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Human rights enforcement via peremptory norms –
a challenge to state sovereignty

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ABSTRACT

This research paper is focused on the issue of peremptory norms (*jus cogens*), formulated in the Vienna Convention on the Law of Treaties, and its applicability in human rights implementation. *Jus cogens*, "compelling law," is the technical term given to those norms of general international law that are argued to be hierarchically superior. There is an intrinsic correlation between peremptory norms and human rights. Peremptory human rights norms, as projections of individual and collective ethics, being the fundamental principles of the international community, materialize as powerful collective values. This analysis is focused on the legal impact of these norms. If certain human rights can be considered *jus cogens* it subsequently brings superior procedural effects to their implementation in relation to the principles associated with state sovereignty.

The research examines the nature of *jus cogens* and its formation *vis-a-vis* human rights and elaborates on the additional value that *jus cogens* can bring to human rights implementation. The central part of the study is devoted to human rights which are affirmed as *jus cogens* and the different aptitude of certain rights (social, economic, cultural) to gain peremptory character.

The focal problem that the research addresses is the lack of will or capabilities of certain states to implement human rights, and the barrier to human rights implementation imposed by the doctrine of state sovereignty. This is mainly reflected in jurisdictional issues, immunities of the state and state officials, and extradition. The principle of sovereign immunity, although it remains an inviolable tenet of international law subject to no exceptions for grave international crimes in national case law, has no legal ground to supervene *jus cogens*. The argumentation clearly stems from the normative hierarchy advocated in international case law and doctrine.

The author firmly believes that the *jus cogens* concept brings a significant contribution to human rights implementation, putting them at the foundation of the international legal order. This effect is procedural but on the other hand substantial to future human rights development.

INTRODUCTION

Every discussion about theoretical or practical aspects of international law should take into account its very changing nature. One of the important aspects of that change is happening continuously from the end of World War II in the field of human rights giving international law a different meaning and function. These changes are rarely harmonious, usually reflecting as a collision between principles governing the field of international law. In the perspective of “real world” ranging temporally and geographically from the tragic experience of the Holocaust to recent atrocities in Kosovo, Iraq, Libya we constantly face the definitional problems of both international law and human rights law: Do human rights violations present a legitimate reason for violating state sovereignty, in all of its dimensions? What is the legal basis for comparing these norms and determining which ones prevail? If there are peremptory norms, which are by definition norms from which no derogation is allowed, do these norms (and to what extent) include internationally recognized human rights? It would be more precise to say that these questions are background inquiries necessary for the topical question: can the notion of *jus cogens*, as a purely legal avenue, ‘break through the wall’ of state sovereignty giving human rights enforcement a real perspective? This research paper will find and discuss legal justifications for overcoming state sovereignty as the ultimate international law principle. The topic which this analysis is dealing with is focused exclusively on legal aspects of the contemporary international order and its crucial dimensions. The concept of sovereignty will not be dealt with in its broad and predominantly political meaning; only legal aspects of sovereignty will be taken into consideration.

It is generally observed among scholars and human rights practitioners that while the post WW II period was the time of human rights definition and formulation, in the post cold war period we have to deal with human rights *implementation* and *enforcement*. There is currently no international court to administer international human rights law,

which would probably make this paper redundant, although quasi-judicial bodies exist under some UN treaties (the Human Rights Committee among nine of them). The International Criminal Court (ICC) has material jurisdiction over the crime of genocide, war crimes and crimes against humanity but *ratione personae* jurisdiction is strictly connected to a state accepting it. The European Court of Human Rights and the Inter-American Court of Human Rights, for example, enforce regional human rights law. Being predominantly monitoring, quasi judicial or regional, these mechanisms of human rights promotion still depend on enforcement mechanisms guaranteed by the state. States are those who should make human rights a reality. What if states are not willing or capable to put that process in force? The concept of *jus cogens* might give a legal solution to that.

The first part of the research paper will give a descriptive picture of international law, the basic principles of international law, human rights law formation, the sources of international law and the place of *jus cogens* within the broader picture of the international legal order. This introductory part should present a brief tracking of contemporary international law issues and discuss the significance of the concept of state sovereignty in the implementation of human rights. Although descriptive it will enable the author to approach critically the issues of human rights enforcement. It also needs to discuss the role of state sovereignty – whether it overrides *jus cogens*, acknowledging that the state is after all the crucial actor in human rights implementation. The normative impact is clearly diverse, in the case of *jus cogens* it is based on certain values from which no derogation is possible and state sovereignty is a key modality of international law formation. At the same time *jus cogens* predetermines that the role of a state and its prerogatives is diminishing due to the human rights, environmental and other globalizing issues where state consensus is not justified or relevant.

The second part of the study focuses on the mutual normative impact of human rights and *jus cogens*. In order to prove that *jus cogens* norms significantly contribute to human rights implementation it is necessary to establish a clear link between specific

human rights or human rights as a bill of rights and the notion of *jus cogens*. The theoretical issue in this part is that it is difficult to prove, without any doubt and referencing to international law authority, which norms represent *jus cogens*. This vague status of *jus cogens* can adversely address the issue of human rights and this will be in particular elaborated. The crucial point of this part is to elaborate on the sources of international human rights norms: international treaties and customs, based on explicit state consensus or protest, and *jus cogens* where human rights gain compelling character through international treaties and doctrine, usually acknowledged by judicial bodies, and not only for the states which express consensus. This distinction might be decisive in cases when states are not willing to fulfil their duty to implement human rights.

The third part will focus on different aspects deriving from the sovereign equality of states (state immunities, jurisdictional issues and territorial sovereignty) which are restrained by the effects of *jus cogens* norms. Each of these aspects of state sovereignty will be discussed separately through evaluation of the case law and relevant legal documents. A specific reference will be made to the 2001 *Articles on state responsibility for internationally wrongful acts* and the role of *jus cogens* within state responsibility.

Issues and theoretical concerns that the research focuses on can be formulated in several questions: Which human rights can be formulated as *jus cogens*? Do *jus cogens* norms, as universally accepted norms from which no derogation is possible represent a challenge to state sovereignty, which is the main guarantee of human rights implementation, and in which aspects? And finally, what kinds of human rights violations represent a breach of *jus cogens* and what are the legal avenues for a state to be held responsible and other states or international legal instances to react? The main argumentation line will be developed gradually, on the lines of these questions.

The main hypothesis is that *jus cogens* norms give HR legal universality necessary for their implementation, providing supremacy over the traditional concept of state sovereignty. 'The principal obstacle to the development of the international law of human rights was the rule of customary international law that recognized the doctrine

of state sovereignty'.¹ The author will discuss the normative impact of *jus cogens*, based on the values it protects and the way it is formed as a source of law. The normative significance of *jus cogens* renders human rights capable of changing the state-centric nature of international law, a process entrenched in human rights universalisation.

Peremptory norms are capable of making certain rights enforced outside the scope of state sovereignty (i.e. territorial jurisdiction and citizenship as rules for *locus standi*) while others, which do not fall within the scope of *jus cogens*, have to be addressed differently. Unlike other rights, political rights have the prospect of becoming *jus cogens* easily and being internationally recognized as such. This issue will be discussed in the central part of the study focusing on different legal definition and normative outcomes of different generations of human rights.

¹ Nihal Jayawickrama, *The Judicial Application of Human Rights Law, National, Regional and International Jurisprudence*, Cambridge University Press, New York, 2002, p. 17.

PART I: *JUS COGENS* AND HUMAN RIGHTS WITHIN PUBLIC INTERNATIONAL LAW

1.1. Human rights *versus* state sovereignty

Public international law has been based on the principle of sovereign equality of states since it was founded as a legal framework of international relations. The scope of international law has been based on the relations between states, while states themselves were entitled to be respected in their internal matters, the sphere where they can exclusively exercise the monopoly of violence. State based in its origin, international law is continuously evolving towards a broader legal scope, including in its categorical apparatus other actors of international relations: international organizations, minority and other groups, multinational organizations and individuals. Its progressive change significantly influences the understanding and application of the notion of sovereignty.

