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SHORTCOMINGS OF THE PEREMPTORY NORM CONCEPT IN POSITIVE INTERNATIONAL LAW AND PROPOSALS FOR ITS IMPROVEMENT

The paper presents the development of peremptory norms (ius cogens) in international law and their constitution through the Convention on the Law of Treaties. It first analyses the work of the International Law Commission, which preceded the introduction of peremptory rules into international law; the Commission subsequently moved onto the consideration of peremptory norms, which remains in its focus at the present. Special attention is given to, on one hand, the doctrine on peremptory rules and, on the other hand, to the international case law in this matter. The need for more precise criteria for the determination of ius cogens, as well as the compilation of a framework list of peremptive norms in positive international law, is stressed. Heterogeneous practices of international bodies in identifying peremptory rules are presented, demonstrating the need to precisely define the criteria for determining such rules and to guide the further development of imperative rules. The relationship between ius cogens and the United Nations law is analysed and certain guidelines are provided for the mutual relationships of ius cogens rules. The importance of ius cogens rules in preventing potential international law fragmentation is particularly emphasized.

Key words: *Peremptory norm. – International Law Commission. – International law fragmentation.*

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1. INTRODUCTION

International legal order has a specific structure, as there are no legislative bodies, the judiciary is facultative and there is a specific legal technique of adopting the rules of law and their application. The development of a contemporary international legal order rests on the constitution of supreme legal norms, which form the base for an entire framework of other legal rules with different legal effects. The origins of *ius cogens* lie in the traditional customary law and their development, as well as their legal effects, help make the foundations of the international legal order more objective. Peremptory norms give the entire legal order a necessary robustness; these norms are at the top of hierarchy of the international legal order.

The fact that the General Assembly of the United Nations decided to add the topic of *ius cogens* into the agenda of the International Law Commission during its sixty-ninth session[1] speaks of the importance that peremptory rules play in contemporary international law. The following year, at the session of the International Law Commission, a special rapporteur for this topic was appointed, which marked the formal beginning of the work on the first report. The first report was submitted to the International Law Commission at its session in 2016[2]; based on this report, further steps pertaining to the *ius cogens* can be predicted.

The issue of peremptory norms is of enormous importance for general international law, but their conception, detection and application are not devoid of difficulties or shortcomings. For instance, Brownley described the peremptory norms as "a vehicle [that] does not often leave the garage."[3] In this way, the renowned author wanted to emphasize the fact that everyone accepts *ius cogens* norms, but few truly grapple with the important issues surrounding them. On the other hand, Alain Pellet compares the *ius cogens* norms with "nuclear weapons"[4], alluding to the clear outcome of any conflict between

1 See: General Assembly resolution 69/118 of 10 December 2014, para. 8.

2 First report on *jus cogens* by Dire Tladi, Special Rapporteur, International Law Commission Sixty-eighth session Geneva, 2 May-10 June and 4 July-12 August 2016.

3 l. Brownlie, "Comment", *Change and Stability in International Law Making*, (eds. Antonio Cassese and J. H. H. Weiler), De Gruyter: Berlin 1988, 110.

4 A. Pellet, "Comments in Response to Christine Chinkin and in Defense of Jus Cogens as the Best Bastion against the Excesses of Fragmentation", *Finnish Yearbook of International Law* 2/2006, 87.

peremptory norms and any other act, as well as to the enormous importance of these norms for the international legal order. The development of peremptory norms as legal rules shall be discussed below, with special attention to the critique of the present concept of *ius cogens*, established in the Convention on the Law on Treaties from 1969. Special attention shall be paid to the case law of international courts and other bodies, showing diverse trends with respect to peremptory norms. Proposals for instruments for the detection of such legal rules shall be discussed in detail, as well as the need to encourage their use in practice, in various judiciary forums.

2. DEFINITION AND DEVELOPMENT OF *IUS COGENS* RULES

Even though the existence of peremptory norms has been accepted in the legal doctrine for quite some time, their determination and their legal effects crystallized after World War II. The general consensus was that the principles from Article 2 of the Charter were peremptory in their nature, while the definition and the effects of peremptory norms were, to a significant extent, rounded off in the Convention on the Law on Treaties.[5] The first report of the Special Rapporteur aimed to answer the questions of the legal nature of peremptory norms, on their development, the practices of different countries and on the previous work on the International Law Commission pertaining to peremptory norms. For quite some time, the international community has sought to resolve the issue of *ius cogens* norms in a more precise manner, not in terms of their legal effects, their form and their scope, but in the sense of creating a catalogue of the norms that could be encompassed by these rules. This would add to legal certainty, even if it did not lead to the adoption of a typical convention with such contents. Thus, for example, the representative of Spain in the Sixth Legal

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5 Art. 53 of the Convention on the Law on Treaties from 1969: Treaties conflicting with a peremptory norm of general international law ("jus cogens"): A treaty is void if, at the moment of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Committee of the General Assembly proposed that a list of *ius cogens* norms be adopted, even if it is just a framework list.[6] Similar positions were presented by delegates of many other countries. It is becoming clear, therefore, that states have a strong need for at least a framework list of *ius cogens* norms, as it would facilitate the functioning of the entire international law.

