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FINDING THE CORE OF INTERNATIONAL LAW – *JUS COGENS* IN THE WORK OF INTERNATIONAL LAW COMMISSION

Abstract

The aim of the paper is to contribute to the contemporary debate on the jus cogens norms of international law, especially since the topic is being analyzed by the International Law Commission. Besides providing comments on some of the conclusions of the ILC's Special Rapporteur concerning various aspects of jus cogens concept, such as the process of identification of these norms or the notion of regional jus cogens, the paper endeavours to shed a new light on the criteria for the creation of these norms by introducing one innovative, so far hidden, requirement that can be deduced from the "Fourth report on peremptory norms of general international law (jus cogens) by Special Rapporteur Dire Tladi". Respectively, a norm cannot gain a jus cogens status until the International Court of Justice qualifies it as such. Once this additional requirement is recognized and accepted by the whole international community, jus cogens concept can be further developed in order to be completely clarified and to start fulfilling its main functions.

Key words: *– Jus cogens. – Peremptory norms of General International Law. – International Law Commission. – International Court of Justice.*

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A. INTRODUCTION

"*Jus cogens* have the abbreviations JC and there was another fellow, very long ago, who could walk on water, who could turn water into wine and who also had the initials JC and I think this is suggesting something about the power of *jus cogens* and the impact that they potentially could have", were the exact words used by Dire Tladi, UN Special Rapporteur for the topic of *jus cogens*, at one conference at the King's College London.[1] Rather controversial, these words are likely to stick to one's mind and be a reminder of an immense importance of the topic in question.

Back in 1993, the International Law Commission's (hereinafter: ILC) member Andreas Jacovides presented a paper on *jus cogens* as a possible ILC topic, noting that "no authoritative standards have emerged to determine the exact legal content of *jus cogens*, or the process by which international legal norms may rise to peremptory status", but the proposal was rejected as premature and of no useful purpose.[2]

Eventually, in 2014 the time has come. During its sixty-sixth session, the ILC decided to place the topic "*Jus cogens*" on its long-term programme of work.[3] Since then, four reports were drafted, dealing with different parts of *jus cogens* puzzle, from identification of norms, consequences and regional *jus cogens* to finally, an illustrative list of norms that have already gained the *jus cogens* status.

But what is the real significance of those reports, have they answered all of the questions that were troubling international lawyers for decades?

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[1] "Making Sense of Higher Law", Conference at the Yeoh Tiong Lay Centre for Politics, Philosophy and Law, King's College London, 16 March 2016, video available at https://www.youtube.com/watch?v=nSh5dEb1KbQ&t=242s (01/07/2019)

[2] *Shelton*, Sherlock Holmes and the Mystery of Jus Cogens, Netherlands Yearbook of International Law Jus Cogens: Quo Vadis 2015, p. 46.

[3] International Law Commission, *Report of the International Law Commission, Jus cogens,* 66th session, UN Doc. A/69/10 Annex, 2014.

B. IDENTIFICATION OF *JUS COGENS*

Considering that Article 53 of the Vienna Convention on the Law of Treaties (hereinafter: VLCT) sets out the only written legal definition of the effects of *jus cogens* and consequences of conflicts with such a norm, it was justifiably used by the Special Rapporteur as a starting point for the analysis of the subject matter.[4]

Article 53 provides as follows: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. 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 from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

From the terms of the Article 53, the Special Rapporteur has determined two cumulative criteria for the identification of *jus cogens*, firstly that the norm in question must be a norm of general international law and secondly that the norm must be accepted and recognized by the international community of states as a whole as one from which no derogation is permitted.[5] The part stating that the norm can be modified only by a subsequent norm of general international law having the same character has been correctly qualified as a description of the process of modification of the *jus cogens* norm, rather than an independent criterion for the identification of *jus cogens* norm.[6]

I. What is general international law?

[4] International Law Commission, *Second report on jus cogens by Dire Tladi, Special Rapporteur*, 16 March 2017, A/CN.4/706, par. 33.
[5] International Law Commission, *fn. 5*, par. 37.
[6] *Ibid*.

