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Normative aspects of *jus cogens* identification in Vienna Convention on the Law of Treaties[1]

Aspekty normatywne identyfikacji norm *jus cogens* w konwencji wiedeńskiej o prawie traktatów

Article 53 of the Vienna Convention on the Law of Treaties is a codification of *jus cogens* norms of international law. The purpose of this provision is to enable peremptory norms to be identified without including examples of them or a catalogue of such norms in the treaty. In order for a legal norm to acquire a peremptory status, it must meet the sociological, normative and axiological criteria set out by the Convention. A legal norm that acquires a *jus cogens* status must already exist and derive from a particular source of international law. It is only through its adoption and recognition as *jus cogens* that it acquires its special status.

Keywords: *jus cogens*, Vienna Convention on the Law of Treaties, peremptory norms, international law

Artykuł 53 konwencji wiedeńskiej o prawie traktatów stanowi kodyfikację norm *ius cogens* dla prawa międzynarodowego. Celem tego postanowienia jest umożliwienie identyfikacji norm peremptoryjnych bez zawierania w traktacie ich przykładów lub katalogu takich norm. Aby norma prawna mogła uzyskać status peremptoryjny, musi spełniać kryteria socjologiczne, normatywne i aksjologiczne określone przez konwencję. Norma prawna, która uzyskuje status *ius cogens*, musi już funkcjonować w obrocie prawnym i pochodzić z określonego źródła prawa międzynarodowego. Dopiero przez jej przyjęcie i uznanie za *ius cogens* uzyskuje ona swój szczególny status.

Słowa kluczowe: *ius cogens*, konwencja wiedeńska o prawie traktatów, normy peremptoryjne, prawo międzynarodowe

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[1] This paper is a second paper in a series on the concept of jus cogens in international public law. It focuses on the construction of Article 53 of VCLT by outlining the criteria for identification of *jus cogens*. The first paper in the series focused on the process of emergence of peremptory norms in VCLT (see K. Niewęgłowski, *The emergence of jus cogens in the Vienna Convention on the Law of Treaties*, "Zeszyty Prawnicze BAS" 2(74) 2022). The following papers will aim at an overview of the consequences of the conflict of treaties with jus cogens, will revisit the issue of the catalogue of peremptory norms and will summarize and describe the international legal norms that are most commonly indicated as having the *jus cogens* character.

Introduction

The Article 53 of the Vienna Convention on the Law of Treaties[2] (hereinafter: VCLT or Vienna Convention) provides a definition of *jus cogens*. According to that provision, *jus cogens* are norms of general international law that are accepted and recognized by the international community of States as a whole as the norms from which no derogation is permitted and which can be modified only by subsequent norms of general international law having the same character. The purpose of this provision is to enable identification of the peremptory norms without containing examples or a catalogue of such norms in VCLT. Article 53 of VCLT is not a mere rule of conduct imposing obligations or conferring rights, but a special kind of prism that confers a peremptory character on norms of conduct that fulfil the conditions set out in the said provision. The wording of this provision is also repeated in Article 53 of the Convention on the Law of Treaties between States and International Organizations and between International Organizations[3].

It is worth to note the specific reservation appearing in the Article 53 *ab initio*. The definition of *jus cogens* included in that provision should in fact be used for the purposes of VCLT. The used phrase along with the fact that the definition does not appear in Article 2 of the Convention, which contains use of terms 'for the purpose of the present Convention', may indicate the unclear status of this definition[4]. Nevertheless, Article 53 of VCLT sets out four formal criteria that must be met in order for a norm of international law to be considered as *jus cogens*. The VCLT does not provide concrete examples, but only general indications regarding the appearance, modification, and termination of such norms. For a legal norm to acquire the character of *jus cogens* it has to be a norm of general international law, a norm accepted and recognized by the international community of States as a whole, a norm from which no derogation is permitted and a norm that can only be modified by a subsequent norm of general international law having the same character.

The research method for this paper is mostly jurisprudential (formal – dogmatic method), which is used to identify, analyze, and evaluate treaty provisions that are currently in force. The formal-dogmatic method will be complemented

[2] Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

[3] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, done at Vienna on 21 March 1986, Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations (Documents of the Conference) vol. II, p. 95.

[4] C. Mik, *Jus Cogens in Contemporary International Law*, "Polish Yearbook of International Law" 2013, vol. XXXIII, p. 31.

by a historical method, which will allow to trace the *travaux préparatoires* of the VCLT in regard of Article 53 of the treaty.

