

JUS COGENS REVISITED

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ABSTRACT

Jus cogens raises a vital interest of judicature and doctrine of international public law. We may find different views and opinions on the problem of the existence of peremptory norms, as well as their content. On the basis of the analysis of the practice of international judicial bodies, the article constitutes an attempt to define the prerequisites of a *jus cogens* norm as well as it aims at determination of a current catalogue of peremptory norms. Moreover, this catalogue evolves over time and in future it might be expected that new *jus cogens* norms will be recognized by the international community.

Keywords: *jus cogens*, public international law, peremptory norms, hierarchy of norms

As a rule, the effectiveness and the implementation of international public law depends on the will of subjects of international law, meaning especially States. However, international law is considered to be a legal system, with its own organized structure and even specific hierarchy. The obligations resulting from the Charter of the United Nations¹ and from *jus cogens* norms have priority over other norms of international law, which are dispositive².

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¹ Art. 103 UN Charter.

² Cezary Mik, *Jus cogens in contemporary international law*, Polish Yearbook of International Law 2013: 27-28.

Jus cogens is a category of norms of international public law that raises a high interest of courts and legal doctrine. These are peremptory norms of international law that cannot be derogated by international treaties, as these norms protect fundamental values of international community as a whole³. As it was stated by the International Criminal Tribunal for the Former Yugoslavia (ICTY), *jus cogens* norms enjoy a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules⁴.

Art. 53 of the Vienna Convention on the law of treaties defines *jus cogens* norm as follows: “For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm

³ Anthony Aust, *The Role of Human Rights in Limiting the Enforcement Powers of the Security Council: A Practitioner’s View*. In: *Review of the Security Council by Member States*, ed. Erika de Wet, André Nollkaemper, Amsterdam: Intersentia, 2003, 34. Andrea Bianchi, *Assessing the Effectiveness of the UN Security Council’s Anti-terrorism Measures: The Quest for Legitimacy and Cohesion*, “European Journal of International Law” 5 (2006), 887. Jochen Abr. Frowein, Nico Krisch, *Introduction to Chapter VII of the Charter of the United Nations*. In: *The Charter of the United Nations. A Commentary*, ed. Bruno Simma, New York: C.H. Beck 2002, 711. Robin Geiss, *Humanitarian Safeguards in Economic Sanctions Regimes: A Call for Automatic Suspension Clauses, Periodic Monitoring, and Follow-Up Assessment or Long-Term Effects*, Harvard Human Rights Journal 18 (2005), 177. Winston P. Nagan, Joshua L. Root, *The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory*, North Carolina Journal of International Law and Commercial Regulation 38 (2013), 401. Lutz Oette, *A Decade of Sanctions against Iraq: Never Again! The End of Unlimited Sanctions in the Recent Practice of the UN Security Council*, European Journal of International Law 1 (2002), 98. Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, European Journal of International Law 1 (2005), 60, 62. August Reinisch, *Developing human rights and humanitarian law accountability of the Security Council for the imposition of economic sanctions*, American Journal of International Law 4 (2001), 859. Thomas Weatherall, *Jus cogens and sovereign immunity: reconciling divergence in contemporary jurisprudence*, Georgetown Journal of International Law 46 (2015), 1152, 1154. A. Mark Weisburd, *The emptiness of the concept of jus cogens, as illustrated by the war in Bosnia-Herzegovina*, Michigan Journal of International Law 1(1995), 10. Erika de Wet, *The role of human rights in limiting the enforcement power of the Security Council: A principled view*. In: *Review of the Security Council by Member States*, ed. Erika de Wet, André Nollkaemper, Amsterdam: Intersentia, 2003, 19.

⁴ International Criminal Tribunal for the Former Yugoslavia, case IT-95-17/1-T Prosecutor v. Furundzija, decision of 10 December 1998, 153.

from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". An analogous definition was included also in Art. 53 of the Vienna Convention on the law of treaties between States and International Organizations or between International Organizations of 1986. It is however worth mentioning, that the notion of *jus cogens* was not developed after the 2nd World War, as it could be suggested by the above mentioned Conventions. The referrals to the concept of *jus cogens* can be found in the documents published earlier.