In regard to the first criterion, the Special Rapporteur has clarified that it implies the two-step process for the emergence of *jus cogens* norms, particularly that the norm was established under general international law and after that it elevated to the status of *jus cogens*.[7]

However, there is no commonly accepted definition of general international law. According to some authors, there is a distinction between general and particular international law, the former consisting of norms binding on all members of the international community, while the norms of the latter are binding on less than all members.[8]

Kunz has also taken the view that it is the range of spatial validity, not the procedure of the creation of norms, that should be a distinctive criterion.[9] However, he went further to state that general international law could be created solely by a custom, whereas particular international law could be created not only by a custom, but also treaties.[10] As far as he is concerned, treaties always constitute particular international law, no matter if they are bilateral, regional or universal and no matter if they create concrete, individual or general, abstract norms.[11] In conclusion, treaty law may become general international law, but only if it eventually evolves into a customary law.[12]

On the other hand, Tunkin believed that general international law comprises both customary and conventional rules[13] and that principles of *jus cogens* consist of rules accepted either expressly by treaty or tacitly by custom[14].

[7] *Ibid*, par. 40
[8] *Oppenheim*, *Lauterpacht*, International Law: A Treatise, Longmans Green, vol. 1, 1948, pp. 4-5.
[9] *Kunz*, General International Law and the Law of International Organizations, AJIL 1953, p. 457.
[10] *Ibid*. For an opposite point of view, he refers to Guggenheim, Lehrbuch des Völkerrechts: unter Berücksichtigung der internationalen und schweizerischen Praxis, Verlag für Recht und Gesellschaft, 1948, p. 48.
[11] *Kunz*, *fn. 10*, p. 457.
[12] *Ibid*, 459.
[13] *Tunkin*, Is General International Law Customary Law Only?, EJIL 1993, p. 541.
[14] *Tunkin*, Jus Cogens in Contemporary International Law, Toledo Law Review 1971, p. 116.

For Thirlway, it is universally accepted that, apart from *jus cogens*, a treaty as *lex specialis* is law between the parties to it, in derogation of the general customary law which would otherwise have governed their relations.[15]

Similarly, the Special Rapporteur recalled that the Study Group on fragmentation of international law had made a difference between general international law and specialist systems as "trade law", "human rights law", "environmental law", "law of the sea", "European law" etc. (and in some respect, treaty law).[16] However, only few lines later, it was accurately admitted that this kind of distinction might preclude some rules, such as those of international humanitarian law, from acquiring the status of *jus cogens*.[17] Precisely, as it will be shown further down in the text, most of the candidates for *jus cogens* status indeed come from either international human rights law, international humanitarian law or international criminal law, all of which could be treated as *lex specialis* vis-à-vis general international law. Therefore, it only seems appropriate that the sole criterion for defining general international law should be the scope of applicability, since it does not deprive any branch of international law of the chance to acquire the *jus cogens* status.

In that matter, the Special Rapporteur correctly indicated that the most obvious manifestation of general international law is customary international law[18], or in other words, that "customary international law rules qualify as norms of general international law for the purposes of the criteria for *jus cogens* derived from article 53 of VCLT"[19]. The only issue with this statement is a bit of hesitation, which is evident in the part that reads "for the purposes of the criteria for *jus cogens* …". The thing is, the concept of general international law cannot

[15] *Thirlway*, The Law and procedure of the International Court of Justice, *BYBIL* 1989, p. 147.
[16] International Law Commission, *Fragmentation of International Law: Difficulties Arising from The Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, 13 April 2006, A/CN.4/L.682, par. 8.
[17] International Law Commission, *fn. 5*, par. 41.
[18] *Ibid*, par. 42, citing *Cassese*, For an enhanced role of *jus cogens*, in: Cassese (ed.), Realizing Utopia: The Future of International Law, OUP 2012, p. 164.
[19] *Ibid*, par. 47.

have multiple meanings depending on the purpose. Howsoever, the Special Rapporteur drafted a pretty straightforward conclusion: "A norm of general international law is one which has a general scope of application"[20], which confirmed the final adoption of the scope of applicability criterion.

