

*Cezary Mik**

JUS COGENS IN CONTEMPORARY INTERNATIONAL LAW

INTRODUCTION

The international community, both in the past and nowadays, has been seen as a decentralized and horizontal one. Owing to the lack of any central international authority, it is regarded as a relatively unorganized community rather than a society. Even in such a community however there is room and a need for law. In its application and operation, however, it depends to a great extent on the free will of the subjects of the international community, in particular states.¹ As a consequence, international law is in principle of a dispositive nature (*jus dispositivum*). Its content, irrespective of the form or number of states engaged, can be freely changed or replaced by subsequent norms. *Lex posterior derogat legi priori*.

At the same time, international law is universally, although rather intuitively, regarded as a legal system.² However, each legal system has an organized structure, an important element of which is the principle of hierarchy. At the national level this hierarchy is based on a hierarchy of powers. It finds expression in a hierarchical legal system, with a constitution in the superior position. All legal acts that are located below the constitution, and even if they are later in time need to be compatible with it. *Lex*

* Prof. Cezary Mik is a Chair of the Department of International and European Law at the Cardinal Stefan Wyszyński University in Warsaw (Poland).

¹ See R. Müllerson, *Ordering Anarchy: International Law in International Society*, The Hague-Boston-London: 2000, pp. 87-97.

² The International Law Commission did not have any serious doubts in characterizing international law as legal system: “*International law as a legal system*. International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them. Norms may thus exist at higher and lower hierarchical levels, their formulation may involve greater or lesser generality and specificity and their validity may date back to earlier or later moments in time” (pt 1). The Commission also held that the basic relations within the system are relationships of interpretation, while relationships of conflict are exceptional. See Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law (hereinafter: Fragmentation. Conclusions 2006), available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/1_9_2006.pdf.

inferior posteriori non derogat legi superiori. Moreover, since Roman times it is accepted that norms enacted by a state cannot be changed by the arrangements of private entities (*jus publicum privatorum factis mutari non potest*).³ In international law, where the creators of law are at the same time its addressees, and where sources of law can have features of both legal acts and contracts, the principle of hierarchy expresses itself not in the hierarchy of the sources of law, but in the existence of certain elements that introduce hierarchy.⁴ Two elements are indicated in this context: Art. 103 of the UN Charter (the principle of superiority of obligations arising from the Charter over any other treaty obligations of member states), and the peremptory norms of international law (i.e. *jus cogens*).⁵

Excluding incidental international arbitration awards from the interwar period as well as a part of the doctrine that traces the roots of *jus cogens* back to various naturalist (e.g. *jus necessarium*) or positivist conceptions (e.g. the international public order clause),⁶ one may consider that *jus cogens* was introduced into international law by Arts. 53 and 64 of the Vienna Convention on the Law of Treaties of 23 May 1969 (VCLT),⁷ and subsequently repeated in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 26 January 1986 (VCLTIO).⁸

³ The formula originates from Papinian (D.2.14.38). Roman law did not, however, use the notions “*jus cogens*” or “*jus dispositivum*”. See W. Wołodkiewicz (ed.), *Prawo rzymskie. Słownik encyklopedyczny* [Roman law: Lexicon], Warszawa: 1986, pp. 82, 84. See also, K. Schmalenbach, *Commentary to Art. 53 of the Vienna Convention on the Law of Treaties of 1969*, [in:] O. Dörr, K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Berlin-Heidelberg: 2012, pp. 899-900.

⁴ R. Kolb labelled international law as law of horizontal cooperation and primitive law (R. Kolb, *Réflexions de philosophie du droit international. Problèmes fondamentaux du droit international public: théorie et philosophie du droit international*, Bruxelles: 2003, pp. 91-95).

⁵ This text uses terms of “*jus cogens*” and “peremptory norms” interchangeably. In the latter case, as will be discussed in more details in the context of the analysis of the criteria used for distinguishing *jus cogens*, I will mean norms of general law.

⁶ See R. Kolb, *Observation sur l'évolution du concept de jus cogens*, 113(4) *Revue Générale de Droit International Public* 837 (2009). The author presents the following evolutive sequence of conceptual changes (p. 839): “vicaire du droit naturel – vecteur de construction du droit international – traités *contra bonos mores* – validité des traités à raison de leur contenu – super-légalité internationale aux effets chatoyants et multiples”. For a broad overview of the different theories of *jus cogens*, see R. Kolb, *Théorie du jus cogens international*, Paris: 2001, p. 54 et. seq.

⁷ 1155 UNTS 331, the Convention entered into force on 27 January 1980, and as of 15 March 2014 there are 113 State-Parties. Commentary of the International Law Commission to the Draft Convention of 1966: Draft Articles on the Law of Treaties with commentaries 1966 (hereinafter: Law of treaties between States. Commentaries 1966), available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf.

⁸ Text of the VCLTIO with commentaries (1982): Draft Articles on the law of treaties between States and international organizations or between international organizations with commentaries 1982 (hereinafter: Law of treaties of international organizations. Commentaries 1982), available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/1_2_1982.pdf. The Convention has not yet entered into force, as of 15 March 2014 there are 42 parties.

Both conventions are the product of works undertaken within the International Law Commission (ILC). However, the Commission has also later, when dealing with other issues of international law, considered the question of peremptory norms. Proposals and comments on *jus cogens* have appeared in the context of the Draft articles on the responsibility of states (2001)⁹ and international organizations (2011),¹⁰ the guiding principles applicable to unilateral declarations of states (2006),¹¹ and guidelines on reservations to treaties and interpretative declarations (2010).¹² The ILC also addressed the problem of peremptory norms within the context of its work on the fragmentation of international law (2006).

The inclusion of *jus cogens* in the VCLT, as well as in the subsequent works of the ILC, combined with the changes and events that have taken place in the international community at the end of the 20th century/beginning of the 21st (in particular the end of the Cold War, massive violations of human rights, humanitarian law in internal and regional conflicts, dissolution and creation of states, and controversial cases of military interventions) have encouraged international and national courts to refer more frequently to this legal concept. Although the practice is still not extensive, the issue of *jus cogens* has appeared in judgements and advisory opinions of the International Court of Justice (ICJ), in international arbitration awards (mainly *ad hoc*), judgements of international criminal courts (particularly, the International Criminal Tribunal for the former Yugoslavia (ICTY)), general comments of the UN Human Rights Committee, as well as in judgements and advisory opinions of some regional courts such as the European Court of Human Rights (ECtHR) and the Inter-American Commission and Inter-American Court of Human Rights (IACHR), as well as the Court of Justice of the European Union (ECJ).

Peremptory norms have also received considerable attention in the doctrine of international law. Today it would be difficult to find a textbook or a general lecture of the Hague Academy that would not touch upon the issue of *jus cogens* (the Hague Academy even dedicated a few specialized lectures solely to the issue of peremptory norms).¹³

⁹ 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.

¹⁰ 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.

¹¹ 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.

¹² 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>.

¹³ L. A. Aleksidze, *Legal Nature of Jus Cogens in Contemporary International Law*, RCADI 1981, vol. 172; G. Gaja, *Jus Cogens beyond the Vienna Convention*, RCADI 1981, vol. 172; A. Gomez-Robledo, *Le jus cogens international: sa genèse, sa nature, ses fonctions*, RCADI 1981, vol. 172.

There are also a number of monographs on *jus cogens* (sometimes being a result of the Hague lectures),¹⁴ as well as numerous smaller studies. In this context, the Polish doctrine of international law is rather limited. Only a few shorter texts are available, and no monograph has yet been published.

The existence of relatively well-developed international regulations and court practice relating to *jus cogens*, as well as the rich literature, has not removed all the legal problems connected with this concept. Even now one may find voices questioning the inclusion of *jus cogens* in international law. Others stress various problems related to its legal force and the operation of peremptory norms in international legal order.

Examination of all relevant aspects, as well as detailed analysis of all the cases that include references to *jus cogens* (together with the corresponding voices in the doctrine of international law) goes well beyond the scope of this article. Nevertheless in the context of a process that is taking place in the contemporary international community and international law, there seems to be a need for reassessment of this issue. This will be done from two perspectives: normative and functional. Within the normative perspective, the analysis will include the issue of the nature of *jus cogens*, its basis, normative character and the catalogue of peremptory norms. Within the functional perspective, I will discuss issues connected with the influence of *jus cogens* on the creation of international law: its application, including enforcement (with the reservation that the relationship between *jus cogens* and the immunity of a state and its officials will only be briefly addressed); the interpretation of international law and the position of *jus cogens* in normative conflicts; as well as its impact on the responsibility of the main subjects of international law (states and international organizations) and individuals.

I. *JUS COGENS* IN A NORMATIVE PERSPECTIVE

1. Problem of the legal substance of *jus cogens*

1.1. Introductory remarks

Our analysis should start from the only provision that defines *jus cogens*, that is Art. 53 of the VCLT. (“Treaties conflicting with a peremptory norm of general international law (‘jus cogens’)”). It provides 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

¹⁴ A. Orakhelashvili, *Peremptory Norms in International Law*, Oxford University Press, Oxford: 2006; Kolb (*Théorie*), *supra* note 6; L. Hannikainen, *Peremptory Norms in International Law: Historical Development, Criteria, Present Status*, Helsinki 1988; L.A. Aleksidze, *Nekotoryye voprosy teorii mezhdunarodnovo prava. Imperativnyye normy jus cogens*, Tbilisi: 1983; C. Rozakis, *The Concept of Jus Cogens in the Law of Treaties*, Amsterdam: 1976; J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties*, Vienna: 1974.

which can be modified only by a subsequent norm of general international law having the same character.

Art. 53 of the VCLT explicitly states that its definition of peremptory norms was formulated only “for the purposes of the Convention”. Its unclear status and *ad hoc* character also seems to be reinforced by the fact that it was not included in the convention’s dictionary, but only in the provision that regulates the nullity of a treaty. However, one should also recall that this definition was repeated literally by Art. 53 of the VCLTIO, and that the ILC in its texts and commentaries frequently refers to Art. 53 of the VCLT. International law doctrine also considers Art. 53 as a basic point of reference in its deliberations.

1.2. Nature of Art. 53 of the VCLT

The first issue that needs to be addressed is the legal character of the conventional regulation of *jus cogens*. In particular, it is important to determine whether Art. 53 is an element that contributes to the development of customary law, or whether it should rather be seen as its codification.¹⁵ In the latter case, this would mean that *jus cogens* already had the status of customary law when the Convention was concluded and belongs to *corpus iuris gentium*. This would also mean that although not all states are bound by the VCLT, they would all be bound by *jus cogens*, as provided in the Convention, on the basis of a parallel norm of customary law.

The idea that lies at the basis of *jus cogens* has been known to the international community for centuries, and the pre-conventional doctrine¹⁶ and practice¹⁷ were not entirely unfamiliar with *jus cogens*. At the same time however, the ILC, in its commentary to the draft Convention, noted that “the emergence of rules having a character of *jus*

¹⁵ There was disagreement on this issue during the Vienna Conference, see e.g. S. E. Nahlik, *Kodeks prawa traktatów* [The codex of law of treaties], Warszawa: 1976, pp. 316-317. However, some authors consider this problem to be of secondary importance (see M. Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford University Press, Oxford: 1997, p. 45. The author argues that what is important is a growing acceptance for *jus cogens*).

¹⁶ A. Verdross, *Forbidden Treaties in International Law*, 31(4) American Journal of International Law 571 (1937) is conventionally considered to be the first analysis of *jus cogens*. However, sometimes earlier works are mentioned, e.g. K. Zemanek, *How Identify Peremptory Norms of International Law*, [in:] *Völkerrecht als Wertordnung. Festschrift für Christian Tomuschat*, P.-M. Dupuy, B. Fassbender, M.N. Shaw, K.-P. Sommermann (eds.), Kiel: 2006, p. 1103, pointing to the PhD thesis of M. Fröhlich, *Die Sittlichkeit in völkerrechtlichen Verträgen*, published in 1924 in Zürich. D. Shelton identifies a work of Q. Wright of 1917, in which he considered the case of illegal treaties against the judgement of the Central American Court of Justice of 30 September 1916, see D. Shelton, *Normative Hierarchy in International Law*, 100(2) American Journal of International Law 297 (2006), pp. 297-298.

¹⁷ See, especially, the arbitral award of 19 October 1928 in *Pablo Nájera (France) v. United Mexican States*, RIAA vol. V, p. 466 et. seq. The arbitral tribunal held that Art. 18 of the Covenant of the League of Nations (obligation to register treaties concluded before the establishment of the League of Nations otherwise being non-binding) has a peremptory character, with the reservation that this sanction applied only to the members of the League (pt. 7). The assignment of a peremptory character to Art. 18 shows the technical perception of *jus cogens*.

cogens is comparatively recent.” The Commission did not refer to any earlier case law, and added that international law is in the process of rapid development (pt. 3).¹⁸

The VCLT entered into force at the beginning of 1980, following the deposit of the thirty-fifth instrument of ratification (in accordance with Art. 84 of the Convention). Until then, international courts in principle did not refer to the concept of *jus cogens*.¹⁹ Such references appeared only in the 1980s and particularly in the 1990s. This fact has led a part of the cotemporary doctrine of international law to conclude that the norm contained in Art. 53 of the Convention “has gradually acquired a status of customary law.”²⁰ However, it also should be noted that as of today only 111 countries (out of 193) are parties to the VCLT. The Convention is therefore a common, but not universal, treaty. For example, neither the US, India nor France are parties, which may cast some doubt on its representativeness.

International law allows, however, in certain circumstances for the deduction of norms of customary law from treaty norms. Applying the criteria used by the ICJ in the *North Sea Continental Shelf* case (1969) to determine the ability of a multilateral treaty to create customary norms,²¹ one has to show that: 1) a treaty norm is of a fundamentally norm-creating character and could be regarded as forming the basis of a general rule of law; 2) participation in a convention should be very widespread and representative; 3) although the passage of any considerable period of time since a convention was signed or entered into force is not necessary element, the state practice (particularly those countries which are not parties to a particular convention) should be both extensive and virtually uniform with respect to the content of the particular norm and should have occurred in such a way as to show a that a general recognition of a rule of law or legal obligation is involved (the ICJ analysed the customary nature of a substantive norm).

Assuming that Art. 53 of the VCLT is a provision which could theoretically acquire the status of a customary international norm in accordance with the formula proposed by the ICJ, it should be noted that while Art. 53 of the VCLT meets the first criterion, and the second one has arguably been met over several dozens of years of its operation (except for the United States and France), showing that the third criterion is met could

¹⁸ See Commentary to Art. 50 of the draft Convention [in:] *Law of treaties between States: Commentaries 1966*, p. 248. On the negotiating history of Art. 53, see also Schmalenbach, *supra* note 3, pp. 901-907.

¹⁹ But see Arbitral award (merits) of 19 January 1977 in the case *Texaco Overseas Petroleum Company v. The Government of Libyan Arab Republic*, [in:] G. Distefano, G.F. Buzzini, *Bréviaire de jurisprudence internationale. Les fondamentaux du droit international public*, Bruxelles: 2005, p. 1220.

²⁰ Cf. E. Suy in his commentary to Art. 53 [in:] O. Corten, P. Klein (eds.), *Les Conventions de Vienne sur le droit des traités. Commentaire article par article*, Bruxelles: 2006 (hereinafter referred to as “Les Conventions de Vienne. Commentaire”), vol. II, p. 1908.

²¹ See Judgement of the ICJ in *North Sea Continental Shelf* in disputes between *Federal Republic of Germany v. the Netherlands* and *Federal Republic of Germany v. Denmark* cases of 20 February 1969, para. 63, 70-81, ICJ Rep. 1969, pp. 39, paras. 41-45. See also Judgement (merits) of the ICJ of 27 June 1986 in *Case concerning military and paramilitary activities in and against Nicaragua* of 27 June 1986, ICJ Rep. 1986, para. 177, p. 95.

be problematical. The difficulties involved are amplified by the fact that international case law is fragmented and rather superficial, and a part of the doctrine of international law still questions the existence and legal nature of *jus cogens*.²² Consequently, it is difficult to consider Art. 53 of the VCLT as a norm that codifies or crystalizes pre-conventional international law. It is still primarily a treaty norm.²³ On the other hand, it is less controversial to consider Art. 53 as a source of a customary law norm, which is just in the process of gradual formation.

1.3. *Jus cogens* as a norm of international law

1.3.1. *Jus cogens* from the perspective of general theory of international law norms

1. The text of Art. 53 of the VCLT indicates that *jus cogens* should be qualified as a norm of international law. It is worth noting that two official languages of the Convention (i.e. English and French) use the term “norm” and “norme” rather than the notion of “rule” or “règle”.

International law doctrine sometimes distinguishes, within international norms, between provisions that determine policies, principles and rules. Provisions concerning policies are set in a general and abstract manner as objectives of required conduct. They do not, however, establish any procedures, means or criteria for achieving those objectives. They place an obligation on states to pursue the objective and to make a good faith effort to reach consensus with respect to that objective. Provisions concerning principles establish abstract norms and serve as guidelines (standards) for states' conduct rather than as the basis for concrete rights and obligations. These provisions do

²² Criticisms that reject *jus cogens* were present from the very beginning. They were expressed during the Vienna Conference (see e.g. Nahlík, *supra* note 15, pp. 314-316; M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden-Boston: 2009, p. 667). In the Polish literature, the concept of *jus cogens* in international law, albeit in the pre-Convention era, was rejected by L. Ehrlich, *Prawo międzynarodowe* [International law], Warszawa: 1958, pp. 20-21, while during the works of the International Law Commission a particularly important article was that of G. Schwarzenberger, *International Jus Cogens?*, 43 *Texas Law Review* 455 (1965). Rejection of *jus cogens* remains, however, present today, particularly in the French doctrine (see S. Sur [in:] J. Combacau, S. Sur, *Droit international public*, Paris: 2006, pp. 50 et. seq.; de facto G. Guillaume, *Jus cogens et souveraineté*, [in:] *L'Etat souverain dans le monde d'aujourd'hui. Mélanges en l'honneur de Jean-Pierre Puissochet*, Paris: 2008, p. 127 et. seq.), but not only (see e.g. M. J. Glennon, *De absurdité du droit impératif (jus cogens)*, 110(3) *Revue générale de droit international public* 529 (2006). In the Polish doctrine, Czapliński remains pessimistic, see W. Czapliński, *Odpowiedzialność za naruszenia prawa międzynarodowego w związku z konfliktem zbrojnym* [Responsibility for a breach of international law in relation to armed conflict], Warszawa: 2009, pp. 202 et seq. See also U. Linderfalk, *The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences*, 18(5) *European Journal of International Law* 855 (2008), who observes that the number of critics is decreasing.

²³ Similarly, Shelton, *supra* note 16, p. 301. O. Dörr also notes that “to include the provisions on *jus cogens* in the Convention led to considerable progress from the viewpoint of general international law, since a topic discussed in doctrine acquired a ‘normative face’ in a binding document of law and lively debate about it was instigated, but it is not an undiminished success story, as the acceptance of the Convention as a whole was thereby restricted”. See O. Dörr, *Codifying and Developing Meta-Rules: The ILC and the Law of Treaties*, 49 *German Yearbook of International Law* 129 (2006), pp. 150-151.

not always require that a particular objective be the central point; they rather describe “a set of values and the quality of behaviour as such”. A provision concerning a principle does not regulate specific conduct; it expresses consensus as to the points of departure, values and means (these are “norms of aspiration” and not “norms of obligation”). In the case of a lack of specific norms that would develop a principle, its consequence usually consists in prohibiting a particular conduct. Last but not least, a provision concerning a rule determines specific conduct, addressees and beneficiaries. It may also happen that a provision designed as a rule is in fact a principle and requires normative development.²⁴

Using the above distinction, we can say that provisions that only articulate aims or which are principles of law (i.e. rules that set general standards of conduct) should not be qualified as *jus cogens*. In principle, this category should include rules that determine the conduct of subjects of international law, i.e. indicate their rights and obligations.²⁵ However, in international law, as mentioned above, we sometimes witness the reinterpretation of provisions. As a consequence, provisions that set aims can be interpreted as principles having regulatory implications. For example, the principles of self-determination and respect for human rights and fundamental freedoms were derived from Art. 1 of the UN Charter, which sets the aims of the organization. Similarly, principles of law may sometimes be not only general determinants of conduct, but they may also serve as a basis from which specific rights and obligations of subjects of international law are derived. This is the case with respect to the prohibition on the use and threat of force as provided by Art. 2.4 of the UN Charter.²⁶ As a consequence, principles (regarded as such or derived from provisions designed as policies) cannot be *a limine* excluded from the scope of peremptory norms. In such a case however, assigning principles with a *jus cogens* character requires specifying the conditions of their operation, otherwise they may prove to be too general to link them with, for example, the sanction of nullity.

2. *Jus cogens* are rules of conduct. In the doctrine of international law, one may distinguish between norms that directly regulate rights and obligations (substantive and procedural norms) and those which do so in an indirect way (competence norms and conflict of law norms).²⁷ Only the first category is suitable for *jus cogens*. At the same time, peremptory norms are of a substantive rather than procedural nature. Looking from the perspective of responsibility for a breach of international law, *jus cogens* will

²⁴ P. van Dijk, *Normative Force and Effectiveness of International Norms*, 30 German Yearbook of International Law 9 (1987), pp. 12-15. He follows a distinction made by R. Dworkin.

²⁵ An international law norm can be defined as a rule of conduct in international relations, providing a basis for obligations and rights, and aimed at giving a voice to three values: effectiveness, equity and respect. See J. Gilas, *Norma prawa międzynarodowego* [A norm of international law], [in:] *Polska i świat. Księga pamiątkowa ku czci prof. H. Olszewskiego* [Poland and the world: A commemorative book for prof. H. Olszewski], Poznań: 1978, p. 130.

²⁶ Particularly if we interpret this prohibition in the light of the Declaration on Principles of International Law of 24 October 1970, A/RES/46/2625 (XXV).

²⁷ J. Gilas, *Prawo międzynarodowe* [International law] (2nd ed.), Toruń: 1999, pp. 97-98.

consist of norms of the first rank, not norms that specify or implement responsibility (the second – or if one so distinguishes – the third rank).²⁸

1.3.2. *Jus cogens* as norms of international law

1. *Jus cogens* as norms of international law need to have a specific structure. As explained by J. Gilas, the structure of international law norms, as compared to norms of national law, is usually atypical. In particular, it is not always possible to find sanctions, which accompany the whole system of international law, or its specific sections. Hypotheses are frequently implied. As a consequence, the only visible element is disposition.²⁹ Of course, such a situation does not need to occur in the case of every norm of international law.

If one looks at the definition of Art. 53 from this perspective, it should be noted that *jus cogens* is defined not as a norm – rule of conduct, but in a generic fashion, as a particular matrix with which specific substantive peremptory norms should correspond. The Convention, therefore, only gives criteria for distinguishing *jus cogens*.

Are we able to derive from Art. 53 of the VCLT any elements of the normative structure of *jus cogens*? Considering that *jus cogens* as a general peremptory norm should operate in the international community as whole, this would indirectly mean that such a norm is directed to all its members. Consequently, the addressees, although implied, would be generally known. Moreover, the prohibition of derogation is undoubtedly an element of the disposition. Finally, the norm is supplemented with sanctions, as envisaged by Art. 53 of the VCLT.