'In the context of the doctrine of state sovereignty, it was inconceivable that international law could vest an individual with any rights exercisable against his own state'.² Human rights as a concept and legal category change the original state centred face of international law, challenging its starting point. Built on a different tradition of political philosophy, with a different perspective of the ethics of law, human rights call for a different understanding of state sovereignty and its repercussions in the contemporary era.

International human rights law, unlike classic international law, sees individuals as the main subjects of international law. It is not based on reciprocity, but rather on a network of objective obligations the enforcement of which is: a) not primarily in the interest of other states and b) sometimes accomplished through international bodies.³

² *Ibid.*, p. 17.

³ Nowak, Manfred, Introduction to the international human rights *regime*, Leiden, Boston: Martinus Nijhoff Publishers, 2003, p. 36.

It seems appropriate to start the discussion about *jus cogens* influence on human rights implementation by this briefly discussed status of human rights norms within public international law. Law governs, generally speaking, legal relations among people. International public law, as the traditional definition says, governs the relations among nations. This might be the focal problem of two bodies of law: public law and human rights. Human rights, in their very essence, are focused on the human being, the individual, whose status in international law can still not be regarded as autonomous. International law, although rapidly changing and expanding⁴, has its constant feature that its body is based on the consensus between states, expressed explicitly, through state *jus contrahendi* or implicitly via state acts or omissions.

Sovereignty can be defined as the quality of having the highest, self-regulating authority over a certain geographical area, such as a state territory. It represents a power of law making within its scope, which is considered to be legitimate itself, without the need for any other justification.

International human rights, on the other side, emerged later in the history of international relations. The process of the universalizing of human rights, through the codification of “natural law” started with the UN Charter and Universal Declaration of Human Rights (UDHR).⁵ The laws and practice of international human rights embodied in these documents represent the other stream in the circumscription of sovereignty, which began in practice after the atrocities of World War II. Since that very moment in world history, the principles of human rights and state sovereignty relate to each other in different legal instruments.

⁴ ‘International law, however, has not just expanded horizontally to embrace the new states which have been established since the end of the Second World War; it has extended itself to include individuals, groups and international organisations, both private and public, within its scope. It has also moved into new fields covering such issues as international trade, problems of environmental protection, human rights and outer space exploration.’ Malcolm N Shaw, *International Law*, 6th ed., Cambridge University Press, 2008, p. 45.

⁵ Protection of certain groups and their human rights (e.g. minorities, refugees) and *jus cogens* (peremptory) norms that evolved from customary law (e.g. the abolition of slavery) existed before, but the international human rights system as such developed significantly later.

The UN Charter emphasizes the promotion of human rights as a goal of the United Nations (article 1) concurrently considering the sovereign equality of states as a basic principle of international law (article 2.1.). The Charter affirms the principle of non-intervention in matters within the domestic jurisdiction, “but this principle shall not prejudice the application of enforcement measures under Chapter VII”⁶. The UN Security Council itself may intervene and impose binding measures in cases where human rights violations pose a threat to international peace and security in accordance with Chapter VII of the UN Charter.

U.N. Resolution 2625 (XXV) (1970), elaborates the principle of State sovereignty by providing its legal scope: “All States enjoy sovereign equality...In particular, sovereign equality includes the following elements:

- (a) States are juridically equal;
- (b) Each State enjoys the rights inherent in full sovereignty;
- (c) Each State has the duty to respect the personality of other States;
- (d) The territorial integrity and political independence of the State are inviolable...”

The importance of the principles of state sovereignty, non-intervention, and non-use of force were addressed in several UN resolutions, which, although not legally binding, express the general state and praxis of international relations. In essence, in the cited declaratory and general paragraph there is nothing that conflicts with the idea that human rights of the people within state boundaries remain within the state’s absolute discretion.

The 1975 Final Act of the Conference on Security and Cooperation in Europe, (*Helsinki Final Act*) reaffirms the principles of state sovereignty (Declaration of principles, I) and non-intervention in internal affairs (Declaration of principles, VI)⁷. Nevertheless, “...the CSCE negotiations proved a catalyst in the gradual dismantling of the state sovereignty dogma in human rights matters, as upheld by the socialist states.

⁶Article 2.7. UN Charter, <http://www.un.org/en/documents/charter/chapter1.shtml>

⁷ <http://www.hri.org/docs/Helsinki75.html>

The most visible sign of this development is the conference on the 'human dimension' agreed upon at the 1989 Vienna follow up meeting"⁸. This CSCE document concerning respect for all human rights and fundamental freedoms, human contacts and other issues of a related humanitarian character set an agenda for dealing with human rights, through multilateral and bilateral state cooperation.

The essential point to this research paper is focused on the issue of human rights implementation. Although states represent guarantees of human rights enforcement, the state sovereignty doctrine is often a barrier to that process, in cases when states are not truly committed to human rights. 'The principal obstacle to the development of the international law of human rights was the rule of customary international law that recognized the doctrine of state sovereignty. According to that rule, a sovereign state had full, complete and exclusive authority to deal with its own territory and with its own nationals.'⁹ That is where the problem of human rights implementation lies: differences in human rights standards reflect the differences of the state building process across the world, different judicial systems, law enforcement mechanisms, human right awareness etc.

Vienna declaration and programme of action, the human rights declaration adopted by consensus at the World Conference on Human Rights on 25 June 1993, reflects a historic moment and the aspirations of the international community. The Vienna Declaration defines human rights as universal standards which are indivisible, interdependent and interrelated, directly addressing the main issues of human rights' polarity determined by world ideological schisms: *classical vs. social human rights, western dominated vs. universal*.

The paragraph in the Vienna declaration of specific interest to the topic of this study states: "The promotion and protection of all human rights and fundamental freedoms must be considered as *a priority objective* of the United Nations in accordance with its purposes and principles, in particular the purpose of international cooperation.

⁸ Nowak, *op. cit.*, p.34.

⁹ Nihal Jayawickrama, *op. cit.*, p. 17.

In the framework of these purposes and principles, the promotion and protection of all human rights is *a legitimate concern of the international community... (cursive, author)*¹⁰. The essence of this statement is that human rights are not exclusively an internal matter of the state, shielded by the concept of sovereignty. The Vienna declaration has not clearly articulated this shift in understanding of the relation between sovereignty and human rights, as was done two years earlier in the 1991 Moscow Declaration of the Conference on Security and Cooperation in Europe (the "Moscow Declaration"), which declared that human rights 'are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned'¹¹. Nevertheless, it does not undermine the significance of the legal *novum* that this declaration put into existence.

The above referenced documents still do not show a clear legal avenue for human rights to be enforced. The cause of the problem without a solution lies in the formation of human rights treaties, where states form them as sovereigns, accept the mechanisms they prefer, opt out choosing the best formula between a declarative human rights guarantee and effective human rights enforcement. The Vienna declaration is still limited with regard to practical solutions to the human rights *vs* state sovereignty issue. 'Even if all States accepted the principle that human rights are a fit subject of international concern and therefore not essentially within a State's domestic jurisdiction, they still would need to answer the question of how the international community can lawfully express that concern.'¹²

The main hypothesis we advocate is that the concept of *jus cogens* can judicially and operationally give a legitimate and legal way of human rights enforcement outside the boundaries of state sovereignty¹³. *Jus cogens* is not a norm that every single state has

¹⁰ <http://www.unhchr.ch/huridocda/huridoca.nsf/%28symbol%29/a.conf.157.23.en>

¹¹ Elizabeth E. Ruddick, *The continuing constraint of sovereignty: international law, international protection, and the internally displaced*, 77 B.U. L. Rev. (1997), p. 450.

¹² Ruddick, *ibid.*, p. 142.

¹³ A theoretical approach to this issue present in contemporary writings is focused on fiduciary theory of international law: '...the theory we defend is that the state and its institutions are fiduciaries of the people subject to state power, and therefore a state's claim to sovereignty,

to voluntarily accept as a legal norm, it is a result of a sophisticated international law development in which state sovereignty is not the highest value. In the 1999 United Nations general debate, then-Secretary-General Kofi Annan indicated that “[s]tate sovereignty (is) being redefined by the forces of globalization and internal cooperation.”¹⁴ There are authors who argue that “the conceptualization of state equality is losing its irresistible force and the concept of sovereignty is not as compelling as before”¹⁵ or herald in a descriptive that sovereignty sits ‘on a precarious perch’¹⁶.

