Introduction the two as part of his analysis.

Introduction and Summary This paper broadly aims to look at theway in which it is possible, or indeed not possible, to reconcile the conceptof jus cogens with the concept of legal positivism. Before going on to look atthe how Linderfalk has looked to achieve this, it is helpful to consider whatprecisely the topic of the paper included and what is meant by both jus cogensand legal positivity, along with why the author has chosen to look at therelationship between the two as part of his analysis. Jus cogens refers to the principle thatthere are some international rules and laws that simply cannot be deviatedfrom—they will simply always exist—whereas legal positivism accepts andencourages the notion that there will be changes and adaptations depending onthe social and political context. Essentially, jus cogens creates a situationwhereby there are norms that all states are bound by, whereas positivismindicates that a law can only exist as a result of the actions of anauthoritative body. 1The author of the paper under analysis here sets out at the start of the paperthat it is this seeming discrepancy that is under question.

One of the keystrengths of this paper is the initial introduction that states quite clearlywhy the issue of jus cogens is perceived to be such a difficult concept basedon the growing complexities of international law. Within the opening paragraph, the author defines jus cogens as per the Vienna Convention, setting theparameters clearly for the discussion at hand. The author does, however, crucially go on in the introductory phase of the paper to say that thedefinition, although readily accepted, does add to the difficulties experiencedbetween those pursuing the concept of jus cogens and those looking to take amore positivist approach. 2 Nature of the

Arguments Raised The current paper looks to pull theposition together and to understand how the debate has evolved. A strength ofthis academic paper is the way in which it looks to develop the discussion andto draw in the reader in a way that allows them to follow the debate from ahistoric perspective, as well as encouraging the reader to generate their ownthoughts and discussions. It is noted here that those supporting natural lawtake the basic definition and then extend this to create a greater dividebetween the two schools of thought. By setting this background in place, it isthen easier for the author to focus on the ultimate aim of the paper, which isto discuss how legal positivism manages to deal with and cope with the naturallaw concepts. The very title suggests that the author has made the decisionthat the concept of jus cogens is one to be tolerated by legal positivismrather than it being a concept that needs to be developed and accepted.

3 The author notes thatthose pursuing natural law have taken the basic definition further and havetried to establish that nation states which have not even consented to be boundby the natural rules are bound as a matter of international law. A secondaspect of the development of jus cogens is that of the lex superior, suggestingthat taking the definition for jus cogens at face value means that theseinternational norms and laws take a superior position that simply cannot bedeviated from or modified. This would mean that, where there is a discrepancy, the rules of jus cogens will prevail. 4 Having established these two key linesof debate, the author crucially states that the legal positivists must overcomethese if they are to coexist suitably with each other.

In order to do this, theauthor suggests that it will be necessary to establish that jus cogensobligations must be deviated from in some situations and that it cannot have ahierarchical position within the area of international law. It is at this point that there is aweakness in the approach taken by the author. There is an immediate statementmade by the author that it is this argument that he aims to put forward in thebody of the paper.

In this critique, it is argued that the author has stated hisintended conclusions before he has in fact raised any meaningful arguments; assuch, it could be argued that the tone of the article is biased towards showinga favouritism towards the legal positivist approach from the outset. 5A further strength that is shown by theauthor in this article is the willingness to look at the theory of jus cogensalongside general international law theories and the way that customaryinternational law may emerge. The author recognises that there is thepossibility that such norms may be established based on the idea that there isa pattern of conduct and that certain states do nothing to go against thatpattern. It is not necessary, according to the author, for the states toactively accept the norm; rather, they simply need to ignore the conduct or donothing about the conduct.

Therefore, where it is desirable that there is noacceptance of a norm, the state objecting should object openly rather thansimply staying quiet. Furthermore, the author accepts that there is no mechanismof showing persistent objection once the rule has reached a status of juscogens. It would seem, therefore, that the author has managed to dissect theprinciples of jus cogens in such a way that it is possible to explain andunderstand the combination of the two approaches and to reconcile acoexistence, even if

this cannot be fully explained in all circumstances. 6 A Critique of the Author’s Position Despite the robust and reasoned argumentthat is presented by the author, there are some key difficulties in theposition taken by the author which must be raised as part of this critique. Inthe main body of the article, referred to as section 3, it is argued here thatthere is sufficient bias to make the article somewhat leading in terms ofmaking the point that jus cogens needs to be adapted to take account of theseemingly favoured positivist approach. At the very outset of the discussion ofthe modification of the jus cogens rule in a way that may make it fit into thewider international law arena, the author tries to hedge between the practicalapplication of jus cogens, the empirical and, crucially, the judicial element. 7 The author attempts toexplain this by using genocide as an example of an alleged jus cogens rule.

Whilst it is felt here that this does offer some opportunities to understandthe practical working, it is argued in the critique that such a heavy focus onan emotive area of international law detracts somewhat from the academicargument that was so well delineated at the outset. That said, although it isthought to be somewhat emotive in nature, it is a good illustration of thepoint being made by the author and, on balance, was an appropriate technique touse. 8 The paper would potentially benefit froma more balanced argument. Referring back to the original statement whichrecognises the distinction between the two theories and considers howpositivity ‘ copes’ with jus cogens, there was naturally going to be a focus onthe support for positivity; however, a greater focus on the merits of juscogens may have been beneficial for the subsequent discussion.

Conclusions and SummaryIn summary, the paper under analysishere has presented a robust argument on how jus cogens can be interpreted andadapted in order to support, or at least not go against, more modern conceptsof legal positivity. The author presents a very strong background and travelsthrough the discussion with purpose. It is thought here, however, that theexcessive focus on issues associated with genocide may detract from theotherwise very focused discussion. On balance, however, this is a strongdiscussion and provides a robust argument and understanding as to how these twolegal theories have developed to co-exist. 1 Elias, O (1991),” Some Remarks on the Persistent Objector Rule in Customary InternationalLaw”, The Denning Law Journal, Vol. 6, pp.

37–51. 2 MacCormick, N (1994) Legal Reasoning and Legal Theory, Oxford, Clarendon. 3 Cassese, A (2005), International Law, 2nd edition, Oxford, Oxford University Press4 Kolb, R (2003)” Selected Problems in the Theory of Customary International Law”, Netherlands International Law Review, 119. 5 Linderfalk, U (2008), “ The Effectof Jus Cogens Norms: Whoever opened Pandora’s Box, Did You Ever Think About theConsequences?” The European Journal of International Law, Vol. 18, No. 5, pp. 853–871.

6 Danilenko, G (1991),” International Jus Cogens: Issues of Law Making”, European Journal of International Law, Vol. 42, No. 2, pp.

42–65. 7 Meron, T (1986), “ On a Hierarchy of International Human Rights”, American Journal of International Law. 8 Gardiner, R. (2003), International Law, Essex, Pearson.