

A Critique on the Concept of Jus Cogens and Its Substantive Content in International Law: A Brief Overview

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Abstract

The legal concept of *jus cogens* in international law was introduced by the Vienna Convention on the Law of Treaties (VCLT). This convention does not explicitly define *jus cogens*. Article 53 of the VCLT instead enumerates the conditions that norms should fill in order to qualify as peremptory norms. This convention, however, is still lack of clarity on the concept of *jus cogens* norms and its substantive content. In this paper, the authors briefly explained to readers: what does the term *jus cogens* mean in a general sense; what norms are falling within the catalogue of *jus cogens*; and how do we decide which norms are *jus cogens* norms. Hence, this paper deals with problems and difficulties arise under international law with regard to the concept of *jus cogens* and its substantive content using a conceptual, normative and case approach.

Keywords: *Jus Cogens*, VCLT, International Law, Peremptory norm.

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1. INTRODUCTION

1.1. Introductory notes on Definition and Nature of *Jus Cogens*

Despite the legal concept of *jus cogens* was introduced by the VCLT¹, its precise defining, criteria or elements, and substantive content were remains in dispute. Thus, the term *jus cogens* is in vogue. The legal nature of the said concept remains a subject of debate with all sort of speculation.² Besides, its content is constantly evolving which brings additional issues to the definition. Hence, defining *jus cogens* might be the first step in determining its substantive and procedural impact.

Accordingly, the term *jus cogens* come from Latin *Jus* (“Law”) and *Cogens* from *cogere* (“compel”), *jus cogens* can be rendered by “*compelling law*” or “*peremptory norm*”.³ It refers to certain fundamental overriding principles of international law from which no derogation is ever permitted.⁴ In other words, *jus cogens*, the literal meaning of which is “*compelling law*” is the technical term given to those norms of general international law that are argued as hierarchically superior.⁵ These are, in fact, a set of rules which are peremptory in nature and from which no derogation is allowed under any circumstances.

Despite controversies related to its definition, its function is to limit the autonomy of states from contracting out of certain rules of law that is significant in international law. Thus, this paper aimed at shedding light on critiques and controversy with regard to *jus cogens* concept and its substantive content.

1.2. Critiques on *Jus Cogens* Concept

There is a vast literature about the *jus cogens* and its importance in the development of international law.⁶ Despite this, there is little consensus on the content and scope of this concept. Two groups of international scholars can be distinguished based on their attitude towards the concept of *jus cogens*. The first group of scholars, the number of which has recently started to decrease is the “*skeptics*”. They recognize the provisions of the VCLT on the concept of *jus cogens*, noting, however, that this concept has not gained its substantive content yet. Thus, they believe that the *jus cogens* norms exist only in the theory of international law, with no positive character.⁷ For instance, to

¹ Article 53 of VCLT reads: “*a peremptory norm of international law is a norm accepted and recognized by the international community as whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character*”.

² R.V. Sarara, “*A Critical Analysis of the Scope and Application of Jus Cogens*”, University of Kent, (LLM Thesis), (2012), at 2.

³ I. Brownlie, “*Principles of Public International Law*”, 5th ed. Oxford (1998), at 516; Rebecca M.M. Wallace, “*International Law*”, (2nd ed. 1994), at 33.

⁴ I. Brownlie, *Supra* note 3, at 516.

⁵ Rebecca M.M. Wallace, *Supra* note 3, at 33.

⁶ Alfred Mwendata and Joseph Sehorana, “*The Determination and Enforcement of Jus Cogens Norms: For Effective Human Rights Protection*”, IOSR Journal Of Humanities And Social Science (IOSR-JHSS) Vol. 21, Issue 8, Ver.7 (Aug.2016), at 66-82.