In order to prove the normative balance between sovereignty and *jus cogens*, we need to examine the issue of normative hierarchy within public law and the status of *jus cogens* norms. The third part will be a thorough analysis of this issue facing *jus cogens* normative impact to phenomena stemming from the state sovereignty doctrine.

1.2. *Jus cogens* and hierarchy of norms in public international law

Unlike municipal law, public international law does not have a clear constitutional normative hierarchy of sources of law and legal norms. Even though there is a certain presumption against normative conflict, international law is not as clear as domestic law in listing the order of constitutional authority, with a clear legal order. The situation is complicated by the proliferation of international courts existing in a non-hierarchical fashion, as well as the significant development of international law, both substantively and procedurally.¹⁷

properly understood, relies on its fulfillment of a multifaceted and overarching fiduciary obligation to respect the agency and dignity of the people subject to state power. One of the requirements of this obligation - perhaps the main requirement - is compliance with *jus cogens*.’ E.J. Criddle, E. Fox-Decent, *A fiduciary theory of jus cogens* 34 Yale J. Int’l L. 331, 339 (Summer 2009).

¹⁴ Kofi A. Annan, *Two concepts of sovereignty*, *The Economist*, 1999, available at <http://www.un.org/News/ossg/sg/stories/kaecon.html>.

¹⁵ Ernest K. Bankas, *The state immunity controversy in international law: private suits against sovereign states in domestic courts*, Springer, 2005, p. 255.

¹⁶ William J. Aceves, *Relative Normativity: Challenging the Sovereignty Norm through Human Rights Litigation*, 25 *Hastings Int’l & Comp. L. Rev.*, 261, 261 (2002), p. 262.

¹⁷ Malcolm N. Shaw, *International Law*, 6th ed., Cambridge University Press, 2008, p.123.

Article 38 of the ICJ Statute and ICJ case law clearly determined the sources of law: principal (treaties and customs), complementary (general principles of law) and subsidiary (judicial decisions and doctrine)¹⁸. Determining the priority among these sources of norms is resolved using well-known principles of conflict resolution between norms that relate to the same matter (*lex posterior derogate legi priori, lex specialis derogate legi generali*)¹⁹. Nevertheless, the concept of *jus cogens* determines a substantial change to the existing order. Although many authors determine *jus cogens* as a form of international custom it is important to point out that the emergence of *jus cogens* and the rationale for its introduction into the realm of international law is to give a substantial feature to existing norms, not to emerge as completely new ones.

Article 53 of the Vienna Convention on the Law of Treaties, 1969, provides that a treaty will be void 'if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'. Further, by article 64, if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

In that sense, we can argue that there is a certain level of normative hierarchy within international law. Indeed, if public international law is created by the consensus of state sovereigns and the application of its regime is dependent on the individual state's behaviour and 'will', *jus cogens* represents a legal exception to this general pattern. Nevertheless, it does not mean that peremptory norms are imposed by a minority, or dictated by the most powerful states.²⁰ Finally, it does not mean that *jus cogens* is a set of vague ideals of the international community, it is rather a set of clearly

¹⁸ Malcolm N. Shaw, *ibid.*, p. 123.

¹⁹ For the relation and legal consequence of the same legal issue being a part of both contractual and customary law see the judgment in *Nicaragua v. USA* (Case concerning military and paramilitary activities in and against Nicaragua): "Principles such as those of the non-use of force, nonintervention, respect for the independence and territorial integrity of States...continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated (ICJ Reports 1984, p. 424, para. 73)".

²⁰ This fear for the further development of *jus cogens* norms is justified. That is why it is necessary to formulate it in a legally more precise way. However, due to the axiological character of this concept, it will hardly resist the influence of extra-legal elements.

expressed legal norms of the international community as such. As explained in the advisory opinion of the International Court of Justice regarding rules of humanitarian law applicable in armed conflict that are so fundamental to the respect of the human person and "elementary considerations of humanity":

Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.²¹

Academic writings and judicial opinions were focused on the relation between *jus cogens* and the clause of supremacy, enshrined in Article 103 of the UN Charter.²² The relation is complex, though it could be stated that this article, introducing a certain level of hierarchy within norms of international law, also protects norms embodied in the UN Charter some of them representing *jus cogens* norms (e.g. prohibition of the illegal use of force). In that sense, it seems that these normative frameworks are complementary. This clause of supremacy extends also to decisions of the UN Security Council, as it is stipulated in Article 25 of the UN Charter, which makes all member states comply with these decisions.

The complexity of the issue, seen in a *jus* positivistic paradigm, arises from the fact that *jus cogens* is legally defined by the 1969 Vienna Convention on the Law of Treaties. This convention was ratified and came into force after the UN Charter, it is not retroactive by its application²³ and is not universally accepted. Nevertheless, in the author's view *jus cogens* was only legally defined by this convention, while its substantial character was present in international law before the convention. An additional argument for this statement is the fact that the Vienna Convention did not enumerate or substantially define *jus cogens*, but only formulated the legal form of *jus cogens* norms. In the view of the author it would be substantially wrong to look for the

²¹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, para. 79.

²² 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.', Article 103, UN Charter, <http://www.un.org/en/documents/charter/chapter16.shtml>.

²³ Article 4 VCLT, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

historical and legal emergence of *jus cogens* in this multilateral treaty. Something that existed as a part and form of customary law (although today we clearly differentiate it) cannot be 'absorbed' and legally deduced to one international concept. Thus, the argument of non-retroactivity cannot stand.

The argument considering the hierarchy of norms within the UN Charter and *jus cogens* was advocated by judge Lauterpacht in his Separate Opinion in the Bosnia case where he stated that 'the relief which article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation *cannot* – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and *jus cogens*' (cursive, *author*)²⁴. In other words, the obligations under the present Charter will always prevail but not necessarily in cases when they are confronted with a *jus cogens* norm.

In the author's view, in the case of conflict between UN Charter obligations or SC decisions and *jus cogens* norms, the latter should prevail by the very essence of their normative capacity. These are the values that the international community recognized as non-derogable and no treaty as stipulated in the Vienna Convention, reflecting customary law, can be superior to them. The UN Charter is formally a multilateral treaty, the expression of the will of the signatory states. On the one hand the UN Charter, due to its extraordinary significance, is one of the treaties in which peremptory norms can be identified. On the other hand, if *jus cogens* is a reflection of existing law, a form of customary law that existed in the international legal order, it is clear that the UN charter and its interpretation necessarily need to correspond to these norms.

Jus cogens is a dynamic, changeable concept, evidence of the legal and political *status quo* of the international community. International law itself changes constantly and rapidly. That is a reason more to acknowledge the primacy of *jus cogens* – especially when it comes to their applicability.

²⁴ ICJ Reports, 1993, pp. 325, 440.

1.3. Legal effects of *jus cogens*

After examination of the status of *jus cogens* norms within public international law it is necessary to define the legal effects which these norms exercise. It is to be shown how the realm of human rights can override state sovereignty and render human rights a concern for the international community. *Jus cogens*, contrary to *jus dispositivum*, is "compelling law," a technical term given to the substantially unique norms of general international law that are, as elaborated in the previous passage, hierarchically superior. These are, in fact, a set of rules which are peremptory in their nature and from which no derogation is allowed.

There is a dilemma among scholars concerning *jus cogens*, whether it represent *lex lata*, the legal institution already present and functional within the scope of international law or *lex ferenda*, an ideal concept introduced by the 1969 Vienna Convention. Nevertheless, as will be demonstrated in the development of the argument, the idea that *jus cogens* is an inapplicable concept is less and less advocated among scholars and judicial instances.²⁵

Jus cogens, as stipulated in the Vienna Convention, makes all treaties annulled if those are contrary to a norm considered to be *jus cogens*. The power of a state to make treaties, its contractual right that derives from its equal sovereignty, is restrained when it confronts the super-customary norm of *jus cogens*. That is the first and paradigmatic effect of *jus cogens* – it disables the state (both *de jure imperii* and *de jure gestionis*) to get into contractual relations which might be detrimental to human rights recognized as *jus cogens*.