The fundamentals of the *ius cogens* norms provided diverse inspiration for the doctrine. Thus, positivists saw them as an undisputed influence of the will of the States, even at a higher level of abstraction,[7] while the representatives of the school of natural law saw them as typical natural law norms, existing independently of the will of the states.[8] When discussing the theoreticians of natural international law, it is imperative to mention Hugo Grotius, who believed that inter-state relations comprised legal rules independent of the will of the states, which represented the law of necessity – *ius naturale necessarium* – and such legal rules could not be modified even by God himself.[9] Other authors of the same school of thought came to similar conclusions, stating that "The natural law is a dictate of reason, including a moral need, independent of any institution – man-made or divine." The consensus among the authors is that Alfred Verdoss was the first author to recognize the existence of peremptory norms in international law[10] as norms from which no derogation was permitted.[11] Even though the idea of a dominant law and a superior law as well is very old, it would be

6 Statement by Spain, A/C.6/69/SR. 21, para. 42.

7 L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, Helsinki 1988, 12 ("Art. 53 requires 'double consent'"); J. Vidmar, Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?, *Hierarchy in International Law: The Place of Human Rights* (eds. Erika de Wet and Jure Vidmar), Oxford 2012, 25.

8 See: M. Janis, The Nature of Jus Cogens, *Philosophy of Law: Classical and Contemporary Readings*, (eds.Larry May and Jeff Brown), Chichester, 2010.

9 H. Grotius, *De Jure Belli Ac Pacis*, Libri Tres, 1625, Ch. 1, X, 5.

10 M. Petsche, Jus Cogens as a Vision of the International Legal Order, *Penn State International Law Review*, 2010, 233. See also: L. Alexidze, "The Legal Nature of Ius Cogens in Contemporary International Law", *Recueil de Cours de l'Académie de droit international de La Haye* III/1981, 229; A. Verdross, "Forbidden Treaties in International Law", *American Journal of International Law*, 1937, 571.

11 A. Verdross, "Jus Dispositivum and Jus Cogens in International Law", *American Journal of International Law* 1966, 56.

difficult to argue that the first peremptory norms emerged before the first half of the 19th century.[12]

As for imperative norms, Hugo Grotius spoke of unmodifiable law, grounded in natural law, in the first book On the Law of War and Peace.[13] Vattel later elaborated on this legal concept, stating that: "Within such higher law, the States cannot introduce any modifications through conventions, or through the influence of any of their acts or procedures, nor can they be liberated from the effects of such law in bilateral relations."[14] Such ideas were inspired by natural law; they are the dominant trait of the first stage in the development of *ius cogens* norms in international law. These legal foundations of the aforementioned norms were later substituted with positivist views, resting on strong sovereignty of States and finding the sources of *ius cogens* norms in the will of the States. For example, Jellinek wrote that a treaty can be void both if it is physically impossible to enforce and due to moral considerations.[15] Hans Kelsen can be distinguished as one of the dominant authors of the positivist movement. He writes of the absolutely mandatory norms as fixed provisions, as absolute legal values still existing in law.[16] It is interesting that positivists list value criteria when discussing imperative norms, as their positions are, as a rule, free from subjectivity.

Over time, ideas emerged of generally needed legal rules, which existed in the legal practices of the States. Thus, the norms that protect absolute and vital interests of the states, as well as the international order, allowing for no possibility of derogation, were emphasized.[17] This led to the crystallization of the basic properties of *ius cogens* norms:

12 Carnegie Endowment for International Peace, "The Concept of Jus Cogens in Public International Law", *Papers and Proceedings: Report of a Conference in Lagonisi*, Greece, 1966, Geneva 1976, 19.

13 See: H. Grotius, *The Rights of War and Peace in Three Books*, Paris 1652, translated by J. Barbeyrag, 1738;

14 E. Vattel, *Law of Nations,* or *Principles of the Law of Nature Applied to Conduct and Affairs of Nations and Sovereigns*, 1758, translated by CG and J. Robinson, London 1797, 9.

15 G. Jellinek, *Die Rechtiliche Natur der Staatenverträge: Ein Beitrag Zur Juristichen Construction des Volkerrechts,* Wien 1880, 59–60.

16 H. Kelsen, "The Pure Theory of Law: Its Method and Fundamental Concepts", translation by Charles H Wilson, *The Law Quarterly Review* 50/1934, 474.