2. **Hypothesis of *jus cogens*.** As has already been stated, in the case of a majority international law norms, including *jus cogens*, hypothesis is implied. However, one cannot exclude that in the case of a particular norm, an addressee and the circumstances of its operation will be entirely or partially specified. Since peremptory norms are of a general or even universal character, the group of potential addressees includes all subjects of international law, in particular states.³⁰ What remains problematic is whether individuals can also belong to this group.

3. **Disposition of *jus cogens*.** Addressees of a peremptory norm cannot derogate or depart from its instruction. At the same time, a conduct resulting from rights and obligations, which cannot be derogated or departed from, is not known until it gets at the moment of recognition of a concrete substantive rule as a peremptory norm.

Looking from the perspective of the content of the disposition, one may distinguish between norms that prohibit, command or permit (i.e. rights) certain conduct.

²⁸ *Ibidem*, p. 98.

²⁹ *Ibidem*, p. 96.

³⁰ The ICJ, in its advisory opinion of 8 July 1996 on *legality of the threat or use of nuclear weapons*, para. 79, ICJ Rep. 1996, p. 257, stressed that fundamental rules of humanitarian law constitute intransgressible principles of international customary law and have to be observed by all states, whether or not they are bound by a particular convention. The ICJ however did not answer whether such intransgressible principles constitute *jus cogens* (para. 83, p. 258).

In principle, there is nothing wrong with considering each of these norms as having a peremptory character. In practice, however, normally norms that express prohibitions (e.g. prohibition of racial discrimination, prohibition of torture) or permission (e.g. right of nations to self-determination or even all individual rights) are considered as *jus cogens*.³¹

4. Jus cogens and sanction. Sanction seems to be an indispensable element of *jus cogens*. Art. 53 of the VCLT stipulates that the sanction consists in rendering a treaty null and void, while in case of *jus cogens superveniens* (Art. 64 in connection with Art. 71 of the VCLT), it is termination of a treaty. The situation is not so clear when it comes to reservations and interpretative declarations (guideline 4.4.3 of the Guide of the International Law Commission on reservations). Although reservations contrary to *jus cogens* are not permitted, they are not necessarily invalid. On the other hand, unilateral declarations which are in conflict with peremptory norms are void (pt. 8, Guiding Principles applicable to unilateral declarations of States). Irrespective of variations in the consequences resulting from a breach of a peremptory norm, one may observe that formal sanctions, as an element of *jus cogens*, appear in the context of formalized acts. As a side note, it should be also added that the sanction of nullity is envisaged not only in the context of *jus cogens*. The VCLT provides that a treaty may also become void in other situations (Art. 46 and subseq.).

However, application of *jus cogens* in international law, unlike in the case of domestic law, is not limited to formalized acts. In order to ensure the practical utility of *jus cogens*, it also concerns factual acts, including failure to act (breaches of peremptory norms can sometimes occur through factual behaviour or through formalized acts in the form of acts of domestic law which are considered in international law as facts³²).

One may find a confirmation of such influence of *jus cogens* in the regulation of responsibility of states and international organizations. In particular, when it comes to considering national law as a question of fact it should be noted that according to Art. 3 of the Articles on responsibility of states for internationally wrongful acts, an assessment as to whether an act of a state is internationally wrongful is performed on the basis of international and not national law (see also Art. 12). The situation is slightly different in the case of responsibility of international organizations. Pursuant to Art. 1.1 of the draft articles on the responsibility of international organizations, the Articles apply to the international responsibility of international organizations for internationally wrongful acts. However, Art. 10.2 of the Articles provides that a breach of the rules of the organization, and not only its external obligations, may also constitute a breach of international obligations.

³¹ See also, Linderfalk, *supra* note 22, p. 856, who believes that peremptory norms are regulative and not constitutive norms. At the same time “when a norm is used to identify some behaviour or state of affairs as either prescribed, prohibited, or permitted, it is said to have a regulative character”.

³² Unless international law refers to national law, it is regarded as a mere fact, manifestation of a will and activities of states. See judgement of the PCIJ of 25 May 1926 in the case *Certain German interests in Polish Upper Silesia*, Publ. PCIJ, Series A, No. 7, p. 19.

Looking from this perspective, one may ask what sanctions apply to infringements of *jus cogens* as a consequence of factual acts. The sanction of invalidity or ineffectiveness would be relevant only if national law would be a source of a breach. However, a dualistic perception of the relationship between international and domestic law, both in the Articles of the International Law Commission as well as in many constitutional orders, excludes such an effect of *jus cogens* (although from the perspective of the effectiveness of *jus cogens* such a formal sanction would be desirable). With respect to factual acts *sensu stricto*, formal sanction cannot apply. Observance of *jus cogens* is secured within the regime of responsibility for a breach of international law, together with the specific consequences envisaged with respect to the responsibility for violation of peremptory norms.

The above analysis allows for drawing some more general conclusions. First, sanction constitutes an element of *jus cogens*. Second, sanction does not take one form. As far as formalized acts are concerned, sanction may depend on the moment when *jus cogens* was violated. In any case, it is not necessarily and exclusively nullity. Third, sanction is also present with respect to breaches of a factual nature, and it is determined by the regime of responsibility for a breach of international law. Fourth, it would be a mistake to look for *jus cogens* in every case when a formalized act of a subject of international law is considered to be invalid. Nullity may be the result of reasons other than *jus cogens*.

1.4. Identification criteria of peremptory norms

1.4.1. Sociological criterion

1. Art. 53 of the VCLT qualifies as *jus cogens* those norms which meet two criteria: a sociological one and a normative one.³³ Both criteria need to be met simultaneously and both of them should be understood as complementary. The former is connected with the way *jus cogens* is created and modified, while the second one concerns the prohibition of derogation.

According to Art. 53 of the VCLT *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 norm of the same character (in a sociological and normative sense). In this context, it should be stressed that the requirement of acceptance and recognition by the international community of states as a whole is a necessary condition, but not a sufficient one. The community of states also needs to accept and recognize such a norm as one from which no derogation is permitted.

2. The sociological criterion, which is used in Art. 53 of the VCLT, raises numerous doubts. They are already visible in the heading of the provisions as well as in the first

³³ Sometimes these criteria are even more diversified. See e.g., K. Hossain, *The Concept of Jus Cogens and Obligation under the U.N. Charter*, 3 Santa Clara Journal of International Law 76 (2005), who identifies four criteria for distinguishing *jus cogens*: 1) status as a norm of general international law; 2) acceptance by the international community of states as a whole 3) immunity from derogation; 4) modifiable only by a new norm having the same status.

sentence of Art. 53, both of which stipulate that *jus cogens* is a norm of general international law (French: droit international général).

The doctrine is not particularly clear on this aspect. Although a majority of authors agree that only general norms can qualify as *jus cogens* (at least only those are covered by Art. 53 of the Convention),³⁴ there also scholars who accept that *jus cogens* can be of a regional character. These authors argue that the definition in the Convention was created only for the purpose of the VCLT.³⁵

Part of the doctrine perceives the existence of regional *jus cogens* not as a simple application of the general concept of peremptory norms in regional settings, but as an autonomous concept which differs from the general *jus cogens* with respect to its purpose and roots. For example, R. Hasmath argues that regional peremptory norms assist in accomplishing certain social and political tasks in specific temporal contexts, and are limited to regional groups of states. Such regional *jus cogens* can be replaced by another super-norm or eliminated completely by the expiration of its usefulness. Regional *jus cogens* can also take precedence over general customary law of a dispositive character. Regional peremptory norms can be based on regional customs or treaties. The author gives three examples of regional *jus cogens*: 1) the Brezhnev Doctrine of 1968, operating in the regional grouping of socialist countries; 2) the prohibition against juvenile execution in the OAS; 3) human rights interpreted in accordance with the Qur'an and the Sunnah, as embodied in various declarations on human rights in the Islamic world. He sees a justification for this approach in the heterogeneity of the contemporary international community, which makes a consensus between states difficult. Although Hasmath recognizes that regional *jus cogens* can promote regional divisions and variations in international law, he accepts such norms in limited situations.³⁶

It is difficult to agree with this approach. As a matter of fact R. Hasmath talks about a concept which is completely different from *jus cogens*. The criteria used for identification of such norms are not clear. It is also difficult to accept the examples of regional *jus cogens* norms given by the author. The Brezhnev Doctrine was not considered to be a legal norm and in fact constituted a violation of international law, not the expression of *jus cogens*. Seemingly, it would be easier to accept the peremptory character of the prohibition against juvenile execution. However, in fact this prohibition is already included in the general norm that protects the right to life. A regional norm is only a concretization of general law. Finally, Islamic human rights can be considered as an ideological interpretation of individual rights. Overall all, it seems that the author overemphasizes,

³⁴ E.g. M.E. Villiger in commentary to Art. 53, [in:] Villiger (ed.), *supra* note 22, p. 676. In the Polish literature e.g. Gilas, *supra* note 27, p. 97.

³⁵ See e.g. Suy, *supra* note 20, p. 1911. In the Polish literature, conditionally (with a reservation that such norms do not contradict general *jus cogens*), e.g. T. Jasudowicz, *Normy regionalne w prawie międzynarodowym* [Regional Norms in International Law], Toruń: 1983, pp. 293-296.

³⁶ See R. Hasmath, *The Utility of Regional Jus Cogens in International Law*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1366803## (last visited 20 August 2013).

even demonizes to some extent, the heterogeneity of the international community and does not take account of the need for dialogue within it.

Nevertheless, if one accepts the existence of regional peremptory norms, a decisive element in qualifying specific norms as *jus cogens* would be a formal criterion (i.e. prohibition of derogation). This condition would, however, be prone to relativisation as the prohibition of derogation would only operate within the regional community. At the same time, regional *jus cogens* would need to be compatible, or at least not contradictory, with general *jus cogens*.

The issue is debatable. In any case, if one accepts that the definition included in Art. 53 of the VCLT has become general (which also may be questioned, particularly if one considers that references to Art. 53 appear predominantly in the works of the International Law Commission), the argument which supports the conclusion that only general norms can constitute *jus cogens* becomes a method, inscribed in their nature, of accepting and modifying peremptory norms.³⁷

This conclusion is not undermined by the fact that regional organs (e.g. courts of regional organizations) rule on regional peremptory norms or that some regional norms are recognized as *jus cogens*. Although regional organs may recognize various norms as *jus cogens*, their decisions are not decisive but only constitute an invitation to enter into international judicial dialogue. Confirmation of peremptory norms by general or other regional organs may lead to the recognition of real *jus cogens*. In this sense, regional norms can operate as a source in the formation of real general *jus cogens*. At the same time, it is not necessary that a particular regional norm as such is recognized as *jus cogens* by other international organs. It is sufficient to grant such status to a corresponding norm of a general or regional (i.e. coming from a different region) character. Such confirmation coming from other international organs should be done as to the principle (e.g. prohibition of torture or use of force), and not as to a specific formulation.

3. The generality of peremptory norms undoubtedly should be connected with the mode of their acceptance and recognition. In this context, however, some doubts arise with respect to determination of the subjects that accept and recognize *jus cogens*: “international community of States as a whole” (French: “communauté internationale des Etats dans son ensemble”). During works on the draft Convention, the Drafting Committee explained that it is not necessary to have the acceptance of all existing states. As noted by its chairman, ambassador M.K. Yasseen, it is sufficient to have the acceptance of a great majority of states. Consequently, an objection from a single state or a small group of states would not constitute an obstacle to the formation of *jus cogens*.³⁸ In the context of customary norms, this would imply the ineffectiveness of actions taken by a persistent objector. However, one may wonder whether, in the case of the presence of

³⁷ It is also worth noting that in the draft of the Convention of 1966, the sociological criterion was limited to generality of a peremptory norm (then Art. 50 of the Convention). There was no reference to the requirement of its acceptance by the international community of states.

³⁸ See Suy, *supra* note 20, p. 1910.

a superpower in a minority group (alone or with a group of coalition states), *jus cogens* can really be formed.

During the work of the conference on law of the treaties, it was argued (via the US amendment, but a similar position was also held by Finland, Greece and Spain), in the context of the expression “international community of States as a whole”, that existence of *jus cogens* should depend on its acceptance in all regions of the world or on its recognition in different national and regional legal systems of the world.³⁹ Ultimately, this position was rejected since international law could be more advanced than national law (H. Waldock).⁴⁰ However, it should also be observed that while, on the one hand, the US amendment reflected a consensual approach under which peremptory norms should not be imposed by a limited group of states which are not of a sufficiently representative character, on the other hand – and this probably had an important impact on the outcome of the voting – its acceptance could block the recognition of norms that are vital for a great majority of states but not accepted in one specific region (e.g. in the Arab world due to Sharia law, or by the United States and its allies).

4. The notion of “international community of states as a whole” highlights the fact that such community is composed of states. Nowadays, however, such a perception of the international community can be criticized, particularly due to the processes of institutionalization and globalization. The process of institutionalization of international relations, which particularly took hold after the end of the WWII, has led to the creation of numerous international organizations with international legal personality. There are those among them which enjoy as much or more extensive powers than states to act at the international level. Last but not least, some argue that other entities, including individuals and transnational companies, can be also regarded as subjects of international law. As a consequence, the international community is perceived as a global community and its law is regarded as global law.

Nonetheless, the International Law Commission, when it proposed a draft of the Convention on the law of treaties between states and international organizations or between international organizations, negatively assessed the possibility of shortening the analysed phrase to “international community as a whole”. In its commentary to Art. 53 of the VCLTIO, it observed that “because the most important rules of international law are involved [...], in the present state of international law, it is States that are called upon to establish or recognize peremptory norms” (pt. 3).⁴¹ This formulation should not be taken as an indication that the Commission is not taking into account the changes taking place in the international community. For despite such changes, the Commission continues to believe that the predominant role is still played by states, not other entities.

At first glance, a more flexible approach to conceptualizing the international community can be found in the commentary to the Articles on responsibility of states for

³⁹ *Ibidem*.

⁴⁰ Nahlik, *supra* note 15, pp. 320-321.

⁴¹ See Law of treaties of international organizations. Commentaries 1982, p. 56.

internationally wrongful acts (2001). Although no definition of *jus cogens* is provided in the relevant provisions, which would have modified the sociological criterion, the Commission consistently, both in the draft and comments, followed the ICJ judgement in *Barcelona Traction*⁴² (of 1970) and used the notion of “international community as a whole”, formally ignoring states (see Arts. 33, 42, 48). At least theoretically this could open a discussion with respect to the possible extension of the group of subjects that belong to the international community for the purpose of defining *jus cogens*. However, when it comes to determination of subjects which, as belonging to international community, could invoke responsibility, only states are mentioned (see Art. 48 of the draft Articles). Having said this, one also needs to admit that such a formulation results from the subject of the regulation, i.e. responsibility of states (and not generally the general responsibility for a breach of international law).

The work of the ILC on responsibility of international organizations provides a broader view of the international community as a whole. In particular, Art. 49 of the draft Articles on the responsibility of international organizations provides that responsibility can be invoked not only by states, but also by international organizations. At the same time, international organizations are defined more broadly than organizations of states (see Art. 2 lit. a). This means that the international community as a whole is composed not only of states, and it is not only states which can influence the acceptance and recognition of specific norms as *jus cogens*. A similar approach (at least *prima facie*) to the conceptualization of international community is also visible in the Rome Statute of the International Criminal Court of 1998 where, in defining crimes within the jurisdiction of the Court, it was stated that it has jurisdiction with respect to the most serious crimes of concern to the international community as a whole (Art. 5).

5. “The international community as a whole” also means that a norm is valuable for the community and, as a result, that there is a community interest in the protection of the value enshrined in the peremptory norm. As C. Focarelli pointed it out, “The term ‘as a whole’ seems to hint at an ‘organic whole’ in a sense similar to a biological organism or a mystical body, and to place emphasis on the fact that the community of states has to be understood as the *indivisible unity* of states, as opposed to a ‘mere’ arithmetical sum of them taken individually.”⁴³ At the same time the international community as a whole can be perceived as an international *pouvoir constituant*. Consequently, the *jus cogens* norms, which safeguard existing fundamental shared values, are of special importance for the world community. In that sense it is *jus necessarium*.⁴⁴

6. Another element of the sociological criterion, although one that is also connected with normative criterion, is that the modification of a peremptory norm can be done

⁴² See ICJ judgement in *a dispute between Belgium and Spain Barcelona Traction, Light and Power Company Limited* (new application: 1962; second phase), ICJ Rep. 1970, p. 32, para. 33.

⁴³ C. Focarelli, *International Law as Social Construct: The Struggle for Global Justice*, Oxford: 2012, p. 151.

⁴⁴ *Contra, ibidem*, pp. 312-316. The author maintains that *jus cogens* is applied as *jus necessarium*, understood as a law that must be (i.e. it does exist currently, but rather will appear in future). It has a “promotional, provisional, an ultimately deontological function”.

only in the same way as its acceptance. This indirectly results from the formulation of Art 53 of the VCLT, which provides that modification of *jus cogens* can be done only by a subsequent norm having the same character, i.e. a peremptory norm of general international law. In this context it is worth noting that the use of the verb “modify” indicates that *jus cogens* can be changed.⁴⁵ On the other hand, it is striking that the definition of *jus cogens* does not directly speak about the repeal of such norms.

One may therefore assume that it is tacitly understood that an existing peremptory norm can be replaced by a new norm having, at the time of modification, the same nature as the existing norm. Is it, however, possible that a new norm could have a radically different (opposite) content (complete modification) from the existing norm? One may argue that, due to the special importance of values for states, its nations and humans (see my remarks in section 1.4.2), in practice it is not possible to replace an existing norm with a new one that has an opposite content.⁴⁶ This would mean that the international community would become a completely new community (which perhaps cannot be even called a community), probably a totalitarian one. In such a community there will be no room for international law as we have known it for centuries.

Art. 53 does not provide that the (complete) modification of a norm would lead to simple removal of an old norm from the international legal order (without replacement by a new norm), or even its elimination and replacement by a norm of a dispositive character. What is assumed here is the relative continuity of *jus cogens*. Consequently, although theoretically this cannot be excluded, in practice it is questionable to apply the institution of *desuetude to jus cogens*.⁴⁷

Since it is not very probable in the contemporary international community that *jus cogens* would be replaced by a new norm of the same character but an opposite content, or that it will degrade into a dispositive norm or be removed entirely from the international legal order, one may ask what changes are possible. It seems that such a change could relate to a partial modification in the objective scope of the norm, in particular with respect to the permissibility of new exceptions (or the broadening of existing ones) from the rule expressed in such a norm.⁴⁸

⁴⁵ This is the position of the ILC in its commentary to the draft articles on the law of treaties, where it observed (pt. 4) that: “it would be clearly wrong to regard even rules of *jus cogens* as immutable and incapable of modification in the future developments”. The Commission believes that such modification could particularly occur on the basis of a general multilateral treaty, which however seems to be disputable. See Law of treaties between States. Commentaries 1966, p. 248.

⁴⁶ See similarly, Orakhelashvili, *supra* note 14, pp. 127-130.

⁴⁷ See two studies on this issue: R. Kolb, *La desuétude en droit international public*, 111 Revue Générale de Droit International Public 577 (2007); G. Le Floch, *La desuétude en droit international public*, 111 Revue Générale de Droit International Public 609 (2007).

⁴⁸ According to B.D. Lepard in *Customary International Law: A New Theory with Practical Applications*, Cambridge: 2010, p. 259, a change can occur when “there is overwhelming evidence of a global moral consensus among States in favour of the evolution, and the change better helps to implement ‘essential ethical principles’.”

It is not particularly difficult to imagine such a situation. The prohibition on the threat or use of force inconsistently with the UN Charter can serve as an example. This prohibition is generally regarded, both in the doctrine and judicature, as *jus cogens*. It is not, however, without exceptions, as the use of force within the doctrine of self-defence, as well as upon authorization of the Security Council, is permissible. In addition, one may wonder whether some additional flexibility has been introduced to the exceptions provided by the UN Charter by the 'preventive self-defence' undertaken by the United States with respect to Iraq. Although the majority of scholars have condemned the conduct of the United States, it should be noted that the UN did not condemn it unequivocally, and the lack of a strong reaction on the part of the international community and lack of clear statement from the Security Council that the peremptory norm was breached may, in the future, lead to the acceptance of such an exception. Another example, which also relates to the prohibition of threat and use of force, is the use of armed force against Serbia, without prior authorization of the Security Council, due to Serbia's serious violations of humanitarian law on the territory of Kosovo. This case is probably even a better candidate for an additional exception to the prohibition against the threat or use of force.⁴⁹

If one accepts the possibility of partial modification of the objective scope of *jus cogens*, one thing needs to be stressed. Such modification cannot lead to rejection of the essence of the substantive peremptory norm in question. No role-reversal is possible, i.e. a situation when a previous norm (e.g. prohibition of torture or prohibition on the use of force) becomes, as a result of acceptance of exceptions, transformed into an exception itself. As was already mentioned, this would amount to a radical (and rather irreversible) modification of the nature of the international community and the law that governs it. Consequently, one may argue that, contrary to some superficial opinions, *jus cogens* consists of norms that cannot be changed as to their essence.

1.4.2. Normative criterion

1. *Jus cogens* under Art. 53 of the VCLT needs to meet not only a sociological but also a normative criterion, i.e. it has to be a norm from which no derogation is permitted.⁵⁰ The notion of derogation (French: *dérogation*) requires some explanation. The doctrine indicates that derogation should be understood as encompassing not only

⁴⁹ See also analysis of Linderfalk, *supra* note 22, pp. 859-867. See also J. Kranz, *Między wojną a pokojem: świat współczesny wobec użycia siły zbrojnej* [Between war and peace: The contemporary world and the use of armed force], [in:] J. Kranz (ed.), *Świat współczesny wobec użycia siły zbrojnej. Dylematy prawa i polityki*, Warszawa: 2009, pp. 81 et. seq. The author argues that due to difficulties in maintaining coherence of the prohibition on the threat or use of force, its peremptory character should be rather connected with the prohibition of aggression or armed attack (p. 232). This is however disputable as it equates the non-derogability of a norm with the lack of exception to a norm.

⁵⁰ Part of the doctrine has criticized the use of normative criterion as an element that defines *jus cogens*. It is argued that the criterion is a tautology: "a norm that does not admit derogation is just that – a norm that does not admit derogation", see F.A. Teson, *A Philosophy of International Law*, Oxford: 1998, p. 93.

rejection of the norm (annulment, deviation, derogation *sensu stricto*), but also as an amendment or partial derogation thereof.⁵¹

One may go even a step further when analysing the substance of derogation. Derogation can be of a formal or informal character (made through interpretation).⁵² As far as the formal source is concerned, it is prohibited to derogate on the basis of international agreements (written or oral, bilateral or multilateral, except for a universal treaty, which however occurs very rarely), unilateral acts, or resolutions of international organizations. It is equally not possible to ascertain dispositive customary law or general principles of law which are incompatible with *jus cogens*.