It was followed by more than enough case law showing how international tribunals often use "general international law" and "customary international law" as synonyms. For instance, the ICJ recognized the prohibition of torture as "part of customary international law" that "has become a peremptory norm"[21] or "many rules of humanitarian law as constituting intransgressible principles of international customary law"[22]. One of many examples is also *Furundžija* case, in which the International Tribunal for former Yugoslavia found that "*jus cogens* norms enjoy a higher rank in the hierarchy of international law than treaty law or even 'ordinary' customary rules and that the most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by states through international treaties or local or special customs or even general customary rules not endowed with the same normative force".[23] Orakhelashvili offered an interesting and thought-provoking interpretation of *Nicaragua* case, stating that the Court pointed out to the ILC's qualification of the relevant norm as peremptory and then used that as an evidence of the relevant norm's customary character.[24] By way of explanation, the Court assumed that if there is enough evidence that a norm has gained a status of *jus cogens*, it could be presupposed that it is also a norm of customary character and there is no need to go one step backwards in proving that the source of the norm is indeed international customary law. Finally, given the definition of a custom in Article 38 of the Statute of the International Court of Justice, that refers to general practice

[20] *Ibid*, draft conclusion 5, par. 1.
[21] ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, par. 99.
[22] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, par. 79.
[23] ICTY, no. IT-95-17/1-T, T.Ch., *Prosecutor v. Furundžija*, Judgement of 10 December 1998, par. 153.
[24] *Orakhelashvili*, Peremptory Norms in International Law, OUP 2006, p. 42. For opposite point of view, *see*, *Shelton*, Righting Wrongs: Reparations in the Articles on State Responsibility, AJIL 2002, p. 843.

accepted by law[25], it can be concluded that customary law undoubtedly gives rise to the norms of general international law.

According to the Special Rapporteur's report, another source of general international law is the general principles of law recognized by civilized nations provided in Article 38 (1) (c) of the Statute of the International Court of Justice.[26] However, this statement is not accompanied by a detailed analysis of this source, nor by a comparison between general legal principles inherent to international law and general principles of law recognized by civilized nations. As a matter of fact, general principles of law recognized by civilized nations are subsidiary source of international law, which refers to norms common to national legal systems of majority of states or at least states involved in a dispute.[27] Hence, they are originally source of national laws and only give rise to the international law once the International Court of Justice (hereinafter: ICJ) recognize and apply them in a particular case.[28] Some of the examples would be *res iudicata*[29], *extra compromissum arbiter nihil facere potest*[30] or *jura novit curia*[31]. On the other hand, general legal principles are those governing the whole international public order, that are inherent to international law, such as principles deriving from Article 2 of the Charter of the United Nations[32]. That is why many authors consider only the latter as having a peremptory character.[33] All in all, linking *jus cogens* to general principles of law recognized by civilized nations would require understanding them not as principles deriving from domestic legal systems, but

[25] UN, *Statute of the International Court of Justice*, 18 April 1946, Article 38.
[26] International Law Commission, *fn. 5*, par. 48.
[27] *Kreća*, Međunarodno javno pravo, Pravni fakultet Univerziteta u Beogradu, 2014, p. 95.
[28] *Ibid*.
[29] ICJ, *Effects of the Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, I.C.J. Reports 1954, p. 53.
[30] ICJ, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, I.C.J. Reports 1949, pp. 12, 26.
[31] PCIJ, *Brazilian Loans*, Judgment No. 15, P.C.I.J. Publications 1926, Ser. A, No. 20/21, p. 124.
[32] United Nations, *Charter of the United Nations*, 24 October 1945, United Nations, Treaty Series XVI, Article 2.
[33] *See, Kreća*, *fn. 28*, p. 96.

as principles recognized by nations as guiding their behavior in international relations[34] and therefore capable of making general international law.