In its discussion of torture, the International Criminal Tribunal for the former Yugoslavia, in the case of *Prosecutor v. Furundzija*, para. 153, described the normative relativity of and obligations emanating from *jus cogens*:

²⁵ There are also authors (e.g. Georg Schwarzenberger) who assert that there can be only 'consensual *jus cogens*' norms, not peremptory in the real sense. This criticism has no grounds, and could not be justified by the nature and development of contemporary international law which is less and less state-centred.

Because of the importance of the values it protects, (the prohibition of torture) has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.²⁶

The Inter-American Commission on Human Rights concerning imposition of the death penalty on child offenders stated that norms of *jus cogens*

...derive their status from fundamental values held by the international community, as violations of such peremptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition or acquiescence.²⁷

Under legal doctrine and case law, *jus cogens* comprises a certain form of constitutional rules which every state is obliged to follow. This confirms the fact that *jus cogens* has gained extra-conventional value, developing outside of the consensual framework of the VCLT Article 53. Being compelling law, it does not give a state the right to opt out, as is the case with other international norms deriving from custom or treaty. Peremptory norms limit the capacity of the state to change rules or create ones which would be in contradiction with *jus cogens*. Any act or policy of the state contrary to *jus cogens*, would represent a breach of international legal order.

Furthermore, any state has the right to protect the international legal order which is imperilled by some other state. That is exactly how the norms of *jus cogens*, which are a reflection of the international legal order, give legitimacy to infringement of state sovereignty. As we discussed in the first part of this chapter, human rights development and sovereignty as an international law paradigm, although contradicting each other, have to be seen as indivisible since they evolve in the state based system of international

²⁶ Similar statements were made in *Prosecutor v. Delacic and Others* (16 November 1998, case no. IT-96-21-T, § 454) and in *Prosecutor v. Kunarac* (22 February 2001, case nos. IT-96-23-T and IT-96-23/1, § 466).

²⁷ Report No. 62/02. Case 12.285. Michael Domingues, United States. 22 October 2002.

law. Peremptory norms are considered to be obligations *erga omnes*²⁸, those which are owed to all other states and the community as a whole. In the 1970 *Barcelona Traction* case the court found that ‘in view of the importance of the rights involved (obligations *erga omnes*), all States can be held to have a legal interest in their protection’²⁹. That is why the concept of *jus cogens*, which would embody certain human rights or human rights as a compound body of rights, gives a legal avenue for human rights enforcement. In other words, *jus cogens* norms are an answer to the ‘chicken and egg’ causality dilemma of human rights and state sovereignty.

The *jus cogens* was and is still not universally accepted and brings many dilemmas and concerns. Nevertheless, the argumentation offered relies upon the dynamics of international human rights law which gradually brings the individual in the focus of international law. The shift is slow and does not manifest around the globe in a unique way. As one author referred to the new legal phenomenon whose normative impact can never be fully foreseen:

When law, whether domestic or international, mirrors the aspirations of society and captures its imagination, it acquires a moral and political force whose impact can rarely be predicted and often far exceeds the wildest expectations of its particular lawmaker. Those who believe that Realpolitik means only military and political power have not learned the lesson of history about the force of ideas and the irony of hypocrisy. Many of the countries which have voted in the United Nations for human rights instruments without any intention of complying with them gradually find these instruments impose restraints on them and limit their freedom of action.³⁰

The procedural effects of *jus cogens*, which substantially contribute to human rights enforcement, will be discussed in the third chapter. In the following chapter it is

²⁸ *Erga omnes* and *jus cogens* are clearly connected (e.g. *Barcelona Traction* case), but conceptually these are different. In criminal law, for example, ‘*jus cogens* refers to the legal status that certain international crimes reach, and *obligatio erga omnes* pertains to the legal implications arising out of a certain crime’s characterization as *jus cogens*.’ See M. Cherif Bassiouni, *International crimes: jus cogens and obligatio erga omnes*, Law and Contemporary Problems, Vol. 59, No. 4, p. 64.

²⁹ ICJ Reports 1970, 32 (para. 33).

³⁰ Thomas Buergenthal, ‘International Human Rights Law and Institutions: Accomplishments and Prospects’ (1988) 63 *Washington Law Review*, pp. 1–19.

important to establish a connection between human rights and *jus cogens* in order to see to what extent peremptory norms can alleviate the process of human rights enforcement.

PART II: FORMULATION OF *JUS COGENS* AND INTERNATIONAL HUMAN RIGHTS

2.1. Peremptory norms in public international law

2.1.1. Definition of *jus cogens*

Existing writings on peremptory norms reflect this ambivalent nature of *jus cogens*. It was usually criticized for emptiness, vagueness, uselessness, and a great potential for political abuse, as well as the insufficiency of its conceptual bases, thereby challenging the very existence of the notion of *jus cogens*. The content of *jus cogens* is constantly evolving, which brings additional issues to the definition. Definitions vary from purely legal to those which are rather sociological, ethical.³¹ Defining *jus cogens* might be the first step in determining its substantive and procedural impact.

Regarding the etiology of *jus cogens*, the dominant views can be identified: one which sees *jus cogens* directly originating from international law, the second basing them on existing sources of international law (thus, treaties, customs etc.) and the third which recognizes *jus cogens* as an entirely new source of law, a set of generally binding rules.³²

Sir Hirsch Lauterpacht introduced the concept of *jus cogens* into International Law Commission discussions by proposing in 1953 that “treaties imposed by force” violated “international public policy.”³³ The definition of peremptory norms, still quite vague and broad, was given as an article in the 1969 Vienna Convention on the Law of Treaties. As

³¹ Alfred Verdross, for example, defined peremptory law as the ‘ethical minimum recognized by all the states of the international community.’ See Verdross, A. ‘*Forbidden Treaties in International Law*’ (1937) 31 *American Journal of International Law*, pp. 571, 574.

³² The author assumes that an eclectic way of interpreting the origins of *jus cogens* would be most beneficial to the understanding of this concept. *Jus cogens*, without any doubt, brings the norms of a new legal scope which keeps broadening due to changes in international society and the international legal order. However, these norms cannot be separated from the treaties and customs which their legal impact usually stems from.

³³ F.F. Martin, et.al, *International Human Rights and Humanitarian Law*, Cambridge University Press, New York, 2006. p. 31.

we already stated, it was the emergence of a legal definition of *jus cogens*, not the emergence of the concept itself or its legal value, which was elaborated by the international and national courts. As stated in *Article 53- Treaties conflicting with a peremptory norm of general international law ("jus cogens")*:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm *accepted and recognized* by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. (*Emphasis added*)

The definitional issue raised in this article is in the formulation of *jus cogens* as norms which are 'accepted and recognized' by the international community as a whole. Namely, this definition would delete the difference between custom and *jus cogens*: 'accepted' could be easily understood as state practice and 'recognized' as *opinio juris*, when that practice of a state is due to a belief that it is legally obligated. However, the contemporary version, deriving from academic writings and case law, which is not much more than two decades old, says that *jus cogens* imposes an obligation in and of itself, even if a state has not accepted it. We already elaborated this, referring to the actual understanding of *jus cogens*, underlying that the 1969 Vienna Convention should not be seen as the primary or exclusive source of peremptory norms.

Another aspect of *jus cogens* emerges from this treaty definition: *jus cogens* is a vital and dynamic concept, reflecting the changing values of the international community as a whole. As stipulated in Article 64 of VCLT: 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.'

In its 2006 Report on the Fragmentation of International Law, the ILC concluded that some rules of international law are more important, that they enjoy a 'special status in the international legal system' and are described in terms of being 'fundamental',

'elementary considerations' and 'intransgressible principles of international law'³⁴. The norms of *jus cogens*, theoretically speaking, are somewhere between legal positivism, since their existence is proved through analysis of international treaties and customs, and the natural law concept.³⁵ They are considered to be norms of 'higher' value, separate from the sphere of state contractual law. Nevertheless, the courts interpreting *jus cogens*, necessarily invoke positive law in order to determine the status of certain norms. This paper will try to advocate *jus cogens* in both of these schools of law, with the awareness of their dialectical interrelation.