In principle, it is prohibited to adopt a national measure that includes provisions which conflict with *jus cogens* (even beyond unilateral acts), since *jus cogens* imposes obligations with respect to all subjects belonging to the international community. None of them can invoke its internal law as a justification for its failure to perform such obligations. *Obligationes sunt servanda*. The adoption of such acts will lead to international responsibility.

As far as the prohibited derogation is concerned, this may include modification of the content of a norm, exclusion or limitation of certain consequences (e.g. through reservations), assigning terms used in such a norm with a specific meaning, or modification of the scope of its applicability (e.g. in the context of interpretative declarations). A *jus cogens* norm must be of a peremptory character.

2. An issue that remains controversial is the relationship between prohibition of derogation and the permissibility of exceptions to peremptory norms. At first glance, the principle of non-derogation would seem to exclude any exceptions. However, such an understanding of the prohibition is oversimplified and erroneous, as a peremptory norm can exist together with exceptions. This does not, however, mean that such exceptions always have to occur; for example the prohibition on torture is absolute.⁵³ What is important is that exceptions need to be precise and not allow for excessive freedom in their interpretation, while the norm as a whole has to meet the sociological criterion (i.e. it is accepted and recognized by the international community of states as a whole as *jus cogens*).⁵⁴ A classic example of a situation allowing exceptions is the prohibition

⁵¹ Jasudowicz, *supra* note 35, p. 286. R. Kolb, *Jus cogens, intangibilité, intransgressibilité, dérogation 'positive' et 'négative'*, 109(1) *Revue Générale de Droit International Public* 305 (2005), pp. 323-324. The author observes, in this context, that *jus cogens* is a legal technique that permits to maintain the unity and integrity of the legal regime, prohibiting its normative fragmentation, in particular when a legislator has envisaged non-derogability due to public interest (*utilitas publica*). In his understanding, derogation means replacement of more limited *ratione personae* normative regime with a more general regime.

⁵² See Orakhelashvili, *supra* note 14, pp. 76-77.

⁵³ In this context some authors propose to distinguish between peremptory norms which allow for exceptions and those which do not so allow.

⁵⁴ Lepard, *supra* note 48, pp. 248-250. The author rejects the position that peremptory norms are of an absolute character from which no exception is possible, and observes that limited exceptions are permissible, particularly in the interest of observance of another *jus cogens* norm (e.g. prohibition on the use of force and right to self-determination) (p. 250).

on the threat or use of force, as described above.⁵⁵ At the same time, the permissibility of exceptions from peremptory norms should not be equated with permissibility of reservations and interpretative declarations which represent unilateral attempts to modify the content, scope and consequences of peremptory norms and which are incompatible with the principle of the non-derogation of such norms.

3. As has already been explained, *jus cogens* applies not only to formalized acts (where the prohibition against derogation is a pre-condition of the formal legal consequences of violation, e.g. nullity), but also to factual actions in the context of responsibility, as broadly understood, for a breach of international law. However, in the latter case one may ask whether it makes sense to talk about *jus cogens* as a peremptory norm. Maybe it would suffice to say that what we have here is simply the responsibility of subjects of international law. It follows from the Articles on responsibility of states and international organizations for wrongful acts that the character of the norm (including its peremptory character, expressing itself in the prohibition of derogation) does not influence of the degree of responsibility (e.g. Art. 12 of the Articles on responsibility of states; Art. 10.1 of the Articles on the responsibility of international organizations).

In answering this question, one should start with the observation that under international law on responsibility (of states and international organizations) and criminal responsibility of individuals, the character of the norm that was breached is *prima facie* irrelevant. Responsibility arises for breach of any binding norm of international law. However, the consequences of a breach – as determined by the ILC – vary depending the character and scope of the applicable norm. Thus, the question whether a breach (in particular a serious one) concerns a peremptory norm is relevant. The nature of the breach can therefore qualify international responsibility.

4. It is also worth noting that one may look at the prohibition of derogation not only from the formal, or technical, point of view.⁵⁶ This criterion was formulated in connection with the sociological criterion (both need to be met together). The prohibition of derogation has an ancillary, consequent function and protects what the international community as a whole considers as requiring special protection.⁵⁷ One may therefore come to the conclusion that a proper understanding of the prohibition of derogation requires reconstruction of the justification of such a considerable normative rigour. In

⁵⁵ Sometimes, in the context of discussion on the peremptory character of the prohibition on the use of force, it is argued that one should distinguish between regular *jus cogens* (which permits exceptions) and strengthened *jus cogens* (without exceptions). This distinction, although not entirely separable, could be relevant in the context of the analysis of the prohibition on the use of force and the taking of countermeasures or sanctions. See Ch. Leben, *Obligations relating to the Use of Force and Arising from Peremptory Norms of International Law*, [in:] J. Crawford, A. Pellet, S. Olleson (eds.), *The Law of International Responsibility*, Oxford: 2010, pp. 1202-1203.

⁵⁶ This position (with respect to the law of treaties) was taken by the arbitral tribunal in its award of 31 July 1989 in *Maritime delimitation between Guinea-Bissau and Senegal*, para. 41, RIAA vol. XX, p. 135. It held: “Du point de vue du droit des traités, le *jus cogens* est simplement la caractéristique propre à certaines normes juridiques de ne pas être susceptibles de dérogation par voie conventionnelle.”

⁵⁷ Ragazzi, *supra* note 15, p. 49.

other words, one may argue that a condition *sine qua non* for recognition of a norm as peremptory is its special content, and more specifically, the special significance of the value it protects, which the international community as a whole considers as precious and requiring special protection. This finds a support in the ILC commentary to Art. 50 of the draft VCLT, which states (pt. 2) that: “[i]t is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*.”⁵⁸

This leads to the conclusion that the criterion of non-derogation implies the existence of an axiological criterion that refers to a special value inscribed in the content of a norm.⁵⁹ As a consequence, only a norm that simultaneously meets the sociological, normative and axiological criteria can be recognized as *jus cogens*. It would seem that the axiological criterion is the most important. In any case, this criterion has a particular importance in the context of the effect of *jus cogens* on the assessment of factual actions (i.e. in the context of responsibility for a breach of international law).

This conclusion finds support in the ICTY judgement in the *A. Furundzija* case of 10 December 1998, where the Tribunal found, when analysing the prohibition of torture as a *jus cogens* norm, that it had acquired such a status due to the importance of the values which are protected. A few lines later the Tribunal added that the prohibition of torture constitutes one of the most basic standards for the international community. This prohibition has a deterrence effect, in the sense that it indicates to all members of the international community, as well as individuals subject to their power, that it is an absolute value from which no departure is possible.

One may reach the same conclusion generalizing from the statement of the ILC found in its commentary to Art. 40 of the Articles on responsibility of states (scope of application of chapter III, part II relating to serious breaches of obligations arising under peremptory norms). The ILC found that such obligations “arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values” (pt. 3).⁶⁰

Viewed from this perspective, one can say that *jus cogens* includes norms that protect existential values. This, however, does not resolve the problem as to which norms should be included in this group. Under a positivist approach, one can argue that only values that have received a broad inter-civilizational acceptance may qualify as *jus cogens*. In face of the world’s cultural diversity, a dialogue between the cultures of the con-

⁵⁸ Law of the treaties between States. Commentaries 1966, p. 248. In this context one cannot agree with R. Kolb, who believes that in 1969 *jus cogens* was perceived as an ordinary legal technique expressing itself in the prohibition of derogation (Kolb (*Observation*), *supra* note 6, pp. 841-842).

⁵⁹ P.-M. Dupuy, [in:] *L’unité de l’ordre juridique international*, RCADI 2002, vol. 297, p. 281, argues that together with Art. 53 of the VCLT, a principle is formulated that establishes a normative hierarchy of a new type. It is based not on formal criteria, but is a hierarchy which corresponds with the values and priorities of the international community.

⁶⁰ Responsibilities of States. Commentaries 2001, p. 112.

temporary world is a desired method for identifying such values.⁶¹ At the same time, one should bear in mind that a number of norms which are declared to be peremptory norms represent values that are important for the Western World, and which are possibly internalized by other cultures. On the other hand, when viewed from the long-term perspective the room for agreement on basic values that would constitute a foundation for the existence of international community as a whole (and as a consequence on the law that regulates its functioning) is rather limited. If the international community as a whole were to decide to establish values that are different from those which are actually fundamental (e.g. relating to the protection of human dignity or basic rights of nations), or to qualify only some of them, this may endanger the existence of the international community, or at least cause serious dysfunctions in its operation.

5. There is disagreement among scholars as to the role of the formal criterion in the identification of *jus cogens* norms. On the one hand, one part of the doctrine repeatedly argues that the prohibition of derogation is an essential element for distinguishing *jus cogens*. On the other hand, there is belief in the practice of international law (as well as among some scholars) that this criterion is definitively not sufficient, and may even be deceptive. This stance is reflected in the works of the ILC as well as in the opinions expressed by some international bodies. The Commission, already in its commentary to Art. 50 of the draft VCLT, rejected the idea that a treaty provision “possesses the character of *jus cogens* merely because the parties have stipulated that no derogation from that provision is to be permitted. [...] Such stipulation can be inserted to any treaty with respect to any subject matter for any reasons which may seem good to the parties. [...] Breach of the stipulation does not, simply as such, render the treaty void.” What is important is the particular nature of the subject matter which the prohibition protects (pt. 2).⁶²

A similar stance was taken by the Commission in its guidelines on reservations to treaties and interpretative declarations (2010), where it distinguished between reservations contrary to a rule of *jus cogens* and reservations to provisions relating to the non-derogation of rights (guidelines 3.1.9 and 3.1.10). In doing this it referred, among the other things, to the UN Human Rights Committee’s general comment no. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant, or the optional protocols where such a relationship was rejected.⁶³ In addition, the international law doctrine sometimes holds that the prohibition of derogation constitutes a consequence of *jus cogens* rather than a criterion for singling it out.

This approach presumes that there are two categories of norms prohibiting derogations in the international legal order: *jus cogens* and *jus dispositivum*. There are also two

⁶¹ See Zemanek, *supra* note 16, p. 1117, who observes: “In asserting the peremptory character of international norms the differing cultural/religious value systems among the States forming the international community should be kept in mind. Agreement on the formal validity of a certain peremptory norm alone, without a consensus on its content, creates a dangerous illusion.”

⁶² See Law of the treaties between States. Commentaries 1966, p. 248.

⁶³ See Reservations. Commentaries 2010, pp. 469-470.

categories of *jus dispositivum*: those which prohibit derogation and those which permit it. The result is great confusion, which may even have dangerous consequences for protected entities (in particular individuals), as it leads to relativisation of the minimum catalogue of norms that are regarded as non-derogable, even in situations that are particularly dangerous for the functioning of a state, e.g. in case of war.⁶⁴

Irrespective of the assessment of the relationship between the prohibition of derogation and *jus cogens*, the situation discussed above (i.e. *jus cogens* concerns only those norms which are non-derogable and which, at the same time, protect fundamental values of a universal nature) additionally strengthens the argument for apprehension of a close relationship between the formal and sociological criterion, and by implication also a criterion of special content for such norms.

1.4.3. Conditions for applying the criteria of *jus cogens*

1. From the perspective of the criteria used to distinguish *jus cogens*, it is important to ask what are the practical and institutional conditions for its application. This seems to be particularly relevant in the context of the sociological and axiological criteria. Who decides, and on what basis, that a norm has been accepted and recognized by the international community of states as a whole, and that such a norm is of fundamental importance to that community?

Certainly, individual states are not qualified to do this. The same is true for their groupings, especially if they were established on ideological principles. A more important role could be played by universal international organizations, in particular those like the UN. Within the UN, resolutions of the General Assembly are arguably the most important. Although the Assembly does not have executive powers, it is a body where all Members are represented (in practice hence it is a universal international community of states). Resolutions of the Security Council, a body which has an important functions and adequate competences and which assembles the Great Powers, should be seen as a means of control over compliance with *jus cogens*. The Security Council constitutes an important organ of the UN, but at the same time it is a limited club of states.⁶⁵

2. Besides international organizations of a universal character, an important role in the recognition and acceptance of norms of general international law as peremptory norms is (and should be) played by international case law, as broadly understood. International courts and arbitration tribunals are, at least potentially, able to look at the various demands for acceptance and recognition of *jus cogens* in more independent and

⁶⁴ See also critical remarks by C. Mik, *Ochrona praw człowieka w świetle źródeł prawa międzynarodowego* [Protection of human rights in the light of sources of international law], [in:] C. Mik (ed.), *Prawa człowieka w XXI wieku. Wyzwania dla ochrony prawnej* [Human rights in 21st century: Challenges for legal protection], Toruń: 2005, pp. 60-61.

⁶⁵ See similarly P. Tavernier, *L'identification des règles fondamentales – un problème résolu?*, [in:] Ch. Tomuschat, J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, Leiden: 2006, pp. 3-5.

deeper way. Certainly universal courts should be in a privileged position as compared to regional courts or arbitration tribunals. At the same time, their decisions should be recognized and confirmed in the regional and arbitration case law. In any case, a dialogue among these different organs is surely the preferred method of reaching consensus. One manifestation of this dialogue was the recognition in one of the ICTY judgements of the prohibition of torture as *jus cogens*, which was subsequently accepted in the ECtHR case law. Another example concerns the prohibition of genocide, which was again recognized as a peremptory norm by the ICTY, followed by the ICJ and ECtHR.

International courts and arbitration tribunals should not, however, act in a vacuum or arbitrarily. Their decisions cannot be based solely on their own interpretation or determination of the content of such norms, references to external case law, or determinations made by the ILC or legal doctrine. International organs should consider the positions of states, their groupings, as well as the resolutions and practice of important international organizations.⁶⁶ It is advisable that they use relatively objective indicators and evidence; with respect to treaties this should particularly include the number of state-parties (which should be close to the whole international community – in other words one should avoid recognition of the norms of particular treaties as *jus cogens*). They should also take into account the existence of provisions explicitly prohibiting derogations, and those prohibitions should not be relativised in relation to treaties of a universal character. In the case of customs, it would be advisable to require showing that a particular custom is really universal.

1.5. Legal basis, general character and effectiveness of *jus cogens*

1. Recognition of certain substantive norms as *jus cogens* raises the problem of identification of a positive legal basis for such norms (not Art. 53 of the VCLT). In the context of theory on the sources of international law, one may look for such legal basis in a treaty, custom or general principles of law. Considering that *jus cogens* are general norms (accepted and recognized by the international community of states as a whole), particular norms, including regional and bilateral ones (even if they prohibit any derogations) should not be accepted as a legal basis for peremptory norms. A difficulty arises in determining when such norms gradually acquire acceptance as a part of customary law, becoming general norms, or if they correspond to treaty provisions of a general character. In such a case, particular norms will only constitute a starting point for the establishment (acceptance and recognition) of *jus cogens*. However, alone they will not form a sufficient basis.

It seems more natural to look for the legal basis of peremptory norms in treaty norms of a general character. However, even here one needs to be careful. Treaty norms should be more than just general (i.e., more than just included in a regular multilateral

⁶⁶ See *contra* Tavernier, *supra* note 65, p. 11, who argues that identification of *jus cogens* belongs to international courts and not to states. As such, their role is a consequence of their special position in the contemporary international community.

treaty). They should rather be universal and representative of the international community of states as a whole. With respect to such rules, one could more easily expect that the criteria for establishment of parallel custom will be met.

However, the most natural basis for *jus cogens* is provided by general customary law. At the same time, and contrary to what one would expect, recognition of a particular customary norm as a peremptory one is not an easy task and may lead to many surprising results. Customary law in its classical understanding (e.g. ICJ case law⁶⁷) is based on two elements: practice (particularly of states) and a belief that such a practice is required as a matter of law (*usus* and *opinio iuris*). On the textual level, Art. 53 of the VCLT does not indicate that the practice of states is relevant in establishing *jus cogens*. The Convention only speaks about the acceptance and recognition of a norm, which may suggest that only legal consciousness is important. However, the preparatory works of the Convention do not confirm the position that *jus cogens* could consist only of a reflection of legal consciousness, a new source of international law or a specific type of “intellectual” custom.⁶⁸

2. If one subscribes to the classical understanding of custom, it would be necessary, in the context of *jus cogens*, to show that there is general, consistent, and uninterrupted and long-lasting practice of states, from which a certain rule of conduct emerges, coupled with a belief that such a rule is binding and of a peremptory character (double *opinio iuris*).⁶⁹ However, showing a general, consistent, uninterrupted practice that lasts for some time can prove to be extremely difficult, if possible at all. The position held by the ICJ in the *Nicaraguan case* of 1986, which accepts, as a basis of custom, a practice that is not absolutely consistent is not particularly helpful.⁷⁰ Practice, understood as an active attitude of subjects of international law, may simply not exist. To the contrary, there may be only cases finding a breach of important norms.

Treating peremptory norms as traditionally understood norms of customary law raises an immediate question about the permissibility of having a persistent objector at the stage of formation of a norm (in an analysed case, both during the formation of the norm as well as during the process of recognition of its peremptory character, if these two processes take place at different moments of time). If one subscribes to the classical understanding of custom, exclusion of the institution of a persistent objector is questionable.⁷¹ It is always possible to argue that a peremptory norm does not yet exist while there is an objection to prevent its recognition as a customary norm or peremptory norm.

⁶⁷ See e.g. Judgement of 13 July 2009 in *Dispute regarding navigational and related rights between Costa Rica and Nicaragua*, paras. 140-143, ICJ Rep. 2009, pp. 48-49; Judgement of 3 June 1985 in *Dispute between Libya and Malta on delimitation of the continental shelf*, para. 27, ICJ Rep. 1985, pp. 29-30.

⁶⁸ See Hossain, *supra* note 33, pp. 79.

⁶⁹ See R. Huesa Vinaixa, *Le rôle de l'opinio iuris*, [in:] R. Huesa Vinaixa, K. Wellens (eds.), *L'influence des sources sur l'unité et la fragmentation du droit international*, Bruxelles: 2006, pp. 65-66.

⁷⁰ See ICJ Judgement (merits) in *Case concerning military and paramilitary activities in and against Nicaragua*, para. 186, p. 98.

⁷¹ See also M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge: 2005, p. 443, referring to the principle of sovereign equality.

However from the perspective of Art. 53 of the VCLT (as well as the works of the International Law Commission), acceptance of the objection is not a realistic option. Under the classical approach a persistent objection allows one to avoid to be bound by a specific norm, while the aim of a peremptory norm is just the opposite (i.e. to bind all subjects of international law). It may be therefore argued that Art. 53 requires acceptance and recognition by the international community of states as a whole, but not necessarily by all states. This would mean and the objection of single state or small group of states cannot frustrate the creation of a peremptory norm.⁷²

Accepting custom as a basis for *jus cogens* is also connected with various practical (evidentiary) problems. Some of them generally concern customary law, e.g. access to the official practice of states, the relevance of practice of non-democratic states, and the relevance of resolutions of international organizations as an element of practice. Whereas it might be relatively easy to prove the elements that constitute a norm of customary law, showing that such a customary norm is actually accepted and recognized as non-derogable is much more difficult.⁷³

3. Today the understating of customary law is subject to reinterpretation.⁷⁴ These attempts are connected with the process of marginalization of the importance of practice (i.e. accepting practice that expresses itself only in national legislation or so-called verbal practice, and in particular in the cases of practice by omission or practice based only on the number of ratifications of a treaty), while at the same time placing emphasis on the legal consciousness of the community (particularly if a practice is sparse and not entirely consistent). These attempts are especially visible in the case law of criminal courts, particularly in some judgements of the ICTY.⁷⁵ Such a reinterpretation of customary law could favour the recognition of peremptory norms. Under this approach however, custom deviates from its traditional understanding as always being composed

⁷² Similarly, Lepard, *supra* note 40, pp. 250-252; Ragazzi, *supra* note 15, pp. 67-72. However, the author also acknowledges that in practice a situation can be more complex, while the objection cannot be so easily rejected.

⁷³ In defence of customary law as a source of peremptory norms, see U. Linderfalk, *The Creation of Jus Cogens – Making Sense of Article 53 of the Vienna Convention*, 71 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 359 (2011).

⁷⁴ On such reinterpretation, see more generally D.P. Fiedler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, 39 *German Yearbook of International Law* 198 (1996).

⁷⁵ See e.g. decision of the ICTY of 2 October 1995 in the case *Prosecutor v. Dusko Tadić*, para. 99; Judgement in the case *Prosecutor v. Anto Furundzija* of 10 December 1998, IT-95-17/1-T, para. 138, and particularly the judgement of 14 January 2000 in the case *Prosecutor v. Zoran Kupreskic and others*, paras. 527, 531-534, IT-95-16-T. In the last judgement the ICTY explicitly said that, *opinio iuris* “crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.” See also the Special Court for Sierra Leone (Appeals Chamber), Decision on preliminary motion based on lack of jurisdiction of 31 May 2004, paras. 18 and 19, on the high number of ratifications of the Convention on the rights of the child. For the classical approach to customary law, see judgement of the ICTY in case *Prosecutor v. Zejnir Delalic and others* of 16 November 1998, para. 302, IT-96-21-T.

of two elements. In this context, one may ask whether we are still talking about custom or rather a completely new source of international law.

Placing an emphasis on legal consciousness (*jus necessarium*) may also lead to abandonment of the positivist approach in favour of natural law.⁷⁶ *Jus cogens* as an element of natural law will find its reflection in the consciousness of states as discovered by judges and arbitrators deciding on the existence of peremptory norms.⁷⁷ Such an approach may however be subject to a two-fold criticism. First, reference to the consciousness of states would require demonstration of its existence, which in turn would raise the question of *whose* consciousness has to be taken into account – all states or only those which are democratically legitimised? In this context it would be unclear which countries should qualify, who should make such a decision, and what democratic legitimization really means. This argumentation could be refuted by indicating that what is at stake here is not a positivistically formed consciousness that is proved empirically, but rather a deep conviction (essentially an axiom) that certain values are so fundamental for the international community that they are obvious and cannot be morally rejected in the currently existing condition of the human community. These values in a way impose themselves and cannot be rejected.

A second criticism could relate to the risk of judicial imperialism (judicial arbitrariness), i.e. a situation in which a court or courts will impose on states what should be considered as peremptory norm (what is *jus cogens* in the opinion of a court).⁷⁸ On the other hand,

⁷⁶ See Orakhelashvili, *supra* note 14, p. 125, where, after analysing the existing practice, the author rightly observes: “Unlike the traditional framework, the emergence of customary *jus cogens* hardly requires examination of behaviour or attitudes of specific States. Certain norms are there simply because they belong to public order and not because States specifically consented to them through their actual practice. Traditional elements of custom-generation could be useful in explaining the emergence of *jus dispositivum*, which States recognize as suiting their individual interests, but not of *jus cogens*, whose existence and operation serves the fundamental community interests.”