Last, but not less controversial question refers to treaties and their capability to create general international law. The Special Rapporteur's report relies once again on the Study Group on fragmentation that took the view that there is a distinction between general international law and treaty law (for the purposes of systemic integration).[35] Another reference is made to the ILC's commentary to draft article 50 of the Draft Articles on the Law of Treaties, which also distinguishes general rules of international law from treaty rules (through which states may contract out of general international law).[36] However, as Orakhelashvili stated, the ICJ, in the *Nicaragua* case, spoke of customary rules made via concerted and collective expression of positions of dozens, even hundreds of states, manifested through their participation in multilateral treaties and the adoption of UN General Assembly resolutions.[37] In other words, a rule that originate from a multilateral treaty, although once binding only on the parties of that treaty, eventually can and probably will become a rule of international customary law. During the implementation of the multilateral treaty obligations, material element of state practice would be fulfilled, while psychological element of acceptance of the norms thus practiced as legally binding (*opinio juris*) would already be manifested since states decided to become parties of that specific treaty. Hence, multilateral treaties may indeed be vehicles for peremptory norms to be established as part of general international law.[38] The Special Rapporteur proposed a completely tenable conclusion that a treaty rule may reflect a norm of general international law capable of rising to the level of a *jus cogens* norm, which

[34] *Orakhelashvili*, *fn. 25*, p. 126.
[35] International Law Commission, *fn. 5*, par. 53.
[36] *Ibid*, par. 55.
[37] *Orakhelashvili*, Audience and authority – The Merits of the Doctrine of Jus Cogens, Neth. Yearb. Int. Law 2015, p. 124.
[38] *Orakhelashvili*, *fn. 25*, p. 112.

was provisionally adopted by the Drafting Committee.[39] The only objection that could possibly be made is that the report has not emphasized enough the importance and the impact that multilateral treaties could have not only on the emergence, but also on evidencing *jus cogens* norms. Nowadays, one of the most transparent and convincing methods for states to express their *opinio juris cogentis* is indeed through a multilateral treaty.

Overall, even though international customary law is the most common basis for the formation of *jus cogens* norms,[40] and most certainly is a formal source of the norms of general international law, all other relevant sources should be treated as mutually complementary, rather than mutually exclusive[41].

II. How do we know that a norm was recognized and accepted as a norm form which no derogation is permitted?

Only after has it been determined that a norm belongs to the general international law, it can be proceeded with the next step, which is to examine whether such a norm is accepted and recognized as a norm from which no derogation is permitted, by the international community of states as a whole. The Special Rapporteur greeted the "double acceptance" requirement, suggested by, *inter alia*, Erica de Wet[42], meaning that the norm should firstly be accepted as a norm of general international law and after that, special qualities of that norm, namely its non-derogability, are to be accepted (*opinion juris cogentis*).[43] The materials capable of expressing the views of states in this regard are quite similar

[39] Statement of the Chairperson of the Drafting Committee on peremptory norms of general international law (*jus cogens*), 26 July 2017, annex, as in International Law Commission, *Third report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur*, 12 February 2018, A/CN.4/714, par. 11.
[40] International Law Commission, *ft. 5*, draft conclusion 5, par. 2.
[41] *Orakhelashvili*, *fn. 25*, p. 127.
[42] *De Wet*, Jus Cogens and Obligations Erga Omnes, in: Shelton (ed.), The Oxford Handbook of International Human Rights Law, OUP 2013, p. 542.
[43] International Law Commission, *fn. 5*, par. 77.

to those that may constitute evidence of international customary law[44], for example treaties, resolutions adopted by international organizations, public statements on behalf of states, official publications, government legal opinions, diplomatic correspondence, decisions of national courts and judgments and decisions of international courts and tribunals, while other materials, such as the work of the ILC, expert bodies and scholarly writings may be considered as secondary means of identifying beliefs of states that the norm in question is one from which no derogation is permitted.[45] As comprehensive as this is, there still remains one question unanswered in the Special Rapporteur's report[46], namely how many states has to accept and recognize the particular norm. Although the phrase "large majority of states" was used several times, on the one side it is not sufficiently distinctive and on the other, members of the ILC expressed the view that the requirement should be larger and proposed "a very large majority"[47]. With all due respect, there is no sharp difference between those two phrases, and none is actually applicable in practice. Therefore, it could be suggested that the same criteria that the ICJ required in the Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* for the *opinio iuris* as an element of an international custom was applied in regard with *opinion iuris cogentis*. So, at least two-thirds of all members of the international community, including the most powerful states in economic and military terms, should accept and recognize the norm in question.[48] Formulated in that way, the threshold for a norm to become *jus cogens* is perspicuous, though very high, as in the end it should be, since *jus cogens* norms reflect the will, fundamental interests and public conscience of the whole