Finally, it is evident that '*jus cogens*' is a technical, procedural framework which gives certain substantive norms compelling character. This is very important for the main hypothesis of this paper: the author see human rights as a substance which needs procedural form, out of the state consensus based human rights mechanisms, to overcome the legal barriers on the way of its enforcement in cases when state sovereignty poses barriers.

2.1.2. *Jus cogens* and human rights norms – comparative approach

Jus cogens norms undoubtedly testify to the influence of natural law within the realm of international relations. These compelling norms are the opposite to the vast majority of *jus dispositivum* norms which the state can decide to apply, by using its *jus contrahendi* to get into contractual relations. Unlike *jus cogens*, human rights norms are a set of obligations which states agree to apply within their territory, demonstrating their sovereign equality. This is exactly the starting point of our argumentation: human rights enforcement can be advanced through the concept of *jus cogens*, 'immune' to the barrier of state sovereignty. *Jus cogens* is a legal method to override state sovereignty when it

³⁴ 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' UN Doc A/61/10 (2006), para. 32.

³⁵ 'The concept of *jus cogens* is based upon an acceptance of fundamental and superior values within the system and in some respects is akin to the notion of public order or public policy in domestic legal orders. It also reflects the influence of Natural Law thinking.' Malcolm N. Shaw, *op. cit.*, p. 126.

represents a predicament for human rights not to bring 'chaos' into the international legal order. Furthermore, it gives a normative hierarchy putting common values above other conventional and customary norms³⁶.

The rise of peremptory norms over the past century has sent shock waves across international legal theory, transforming the venerable doctrine of sources and unsettling inherited conceptions of state sovereignty. As some scholars have celebrated and others have lamented, the concept of *jus cogens* has been widely perceived to establish a normative hierarchy within international law, endowing certain fundamental norms such as the prohibitions against slavery and genocide with a quasi-constitutional status vis-à-vis ordinary conventional and customary norms.³⁷

As we know, the written legal formulation of *jus cogens* came with the 1969 Vienna Convention on the Law of Treaties, which is probably the main reason for the misconception that *jus cogens* is a new, modern, twentieth century phenomenon. Although the term "*jus cogens*" did not take root in international legal discourse until the twentieth century, the principle that certain fundamental norms merit peremptory authority within international law bears a much older pedigree.

Classical publicists such as Hugo Grotius, Emer de Vattel, and Christian Wolff drew upon the Roman law distinction between *jus dispositivum* (voluntary law) and *jus scriptum* (obligatory law) to differentiate consensual agreements between states from the "necessary" principles of international law that bind all states as a point of conscience regardless of consent. In contrast to ordinary legal obligations derived from treaty or custom, *jus scriptum* norms would not permit derogation, Vattel reasoned, because they derived from a higher source - the natural law of reason itself...³⁸

Although the concept of natural law is just a theory of law, not a final and decisive way of international law creation, it is important to stress Vattel's vision of *jus cogens* and 'its source'. Namely, both *human rights* and *jus cogens* are considered to have the same source: natural law. These two bodies of international law are etiologically correlated. This might be the starting point for determining the similarity and association between

³⁶ See supra *Prosecutor v. Furundzija*, para. 153.

³⁷ E.J. Criddle, E. Fox-Decent, *A fiduciary theory of jus cogens* 34 Yale J. Int'l L. 331, 332, 339 (Summer2009).

³⁸ *Ibid.*, p. 334.

jus cogens and international human rights. However, it might not be very useful for this thesis, since the natural law concept is significantly limited – only when ‘codified’ does this law become effective. Without any doubt, this aspect of natural law, and the critique that *jus cogens* is abstract and ideal, will be taken into account during elaboration.

Peremptory norms were the reflection of the values within the international community, gaining the highest significance for international relations. Traditional *jus cogens* norms include prohibition of slavery, piracy, and genocide. All these norms are clearly connected to the interest and system of values of the international community during time. ‘After World War II, *jus cogens* expanded to include crimes against humanity, murder, torture, and use of force or aggression.’³⁹ All the *jus cogens* norms we enlisted here diachronically are either intrinsically or indirectly related to human rights.

Jus cogens consists of both rights and responsibilities, depending on the norm embodied. In the case of self determination it is promoting a right, in the case of genocide for example it is prohibition actions taken by individuals or legal persons. In that sense *jus cogens* is similar to human rights norms, which also contain certain rights but also distinctive responsibilities for individuals and states. *Jus cogens* norms reflect the developing interests of the international community as a whole, not the narrow interests of a particular state. Peremptory norms protect the fundamental values of the international community. That brings a significant normative impact of *jus cogens*: legal duties in this case are owed by states, not only to their own subjects (which is strictly speaking the case with human rights *en generale*), but to the international community as well. The prohibition of genocide, torture, slavery, crimes against humanity cannot be only internal affairs of a certain state since they reflect the core values of international society⁴⁰. States and peoples are not isolated, they communicate, integrate and exchange among each other. That is why it is important to show that certain human rights do

³⁹ See D. Adams, *The prohibition of widespread rape as a jus cogens*, 6 San Diego Int'l L.J. 357, p. 362 (Spring 2005).

⁴⁰ The issue of human rights is certainly dealt with by international organizations. But even in that arena the competences of international governmental organizations are essentially limited by the state sovereignty doctrine, since their legitimacy and functionality is based on the dominant role of the state.

represent *jus cogens*, since it brings *legal duties* of the state to the community as a whole and gives legitimacy for the *legal interest* of the community, which was elaborated above in the notion of *erga omnes*.

Although there is so much in common between human rights and their creation with the generation of peremptory norms, with the significant difference that a single state's consensus is not needed in *jus cogens*, there is still lack of case law to demonstrate that human rights as such are to be considered compelling norms in international law. However, the intrinsic relation between *jus cogens* and human rights was elaborated in the dissenting opinion of Judge Tanaka in the South West Africa case:

If we can introduce in the international field a category of law, namely *jus cogens*, recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to *jus dispositivum*, capable of being changed by way of agreement between States, surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*.⁴¹

It is clear that *jus cogens* norms, due to the supreme legal character and high normative threshold, cannot cover every individual human right. In order to determine which human rights can gain peremptory character we need to examine in the following chapter what are the legal criteria for certain norms to be considered peremptory, and to see how these tests relate to human rights.

2.1.3. The issue of legal criteria required for a norm to be considered *jus cogens*

Determining the criteria for norms to be considered peremptory is a durable task of legal scholars. Not only is *jus cogens* not enlisted in the Vienna Convention, but even the criteria for claiming peremptory character for a norm are not given in this treaty. By comparing two sets of criteria, given at different times of international development, it can be demonstrated that these criteria vary and depend on the general 'state of the art' of legal doctrine, different schools of law and distinct international relations momentum.

⁴¹ Judge Tanaka's Dissenting Opinion in the *South West Africa* case (*Ethiopia v. South Africa; Liberia v. South Africa*), Second Phase, Judgment [1966] ICJ Rep 298.

The following conditions are recognized for identification of a *jus cogens* norm in the international law of the time⁴²:

- (a) a rule should be recognized as legally binding by the international community of States as a whole, i.e., by all or almost all States with different socio-economic systems ;
- (b) the peremptory character of a rule should be recognized by States either *expressis verbis*, or such a character can be presumed due to its vital social and moral value for the functioning of the whole contemporary international legal order;
- (c) any derogation from a rule by the mutual consent of States on the local level, aimed at worsening the commonly recognized legal standards of civilization, is null and void ;
- (d) the voidness of agreements derogating from a given treaty or customary rule cannot be avoided even if the participants to a derogating agreement try to free themselves from treaties or customs containing *jus cogens* norms

It is clear from these criteria for identification of *jus cogens* that they reflect the ideological state of the cold-war era and put strong stress on the state sovereignty right reflected in state recognition of *jus cogens*.