⁷⁷ Such a possibility was unequivocally rejected by M. Koskenniemi, who believes that disregard of the will of states will lead to violation of the principle of sovereign equality (see Koskenniemi, *supra* note 71, pp. 323-324). On the other hand, J. Martin Rochester, *Between Peril and Promise: The Politics of International Law*, Washington DC: 2006, p. 43, indicates that *jus cogens*, as based on the tradition of natural law, is almost incompatible with the idea of state sovereignty. Cançado goes even further. He recalls different statements of the participants of the Vienna conference and stresses the autonomous meaning of universal legal consciousness (pp. 187-188), concluding that the Martens clause belongs to *jus cogens* (p. 192, following S. Miyazaki). He also notes the obvious contradiction between *jus cogens* and the voluntarist theory of international law (p. 339). According to him, *jus cogens* consists of basic principles, which constitute a substrata of legal order and are indispensable (*jus necessarium*), prior to and higher than the will of states. They express the idea of objective justice (proper natural law) and are co-substantial with the international legal order (p. 92) (A.A. Cançado Trindade, *International Law for Humankind: Towards A New Jus Gentium*, RCADI 2005, vol. 316).

⁷⁸ T. Meron, *The Humanization of International Law*, Leiden-Boston: 2006, p. 397, when considering a catalogue of peremptory norms, argues against subjectivity and arbitrariness in the process of identification of *jus cogens*. Consequently, he believes that although the customary process does not properly explain the creation of peremptory norms, it is necessary to show that they were accepted and recognized by the international community as a whole. He also adds that a limited number of peremptory norms is not bad thing, as it allows to preserve their value and credibility, which will be endangered by an inflation of such norms.

one may argue that *jus cogens* may become general and accepted through the dialogue between courts, in the course of which it will solidify and acquire real recognition.

4. General principles of law constitute an unquestionable source of international law. Their nature, however, still remains controversial. In particular, it is not clear whether those principles can be derived only from binding international law (e.g. as a generalization of different norms) or rather from the national law of states representing different legal orders. Generally one should not exclude that *jus cogens* can also have a legal basis in general principles of law.⁷⁹ Indirectly such a possibility was suggested by the arbitration tribunal in the *Case concerning delimitation of the continental shelf* (1989), in a dispute between Guinea-Bissau and Senegal. The tribunal stated that Guinea-Bissau did not show that a treaty norm on succession with respect to obligations as a consequence of decolonization process had acquired the status of *jus cogens* through custom or as a general principle of law.⁸⁰

One should add however that general principles of law as a source of peremptory norms need to embody substantive rules (which is not very frequent in international law, which is dominated by procedural rules) and be relatively precise, as such general principles would need to regulate the specific conduct of subjects of international law. The prohibition of derogation would also need to be inscribed in the content of such a norm. These conditions make it rare that general principles of law provide a basis for *jus cogens*. It is, however, conceivable that a peremptory norm is at the same time a norm of customary law and a general principle of law.

5. Finally, it can be argued that peremptory norms cannot be based on traditional sources of international law. The only possible solution seems to be acceptance of the idea that there is a new (or rather old) source of international law: the international legal conscience (a kind of natural law⁸¹), which is common for the international community as a whole as it stands, and which can be called contemporary natural law.⁸²

6. A concrete *jus cogens* norm is a substantive legal norm. In this context, however, one may ask what are the effects of such a norm (the problem of so-called opposability), and what are the nature of obligations arising from it? In general, international law

⁷⁹ For criticism concerning this issue, see Jasudowicz, *supra* note 35, p. 279.

⁸⁰ See para. 44 of the award, RIAA vol. XX, p. 136.

⁸¹ G.I. Hernandez wrote that “the very concept of *jus cogens* norms embodies a natural law component” which goes beyond the category of general principles common to civilised nations. In a footnote, however, he added that “The natural law component to rules of *jus cogens* cannot, however, constitute their essence, given how most scholars conceptualise natural law as static, objective rules that pre-date any legal system posited by humans”. G.I. Hernandez, *A Reluctant Guardian: The International Court of Justice and the Concept of International Community*, 83 *British Yearbook of International Law* 1 (2013), p. 39, ft 145.

⁸² See Schmalenbach, *supra* note 3, pp. 908-909, 912-916, 919-923. The author, however, doubts that a legal basis for *jus cogens* norms is an autonomous source in the form of states’ consensus or the international community’s acknowledgement of norms. According to her, “In view of the international rules so far acknowledged as *jus cogens*, it is safe to say that all of them belong to the corpus of international customary law” (p. 919), although she rejects the admissibility of persistent objections against customary peremptory norms (p. 923).

doctrine holds that *jus cogens*, as norms accepted and recognized by the international community of states as a whole, gives rise to obligations for each member of this community towards the community as a whole (i.e. *erga omnes*). The relationship between *jus cogens* and obligations *erga omnes* is most frequently presented in the following way: all universal peremptory norms create obligations *erga omnes*, but not all obligations *erga omnes* result from *jus cogens*.⁸³ This stance was also taken by the Study Group of the International Law Commission in its 2006 Conclusions entitled “Difficulties arising from the Diversification and Expansion of International Law” (para. 38).⁸⁴

If one accepts the existence of regional *jus cogens*, which is however questionable, M. Ragazzi is correct in observing that the sociological criterion would need to be relativized. This would mean that one could qualify as *jus cogens* not only norms other than general ones, but also that they would have *erga omnes* effect only within a specific region and that they could not be invoked against a state from outside the region.⁸⁵

It is sometimes argued that *jus cogens* and obligations *erga omnes* constitute two different legal categories, which should not be confused. In particular, obligations *erga omnes* do not presuppose the superiority of some rules over the others.⁸⁶ This idea seems to find support in the general commentary of the International Law Commission to chapter III part II of the Articles on the responsibility of states for internationally wrongful acts, where the overlap between these two concepts is recognized, but at the same time it is also recognized that each of them puts an emphasis on different elements.⁸⁷

⁸³ Ch. Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge University Press, Cambridge: 2005, pp. 151-156. *Contra* P. Picone, *The Distinction between Jus Cogens and Obligations Erga Omnes*, [in:] E. Cannizzaro (ed.), *The Law of Treaties: Beyond the Vienna Convention*, Oxford University Press, Oxford: 2011, pp. 413-416. According to him, *jus cogens* norms do not always generate *erga omnes* obligations (p. 418).

⁸⁴ The Study Group indicated that an example of an obligation *erga omnes* not established by *jus cogens* includes obligations under “the principles and rules concerning the basic rights of human persons as well as [...] some obligations relating to the global commons.” Fragmentation. Conclusions 2006, para. 38.

⁸⁵ Ragazzi, *supra* note 15, pp. 194-199.

⁸⁶ *Similarly*, Y. Dinstein, *The Interactions between Customary International Law and Treaties*, RCADI 2006, vol. 322, pp. 401-402.

⁸⁷ See pt. 7: “Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which ICJ has given of obligations towards the international community as a whole all concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise the examples of peremptory norms given by the Commission in its commentary to what became Article 53 of the 1969 Vienna Convention involve obligations to the international community as a whole. But there is at least a difference in emphasis. While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance — i.e. in terms of the present articles, in being entitled to invoke the responsibility of any State in breach. Consistently with the difference in their focus, it is appropriate to reflect the consequences of the two concepts in two distinct ways. First, serious breaches of obligations arising under peremptory norms of general international law can attract additional consequences, not only for the responsible State but for all other States. Secondly, all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole.” (Responsibility of States. Commentaries 2001, pp. 111-112).

7. The effectiveness of *erga omnes* peremptory norms (and obligations arising from them) is normally conceptualized as effectiveness with respect to all subjects of international law or all states.⁸⁸ Once in a while however there is a judgement which goes beyond this understanding. For example, the IACHR, in its advisory opinion of 17 September 2003 on *juridical condition and rights of the undocumented migrants*, held that *jus cogens*, by its definition and development, is not limited to treaty law, but has expanded to encompass general international law, including all legal acts, and has an influence on the basic principles of the international legal order. In particular, the principle of equality and non-discrimination permeates every act of the powers of the state and may be considered as a peremptory norm “inasmuch as it applies to all States, whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals.”⁸⁹

This expanded effectiveness of *jus cogens* is visible to an even greater extent in the judgements of international criminal courts. As the ICTY held in the case *A. Furundzija* of 10 December 1998, one of the consequences of *jus cogens* at the individual level is an obligation on the part of a state to investigate, prosecute, punish and extradite individuals accused of violation of *jus cogens* norms (in this case the prohibition of torture), who are present in the territory under its jurisdiction. The Tribunal explained that:

[I]t would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States’ universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime.

The ICTY also added that additional consequences which arise from qualifying the prohibition of torture as *jus cogens* include “the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption.”⁹⁰

2. The difficulties in creating a catalogue of peremptory norms

During the VCLT negotiations it was postulated (the British amendment) to create a list of peremptory norms. The proposal envisaged that such a list would be updated

⁸⁸ According to O. Quirico, however, “Article 53 of the VCLT literally does not say that a norm of *jus cogens* has necessarily a general scope. The peremptory character of a norm and its scope (general or relative effectiveness) are two different aspects of a norm (right). In fact, the majority of states could manifest their consent about a rule that binds only two or some states and is non-derogable. The scope of a norm cannot be expressed by non-derogability, which relates to the impermissibility of bilaterally modifying a rule.” O. Quirico, *Jus cogens: A Puzzle*, [in:] M. Szabo (ed.), *State Responsibility and the Law of Treaties*, The Hague: 2010, p. 105 and note 23.

⁸⁹ See paras. 99, 100, 109, 110, opinion no. OC-18/03, pp. 98-101.

⁹⁰ Judgement in case IT-95-17/1-T, paras. 156-157.

from time to time through protocols to the VCLT. Other countries were critical of the idea of an exhaustive list of *jus cogens*, but quite sympathetic to an open-ended list that would be regularly updated. This proposal was never put to a vote as the Great Britain decided to withdraw it.⁹¹ However, the Commission explained in its commentary to the draft Convention that such an approach could have created misunderstandings with respect to the position of other norms not enumerated. In addition, according to the Commission this would have also required exhaustive studies, which would have prolonged the work of the conference and fell outside of its scope (pt. 3).⁹² Nevertheless, in the commentary to the draft Convention as well as in subsequent studies, the idea of having a non-exhaustive list of peremptory norms remains in circulation. Moreover, a number of international bodies, in particular international courts and arbitration tribunals, have occasionally considered whether a particular norm could be regarded as *jus cogens*. The table below summarizes the proposals of the International Law Commission and determinations of various international bodies.⁹³

International body Norm	ILC 1966 ⁹⁴	ILC 2001 ⁹⁵	ILC 2006 ⁹⁶	UN General Assembly	ICJ	ICTY	HRC ⁹⁷	ECtHR	IACHR	ECJ	arbitration
Prohibition of aggression		x	x								
Prohibition on the use of force	x ⁹⁸					x ⁹⁹					
Right to self-determination		x	x								x (n) ¹⁰⁰
Permanent sovereignty over natural resources											x (n) ¹⁰¹
Prohibition of genocide	x	x	x		x ¹⁰²	x ¹⁰³		x ¹⁰⁴			
Basic norms of humanitarian law			x		x ¹⁰⁵	x ¹⁰⁶	x				
Crimes against humanity		x						x (n) ¹⁰⁷			
Individual rights							x ¹⁰⁸				x ¹⁰⁹
Right to life							x				
Prohibition of torture		x	x	x ¹¹⁰		x ¹¹¹	x	x ¹¹²	x ¹¹³		
Prohibition of slavery	x	x	x ¹¹⁴						x ¹¹⁵		
Principle of equality/ non-discrimination									x ¹¹⁶		x ¹¹⁷

⁹¹ Nahlik, *supra* note 15, pp. 321-322.

⁹² See Law of treaties between States. Commentaries 1966, p. 248.

⁹³ This enumeration is not exhaustive, but it is representative. However, it does not include the case law of the Inter-American Commission on Human Rights. For a good overview of the case law of the ECtHR and IACHR concerning *jus cogens*, see F. Vanneste, *General International Law Before Human Rights Courts: Assessing the Specialty Claim of International Human Rights Law*, Antwerp-Oxford-Portland: 2010, pp. 419-436.

Prohibition of racial discrimination		x	x							
Right of access to courts						x		x ¹¹⁸		
Prohibition of piracy	x									

⁹⁴ A basic enumeration of cases when a treaty is incompatible with *jus cogens* was included in the commentary of the Commission, as suggested examples. Moreover, the Commission indicated that some of its members felt that it would be undesirable to limit the scope of the article to cases involving acts which constitute crimes under international law. According to them, other examples included human rights, equality of States and the principle of self-determination (pt. 3 of the commentary to Art. 50 of the draft VCLT). Law of treaties between States. Commentaries 1966, p. 248. Art. 53 of the VCLTIO of 1982 does not include an analogous enumeration.

⁹⁵ See pt. 5 of the commentary to Art. 26 (*jus cogens* as a circumstance precluding wrongfulness). When commenting on Art. 40 (serious breach of an obligation arising under a peremptory norm of general international law), the Commission indicated that, during the Vienna conference, there was an agreement between governments to consider the prohibition against aggression and illegal use of force as *jus cogens*, which was subsequently confirmed by the ICJ. In addition there was a wide-spread agreement with respect to the prohibition against slavery and the slave trade, genocide, and racial discrimination and apartheid. Responsibility of States. Commentaries 2001, pt 4. It is interesting to note that in its commentary to Art. 26 of the draft Articles on the responsibility of international organizations (2011), being the equivalent of Art. 26 of the Articles on responsibility of states, the Commission referred to the same catalogue of norms as previously (pt. 2), while it did not do this in the context of Art. 40 (being the equivalent of Art. 40 of the Articles of 2001).

⁹⁶ See pt. 33 of the Conclusions of the Study Group. Fragmentation. Conclusions 2006.

⁹⁷ Statement of the Human Rights Committee included in the General Comment No. 29: States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11 of 31 August 2001. The Committee stated that peremptory norms only partially overlap with the enumeration of non-derogable provisions in Art. 4(2) of the International Pact of Civil and Political Rights. The Committee did not include, for example, debt bondage, or freedom of thought, belief and religion as *jus cogens* (pt. 11).

⁹⁸ Besides the prohibition on the use of force in violation of the UN Charter, the Commission also indicated “the performance of any other act criminal under international law”.

⁹⁹ ICJ judgement (merits) *Case concerning military and paramilitary activities in and against Nicaragua*, para. 190, pp. 100-101. The Court did so very softly, referring to the unanimous position of the parties.

¹⁰⁰ The peremptory character of the right to self-determination was rejected by the arbitral tribunal in its award of 31 July 1989 relating to *Maritime delimitation between Guinea-Bissau and Senegal*, paras. 40-45, RIAA vol. XX, pp. 135-136.

¹⁰¹ In the case *Government of the State of Kuwait v. The American Independent Oil Company (Aminoil)*, the arbitration tribunal in its award of 24 March 1982 rejected the peremptory character of this principle, ILM 1982, vol. 21, p. 976.

¹⁰² E.g. judgement of 26 February 2007 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, para. 161, ICJ Rep. 2007, p. 61.

¹⁰³ ICTY, in the following judgements: of 14 December 1999 in case *Prosecutor v. Goran Jelusic* of 14 December 1999, para. 60, IT-95-10; of 2 August 2001 in case *Prosecutor v. Radislav Krstic*, para. 541, IT-98-33-T; of 31 July 2003 *Prosecutor v. Milomir Stakic*, para. 500, IT-97-24-T (according to the Tribunal, the whole Convention has a peremptory character).

¹⁰⁴ ECtHR in its judgement of 12 October 2007 in the case *Jorgic v. Germany*, para. 68.

¹⁰⁵ The Court in its advisory opinion of 8 July 1996 on *legality of the threat or use of nuclear weapons*, para. 79, ICJ 1996, p. 257, used the expression “a great many rules of humanitarian law applicable in

In international law doctrine catalogues of peremptory norms have sometimes been proposed. These efforts, however, have not led to satisfactory results, and they still remain very divergent. For example, M. M. Whiteman in his article published in 1977, enumerated 20 different *jus cogens* norms.¹¹⁹ In particular he included the prohibition of genocide; slavery and slave trade; piracy; political terrorism abroad, including terroristic activities; hijacking of air traffic; recourse to war, except in self-defence; threat or use of force against the territorial integrity or political independence of another State (inter-

armed conflict” and “intransgressible principles of international customary law”. Although, the Court did not unequivocally connect these principles with *jus cogens*, the doctrine believes that what the Court had in mind are peremptory norms (see Kolb, *supra* note 51, pp. 324-326). While the author indicates that equalizing intransgressible principles with peremptory norms is not certain, if one connects intransgressible norms with negative derogation (prohibition against surpassing the minimum that is protected by a norm), it would be possible to qualify them as a sub-category of *jus cogens*.

¹⁰⁶ ICTY in its judgement of 14 January 2000 in case *Prosecutor v. Zoran Kupreskic and others*, para. 520, IT-95-16-T. The Tribunal included in this group those norms which prohibit war crimes, crimes against humanity and genocide.

¹⁰⁷ Negation of the peremptory character of a norm is indirectly visible in the ECtHR decision of 12 December 2002 on the admissibility of a claim in the case *Kalogeropoulou and others v. Greece and Germany*.

¹⁰⁸ The Human Rights Committee held, in the General Comment No. 29 of 2001, that *jus cogens* includes, *inter alia*, the prohibition on taking hostages, imposition of collective punishments, and arbitrary imprisonment.

¹⁰⁹ E.g. Banditer Arbitration Commission in its opinion no. 1 of 1991, ILM 1992, vol. XXXI, p. 1496, where it mentions peremptory norms of international law and includes in that group “respect for fundamental right of the individual and the rights of peoples and minorities”.

¹¹⁰ See *inter alia*, the recent General Assembly resolution “Torture and other cruel, inhuman or degrading treatment or punishment”, A/RES/68/156, preamble (explicitly: peremptory norm), pt. 1 (by implication).

¹¹¹ Judgement of 16 November 1998 in the case *Prosecutor v. Zejnir Delalic and others*, para. 454, IT-96-21-T; 10.12.1998 in the case *Prosecutor v. Anto Furundzija*, paras. 144, 153 et. seq., IT-95-17/1-T; of 22 February 2001 in the case *Prosecutor v. Dragoljub Kunarac and others*, para. 466, Case no. IT-96-23-T and IT-96-23/1-T.

¹¹² Judgement of 21 November 2001 in the case *Al-Adsani*, para. 61.

¹¹³ The IACHR in its judgement of 11 March 2005 in the case *Caesar v. Trinidad-Tobago*, para. 100, held that that the prohibition on inhuman or degrading treatment fell within the right to personal integrity (as provided by Art. 5.2 of the American Convention on Human Rights of 1969) and has a *jus cogens* character

¹¹⁴ Together with the prohibition on slave trade.

¹¹⁵ The IACHR in its judgement of 10 September 1993 in the case *Aloeboetoe et al. v. Suriname (reparations and costs)*, para. 57, p. 71.

¹¹⁶ E.g. Advisory opinion of 17 September 2003 in the case *Juridical condition and rights of the undocumented migrants*, opinion OC-18/03, paras. 100-101, 109. The IACHR held that the principles of legal equality, non-discrimination and the equal and effective protection of the law all have a peremptory character and *erga omnes* effects. The Court confirmed its stance with respect to the peremptory nature of the principle of equality and prohibition of discrimination in advisory opinion of 29 September 2009 in *Case concerning interpretation of art. 55 of the American Convention on Human Rights*, OC-20/09, para. 54.

¹¹⁷ E.g. NAFTA arbitration tribunal in its award of 3 August 2005 in *Methanex Corporation v. United States* (para. 24). The tribunal did not, however, find a violation of the prohibition of non-discrimination.

¹¹⁸ E.g. IACHR in its judgement of 22 September 2006, case *Goiburú and others v. Paraguay*, para. 131.

¹¹⁹ M. M. Whiteman, *Jus Cogens in International Law, with A Projected List*, 7(2) Georgia Journal of International and Comparative Law 609 (1977), pp. 625-626.

vention); armed aggression; recognition of situations brought about by force, including fruits of aggression; acceptance of treaty provisions imposed by force; war crimes; crimes against peace and humanity; offenses against the peace and/or security of mankind; dispersion of germs with a view to harming or extinguishing human life; all methods of mass destruction, including nuclear weapons; contamination of the air, sea, or land with a view to making it harmful or useless to mankind; hostile modification of weather; appropriation of outer space and/or celestial bodies; disruption of international communications with a view to disturbing the peace; economic warfare with the purpose of upsetting the world's banking systems, currencies, or the energy or food supply.

This approach, which is relatively rare, has a maximalist character. In a majority of cases the doctrine formulates more modest catalogues of peremptory norms, which are however not always compatible with existing jurisprudence or the proposals of the International Law Commission. For example, E. Suy argues that *jus cogens* only includes the prohibition on the threat or use of force; prohibition of slavery, genocide, piracy, conclusion of unequal treaties, intervention in the internal affairs of a state, and peaceful settlement of international disputes.¹²⁰

One may also find more systemic approaches in the doctrine. For example, R. Kolb asserts that *jus cogens* does not constitute a homogenous legal category. He identifies four types of peremptory norms: 1) norms of public order (e.g. prohibition against recognizing *inter partes* situations that are a result of a breach of international law), 2) norms contained in the UN Charter and resolutions of the Security Council which are based on the Charter, 3) norms that are non-derogable due to their logical structure (e.g. *pacta sunt servanda*, good faith principle), and last but not least 4) norms qualified as *utilitas publica* and created by international organizations.¹²¹

In the context of the rather inconsistent international jurisprudence and approach of the International Law Commission, as well as conflicting opinions in the doctrine, one can criticize (although this assessment is ahistorical) the abandonment of the idea of having at least exemplary catalogue of peremptory norms. The current practice shows that apart from problems of an existential nature (related to determination of the substance or criteria of *jus cogens*), the basis obstacle to the effective implementation of this concept is the lack of clarity as to which norms constitute *jus cogens*. Perhaps the international community, despite all the changes taking place, is still not ready to accept a transparent catalogue of peremptory norms.

The analysis of the case law, as well as positions held by the ILC, shows the insufficiently transparent and deep analysis of such norms against the criteria of Art. 53 of the VCLT. Courts and international arbitration tribunals frequently simply conclude that a specific norm is of a peremptory character.¹²² On the other hand, the International Law

¹²⁰ See Suy's commentary to Art. 53 of the VCLT, *supra* note 20, p. 1912.

¹²¹ See Kolb (*Théorie*), *supra* note 6, pp. 169 et. seq.; R. Kolb, *Conflits entre normes de jus cogens*, [in:] *Droit du pouvoir, pouvoir du droit. Mélanges offerts à Jean Salmon*, Bruxelles: 2007, pp. 485-488.

¹²² Similarly, Guillaume, *supra* note 22, pp. 131-132. The author concludes: "en définitive si le jus cogens fait désormais partie du paysage jurisprudentiel, ses contours demeurent incertains et les choix opérés

Commission merely refers to international jurisprudence. As a consequence, we have a self-perpetuating circular mechanism: the doctrine refers to the work of the International Law Commission, the Commission refers to jurisprudence, while the latter takes into account views expressed by the doctrine and the Commission (which is in any case composed of representatives of both doctrine and practice).