[44] For detailed analysis *see Hudson*, Article 24 of the Statute of the International Law Commission, YILC, 2/1950, UN Doc. A/CN. 4/16.
[45] International Law Commission, *fn. 5*, paras. 2, 3, 4.
[46] "Acceptance and recognition by a large majority of states is sufficient for the identification of a norm as a norm of *jus cogens*. Acceptance and recognition by all states is not required.", International Law Commission, *fn. 5*, draft conclusion 8, par. 2.
[47] International Law Commission, *fn. 40*, par. 10.
[48] *Sassoli*, *Bouvier*, How Does Law Protect in War?, ICRC 1999, pp. 34, 35, as in *Krstić*, Univerzalna nadležnost u međunarodnom pravu za teške povrede ljudskih prava, Pravni fakultet Univerziteta u Beogradu, 2013, p. 88.

international community and cannot be derogated once they are accepted and recognized.

III. Can the *jus cogens* intrigue now get the all-clear sign?

Now that the criteria necessary for the identification of *jus cogens* have been analyzed, it could be reasonably expected that anyone would be able to determine which norms have fulfilled them and thus have become *jus cogens*. Unfortunately, it is not that simple. For ages have many theorists tried to point out to various norms as candidates for the *jus cogens* status, yet it had little to no relevance, as long as some international tribunal, most preferably ICJ, explicitly recognized the norm as the *jus cogens* one. To be completely fair, views of academic writers may throw some light on the particular norms and thus contribute to the court's decision but are never accepted alone as sufficient evidence of *jus cogens* status. To the contrary, once the ICJ qualifies a norm as *jus cogens*, it is often accepted as the final and undebatable argument.

In this respect, it does not come as a surprise that the Special Rapporteur has also given the highest value to the Court's standings on whether a norm has gained the status of *jus cogens*. In his analysis of the candidate norms, almost every time one of the first arguments was the case law of ICJ, no matter if the Court has explicitly determined the peremptory status of the norm (as with the prohibition of aggression, the prohibition of torture, the prohibition of genocide, the prohibition of crimes against humanity[49]) or indirectly, through inclusion of the norm in the list of rules creating *erga omnes* obligations (the prohibition of apartheid and racial discrimination, the prohibition of slavery and the right to self-

[49] ICJ has actually never qualified the prohibition of crimes against humanity as a *jus cogens* norm. However, the Special Rapporteur has taken the view that since the ICJ has recognized the prohibition of torture as a *jus cogens* norm, it *a fortiori* suggests that a prohibition of the perpetration of that act on a widespread or systematic basis amounting to crimes against humanity would also have the character of *jus cogens*, International Law Commission, *Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur*, 31 January 2019, A/CN.4/727, para. 84.

determination) or when it described the basic rules of international humanitarian law as "intransgressible".[50] As for other arguments used by the Special Rapporteur, they usually included the case law of the International Tribunal for the Former Yugoslavia, the Inter-American Commission or the Court of Human Rights, the European Court of Human Rights, the African Commission on Human and Peoples' Rights, the International Criminal Court, multilateral treaties, decisions of national courts, academic writings or writings of the International Law Commission, General Assembly and Security Council resolutions.[51] With that being said, it is important to note that most of these could also be used to support some other norms that may be considered as *jus cogens*, but the only difference is that the ICJ has never had the opportunity to take them into consideration and hence, has never qualified them as *jus cogens* or rules creating *erga omnes* obligations. In the words of the Special Rapporteur "beyond the list here proposed, other norms that have been cited as norms of *jus cogens*, and whose *jus cogens* status enjoys a degree of support, include the prohibition of enforced disappearance, the right to life, the principle of non-refoulement, the prohibition of human trafficking, the right to due process (the right to a fair trial), the prohibition of discrimination, environmental rights and the prohibition of terrorism.".[52] And then he continued to provide arguments in support of their possible *jus cogens* status, which included case law of the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights, multilateral treaties, General Assembly resolutions, decisions of domestic courts and the literature. So, almost all the same evidences, except for the ICJ cases.