⁷ Linderfalk. U, “*The Effect of Jus Cogens Norms*”, *Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences*”? The

ascertain the vagueness of *jus cogens*, in his memoir on a “*Critical Analysis of the Scope and Application of Jus Cogens*, R.V.Sarara concludes that: “its practical application is faced with many challenges due to doctrinal incoherency. The principle seems to be thriving due to its uncertainty and ambiguity”.¹

The point is also emphasized by A.M. Weisburd maintaining that: “any consideration of the concept of *jus cogens* is necessarily rather complex”.² The author considers the implications of the difficulty in specifying the substantive content of *jus cogens*, arguing that this problem reveals fundamental theoretical and practical problems with the concept. He also attempts to show that considering the concept of an international *jus cogens* in light of reasonable criteria of legitimacy exposes both theoretical problems and practical difficulties and concludes that: “the concept of *jus cogens* as actually defined can neither make any sense nor serve any useful purpose in the international legal system”.³

Indeed, it was usually criticized for emptiness, vagueness, uselessness, and a great potential for political abuse, as well as the insufficiency of its conceptual bases, thereby challenging the very existence of the notion of *jus cogens*.⁴

The second group of scholars those who conventionally defined as the “*affirmants*” i.e., those affirming the existence and effectiveness of peremptory norms.⁵ The “*affirmants*” refer to Article 53 of the VCLT; interpreting it as such that extends the validity of the *jus cogens* norm status of the international law in general. Some supporters of this position argue that the impact of peremptory norms goes even beyond this interpretation. They have sought to defend the usefulness of this concept and suggested definitions containing detailed criteria allowing the establishment of the *jus cogens* character of specific norms.⁶ Again, others implicitly recognize the existence of the *jus cogens* concept and attempt to determine its nature and particularity within the rules of international law.⁷

Still, all those academic discussions on *jus cogens* share a common approach, namely the fact that their criticisms of support for and overall analysis of *jus cogens* invariably relate to the vagueness of this concept. Apart from confirming the actual vagueness of the concept of *jus cogens*, it goes further to suggest what to do and by whom to overcome this issue.

2. SUBSTANTIVE CONTENT, AND CASE LAW AND PRACTICE OF *JUS COGENS*

2.1. Content of *Jus Cogens* and its Controversy

As far as the content of *jus cogens* is concerned, the VCLT provides on examples of *jus cogens* and does not specify its content. No list is compiled of *jus cogens*; it is the case law that erected these peremptory norms.⁸ In its final draft of the law of treaties, the International Law Commission (ILC) deliberately dispensed with listing concrete examples of *jus cogens* norms.⁹ It did so because, as it put the matter, there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*.¹⁰ In other words, drafters of Article 53 of VCLT did not spell out which norms of international law fell within the definition given of peremptory norms. The ILC considered it to be the right course to leave the full content of the rule to be worked out in state practice and in the jurisprudence of international tribunals.¹¹ Some members of the ILC favored including examples of peremptory norms in the body of the treaty, at least of the most settled and accepted *jus cogens* rules.¹² In its commentary, the ILC gives two reasons for not identifying any rules of *jus cogens*. First, the mention of some cases might lead to misunderstanding as to the position concerning other cases. Secondly, an attempt to draw up, even on a selective basis, a list of rules of *jus cogens* might find the ILC engaged in a prolonged study of matters which fall outside the draft Articles.¹³ However, the members of the ILC do acknowledge in their commentary obvious and well-settled rules of *jus cogens*¹⁴ about which there is general agreement.

Finally, the ILC was concluded by stating that it was:

European Journal of International Law, 18, 5, 855, (2008), at 32.

¹ R., V., Sarara, *Supra* note 2, at 58.

² Weisburd. A.M. “*Customary International Law: The Problem of Treaties*”, Vanderbilt Journal of Transitional Law (1988), at 12.

³ *Ibid*, at 13.

⁴ Predrag Zenovic, “*Human Rights enforcement via Peremptory Norms-a challenge to State Sovereignty*”, RGSL Research Papers NO.6, ISSN 1691-9254, (2012), at 22.

⁵ Natalia Dromina Voloc, “*Imperativization of International Law: Jus Cogens Concept in Jurisprudence*”, European Political and Law Discourse, ISSN 2336, 5439, Vol. 2 Issue 1(2015), at 32.