In 1928 the French-Mexican Claims Commission referred to *jus cogens* in its decision in *Pablo Nájera*⁵. The Commission had to decide on the interpretation of the Art. 18 of the Covenant of the League of Nations and stated that Art. 18 has a character of a norm that cannot be derogated from by the Member States of the League of Nations through any specific stipulations made between them. These States are bound by the same rule of imperative law that restricts their liberty of action in the area of international treaties⁶. However, we cannot forget that in this case we are deliberating a conventional *jus cogens* norm. These were the States who decided, in the text of the Covenant of the League of Nations, that they cannot breach Art. 18 by their subsequent actions.

Another example of a referral to *jus cogens* in the interwar period was the dissenting opinion of judge Walther Schücking to the judgment of the Permanent Court of International Justice in *Oscar Chin*⁷: "And I can hardly believe that the League of Nations would have already embarked on the codification of international law if it were not possible, even today, to cre-

⁵ French-Mexican Claims Commission, case 30-A *Pablo Nájera (France) v. United Mexican States*, decision of 19 October 1928, Reports of International Arbitral Awards, vol. XXIX, 466-508.

⁶ French-Mexican Claims Commission, case 30-A *Pablo Nájera (France) v. United Mexican States*, decision of 19 October 1928, Reports of International Arbitral Awards, vol. XXIX, 469-470, 472: "[...] et à l'article 18 lui-même, le caractère d'une règle de droit à laquelle il n'est pas libre aux Etats, membres de la Société des Nations, de déroger par des stipulations particulières, entre eux (*jus cogens*). [...] les Parties contractantes sont, l'une et l'autre, liées par la même règle de droit imperative (*jus cogens*), qui prévaut sur leur liberté d'agir en matière de traités internationaux".

⁷ Permanent Court of International Justice, case *Oscar Chin (United Kingdom v. Belgium)*, judgment of 12 December 1934, 1934 PCIJ (series A/B), no 63 (December 1934), 341.

ate a *jus cogens*, the effect of which would be that, once States have agreed on certain rules of law, and have also given an undertaking that these rules may not be altered by some only of their number, any act adopted in contravention of that undertaking would be automatically void”.

After the 2nd World War we may observe multiple referrals to *jus cogens*. Peremptory norms of international law were deliberated by the International Court of Justice (ICJ) in *Nicaragua v. the United States*⁸, *Congo v. Rwanda*⁹, *Germany v. Italy*¹⁰, *Belgium v. Senegal*¹¹, and by the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Furundzija*¹², *Prosecutor v. Delacic*¹³ and *Prosecutor v. Kunarac*¹⁴. *Jus cogens* was also dis-

⁸ International Court of Justice, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, judgment of 27 June 1986, ICJ Reports 1986, p. 14, 190. „A further confirmation of the validity as customary international law of the prohibition of the use of force expressed in Article 2 paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that “the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule of international law having the character of *jus cogens*” (paragraph (1) of the Commentary of the Commission to Article 50 of its draft Articles on the Law of Treaties, ILC Yearbook, 1966-II, p. 247). *Nicaragua in its Memorial on the Merits submitted in the present case states that the principle prohibiting the use of force embodied in Article 2 paragraph 4, of the Charter of the United Nations “has come to be recognized as *jus cogens*”. The United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a “universal norm”, a “universal international law”, a “universally recognized principle of international law, and a “principle of *jus cogens*””.*

⁹ International Court of Justice, *Case Concerning Armed Activities on the Territory of Congo (Democratic Republic of the Congo v. Rwanda)*, judgment of 3 February 2006, ICJ Reports 2006, p. 6, 64.

¹⁰ International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, judgment of 3 February 2012, ICJ Reports 2012, p. 99, 92-97.

¹¹ International Court of Justice, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, judgment of 20 July 2012, ICJ Reports 2012, p. 422, 99.

¹² International Criminal Tribunal for the Former Yugoslavia, case IT-95-17/I-T *Prosecutor v. Furundzija*, decision of 10 December 1998, 144-154.

¹³ International Criminal Tribunal for the Former Yugoslavia, case IT-96-21-T *Prosecutor v. Delacic and others*, decision of 16 November 1998, 454.