Jus cogens as a norm of general international law

As all legal norms, *jus cogens* are general and abstract in nature[5]. In international public law, it is possible to distinguish between norms that directly regulate rights and obligations (substantive and procedural norms) and those that indirectly regulate them (competence norms and conflict of law norms). Only among the norms of the first category can peremptory norms appear[6]. These norms as part of the international legal system have a specific structure which differs from the structure of legal norms of national legal systems. The hypothesis of international legal norms is usually implicit, and the sanction is often absent[7]. Characteristics of these norms are also applicable to the *jus cogens*. The hypothesis of peremptory norms, i.e. the indication of the addressee, is implicit. Due to its nature and source, as well as the requirement of acceptance and recognition by the international community of States as a whole, it may be concluded that the addressees of peremptory norms are all subjects of international law – States in particular. The conduct indicated in the disposition, as follows from the provisions of Article 53 of VCLT, cannot be derogated from. Despite the lack of a clear catalogue of *jus cogens* it follows from the very nature of the concept of *jus cogens* that the disposition of such norms may take the form of a prohibition or an order. There are no peremptory norms in the form of consent. The sanction of *jus cogens* may be considered on two levels. At the formal level, in the case of a breach of *jus cogens* taking form of the conclusion of a treaty, the treaty is null and void. The treaty also becomes void and terminates if a new peremptory norm emerges and the treaty stands in contradiction to the newly emerged *jus cogens*. The situation is more complicated when the breach of the peremptory norm occurs at the substantive level, i.e. not through the law-making action of the entity in question, but through its factual conduct or through an act of domestic law which is regarded by international law as a fact[8]. According to draft articles 2 and 3 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts[9], internationally wrongful acts are considered to be committed under international

[5] M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden-Boston 2009, p. 670.

[6] C. Mik, *op. cit.*, p. 34.

[7] J. Gilas, *Prawo międzynarodowe*, p. 96.

[8] Permanent Court of International Justice, *The Case of Certain German Interests in Polish Upper Silesia*, PCIJ Series A, no. 7, 1925.

[9] Draft articles on Responsibility of States for Internationally Wrongful Acts, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10, A/56/10.

law, not under internal law, therefore they are regarded as a breach of international obligations. States' actual conduct contrary to *jus cogens* would therefore be treated as a breach of international obligations, which under the Draft Articles on the Responsibility of States entails an obligation to cease violations, to ensure that violations are not repeated, and a specific form of reparation (restitution, compensation or satisfaction). Moreover, according to draft articles 40 and 41 of Draft Articles on the Responsibility of States, if a breach of an obligation is serious (and all breaches of peremptory norms would constitute a serious breach), States are obliged to cooperate to put an end to such breaches and not to recognize as lawful the situations created as a result.

The provisions of the VCLT require *jus cogens* to be norms of general international law. The term "general international law" has no clear definition or generally recognized meaning[10]. Nevertheless, there is a tendency in international legal doctrine to equate general international law with customary international law[11]. In the literature, one can find a view that treaties, as sources of law binding only the parties to them, lack the attribute of universality[12]. The authors of the VCLT, however, intended to give this term a broader meaning[13]. The sources of law referred to in Article 38 of the Statute of the International Court of Justice (hereinafter: ICJ)[14] may therefore be considered as constituent elements of general international law. General customary international law is considered to be the most important and appropriate source of *jus cogens*[15], especially when the custom binds all States except those that permanently, consistently and unequivocally oppose it[16]. Peremptory norms may also be derived from multilateral treaties to which a sufficiently large number of States are parties to constitute a treaty of general application. The general principles of law are also an appropriate source of law for the formation of *jus cogens.*

The Article 53 of VCLT, by using the phrase 'norm of general international law', avoids establishing direct link between peremptory norms and any source of international law. When these sources are considered in the context of a for-

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10 M. Koskenniemi, *Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law*, A/CN.4/L.682, p. 254.

11 See G. I. Tunkin, *Is General International Law Customary Law Only?*, "European Journal of International Law, 1993, vol. 4, no. 4.

12 See E. de Vattel, *The Law of Nations or, Principles of the law of nature, applied to the conduct and affairs of nations and sovereigns, with three early essays on the origin and nature of natural law and on luxury*, Indianapolis 2008, p. lxv.