Modern concepts of *jus cogens*, as expected, reflect changes in the international political and legal system and correspond to recent developments in public international law. One of the set of criteria for *jus cogens*, related to the mentioned fiduciary theory of international law, is a framework determined to show how *jus cogens* norms can be both non-derogable and mandatory independently of state consent (Table 1). This model reflects the normative and ethical transformation of the modern international community and a contemporary view on 'state sovereignty'.

⁴² Levan Alexidze. "Criteria for the identification of norms of *jus cogens* in international law." Legal nature of *Jus cogens* in contemporary international law. Collected Courses of the Hague Academy of International Law 172. Martinus Nijhoff Publishers, 1981. Martinus Nijhoff Online. 05 May 2011 DOI:10.1163/ej.9789024727780.219-270.6, p. 262.

Table 1. Criteria for Specifying Peremptory Norms⁴³

Specific <i>Jus Cogens</i> Criteria	Character	Constitutive Property
Generality	Formal	Necessary
Publicity	Formal	Necessary
Feasibility	Formal	Necessary
Clarity	Formal	Necessary
Consistency	Formal	Necessary
Prospectivity	Formal	Necessary
Stability	Formal	Necessary
Integrity	Substantive	Necessary
Formal moral equality	Substantive	Necessary
Solicitude	Substantive	Necessary
Fundamental equal security	Substantive	Sufficient
Rule of law	Substantive	Sufficient

The other concept does not refer to the concept of sovereignty. The only aspect which might include state recognition of *jus cogens*, although not directly, would be *generality*. The inquiry in the criteria for determining *jus cogens* shows that sovereignty does not play the significant role it used to. Although some scholars still question the *jus cogens* concept on the issue of state sovereignty, there can hardly be found evidence in contemporary legal writings of taking the explicit consensus of every single state as a condition for the validity of *jus cogens*.

⁴³ E.J. Criddle, E. Fox-Decent, *op. cit.*, p. 367.

2.2. Human rights recognized as *jus cogens*

2.2.1. Human rights as a value of the contemporary international community

The history of international human rights, despite the presence in history of political and legal thought, does not go far in the past. Nevertheless, the horrors of World War II, the development of the UN order and the principles of the UN Charter, together with the process of decolonisation, rights and liberty movements on both sides of the ideologically shifted world, have made human rights one of the principal values of the international community as a whole.

Despite human rights violations across the globe, even in countries with the highest human rights records, 'the dignity of man' is the standard that the international community is trying to achieve. Analyzing the media discourse of nowadays, the political agendas of important international actors demonstrate that human rights have become an inevitable value, a way we understand ourselves in the modern world.

The Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights on 25 June 1993, reflects the post cold-war change of the international community towards the idea that human rights are universal and indivisible. This document reaffirms the commitment contained in Article 56 of the Charter of the United Nations to take joint and separate action, placing proper emphasis on developing effective international cooperation for the realization of the purposes set out in Article 55, including universal respect for, and observance of, human rights and fundamental freedoms for all. Although declarative in its character, thus absolutely not legally binding, it reflects the tendencies which continue to exist almost two decades afterwards. Particularly important for the argumentation line of these are the fourth and the fifth paragraphs of the declaration:

IV The promotion and protection of all human rights and fundamental freedoms must be considered *as a priority objective* of the United Nations in accordance with its purposes and principles, in particular the purpose of international cooperation. In the framework of these purposes and principles, *the promotion and protection of all human rights is a legitimate concern of the international community*. The organs and specialized agencies related to human rights should therefore further enhance the

coordination of their activities based on the *consistent and objective application of international human rights instruments*.

V All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.⁴⁴ (Emphasis added)

The fundamental ideas of these articles, despite the legal character of the document, can be regarded as an official statement that human rights are the value which the international community, particularly through the UN system, highly prioritises. It must be observed as well that many of the qualifications used in this declaration substantially resemble already elaborated criteria for a norm to be considered *jus cogens*. This, however, does not mean that states would be keen to give priority to human rights over the exercise of their sovereign rights. The significance of this programme of action should be rather seen as a reflex of the international community's paradigm of values.

The Universal Declaration of Human Rights (UDHR), a declaration adopted by the United Nations General Assembly, as a cornerstone of international human rights, has no legally binding effect either. Its significance as articulation of world commitment to the human rights issue is not questionable. In Article 28 it declares that 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.'⁴⁵ This article is evidence of the idea that human rights cannot be fully enforced exclusively through the mechanism of sovereign states. International order, which necessarily includes the legal one, is an inevitable component of that process. It seems reasonable to consider *jus cogens* (and associated legal concepts and institutions: universal jurisdiction, international crimes, international tribunals etc.) as a legal way to address the issue raised in this article.

The change in international legal values was also reflected in the case law of the International Court of Justice even before the end of cold war, regarding the *locus standi*

⁴⁴ <http://www.unhchr.ch/huridocda/huridoca.nsf/%28symbol%29/a.conf.157.23.en>

⁴⁵ <http://www.un.org/en/documents/udhr/index.shtml>

of a state before the court in matters considering *jus cogens*. As demonstrated before, the *Barcelona traction* case was the cornerstone of the recognition that *jus cogens* norms give rise to the legal interest of any state to start proceedings. Although a procedural aspect, it might have significant consequences regarding the different level of human rights record among states.

After this broad and general inquiry about the state of 'values' in the world we live in today, and its impact on doctrine and jurisprudence, we shall now address specific human rights and their status as *jus cogens*.

2.2.2. Multilateral human rights treaties as a source of *jus cogens*

Although it is not obligatory that every single state explicitly recognizes certain norms of *jus cogens*, there still has to be a clear empirical way to determine the existence of *jus cogens*. Many multilateral treaties contain norms which are peremptory and non-derogable. Besides, multilateral treaties are usually ratified (or in some other way accepted) by a higher number of contracting parties which fulfils the condition necessary for *jus cogens*. Treaties usually stipulate the judicial organs which will further elaborate and interpret the norms, which makes the issue of peremptory norms to some extent easier.

This might sound contradictory to the concept of *jus cogens* elaborated in previous chapters with regard to state consent, whether it is compulsory or not. Nevertheless the idea and legal form of multilateral treaties, especially those concerned with human rights, has significantly changed. 'In our contemporary international legal order, the multilateral treaty-making process is legislative in objective but only contractual in method.'⁴⁶ That is how non-derogable norms emerging from treaties almost universally accepted, adopted by a majority of states within either a global or regional treaty regime, have become the norms of *jus cogens*. That would be the case with the prohibition of genocide (Article 1 of the 1948 Convention on the Prevention and

⁴⁶ F.F. Martin, et. al, *op. cit.*, p. 33.

Punishment of the Crime of Genocide⁴⁷), the prohibition of torture (Articles 2 and 3 of the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment⁴⁸) and the right to self determination, based on various international treaties and 'a series of General Assembly resolutions and state practice of decolonization'⁴⁹. In these cases, *jus cogens* has a significant effect on human rights endorsement: it spreads the compelling character of the norm to states which are not signatories of a certain regional or universal legal framework.

The question which arises is how many contracting parties are needed for a norm to be considered as *jus cogens*. This is a rather quantitative issue and although some courts explicitly referred to a percentage of the states applying a certain rule⁵⁰ to determine a peremptory norm, it is hard to expect that this would be a practise of an international, world court, or some political instance. Nonetheless, human rights treaties remain the most reliable source for the *jus cogens* recognition of a norm that courts can apply in their findings. In other words, international treaties, by their character, are more prone to fulfil the legal criteria mentioned above for a norm to be considered peremptory (generality, clarity, consistency, rule of law etc.).

2.2.3. Human rights recognized as *jus cogens*

Through the course of elaboration of the significance of *jus cogens*, it was stated several times that determining which rules are to be regarded as *jus cogens* is not an easy task. Although scholarly writing and legal doctrine has given a prominent contribution to this issue, *jus cogens* norms can only be defined by courts in order to have the procedural effect that we find so significant for human rights implementation. We will refer to the courts' application of *jus cogens* in the last part of the paper.