Let us take the principle of non-refoulement as an example. Some of the points stated by the Special Rapporteur were the fact that the Inter-American Court of Human Rights linked the principle to the prohibition of torture and

[50] *Ibid*.
[51] *Ibid*.
[52] *Ibid*., par. 123.

therefore held that the principle is "absolute and also becomes a peremptory norm of customary international law; in other words, of *jus cogens*"[53], that the General Assembly also described this principle as "a fundamental principle which is not subject to derogation"[54], as well as that some multilateral treaties contains the principle, that Latin American States have recognized its *jus cogens* character[55] and that several writers have concluded that the principle is a norm of *jus cogens*.[56] However, there was no mentioning of the Cartagena Declaration on Refugees which explicitly affirms that the principle is "imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*".[57] The same belief was presented by Judge Pinto de Albuquerque in his concurring opinion in the *Hirsi Jamma* case of the European Court of Human Rights.[58] Be as it may, the principle of non-refoulement is inseparably linked with the observance of basic human rights, *imprimis* the freedom from torture and inhumane treatment, since it directly contributes to the prohibition of torture being respected and truly implemented. The Special Rapporteur included the prohibition of torture to the list of *jus cogens* norms, mostly due to the fact that the ICJ unequivocally detected that status in the *Belgium v. Senegal* case.[59] Moreover, considering the case law of the European Court of Human Rights which is plentiful with rejections of the risk of subjecting foreign nationals to ill-treatment, even in cases when actions are carried out by a non-contracting states and national security is at stake[60], would that all be enough for a conclusion that the principle of non-refoulment has gained the status of *jus*

[53] IACHR, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion of 19 August 2014, par. 225.
[54] UNGA Resolution 51/75 of 12 December 1996 on the Office of the UNHCR, par. 3
[55] Brazil Declaration: "A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean", 3 December 2014.
[56] International Law Commission, *fn. 50*, paras. 131-133.
[57] Cartagena Declaration on Refugees, Colloquium on International Protection of Refugees in Central America, Mexico and Panama, Cartagena, 19-22 November 1984, OAS Doc. OEA/Ser.L/V/II.66, doc. 10, rev. 1, par. III.5.
[58] ECHR, no. 27765/09, *Hirsi Jamaa and Others v. Italy*, Judgment of 23 February 2012, para. 64.
[59] International Law Commission, *fn. 50*, par. 69.
[60] *Gentili*, European Court of Human Rights: An Absolute Ban on Deportation of Foreign Citizens to Countries Where Torture or Ill-Treatment is a Genuine Risk, ICON 2010, p. 322.

cogens norm, at that very moment when the prohibition of torture had gained the same status? Apparently not. Although the connection is obvious and the indications are more than clear, it is obvious that until the ICJ says its piece, there will be no room for extensive interpretation.

The same, if not more, could be said for the prohibition of arbitrary deprivation of life, which is a non-derogable right according to the International Covenant on Civil and Political Rights[61], the European Convention on Human Rights[62], the American Convention on Human Rights[63], while the African Commission on Human and Peoples' Rights has recognized it explicitly as "a *jus cogens* norm, universally binding at all times"[64]. What is more, the Human Rights Committee has stated that "the right not to be arbitrarily deprived of life is a norm of *jus cogens*".[65] To sum up, all of the regional human rights mechanisms, as well as the United Nations human rights mechanism have recognized the prohibition of arbitrary deprivation of life as a non-derogable one, *i.e.* hierarchically superior to all other human rights norms and hence of a peremptory character, but that was not sufficient enough for the prohibition to be included in the Special Rapporteur's list of *jus cogens* norms. Would the situation be different if the ICJ recognized the prohibition as a *jus cogens* norm? Probably. Once again, there was enough space for drawing an analogy, since the prohibition of arbitrary deprivation of life is in the essence of the prohibition of genocide, the prohibition of aggression and crimes against humanity, all of which were declared as *jus cogens* by the ICJ.