13 Yearbook of International Law Commission (hereinafter: YILC) 1963, vol. I, p. 214.

14 Charter of the United Nations, the Statute of the International Court of Justice, 24 October 1945, 1 UNTS XVI.

15 O. Dörr, K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Berlin Heidelberg 2012, p. 913.

16 See M. Shaw, *International Law (6th ed.),* p. 90.

mal process that results in the creation of binding legal norms, one may come to the conclusion that *jus cogens*, through the specific manner of their creation (acceptance and recognition as such by the international community as a whole), may constitute a separate source of international law[17]. Such a conclusion, however, is based on faulty premises. For a norm of international law to acquire the status of *jus cogens*, it must already exist at the moment of its recognition as a peremptory norm. It derives from a particular source of international law and only through its adoption and recognition as *jus cogens* it acquires its special legal status. If the norm whose peremptoriness is being examined has its roots in customary international law, it is a mistake to equate *opinio juris sive necessitatis* with recognition and acceptance as *jus cogens*. It is crucial to distinguish between the formation of a norm of customary law and the attribution of a peremptory character to the specific norm. These operations are independent of each other, although outwardly similar. As a result of a properly conducted process, a treaty norm or a norm of customary international law is transformed into a general principle of law recognized by civilized nations, within the meaning of Article 38 of the ICJ Statute (or remains so in the case of the derivation of *jus cogens* from such principles), at the same time acquiring a special legal status under Article53 of the VCLT[18].

While considering the relation of *jus cogens* and customary international law, the issue of persistent objectors should be raised. Persistent objectors are States that permanently and openly do not recognize a given legal norm as a customary law norm or that are against the peremptory character of the norm or even oppose the very concept of *jus cogens*[19]. The extension of the institution of a persistent objector to peremptory norms of customary law would result in the recognition that there may be a State or a group of States which, in their treaty practice, may conclude provisions contrary to *jus cogens* derived from customary law and these agreements will not be null and void. It is generally recognized in legal doctrine that such situations cannot occur[20]. At the Vienna Conference,

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[17] See K. Wolfke, *Jus Cogens in International Law (Regulation and Prospects)*, "Polish Yearbook of International Law" 1974, p. 155.

[18] See: B. Simmai, P. Alston, *The Sources of Human Rights Law: Custom, jus cogens and General Principles*, "American Journal of International Law", vol. 12, p. 104.

[19] Turkey was against the introduction of the concept of *jus cogens* into the Vienna Convention as it considered it to be an overly progressive concept not reflected in international law. See Official Records of the United Nations Conference on the Law of Treaties (hereinafter: UNCLOT), vol. I, pp. 299–300.

[20] See: L. Hannikainen, *Peremptory Norms in International Law*, Helsinki 1988, I. Brownlie, *Principles of Public International Law*, Oxford 1966, M. Bos, *The Identification of Custom in International Law*, "German Yearbook of International Law", vol. 25, M. Bos, *The Methodology of International Law,* Elsevier 1984, U. Scheuner, *Conflict of Treaty Provisions with a Peremptory Norm of General International Law*

Emmanuel Dadzie stated that recognition and acceptance by a sufficient majority of states makes *jus cogens* universal[21], while Mustafa Yassen stated that it seems to be the view of the entire plenary committee that no individual state should have a veto over *jus cogens*[22]. In addition, it is worth noting that the Government of the United Kingdom in its pleading in the *Fisheries* case before the ICJ stated that "where a fundamental principle is concerned, the international community does not recognize the right of any State to isolate itself from the impact of the principle"[23]. It should also be noted that the Inter-American Commission on Human Rights stated in *Domingues v. United States* that "as customary international law rests on the consent of nations, a state that persistently objects to a norm of customary international law is not bound by that norm. Norms of *jus cogens*, on the other hand, derive their status from fundamental values held by the international community, as violations of such peremptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition or acquiescence"[24].

