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IS THERE A SPACE FOR *JUS COGENS* IN PRESENT INTERNATIONAL LAW? REMARKS IN THE CONTEXT OF A BAN ON THE USE OF FORCE

Abstract: The work of the ILC on *jus cogens* constitutes an important factor in a discussion on peremptory norms in international law. The present paper presents reflections on the definition and identification of *jus cogens*, the legal effects of *jus cogens*, and consequences of its violations. Finally, the author discusses the ban on the use of force in the context of *jus cogens*, presenting doubts as to its qualification as peremptory.

Keywords: International Law Commission, *jus cogens*, use of force

After several years of relatively intensive work, The UN International Law Commission (ILC) presented a draft of articles on norms absolutely binding in international law.[1] The problem of peremptory norms from has caused controversy from the very moment they were formulated as part of preparatory work for the codification of treaties in the mid-1960s. It continues to be controversial to this day. The concept of mandatory norms has as many supporters as opponents. They accept or equally reject the concept of *jus cogens* as well as its detailed solutions. This issue was presented in detail by Cezary Mik in an article published recently in the Polish Yearbook of International Law.[2] Our goal is not so much a systemic presentation of peremptory norms which influenced the construction of *jus cogens* in

1 Text of the draft conclusions on peremptory norms of general international law (*jus cogens*) and commentaries thereto, UN Doc. A/74/10 p. 141 ff.

2 Mik, "*Jus Cogens* in Contemporary International Law", 27.

international law but rather an analysis of whether the ILC draft influenced the shape of international *jus cogens*.

The construction of mandatory standards triggers not only theoretical dispute, but also practical controversies. It would be simple to say that the term is often overused. Its supporters refer to the *jus cogens* norms often without reflection, without even trying to prove that *jus cogens* meets the conditions suggested by the ILC, for example. Moreover, we do not prejudge at this stage whether such conditions are justified. On the other hand, the opponents of peremptory norms highlight the formal and practical difficulties related to their identification, and the determination of effects and application in practice. Even the assessment of states' positions on the work of the Commission is extremely differentiated: some states indicated that the Commission relied on positive state practice; just as many states, however, believed that in practice there was insufficiently consistent evidence of state practice to formulate general guidelines acceptable to the majority of the international community. Interesting in this context is the comment by Dire Tladi, the Commission's Special Rapporteur on Peremptory Norms. He stated that it was not the task of the ILC to settle doctrinal disputes but to opt for one solution or the other and thus contribute to the progressive development of the law of international law.[3] However, such approach is not seem convincing. Even if the Commission acts in the framework of the progressive development of international law, it should nevertheless operate within a framework based on existing international law. As a rule, states are not overly willing to accept propositions that go too far beyond the law in force. Tladi himself stated that the purpose of the Commission's work was not novelty, but guidelines for the identification of *jus cogens*, i.e. the Draft conclusions are methodological, not substantive.

Russia's aggressive war against Ukraine, which has been going on in a hybrid form since at least 2014 and started with the illegal annexation of Crimea, has once again raised the question of the nature of the prohibition of the use of force in international law. Since it is the prohibition of the use of force that is most often mentioned as a peremptory norm, we will try to assess whether, in the light of the criteria adopted by the ILC for the identification of *jus cogens*, we can assume that the prohibition of the use of force is really peremptory. Moreover, the Commission has adopted

3 Tladi, „The International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*), Making Wine from Water or More Water than Wine", 246.

guidelines on the effects of breach of *jus cogens*. Confronting international practice with the achievements of the ILC will allow us to confirm whether the ban on the use of force can actually be treated as *jus cogens*.

1. Definition

In its guidelines, the ILC repeated the definition formulated in Article 53 of the 1969 Vienna Convention according to which a peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of states as a 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. It is a logical solution from the point of view of legislative technique, however, that it did not solve the doubts already raised at the codification conference in 1969. First of all, the definition from the 1969 Vienna Convention defines a norm through its effect, which has certain practical consequences. First, it is necessary to select a certain norm in relation to which we assume that the agreement inconsistent with it will be considered by the international community to be invalid by operation of law. Next, we must check whether this community is actually willing to recognize this effect of the norm in question. This, of course, raises further questions. Firstly, what is the international community? Does it consist only of states, or also other entities of international law, and can the latter play some (crucial) role in creating or changing peremptory norms? The Commission in its work on customary law has long questioned the participation of non-state actors in the creation of customary law. It does not appear, however, that anyone would have doubts as to whether non-state actors, including in particular international organizations, are bound by international customary law. On the other hand, the ILC only indirectly indicates that peremptory norms are binding in relation to resolutions, decisions and other acts of international organizations. If they are contrary to *jus cogens*, they cannot give rise to international obligations, even if the acts would be binding in other circumstances. The Commission's conclusions do not contain any declaration of invalidity of such acts, which is, after all, the most characteristic consequence of *jus cogens*. In the context of work on peremptory norms, however, ILC unequivocally refers to the international community of states (such as draft conclusion 7 al.1 and 3) as entities whose actions may lead to the creation of absolutely binding law. As for other entities, their role is

limited to a purely auxiliary function, helping to read the will of states. We have doubts because the essence of international subjectivity of non-state actors implies that their role in law-making should be much more significant. Its limitation does not in any way result from the essence of these entities.