⁶ L. Yearwood, “*Jus Cogens: Useful Tool or Passing Fancy? A Modest Attempt at Definition*”, in British Law Journal, Vol.16,(2006), at 38.

⁷ C. Kahgan, “*Jus Cogens and the Inherent Right to Self-Defense*”, in International Law Students Association Journal, Issue 3, 1996-1997, at 767.

⁸ P. B., Stephan Vanderbilt, “*The Political Economy of Jus Cogens*”, in Journal of Transnational Law, Vol.44, (2011), at 66.

⁹ See Draft Articles on the Law of Treaties, Report of the International Law Commission on the work of its eighteenth, Yearbook, (1966), Vol. II, at 248.

¹⁰ P. B., Stephan Vanderbilt, *Supra* note 15, at 68.

¹¹ Egon Schwelb, “*Some Aspects of International Jus Cogens: As Formulated by the International Law Commission*”, 61 AM.J. INT’LL. 946 (1967), at 963.

¹² *Ibid*

¹³ *Ibid*

¹⁴ The 1963 I.L.C.Y.B. (I), 705th Mtg, para.3 of the commentary to Draft Article 50.

“not possible to state exhaustively what are the rules of international law that have the character of *jus cogens*, but a feature common to them, or to a great many of them evidently is that they involve not only legal rules but also considerations of morals and of international good order”.¹

2.2. Catalogues of Substantive Content of *Jus cogens*

The problem of how to identify catalogues of substantive content of *jus cogens* is not easy to resolve in abstract. As most commentators point out, it is not only that there is no single authoritative catalogue of *jus cogens* norm, but also there is no agreement about the criteria for inclusion on that catalogue.

Although Article 53 of the VCLT provides some guidance to the identification of *jus cogens* nevertheless elevation of norms of international law to the status of *jus cogens* is not an easy task. There are obvious risks in over use of the notion and consequently often attempts to do so attract criticism.² This is particularly so when for instance attempts are made to exhaustively list entire treaties as being *jus cogens*.³ In fact, as it has been stated: “more authority exists for the category of *jus cogens* than exists for its particular content”.⁴ To prove the existence of *jus cogens* norms one should refer to the international treaties, the decisions of international judicial institutions, first of all of the International Court of Justice (ICJ), as well as the decisions of national courts, international declarations and the works of well-known reputable scholars. Nevertheless it is possible to give some lists of norms which have been considered as peremptory in nature.

There are today a number of pronouncements from various judicial or diplomatic organs that give an idea of what might count as *jus cogens* norms. In its Commentary to the Draft Articles on State Responsibility in 2001 the ILC gave as examples of *jus cogens* the prohibition of aggression, slavery and slave trade, genocide, racial discrimination and apartheid, torture, basic rules of international humanitarian law applicable in armed conflict, and the right to self-determination.⁵ In the *Furundzija case*, the International Criminal Tribunal for the former Yugoslavia defined torture as both a peremptory norm and an obligation *erga omnes*.⁶ Indeed, the International Criminal Tribunal for the Former Yugoslavia in the *Kupreskic case* stated: “most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character”.⁷

Moreover, in the recent case-law of the Inter-American Court for Human Rights (IACtHR), for instance, *jus cogens* status has been accorded to the prohibition of torture; the prohibition of cruel, inhuman, or degrading treatment; the principle of equality before the law, equal protection before the law, and non-discrimination; the prohibition of a pattern of extralegal executions fostered or tolerated by the state; the prohibition to commit crimes against humanity; access to justice; the prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible.⁸

Overall, the most frequently cited candidates for the status of *jus cogens* includes: (a) the prohibition of aggressive use of force; (b) the right to self-defence; (c) the prohibition of genocide; (d) the prohibition of torture; (e) crimes against humanity; (f) the prohibition of slavery and slave trading; (g) the prohibition of piracy; (h) the prohibition of racial discrimination and apartheid, and (i) the prohibition of hostilities directed at civilian population (basic rules of international humanitarian law).⁹

