

# **JUS COGENS (PEREMPTORY NORMS)**

## **- A KEY CONCEPT OF THE INTERNATIONAL LAW**

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### **Abstract**

*One of the most important concept of international law, jus cogens, still has a controversial significance. Jus cogens is a Latin term meaning a mandatory or compelling law, and it refers to the peremptory norms of general international law from which derogation is forbidden. Despite the formal recognition of this legal concept, based on articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties, regarding the nullity of the provisions of a treaty which come into conflict with a peremptory norm, jus cogens has a wider application in the international realm than the law of treaties. Therefore, jus cogens can appear in different forms, such as treaty law, customary law, general principles of law, etc., according to the content of the norms. This paper aims to analyse the significance of this legal concept, the role of it in international law and the relevance of it for the international doctrine and the jurisprudence of international courts.*

**Keywords:** international law, jus cogens, peremptory norm, international public order.

**JEL Classification:** K33

### **1. Introduction**

The 1969 Vienna Convention on the Law of Treaties stipulates in its Article 53 on “*Treaties conflicting with a peremptory norm of general international law (“jus cogens”)*” that “*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*”.

The 1969 Vienna Convention on the Law of Treaties stipulates in its Article 64 on the “*Emergence of a new peremptory norm of general international law (“jus cogens”)*” that “*If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates*”.

We may observe that the provisions of the Convention mentioned above, provide criteria for determine the norms could be qualified as *jus cogens*.

As was underline in legal literature, the norms belonging to *jus cogens* are applicable to the entire international community as whole. Also, all peremptory norms involves the prohibition of derogation from its and are supplemented with sanctions.<sup>2</sup>

Moreover, the concept of *jus cogens* have appeared in the context of the Draft articles on the responsibility of states (2001)<sup>3</sup> and international organizations (2011)<sup>4</sup>, the Guiding principles

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<sup>2</sup> Cezary Mik, *Jus Cogens in Contemporary International Law*, XXXIII POLISH Yearbook of international law - 2013, Polish Academy of Sciences Institute of Law Studies and the Committee on Legal Sciences, Warszawa 2014, p. 35; Christian Tomuschat, Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order. Jus Cogens and Obligations Erga Omnes*, ed. Koninklijke Brill Nv, Leiden, 2006, p. 30; Lauri Hannikainen, *Peremptory Norms in International Law: Historical Development, Criteria, Present Status*, ed. Finnish Lawyers Publishing Company, Helsinki, 1988, p. 23; Alexander Orakhelashvili, *Peremptory Norms in International Law*, ed. Oxford University Press, Oxford, 2006, p. 27.

<sup>3</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (hereinafter: Responsibility of States. Commentaries 2001), available at [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)., consulted on 1.10. 2019.

<sup>4</sup> Draft Articles on responsibility of international organizations, with commentaries (hereinafter: Responsibility of international organizations. Commentaries 2011). Text together with commentary is available at: [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_11\\_2011.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf)., consulted on 1.10. 2019.

applicable to unilateral declarations of states (2006)<sup>5</sup>, and Guidelines on reservations to treaties and interpretative declarations (2010)<sup>6</sup>.

## 2. The application of *jus cogens*

The 1969 Vienna Convention on the Law of Treaties notably stipulates in its Article 66 on “Procedures for judicial settlement, arbitration and conciliation” that “If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed: (a) any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;”.

Art. 65 para.3 of the Vienna Convention on the Law of Treaties stipulates that *if an objection has been raised against a claim aimed at invalidating a treaty, the parties shall have a recourse to the pacific means of settlement of disputes as provided in Art. 33 of the UN Charter.*

This procedure requires the parties to choose between arbitration and the ICJ. However, nowadays there is not a general and mandatory jurisdiction with respect to *jus cogens*.

It is important to underline that during the Vienna Conference, Arts. 65 and 66 provoked a number of controversies.<sup>7</sup> They were reflected, among the others, in the reservations made by states to Art. 66 (8 countries, including Russia and China) and Art. 66(a) (3 countries: Algeria, Saudi Arabia, Tunisia), as well as the so-called counter-reservations (4 countries: Belgium, Denmark, Finland and Tanzania) and objections to those reservations (15 countries, including The Netherlands, United States, Sweden and the United Kingdom). These controversies determine in practice the a very limited application of Art. 66 which however does not preclude its enforcement in accordance with Art. 33 of the UN Charter.

## 3. Conclusions

*Jus cogens* consists in fundamental norm of international public policy which are peremptory in nature and from which no derogation is allowed unless a subsequent peremptory norm is adopted. “This means that the position of the rules of *jus cogens* is hierarchically superior compared to other ordinary rules of international law.”<sup>8</sup>

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<sup>5</sup> Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto (hereinafter: Unilateral acts. Commentaries 2006), available at: [http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9\\_9\\_2006.pdf](http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_9_2006.pdf), consulted on 1.10. 2019.

<sup>6</sup> Guidelines constituting the Guide to Practice on Reservations to Treaties, with commentaries (hereinafter: Reservations. Commentaries 2011) adopted by the International Law Commission, available at: <http://legal.un.org/ilc/reports/2011/english/addendum.pdf>, consulted on 1.10. 2019.

<sup>7</sup> Status of the Convention together with reservation of states-parties to Art. 66: [http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en](http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en), consulted on 1.10. 2019.

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