Jus cogens as a norm accepted and recognized by the international community of states as a whole

An international legal norm must be accepted and recognized as such by the international community of States as a whole in order to acquire a peremptory character. This part of Article 53 of VCLT, which is the sociological criterion for identifying *jus cogens*, was introduced into the Convention by a proposition issued by Finland, Greece, and Spain[25]. Although the proposed amendment in-

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and its Consequences. Comments on Arts. 50, 61 and 67 of the ILC's 1966 Draft Articles on the Law of Treaties, "Zeitschrift für auslandisches öffentliches Recht und Völkerrecht, 1967, vol. XXVII, H. B. Reimann, *Jus cogens im Völkerrecht: Eine quellenkritische Untersuchung*, "Zürcher Studies zum internationalen Recht" 1971 no. 43, C. L. Rozakis, *The Concept of jus cogens in the Law of Treaties*, Oxford 1976, W. T. Gangi, *The jus cogens dimensions of Nuclear Technology*, "Cornell International Law Journal" 1980, vol. 13, no. 1, H. Lau, *Rethinking the Persistent Objector Doctrine in International Human Rights Law*, "Chicago Journal of International Law" 2006, no. 495.

21 UNCLOT I, p. 301.

22 *Ibidem*, p. 471.

23 *United Kingdom* reply of 28 November 1950, See: International Court of Justice, *Fisheries (United Kingdom v. Norway)*, ICJ Reports 1951.

24 Inter-American Commission on Human Rights, *Domingues v. United States*, Case 12.285, Report No. 62/02.

25 UNCLOT III, p. 174. The word "recognized" was also used in the rejected United States proposal.

cluded only the expression 'recognized,' the Drafting Committee also added the phrase 'accepted' to make the drafted provision sound more familiar to Article 38 of the ICJ Statute[26], which can be considered as another proof against the view that *jus cogens* are a separate source of international law.

The term 'international community' has no clear definition. International community *sensu stricto* refers to States, whose mutual relations are based on the principle of sovereign equality[27], maintaining relations governed by international law[28]. International community *sensu largo* includes all organized entities characterized by the ability to participate in international relations[29]. Moreover, international community *sensu largissimo* is considered synonymous with humanity[30]. As early as 1949 the International Court of Justice explicitly recognized the existence of subjects of international law other than States. ICJ stated that "throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States"[31]. Nevertheless, the VCLT uses in Article 53 the most narrow understanding of the term "international community". It states that *jus cogens* have to be accepted and recognized by the international community 'of States' as a whole. While recognizing that only States can participate in attributing a peremptory character to legal norms, other subjects of international law, in particular international organizations, were excluded from the process of creating *jus cogens*.

The Convention on the Law of Treaties between States and International Organizations and between International Organizations does not extend the list of entities capable of forming *jus cogens* to international organizations, while expressly stating that the peremptory norms apply to the treaties between States and international organizations in the same way as they apply to treaties con-

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[26] Official Records of the United Nations Conference on the Law of Treaties, First Session (Summary records of the plenary meetings and of the meetings of the Committee of the Whole), A/CONF.39/C.1/SR.80, p. 471. According to some representatives of the doctrine, however, Article 38 of the ICJ Statute cannot be used to assist in the interpretation of Article 53 of the Vienna Convention. See: O. Dörr, K. Schmalenbach (eds.), *op. cit.*, p. 919.

[27] R. Bernhardt (ed.), *Encyclopaedia of Public International Law volume 7. History of International Law, Foundations and Principles of International Law, Sources of International Law, Law of Treaties*, Oxford 1984, p. 309.

[28] R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne*, Warsaw 2005, p. 13.

[29] R. Bernhardt, *op. cit.*, p. 309.

[30] C. Tomuschat, *Obligations Arising for States Without or Against their Will*, "Recueil des cours de l'Academie de droit international de La Haye" 1993, vol. 241, p. 224.

[31] International Court of Justice, *Reparation of Injuries Suffered in Service of the U.N., Advisory Opinion*, ICJ Reports 1949.

cluded between States only. During the drafting of the Convention consideration was given to the idea of changing that provision, so that the norms of *jus cogens* would have to be accepted and recognized by the international community of States and international organizations as a whole. However, this idea was abandoned on the basis that since States create and are part of international organizations, such a modification would be *superfluous.* Consideration was also given to the removal of the word 'States' from the provision in question, but that modification did not appear in the final version of the Convention either. The Commission concluded that, given the current state of international law, it is States that are called upon to create or recognize peremptory norms[32].