17 L. Hannikainen, *op. cit*. fn. 9, 48–49.

universality, peremptory nature and dynamic. Therefore, these norms are universally applicable, they have an absolute legal effect, causing any conflicting legal act to be absolutely void; they, themselves are subject to modification, but in a specific manner, bearing in mind their character.

Historically speaking, the foundation of the League of Nations greatly contributed to the development of peremptory norms and to the understanding of a general, common interest of states. Even though the organization was predominantly criticized for failing to maintain general peace in the international community, it was the first general and universal international organization. The fact that an international organization was considering all issues of importance to the states meant that the international community had reached a certain level of maturity, needed for the establishment of some generally recognized imperative norms with a certain internal value. The fact that for the first time, a body within the League of Nations was working on the codification of international law – the Committee of Experts for the Progressive Codification of International Law, was a strong support to that conclusion. Thus, the very text of the Covenant of the League of Nations envisages that the threat and use of force were a danger to the entire international community.[18] The international law doctrine would later also start to use terms such as "breach of interest of the international community",[19] leading to the acceptance of the development of absolutely binding norms. In terms of peremptory rules, the existence of collective will is the pre-requirement for their development. On the other hand, between two world wars, case law moved along the lines of accepting *ius cogens* norms. Therefore, in deliberating on a concrete dispute between France and Mexico, Article 18 of the Covenant of the League of Nations was construed to produce absolutely imperative effects with regards to the validity of treaties between the member-states of this organization.[20] It can therefore be concluded that the development of the idea of *ius cogens* norms can be dated to the middle of the 19th century, but that the first evidence of their existence, in a practical sense, date back to the beginning of the 20th century.

18 Art. 11, Covenant of the League of Nations.

19 A. Verdross, *op. cit*. fn. 13, 55.

20 Pablo Najera (France) v United Mexican States, Decision No. 30-A of 19 October 1928, *UNRIAA*, Vol. V, 466, 470.

3. THE WORK ON LEGAL FORMULATION OF *IUS COGENS* NORMS

After World War II, peremptory norms development expanded, marking the beginning of the era of codification and establishment of international law on firm normative grounds. The first step in this direction was the Charter of the United Nations itself, which, even though it does not explicitly list *ius cogens* norms, in its Article 2 lists undisputed general principles of international law with imperative effects.[21] Article 103 further supports the idea that this act was envisaged as a form of a constitution of international law.[22]

The International Court of Justice, in its advisory opinion on the reservations pertaining to the Convention on the Prevention and Punishment of the Crime of Genocide, clearly supported the existence of a general will of the international community. "In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplish-

21 The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles: 1. The Organization is based on the principle of the sovereign equality of all its Members. 2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter. 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. 5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action. 6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security. 7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

22 In case of a conflict between the obligations of the members of the United Nations in line with this Charter and the obligations arising from any other international treaty, the obligations stemming from this Charter shall prevail.

ment of those high purposes which are the *raison d'etre* of the convention. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions."[23] The *ius cogens* norms are those norms that are superior, in terms of hierarchy, to all other norms of international law.[24] This establishes a legal order, in the sense of norms of international law.[25] In addition, it is not necessary that all states accept the imperative norms. It is sufficient that they are accepted by a majority of the states, meaning that an isolated state's refusal to accept such a norm has no bearing on the absolute mandatory nature of these rules; even if several states oppose such a norm, it will have no bearing on the existence of an obligatory norm.[26]

If the peremptory norms were to be observed in a strictly formal manner, their final constitution is weaved into the work of the International Law Commission on the Convention on the Law on Treaties. Having previously in mind, Fitzmaurice introduces the term *ius cogens*, for the first time, in his report.[27] Fitzmaurice clearly distinguishes *ius cogens,* from which no derogations are permitted, and dispositive rules, having legal effects which can be avoided by the will of the subjects of international law.[28] A short time before this report, Special Rapporteur Lauterpacht expressed his position that the voidness of treaties was correlated with their discordance with from the rules of international customary law.[29] In this manner, he pointed out the origin of the majority of peremptory norms in contemporary international law. It was exactly the link between the peremptory norms and the common law rules that allowed the existing foundation in the

23 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Reports (1951), 23.

24 See: R. Wallace, *International Law*[2], 1994.

25 K. Hossain, "The Concept of Jus Cogens and the Obligation Under The U.N. Charter", *Santa Clara Journal of International Law* 2005, 72.

26 M. K. Yasseen, the former Chairman of the Drafting Committee of the Vienna Conference on the Law of Treaties, U.N. Conference on the Law of Treaties I, 472.

27 Third Report on the Law of Treaties by Mr. G Fitzmaurice, Special Rapporteur, A/CN, 4/115.

28 *Ibid.*, Corr. 1, under the title "legality of the object", *Yearbook of International Law Commission* 1958, Vol. II, para 76.