It also should be noted that references in the case law to specific peremptory norms are not very frequent and consistent (e.g. the prohibition of torture is only sporadically labelled as *jus cogens* in the jurisprudence of the ECtHR). This may raise the question whether the recognition of a concrete norm as a *jus cogens* norm is actually undertaken in a serious manner, or rather is done only when, due to some external reasons (e.g. usefulness in judicial reasoning) it is important for an adjudicating body.

It is also surprising that in both the exemplary enumerations of peremptory norms as well as in some case law, some fundamental norms are not perceived (or are perceived only partially) as *jus cogens*. For example, this is case with the principle of sovereignty or equal sovereignty, which remains a basic foundation of contemporary international law. In the context of protection of individual interests, equally rarely is there a reference to the right to life, which has a fundamental importance in the protection of human rights.

II. *JUS COGENS* IN A DYNAMIC APPROACH

1. *Jus cogens* and the establishment of international law

1.1. Introductory remarks

1.1.1. Freedom to undertake international obligations

To simplify the matter, one may distinguish two types of sources of international law: consensual and non-consensual. The first category includes treaties and resolutions adopted on the basis of treaties by international organizations as well as – if one accepts that they also constitute a source of law – unilateral acts. With some reservations, customary law can be also qualified as a consensual source (particularly in the case of general customs, where normally freely expressed will and acceptance are implicit). In all these cases the freely expressed will and consent of the subjects of international law is directly relevant for the creation of legal obligations. When it comes to non-consensual sources, which include general principles of law, individual will and consent is only indirectly relevant. *Jus cogens* is particularly pertinent with respect to consensual sources, as it constitutes a limitation on the freedom to undertake obligations. It acts in a way similar to the national clause of public order. As a result it removes from international legal system all legal actions (and their consequences), which are incompatible with the

par certains juges ou arbitres semblent relever davantage de la volonté de promouvoir un droit naturel conforme à leurs aspirations que de la constatation d'un droit positif bien établi.”

fundamental values protected by peremptory norms (also see below for more in the context of the conflict between norms of international law and *jus cogens*).¹²³

The freedom to undertake obligations includes the decision to enter into an undertaking, to determine its form and content, and sometimes even dispute settlement mechanisms or the consequences of its breach. *Jus cogens* as a substantive norm limits that freedom with respect to content. As a consequence, peremptory norms exclude the possibility of undertaking obligations with respect to certain matters (e.g. use of force, slavery or discrimination). However, the form of obligations is also relevant for the operation of *jus cogens*. Peremptory norms have been frequently associated with sanctions applicable to formal legal acts. Consequently, although *jus cogens* does not limit the freedom to undertake obligations as to their form, the sanctions of nullity or termination for its breach concern only formalized acts.¹²⁴

1.1.2. Lack of retroactive effect of *jus cogens* in treaties

Art. 53 of the VCLT, as an integral part of the Convention, does not apply retroactively (Art. 4). Moreover, since *jus cogens* did not enjoy a customary law status when the Convention entered into force, arguably Art. 53 only applies to treaties that have been concluded after that date (*ex nunc*). The second dimension of non-retroactivity is reflected in the fact that only those treaties become void which, at the time of their conclusion, are in conflict with an already-existing peremptory norm. This solution is additionally supported by Art. 64 of the VCLT, which provides that valid treaties concluded before the establishment of a peremptory norm, and which are in conflict with that norm (*jus cogens superveniens*), in principle terminate rather than becoming invalid (see also Art. 71 of the Convention), as the application of the nullity sanction in such a case would mean retroactive effect.¹²⁵

1.2. *Jus cogens* and the freedom to conclude treaties

1.2.1. *Jus cogens* and the conclusion of treaties

1. Art. 53 of the VCLT provides that the conclusion of a treaty which conflicts with *jus cogens* makes it null and void. In particular, the article stipulates that: “[a] treaty is

¹²³ I agree with the opinion of Meron, *supra* note 78, p. 397, that the *rationale* underlying *jus cogens* and international public order is the same, i.e. the importance of certain norms and values for the international community.

¹²⁴ R. Kolb distinguishes between the operation of *jus cogens* in connection with the validity of normative acts and the operation of *jus cogens* as a limitation on competence to act (Kolb (*Observation*), *supra* note 6, pp. 843-848). It is true that the concept of peremptory norms, as included in the VCLT, is connected with possibility of questioning the validity of a treaty. The International Law Commission indicated that this applies *mutatis mutandis* to unilateral acts. However, if subjects of international law know that their formal actions (in the event they are taken) will be invalid, this obviously and objectively limits their freedom to undertake international obligations.

¹²⁵ Pt. 6 of the commentary to Art. 50, [in:] Law of treaties between States. Commentaries 1966, pp. 248-249.

void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”

This means that the sanction of nullity does not apply to treaties concluded before the formation of *jus cogens*. In such a case Art. 64 applies, which envisages termination of a treaty. *Jus cogens* needs to exist at the time a treaty is concluded. The notion expressed in the term “time of its conclusion” requires some commentary. In the course of the work of the International Law Commission, it was the United States that opted for the inclusion of this condition, and there was no opposition.¹²⁶ However, its meaning was not clarified. The “time of [a treaty’s] conclusion” should be understood as the moment when a treaty is signed, if it was agreed that the treaty is to be applied provisionally pending its entry into force (a treaty that was simply signed is not in force yet, and as a consequence it would be difficult to make it void, as from the formal point of view such a treaty does not exist in the international legal order, or at least it cannot produce legal effects),¹²⁷ or ultimately at the time when a treaty enters into force, independent of the fact whether it has legal effects or whether it was really performed and applied by the parties.¹²⁸

Art. 44.5 of the VCLT also indicates that nullity affects the treaty as a whole (*in toto*). Consequently, one cannot excise those provisions that are incompatible with *jus cogens* and preserve the rest of the treaty. It is assumed that *jus cogens* is of a fundamental nature and should be strictly observed.¹²⁹ In this context, it is irrelevant whether such a *jus cogens* norm affects the object and purpose of a treaty or whether it is marginal from the point of view of the whole treaty. A treaty that is void as a consequence of being in conflict with a peremptory norm cannot be validated (see Art. 45 of the Convention).

It is also important to note that the invalidity of a treaty due to violation of *jus cogens* can be invoked by each and every state, and not only by parties to the treaty.¹³⁰ A different conclusion would lead to the bilateralization of peremptory norms. All countries are obliged to recognize as invalid a treaty that is incompatible with *jus cogens*.¹³¹

2. Article 71.1 of the VCLT describes the consequences of a treaty’s violation of *jus cogens* and provides that:

In the case of a treaty which is void under Article 53 the parties shall:

- a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and
- b) bring their mutual relations into conformity with the peremptory norm of general international law.

¹²⁶ See Nahlik, *supra* note 15, p. 320.

¹²⁷ *Contra*, E. Suy in his commentary to Art. 53 of the VCLT. He believes that the relevant moment is the time when a text of the treaty is adopted. However, adoption of the text is merely a form of finishing work on a treaty. In a formal sense such a treaty does not exist and it cannot be even provisionally applied.

¹²⁸ See similarly Schmalenbach, *supra* note 3, p. 924.

¹²⁹ See pt. 8 of the commentary to then Art. 41 [in:] Law of treaties between States. Commentaries 1966, p. 239.

¹³⁰ See Orakhelashvili, *supra* note 14, p. 143.

¹³¹ *Ibidem*.

Art. 71 has not yet been addressed in the jurisprudence. Undoubtedly, and similarly as with Art. 53, it did not have the status of international customary law when the Convention was signed. However, and contrary to Art. 53, the doctrine is consistent in holding that it has *not* acquired such a status over time.¹³² This means that the consequences described in the provision are relevant only for the parties to the VCLT. On the other hand, if one thinks about possible consequences of the violation of a peremptory norm, it is hard to imagine what other effects than those mentioned in Art. 71 could be indicated.

The Convention describes the consequences of nullity of a treaty due to its incompatibility with *jus cogens* differently than in the case of other grounds of nullity (*cf.* Art. 69). In other words, this is a special type of nullity.¹³³ The sanction of nullity applies to such a treaty as of the moment of its conclusion (*ab initio*). The good faith of the parties to a treaty is irrelevant in this context (unlike in Art. 69). The text of Art. 71 shows, however, that the sanction is not formulated very strictly. In particular, although the parties are obliged to eliminate all consequences of any act, this only relates to consequences of an act performed in reliance on a provision which conflicts with the peremptory norm (which is surprising if one recalls the indivisibility of a treaty). This means that Art. 71 does not apply to consequences of acts performed in reliance on other provisions included in the treaty (not incompatible with *jus cogens*). Moreover, the obligation to eliminate consequences is additionally limited by the phrase “as far as possible”.¹³⁴

Parties to a treaty that is invalid are obliged to undertake all necessary actions aimed at bringing their mutual relations into conformity with *jus cogens*. These actions can take different forms. Since in many cases *jus cogens* consists of prohibitions, this would include above all actions intended to eliminate the consequences of an act (adopted laws or concluded agreements) prohibited by the peremptory norm. This also means that a national act incompatible with *jus cogens* should be repealed or amended as necessary. This obligation has an absolute character (obligation of the result).

In practice, the impact of peremptory norms on the freedom to conclude treaties is limited.¹³⁵ When one considers a catalogue of norms that are qualified as *jus cogens*, it seems improbable that a treaty will be concluded which is incompatible with a peremptory norm. On the other hand, one may expect factual actions that will be incompatible with such norms (e.g. torturing, undertaking an armed attack, committing genocide).

¹³² See F. Crépeau, R. Côté, commentary to Art. 71, [in:] *Les Conventions de Vienne. Commentaire*, vol. III, pp. 2549-2551.

¹³³ Pt. 1 of the commentary to then Art. 67, [in:] *Law of treaties between States. Commentaries 1966*, p. 266.

¹³⁴ See S. Wittich, commentary to Art. 71 of the VCLT, [in:] Dörr & Schmalenbach, *supra* note 3, pp. 1217-1218. The author considers that the elimination of the consequences of a void treaty may be prevented by material or legal impossibility. More radically, but not entirely rightly, see Crépeau & Côté, *supra* note 132, pp. 2552-2557, who derives an obligation *restitutio in integrum* from Art. 71(1)(a) of the VCLT. The Convention retains a responsibility regime which differs, however, from absolute nullity.

¹³⁵ Similarly Suy, *supra* note 20, p. 1922; see also Meron, *supra* note 78, p. 392.

1.2.2. Reservations and interpretative declarations

1. The freedom to conclude treaties also includes the possibility of making reservations and issuing interpretative declarations. The Vienna Convention regulates, albeit in a very unsatisfactory manner, only the first issue (Art. 19 et seq.).¹³⁶ As a consequence, the International Law Commission decided in 1993 to reconsider the problem of treaty reservations and included interpretative declarations in its work agenda. The aim of the Commission was to develop practical guidelines rather than draft articles or a treaty. In 2011 the Commission presented the Guide to Practice on Reservations with commentaries, which considerably develops the rules of the VCLT.

Reservations and interpretative declarations are important, as they can modify the extent of treaty obligations. Therefore it should not come as a surprise that the Commission saw the connection between this issues and *jus cogens*. In this context, however, one can observe a surprising and significant change between the Commission's draft of 2010 and its final version of 2011. According to the 2010 Draft, the important rule was introduced in guideline 3.1.9, according to which "[a] reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law." In addition, the Commission distinguished such reservations from the reservations to provisions relating to non-derogable rights (guideline 3.1.10), which was controversial in the context of the non-derogability of *jus cogens*. The Commission also distinguished between reservations to peremptory norms and reservations to provisions that secure the object and the purpose of the treaty (guideline 3.1.5), indicating that it might be possible that a treaty only marginally refers to *jus cogens*, without it being its object and purpose.¹³⁷ The Commission did not, however, give any examples of such a situation. As the Commission highlighted in its commentary, guideline 3.1.9 prohibited not only reservations to peremptory norms included in a treaty, but also covered those instances in which a *jus cogens* norm was not included in a treaty, but a reservation would require applying the treaty in a way that would conflict with *jus cogens*.¹³⁸ On the other hand, the Commission did not indicate any sanction (i.e. nullity of the reservation). Moreover, the Commission also accepted that formulating a reservation that conflicts with *jus cogens* does not give rise to international responsibility of the state making the reservation (guideline 3.3.2), which means that such reservation is subject to the law of treaties. However, the consequences of a reservation could give a rise such responsibility.¹³⁹ The Draft included also rule 4.4.3 concerning the absence of effect on a peremptory norm of general international law.

The final text of the Guide to Practice contains only two of these guidelines, joining in fact the previous guidelines 3.1.9 and 4.4.3. Ultimately, it states as follows:

1. A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm,

¹³⁶ On the jurisprudence under Art. 19 of the VCLT, see Orakhelashvili, *supra* note 14, pp. 176-192.

¹³⁷ See pt. 4 of the commentary to 3.1.9 [in:] Reservations. Commentaries 2010, p. 466.

¹³⁸ *Ibidem*, pt. 11 (p. 468).

¹³⁹ See also *ibidem*, pt. 7 (p. 510).

which shall continue to apply as such between the reserving State or organization and other States or international organizations.

2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.

Due to the usual customary basis of *jus cogens* (i.e. naturalist universal legal consciousness), the above rule seems to be natural. However, it is still not clear what happens with a reservation which is in conflict with a peremptory norm and has already produced effects. It may be argued that since a treaty provision, with respect to which a reservation was formulated, still has to be applied, such a reservation would be at least ineffective. However, this solution is not fully satisfactory.

2. In the more recent treaty practice, interpretative declarations play an important role. As highlighted by the International Law Commission, each country and international organization may formulate an interpretative declaration. In the 2010 Draft the only limitation was that such a declaration could not be incompatible with a peremptory norm of general international law (guideline 3.5). Similarly as in the case of reservations, the Commission did not indicate any sanction.¹⁴⁰ In the end, the Commission decided to delete this guideline.

1.2.3. *Jus cogens* and the termination of treaties

1. An interesting case in the application of *jus cogens* occurs in a situation when a valid obligation is affected by a newly formed peremptory norm. This problem is regulated only with respect to treaties. Art. 64 of the VCLT provides that: “[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.” An analysis of the limited practice shows that Art. 64, similarly to Art. 53, has over time acquired the status of a customary norm of international law.¹⁴¹

Art. 64 presumes the following sequence: conclusion of a treaty, which is followed by the formation of *jus cogens* (Art. 53 speaks about acceptance and recognition of a norm of general international law as a peremptory norm). From the formal point of view, a particular norm could exist even before or at the moment of the conclusion of a treaty. What is important is the fact that it was not accepted and recognized as *jus cogens* at the time of the treaty’s formation, otherwise, Art. 53 of the VCLT would apply. A sanction affects the whole treaty (*in toto*). As a consequence, such a treaty should be eliminated from the international legal order. Similarly as in the case of Art. 53 of the VCLT, every state, not only parties to such a treaty, has the right to invoke its incompatibility with *jus cogens*.¹⁴²

¹⁴⁰ See K. Zemanek, *The Metamorphosis of Jus Cogens: From an Institution of Treaty Law to the Bedrock of the International Legal Order?*, [in:] Cannizzaro (ed.), *supra* note 83, p. 392. The author doubts that the idea that a conflict of a reservation with a *jus cogens* norm causes the absolute and automatic nullity of the reservation (without a decision of the ICJ) would promote the certainty of the law.

¹⁴¹ A. Lagerwall in his commentary to Art. 64, [in:] *Les Conventions de Vienne. Commentaire*, vol. III, pp. 2304-2314.

¹⁴² See Orakhelashvili, *supra* note 14, p. 152.

Each state has also the obligation to accept the consequences of this incompatibility.

2. The expression that a treaty, after the emergence of new peremptory norm “becomes void and terminates” is sometimes regarded as an obvious mistake.¹⁴³ This is however a result of mixed consequences of the situation, as provided for by Art. 71.2 of the VCLT, and results from the specific nature of *jus cogens*.¹⁴⁴ According to this provision:

In the case of a treaty which becomes void and terminates under Article 64, the termination of the treaty:

- a) releases the parties from any obligation further to perform the treaty;
- b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Art. 71 constitutes *lex specialis* with respect to Art. 70, a provision that indicates the general consequences of termination of a treaty. A principal consequence of incompatibility with *jus cogens superveniens* is that the parties are released from the obligation further to perform the treaty, which closely corresponds with the nature of termination. This consequence applies *ex nunc*, that is from the moment of termination of a treaty, and is of an obligatory character (i.e. parties are not allowed, on the basis of an agreement *inter se*, to agree that a treaty will be still binding or that that the provision in conflict with a new peremptory norm will be binding).¹⁴⁵ This is specific for *jus cogens superveniens*, where the rights, obligations or legal situations of the parties to a treaty created before the emergence of *jus cogens* are incompatible with the new peremptory norm. However, there is no retroactivity in this case.¹⁴⁶

Jus cogens superveniens is of limited practical importance, with only occasional references thereto by international courts. For example the IACHR, in its judgement of 10 September 1993 in *Aloeboetoe and others* explained, among the other things, that it did not see any need to analyse whether the 1762 treaty guaranteeing autonomy to the Suriname tribe of Saramakas is a treaty of international law. It held, however, that:

Suffice it to say that even if that were the case, the treaty would today be null and void because it contradicts the norms of *jus cogens superveniens*. In point of fact, under that treaty the Saramakas undertake to, among other things, capture any slaves that have

¹⁴³ See e.g. A. Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka* [International agreements. Theory and practice], Warszawa 2006, p. 408; S. Wittich, commentary to Art. 71 of the VCLT, [in:] Dörr & Schmalenbach, *supra* note 3, pp. 1214-1215.

¹⁴⁴ A. Langerwall, in his commentary to Art. 64 of the VCLT [in:] *Les Conventions de Vienne. Commentaire*, pp. 2338-2339. Similarly Villiger, *supra* note 22, p. 881, talks about a specific form of nullity which affect only those provisions of a treaty that are incompatible with *jus cogens superveniens* (nullity *ex nunc*).

¹⁴⁵ Villiger, *supra* note 22, p. 881.

¹⁴⁶ Pt. 4 of the commentary to then Art. 67, [in:] *Law of treaties between States. Commentaries 1966*, p. 267.

deserted, take them prisoner and return them to the Governor of Suriname, who will pay from 10 to 50 florins per slave, depending on the distance of the place where they were apprehended. Another article empowers the Saramakas to sell to the Dutch any other prisoners they might take, as slaves. No treaty of that nature may be invoked before an international human rights tribunal.¹⁴⁷

1.2.4. *Jus cogens* and contracts concluded by states

It is clear that when Art. 53 of the VCLT (Art. 53 of the VCLTIO) was drafted, it was not regarded as a rule that could apply to agreements concluded between states and international commercial entities (concession contracts). Considering, however, the tendency to extend the consequences of *jus cogens* to subjects other than states, such a possibility cannot be *a priori* excluded. In this context, it should be noted that an arbitration tribunal, in its award in the *Texaco-Calasiatic v. Gouvernement of Libya* case of 19 January 1977, touched upon this issue when analysing the peremptory character of the principle of permanent sovereignty over natural resources. Although the tribunal did not go into detail, it observed that such an approach seemed to be desirable.¹⁴⁸

Contracts between states and transnational companies (usually of an investment nature) are not international treaties, even in the broadest sense of the term. Nevertheless, if an international treaty applies to them as a consequence of the treaty under which such contracts are concluded (so-called “umbrella clauses”), or when international law is chosen as applicable law,¹⁴⁹ it is advisable to apply *jus cogens* to such agreements. No one who acts in the contemporary world (a state concluding contract, a transnational corporation) and who is subject to international law should be permitted to violate those few norms which are considered by the international community as a whole as fundamental.

1.2.5. *Jus cogens* and resolutions adopted on the basis of treaties

International law does not unequivocally regulate the issue of the application of *jus cogens* norms to resolutions adopted by international organizations or conferences of state-parties, and the literature on the topic is very limited. However, one may logically infer, *a maiori ad minus*, that if a treaty that constitutes the basis for such resolutions can be subject to a sanction, the same must be true for acts adopted on its basis, even if the treaty as such remains valid (i.e. it does not directly conflict with *jus cogens*).

Both Arts. 53 and 64 of the VCLT should apply, *mutatis mutandis*, to resolutions.¹⁵⁰ In particular, Art. 5 of the Convention cannot be understood as allowing bodies of an

¹⁴⁷ See para. 57 of the judgement, p. 71.

¹⁴⁸ See para. 78 of the judgement.

¹⁴⁹ See M. Jeżewski, Prawo traktatów wobec umów między państwami a podmiotami prywatnymi [Law of the treaties and contracts between states and private entities], [in:] Z. Galicki, T. Kamiński, K. Myszone-Kostrzewa (eds.), *40 lat minęło – praktyka i perspektywy Konwencji Wiedeńskiej o prawie traktatów*, Warszawa: 2009, pp. 356-365.

¹⁵⁰ Similarly J. Klabbers permits, although through analogy, the application of *jus cogens* to resolutions of international organizations (J. Klabbers, *An International Institutional Law*, Cambridge University Press, Cambridge: 2002, p. 239). See also J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, Cambridge University Press, Cambridge: 2003, p. 324.

organization, acting on the basis of its statute, to adopt rules that would conflict with peremptory norms of general international law.¹⁵¹ The assessment as to compatibility with *jus cogens* should be made in the first place with respect to binding resolutions. However, it would also be difficult to accept the adoption of non-binding resolutions (so-called soft law resolutions), even in instances where the only existing control is of a political character and is performed by the international organisation which adopted the resolutions, if such would be incompatible with *jus cogens*.

The problem of the compatibility of international organizations' resolutions with peremptory norms has greater practical potential than with respect to treaties. The probability that *jus cogens* will be violated seems higher here, even though this is not a common practice. Possible incompatibility with peremptory norms may particularly appear in the context of the constitutionalization tendencies of certain treaties (e.g. treaties constituting a basis for regional integration processes, in particular the European Union).¹⁵² Resolutions adopted on the basis of such treaties could be an expression of an aspiration to self-sufficiency or emancipation of a legal subsystem, even with the inclination to detach it from international law. *Jus cogens* should be included *ipso iure* into the laws of such an organization. Resolutions of international organizations are not independent from international law, but rather constitute an important part of it. Any claims asserting a breach of a peremptory norm should be submitted in accordance with procedures existing in the particular organization (especially through the review of legality of acts, if such a procedure is available). The consequences of finding a resolution incompatible with *jus cogens* should consist of its invalidity *ab initio* and *in toto*.

1.2.6. *Jus cogens* and the formation and termination of customary norms and general principles of law

The impact of *jus cogens* on the creation of norms of customary law and the determination of general principles of law has not been properly investigated. The problem has never been regulated, while international law practice does not provide any unequivocal position. In any case, it seems correct to conclude that an existing peremptory norm should prevent the emergence of any incompatible customary norm of a dispositive character. Strictly speaking, this could bring about a situation whereby the practice of subjects of international law that would normally lead to the establishment of customary law could be regarded as a breach of *jus cogens*. However, considering the progressive

¹⁵¹ See also C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd ed.), Cambridge University Press, Cambridge: 2005, p. 214. The author correctly notes that an international organization cannot exercise its competences with the violation of peremptory norms, even when the constitution of such an organization permits this or when its exercise is within the limits of legislative discretion. He gives, as an example of a resolution violating *jus cogens*, a resolution that discriminates due to race or religion.

