun when you are not a part of the legal dispute. Yet, the “right-answer-thesis” can only be correct if law is like mathematics, a perfect science. Mathematics is “the science that draws necessary conclusions”.¹³⁶ Law, however, is seeped with values. To boot, it is seeped with questions of degree (such as, to what extent a right is violated).

Still, there is another fundamental issue at stake. The article insists that the “right answer” question is a false one, and misleading. Legal disputes, before courts, generally arise between two parties, with at least one party claiming at least one right violated by the other party. What if, however, in a given case, the full range of parties responsible for violating the right, are not brought before the court? What if, the full range of rights violated are not claimed before the court? A legal dispute before a court can be too simplistic: we are forced to choose between two alternatives (the claimant or the defendant; the violation of a right, or not). This can be a false set-up. It can be the *wrong* question. A legal dispute might, in reality, encompass a range of unforeseen responsible parties, and unforeseen violated rights. To illustrate in a very different context, it is a bit like being frightened, cold, nervous and tired at the same time, when someone asks, “Are you only cold, or are you only nervous?” We are forced to choose between these two alternatives, when in reality, we feel much more than this. Legal dilemmas are human constructions; they exist in law, but only because we choose to juxtapose one particular right against another right; a particular claimant against a particular defendant.

Why is a discussion on the “right-answer-thesis” important for this article? It is important because the article hypothesizes that many of these legal dilemmas (also with regards to the right to life, self-defence, war) might disappear if the human right to food and water is enforced seriously. It is, after all, the most violated right. Indeed, the article hypothesizes that many aspects of law (national and international) might look very different if the right is enforced. The answer, to the “right answer” question, does not actually matter, since we cannot know the answer, in the absence of Judge Hercules. What does matter is to address urgent legal disputes, first (i.e. enforce norms of *jus cogens*; they are non-derogable and immediately applicable).

Thus, what would Judge Hercules (i.e. an ideal judge, fair and just, with a

doctrine, earlier upheld by the Court in *Plessy v. Ferguson* 163 US 537 (1896). See Moeckli, D., Shah, S., Sivakumaran, S., (eds.), *International Human Rights Law*, Oxford, Oxford University Press, 2010.

¹³⁶ Peirce, B., *Linear Associative Algebra*, American Journal of Mathematics (Vol. 4, No. 1/4), 1881, p.97.

complete knowledge of legal sources) say about war and peace? Your guess is as good as mine. But, in the opinion of the author of this article, Hercules would say:

War is a crime; there are no exceptions to the right to life; war is legally not permissible. And the reason would be that the right to life is a *jus cogens* norm, a right of such importance, that any seeming dilemma, is a false dilemma; whereas, tricky legal questions like the ones mentioned above (e.g. deciding in a given case, the degree to which the right to freedom of speech violates another individual's right to privacy) lead to difficult legal dilemmas, but might disappear if certain *jus cogens* norms are enforced seriously.

V. Conclusion

In accordance with our laws, peace must prevail.

This is an article about peace and war. Through *jus in bello* ("laws of war") and *jus ad bellum* ("right of war"), lawyers have tried to find a way around the *jus cogens* norm of the right to life. In other words, they have tried to find a way to sneakily derogate a non-derogable right.

As mentioned at the start of this article, I would add to Ronald Dworkin's question: What would the Greek goddess of peace (Irene) have to say about Hercules' answer about war? In the section above, the author of this article ended by guessing what Judge Hercules might answer about war. Of course, as legal scholars, we must turn to all pertinent law in answering a legal question. The article has set forth to do this. With regards to the legality or criminality of war, as well as whether there are exceptions to the right to life or not, the vast majority of legal scholars today certainly state that "it depends; in some circumstances yes; in some circumstances, no." The author is in a minority.

Being in the minority among legal scholars, can mean one is wrong. But, it can also mean that one's legal interpretation is right, and presently unfashionable. So, what might the Greek goddess of peace (Irene) have to say about Hercules' answer about war? In the opinion of the author of this article, they would probably get along quite well. Perhaps she would say, "The extraordinary belongs to those who make it."