Secondly, how many states have to say in favour of a possible declaration of invalidity of a treaty contrary to a peremptory norm? Usually, the doctrine indicated that the peremptory norm must be recognized as such by the international community as a whole. In its conclusions, however, the Commission stressed that it is not required that a specific *jus cogens* standard be accepted by all states, but only by their dominant majority. It is surprising that at the same time the Commission ruled out the possibility of applying the concept of a persistent objector (i.e. a minimum deviation from the universal binding force applicable to general international law) with respect to *jus cogens*. The precise determination of how many states must consider a norm to be peremptory and whether any additional factors may be required of these states is left to practice. Interestingly, it was only in the commentary that the ILC mentioned that the *jus cogens* construction did not apply to regional (particular) norms. In our opinion, such a solution is correct and in line with the spirit of peremptory norms.

Thirdly, what acts or omissions of subjects of international law should be taken into account in the process of creating and applying peremptory norms. In this context, the Commission was not particularly inventive, noting brilliantly that evidence of acceptance and recognition that a norm of general international law is a peremptory norm (*jus cogens*) may take a wide range of forms. The evidence listed in the draft of the peremptory nature of international law standards include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; legislative and administrative acts; decisions of national courts; treaty provisions; and resolutions adopted by an international organization or at an intergovernmental conference. The catalogue corresponds to a large extent with evidence of practice and *opinio iuris* as elements of creation of customary law, invoked by the ILC in a draft concerning the identification of international customs.[4]

The definition in Article 53 of the 1969 Vienna Convention was formulated for the purposes of the international law of treaties. However, in the practice of the international courts (especially the International Court

4 UN Doc. A/73/10 p.134 and p. 140.

of Justice) it has not yet been considered invalid due to non-compliance with an absolutely binding norm. However, the formula in Article 53 seems to go beyond the law of the treaties, especially when it states that the *jus cogens* norm is not subject to derogation, and its modification is allowed only by creating a norm which is also mandatory in nature.

We have to consider whether the situation described in this provision is possible at all. The starting point for our discussion is the mechanism of amending the customary norm. The only way to modify a customary norm is for a state or group of states to take an action or omission that does not comply with the applicable norm. As stated by the International Court of Justice (ICJ), it is possible to interpret this situation in two ways. Either the new practice will be accepted by successive states until the majority of states find that the new practice is sufficiently coherent, uniform and extended in time to lead to the formation of a new customary norm; or else the new practice will be rejected by the international community as unlawful and hence will entail international responsibility. The latter situation does not lead to the acceptance of the new standard and we can omit it. Hence our interest remains entirely on the first of these contingencies. However, the problem seems to be that the development of a customary norm is in principle complicated. Apart from the concept known as instant customary law, which means that a customary standard is created on the basis of a single precedent, the legal effects of which are not objected to by most states, but the emergence of a customary standard is associated with the passage of time.

We decisively reject the possibility of concluding an international agreement in which the vast majority of states would agree that its provisions will be absolutely binding. Today, many international agreements are in force, the signatories of which are almost all countries in the world, but nearly none of these conventions reflects and protects the basic (vital and fundamental, following a formula used by the ICJ in the *Tehran Hostages* case with respect to diplomatic law) values and interests of the international community. On the other hand, the number of parties to many important conventions is not impressive.[5] If we were to take into account pure numbers and ignore the role

5 The 1985 Vienna Convention on the Protection of the Ozone Layer regroup contained 196 parties (States and the EU); two conventions on environmental law (Biological Diversity, and Climate Change) both had 193 parties; the 1961 Vienna Convention on Diplomatic Relations included 191 States; 1949 Geneva Conventions on Humanitarian Law had 193 parties; 1989 Convention on the Law of the Child and 1944 Chicago Convention on Civil Aviation included

of customary law, it would be difficult to classify the prohibition of racial discrimination as a *jus cogens* norm.

On the other hand, the concept – also taken into account by the ILC – that mandatory norms may result from or be included in the general principles of law seems to be much more interesting. The fundamental doubt arises only from the fact that the very concept of the general principles of law and their application in international law are highly controversial. Thus, the process of recognizing a standard resulting from a general rule would become even more multi-staged and complicated. Another matter is that the general principles of law may be naturally associated with the standards reflecting and protecting fundamental values of the international community.

We are aware that international law is a highly informal system. Nevertheless, it is difficult to completely ignore and reject formal elements, especially if we remember that an international legal norm may be the basis for a court decision in matters concerning the legal situation of individuals. Although not all norms and rules can be qualified as self-executing, this does not mean that norms other than self-executing cannot result in granting rights to individuals.