¹⁵² See C. Mik, *Konwencja wiedeńska o prawie traktatów wobec konstytucjonalizacji traktatów* [Vienna Convention on the Law of Treaties in light of the constitutionalization of treaties], [in:] Galicki et al. (eds.), *supra* note 149, pp. 89 et. seq.

limitation of the importance of practice, this may be difficult. The existence of *jus cogens* should also prevent recognition of certain principles as general principles of law.¹⁵³

On the other hand, *jus cogens superveniens* should lead to the termination of binding customary norms of a dispositive character. A recognized general principle of law that conflicts with a new peremptory norm should be rejected, not only in particular circumstances but in general. In practice, however, such a situation would be truly exceptional.

1.2.7. *Jus cogens* and unilateral acts

In contemporary international law there is no doubt that states can undertake obligations in the form of unilateral acts. This problem has been extensively discussed, both in the doctrine and judicature.¹⁵⁴ It was also addressed by the ILC, which started its work in 1996. This led to the adoption of the “Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations” in 2006.

The Guiding principles concern only unilateral acts of states, while unilateral acts of international organizations were excluded from their scope. Unilateral acts as such have not been defined. The preamble to the Guiding principles only provides that they “may take the form of formal declarations or mere informal conduct including, in certain situations, silence, on which other States may reasonably rely.” The Guiding principles relate only to formal unilateral acts, that is unilateral acts *sensu stricto*. As indicated by pt. 5 of the Guiding Principles, they may be formulated orally or in writing.

The ILC document contains basic principles on the formulation and operation of unilateral acts of states. One of the principles stipulates: “A unilateral declaration which is in conflict with a peremptory norm of general international law is void” (pt. 8).

As observed by the Commission, this principle derives from the rule contained in Art. 53 of the VCLT and applies to unilateral acts.¹⁵⁵ Interestingly, the principle, contrary to Art. 53, does not contain a temporal qualifier that specifies that the conflict needs to occur at the moment of formulation of the unilateral act in question, although such wording was included in the initial version of this principle. Consequently, one could conclude that principle no. 8 equally applies to the situation when *jus cogens* already exists, as well as to cases of *jus cogens superveniens*. However, this would mean that a new peremptory norm more strongly affects unilateral acts than treaties, as it would always make them void. It is clear from the text of principle no. 8 that the sanction of nullity equally applies to oral and written unilateral acts. It is not however clear what the consequences of nullity are, and in particular whether one should consider Art. 71 of the VCLT as a potential model.¹⁵⁶

¹⁵³ Gilas, *supra* note 27, p. 55, correctly observes that assessing whether a general principle of law is suitable for international regulation requires verification as to whether it is compatible with *jus cogens*.

¹⁵⁴ See generally P. Saganek, *Akty jednostronne w prawie międzynarodowym* [Unilateral Acts in International Law], EWSPiA, Warszawa: 2010, *passim*.

¹⁵⁵ Unilateral acts. Commentaries 2006, p. 378.

¹⁵⁶ K. Zemanek, citing A.M. Weisurd, remarks that in fact, even in the case of such a fundamental peremptory principle as the prohibition of force, unilateral transgressions led to changes in its content rather than to the nullity of unilateral acts (Zemanek, *supra* note 140, p. 394).

2. *Jus cogens* and the application of international law

2.1. *Jus cogens* and its enforcement

2.1.1. General considerations

1. From the point of view of the application of *jus cogens*, the most important aspect concerns the procedural opportunities for its enforcement. These issues were addressed only with respect to treaties (arts. 65 and 66 VCLT). Art. 65.3 of the VCLT 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. However, Art. 66(a) of the VCLT provides that if the parties have not reached a solution within 12 months following the date on which the objection was raised, the following procedure should apply:

- 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.

What we have here is a special and stricter mode (judicial method in the broad sense) than that established for *jus cogens*. This procedure requires the parties to choose between arbitration and the ICJ. In the context of arbitration, based on *ad hoc* tribunals, international law doctrine warns of the danger of contradictory awards relating to *jus cogens*.¹⁵⁷ This in turn may lead to different consequences than one would expect.

As far as the judicial method *sensu stricto* is concerned, it is worth recalling the statement of the ICJ in its jurisdictional judgement of 3 February 2006 in the case *Armed activities on the territory of the Congo* (new application: 2002). The Court examined, *inter alia*, the relationship between the character of obligations arising from the conventional prohibition of genocide and its jurisdiction. It recalled its previous statement in the *East Timor* case and held that the *erga omnes* character of a norm and the rule of consent to Court's jurisdiction are two different things. It also added that:

[T]he mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute. The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties.¹⁵⁸

¹⁵⁷ See Villiger, *supra* note 22, pp. 820-821.

¹⁵⁸ ICJ, Judgement in the *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)*, Jurisdiction of the Court and admissibility of the application, ICJ Rep. 2006, p. 32, para. 64.

On the other hand, as stressed by the ICJ in the *Case concerning application of the Convention on the prevention and punishment of the crime of genocide* of 26 February 2007, there is a:

fundamental distinction between the existence and binding force of obligations arising under international law and the existence of a court or tribunal with jurisdiction to resolve disputes about compliance with those obligations. The fact that there is not such a court or tribunal does not mean that the obligations do not exist. They retain their validity and legal force. States are required to fulfil their obligations under international law, including international humanitarian law, and they remain responsible for acts contrary to international law which are attributable to them.¹⁵⁹

In the currently existing procedural situation (lack of general and obligatory jurisdiction with respect to *jus cogens*), the above statement is of fundamental importance for international law, and as a consequence for the performance of obligations that are based on *jus cogens* and responsibility for its breach.

2. Already during the Vienna Conference, Arts. 65 and 66 provoked a number of controversies.¹⁶⁰ 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).¹⁶¹ These controversies had an impact on the ultimate rejection of Art. 66 as a potential customary law norm.¹⁶² In practice the significance of Art. 66 of the VCLT is very limited, which however does not preclude its enforcement in accordance with Art. 33 of the UN Charter (procedures other than judicial).

2.1.2. Immunity of a state and its officials and enforcement of *jus cogens*

The effectiveness of peremptory norms is connected to great extent with the possibility of their enforcement through various international and national bodies (includ-

¹⁵⁹ ICJ, Judgement in the *Dispute between Bosnia and Herzegovina v. Serbia and Montenegro* (merits), para. 148, ICJ Rep. 2007, p. 56.

¹⁶⁰ See generally Nahlik, *supra* note 15, pp. 292 et. seq.

¹⁶¹ See 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. H. Ruis Fabri, commentary to Art. 66 of the VCLT [in:] *Les Conventions de Vienne. Commentaire*, vol. III, in particular pp. 2421-2427. See also J. Verhoeven, *Jus Cogens and Reservations or "Counter-Reservations" to the Jurisdiction of the International Court of Justice*, [in:] K. Wellens (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy*, The Hague-Boston-London: 1998, pp. 195 et. seq. The author believes that counter-reservations aimed at the exclusion of the applicability of Articles 53 and 64 "should be considered null and void, despite the legitimate concerns of many (mostly western) countries to enhance the jurisdiction of the ICJ". The validity of reservations to Art. 66 is not important. States objecting to such reservations cannot prevent *jus cogens* norms from being applicable. See also Villiger, *supra* note 22, pp. 822-823.

¹⁶² See ICJ, *Armed activities on the territory of the Congo* (new application: 2002), p. 45.

ing domestic courts). The issue is delicate. In particular, states, also some international organizations, as well as international officials frequently raise the defence of jurisdictional immunity. This may include state immunity, immunity of an international organization,¹⁶³ or immunity of the most important persons in a state (e.g. heads of state or governments).

This immunity appears to be a quite effective tool in barring enforcement of claims, even in the case of breaches of peremptory norms.¹⁶⁴ In the context of state immunity before international courts, *Al-Adsani v. United Kingdom* is a particularly interesting case that was decided by the European Court of Human Rights on 21 November 2001. The Court distinguished the case from the immunity of a (former) head of state in criminal matters (case of Pinochet),¹⁶⁵ where indeed the immunity should not apply when a breach of *jus cogens* is alleged. Basing its analysis on the practice of national courts, the ECtHR held that, despite contrary statements of the working group of the International Law Commission related to the draft of the Convention on jurisdictional immunities of states and their property, state immunity can be successfully pleaded in civil proceedings based on allegations of torture (the prohibition of torture was recognized as *jus cogens*).¹⁶⁶

As indicated, the situation is slightly different when it comes to criminal immunity. In particular, although the judicial practice concerning rejection of claims of immunity by state officials in a criminal proceeding – based on universal jurisdiction and connected with an act that breaches *jus cogens* – shows some positive tendencies, it is not yet stable.¹⁶⁷ As a consequence, immunity can still also successfully pleaded in criminal proceedings.¹⁶⁸

¹⁶³ See C. Focarelli, *Immunité des Etats et jus cogens. La dynamique du droit international et la fonction du jus cogens dans le processus de changement de la règle sur l'immunité juridictionnelle des Etats étrangers*, 112(4) *Revue Générale de Droit International Public* 761 (2008); Kolb, *supra* note 51; R. Pavoni, S. Beaulac, *Etude croisée Italie/Canada sur l'immunité des Etats et le jus cogens en droit international*, EUI Working Papers. Law 2009, no. 16.

¹⁶⁴ See Orakhelashvili, *supra* note 14, pp. 320 et. seq.; Th. Giegerich, *Do Damages Claims Arising from Jus Cogens Violations Override State Immunity from the Jurisdiction of Foreign Courts?*, [in:] Tomuschat & Thouvenin (eds.), *supra* note 65, pp. 203 et. seq.; I. Pingel, *L'immunité des Etats*, [in:] *ibidem*, pp. 239 et. seq.; T. Stein, *Limits of International Law Immunities for Senior State Officials in Criminal Procedure*, [in:] *ibidem*, pp. 249 et. seq.

¹⁶⁵ See also judgement of the ECHR in the case *Jorgic v. Germany* of 12 July 2007, para. 68, where the Court noted that in the course of the work on the Genocide Convention no agreement was reached as to inclusion of the principle of universal jurisdiction over genocide, but also held that Art. I of the Convention provides an *erga omnes* obligation of a state to prevent and punish genocide. Consequently, the extraterritorial exercise of jurisdiction was considered to be reasonable. Similarly, with respect to *erga omnes* obligations relating to the right to be heard by a court in the American Convention on Human Rights, see the judgement of the IACHR of 22 September 2006 in the case *Goiburú et al. v. Paraguay*.

¹⁶⁶ See paras. 57-67.

¹⁶⁷ For a review of domestic case law, see T. Ostropolski, *Zasada jurysdykcji uniwersalnej w prawie międzynarodowym* [Principle of universal jurisdiction in international law], Warszawa: 2008, pp. 212-223. See also A. Zimmermann, *Violations of Fundamental Norms of International Law and the Exercise of Universal Jurisdiction in Criminal Matters*, [in:] Tomuschat & Thouvenin (eds.), *supra* note 65, pp. 335 et. seq.; M. Cosnard, *La compétence universelle en matière pénale*, [in:] *Fundamental Rules...*, p. 355 et. seq.

¹⁶⁸ See ICJ judgement in *Arrest Warrant* of 11 April 2002, ICJ Rep. 2002, p. 24, para. 58, p. 33, para. 78.

In the context of the relationship between *jus cogens* and jurisdictional immunity, the issue of whether immunity is treated as an element of substantive or procedural law is of prime importance.¹⁶⁹ With respect to substance, it would be difficult to argue that in the case of breach of a peremptory norm the immunity of a state or its officials (either criminal or civil) should prevail. However, contrary to those who look for the maximum effectiveness of *jus cogens*, such a perception of the relationship is incorrect. The immunity defence has primarily a procedural dimension, which should be addressed in the context of the possibility of pursuing a claim for a violation of *jus cogens*.¹⁷⁰ As the International Court of Justice rightly stated in a dispute between Germany and Italy:

Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. [...] For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission's Articles on State Responsibility.

Of course, it is an entirely different issue whether immunity should be of an absolute character or be restricted due to the particular importance of the value protected by peremptory norm and its universal acceptance.

2.2. *Jus cogens* and the interpretation of international law

2.2.1. General remarks

The ILC, in its commentary on the Draft articles on Responsibility of States for Internationally Wrongful Acts, stated that “peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts.”¹⁷¹ This means that in cases of normative conflicts with peremptory norms that can be resolved through interpretation, one has to rely on such interpretative rules that will support a *jus cogens*-friendly interpretation of dispositive norms.

¹⁶⁹ *Contra* Orakhelashvili, *supra* note 14, pp. 340-343, who believes that international law does not strictly distinguish between substantive and procedural norms.

¹⁷⁰ See ICJ judgement in the *Jurisdictional Immunities of the State* of 3 February 2012, ICJ Rep. 2012, pp. 141-143, paras. 93, 95, 99. See also J. Verhoeven, *Sur les relations entre immunités et jus cogens, à la lumière de l'arrêt Allemagne-Italie du 3 février 2012*, [in:] D. Alland, V. Chetail, O. De Frouville, J.E. Viñuales (eds.), *Unity and Diversity of International Law. Essays in Honour of Professor Pierre-Marie Dupuy*, Leiden-Boston 2014, p. 527 et. seq.

¹⁷¹ See pt. 3 of the commentary to Art. 26 (Compliance with peremptory norms), [in:] Responsibility of States. Commentaries 2001, p. 85.

2.2.2. *Jus cogens* and the systemic interpretation of international law

International law, as any other field of law, is subject to interpretation.¹⁷² Only the interpretation of treaties is regulated in codified law (arts. 31-33 of the VCLT). These provisions are conventionally regarded as norms of customary law,¹⁷³ albeit of a dispositive character. The International Law Commission has also indicated rules that apply in the interpretation of unilateral acts of states (pt. 7 of the Guiding principles of 2006). Interpretation of the resolutions of international organizations, as well as customary law and general principles, remains an open issue.

It should be also noted that, at least *prima facie*, the interpretation methodology used in the context of treaties is not fully compatible with the methodology used with respect to unilateral acts. While the interpretation of treaties is only focused on their texts, but it open for international law, when it comes to unilateral acts the interpretation focuses on the analysis of a statement, including the author's intention.¹⁷⁴

Openness of treaty interpretation for international law is guaranteed by Art. 31.3(c) of the VCLT, which provides for systemic interpretation, labelled by the International Law Commission as the "systemic integration method" (Conclusions on the fragmentation of international law). Accordingly, when interpreting treaties one has to take into account "any relevant rules of international law applicable in the relations between the parties." *Jus cogens* undoubtedly falls within this category.¹⁷⁵ Since the majority of peremptory norms are general (universal) customary law, there is no need to show that those rules are applicable between the parties. The only condition necessary for taking *jus cogens* into account in the process of treaty interpretation is the applicability of such a rule in a specific case. Moreover, systemic interpretation also indirectly prohibits any interpretation of a treaty that would lead to a conflict with *jus cogens*. From the perspective of the organ that undertakes interpretation, the consideration of peremptory norms should be obligatory (*ex officio*)

Considering that treaties can serve as a basis for subsequent executive acts, particularly in the case of treaties that serve as statutes of international organizations, on the basis of which their organs adopt resolutions, one may ask whether such executive acts shall be subject to the same systemic interpretation as applied in the context of treaties. The answer is not an easy one, as the VCLT in Art. 5 allows, on the basis of rules of an organization, for a departure from its provisions. This also applies to interpretative rules that may be used in the context of resolutions of such international organizations.

¹⁷² For a broad understanding of the interpretation of international law, see R. Kolb, *Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public*, Bruxelles: 2006; A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, Oxford University Press, Oxford: 2008.

¹⁷³ See C. Mik, *Wykładnia prawa międzynarodowego* [Interpretation of International Law], [in:] L. Gardocki, J. Godyń, M. Hudzik, L.K. Paprzycki (eds.), *Interpretacja prawa międzynarodowego i unijnego w sprawach karnych* [Interpretation of International and European Law in Criminal Cases], Warszawa: 2006.

¹⁷⁴ Unilateral acts are interpreted in a restrictive manner. See Unilateral acts. Commentaries 2006, pp. 377-378.

¹⁷⁵ Mik, *supra* note 173, p. 34.

However, the peremptory character of *jus cogens* suggests that such a departure should not be available here. Consequently, neither the founders of an organization (parties to a treaty) nor the organization as such can “contract out” from *jus cogens*, which also includes a process of interpretation of a founding treaty or rules of organization (executive acts). On the other hand, an international organ adjudicating the case should *ex officio* take into consideration peremptory norms, without regard to the autonomy of the parties within the international proceeding.¹⁷⁶

2.2.3. Collision between norms of international law and *jus cogens*

1. General remarks. In its Conclusions on fragmentation of international law (2006), the International Law Commission correctly observed that most of international law is dispositive. This means that special laws can be used to apply, clarify, update or modify, or even set aside general law on the basis of the *lex specialis derogat legi generali* principle. This rule, however, is subject to exceptions, as certain categories of general norms cannot be derogated by special laws. *Jus cogens* was correctly included by the Commission in this category.¹⁷⁷

The Commission also noted in its Conclusions that “[a] rule of international law may be superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority. This is the case of peremptory norms of international law” (pt. 32).

The above indicates that in the Commission’s opinion *jus cogens* introduces a hierarchical aspect in the international legal order. There are two grounds for its special position in this legal order: 1) particularly important content; 2) universal recognition of its superiority. The first element indicates not only the fundamental character of the values protected by peremptory norms, but also that this fundamental character results from the fact that the value is particularly precious for the international community as a whole. At the same time, the fundamental character of the value does not alone determine the special position occupied by *jus cogens* in the international law system. The second condition – universal recognition of superiority of a norm – also needs to be met. What is important here is that a norm needs to be recognized as superior by the international community as a whole. Such an understanding corresponds with the decentralized character of the international community, and as a consequence with a lack of automatic supremacy of general law over particular earlier and later norms. It is therefore necessary to recognize a norm as superior,¹⁷⁸ and such recognition needs to have a universal character.

¹⁷⁶ See e.g. NAFTA arbitration tribunal in *Methanex Corporation v. United States* holding: “the Tribunal agrees with the implication of Methanex’s submission with respect to the obligations of an international tribunal – that as a matter of international constitutional law a tribunal has an independent duty to apply imperative principles of law or *jus cogens* and not to give effect to parties’ choices of law that are inconsistent with such principles” (para. 24).

¹⁷⁷ See pts 8 and 10 of the Conclusions, [in:] Fragmentation. Conclusions 2006.

¹⁷⁸ As J. Pauwelyn rightly observed: “[T]he higher value of a norm *jus cogens* is not based on its source, that is, with reference to how it was created or by whom, but, but rather based on its acceptance and

The specific nature of peremptory norms, as established in Arts. 53 and 64 of the VCLT, requires that conflicting norms which do not have such a character will be removed from the international legal system. Conflicts between *jus cogens* and such norms will therefore take place at the validation, not the application, level. As a consequence, this issue could be addressed when discussing the impact of *jus cogens* on the creation of international law (freedom to undertake international obligations). However, some cases are not entirely clear when viewed in this perspective (in particular, possible conflicts between *jus cogens* and the UN Charter). In addition there is the problem of possible conflicts between peremptory norms. This justifies presentation of these issues here.

2. Conflicts between peremptory and dispositive norms

1. Peremptory norms may conflict with dispositive norms. The latter category covers not only norms included in bilateral or “ordinary” multilateral treaties, but also general ones. This issue, although rather straightforward, was not unequivocally addressed in the VCLT. In particular, it was omitted in Art. 30 of the Convention, which provides a basic rule for conflicts of norms. Yet it may be the case that a later treaty conflicts with a peremptory norm included in an earlier treaty or in customary law. In such a situation, the rule contained in Art. 30 will be inapplicable. The earlier treaty still will be in force, while the latter one will be null and void from its conclusion as a consequence of the conflict with a peremptory norm. Art. 53 will not operate as a conflict of law norm but as a validation rule.¹⁷⁹ Similarly, in the case of conclusion of a new treaty containing *jus cogens*, which conflicts with an earlier treaty, no conflict of norms will be involved, but the validation rule provided by Art. 64 of the VCLT that results in the termination of the earlier treaty.

One may therefore say that treaties which contain peremptory norms express greater stability than others. This also means that it is not possible to terminate or make a treaty which contains such norms inapplicable, even in case of a material breach of a treaty in the sense of Art. 60 of the VCLT. Nor does the principle of reciprocity apply here.¹⁸⁰

2. Similarly, a conflict between peremptory norms and norms of customary law should not, at least *prima facie*, pose any problems, as customary law, including those laws of a universal character, is predominantly *jus dispositivum*. Even though these norms are not purely consensual, they can be changed or even waived *inter partes* on the basis of agreement between the parties. This was clear for the ICTY in the *A. Furundzija* case of 10 December

recognition as a norm from which no derogation is permitted” (Pauwelyn, *supra* note 150, p. 98). Strictly speaking, however, the creation of a norm and its recognition as a peremptory norm are not completely separate. The norm can exist before its recognition as a *jus cogens* norm, but it is possible to create a norm and recognize it as a peremptory norm at the same time as well. *Contra*, see K. Zemanek, *supra* note 140, pp. 400–405. According to him, *jus cogens* norms neither have higher rank nor constitutional status. He called *jus cogens* an “academic construct” (p. 409).

¹⁷⁹ See F. Paolillo in his commentary to Art. 30, [in:] *Les Conventions de Vienne. Commentaire*, vol. II, pp. 1262–1263.

¹⁸⁰ See ICTY in its judgement of 10 December 1998 in the case *Prosecutor v. Anto Furundzija*, para. 150, IT-95-17/1-T.

1998, and for the IACHR in its advisory opinion of 29 September 2009 on *Art. 55 of the American Convention on Human Rights*. The ICTY clearly stated that the prohibition of torture, as *jus cogens*, is placed not only above treaty norms but also above customary law – be it local, particular or general, unless the latter has the status of a peremptory norm.¹⁸¹ The IACHR added that even if the provisions of Art. 55 would enjoy the status of customary law, it could not have compulsory effects over a peremptory norm (here the principle of equality and non-discrimination).¹⁸² Contrary to appearances, the conflicts that are discussed here need to be resolved on the level of validity, not applicability.