¹⁴ International Criminal Tribunal for the Former Yugoslavia, case IT-96-23-T i IT-96-23/1 *Prosecutor v. Kunarac*, decision of 22 February 2001, 466.

cussed by the European Court of Human Rights (ECtHR) in *Al-Adsani*¹⁵ and *Hirsi Jamaa*¹⁶.

As it would appear from the above mentioned decisions of international bodies, the concept of *jus cogens* is very well entrenched in international law. Nevertheless, we still might find opinions of legal scholars, who deny its existence. Such view was presented for example by U. Linderfalk, who analysed the prohibition of use of force, being commonly recognized as peremptory norm. He noticed that there can be found a permissible derogation from this rule, namely the right to self-defence. This author concluded, that there exist no norm of public international law that allows absolutely no exceptions and therefore the concept of *jus cogens* is purely theoretical, deprived of any practical meaning¹⁷. On the other hand, we may find opposite opinions, for example the view of C. Mik. According to this author, it is an inaccurate simplification to understand exceptions to a peremptory norm as impermissible derogations. An imperative norm of international law should be always treated as a whole, meaning a given rule with the commonly approved exceptions, if they exist. In that case, the exceptions should be precisely defined¹⁸.

To acknowledge a peremptory status of a given norm, several conditions should be fulfilled. Without any doubts, *jus cogens* is binding as a customary rule. As it has been already mentioned, another prerequisite of such recognition is the impossibility of providing for any derogation. Even if some States in international treaty concluded between them exclude the application of a given norm, it does not eliminate the *jus cogens* status of that norm. We are deliberating a norm permitting no derogation due to

¹⁵ European Court of Human Rights, case 35763/97 *Al-Adsani v. the United Kingdom*, judgment of 21 November 2001.

¹⁶ European Court of Human Rights, case 27765/09 *Hirsi Jamaa and others v. Italy*, judgment of 23 February 2012.

¹⁷ "Jus cogens is a term used for rhetorical purposes, but on closer analysis we should admit that in positive international law jus cogens norms simply do not exist". Ulf Linderfalk, *The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?*, European Journal of International Law (5) 2007, 854-871.

¹⁸ Cezary Mik, *Ius cogens we współczesnym prawie międzynarodowym*. In: *Aksjologia współczesnego prawa międzynarodowego*, ed. Agata Wnukiewicz-Kozłowska, Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2011, 206. Cezary Mik, *Jus cogens in contemporary international law*, Polish Yearbook of International Law 2013: 44.

its nature, protecting interests of the international community as a whole, situated beyond any particular interests of individual States¹⁹. A peremptory norm is binding even in spite of or independently of a formulated *ad hoc* will of particular States. However, a mere fulfilment of this single condition is not sufficient to regard a given norm as *jus cogens*.

A status of peremptory norm of international public law is not determined by its absolute character or a lack thereof. Among *jus cogens* we may find norms that are commonly regarded as absolute, for example the prohibition of torture, what is confirmed by numerous international treaties²⁰. On the other hand, we may point out norms that might allow certain limitations and exceptions, for example the prohibition of use of force, that was mentioned previously in this paper. Another illustration is the right to a fair trial, approved as *jus cogens* by the Inter-American Court of Human Rights (IACtHR)²¹, although its present status as an imperative norm might be questioned. Once again it has to be underlined, that the author of this article shares the opinion of C. Mik, that a peremptory norm means a rule of international law together with approved exceptions. Therefore, the absence of an absolute character of a given norm should not exclude its peremptory nature.

Without any doubts, there is no constant set of norms that could be classified as *jus cogens*. This catalogue of norms evolves, it changes over time,

¹⁹ Andrew Hudson, *Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights*, Berkeley Journal of International Law (25) 2007, 216. Cezary Mik, *Ius cogens we współczesnym prawie międzynarodowym*. In: *Aksjologia współczesnego prawa międzynarodowego*, ed. Agata Wnukiewicz-Kozłowska, Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2011, 208, 210.

²⁰ Art. 2 of the Convention against Torture and Other Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984 prohibits any kind of torture and provides that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Art. 3 and Art. 15 of the European Convention on Human Rights do not allow any exception to the prohibition of torture, what was confirmed by the ECtHR in case 22978/05 *Gäfgen v Germany*, judgment of 1 June 2010, 87-93.