The words 'as a whole' were also added to the phrase 'international community of States'. Its inclusion in the draft provision governing *jus cogens* prompted queries from representatives of Chile and Ghana[33]. The meaning of this phrase was clarified by Mustafa Kamil Yassen, Chairman of the Drafting Committee. He stated that the consent of literally all States is not required for the legal norm to be accepted and recognized as *jus cogens*. The condition will be fulfilled if the acceptance and recognition is carried out by a very large majority of States, provided that this majority includes the most important members of the international community and that the norm itself has a universal scope[34]. If one State or a small group of States refuse to accept a peremptory norm, that refusal will be irrelevant to its acceptance and recognition by the international community of States as a whole[35].

It can be derived from the negotiating history of VCLT that if the objector is a State that has a dominant role in the international community, the legal norm in question will not emerge as *jus cogens.* Richard Kearney, a representative of the United States during the Vienna Conference stated that the emergence of a peremptory norm "would clearly require, as a minimum, the absence of dissent by any important element of the international community"[36]. However, this thesis is criticized in the doctrine, according to which the opposition of such a State (that is alone or in an overwhelming minority) does not prevent the formation of *jus cogens*[37].

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[32] Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter: UNCLOTIO), vol. II, p. 39.

[33] UNCLOT I, p. 472.

[34] O. Dörr, K. Schmalenbach (eds.), *op. cit.*, p. 912.

[35] See: G. Gaja, *Jus Cogens Beyond the Vienna Convention*, "Recueil des cours de l'Academie de droit international de La Haye" 1981, vol. 172, p. 283; UNCLOT I, p. 472.

[36] UNCLOT II, p. 102.

[37] See: O. Dörr, K. Schmalenbach (eds.), *op. cit.*, p. 912.

Jus cogens as the norm from which no derogation is permitted

An inherent trait of *jus cogens* is the prohibition of their derogation, which constitutes a normative criterion for their identification. Peremptory norms, which are a part of general international law, are based on the acceptance and recognition by the international community of States as a whole as norms from which no derogation is permitted. By such recognition, the international community grants special legal status to specific legal norms. This status manifests itself *inter alia* in a unique procedure for their replacement. It is worth noting that Article 53 provides no distinctions between different types of norms or sources of these norms. Thus, it is not important whether the derogating norm has a customary character or is derived from a treaty, either bilateral or multilateral, or whether it derives from general principles of law[38].

One of the most crucial factors distinguishing the international law system from the national law systems is the lack of single legislator with power to impose legally binding norms on the subjects of the law. International law is characterized by a plurality of legislators, i.e., entities capable of actively participating in the creation of norms binding in the international legal order. States may conclude bilateral treaties among themselves, they may be parties to multilateral treaties, and they are also subject to customary international law. Conflicts between binding norms are therefore common, and derogation of one norm in favour of another is the rule rather than the exception in international law[39]. The VCLT refers in its provisions to conflicts of treaties, recognizing as binding the principle of *lex posterior derogat legi priori.* Under Article 30 of the Vienna Convention, however, the concept of "derogation" does not mean the complete removal of an earlier provision from the legal order, but only its "dormancy". Such a provision is inapplicable as long as it remains in conflict with a more recent norm (unless the later treaty expressly provides that the earlier treaty has lapsed or if its application has been suspended under Article 59 of VCLT). The system of international law also operates the principle of *lex specialis derogat legi generali*. Although it does not derive directly from the Vienna Convention, its application is confirmed both by representatives of the international law doctrine[40] as well as international courts. The International Tribunal for the Law of the Sea in the *Southern Bluefin Tuna*[41] case stated that if the *lex specialis* contains a dispute settlement provision, the *lex specialis* prevails over any dispute settlement provision in the *lex generalis*[42].

[38] M.E. Villiger, *op. cit.*, p. 670.

[39] O. Dörr, K. Schmalenbach (eds.), *op. cit.*, p. 916.

[40] See: *Ibidem*, p. 506.

[41] International Tribunal for the Law of the Sea, *Southern Bluefin Tuna*, Reports of International Arbitral Awards, vol. XXIII.

[42] Cited in M. Pika, *Third – Party Effects, Arbitral Awards: Res Judicata Against Privies, Non-mutual Preclusion and Factual Effects*, Wolters Kluwer 2019.

Article 53 of the Vienna Convention expressly established an exception in the application of the above conflict of norm rules to the peremptory norms.