Here another fundamental issue arises. ILC uses the notion of general international law in its guidelines several times in the context of *jus cogens*, indicating that a peremptory norm must be of this nature. Meanwhile, this concept is not clearly defined in international law. In ICJ jurisprudence, the term general international law has been used interchangeably with the term customary international law, without any particular explanation or distinction.[6] General international law did not appear in Article 38

192 parties each. On the other hand, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide has currently 153 parties, and the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid has 110 parties. Apartheid was mentioned by the ICJ in the *Barcelona Traction* case as the *erga omnes* obligation what which in fact meant *jus cogens*.

6 *Pulp Mills on the River Uruguay (Argentina v. Uruguay) case*, Judgment of 20 April 2010, ICJ Reports 2010, 83, para. 204. See also discussion in separate opinions of judges Donoghue and Dugard in *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, ICJ Reports 2015, 665. The former judge identifies general international law with general customary law, while according to the latter the notion of general international law is much larger, as it includes also generally binding international treaties, in particular codification agreements, and widely accepted judicial decisions, particularly the decisions of the International Court of Justice. Certainly, this it includes both customary international law and general principles of law within the meaning of Article 38(1)(c) and (d) of the Court's Statute. Problems connected

of the ICJ Statute. The Study Group on the fragmentation of international law established by the Commission observed that "there is no accepted definition of 'general international law'".[7] The meaning of general international law will always be context-specific. In some contexts, "general international law" could be construed in contradistinction to *lex specialis*. In the context of the peremptory norms of general international law (*jus cogens*), however, the term "general international law" is not a reference to *lex generalis* or law other than *lex specialis*." Rather, the word "general" in the "norms of general international law", in the context of peremptory norms, refers to the scope of applicability of the norm in question. The norms of general international law are thus those norms of international law that, in the words of the International Court of Justice, "must have equal force for all members of the international community".[8]

In the draft conclusions on *jus cogens*, the Commission points out that peremptory standards can appear in both customary law and international agreements and can take the form of general principles of law. This suggests that peremptory norms should be sought in all formal sources of law, which in turn leads to some opacity and makes them difficult to identify. However, the Commission decisively points to customary law as the most common source of peremptory norms, referring to the jurisprudence of the ICJ and, *inter alia*, of the International Criminal Tribunal for the former Yugoslavia.[9]

2. Identification of *jus Cogens*

The considerations so far have been theoretical in nature and boiled down to proving that the very concept of mandatory norms, as well as the definition of *jus cogens*, causes serious methodological and logical

with the terminology were addressed by the ILC in its draft articles concerning identification of customary law, see doc. A/73/10 at123.

7 Report of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law (A/CN.4/L.702), para. 14 (10), note 11.

8 *North Sea Continental Shelf,* Judgment of 20 February 1969, ICJ Reports 1969, at 38-–39, para. 63.

9 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal),* Judgment of 20 July 2012, ICJ Reports 2012, at 457, para. 99. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, at 257-258, paras 79 and 83; *Prosecutor v. Furundžija, Case No. IT-95-17/1-T,* Judgment of 10 December 1998, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1998*, at 571, para. 155; *Prosecutor v. Jelisić, Case No. IT-95-10-T,* Judgment of 14 December 1999, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1999*, 431-433, para. 60.

problems. These problems are exacerbated when we try to identify the norm as mandatory. The writing highlights an important element: any discussion on the consequences of peremptory norms is pointless, since we are not able to create instruments and procedures to identify these norms.[10]

Before we move on to a specific norm considered mandatory, i.e. the prohibition of the use of force in international law, let us turn our attention to the ILC's proposal. The Commission has proposed several draft conclusions. First of all, in the opinion of the Commission, a distinction should be made between the recognition and acceptance of a peremptory standard and the identification of a customary standard. It is necessary to show that the international community accepts the special, unique position of *jus cogens* in the system of international law. This conclusion seems obvious if we assume that the mandatory norms are relatively few and their separation is aimed at protecting the basic values and interests of the international community. This means, however, that in each specific case of the proposed *jus cogens* standard, a specific test, proof of added value, should be carried out. It does not seem (at least to our knowledge) that in any judgment of an international court that refers to the construction of *jus cogens*, such an analysis has been carried out. Moreover, we have not heard of any case where a state has successfully invoked non-compliance with a peremptory norm in order to effectively challenge the validity of an international agreement on the grounds of its non-compliance with the peremptory norm. On the contrary, attempts by the UN General Assembly (UNGA) to undermine a peace treaty between Israel and Egypt as contrary to the right to self-determination of the Palestinian people were unsuccessful.