Finally, how come that the prohibition of racial discrimination was qualified as the *jus cogens* norm, while the general prohibition of discrimination

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[61] Article 4, International Covenant on Civil and Political Rights, United Nations, *Treaty Series*, vol. 999, 171, 1966.
[62] Article 15, European Convention on Human Rights, *Council of Europe*, 1950.
[63] Article 27, American Convention on Human Rights, *The Organization of American States*, 1969.
[64] African Commission on Human and Peoples' Rights, General comment No. 3 on the African Charter on Human and Peoples' Rights: The right to life (article 4), 2015, par. 5.
[65] Human Rights Committee, General comment No. 29 on derogation during a state of emergency, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40*, vol. I, 2001, (A/56/40 (Vol. I)), annex VI, par. 11.

was not? Have states ever made it clear that they consider racial discrimination to be more important or more severe violation of one's rights than, for example, discrimination because of religious belief, national origin, sex, or any other personal characteristics? Not that the author is aware of. And not that it would have any truly convincing argument to differentiate the status of these prohibitions. The only difference between these prohibitions is the fact that the ICJ gave some kind of support to the *jus cogens* status of the prohibition of racial discrimination and not to the others.

To be fair, the Special Rapporteur made a dissociation in regard to all of the other norms, so called "candidates for the *jus cogens* status" by stating that "the present report does not take a view on whether the norms in this section do qualify as norms of *jus cogens*"[66]. However, at that very moment when it was chosen that a (non-exhaustive) list of *jus cogens* norms will be made and included in the report, all of the norms that did not find their place in the list was deemed to be seen as ones that have not yet gained the *jus cogens* status, in a word, *jus cogens in statu nascendi*.

To conclude with, although the decision to make a list of *jus cogens* norms, though non-exhaustive one, can be perceived as something revolutionary and game-changing for the contemporary international law, it is highly questionable what are its real implications. What was actually done was listing every norm that has already been qualified as *jus cogens* by the ICJ and leaving all of the other candidates, that are actually debatable and could use some clarification, aside. At the second glance, maybe that is the whole point. Maybe there is a hidden additional requirement for a norm to achieve the status of *jus cogens*, besides all of the above-mentioned, namely that the ICJ has recognized the norm as such. In other words, only after the ICJ makes an assessment whether criteria for *jus cogens* status of a norm are fulfilled and pronounce that they are, the norm is

[66] International Law Commission, *fn. 50*, par. 134.

actually entering the realm of *jus cogens*. Therefore, this constitutive role of the ICJ should indeed be considered as the final, ultimate requirement for a norm to gain a *jus cogens* status.

C. REGIONAL *JUS COGENS*

Probably the most prominent author on the topic, Robert Kolb has adopted the broad conception of *jus cogens* when he took the view that any agreement between states that a particular rule (including even procedural rules of the ICJ) may not be derogated from would qualify as a peremptory norm, hence stating that there is "no reason to deny the existence of regional peremptory norms".[67] That may be true if one follows his reasoning and the proposed legal technique, yet not when it comes to the ILC's reports. As was explained above, the norm in question must be a norm of general international law and accepted and recognized by the international community of states as a whole as one from which no derogation is permitted, in order to become *jus cogens*. Therefore, it is clear from the very criteria that there is no possibility for a norm to be regional and *jus cogens* at the same time. Namely, if a norm is of regional character, it is not accepted and recognized by the international community of states as a whole and cannot be a *jus cogens* norm. Indeed, there are many other difficulties related to this concept, cited by the Special Rapporteur, such as the question of definition of 'region'[68], the persistent objector rule[69] or the situation when the state member of a particular region would conclude a treaty with a third state[70], that is in conflict with a regional *jus cogens*, it is unclear what would the legal consequences be, *i.e.* would that treaty be void and if yes, how could that kind of legal uncertainty be justified.