29 Report on the Law of Treaties by Mr. H Lauterpacht, Special Rapporteur, A/CN.4/63, *Yearbook of International Law Commission* 1953, Vol. II, 154.

rules of international law to be derived from it, clearly separating the elements of progressive development present in the Convention on the Law on Treaties from 1969, with provisions that had been an integral part of the international legal order for quite some time. This ensured their universal application, i.e. their general legal effect, as the integral part of the very nature of *ius cogens*. Very few authors claimed that a particular *ius cogens* was possible. One such author is Schwarzenberger, who saw no obstacle to having individual states agree on *ius cogens* which would then, in their mutual relations, be observed as an absolutely imperative rule.[30] Even though there are no obstacles for such a position from a theoretical point of view, the practice of individual states was not conducive to it, perhaps because such treaties would then have an impact on other obligations of the states due to the legal effects of peremptory norms. The conclusion is therefore obvious: norms that are peremptory in character rest on general acceptance and have an *erga omnes* effect; however, not all norms with such effect are simultaneously *ius cogens.*[31]

Peremptory norms were defined in the Convention on the Law on Treaties in the part pertaining to the foundations of absolute voidness: "Treaties contrary to the imperative norm of the general international law (*ius cogens*). A treaty is void if, at the moment of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[32] The fact that peremptory norms were not defined in the preceding Articles of the Convention can be construed in the light of their common-law nature. The result of conflict with such a norm is absolute voidness, emphasizing the absolute imperative nature of *ius cogens*. As it is clear that peremptory norms will continue to develop in the international community, the Convention on the Law on Treaties envisages the following: "Emergence of a new peremptory norm of general inter-

30 G. Schwarzenberger, "The Problems of International Public Policy", *Current Legal Problems* 1965, 191.

31 M. Byers, "Conceptualising the Relationship Between Jus Cogens and Erga Omnes Rules", *Nordic Journal of International Law* 66/1997, 211.

32 Art. 53 of the Convention on the Law on Treaties.

national law ("*ius cogens*"). If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."[33] As the Convention states that peremptory norms are merely the norms of general international law, it is clear that the concept of universal *ius cogens* has been accepted and that the Convention takes no position on the existence of a regional peremptory regime. Acceptance of regional peremptory norms could create problems with the application and effects, in the interaction with the states outside of the given region.

An imminent characteristic of the peremptory norms of general international law is their absolute mandatory nature, which cannot be annulled, as is the case with dispositive rules of international law where the parties to the treaty could envisage different rules in their bilateral relations.[34] On the other hand, during the development of the Convention on the Law of Treaties, Lauterpacht introduced the term "international legal order" to explain the legal nature of peremptory norms.[35] The very existence of peremptory norms confirms the establishment of an international legal order, which regulates the relations of its subjects in an objective and sovereign manner, the effects of which cannot be annulled by individual will. The only way of modifying an existing peremptory norm is by creating a new norm of the same character. With regards to the natural effects and existence of peremptory norms, McNair concludes that it is difficult to imagine a society that knows no limitations of its liberty in formulating treaties.[36] Later practice within the International Court of Justice shall confirm the acceptance of the peremptory norms from the Convention on the Law on Treaties.[37] Thus, in the case related to the military activities in Congo,

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33 Art. 64 of the Convention on the Law on Treaties.

34 Third Report on the Law of Treaties by Mr. GG Fitzmaurice, Special Rapporteur, A/CN, 4/115 and Corr. 1, under the title "legality of the object", *Yearbook of International Law Commission* 1958, Vol. II, 40.

35 Report on the Law of Treaties by Mr. H Lauterpacht, Special Rapporteur, A/CN, 4/63, *Yearbook of International Law Commission* 1953, vol. II, 155.

36 A. McNair, *Law of Treaties*, Oxford University Press 1961, 213.

37 North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/ Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, 3, para. 72 ("[w]ithout attempting to enter into, still less pronounce upon any question of jus cogens, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in

the Court takes an undisputed position that the prohibition of genocide is a peremptory norm of international public law.[38] In addition to this case, the existence of peremptory norms was also confirmed in the case of the rules on prohibition of torture, where the International Court of Justice concluded that the prohibition of torture formed a part of the international common law and as such had become *ius cogens*.[39]

After the first report, the Special Rapporteur has prepared a second on the peremptory norm that envisaged the precise criteria by which it is possible to find these rules.[40] The envisaged criteria were to form a norm of general international law that it is accepted and confirmed by the international community as a whole. The provisions that were created in the second report are based largely on the decisions of the International Court of Justice, which means on the texts of the Courts' latest practice. Confirmation of a peremptory norm of can be found in the contractual provisions, the resolutions of international organizations, official reports of government and its representatives, diplomatic correspondence and decisions of national's courts.