One more question arises. Since the ILC (in line with the proposals by some authors) requires a special test as a qualification of a peremptory norm, it seems logical that the acceptance and recognition of *jus cogens*

10 The problem was addressed by K. Zemanek in the context of the international responsibility of Sstates. However, in our opinion the problem is more general and concerns every aspect of *jus cogens*. Cf. Zemanek, „How to Identify Peremptory Norms of International Law", 1103ff. This was vividly explained by Frederick Forsyth in the excellent novel *The Day of the Jackal*: "None of the French secret security services was were able to find, arrest, or eliminate a foreigner preparing to attack President de Gaulle, as they did not know whom to find, arrest and eliminate. The entire structure of the security forces is powerless for the want of a name. It seems, therefore, that the first task without which all other proposals become meaningless, is to give this man a name. With a name we got get a face, with a face, a passport, with a passport, an arrest. But however, to find the name, and to do it in secret, is a job for pure detective work". Is identifying *jus cogens* also a detective work of this kind?

were clear; the implied consent or acquiescence is certainly not enough. It seems that such a position is supported by Conclusion 6, which requires proof of acceptance and recognition of a given standard by states. On the other hand, as mentioned above, the Commission does not require that the acceptance of the specific status of a standard applies to all countries.

The ILC indicated in its draft conclusions the role of the international courts and the doctrine in the process of identifying peremptory standards. It seems that judgments of domestic courts referring to *jus cogens* should be important for formulating the rules governing this institution. In turn, the judgments of international courts should provide guidelines for national courts on how to apply peremptory norms. It seems, however, that the domestic courts are not prepared to verify in a convincing way whether a certain norm in fact constitutes *jus cogens*. The ILC emphasized in its commentary (p. 172) that the jurisprudence of the ICJ had a significant impact on the theoretical concept and practical solutions related to *jus cogens*. This allegation concerns its advisory opinions on *Reservations to the Convention on the Prevention and Punishment of Genocide*, the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, as well as its decisions in *Barcelona Traction, Light and Power Company, Limited, East Timor*, and the *Military and Paramilitary Activities in and against Nicaragua*, have made major contributions to the understanding and evolution of peremptory norms of general international law (*jus cogens*), notwithstanding the fact that they do not expressly and unambiguously invoke, for their respective conclusions, peremptory norms.[11]

Judgments of international courts referring to the construction of peremptory norms are mainly based on doctrinal concepts, on the opinions of scholars (including members of the expert bodies established by international organizations), among whom there is no consensus on

11 See *Reservations to the Convention on the Prevention and Punishment of the Genocide*, Advisory Opinion, ICJ Reports 1951, 23; *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, Advisory Opinion, ICJ Reports 1971, 79; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136; *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, ICJ Reports 1996, 258, para. 83; *Barcelona Traction, Light and Power Company, Limited*, Judgment of 24 July 1964, ICJ Reports 1970, 3; *East Timor (Portugal v. Australia),* Judgment of 30 June 1995, ICJ Reports 1995, p. 90; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment of 27 June 1986, ICJ Reports 1986, 137-138, para. 274.

the content and scope of application of the said norms.[12] The opinions of the doctrine are of an auxiliary nature and cannot be the sole basis of the judgment. In this respect, the judgment on *Jurisdictional Immunities*, in which the ICJ referred to the judgments of national courts concerning the immunity of the state is exceptional,[13] but this was due to the essence of the matter under examination. It was in this area that there was significant state practice. At the same time, the ICJ ruling did not cut through the discussion on the status of state immunity in the context of peremptory norms, to which we will return below.

3. Legal Effects

ILC formulated some guidelines concerning the consequences of non-compliance of international law norms with *jus cogens*, drawing logical consequences from this structure. Not only did it adopted certain conclusions about the effects of violating peremptory norms by international agreements, but in fact it strengthened the opinion that *jus cogens* takes precedence also over sources of international law other than treaties. According to Draft Conclusion 3, the *jus cogens* norm is hierarchically superior then to other norms of international law. Such a solution is the subject of a dispute in the doctrine and the Commission itself is aware of it, quoting various views on this matter.

A treaty conflicting with a peremptory norm of general international law (*jus cogens*) is void and its provisions have no legal force. The same rule applies to *jus cogens superveniens*, i.e. a peremptory norm identified as such after the entry of the treaty concerned into force. There remain, however, doubts as to the response of individual subjects of international law to such a contradiction. In practice, it seems that if the states concluding an international agreement incompatible with the *jus cogens* are determined to apply it in practice, the position of third countries will

12 For example, in the *Nicaragua* judgment, the ICJ stated that the parties to the dispute agree that the ban on the use of force is peremptory. In support of this stance, the Tribunal made certain findings, which were limited to quoting the opinions of unspecified state representatives, the work of the ILC and the positions of the parties to the dispute. Compare *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, ICJ Reports 1986, 14.

13 *Jurisdictional Immunities of the State (Germany v Italy, Greece Intervening)*, Judgment of 3 February 2012, ICJ Reports 2012, 99, in part. at 127ff.

not be able to influence the policy of the states-parties. We leave aside the issues of international responsibility, possible countermeasures, etc. Non-compliance with *jus cogens* will remain an instrument at the disposal of the parties to the treaty, if they want to cancel such an agreement.