3. Collision of *jus cogens* with the UN Charter and Security Council resolutions

Distinguishing *jus cogens* among the norms of international law would suggest that a clear normative hierarchy is created: in case of unavoidable conflict *jus cogens* prevails over any dispositive norm. This conclusion, however, is not as obvious as one would expect, particularly if one takes into account the constitutionalization tendencies with respect to some treaties, in particular the UN Charter.¹⁸³

The possibility of a conflict between *jus cogens* and the UN Charter is a delicate issue. Although the Charter, by its nature, is an expression of the freedom to conclude treaties – which gives its provisions a dispositive character – at the same time the parties decided to give it a special position in relation to other obligations by granting priority to its provisions (Art. 103 of the UN Charter; confirmed in Art. 30.1 of the VCLT). The Charter is also a universal treaty, which additionally reinforces its legal position.¹⁸⁴ The International Law Commission, in its Conclusions on the fragmentation of international law, observed that in such circumstances it is difficult to contemplate a conflict between *jus cogens* and the UN Charter (pt. 40).¹⁸⁵ The legal doctrine adds that the Charter entered into force before the VCLT, the latter of which does not have a retroactive effect. Nor is the Vienna Convention universally accepted, as is the case for the Charter.¹⁸⁶ It also seems that, irrespective of intertemporal reservations, the relative generality of the provisions of the Charter would seem to make any conflict rather hypothetical. One may even accept a presumption of conformity of the Charter with

¹⁸¹ Case IT-95-17/1-T, para. 153.

¹⁸² See para. 54, opinion no. OC-20/09, p. 58.

¹⁸³ B. Fassbender, *The United Nations Charter as the Constitution of the International Community*, Leiden-Boston 2009. See also Mik, *supra* note 152, p. 89 et. seq. Some even talk about the constitutionalization of international law, see J. Klabbers, A. Peters, G. Ulfstein, *The Constitutionalization of International Law*, Oxford: 2009.

¹⁸⁴ See Mik, *supra* note 152, pp. 101-110.

¹⁸⁵ A different approach was taken by the Study Group chaired by M. Koskenniemi, which stressed that from the perspective of *jus cogens*, the UN Charter does not differ from other treaties. See pts 346 and 360 of the Fragmentation of international law: difficulties arising from the diversification and expansion of International law. Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, (hereinafter “Koskenniemi report 2006”), pp. 176 and 181. Text of the report is available here: http://www.un.org/ga/search/view_doc.asp?symbol=A/CN.4/L.682.

¹⁸⁶ Hossain, *supra* note 33, p. 86 et. seq.

jus cogens. On the other hand, it is difficult to accept the position that all provisions of the UN Charter enjoy a *jus cogens* status. An inconsistency between the Charter and a subsequent treaty does not result in the invalidity of such a treaty *in toto* and *ab initio*. Neither there is any indication that provisions of the Charter are non-derogable.¹⁸⁷

And yet, if one considers that the priority of obligations arising from the Charter, which also includes obligations resulting from the binding resolutions of the Security Council,¹⁸⁸ the whole situation becomes murkier.¹⁸⁹ The International Law Commission, in its Conclusions (2006), observed that according to Art. 24.2 of the Charter the Security Council acts in accordance with the purposes and principles of the United Nations, which include norms that have been subsequently treated as *jus cogens* (pt. 40). In this context it was even argued that the Security Council could be regarded as the guardian of *jus cogens*,¹⁹⁰ and could not be its violator. Such a statement can be accepted, but only under certain conditions, including a reservation that resolutions of the Security Council are in principle not excluded from assessment as to their compatibility with *jus cogens*,¹⁹¹ although they benefit from a presumption of consistency.¹⁹²

¹⁸⁷ Differently, although not entirely clearly, see Fassbender, *supra* note 183, who believes that Art. 53 of the VCLT and Art. 103 of the Charter lead to the same result, in particular the invalidity of a treaty (p. 124), and that peremptory norms can be created and changed through the amendments of the UN Charter (p. 140). At the same time, the author shares the position of A. Paulus that *jus cogens* is a statement of mission rather than a practicable legal instrument (p. 165).

¹⁸⁸ See R. Bernhardt in commentary to Art. 103, [in:] B. Simma et al. (eds.), *Charter of the United Nations. A Commentary*, vol. II (2nd ed.), Oxford: 2002, pp. 1295-1296.

¹⁸⁹ See K. Zemanek, *The Legal Foundations of the International System*, RCADI 1997, vol. 266, p. 231 (“The concept of *jus cogens* implies that a norm of that character must be respected by *all* actors in the international system, including organs which States may create for common action. The Security Council is thus bound by the norms of *jus cogens* in the same manner as the States composing it, and its decisions are null and void if they conflict with a peremptory norm. It is equally inconceivable that a decision by the Security Council, invoking the duty under Article 25 of the Charter, should oblige members of the United Nations to violate their obligations under human rights conventions. The limits which apply to countermeasures must also restrain the freedom of the Security Council”). Klabbers, *supra* note 150, pp. 248-249, points in this context to the argumentation of Bosnia and Herzegovina in its dispute with Serbia in the ICJ (*order on provisional measures of 13 September 1993*, ICJ Rep. 1993, p. 325), which claimed that resolution of the Security Council contributed to genocide and violated *jus cogens*. Although the ICJ ultimately did not accept this argumentation, judge E. Lauterpacht stated that the Security Council should be bound by peremptory norms (separate opinion, ICJ Rep. 1993, p. 407; the judge observed “it would seem sufficient that the relevance here of *jus cogens* should be drawn to the attention of the Security Council, as it will be by the required communication to it of the Court’s Order, so that the Security Council may give due weight to it in future reconsideration of the embargo”). Y. Dinstein believes, however, that a conflict between a Security Council resolution and *jus cogens* is difficult to imagine. In any case, only the ICJ would be competent to settle such question. See Dinstein, *supra* note 86, p. 426.

¹⁹⁰ Hossain, *supra* note 33, p. 97.

¹⁹¹ See stronger, Schmalenbach, *supra* note 3, p. 929: “Even the UN Security Council acting under Chapter VII has no special position in both political and legal terms in the field of *jus cogens* obligations”. About possible conflicts and their consequences, see generally Orakhelashvili, *supra* note 14, pp. 423 et seq.

¹⁹² E.g. ICTY in its decision of 2 October 1995 in the case *Prosecutor v. Dusko Tadic*, para. 28, where it stated that neither the text nor the spirit of the Charter conceives of the Security Council as unbound by

The Court of the First Instance of the European Union (CFI) has, in a number of its judgements, maintained that it is possible to review resolutions of the Security Council against peremptory norms. In particular, in its judgement in the case *Y.A. Kadi v. Council of the European Union and the Commission of European Communities* of 21 September 2005, it held that in principle resolutions of the Security Council, due to their special status (being an element of the obligations arising from the UN Charter), fall outside the ambit of the Court's judicial review, but that such control is incidentally permissible when an act of secondary Community law is based on a resolution of the Security Council which leaves the Community legislator with no discretion. In such a case *jus cogens*, understood as "a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible",¹⁹³ provides a point of reference. The Court also held that its approach was supported by the specific nature of *jus cogens*, as described in Arts. 53 and 64 of the VCLT. Moreover, it observed that the UN Charter itself presupposes the existence of mandatory principles of international law, in particular, the protection of the fundamental rights of human beings. These principles are binding on all UN members, including all the bodies of the organization. This also applies to the Security Council. As a consequence, international law "permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect, namely, that they must observe the fundamental peremptory provisions of *jus cogens*,"¹⁹⁴ including basic human rights.

The judgement of the CFI was appealed to the Court of Justice, and ultimately set it aside, albeit for reasons not related to *jus cogens*. In particular, the Court questioned the findings of the CFI that the national regulation enjoyed immunity from jurisdiction, except for *jus cogens* cases, due to its character as an implementation mechanism with respect to resolutions of the Security Council.¹⁹⁵

law. See also L. M. Hinojosa Martinez, *Bad Law for Good Reasons: The Contradictions of the Kadi Judgement*, 5 International Organizations Law Review 339 (2008), pp. 348-349.

¹⁹³ Case T-315/01, paras. 224-231, ECR 2005, p. II-3649, para. 226.

¹⁹⁴ *Ibidem*, para. 230. The Court also held that the right to property is of mandatory character (para. 242); *A. A. Yusuf and Al. Barakaat International Foundation v. Council of the European Union and the Commission of the European Communities* of 21 September 2005, T-306/01, paras. 276-282, ECR 2005, p. II-3533; *F. Hassan v. Council of the European Union and the Commission of the European Communities* of 12 July 2006, T-49/04, para. 92, ECR 2006, p. II-52; *Ch. Ayadi v. Council of the European Union and the Commission of the European Communities* of 12 July 2006, T-253/02, para. 116, ECR 2006, p. II-2139.

¹⁹⁵ Judgement of 3 September 2008, case C-402/05 P and C-415/05 P, ECR 2008, p. I-6351 (at the same time the judgement in the *Yusuf* case was set aside). See particularly para. 329. At the same time, the Court questioned the absolute character of the right to property (para. 355). In the judgement of 3 December 2009, Court of Justice also annulled the judgement in *F. Hassan* case (cases C-399/06 P and C-403/06 P, ECR 2009, p. I-11393). See judgement of the Court of 30 September 2010 in *Y. A. Kadi v. Commission of the European Communities*, case T-85/09, ECR 2010, p. II-5177, where it accepted the earlier decisions of the of Court of Justice. For a critical view concerning the silence of the Court on the normative status of individual rights, see A. Gattini in his commentary to the Court's judgement in the *Kadi* case, 46(1) Common Market Law Review (2009), pp. 231-232.

The response of the legal doctrine was rather critical.¹⁹⁶ From the dogmatic point of view, one may argue that EU courts are not competent to undertake review/control, even incidental, of Security Council resolutions from the perspective of their compliance with *jus cogens*, as this could undermine the legal force of acts aimed at guaranteeing international peace and security.

On the other hand, it should also be added that currently no court, including the ICJ, enjoys an unequivocal power to control the legality of Security Council resolutions.¹⁹⁷ Moreover, one can also observe a certain tendency toward questioning the legality of Security Council resolutions that impose sanctions not only at the regional, but also at the national level (English, Swiss and Italia courts). In this context, it can be argued that a benefit of such decentralized judicial supervision (which prevails despite the risk to the integrity and effectiveness of the UN system) consists in inducing the Security Council to provide a better protection of individual rights.¹⁹⁸ Beyond judicial control, other permissible reactions to illegal resolutions of the Security Council would include protests and refusals to execute.¹⁹⁹

4. Collision between *jus cogens* and self-contained regimes

International case law has noted that some legal regimes created on the basis of treaties may aim at greater or lesser autonomy with respect to general international law (i.e. self-contained regimes). Although they were already addressed by the PCIJ,²⁰⁰ they gained in importance only after World War II,²⁰¹ and in particular after the end of the Cold War and collapse of the Soviet bloc. During that time one could witness a dynamic development of international law, including the creation and transformation of international organizations capable of establishing their own legal orders. This has led to the fragmentation of international law and the corresponding problem of its unity.

International law doctrine has since attempted, for some time, to analyse the phenomenon of the emergence and operation of self-contained regimes.²⁰² The issue was

¹⁹⁶ See e.g. D. Simon, F. Mariatte, *Le Tribunal de première instance des Communautés. Professeur de droit international*, Europe. Revue mensuelle, Décembre 2005, p. 6 et. seq.; J. Klabbers, *Treaty Conflict and the European Union*, Cambridge: 2009, pp. 162-163.

¹⁹⁷ Similarly Hinojosa Martinez, *supra* note 192, pp. 352-353. Consequently, the author believes that the competence of EU courts to indirectly control the legality of resolutions of the Security Council should be accepted (at least with respect to compliance with *jus cogens*).

¹⁹⁸ For a review of the practices of international and domestic courts and discussion of the arguments for and against decentralized judicial control, see A. Reinisch, *Should Judges Second-Guess the UN Security Council*, 6(1) International Organization Law Review 257 (2009), particularly pp. 284-290.

¹⁹⁹ See Orakhelashvili, *supra* note 14, pp. 471-479.

²⁰⁰ See judgement in the *S.S. Wimbledon* case of 17 August 1923, PCIJ Rep. 1923, Series A, Nr 1, pp. 23-24, as well as advisory opinion of the Court in *Exchange of Greek and Turkish populations case of 1925*, PCIJ Rep. 1925, Series B, Nr 10, p. 20.

²⁰¹ See ICJ judgement in the *Case concerning United States diplomatic and consular staff in Teheran* of 24 May 1980, ICJ Rep. 1980, p. 41, para. 86; *Case concerning military and paramilitary activities in and against Nicaragua*, p. 134, para. 267.

²⁰² B. Simma, *Self-contained regimes*, 16 Netherlands Yearbook of International Law 111 (1985);

also addressed by the ILC, first in the context of responsibility of states and later as a part of its work on fragmentation of international law. Eventually the Commission presented its stance, looking at self-contained regimes from the *lex specialis* perspective (this is the reason why the Commission favours the notion of “special regimes”; pts 11-16 of the Conclusions).

Special regimes do not constitute a homogenous category. The International Law Commission distinguished three categories of such regimes: 1) regimes related to special rules concerning breach and reactions to breach (special regimes as *lex specialis* with respect to the general regime of responsibility of states); 2) regimes that are formed by a set of special rules, including rights and obligations, relating to a special subject matter. Such rules may concern a geographical area (e.g. a regimes relating to the protection of particular rivers or the uses of particular weapon, and they may emerge not only on the basis of a single treaty but also several treaties, and in addition can be accompanied by non-treaty developments); 3) regimes that contain all the rules and principles that regulate a certain problem or branch of law (e.g. law of the sea or humanitarian law; such regimes are considered in their entirety) (pt. 12 of the Conclusions).

The level of autonomy of such regimes differs. As a consequence the degree of their openness to general international law is also different. Nevertheless, the Commission expressed the conviction that even with regard to the most advanced special regimes, general international law could serve two functions (besides the use of international law for establishing a special regime): 1) it could fill the gaps in special regimes; and 2) it could provide solutions in the case of failure of a special regime or institution set up by it (pts 15 and 16 of the Conclusions).

Jus cogens may play a limiting role in the establishment of a special regime, i.e. it will prevent it from being created in a way that conflicts with a peremptory norm, or it will require its abolition if a conflicting *jus cogens* emerges during the course of its operation.²⁰³ In a natural fashion *jus cogens*, functioning as the most evident part of general international law, should be incorporated in a special regime in so far as it corresponds with such a regime, unless it already constitutes a part of it. A systemic interpretation, if permissible within such a regime, should facilitate a reference to peremptory norms. Within a special regime *jus cogens* would constitute an element functioning similar to a public order clause, framing the substantive conditions for the special regime.

In the context of the work of the International Law Commission, one should also draw attention to the fact that some special regimes express such a strong tendency

L.A.N.M. Barnhoorn, K.C. Wellens (eds.), *Diversity in Secondary Rules and the Unity of International Law*, The Hague-Boston-London: 1995.

²⁰³ See arbitral award of 2 July 2003 in a *dispute concerning access to information under article 9 of the OSPAR Convention (Ireland v. United Kingdom)*, para. 100, RIAA vol. XXIII, pp. 90-91. The Tribunal said explicitly: “[a]s long as it is not inconsistent with *jus cogens*, Parties may also instruct a tribunal to apply a *lex specialis* that is not part of general international law at the time”. Moreover (para. 103), the tribunal also observed that it must “adjust application of a treaty insofar as one of its provisions proves inconsistent with a *jus cogens* that subsequently emerges”. In this case, the OSPAR Convention did not, however, constitute *lex specialis*.

toward self-sufficiency that they claim to be independent from general international law. Treaties that provide a basis for such regimes are conferred with constitutional features, which additionally insulates them from the influence of international law. Such a situation occurs particularly in the context of treaties establishing regional organizations of the European type (i.e. models of progressive integration). These developments cannot be 'neutral' from the perspective of the impact of *jus cogens* on the contemporary international community.

5. Conflicts between peremptory norms

At first glance, the problem of a conflict between peremptory norms might seem to be impossible and artificially created. However, the Study Group of Koskenniemi, in its report on the fragmentation of international law, postulated that such a conflict is not unrealistic. The example given by the Group concerned the right to use force in order to realize the right to self-determination. The Group concluded that at its current stage of development, the doctrine of *jus cogens* would be unable to resolve such a conflict, inasmuch as "there is no hierarchy between *jus cogens* norms *inter se*" (pt. 367).²⁰⁴

The problem of conflict between peremptory norms was also addressed by R. Kolb.²⁰⁵ According to this author, the problem is complex because *jus cogens* does not constitute a homogenous normative category. It is composed of imperative norms of public order, the UN Charter, norms resulting from the logical structure of the legal system, and norms expressing public interest (*utilitas publica*). In this context, Kolb enumerates ten possible situations of conflicts between *jus cogens* norms, both within a specific category as well as between different categories.²⁰⁶ Ultimately, he concentrates on two examples of such a conflict. First, he analyses the contradiction between peremptory norms of public order, which may occur in the context of the prohibition on the use of force and the protection of basic human rights (in the case of a humanitarian intervention). Second, he considers the conflict between *jus cogens* of public order and *jus cogens* belonging to *utilitas publica*.

With respect to the first type of the conflict, Kolb observes that some authors claim that the use of force without authorization of the Security Council is absolutely illegal. Consequently a peremptory norm prohibiting the use of force prevails over a peremptory norm protecting human rights. However, Kolb points out that other authors believe none of the *jus cogens* norms can prevail *in abstracto* over each other. While the harmonization of peremptory norms should be sought, ultimately the principle of protection of individual rights needs to prevail. The author concludes that in a case of such conflict, what is important is not the solution of the problem, but the adopted approach. Both positions are intellectually acceptable.²⁰⁷

As an example of a conflict between peremptory norms of public order and norms of *utilitas publica*, one can give the right of peoples to self-determination and the integrity

²⁰⁴ Koskenniemi report 2006, p. 185.

²⁰⁵ Kolb, *supra* note 121, pp. 481 et. seq.

²⁰⁶ *Ibidem*, p. 492.

²⁰⁷ *Ibidem*, pp. 495-499.

of the Statute of the ICJ. Kolb labels this as an indirect normative conflict. Norms of public order are expansive, usually of *erga omnes* character, requiring the application of sanctions. The Statute, on the other hand, is a document which the ICJ has to apply. At the same time, the jurisdiction of the Court is based on consent. As a consequence a situation may occur whereby the principle of self-determination would clash with the principle of consent (as happened in the *Case concerning East Timor* of 1995). The conflict can be resolved by either giving priority to the *jus cogens* of public order, which would result in setting aside a procedural rule, or, as held by the ICJ, by blocking the right to self-determination through reference to the principle of consensual jurisdiction.²⁰⁸

Irrespective of the correctness (which is disputable) of the distinction between different types of peremptory norms, it seems that real problems could arise in the case of a conflict between substantive peremptory norms (the first case discussed by R. Kolb). The example of inconsistency between the Statute of the ICJ and a substantive norm is in fact not a conflict, but expression of the two phases of examination of a case by the ICJ (and many other courts), i.e. examination of jurisdiction and admissibility of a claim, and assessment of the substance of the case. Conflict is possible within the first and the second phase, but not between them. It is of course another issue that in practice a formal examination may lead to rejection of a case that concerns *jus cogens*.

As far as a conflict between substantive peremptory norms is concerned (conflict *sensu stricto*), analysis of the possibility of harmonious interpretation is of prime importance. At the same time, one should be aware that conflict can occur not only between different categories of peremptory norms (e.g. the case analysed by R. Kolb), but also within one category (e.g. rights of individuals, *vide* prohibition of genocide and the non-retroactivity of criminal sanctions for perpetrators authorising a crime of genocide). The problem arises when it is not possible to reconcile the different norms. In such a case one may adopt different approaches, for example to give preference to the norm that protects the collective interest of the international community to the greatest extent. However, even then it may be not easy to solve the dilemma. One arguably needs to examine which norm better accomplishes generally recognized aims of the contemporary international community.

2.3. *Jus cogens* and compliance with international law

2.3.1. General remarks

From the standpoint of the effective operation of a legal norm, it is important to determine the consequences of its breach. International law establishes a regime for the responsibility of states and international organizations,²⁰⁹ as well as individuals.²¹⁰

²⁰⁸ *Ibidem*, pp. 503-505.

²⁰⁹ See Crawford et al. (eds.), *supra* note 55, *passim*; J. Crawford, *The International Law Commission's Article on State Responsibility: Introduction, Text and Commentaries*, Cambridge: 2002, Introduction.

²¹⁰ See M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Leiden-Boston: 2005.

However, when it comes to a violation of *jus cogens*, the situation is not so clear. On the one hand, it is frequently argued that *jus cogens* operates only with respect to formalized actions, since otherwise the prohibition of derogation or sanction of invalidity (termination) do not make any sense. On the other hand, it is difficult to accept that the breach of norm which protects values that are particularly important for the international community does not give a rise to responsibility on the part of the breaching party.

The injection of *jus cogens* into the discussion over the responsibility of states and international organizations for internationally wrongful acts did not happen all at once. Initially the emphasis was put on the distinction between international crimes and international delicts (Art. 19 of the draft articles on the responsibility of states, as presented by the International Law Commission in 1996).²¹¹ Although *jus cogens* appeared in the document of the Commission, it was in places of secondary importance.²¹² Ultimately, the proposed distinction between crimes and delicts was abandoned in favour of responsibility for a breach of obligations arising under a peremptory norm of general international law. The inclusion of *jus cogens* into international criminal law encountered fewer problems. This occurred thanks to the international criminal courts, particularly the ICTY. What is problematic in both areas, however, is the determination of practical consequences of a breach of *jus cogens*.

2.3.2. Responsibility of states and international organizations for a breach of obligations arising under peremptory norms

1. General remarks

The freedom to conclude treaties also allows subjects of international law to determine specific rules with respect to responsibility for a breach of obligations. The articles of the International Law Commission on both the responsibility of states (Art. 55; hereinafter as ARS) and international organizations (Art. 64; hereinafter as ARIO) confirm this rule. States and international organizations can freely, even in a way that differs from the articles, determine the circumstances whereby responsibility arises, its

²¹¹ The draft of the articles enumerates some examples of international crimes, such as aggression, establishment or maintenance by force of colonial domination, slavery, genocide, apartheid, massive pollution of the atmosphere or of the seas. All those acts were considered as serious breaches of international obligations. Only with respect to acts that breach obligations of fundamental importance for the protection of human beings was there an additional requirement that such a breach must occur on a widespread scale (as in case of slavery, apartheid or genocide).

²¹² See K. Kawasaki, *International Jus Cogens in the Law of State Responsibility*, 1 *International Law* 6 (2007), pp. 7-10, who indicates that there were three provisions in the draft of 1996, which were ultimately deleted from the final text, that referred to *jus cogens*. These included a provision relating to the situation when an act constituting a breach was subsequently recognized as compulsory by virtue of *jus cogens* (Art. 18.1 and 2) (e.g. a capture of a trade ship that was involved in slave trade in connection with the recognition that prohibition of slavery has the status of a peremptory norm), *jus cogens* as a circumstance for precluding wrongfulness of an act (Art. 29(a), and later renumbered as Art. 21 of the draft), and restrictions on restitution in the case of a breach of an obligation arising from a peremptory norm of general international law (Art. 43(b)). The author also analyses the reasons that stood behind the decision of the Commission.

content, and its implementation. However, as stressed by the Commission, this does not apply to rules that would lead to a breach of a peremptory norm.²¹³

Locating *jus cogens* in the sphere of responsibility of states is of crucial importance. It allows for stigmatizing breaches of *jus cogens* norms not only when they originate from agreements between states, but also in cases of unilateral acts (understood as both as formal and factual acts). Considering that *jus cogens* also includes norms that enter into the sphere of internal actions of states, it may be argued that as a consequence of connecting *jus cogens* with international responsibility it is possible to assess the breach of a peremptory norm not only in the case of typical unilateral acts, but also with respect to internal actions of a state (e.g. specific laws).