²¹ Inter-American Court of Human Rights, case Goiburú and others v. Paraguay, judgment of 22 September 2006, 131.

although this process is extended. Some norms, who previously were not considered to be peremptory, convert to imperative norm and a new *jus cogens* norm emerges. At this moment we may point out the following set of norms that were acknowledged as *jus cogens* by different international bodies:

- 1) the prohibition of aggression, understood also as the prohibition of use of force together with approved exceptions, including right to self-defence and right to collective self-defence, as was pointed out in 1986 by the ICJ in *Nicaragua v. the United States*²²;
- 2) the prohibition of genocide, confirmed by the ICJ in 2006 in *Congo v. Rwanda*²³;
- 3) the prohibition of slavery and human trafficking, deliberated in 2003 by the IACtHR in *Aloeboetoe and others v. Suriname*²⁴;
- 4) the prohibition of torture that peremptory nature was confirmed by the ICJ in 2012 in *Belgium v. Senegal*²⁵, and previously by the ECtHR in *Chahal*²⁶ of 1996, *Al-Adsani*²⁷ of 2001 or *Gäfgen*²⁸ of

²² International Court of Justice, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)*, judgment of 27 June 1986, ICJ Reports 1986, p. 14, 191-193.

²³ International Court of Justice, *Case Concerning Armed Activities on the Territory of Congo (Democratic Republic of the Congo v. Rwanda)*, judgment of 3 February 2006, ICJ Reports 2006, p. 6, 64.

²⁴ Inter-American Court of Human Rights, case *Aloeboetoe i inni v. Surinam*, judgment of 10 September 2003, 57. „*The Court does not deem it necessary to investigate whether or not that agreement is an international treaty. Suffice it to say that even if that were the case, the treaty would today be null and void because it contradicts the norms of jus cogens superveniens. In point of fact, under that treaty the Saramakas undertake to, among other things, capture any slaves that have deserted, take them prisoner and return them to the Governor of Suriname, who will pay from 10 to 50 florins per slave, depending on the distance of the place where they were apprehended*”.

²⁵ International Court of Justice, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, judgment of 20 July 2012 r., ICJ Reports 2012, p. 422, 99.

²⁶ European Court of Human Rights, case 22414/93 *Chahal v. the United Kingdom*, judgment of 15 November 1996, 79.

²⁷ European Court of Human Rights, case 35763/97 *Al-Adsani v. the United Kingdom*, judgment of 21 November 2001, 59-61.

²⁸ European Court of Human Rights, case 22978/05 *Gäfgen v Germany*, judgment of 1 June 2010, 87-93.

- 2010, as well as by the IACtHR in *Marritza Urrutia v. Guatemala*²⁹ of 2003;
- 5) the prohibitions stemming from the law of armed conflict that prohibits the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour, mentioned by the ICJ in 2012 in *Germany v. Italy*³⁰;
 - 6) the prohibition against imposing death penalty on juvenile perpetrators, as was decided by the Inter-American Commission of Human Rights in its opinion of 2002 in *Michael Domingues v. the United States*³¹;
 - 7) the right to a fair trial, referred to by the IACtHR in 2006 in *Goiburú and others v. Paraguay*³², although it has to be underlined that in its recent judgment of 2016 in *Al-Dulimi*³³ the ECtHR concluded that despite their importance, the guarantees of a right to a fair trial cannot be considered to be among *jus cogens* norms in the current state of international law.

Basing on the above mentioned examples we may observe, that it is not only problematic to decide, which norms are peremptory in nature, but also to indicate, what body is competent to denominate a norm as *jus cogens*. Of course, we should appreciate the practice of international courts, tribunals and other judicial organs, but on the other hand we should not

²⁹ Inter-American Court of Human Rights, case *Marritza Urrutia v. Guatemala*, judgment of 27 November 2003, 92.

³⁰ International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, judgment of 3 February 2012, ICJ Reports 2012, p. 99, 93.

³¹ Inter-American Commission on Human Rights, case 12.285 *Michael Domingues v. the United States*, opinion of 22 October 2002, 85. “On this basis, the Commission considers that the United States is bound by a norm of *jus cogens* not to impose capital punishment on individuals who committed their crimes when they had not yet reached 18 years of age. As a *jus cogens* norm, this proscription binds the community of States, including the United States. The norm cannot be validly derogated from, whether by treaty or by the objection of a state, persistent or otherwise”.