[67] *Kolb*, Peremptory International Law (Jus Cogens): A General Inventory, Hart Publishing, 2015, pp. 51-54, 97.
[68] International Law Commission, *fn. 50*, par. 29.
[69] *Ibid.*, par. 28.
[70] *Ibid.*, par. 34.

As might be expected, this does not mean that groups of states cannot have common moral values that are in the background of norms that they consider to be more important than others, as is the case with absolute and non-derogable human rights, which differ from region to region, but are not all *jus cogens* norms. The analysis of the Special Rapporteur has resulted in the similar manner, with the assertion that there is no support in the practice of states for the notion of regional *jus cogens*[71], but surprisingly the draft conclusion was not proposed. In the words of the Special Rapporteur "while a draft conclusion explicitly stating that international law does not recognize the notion of regional *jus cogens* is possible, the Special Rapporteur is of the view that such a conclusion is not necessary, and an appropriate explanation could be included in the commentary".[72] While it was shown that regional *jus cogens* is incompatible with the definition of *jus cogens*, reasons for avoidance of making such a conclusion are not obvious, so one can only wait for the commentary in order to discover them. In any case, in the end of this chapter the following conclusion may be regarded as certain – regional *jus cogens* represents no more than *contradictio in adiecto*.

D. ARE WE BEATING AROUND THE BUSH OR HAVE WE FINALLY FOUND THE CORE OF INTERNATIONAL LAW?

Long ago, Verdross famously stated, "a truly realistic analysis of the law shows us that every positive juridical order has its roots in the ethics of a certain community, that it cannot be understood apart from its moral basis".[73] In that manner, the fact that ILC is working on *jus cogens* norms is probably the sign of the maturity of international legal order.

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[71] *Ibid.*, par. 47.
[72] Ibid., par. 47.
[73] *Verdross*, Forbidden Treaties in International Law: Comments on Professor Garner's Report on 'The Law of Treaties', AJIL 1937, pp. 574, 576.

However, it must not be forgotten what is one of the primary roles of *jus cogens* norms, besides their originally intended - to outlaw immoral treaties, specifically to be the effective tool for solving the conflict of different international norms. The ILC Study Group on fragmentation of international law concluded that hierarchy does exist in international law with norms of *jus cogens* being superior to other rules on account of their contents as well as the universal acceptance of their superiority.[74] In that regard, *jus cogens* should provide a means to balance interests and interpret legal obligations in ways that affirm "the emergence of values which enjoy an ever-increasing recognition in international society".[75] Unfortunately, *jus cogens* norms have not yet had a chance to fulfil that function. So far, they were usually invoked in the case law of international courts just to strengthen the moral appeal of some relevant arguments, hence had only declarative character and have almost never been used in the context of invalidation of immoral treaties, let alone within the circumstances of conflict of norms.[76] Not until their identification, content and legal effects are well-defined and undebatable, will they be taken seriously and given the opportunity to accomplish their mission. And that is precisely why are the ILC's reports of paramount importance for further development of international law.

One of the implications of the last, fourth report of the ILC's Special Rapporteur is presented in this paper and is concerning the proactive and constitutive role of the ICJ in the creation of *jus cogens* norms. Whether it was the hidden intention of the Special Rapporteur to lead readers to this conclusion or just fortuitousness, it is perfectly fitting the real state of affairs. Only after the ICJ pronounce that the norm is of *jus cogens* status, one can be certain that it really is. The sooner this additional, hidden criterion is recognized and accepted by the

[74] International Law Commission, *fn. 17*, paras. 31-32.
[75] ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgement, I.C.J. Reports, 2002, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, par. 73.
[76] *De Wet*, Entrenching international values through positive law: The (limited) effect of peremptory norms, KFG Working Paper Series 2019, pp. 16-17

whole international community, the sooner can *jus cogens* concept be further developed and hence start fulfilling its main functions.

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