As correctly noted by the ICTY judgement in the *A. Furundzija* case of 10 December 1998, one of the consequences of qualifying the prohibition of torture as a peremptory norm at the inter-state level is the international de-legitimation of any legislative, administrative or judicial acts authorising torture. The Tribunal highlighted that “it would be senseless to argue, on the one hand, that on account of *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law.”²¹⁴ Such measures should not be accorded international legal recognition.

2. *Jus cogens*, the rise of international responsibility, and the circumstances for its preclusion

It is a principle of international customary law that states and international organizations are responsible for their actions that violate international law. Consequently, an obligation to compensate for damages does not even need to be included in a treaty (or in a unilateral act).²¹⁵ Responsibility is a necessary element of the law.²¹⁶ Parties are not allowed to opt out from this principle.

The ILC held that the responsibility of a state or international organization in principle arises when two conditions are met: 1) the conduct constitutes a breach of an international legal obligation in force for a relevant state or organization; 2) conduct is attributable to that entity under international law (Art. 2 of the ARS; Art. 4 of the ARIO). In the context of *jus cogens*, this means that each violation of such a norm that can be attributed to a state or international organization will result in international responsibility, together with all the consequences described in the draft, including reparation for damages.

At the same time, the Commission stated that each responsible entity needs to have the possibility to invoke certain (exceptional) circumstances precluding the wrongful-

²¹³ See pt. 2 of the commentary to Art. 55, [in:] Responsibility of States. Commentaries 2001, p. 140.

²¹⁴ Case IT-95-17/1-T, para. 155.

²¹⁵ PCIJ, in its jurisdictional judgement of 26 July 1927 in *Case concerning the factory in Chorzow (claim for indemnity)*, PCIJ 1927, Series A, No. 9, p. 21.

²¹⁶ ICJ, the judgement of 5 February 1970 in the case *Barcelona Traction, Light and Power Company, Ltd.*, ICJ Rep. 1970, p. 33, para. 36.

ness of its act (arts. 20-27 of the ARS; Arts. 20-27 of the ARIO). However, the Articles make clear that none of the circumstances can preclude the wrongfulness of an act of a state or an international organization which is not in conformity with obligations arising under a peremptory norm of general international law (Art. 26 of the ARS, Art. 26 of the ARIO).²¹⁷

This means, in particular, that parties neither can preclude the wrongfulness of such an act on the basis of their common consent (Art. 20 of the ARS, Art. 20 of the ARIO),²¹⁸ nor by relying on countermeasures (Art. 22 of the ARS, Art. 22 of the ARIO). The parties equally cannot invoke *force majeure* or necessity (arts. 23 and 25 of the ARS, Arts. 23 and 25 of the ARIO respectively), which results in the objectivisation, or even absolutization, of the responsibility of a state or an organization for a breach of obligations arising from *jus cogens*. In this context, the scale (intensity) or nature of a breach is irrelevant. In other words, according to the Commission a rule of strict responsibility is applicable, even for a single transgression of the obligation.

The solution proposed by the Commission with respect to the relation between *jus cogens* and the circumstances which could preclude the wrongfulness of an act has been criticized in the literature. In particular, K. Kawasaki argues that *jus cogens* concerns consent (draft articles of 1996 only referred to consent and necessity). It does not apply to other circumstances as they relate to factual actions.²¹⁹ In assessing the merits of this criticism one has to refer back to Art. 26 of the ARS (Art. 26 of the ARIO). This provision does not permit taking into account the situation when an act of a state (or international organization), incompatible with an obligation arising from a peremptory norm, is otherwise compatible with international law due to reliance on a circumstance that precludes the wrongfulness of the act. Consequently, it is not possible to rely on self-defence to justify aggression in the application of countermeasures as a reaction to a breach of obligations arising from *jus cogens*. This is also true with respect to necessity, if it is outweighed by an obligation arising from a peremptory norm. On the other hand,

²¹⁷ Cf. M. Ménard, *Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Compliance with Peremptory Norms*, [in:] Crawford et al. (eds.), *supra* note 55, p. 452 (“This article is based on the idea that, in cases of conflict between two or more obligations, one of which flows from peremptory norm, it would be inconceivable not to have the obligation flowing from *jus cogens* norms prevail over the other obligation(s), considering the hierarchy which has been established between peremptory norms and other norms of general international law”, and later: “A circumstance precluding wrongfulness thus cannot be used to justify the non-observance of an obligation by a State imposed upon it by a peremptory norm”).

²¹⁸ In the commentary to Art. 26, pt. 6, it is stated that “in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose. Determining in which circumstances consent has been validly given is again a matter for other rules of international law and not for the secondary rules of State responsibility” (Responsibility of States. Commentaries 2001, p. 85). It seems, however, that the example is more concerned with the question of whether we have a breach of a peremptory norm (was the consent expressed freely or it was forced?) rather than whether consent is a basis for precluding responsibility for a breach of such a norm.

²¹⁹ Kawasaki, *supra* note 212, pp. 10-15.

it is less clear why it is not permissible to rely on distress or *force majeure*, unless the conditions for their invocation are not met. They do not depend on the will of a state (international organization), and the weighing of values, as in case of necessity, is not relevant here. As a consequence, the fundamental problem is not that the behaviour is factual, but that the circumstances precluding the responsibility are independent from behaviour of the violator.

3. *Jus cogens* and qualification of the conditions of responsibility for a breach of international obligations

1. Initially the Commission divided breaches of international law into international crimes and international delicts. Ultimately however, the Commission decided to abandon this distinction (which found some support in the existing practice and a part of the doctrine) as resembling too much the terminology of criminal law.²²⁰ At the same time, the Commission recognized that there are breaches that go beyond an “ordinary” violation of international law, and decided to connect them with *jus cogens* by introducing the notion of a serious breach of obligations under peremptory norms of general international law. This was ultimately reflected in the Articles on responsibility of states as well as those on responsibility international organizations (as chapter III part II regulating international responsibility of states and specific international organizations, respectively; Arts. 40 and 41 of the ARS, Arts. 41 and 42 of the ARIO). The Commission also decided to specify the notion of a serious breach of an obligation arising from *jus cogens*, as well as the basic legal consequences of such a breach.

Consequently, Art. 40.2 of the ARS (Art. 41.2 ARIO) states that a breach of such obligation “is serious if it involves a gross or systemic failure by the responsible State to fulfil the obligation.” The Commission also highlighted that breaches which are referred to in Art. 40 (Art. 41) are intolerable because of the threat they present to the survival of States and their peoples, and to the most basic human values.²²¹

The analysis of this provision leads to the conclusion that responsibility on the basis of Arts. 40 and 41 of the ARS (arts. 41 and 42 of the ARIO) only arises when a breach of *jus cogens* obligations has a serious character. A breach that is of lesser weight is subject to general rules. The Commission also explained in the commentary that the term “systemic” indicates that a violation is carried out in an organized and deliberate way. On the other hand, the term “gross” refers to the intensity (scale) or its effects. Consequently, what is meant is a “violation of a flagrant nature amounting to a direct and outright assault on the values protected by the rule”. At the same time, the notions are not

²²⁰ Orakhelashvili, *supra* note 14, p. 277, noting that the distinction between crimes and delicts has been criticized both in the doctrine and in the Sixth Committee of the UN General Assembly. See also, E. Wylter, *Du “Crime d’Etat” à la responsabilité pour “violations graves d’obligations découlant de normes impératives du droit international général”*, [in:] P.-M. Dupuy (ed.), *Obligations multilatérales, droit impératif et responsabilité internationale des états*, Paris 2003, p. 105 et. seq., in particular pp. 112-113. According to the author, this change is not purely semantic but substantive (it concerns regulation of Art. 54 in connection with Art. 48 of the ARS), although there are not many differences.

²²¹ See pt. 3 of the commentary to Art. 40, [in:] Responsibility of States. Commentaries 2001, p. 112.

mutually exclusive, as a serious breach can frequently be both gross and systemic. The Commission indicated factors that can be helpful in the assessment of the seriousness of a violation. These include the intent to violate the norm, the scope and number of individual violations, and the gravity of their consequences for the victims. It also stressed in this context that some peremptory norms, such as the prohibitions of aggression and genocide, by their nature require an international violation on a large scale.²²²

2. Art. 41 of the ARS (Art. 42 of the ARIO) is a provision which aims at giving Art. 40 a practical meaning. It sets out the basic consequences of a serious breach by indicating the special obligations of entities faced with the commission of such a breach. Simultaneously, as provided in Art. 41.3, this does not exclude other consequences referred to in part III of the Articles, as well as further consequences that a breach may entail under international law. In the first case, this particularly includes an obligation to cease the wrongful act, to continue performance, to give guarantees and assurances of non-repetition, as well as the duty to make reparation.²²³ Other consequences may result from the further development of international law.

Following Art. 41.1 and 2 of the ARS, the Commission indicated the most important obligations of entities in reaction to a serious breach. First, there is an obligation to cooperate in order to bring to such serious breach to an end through all lawful means. Second, no entity shall recognize as lawful a situation created by a serious breach. States and international organizations shall not render any aid or assistance in maintaining that situation.²²⁴ In its commentary to Art. 41, the Commission also explained that the prohibition against recognizing as lawful a situation created by a serious breach is of a collective character and relates to the international community as a whole, i.e. to all states (including the responsible state) and concerns both *de jure* and *de facto* recognition.²²⁵

3. The regulation proposed by the ILC has been criticized by some scholars. According to K. Kawasaki, it is not clear why the reference to *jus cogens* was preferred when the scope of a secondary obligation is at issue. Moreover, Arts. 40 and 41 wrongly relate to legal facts, and not legal acts, (as in Art. 26 of the ARS), although obligations are incumbent upon all states other than the responsible state. He also indicates that the obligation of non-recognition of a situation created by a serious breach cannot relate to factual situations such as occupation, while in the case of national legal acts international law is unable to directly render them invalid. The Security Council is equally unable to invalidate domestic legal acts. According to him, the obligation of non-recognition results from the fact that international *jus cogens* does not apply at the level of national law. The obligation of non-recognition is therefore a substitute for nullity

²²² *Ibidem*, pt. 8, p. 113.

²²³ *Ibidem*, pts 13 and 14 of the commentary to Art. 41 (pp. 115-116).

²²⁴ See A. Gattini, *Les obligations des Etats en droit d'invoquer la responsabilité d'un autre Etat pour violations graves d'obligations découlant de normes impératives du droit international général*, [in:] P.-M. Dupuy (ed.), *supra* note 220, pp. 145 et. seq. The author labels the first obligation as an obligation of solidarity, while the second is an obligation of isolation.

²²⁵ *Ibidem*, pts. 5, 9 and 10 (pp. 114 and 115).

as a consequence of the breach of peremptory norm, and helps to prevent “the illegal event from spreading outside of the territory of the responsible State”.²²⁶ While I share the position that *jus cogens* does not automatically operate in domestic law, it should be added that non-recognition could also concern acts undertaken in international relations. It may be also connected with a factual situation (e.g. refusal to recognize the creation of a state).

The proposed regulation of the Commission is also criticized as being overcautious. For example, P. Gaeta notes that it is not clear why the obligations provided in Art. 41 of the ARS do not apply to all violations of *jus cogens*. In this context, she observes that even ‘smaller’ violations can concern norms that protect the fundamental interests of the international community as a whole. According to her, extending the obligation of non-recognition, conceptualized as an additional consequence, to cover ‘smaller’ violations would not disturb in any way the regime of responsibility for serious violations.²²⁷ To some extent one may agree with Gaeta. At the same time, it should be observed that there is a difference between isolated violations of the prohibition of torture and mass torture or acts amounting to genocide or apartheid. A different matter, however, is that the position taken by the Commission is not consistent inasmuch as it does not introduce any strict reparation regime for serious breaches of international law.²²⁸

4. Implementation of responsibility for a breach of obligations arising from *jus cogens*

1. Part IV of both Articles relates to the implementation of international responsibility. One of its important elements is the question of whether and under what conditions one may take countermeasures. This issue was regulated in chapter II of both Articles (arts. 49-54 of the ARS, Arts. 51-57 of the ARIO). In principle, the Articles permit an injured entity to take countermeasures against the responsible entity (Art. 49 of the ARS, Art. 51 of the ARIO). At the same time, this right is not unlimited. The Commission envisages a number of substantive conditions (e.g. limitations relating to entities that are entitled to take countermeasures and those against whom such measures can be taken, relating to object of countermeasures, and to their intensity – Arts. 49, 51 of the ARS, Arts. 51 and 53 of the ARIO); as well as procedural conditions (e.g.

²²⁶ Kawasaki, *supra* note 212, pp. 17-20. For other critical remarks, see S. Talmon, *The Duty Not to Recognize as Lawful a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?*, [in:] Tomuschat & Thouvenin (eds.), *supra* note 65, pp. 99 et. seq.; Th. Christakis, *L'obligation de non-reconnaissance des situations créées par le recours illicite à la force ou d'autres actes enfreignant des règles fondamentales*, [in:] *ibidem*, pp. 127 et. seq.; M. Toufayan, *A Return to Communitarianism? Reacting to 'Serious Breaches of Obligations Arising under Peremptory Norms of General International Law' under the Law of State Responsibility and United Nations Law*, 42 Canadian Yearbook of International Law 197 (2004), *passim*. The latter author points out that prevention and an institutional reaction should be emphasized.

²²⁷ See P. Gaeta, *The Character of the Breach*, [in:] Crawford et al. (eds.), *supra* note 55, pp. 425-426.

²²⁸ But see Orakhelashvili, *supra* note 14, pp. 248-267, where the author attempts to show the impact of *jus cogens* on the question of reparations. However, it may be also argued that this problem was not directly regulated in the articles of the International Law Commission.

relating to the time when a countermeasure is taken, its termination – Arts. 51, 52 of the ARS, Arts. 54, 55 of the ARIO) that need to be met to in order for a countermeasure to be considered legal.

From the perspective of *jus cogens*, most important is a provision that excludes certain obligations from the scope of countermeasures. According to Art. 50.1 of the ARS (Art. 53.1 of the ARIO), countermeasures shall not affect the following obligations:

- (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
- (b) obligations for the protection of fundamental human rights;
- (c) obligations of a humanitarian character prohibiting reprisals;
- (d) other obligations under peremptory norms of general international law.

The above obligations may not be impaired by countermeasures. An injured entity is required to continue to respect these obligations and cannot expect that a breach by a responsible entity will excuse it from said obligations.²²⁹

The text of the above provision (in particular subparagraph d) suggests that first three categories of obligations also constitute an expression of *jus cogens*. The Commission, however, explained that the term “other” used in this subparagraph suggests that the three preceding categories (in particular subparagraphs b and c) do not necessary qualify (although some of them may qualify) as obligations arising from peremptory norms. The open category of obligations as provided in subparagraph d) also allows for qualifying new obligations as *jus cogens*.²³⁰

It is difficult to accept the position of the Commission without making certain reservations. It should be noted that the prohibition on the use force is generally regarded as *jus cogens*. Part of the case law and literature also holds that the same status is enjoyed by basic human rights and fundamental principles of humanitarian law. It would be therefore advisable to regard the obligations enumerated in subparagraphs (a)-(c) as arising from peremptory norms. In any case, if the intention of the Commission was different, the language it used is very far from that intention.

2. Countermeasures can be taken by an injured State or international organization only against a responsible entity and only to in order to induce that entity to comply with its obligations under Part II of the Articles (Content of the international responsibility of a state). This means that countermeasures are not available to entities that are not injured by the internationally wrongful act. *Prima facie* one could also include in this category entities that are entitled to invoke international responsibility for violation of *erga omnes* obligations (Art. 48 of the ARS, ARIO). Those obligations are generated by, *inter alia*, *jus cogens*. However, as provided by Art. 54 of the ARS (Art. 57 of the ARIO), those entities are entitled to take all lawful measures against a responsible state or international organization to ensure cessation of the breach, in the interest of

²²⁹ See pt. 1 of the commentary of the International Law Commission, [in:] Responsibility of States. Commentaries 2001, p. 131. The Commission describes these obligations as sacro-sanct.

²³⁰ *Ibidem*, pt. 9, pp. 132-133.

the injured state or international organization or of the beneficiaries of the obligation breached.²³¹

The ILC stressed that the provision covers both individual and group reactions of a state(s), as well as institutional reactions in the framework of international organizations which are entitled to invoke the responsibility for a breach of *erga omnes* obligations, including *jus cogens*. Those reactions would be undertaken in the interests of the injured entities and/or the beneficiaries of the obligations protected by international law. According to the Commission, there is no generally recognized entitlement to act in the collective interest (also understood as the interest of the international community as a whole).²³² The practice is very limited in this respect. Such an action in the collective interest can include the application of measures provided for by the law of treaties (e.g. suspension of treaty rights).²³³

2.3.3. Individual criminal responsibility for violation of *jus cogens*

Besides states or international organizations, individuals can also breach peremptory norms. These individuals may include heads of states, other officials, military commanders or even ordinary soldiers or other persons. If their acts constitute a crime under national law, they should be held liable. However, international law also envisages the possibility of punishing perpetrators of certain crimes by international criminal law such as the ICC, the ICTY or the ICTR. Some crimes within the jurisdictions of those courts overlap with some prohibitions which are regarded as *jus cogens* (e.g. prohibitions of aggression, genocide, war crimes or crimes against humanity).

Moreover, as the previous discussion shows, international criminal courts (particularly the ICTY) are bodies that have greatly contributed to the development of the *jus cogens* concept and its introduction into the area of international criminal law. This demonstrates a tendency to extend the operation of *jus cogens* beyond the sphere of treaty law, or even beyond the law on responsibility for internationally wrongful acts. These courts have also derived obligations on the part of states to ensure the prosecution, punishment and extradition of persons responsible for acts covered by the courts' jurisdiction. However, the statutes of these international courts do not directly refer to *jus cogens*. It is also not clear what is the impact on the international criminal responsibility of individuals of a determination that a violated norm is of a peremptory character (e.g. prohibition of torture or genocide), and whether the absence of such a determination

²³¹ See I. Scobbie, *Invocation de la responsabilité pour la violation d'obligations découlant de normes impératives du droit international général*, [in:] P.-M. Dupuy (ed.), *supra* note 220, pp. 121 et. seq.

²³² A.-L. Vaurs-Chaumette, *The International Community as a Whole*, [in:] Crawford et al. (eds.), *supra* note 55, pp. 1024, 1026, correctly noting that the international community is a separate legal concept, but not an entity injured by a breach. According to her, "[i]n cases of serious breaches of obligations deriving from peremptory norms, it is States collectively who are the holders of the injured interest and who have capacity to act against the author of the breach."

²³³ Pts. 2-4, 6 of the commentary to Art. 54 [in:] *Responsibility of States. Commentaries 2001*, pp. 137-139.

results in different criminal responsibility of an individual. This may lead to the conclusion that, as far the international criminal responsibility of individuals for a breach of *jus cogens* is concerned, international law is still in the early stage of development.

CONCLUSIONS

Contrary to some sceptics, the above analysis shows that *jus cogens* belongs to the contemporary *corpus iuris gentium*. It belongs there not only as a specific normative concept based on Art. 53 of the VCLT, but also, although modest and not entirely stable, as a complex of substantive norms of general international law. This does not mean that *jus cogens* is uncontroversial, even with respect to basic issues such as the criteria used for distinguishing such norms, and their legal basis and effectiveness. However, one may accept, *lege lata*, that these controversies do not undermine the fact that *jus cogens* is a part of international law. In particular, peremptory norms need to meet three criteria: 1) sociological (acceptance and recognition, or modification only by the international community as a whole); 2) normative (prohibition of derogation); 3) axiological (norms which protect universally-recognized values connected with the existence of a state and its nations as well as basic human values, the protection of which are in the interest of the world community).²³⁴ Peremptory norms are not subject to substantial changes and cannot be modified or rejected without a change of the nature of the international community and the foundations of the law that governs it. Obligations that arise from peremptory norms are of an *erga omnes* character, and apply to all main subjects of international law (i.e. states and international organizations). At the same time, there is also a tendency to extend their applicability to non-state entities (corporations and individuals).

The basis for peremptory norms is provided by objective legal consciousness (*jus necessarium*). Neither a treaty nor custom is able to provide a sufficiently satisfactory basis for its binding force. As a consequence, norms that belong to *jus cogens* should be identified by international courts, as broadly understood, through dialogue among them and with the use of objective criteria. Such a dialogue should reveal and manifest the legal consciousness encompassing the existence and nature of peremptory norms, which must be held in common by the dominating majority of the international community of states.

Jus cogens is today entering into the sphere of creation, application (including interpretation), and compliance with and control by international law. This provokes discussions on the relationship between *jus cogens* and UN law, as well as on its impact

²³⁴ J. Verhoeven wrote, however, in this context, that: "the concrete usefulness of *jus cogens* is still limited. And it will remain weak as long as the content of the '*intérêt général*' within the community of nations remains poor". See J. Verhoeven, *Invalidity of Treaties: Anything New in/under the Vienna Convention*, [in:] Cannizzaro (ed.), *supra* note 83, p. 306. That view is right. On the other hand, *jus cogens* should not be used as a common tool for solving every problem of the international community.

on factual acts in the context of international responsibility for a breach of peremptory norms.

The fundamental problems which render *jus cogens* as a still insufficient influence on the international legal order relate to its enforcement, in particular such possibility by the ICJ or other international courts which continue to declare their lack of jurisdiction, as well as national courts in the context of state immunity. Other problems include the lack of direct effect of *jus cogens* on acts of national law.²³⁵ This loophole can be filled to some extent by the law on state responsibility. Last but not least, the significance of peremptory norms for the international criminal responsibility of individuals is not entirely clear.

Criticism of *jus cogens* frequently results, consciously or subconsciously, from excessive expectations. Although it undoubtedly constitutes a foundation of the civilized international legal order, *jus cogens* operates primarily as a clause of public order, eliminating from international law formalized acts (and their legal consequences) that conflict with it and correcting, to a certain extent, the conduct of subjects of international law. It also allows for qualifying the responsibility of states and international organization for serious breaches of those norms, although the implications of this qualification are not always clear and uncontroversial. On the other hand, peremptory norms do not have an autonomous and positive regulatory capacity, nor do they fill the entire space of the common aims and values that are important for the contemporary international community. In addition, they can only to a limited extent assist in eliminating or limiting the consequences resulting from the fragmentation of international law, e.g. by restraining some particular communities from the creation of self-contained regimes. *Jus cogens* is definitely not an ideal instrument. Nevertheless, it is the right formula for the purposes for which it has been introduced into contemporary international law. It requires both further conceptual elaboration with respect to the consequences of its breach, as well as the development of a more reflexive judicial practice.

²³⁵ The statement of Guillaume, *supra* note 22, p. 135 that “l’on a pu comparer le *jus cogens* à une voiture destinée à ne jamais quitter le garage” seems to be exaggerated.