⁴⁷ <http://untreaty.un.org/cod/avl/ha/cppcg/cppcg.html>

⁴⁸ <http://www2.ohchr.org/english/law/cat.htm>

⁴⁹ F.F. Martin, et.al, *op. cit.*, p. 35.

⁵⁰ 'Indeed, in 1987 the Inter-American Commission on Human Rights effectively held that there is a regional *jus cogens* norm against the execution of children on the basis that approximately 70 per cent of OAS members were states-parties to the ACHR, which prohibited the execution of individuals committing capital crimes under the age of eighteen.' see *op. cit.*, p. 34.

Jus cogens is a dynamic concept, changing as some kind of 'a public order', together with positive law. The correlation between *jus cogens* and human rights was already elaborated. The question is which human rights can be invoked as *jus cogens*, or more precisely: which human rights are already *jus cogens* and which are emerging as *jus cogens* norms.

Analyzing the international treaties, Francisco F. Martin gives a list of human rights norms being or becoming *jus cogens*. The examination is based on the clauses of human rights treaties that identify certain human rights which may not be derogated from even in time of war or other public emergency⁵¹. According to him, the following represent existing or emerging global *jus cogens* obligations:

- **the right to life** (*International Covenant on Civil and Political Rights*, art. 6)⁵²
- **the right to humane treatment** (ICCPR, art. 7; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, art. 3, *American Convention on Human Rights*, art. 5.)
- **prohibition of criminal ex post facto laws** (ICCPR, art. 15; ECHR, art. 7; ACHR, art. 9)
- **prohibition of genocide** (*Convention on the Prevention and Punishment of the Crime of Genocide*, art 1)
- **prohibition of war crimes** (*Geneva Convention IV*, arts. 146, 149)
- **prohibition of slavery** (ICCPR, art. 8; ECHR, 64, art. 4; ACHR, art. 6.)
- **prohibition of discrimination on the basis of race, color, sex, language, religion, or social origin;** (ICCPR, art. 4. ICCPR, art. 16; ACHR, art. 3)
- **prohibition of imprisonment for civil debt** (ICCPR, art. 11)
- **prohibition of crimes against humanity** (*ICC Statute*, art. 7)

⁵¹ See article 4 of the International Covenant on Civil and Political Rights; article 15 of the European Convention on Human Rights; and article 27 of the American Convention on Human Rights.

⁵² *N.B.* Many of the rights offered by Prof. Martin are defined in *absolute* terms and their exercise may not be restricted on any grounds whatsoever. However the right to life listed here is restrictively defined, which deeply questions its *jus cogens* status. E.g. 'No one shall be *arbitrarily* deprived of his life' (ICCPR 6, ACHR 4). v. Nihal Jayawickrama, *op. cit.* p. 183.

- **the right to legal personhood** (ICCPR, art. 16; ACHR, art. 3)
- **freedom of conscience** (ICCPR, art. 18; ACHR, art. 12) and
- **the right to self-determination** (Western Sahara, advisory opinion, based on a series of General Assembly resolutions and state practice of decolonization)⁵³

Regional *jus cogens* norms based on the American Convention on Human Rights, in Martin's view, include the following: freedom from arbitrary detention; rights of the family; the right to a name; rights of the child; the right to nationality; and the right to participate in government.⁵⁴

The norms enlisted are non-derogable norms, as stipulated by the treaties' provisions. However, this does not make them peremptory norms *stricto sensu*. We should rather treat the list given above as a list of human rights which might obtain compelling character by the nature of rights and duties they contain and by the general acceptance of the treaties in which these human rights are stipulated. *Jus cogens* has a significant procedural effect. That is probably the crucial reason why these norms have to be articulated by legitimate judicial instances.

2.2.4. Human rights outside the scope of *jus cogens*?

There are certain conclusions that can be drawn from the list of rights given in the previous chapter. Apart from the fact that the list does not entail all political rights that the contemporary body of international human rights contains, but there is a qualitative feature, *differentia specifica* of the rights that are or might become *jus cogens*. Namely, the rights mentioned are all focused on 'negative freedoms'. The rights are indeed indivisible, and all the categories including those we use (positive/negative) are discussible and deeply questionable.⁵⁵ Nevertheless, it is not a coincidence that all the

⁵³ F.F. Martin, et. al, *op. cit.*, pp. 34-35.

⁵⁴ *Ibid.*, p. 35.

⁵⁵ A similar terminology brings a classic/social rights division. 'Classic' would be those that require non-intervention of the state (*negative obligation*), and 'social rights' as requiring active

rights believed to have *jus cogens* character do not include broad positive obligations of the state. The reasons are twofold:

a) The treaties related to economic, social and political rights⁵⁶ have either no obligatory character or contain provisions that define the enforcement of these rights as a gradual process. Peremptory norms are absolute in the sense that these reflect automatically legally binding rules for all states in the community. Significantly different from the article with the same cardinal number in the International Covenant on Civil and Political Rights, Article 2 of the International Covenant on Economic, Social and Cultural Rights specifies:

Article 2, ICESCR

1. Each State Party to the present Covenant undertakes to take steps, individually and *through international assistance and co-operation*, especially economic and technical, *to the maximum of its available resources*, with a view to *achieving progressively* the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.⁵⁷

b) Due to the difference in economic development and omnipresent cultural particularism (relativism) it would be conceived in the international community as unjust to impose *jus cogens* character on these rights, since equality is one of the definitional characteristics of *jus cogens*. Social and economic rights mirror social and economic differences, and formulating a legal norm of peremptory character so it would be binding for all states would be a tricky task.

This leads us to the conclusion regarding an auxiliary hypothesis of this analysis: economic, social, and cultural rights have no prospect of becoming directly peremptory norms as is the case with certain political rights. These norms entail affirmative duties

intervention on the part of the state (*positive obligations*). The analysis of specific human rights shows that this division is a purely categorical but not always applicable model.

⁵⁶ Economic and social rights are listed in Articles 22 to 26 UDHR, and further developed and set out as binding treaty norms in the International Covenant on Economic, Social and Political Rights. The UDHR lists cultural rights in Articles 27 and 28, Article 15 ICESCR and Article 27 ICCPR). Although listed in ICCPR, Article 27 is not defined as non-derogable by Article 4 of ICCPR.

⁵⁷ <http://www2.ohchr.org/english/law/cescr.htm>.

requiring the availability of resources to give these rights effect, which makes it hard to apply *jus cogens*. It should be noted that from the prism of human rights law we have an emerging concept of state *due diligence* regarding human rights. The Inter-American Court of Human Rights found in the Velasquez-Rodriguez Case⁵⁸ that a state has a positive duty to prevent human rights violations occurring in territory subject to its effective control, even if such violations are carried out by third parties. Although this case applies to forced disappearance, the standard was formulated in general, without limiting to a certain type of rights. However, the possibility of direct *jus cogens* application to certain social rights is still limited and has no support in case law.

Legal writings suggest a possible avenue for dealing with this drawback of *jus cogens* application, regarding not only social but also some political rights which are not peremptory norms. The concept of derivative *jus cogens* can be applied to certain human rights (rights to due process, food, shelter, right to health etc.) giving them the same procedural effect which substantial non-derogable human rights possess. These rights 'have been proposed as having the status of *jus cogens* because of their necessity in ensuring the protection of other *jus cogens* norms.'⁵⁹ The right to food, by its nature, can easily be connected to the right to life, or even torture which has a confirmed *jus cogens* status. The positive duty of the state in this case is to ensure the mechanism, political, social and administrative, which would make the supply of food applicable to everyone – a due diligence. Otherwise, a state can be held responsible for endangering a right indispensable for the protection of another *jus cogens* norm – the right to life.⁶⁰

This concept relies on the fact that human rights are inter-connected and achieving political rights without economic and social rights is one of the human rights chimeras.

⁵⁸ v. *Velasquez-Rodriguez Case*, 28 ILM 291, para. 166 (1989); Case 7615 IACHR., OAS/ser.L/V/II.66, Doc. 10.

⁵⁹ F.F. Martin, et al., *op. cit.*, p. 36.