The institution of derogation envisages not only a complete withdrawal from the norm, but also a modification of the content of the norm, the exclusion or restriction of some of its consequences (e.g. through reservations) or the scope of its application (e.g. through interpretative declarations)[43]. The prohibition of derogation applies to both formal and informal derogations. No derogation may be made on the basis of international treaties, unilateral acts, resolutions of international organizations, customary law or general principles of law, and no interpretation may be made that would lead to a derogation of the *jus cogens*[44]. Domestic measures that contain provisions contrary to peremptory norms are also prohibited, since such norms impose obligations that affect all those who are part of the international community. The adoption of an act of domestic law that is contrary to *jus cogens* gives rise to international responsibility[45].

The prohibition of derogation from peremptory norms not only sets out a normative criterion for identification of *jus cogens*, but, also with conjunction with the requirement of acceptance and recognition by the international community of states as a whole, plays an auxiliary role in the process of protection of certain values recognized as requiring a special protection[46]. These special, protected values can be seen as the third, axiological criterion for *jus cogens* identification[47]. The prohibition of derogation should be regarded as a means that is used by the international community to protect the norms of behaviour defined by that community. Norms adopted and recognized by the international community of States as a whole as such, from which no derogation is permitted, in order to acquire the character of *jus cogens* must protect the most crucial values for the community. The presence of these values (axiological criterion) is a condition *sine qua non* for the norm to acquire a peremptory character[48]. The International Criminal Tribunal for the former Yugoslavia in the case of Anto Furundzija stated that the prohibition of torture has evolved into a *jus cogens* because of the importance of the values it protects[49]. Furthermore, the Tribunal explained that "this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate"[50].

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43 C. Mik, *op. cit.*, p. 44.

44 A. Orakhelashvili, *Peremptory Norms in International Law*, Oxford 2006, p. 286.

45 C. Mik, *op. cit.*, p. 44.

46 M. Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford 1997, p. 49.

47 C. Mik, *op. cit.*, p. 46.

48 *Ibid*.

49 International Criminal Tribunal for the former Yugoslavia, *Procesutor v. Anto Furundzija*, IT-95-17/1, p. 58.

50 *Ibid*, p. 59.

The auxiliary role of the prohibition of derogation in relation to the object of the protection of *jus cogens* norms has been emphasized by the International Law Commission (hereinafter: ILC). The Commission stated that it would not be correct "to say that a provision in a treaty possesses the character of *jus cogens* merely because the parties have stipulated that no derogation from that provision is to be permitted, so that another treaty which conflicted with that provision would be void. Such a stipulation may be inserted in any treaty with respect to any subject-matter for any reasons which may seem good to the parties. The conclusion by a party of a later treaty derogating from such a stipulation may, of course, engage its responsibility for a breach of the earlier treaty. But the breach of the stipulation does not, simply as such, render the treaty void (…). It is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*"[51]. The gravity of the protected value is therefore an inherent trait of the peremptory norms. This axiological criterion, derived from the prohibition of derogation should be therefore taken into the account along with normative and sociological criterion, for the process of identification of *jus cogens*

Jus cogens as a norm which can only be modified by a subsequent norm of universal international law of the same nature

International law is not a static legal system. States must be able to take legal actions to adapt the international legal system to the dynamic progress of civilizational and social changes. The values most precious to the international community may also become subject to change or modification. Despite the prohibition of derogation of norms of *jus cogens*, Article 53 of the VCLT provides for a situation in which a peremptory norm may be changed by a subsequent norm of international law of the same nature. The existence of this possibility was obvious to the drafters of the Vienna Convention – as early as 1963 Mustafa Yassen stated that "there was no doubt that States themselves could change the content of *jus cogens*"[52]. Moreover, as the International Law Commission stated, "it would clearly be wrong to regard even rules of jus cogens as immutable and incapable of modification in the light of future developments"[53].

According to VCLT, to change the peremptory norm is to create a new rule concerning the same object, but with a different content. Norms of *jus cogens* character usually have the form of a prohibition (e.g. prohibition of torture). It is rare to find peremptory norms in the form of an order (e.g. order to liber-

[51] YILC 1966 II, p. 248.
[52] YILC 1963 I, p. 73.
[53] YILC 1966 II, p. 248.

ate from colonial power), and there is no *jus cogens* in the form of consent[54]. This modification will therefore most often apply to the prohibition norms. Such a prohibition may be expanded (e.g. the prohibition of torture and direct coercion) or narrowed (e.g. the prohibition of torture causing permanent disability). It is difficult to imagine such a decision by the international community, but if all the criteria (sociological, normative, and axiological) set out in Article 53 of the Vienna Convention are met, there is nothing to prevent a newly created *jus cogens* from replacing the old peremptory norm. When a new peremptory norm authorizes previously illegal conduct (e.g. authorizing the use of force), all treaties in conflict with such a norm would become null and void and terminated *ex lege*.