According to Draft conclusion 14, a rule of customary international law does not come into existence if it conflicts with a peremptory norm of general international law (*jus cogens*). This is without prejudice to the possible modification of a peremptory norm of general international law (*jus cogens*) by a subsequent norm of general international law having the same character. A rule of customary international law not of a peremptory character ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law (*jus cogens*). It would be hard to implement those provisions in practice, in particular if we remember that the peremptory law-making process is time-consuming and it can be ascertained *a posteriori*, i.e. with respect to a norm which is already in force. Similar reservations were formulated as to obligations resulting from unilateral acts of States conflicting with *jus cogens* and obligations stemming from different acts (including binding resolutions and decisions) of international organizations.

4. State Responsibility for Violations of Peremptory Norms

Proposals by the ILC (Draft conclusion 19) are manifestly coherent with ARSIWA which provides in Article 41 provides particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*). States should cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*), which involves a cessation of a wrongful act; and no State shall recognize as lawful a situation created by a serious breach by a State of an obligation arising from a peremptory norm of general international law (*jus cogens*), nor render aid or assistance in maintaining that situation. We do not understand why the obligation of non-recognition should be limited to consequences of serious breaches of peremptory norms. In our view, the non-recognition is connected with every internationally wrongful act.

First of all, states should cooperate to bring about an end to violations of peremptory norms by all legal means. This opens the way to a potential dispute as to what measures should be considered lawful. Hypothetically, there is no doubt that the Security Council (UNSC) takes a formal decision

under Chapter VII on the authorization of the use of force. But However, it is possible that the Council rejects the proposed decision or the sponsors withdraw the project because they conclude that they do not obtain the required majority. In such a situation, states will remain free to act, and in the case of *erga omnes* obligations, they can take whatever action they consider most appropriate to protect their interests (as well as the interests of other states). The ILC (but also the UNGA) accepted the right of any State, entitled under Article 48 (1), to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

Specific regulations proposed deal with serious breaches of *jus cogens* defined as breach of an obligation arising under a peremptory norm of general international law (*jus cogens*) is serious if it involves a gross or systematic failure by the responsible State to fulfil that obligation. The fundamental doubt arises in the context of whether there can be any other than serious violations of the *jus cogens* at all. This particular issue relates directly to the use of force in relations between states – because violations of the prohibition of the use of force are gradual, as confirmed by the ICJ itself, for example in the judgment in the case of American hostages in Tehran - it opens the way to serious interpretative doubts as to the scope of the prohibition to use armed force as a peremptory norm.

The ILC attempted to reformulate State obligations resulting from violations of *jus cogens*. Draft conclusion 17 declares that peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*)[14] in which all States have a legal interest. In effect the said conclusion refers to ARSIWA, according to which any State is entitled to invoke the responsibility of another State for a breach of a peremptory norm of general international law (*jus cogens*), in accordance with the rules on the responsibility of States for internationally wrongful acts. Any State other than an injured State is entitled to invoke the responsibility of another State if the obligation breached is owed to the international community as a whole.

However, the powers of states mentioned here concern the law on the international responsibility of states, in particular the regime

14 For current jurisprudence cf. Tanaka, „The Legal Consequences of Obligations *Erga Omnes* in International Law", 1 ff.

of sanctions/countermeasures. The question arises how to assess the legal status in relation to responsibility for violations of peremptory norms. It seems that the ICJ would not be eager to accept the pure *actio popularis* concept, whereby one state would bring a complaint against another state for the breach of a customary norm. While the ICJ allowed Gambia's complaint against Myanmar[15] in relation to genocide, such a proposal does not appear to be generally applicable nor universally accepted by all States. The case concerned the use of a procedure resulting from an international agreement to which both interested states are parties. Similar conclusion can be drawn with respect to *Belgium v Senegal*,[16] in which the subject of the proceedings was the determination of the scope of the obligations of states related to the principle of *aut dedere aut iudicare*. In this case, however, it was not the *erga omnes* obligations but the *erga omnes partes* obligations derived from the multilateral convention (based upon Article 7 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), even if Belgium also raised an argument about obligations under customary international law, overlapping with the convention. However, we believe that the dispute has been transferred to Article 60 of the 1969 Vienna Convention on the Law of Treaties and the scope of the rights of the parties to a treaty in the event of a breach by one of the parties.

In the proceedings, Italy raised the issue of the conflict between the state immunity and peremptory norms in the field of human rights, pointing to two elements: primo, the activities of the German state claimed by Italy and brought before Italian courts constituted war crimes and crimes against humanity, and *secundo*, these activities constituted a violation of *jus cogens*. As to the former submission, the ICJ emphasized that apart from the decisions of the Italian courts which were the subject of the proceedings concerned, there was almost no State practice which might be considered to support the proposition that a State is deprived of its entitlement to immunity in such a case. Although the Hellenic Supreme Court in the *Distomo* case (2000) accepted the exception based on the gravity of violations, the Special Supreme Court in *Margellos* reversed that approach (2002). The stance of the ICJ was

15 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar),* Preliminary Objections, Judgment of 22 July 2022, nyr. Cf. https://www.icj-cij.org/public/files/case-related/178/178-20220722-SUM-01-00-EN.pdf.