³² Inter-American Court of Human Rights, case *Goiburú and others v. Paraguay*, judgment of 22 September 2006, 131.

³³ European Court of Human Rights, case 5809/08 *Al-Dulimi and Montana Management Inc. v. Switzerland*, judgment of 21 June 2016, 136.

underestimate the practice of international organizations, States and their associations³⁴. It is exactly the interplay of different subjects and bodies acting in the international dimension and the analysis thereof that might give us a solid basis for making a determination of the *jus cogens* character of the examined norm.

However problematic as to its content, at the present state of international public law and the practice of numerous subjects we may conclude, that the views denying the existence of *jus cogens* should be rejected. Peremptory norms form substantial part of international law, especially as they permit the construction of hierarchy between different norms. They facilitate judicial bodies to determine and justify that one norm prevails over another one and therefore its application should have priority, whereas the application of *legi inferiori* should be suspended. The international jurisprudence and doctrine prove also, that the catalogue of *jus cogens* norms evolves and new norms having peremptory nature may emerge in future.

REFERENCES:

- Anthony Aust. 2003. *The Role of Human Rights in Limiting the Enforcement Powers of the Security Council: A Practitioner's View*. In: *Review of the Security Council by Member States*, ed. Erika de Wet, André Nollkaemper, 31-38. Amsterdam: Intersentia.
- Bianchi, Andrea. 2006. *Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion*, European Journal of International Law 5: 881-919.
- Frowein, Jochen Abr., Nico Krisch Nico. 2002. *Introduction to Chapter VII of the Charter of the United Nations*. In: *The Charter of the United Nations. A Commentary*, ed. Bruno Simma, 701-716. New York: C.H. Beck.
- Geiss, Robin. 2005. *Humanitarian Safeguards in Economic Sanctions Regimes: A Call for Automatic Suspension Clauses, Periodic Monitoring, and Follow-Up Assessment or Long-Term Effects*, Harvard Human Rights Journal 18: 167-199.

³⁴ Cezary Mik, *Ius cogens we współczesnym prawie międzynarodowym*. In: *Aksjologia współczesnego prawa międzynarodowego*, ed. Agata Wnukiewicz-Kozłowska, Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2011, 212-213.

- Hudson, Andrew. 2007. *Not a Great Aset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights*, Berkeley Journal of International Law (25): 203-227.
- Linderfalk, Ulf. 2007. *The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?*, European Journal of International Law (5): 853-871.
- Mik, Cezary. 2011. *Ius cogens we współczesnym prawie międzynarodowym*. In: *Aksjologia współczesnego prawa międzynarodowego*, ed. Agata Wnukiewicz-Kozłowska Agata, 177-276. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego.
- Mik, Cezary. 2013. *Jus cogens in contemporary international law*, Polish Yearbook of International Law: 27-93.
- Nagan, Winston P, Joshua L. Root. 2013. *The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory*, North Carolina Journal of International Law and Commercial Regulation 38: 371-471.
- Oette, Lutz. 2002. *A Decade of Sanctions against Iraq: Never Again! The End of Unlimited Sanctions in the Recent Practice of the UN Security Council*, European Journal of International Law 1: 93-103.
- Orakhelashvili, Alexander. 2005. *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, European Journal of International Law 1: 59-88.
- Reinisch, August. 2001. *Developing human rights and humanitarian law accountability of the Security Council for the imposition of economic sanctions*, American Journal of International Law 4: 851-872;
- Weatherall, Thomas. 2015. *Jus cogens and sovereign immunity: reconciling divergence in contemporary jurisprudence*, Georgetown Journal of International Law 46 (2015), 1151-1212;
- Weisburd, A. Mark. 1995. *The emptiness of the concept of jus cogens, as illustrated by the war in Bosnia-Herzegovina*, Michigan Journal of International Law 1: 1-51;
- de Wet, Erika. 2003. *The role of human rights in limiting the enforcement power of the Security Council: A principled view*. In: *Review of the Security Council by Member States*, ed. Erika de Wet, André Nollkaemper, 7-30. Amsterdam: Intersentia.