particular cases, or as between particular parties"); Case Concerning Right of Passage over Indian Territories (Portugal v India) Merits, Judgment of 12 April 1960, ICJ Reports 1960, 6; Dissenting opinion of Judge ad hoc Fernandez, at para. 29, South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa), Second Phase, Judgment of 18 July 1966, ICJ Reports 1966, 6; Dissenting opinion of Judge Tanaka, 298. See also North Sea Continental Shelf Cases (n 118), dissenting opinion of Judge Tanaka, 182 declaring that reservations in conflict with a principle of *jus cogens* would be null and void; and see further separate opinion of Judge Moreno Quintana in Case Concerning the Application of the Convention of 1902 Governing Guardianship of Infants (Netherlands v Sweden), Judgment of 28 November 1958, ICJ Reports 1958, p. 55, 106–107 recognizing a number of rules as having "a peremptory character and a universal scope".

38 Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v Rwanda), Judgment of 3 February 2006, *ICJ Reports 2006*, 6, para. 64.

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

40 Second report on *jus cogens* by Dire Tladi, Special Rapporteur, International Law Commission Sixty-ninth session, Geneva, 2017.

4. THE SHORTCOMINGS OF THE EXISTING CONCEPT OF *IUS COGENS*

Authors justly object to a lack of a clear definition of peremptory norms, even with their partial formulation in the Convention on the Law of Treaties. They are defined only by their characteristics – their general effect and their imperativeness. There are no clear criteria for the detection of norms that would be classified within *ius cogens*.[41] This is very important because, if it is undisputed that a conflict with peremptory norms leads to absolute voidness of a given act,[42] it would be necessary to determine clear criteria that would allow us to recognize which norms are peremptory in their character.[43] Even the International Law Commission concluded that "there are no clear criteria based on which it could be determined which norms of the international law are peremptory in character."[44]

There is a significant number of authors who are highly skeptical of the concept of *ius cogens* in international law, claiming that they exist only on paper and that the situation in practice is very different.[45] For instance, these authors reveal some legal inconsistencies with regards to the concept of peremptory norms and some very important institutes of international law. For example, it is stated that, since Article 53 of the Convention on the Law on Treaties clearly states that any conflict with a peremptory norm leads to absolute voidness, derogations with regards to the prohibition of threat and use of force, envis-

41 A. Bianchi, "Human Rights and the Magic of Jus Cogens", *European Journal of International Law* 19/2008, 491.

42 Even though this pertains to the provision from Article 53 of the Convention on the Law on Treaties, it can be construed that the effect of voidness in case of conflict also pertains to unilateral acts, as well as to any other acts in the international community – the decisions of international organizations...

43 U. Linderfalk, "The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did you Ever Think About the Consequences?", *European Journal of International Law* 18/2008, 653.

44 Draft Articles on the Law of Treaties, Report of the International Law Commission on the work of its eighteenth session, *Yearbook of International Law Commission 1966*, Vol. II, 248.

45 G. Christenson, "Jus Cogens: Guarding Interests Fundamental to International Society ", 28 *Virginia Journal of International Law,* 1988, 585; M. Weisburd, " The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina", *Michigan Journal of International Law* 17/1995 – 1996, 1.

aged in Article 2 item 4 of the Charter are unsustainable. Undoubtedly this is one of the most important principles of general international law that cannot be denied its *erga omnes* effect. This was confirmed by the International Court of Justice, when it deemed the prohibition of use of force in the case of Nicaragua as a peremptory rule.[46] On the other hand, there is Article 51 of the Charter, envisaging the right to individual and collective self-defense as the right of any state. Strictly formally speaking, Article 51 would have to be void as it conflicts with Article 2 item 4 of the Charter.[47] Still, if the right to self-defense is categorized as a peremptory rule, for which there is an ample ground, we enter the field of mutual relations of two peremptory rules. This topic could be an element for a separate legal analysis.

Authors are right to point out certain issues that can be detected in the very nature of peremptory norms, in the way they were set up in the Convention on the Law on Treaties, perceived in the conceptual shortcomings of these norms i.e. in the manner of their creation and detection.[48] The following example can attest to the scope of meandering in detection of peremptory norms. The official response of the Netherlands to the International Court of Justice in providing the advisory opinion on Kosovo's self-declared independence reads as follows: "the obligation to respect and promote the right to self-determination as well as the obligation to refrain from any forcible action which deprives peoples of this right is an obligation arising under a peremptory norm of general international law."[49] The prior mentioned shows just how necessary it is for the contemporary international community to define guidelines for the determination of peremptory norms. Should it fail to do so, states will, just as they have done in this case, declare principles that could hardly even be considered legal rules to be peremptory norms. Namely, the right to self-determination was introduced in the Charter of the United Nations with a clear reason, which was to encourage decolonialisation. As the time goes by this process

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

47 U. Linderfalk, *op. cit.* fn. 45, 681.

48 M. Petsche, "Jus Cogens as a Vision of the International Legal Order", *Penn St. International Law Review* 29/2010–2011, 241.