2.3. International Case Law and Practice Concerning *Jus Cogens* norms

As mentioned earlier, *jus cogens* has been referred to in a number of judgments of both the Permanent Court of International Justice and the ICJ as well as in dissenting and separate opinions of various judges.¹⁰ Many courts and tribunals, both international and domestic, have used *jus cogens* based arguments in substantiating their decisions and judgments. The ICJ has been reluctant to refer to *jus cogens* in its decisions. A typical example in this regard is the court’s observations on the prohibition on the use of force in the *Military and Paramilitary case*.¹¹ The Court referred to the fact that the prohibition on the use of force is often referred to by states as being “a

¹ Vol. II, ILC Yearbook (1958), at 40-41.

² K.Parker and L.B. Neylon, in “*Jus Cogens: Compelling the Law of Human Rights*”, 12 Hastings International and Comparative Law Review (1989), at 411.

³ J.Sztucki, “*Jus Cogens and the Vienna Convention on the Law of Treaties*”, (1974), at 82.

⁴ I. Brownlie, *Supra* note 3, at 516 – 517.

⁵ Draft Articles on State Responsibility, Commentary on Article 40, paras.4-6 in Official Records of the General Assembly, Fifth-sixth Session (A/56/10), at 283-284.

⁶ *Prosecutor v. Anto Furundzija*, Judgment of 10 December 1998, Case No. IT-95-17/1, Chamber II, 121 ILR (2002), at 260-262, paras. 151-157.

⁷ *Prosecutor v. Kupreskic et al*, 14 January 2000, ICTY, (Trial Chamber), para. 520.

⁸ Frederic Vanneste, “*General International Law Before Human Rights Courts*”: *Assessing the Specialty Claims of Human Rights Law*”, (Cambridge: Intersentia, 2010), at 124.

⁹ Report of the International Law Commission to the General Assembly A/CN. 4/L.682, Report on Fragmentation of International Law, Fifty-eight Session Geneva, 1 May-9 June and 3 July-11 August, at 181-190.

¹⁰ *Ibid*

¹¹ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua. v. United States)*, 1986 ICJ Reports 14 at para 190.

fundamental or cardinal principle of customary international law”, that the Commission has referred to the law of the Charter of *jus cogens*”, and both parties to the dispute referred to its *jus cogens* status.¹ The Court itself, however, did not state expressly that it viewed the prohibition on the use of force as constituting a norm of *jus cogens*. In more recent cases, however, the Court has been more willing to characterize certain norms as *jus cogens* and to engage more with the intricacies of *jus cogens*. In Questions Relating to the Obligation to Extradite or prosecute, for example, the Court states that: “*the prohibition of torture is part of customary international law and it has become jus cogens*”.² Further, the Court indicated that the prohibition was grounded in a widespread international practice and on the *Opinio juris* of States; it appeared in numerous international instruments of universal application; it has been introduced into the domestic law of almost all States, and that acts of torture are regularly denounced within national and international fora.³

In the *Jurisdictional Immunities of the State* case, the court considered various aspects of *jus cogens*, including its relationship with sovereign immunity from jurisdiction. It held that, because rules of immunities and possible *jus cogens* norms of the law of armed conflict address different matters, there was no conflict between them.⁴ According to the court, immunities are procedural in nature, regulating the exercise of national jurisdiction in respect of particular conduct, and not the lawfulness of the conduct being proscribed by *jus cogens*. There could, therefore, be no conflict between immunity and *jus cogens*.⁵ The Court draws a firm distinction between the substantive prohibition on state conduct constituting *jus cogens* and the procedural immunity states enjoy from national jurisdiction, holding that they operate on different planes such that they cannot be in conflict even in cases where a means by which a *jus cogens* rule might be enforced was rendered unavailable.⁶ In addition to addressing the issue of the relationship between immunity and *jus cogens*, the Court’s judgment also suggests that the prohibition of crime against humanity constitutes *jus cogens*.⁷

A similar view of the relationship between *jus cogens* and procedural rules is adopted by the Court in *Armed Activities on the Territory of the Congo (DRC v. Rwanda)*, where the court found that the fact that a matter related to a *jus cogens* norm in that case the prohibition on genocide cannot itself provide a basis for the jurisdiction of the Court to handle the dispute.⁸ The Court’s reasoning in these cases could be interpreted as suggesting that international rules unrelated to the legality of the underlying conduct are not affected by the fact that the prohibition of that conduct is *jus cogens*. In any event, these recent cases address the issue of the relationship between *jus cogens* and other rules of international law in a way that could assist the ILC in systematizing the rules of international law in this area.