Radical changes, however, do not seem possible without a significant change in the nature of the international community. At present, it seems that the most possible changes that the norms of *jus cogens* might undergo are some modifications of the scope of the norms, especially concerning possible exceptions[55]. Such a change could occur if "there is overwhelming evidence of a global moral consensus among States in favour of the evolution, and the change better helps to implement 'essential ethical principles'"[56]. According to Cezary Mik, such a modification could already occur with respect to the norm against the threat or use of force. This norm, commonly regarded as a peremptory norm, is not absolute in nature. The use of force authorized by the UN Security Council or when it is used in self-defence is permissible. There are claims in doctrine that the 'preventive self-defence' used by the United States against Iraq may be considered such an exception. Despite the condemnation of the United States' activities by many legal scholars, these actions did not receive unequivocal condemnation or a finding of a violation of the peremptory norm by the United Nations, and there was a lack of a firm response from other members of the international community. According to the principle *qui tacet, consentire videtur*[57], it may appear that the prerequisites for the amendment of the peremptory norm under Article 53 of the Vienna Convention have been met.

The possibility of modification of the content of *jus cogens* based in Article 53 should be seen as a recognition that *jus cogens* may be subject to modifications advocated by the international community of States. Such a modification presupposes or implies a *desuetudo* of the norm being replaced[58]. The basis for such changes is always a change of an axiological nature. The international community, recognizing that a given value loses its special character, at the same

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54 O. Dörr, K. Schmalenbach (eds.), *op. cit.*, p. 917.

55 C. Mik, *op. cit.*, p. 42.

56 B. D. Lepard, *Customary International Law: A New Theory with Practical Applications*, Cambridge 2010, p. 259, cited by C. Mik, *op. cit.*, *p.* 42.

57 Latin: He who is silent is taken to agree.

58 M. E. Villiger, *op. cit.*, p. 673.

time deprives it of a special kind of protection in the form of the prohibition of derogation. It is worth noting that in order to remove the peremptory character from the legal norm, a new *jus cogens* has to appear in its place. It is therefore not possible merely to deprive a norm of the attribute of *jus cogens* without replacing it with a new norm of that nature, even in a situation where the value that gave rise to the need for special protection is already indifferent for the international community. It seems possible that social or technological developments will lead to a situation in which a particular *jus cogens* norm will completely lose its *raison d'être*. It seems therefore that *de lege ferenda* the international community should be equipped with a tool that allows not only to change peremptory norms, but also to disempower them of that character without the necessity of replacing that norm with another of *jus cogens* character.

Conclusions

The concept of *jus cogens* should be treated not only as a normative construction contained in Article 53 of the VCLT, but also as an expression of a higher, international public order deriving from general international law in its broadest meaning. Although the peremptory norms are described as, "a vision of international order"[59], "hope for the humane public order"[60] or as "a set of identity values"[61], the Article 53 of VCLT only provides a specific prism that confers a peremptory character on norms of conduct that fulfil the conditions set out in that provision. The identification of peremptory norms is therefore made on the basis of three criteria. The sociological criterion is met if the norm is accepted and recognized as peremptory by the international community of States as a whole. The normative criterion consists in the prohibition of derogation. The axiological criterion concerns the values cited above that underlie the contemporary international community. Only the combined fulfilment of these three criteria allows for the recognition of an international legal norm as *jus cogens*. Moreover, it is crucial to emphasize that *jus cogens* do not constitute a separate source of international legal norms. For a norm to acquire the status of *jus cogens*, it must already exist at the moment of its recognition as a peremptory norm. It derives from a particular source of international law and only through its adoption and recognition as *jus cogens* it acquires its special legal status.

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[59] M. Petsche, *Jus Cogens as Vision of the International Legal Order*, "Penn State International Law Review" 2010, vol. 29, no. 2.

[60] G. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, "Virginia Journal of International Law" 1988, vol. 28, no. 3, p. 590.

[61] A. Bianchi, *Human Rights and the Magic of Jus Cogens*, "The European Journal of International Law" 2008, vol. 19, no. 3, p. 491.

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