49 Kosovo Advisory Opinion, Written Statement of the Netherlands, 17 April 2009, 32.

has been almost completed and the right to self-determination can no longer take its external form, but needs to be interpreted in the context of internal self-determination. The formal obstacle to the interpretation of the right to self-determination as a rule of international law lies in the concept, set up by the Charter of the United Nations, according to which this organization is obliged to preserve territorial integrity of each member state. From the viewpoint of material law, the shortcoming of the right to self-determination lies in the fact that it is unclear who is the bearer of the right to self-determination, or what is the procedure for the realization of this right.

To ensure existence of peremptory norms in present conditions, auxiliary sources of international law must be used – such as the case law and doctrine, in order to allow for their detection.[50] In that sense, one of the better examples for the detection of *ius cogens* in international law can be seen in the conclusion of the International Court of Justice in the case of Belgium vs. Senegal: "it is the opinion of this Court that the prohibition of torture constitutes a part of international common law and has become a peremptory norm. Such a prohibition rests on widely spread international practice and awareness of the states' legal obligations. There are several international instruments, on the universal scale, which pertain to the prohibition of torture – Universal Declaration of Human Rights from 1948, Geneva Convention on the Protection of War Victims, International Covenant on Civil and Political Rights from 1969, the Resolution of the General Assembly no. 3452/30 from 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; in addition, the prohibition of torture is comprised in internal legislation of almost all states; due to all of the above, it is considered that this norm is absolutely accepted on both an international and internal scale."[51] This example can serve as a guideline for the International Law Commission which is tasked with making peremptory norms clearer and better defined, using empirical evidence to confirm the existence of peremptory norms and thus preventing any possible political distortion. If clear rules for the determination of peremptory norms are not set up, then states can de-

50 M. Saul, "Identifying Jus Cogens Norms: The Interaction of Scholars and International Judges", *Asian Journal of International Law* May 2014, 5.

51 ICJ, Belgium v. Senegal case, 2012.

clare unclear rules to be peremptory norms, as was shown in the case of the position of the Netherlands, which could be a dangerous practice due to their legal power The reasoning of the International Court of Justice in the Belgium v. Senegal shows that this court recognized peremptory norms as international customary law rules.[52] It was this approach that helped point out that, in choosing between case law and the doctrine, the focusshould be placed on the case law as a better detector of peremptory norms.

On the other hand, there is no doubt that the case law of international courts and tribunals leans heavily in favour of *ius cogens*. For example, prohibition of torture as a peremptory norm was confirmed in the case of Furundžija, held before an *ad hoc* tribunal for former Yugoslavia[53]. Nevertheless, some authors claim that peremptory norms are "an empty box, but a useful box without which contemporary international law cannot be explained".[54] There is no shortage of criticism in the positions claiming that the construction of peremptory norms, included in the Convention on the Law on Treaties is nothing but a positivisation of natural law[55], which means that the peremptory norms are, in their structure, legal rules of customary law and that their subjection to a formal framework constitutes a departure from their actual legal nature. Another controversy comes from the ideas that have appeared, based on Article 64 of the Convention on the Law on Treaties, that peremptory norms can derive from treaties.[56] Such a legal construction is completely opposite to the customary character of peremptory norms and can only be imagined in a theoretical plane,

52 W. Schabas, "Antigone, Jus Cogens and the International Court of Justice", 22 July 2012, online: PhD Studies in Human Rights /*http://humanrightsdoctorate.blogspot.no/2012/07/antigone-jus-cogens-and-international.htmlS*, last visited 16 September 2019.

53 Prosecutor v. Furundžija (IT-95–17/1), 10 December 1998 (ICTY), para 153.

54 Abi-Saab, "The Third World and the Future of the International Legal Order", *Revue Egyptienne de Droit International,* 29/1973, 53.

55 R. Dupuy's remarks at the meeting of the Committee of the Whole on 30 Apr. 1968, UN Conference on the Law of Treaties, First Session Vienna, 26 Mar. – 24 May 1968, Official Records, *Summary records of the plenary meetings of the Committee of the Whole*, 258, para. 74.