16 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, ICJ Reports 2012, 422.

shared by the jurisprudence of the European Court of Human Rights which rejected the proposition that States are no longer entitled to immunity in cases regarding serious violations of international humanitarian law or human rights law.[17]

The second argument raised by the Italian Government in particular poses the problem of the procedural consequences of *jus cogens*. The logical consequence of the primacy of mandatory norms should be that the jurisdiction of the international courts cannot be excluded if this would prevent the pursuit of claims arising from such norms. ICJ emphasized that it saw no basis for such a submission. The rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status. Moreover, is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application. The Court formulated its opinion in two cases. In the *Armed Activities* case, it held that the fact that a rule has the status of *jus cogens* does not confer upon the Court a jurisdiction which it would not otherwise possess.[18] In *Arrest Warrant*, the Court held , that the fact that a Minister for Foreign Affairs was accused of criminal violations of rules which undoubtedly possess the character of *jus cogens* did not deprive the DR of the Congo the customary right to demand immunity on his behalf.[19] The Court considers that the same reasoning is applicable to the application of the customary international law regarding the immunity of one State from proceedings in the courts of another. In

17 In 2001, the Grand Chamber of the ECtHR, by the narrowest possible majority of nine to eight, concluded that, "Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged." (*AlAdsani v. United Kingdom*, application No. 35763/97, Judgment of 21 November 2001, ILR, Vol. 123, 24.) The following year, in *Kalogeropoulou and Others v. Greece and Germany*, the ECtHR rejected an application relating to the refusal of the Greek Government to permit enforcement of the *Distomo* judgment, also dealing with the responsibility of Germany for war crimes, and said that, "The Court does not find it established, however, that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity." (Application No. 59021/00, Decision of 12 December 2002, ILR, Vol. 129, 537.).

18 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment of 3 February 2006, ICJ Reports 2006, 32, para. 64, and 52, para. 125.

19 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, ICJ Reports 2002, 24, para. 58, and 33, para. 78.

addition, this argument about the effect of *jus cogens* displacing the law of State immunity has been rejected by the national courts. The ICJ continued in that way to rely upon the jurisprudence proposed in the *East Timor* case.

The jurisprudence of the ICJ does not provide any grounds for a proposition that the peremptory norms of international law give rise to consequences guaranteeing the special position of *jus cogens*, since the primacy of *jus cogens* cannot be enforced for procedural reasons. ILC did not attempt to change this solution, which seems to be a reluctance to experiment and to adhere to the applicable international law, with all the scepticism and reservations we have so far expressed towards the institution of peremptory norms. In one of our earlier publications we compared *jus cogens* to Nessie the Loch Ness monster (or Loch Ness monster) and or the Yeti: everybody has heard of them, some believe they exist, but nobody has ever saw seen them. After a passage of 30 years this opinion remains actual the same, and the ILC conclusions did not bring any radical change of in that position.

5. Issues Concerning the Use of Force and *Jus Cogens*

The ban on the use of force as a peremptory norm appeared in the ILC's work on the law of treaties. In its commentary on the draft Article 50 (later Article 53), the Commission stated that the *jus cogens* should also include "the law of the UN Charter concerning the prohibition of the use of force". The Commission apparently did not consider at that stage whether a peremptory rule must have a customary source or it could also result from treaty law. This dilemma with regard to the prohibition of the use of force in the Charter of the United Nations (UN Charter) was resolved by the ICJ in the *Nicaragu*a judgment, pointing out that the customary norm concerning the use of force (especially self-defence) was developed on the basis of the UN Charter and has the same content as the treaty norm. Moreover, the judgment in the case of *Nicaragua* is unconvincing and controversial in this respect.

In *Barcelona Traction*[20] the ICJ contrasted obligations *inter partes* (usually bilateral or multilateral, but implemented in bilateral relations)

20 *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment of 24 July 1964, ICJ Reports 1970, 33, paras. 33 and 34.

with obligations towards the international community as a whole, which the tribunal defined as obligations *erga omnes*.

The judgment enumerates four examples of obligations *erga omnes*: the outlawing of acts of aggression; the outlawing of genocide; protection from slavery; and protection from racial discrimination. The formula proposed by the ICJ is misleading. The norms defined as *erga omnes* are usually considered as peremptory. It has never been authoritatively explained why the ICJ did not explicitly refer to *jus cogens*. On the other hand, it is much easier to explain why the Tribunal dealt with the case at all. This was the Court's response to earlier rulings in *South-West Africa* cases. After much hesitation, the ICJ rejected the possibility for Liberia and Ethiopia to file a complaint about South Africa's violation of its mandate in relation to Namibia. The justification was the alleged lack of an *actio popularis* (public interest complaint) in international law. The Court pointed out, however, that the classification of a certain rule as an effective *erga omnes* does not entail the right of every state to seek redress for its violation.