Moreover, *jus cogens* was also discussed by the European Court of Human Rights (ECtHR) in the prohibition of slavery and human trafficking deliberated in 2003 by the IACtHR in *Aloeboetoe and others v. Suriname*⁹; the prohibition of torture that peremptory nature was confirmed by the ECtHR in *Chahal*¹⁰ of 1996, *Al-Adsani*¹¹ of 2001 or *Gafgen*¹² of 2010, as well as by the IACtHR in *Marritza Urrutia v. Guatemala*¹³ of 2003; 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*¹⁴; and the right to a fair trial, referred to by the IACtHR in 2006 in *Goiburú and others v. Paraguay*¹⁵, although it has to be underlined that in its recent judgment of 2016 in *Al-Dulimi*¹⁶ 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*”.

From 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 associations. It is exactly the interplay of different subjects and bodies acting in the international dimension and the analysis there of that might give us a solid basis for making a determination of the

¹ Ibid, para. 190.

² *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, ICJ Reports 2012, para. 99.

³ Ibid.

⁴ See paras 92, 95 and 97 *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, ICJ Reports 2012; See para 64 in the *Armed Activities in the Congo Case* (New Application 2002: *DRC v Rwanda*) concerning the consequences of *jus cogens* on jurisdiction and para 64 in the *Al-Adsani Case*.

⁵ Para 93 of the *Jurisdictional Immunities of the State Case*.

⁶ Para. 95 of the *Jurisdictional Immunities of the State Case*.

⁷ Ibid, at 95 referring to its judgement in the *Arrest Warrant Case*.

⁸ *Armed Activities on the Territory of Congo Case*, at para.64.

⁹ IACtHR, Case *Aloeboetoe I inni v. Surinam*, Judgment of 10 September 2003, 57.

¹⁰ ECtHR, Case 22414/93 *Chahal v. the United Kingdom*, Judgment of 15 November 1996, 79.

¹¹ ECtHR, Case 35763/97 *Al-Adsani v. the United Kingdom*, Judgment of 1 November 2001, 59-61.

¹² ECtHR, Case 22978/05 *Gafgen v. Germany*, Judgment of 1 June 2010, 87-93.

¹³ IACtHR, Case *Marritza Urrutia v. Guatemala*, Judgment of 27 November 2003, 92.

¹⁴ IACtHR, Case 12.285 *Michael Domingues v. the United States*, Opinion of 22 Oct, 2002, 85.

¹⁵ IACtHR, Case *Goiburú and others v. Paraguay*, Judgment of 22 September 2006, 131.

¹⁶ ECtHR, Case 5809/08 *Al-Dulimi and Montana Management Inc. v. Switzerland*, Judgment of 21 June, 2016, 136.

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.

3. CONCLUDING REMARKS

From the above discussion, the definition and substantive contents of *jus cogens* remain ill-defined and contentious. Its precise nature, what norms qualify as *jus cogens* in international law remains unclear? Even, the ILC has nothing that no authoritative standards have emerged to determine the exact substantive content of *jus cogens*, or the process by which international legal norms may rise to peremptory status. Though, it has been debatable issue but there is consensus among international legal scholars that some legal norms, not all, have acquired the status of *jus cogens*. It is suggested that the ILC should provide an illustrative list of existing substantive content of *jus cogens* norms; make a useful contribution to the progressive development and codification of international law by analyzing the state of international law on *jus cogens* and providing an authoritative statement of the nature of *jus cogens*, and the requirements for characterizing a norms as *jus cogens* and the consequences or effects of *jus cogens*.

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