56 G. Tunkin, "International Law in the International System", *Recueil des cours* 147/1975, 92–93; L. Alexidze, "Legal Nature of Jus Cogens in Contemporary International Law", *Recueil des cours* 172/1981, 255–256.

while in practice, there is still no confirmation of such a legal technique.[57]

From the perspective of general rules which apply to the sources of international law, peremptory norms show certain deviations. It is common for the will of the subjects to international law – primarily states – to be the central element in creating legal rules and obligations in any given case. Peremptory norms show no such regularity. Namely, at first sight these norms prescribe obligations to individual states which they cannot influence, as it is stated that peremptory norms are formed by the will of the international community as a whole.[58] However, it should be pointed out that the will of the states is integrated in the peremptory norms content. Being that peremptory norms arise as customary legal rules, then the will of the states is expressed in the practices these states had been using, and even more so in the awareness that what they were doing was legally binding for states.[59] Peremptory norms cannot be explained from a purely positivist aspect, nor from a purely natural law aspect. Positivists cannot explain how the will of an individual state is integrated in the tissue of a peremptory norm, as was stated above, while the natural law school of thought cannot explain the legal effects stemming from peremptory norms in international law.[60]

Some authors note the relative nature of peremptory norms since their imperativeness is emphasized as a dominant trait while, on the other hand, there are exemptions and deviations prescribed. Such is the case with the prohibition of threat and use of force and exceptions in the form of collective and individual self-defense.[61] Having in mind that the prohibition of threat and use of force is a peremptory rule, but the right to self-defence is also recognized as a peremptory rule, the issue of mutual relationships between peremptory rules arises. In other

57 See: G. Danilenko, "International Jus Cogens: Issues of Law-Making", *European Journal of International Law* 2/1991.

58 M. Koskenniemi, *From Apology to Utopia: The Structure of Legal Argument (Reissue with new Epilogue),* Cambridge 2006, 323.

59 See: B. Milisavljević, *International Customary Law,* Faculty of Law, Belgrade 2016.

60 See: A. D'Amato, "It's a Bird, It's a Plane, It's Jus Cogens", *Connecticut Journal of International Law* 6/1990.

61 O. Spiermann, "Humanitarian Intervention as a Necessity and the Threat or Use of Jus Cogens", *Nordic Journal of International Law* 71/2002, 523.

words, is there a hierarchy of peremptory rules? This is a difficult question to answer. The presumption is that peremptory norms are mutually harmonized and that, by the very nature of things, there can be no conflict between peremptory norms. It would seem that the correct conclusion would be that there is no hierarchy of peremptory norms.[62] Perhaps the International Law Commission will provide a more precise answer to this question in its future work.

The relationship between peremptory rules and Article 103 of the Charter of the United Nations is very interesting. The legal effect of peremptory norms has been discussed above, while the Article 103 of the Charter prescribes that, when it comes to rights and obligations stemming from other sources and the rights and obligations stemming from the Charter, the latter prevail. This sets the Charter of the United Nations at the top of all legal acts, giving it the character of constitutional norms. The question is, however, what is the relationship between the peremptory norms and the rights and obligations stemming from the Charter? This was the point of dispute in the Kadi case before the European Court of Justice, when the Court reached different decisions in the first and second instance.[63] The first instance decision confirmed the measures adopted by the Security Council with regards to targeted sanctions aimed at counter-terrorism, as confirmed by the European Council, while the decision adopted in the second instance placed fundamentalhuman rights, as highest values, above all other acts and decisions, including the Resolution of the Security Council adopted in line with Chapter 7. This opens the question of the relationship between peremptory norms and the Charter of United Nations, bearing in mind the Article 103. Moreover, it also opened another very important question of the relationship between the general international law and the European Union law, i.e. the question of the fragmentation of international law.[64] Still, in discussing the relationship between peremptory norms and the legal order stemming from United Nations,

62 M. Koskenniemi, Fragmentation of International Lav: Difficulties Arising from the Fragmentation and Expansion of International Law, Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682 (13 April 2006), 168–169, para. 367.

63 Kadi v. Council and Commission [2005] ECR II-3649.

64 B. Rakić, European Court of Justice between human rights and counter terrorism – the relationship between international and European law, *Anali Pravnog fakulteta Univerziteta u Beogradu* 4/2009, 155–185.

it should be emphasized that the Article 103 prescribes the priority of rights and obligations stemming from the Charter. Therefore, it is not merely a question of United Nations law, but also of all obligations arising from this organization.[65] In that sense, one could argue that peremptory norms have a general significance and are not conflicted with the Article 103 of the Charter but rather that they fit into the system of this organization. Deriving from the fact that the Charter of the United Nations itself is an international treaty, it is clear that rules on the effects of peremptory norms from the Convention on the Law on Treaties can apply (with a reservation when it comes to timing, as the Charter was adopted in 1945 and the Convention on the Law on Treaties came into force in 1980). According to these rules any treaty, including the Charter of the United Nations, must be in line with peremptory norms, under the threat of absolute voidness. Since all bodies of the United Nations have been established in line with the provisions of the Charter, then they too must exist within the framework set by peremptory norms.