Althought *jus cogens* appeared in the 1969 Vienna Convention, the further development of this institution took place within the codification of the law on the international responsibility of states. In the controversial 1976 draft of Article 19 in this matter, the next rapporteur of the Commission, Roberto Ago, introduced the structure of the international crime of states. An internationally wrongful act which results from the a breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime. As an example of the international crime, Ago suggested four categories of acts, including in particular a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression. Other examples referred to serious violations of the right to self-determination (in particular a colonial domination), serious violations of fundamental human rights (in particular genocide, slavery and apartheid), and finally serious damages to the natural environment. During the discussions with the ILC, at the 6th Committee of the UNGA, and in state comments, important criticism as to the qualification of certain categories of international crimes was expressed.

The subsequent special rapporteur on international responsibility of states, James Crawford, replaced the notion of international crimes of states

by serious violations of the peremptory norms of international law which include the unlawful use of force.

Among these prohibitions, it is generally agreed that the prohibition of aggression is to be regarded as peremptory. This is supported, for example, by the Commission's commentary to what was to become Article 53, uncontradicted statements by Governments in the course of the Vienna Conference on the Law of Treaties, the submissions of both parties in the Military and Paramilitary Activities in and against the *Nicaragua* case and the Court's own position in that case. There also seems to be widespread agreement with other examples listed in the Commission's commentary to Article 53: viz. the prohibitions against slavery and the slave trade, genocide, racial discrimination and apartheid. These practices have been prohibited in widely ratified international treaties and conventions admitting no exception. There was general agreement among Governments as to the peremptory character of these prohibitions at the Vienna Conference. As to the peremptory character of the prohibition against genocide, it is supported by a number of decisions by the national and international courts.

The ILC in its work on *jus cogens* proposed a non-exhaustive list of norms considered as peremptory. Draft Conclusion 23 includes the prohibition of aggression; the prohibition of genocide; the prohibition of crimes against humanity; the basic rules of international humanitarian law; the prohibition of racial discrimination and apartheid; the prohibition of slavery; the prohibition of torture; and the right of to self-determination. Even if the list is disputable (e.g. the meaning of the notion of basic rules of international humanitarian law is ambiguous), the ban on aggression can be found on at the top of the list.

The special importance of the prohibition of the use of force in international relations has been emphasized in numerous judgments of the international courts (especially the ICJ), even if the Court has so far been rather cautious about qualifying it unequivocally as *jus cogens*. It can be concluded that this prohibition should be taken into account as a potential peremptory standard. Likewise, on various occasions, when states have commented on the use of force, they have been inclined to consider it to be

jus cogens.[21] We intend to check whether the ban on the use of force meets the necessary and indispensable preconditions of *jus cogens*.[22]

The starting point must be to define the substantive scope of the use of force. The ILC adopted a broad approach as a prohibition of aggression, but it is possible to limit it to the prohibition of the use of force. Doubt, however, is related to the position of the prohibition of aggression in international law. The definition of aggression was agreed after many years of negotiations in Resolution 3314 (XXIX) of the UNGA. It lists a number of acts that will be considered aggression, in particular the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the UN Charter. The list annexed which was attached to the resolution includes at the very beginning the an invasion or attack by the armed forces of a State of on the territory of another State, or any military occupation, however temporary, resulting from such an invasion or attack, or any annexation by the use of force of the territory of another State or part thereof. The same definition can be found in Article 8 bis of the Statute of the International Criminal Court, as amended at the First Review Conference on the Rome Statute, on 11 June 2010 in Kampala, Uganda. The value of this definition of aggression is, however, debatable. The biggest greatest advantage is that it was adopted. However, it has been established as a guideline for the UNSC, which will makes a political decision on the qualification of specific activity as an act of aggression. The list of acts mentioned in Resolution 3314 is not exhaustive, which leaves a considerable margin of discretion to for the UNSC. Also, the responsibility of individuals for the crimes of aggression before the ICC will depend on its prior determination as an act of aggression by the UNSC.

The concept of the use of force is narrower. Article 2(4) of the UN Charter is decisive. It can be interpreted in two different ways. According to most authors, the prohibition of the use of force is absolute, and the exceptions arise only from the UN Charter and include the use of force in self-defence, the use of force against enemy states, and the use of force on the basis of an authorization granted by the UNSC. The second, restrictive interpretation

21 Exhaustive review of the position of the states was compiled by Corten, Koutroulis, „The *Jus Cogens* Status of the Prohibition on the Use of Force. What Is Its Scope and Why Does It Matter?", 636ff.

22 There is an extensive writing concerning the peremptory nature of the ban on the use of force (see. ibidem above or de Hoogh, „*Jus cogens* and the Use of Force", 1161; as to a critical and sceptical evaluation cf. Green, „Questioning the Peremptory Status of the Use of Force", 215.

prohibits the use of force only in circumstances arising from the provision of Article 2(4) of the UN Charter itself, i.e. against the sovereignty, territorial integrity of states or otherwise contrary to the letter of the UN Charter.

The prohibition of the use of force stems from contractual law, i.e. the UN Charter. However, in the judgments of the ICJ in the *Nicaragua* case (the judgment on jurisdiction of 1984 and the judgment on the merits of 1986), the Court developed its considerations on the mutual relationship of an international agreement and custom, contained in the 1969 judgment in the *North Sea Continental Shelf* case. In that ruling, the Tribunal indicated that the relationship between a contract and custom may be generative, codifying and clarifying; in conclusion, an international agreement may lead to the formation of a customary norm on its basis. In the *Nicaragua* judgment, the ICJ emphasized that a customary norm may apply between the same entities as a treaty norm and, moreover, may have the same content, subjective and objective scope. The judgment in *Nicaragua* continues to arouse criticism, as it was issued in specific circumstances that allowed the court to circumvent the limitation of the Tribunal's jurisdiction on the basis of the US reservation excluding ICJ jurisdiction in cases relating to multilateral agreements. As a result, the Tribunal applied the UN Charter, assuming that the UN Charter and the customary norm based on it have the same content. Besides, this the thesis formulated by the Court was not entirely true. The Tribunal itself observed that the customary norm concerning self-defence was not fully in line with the treaty norm, since there was no place in the customary law for reporting an armed assault to the UNSC, which should undertake further actions resulting from the collective security system.

In its Article 51, the UN Charter upholds the inherent right of each state to self-defence. It can be concluded that the right to self-defence does not have its source in an international treaty, and the UN Charter only confirms a pre-existing right, prior to the entry into force of the UN Charter itself. The right to self-defence has a customary basis. However, a question arises as to the nature of this law, and more specifically - whether it is of a peremptory nature. The UN Charter indicates that the right to self-defence is inalienable, that is, it cannot be waived by concluding an international agreement. Such an agreement would be invalid by operation of law. Thus, we uphold the thesis that the right to self-defence is absolutely binding. Since self-defence is tantamount to the use of force, it is an exception to the prohibition on the use of force in Article 2(4) of the UN Charter. Therefore, the prohibition of the use of force can only be peremptory to the extent provided for by the exceptions to Article 2(4).

Such an approach to the problem would require clarification of the objective scope of self-defence. Self-defence in terms of the UN Charter was designed in the context of a classic attack carried out by the armed forces of one state against another state. Meanwhile, the attack on the WTC of 11 September 2001 raised the question of the acceptable scope of self-defence in the event of an armed attack by non-state actors. In fact, a similar issue was the subject of the ICJ's Advisory Opinion on *the Wall on Palestinian Territory*. And in these cases, there were debatable problems. First, in today's hostilities, a country defending itself against an armed attack may not know who the attacking party is. Second, the classical requirements for the use of force in self-defence are necessity and proportionality. Today, the practice of states shows a noticeable trend towards relaxing the ban on the use of force, as well as both additional requirements. Finally, we should ask another question: is there a possibility that present international law accepts any other form of the use of force by States which are inherent elements of the international system? Frequently asked questions deal in particular with humanitarian intervention and the protection of nationals abroad.

The assessment of the prohibition of the use of force as a mandatory norm must take into account one more element: gradeability. The use of force is therefore serious or less serious. This was pointed out in particular by the ICJ in the *Tehran American hostages* judgment. Soviet judge Rybakov, in fact supporting Iran in his statements, tried to show that the US military action with the use of helicopters was aggression. The ICJ rejected this view and concluded that it was a minor incursion, even if it raised doubts about its legality. Moreover, the Court emphasized that it had no jurisdiction to rule on the compliance of the rescue operation with international law.[23]

6. Final Remarks

M.E. O'Connell[24] noticed an interesting evolution of the approach to the ban on the use of force that creates difficulties in the qualification of the use of force as a peremptory norm.

23 *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgement 24 May 1980, ICJ Reports 1980, 43, para. 93-94.

24 O'Connell, „Prohibiting Force through Peremptory Norms", 51.

> During the Cold War, when the Soviet Union and the United States dominated international politics, a certain amount of competitive compliance with the prohibition existed. The two superpowers often manipulated facts relevant to a lawful use of force; they rarely attempted to manipulate the law. Since the end of the Cold War, efforts to expand the legal right to use military force have been persistent. Interest in the art of negotiation, mediation, and interstate adjudication has noticeably declined. Technological developments with respect to weapons have helped boost this sense of superiority. New interpretations of the law have emerged to provide legal justifications for resort to force. These post-Cold War attempts to expand the right to resort to force have reached the point where leaders like Trump and Kim Jong-un fail to acknowledge any legal constraint.

We share this pessimistic conclusion.

The above-formulated comments and doubts concerning the qualification of the prohibition of aggression/the use of force as a peremptory norm reflect all problems related to the definition, identification, and functioning of *jus cogens* in international law. Answering the question formulated in the title of this study, we suggests the can answer the following answer: the institution of peremptory norms seems to be accepted by states, judicial practice, and the doctrine of international law as a certain pattern, reflecting the longing of the international community for the moral order. The passage of almost 60 years did has not contributed to the crystallization of the *jus cogens* institution, so that it did not as to not raise any theoretical or practical doubts. Difficulties related to *jus cogens* often cause that mean that this structure is abused and, invoked in unjustified circumstances, which does not contribute to the increase of its *de lege lata* authority among within the international community.

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