With regards to the application of peremptory norms, the situation is quite "tricky". The case of the Badinter Commission for Former Yugoslavia first declared that the right to self-declaration was a peremptory norm of general international law, only to refute its legal effects when applied to the rights of minorities,[66] as was the case with the Serbian minority in Croatia or Slovenia. To avoid such legal inconsistencies, clear parameters determining peremptory norms need to be confirmed through case law. It is therefore correct to conclude that "the influence of judicial practice on peremptory norms is enormous."[67] This reinforces the existence of a global public order in which peremptory norms play the central role. Today, the peremptory norms of general international law have been recognized through the practices of the international community, through jurisprudence of both international and internal courts and tribunals, as well as in the legal doctrine.[68]

65 M. Koskenniemi, *op. cit*. 168–169, para. 331.

66 A. Pellet, *op. cit*. fn. 6, 86.

67 M. Koskenniemi, *op. cit*., 190, para. 377.

68 ILC, Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of International Law Commission* 2001, vol. II, Part Two, 282.

5. CONCLUDING REMARKS

This Paper emphasizes numerous issues arising from identification and application of peremptory norms. Even though, at first sight, it would seem that the positive legal concept of peremptory norms has been consistently constituted in the Convention on the Law on Treaties from 1969, which in time became customary international law, the doctrine and the jurisprudence stress the need to redefine this system. It is a positive circumstance that the International Law Commission has initiated the consideration of peremptory norms in order to establish clearer parameters for their detection, but the practice of states and international courts would be a better place for the formulation of such guidelines. Pointing out the existence of a list of undisputed peremptory rules, as was done by the International Law Commission in working on International law fragmentation, is not without merit either.[69] It is certainly no coincidence that peremptory norms were discussed on that occasion, as they are the largest obstacle to the dissolution of general international law. Peremptory norms are all the more significant in the contemporary international community, but with improved criteria for their determination, as was pointed out numerous times by judicial practice in internal and international courts. When determining new peremptory norms, it must be kept in mind that these need to be well-rooted rules of the international law, grounded in several legal instruments on a universal plain, but also in regional acts and internal legal orders of the states, as shown by the International Court of Justice in the Belgium v. Senegal case, pertaining to the prohibition of torture. In that sense, judicial practice provides a vast and useful material to help make the peremptory rules far more concrete and answers numerous questions relating to them. It is for this reason that the work of the International Law Commission must be based, in the large part, on the practices pertaining to peremptory rules.

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69 Thus, the following *ius cogens* is listed: (1) the prohibition of aggressive use of force; (2) the right to self-defense; (3) the prohibition of genocide; (4) the prohibition of torture; (5) crimes against humanity; (6) the prohibition of slavery and slave trade; (7) the prohibition of piracy; (8) the prohibition of racial discrimination and apartheid, and (9) the prohibition of hostilities directed at civilian population ("basic rules of international humanitarian law"), Martti Koskenniemi, Fragmentation of International La2V: Difficulties Arising from the Fragmentation and Expansion of International Law, Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682 (13 April 2006), 190, para. 377.

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NEDOSTACI KONCEPTA PEREMPTORNIH NORMI U POZITIVNOM MEĐUNARODNOM PRAVU I PREDLOZI ZA NJIHOVO PREVAZILAŽENJE

Rezime

U radu je prikazan razvoj peremptornih normi (*ius cogens*) u međunarodnom pravu kao i njihovo uspostavljanje Konvencijom o ugovornom pravu. Prvo je analiziran rad Komisije za međunarodno pravo koji je prethodio uvođenju peremptornih normi u međunarodno pravo, nakon čega je Komisija pristupila analizi peremptornih normi, što je i trenutno u fokusu njenog rada. Posebna pažnja je posvećena, sa jedne strane doktrini peremptornih pravila, a sa druge, međunarodnoj sudskoj praksi povodom istih. Takođe rad naglaševa potrebu za preciznijim kriterijumima pri određivanju normi *ius cogens* kao i za radom na kompilaciji pravila o peremptornim normama u pozitivnom međunarodnom pravu. Predstavljena je vrlo heterogena praksa međunarodnih tela prilikom determinisanja i identifikovanja peremptornih normi, ukazujući tako na važnost preciznog određenja kriterijuma za određivanje ovih pravila kao i smernica u kojima bi išao dalji razvoj ovih pravila. Detaljno je analiziran i odnos između prava Ujedinjenih nacija i *ius cogens* i date su određene preporuke za međusoban odnos. Na kraju, podvučena je i važnost *ius cogens* pravila u sprečavanju potencijalne fragmentacije međunarodnog prava.

Ključne reči: *Peremptorne norme. – Komisija za međunarodno pravo. – Fragmentacija međunarodnog prava.*