⁶⁰ Nevertheless, to apply *jus cogens* in this manner within the sphere of state responsibility, we need to show clearly that it is derogated by the state and to indicate a breach of obligation. In this case it would be quite problematic to determine how a certain state derogates one *jus cogens* norm (e.g., the right to food): how would that act/omission be reasoned by the court? This would lead us to analysis of the scope of responsibility and state obligations stemming from treaties that embody social and economic rights.

'The issue of derivative *jus cogens* norms is important in the context of not only certain first generation rights (*e.g.*, due process rights) but also second and third generation rights, which impact upon other areas of international law, such as the law of armed conflict, trade and environmental law.'⁶¹

Although theoretically and by the logic of same reason these rights should be legitimately regarded as peremptory norms in the world we live in, it remains a question to be resolved by future legal and political struggles for 'non-political' human rights.

⁶¹ F.F. Martin, et al. *op. cit.*, p. 37.

PART III: *JUS COGENS* HUMAN RIGHTS AS A CHALLENGE TO STATE SOVEREIGNTY

This part of the study will analyze the procedural effects of *jus cogens* in the light of the diversified national and international case-law. The problem question is how to implement human rights and find individuals and states accountable for human rights violations in cases when a certain state is unwilling or incapable of doing so. The main hypothesis we follow is that application of *jus cogens* opens a new dimension of human rights enforcement, contrasting the old concept of state sovereignty. In order to prove this, it is to be shown what are the features of the sovereign state that *jus cogens* overrides procedurally before other national or international courts.

Although conceptually recognized, the procedural effects of *jus cogens* are not fully accepted and applied by the jurisprudence of international courts. It seems that the transition to universal recognition of *jus cogens* might deeply question the old legal and political order, and open new 'taboo spheres' of human rights implementation.

Some of the *ratione materiae* limitations of *jus cogens* have been mentioned. It would be hard to expect all rights, on the individual level, to obtain the gravity needed for *jus cogens*. However, it seems that the level of gravity needed for a human rights norm to be seen as *jus cogens* is inversely proportionate to the strength of state sovereignty in the contemporary era.

Nonetheless, we should not undermine the deterrent factor of *jus cogens* application, mentioned in the *Furundzija* case at ICTY, which it will have on future violations of human rights and serious international crimes. This prohibition, as stated in the ruling, designed to produce a deterrent effect, 'signals to all members of the

international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate'.⁶²

The first part of the chapter is predominantly focused on international criminal law and diverse case law regarding criminal proceedings. It will focus on the procedural effects of peremptory norms on jurisdiction and extradition. International criminal law is rapidly developing in the last two decades bringing new ideas and concepts to legal discourse. One of those concepts, universal jurisdiction, will be specifically discussed.

In the second part, partly focused on criminal law, but also addressing civil suits, the author will discuss the issue of immunities (sovereign and *ratione persone* immunities) in relation to peremptory norms. The grant of sovereign immunity to a state in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between states. Is there legitimacy for immunity when human rights which are violated amount to *jus cogens*?

The last part will deal with the issue of state responsibility *stricto sensu* for breach of the *jus cogens* obligation and the possible reaction of the international community to such a breach.

3.1. International Criminal Law and Application of *Jus Cogens*

A significant effect of peremptory norms is visible in the sphere of international criminal law. There is no doubt that the recent development of international criminal law corresponds to the development of international human rights. That is not a coincidence since both bodies of law were 'partially inspired by a wish to ensure that the atrocities that characterized Nazi Germany were not repeated.'⁶³ In fact, international criminal law is one argument more that strictly state sovereignty based international law had flaws.

⁶² *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, p. 59, <http://www.unhcr.org/refworld/docid/40276a8a4.html> [accessed 10 May 2011].

⁶³ Robert Cryer, et al, *An introduction to international criminal law and procedure* – 2nd ed., Cambridge University Press, New York, 2010, p. 13.

Their developments are entangled, and the interaction of the two fields of international public law was explicitly reflected in the ICTY Trial Chamber judgment in the case of *Prosecutor v. Kunarac*:

Because of the paucity of precedent in the field of international humanitarian law, the Tribunal has, on many occasions, had recourse to instruments and practices developed in the field of human rights law. Because of their resemblance, in terms of goals, values and terminology, such recourse is generally a welcome and needed assistance to determine the content of customary international law in the field of humanitarian law. With regard to certain of its aspects, international humanitarian law can be said to have fused with human rights law.^{64 65}

The role of international criminal law in human rights enforcement cannot be overestimated. Namely, 'parts of international criminal law have developed in this context to respond to egregious violations of human rights in the absence of effective alternative mechanisms for enforcing the most basic of humanitarian standards.'⁶⁶ The rights of a sovereign state were exercised in a manner not to allow any international impact on criminal issues. On the one hand, contemporary development of international law, the foundation of international criminal tribunals, regional and world cooperation in criminal matters were a response to the modern world in which dealing with criminality cannot be limited to the boundaries of a state. On the other hand, and what is actually the problem issue addressed in this paper, states often appear as the principal barrier to human rights implementation, transgressing the process, putting state sovereignty as the highest principle. A clear picture of this issue has been presented with regard to the cooperation of Rwanda and ex-Yugoslavia countries with the ad hoc

⁶⁴ Kunarac ICTY T. Ch. II 22.2.2001 para. 467, <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>.

⁶⁵ Although correlated, human rights law and international criminal law still have some essential differences: 'whereas human rights norms may be given a broad and liberal interpretation in order to achieve their objects and purposes, in international criminal law there are countervailing rights of suspects that are protected through principles requiring that the law be strictly construed and that ambiguity be resolved in favour of the accused.' Robert Cryer et al. *op. cit.*, p. 14.

⁶⁶ Robert Cryer et al., *op. cit.*, p. 13.

criminal tribunals set up by Security Council resolutions.⁶⁷ Unfortunately, this issue cannot be fully addressed by the legal concepts that this study advocates, since it is entangled with extra-legal, political aspects.

Cooperation between the criminal courts and states as well as jurisdiction is based on the explicit consensus of the state, expressed via international treaties (e.g. the criminal tribunals for Yugoslavia and Rwanda) or through the standard ratification process of court statutes (ICC). Although protecting universal values and condemning international crimes in their statutes, the jurisdiction of international courts is limited *ratione loci*, to crimes committed on the territories of the signatories and *ratione personae*, to their nationals. Besides, many state officials accused of serious crimes enjoy immunities based on domestic law and international customary law. The concept of the state sovereignty doctrine as reflected on immunities will be discussed separately.

3.1.1. Extradition and *jus cogens*

The issue of extradition, whose legal formulation, in the absence of specific forms of inter-state cooperation in these matters, remains a discretionary right of a state. Extradition does not exist as an obligation upon states in customary law⁶⁸.

A theoretical insight into the relation between extradition and peremptory norms shows no collision between these concepts. Some of the general principles related to

⁶⁷ 'The Balkan states had become increasingly willing to cooperate with the Yugoslavia Tribunal. This was manifested in such dramatic developments as the transfer of Slobodan Milosevic to stand trial in The Hague, which took place in late June of 2001. By contrast, Rwanda had grown more and more negative about its international court, threatening to block cooperation altogether and literally jeopardizing all future activities.' William A. Schabas, book review: *International Justice in Rwanda and the Balkans, Virtual Trials And The Struggle For State Cooperation*, by Victor A. Peskin. New York and Cambridge: Cambridge University Press, 2008. On May 26th 2011, Ratko Mladić was captured. Mladić is a former commander of the Bosnian Serb Army (the VRS), who has been under indictment before the International Criminal tribunal for the Former Yugoslavia (ICTY) since 1995 for genocide, crimes against humanity and war crimes. The broad question, partly addressed by this study, for the international community and its legal order is: How would justice for the horrors of the Bosnian genocide be satisfied if Serbia, as a sovereign state, did not cooperate with the tribunal?

⁶⁸ Malcolm N. Shaw, *International Law*, 6th ed, Cambridge University Press, 2008, p. 686; c.f. the Joint Declaration of Judges Evensen, Tarassov, Guillaume and Aguilar Maudsley, the *Lockerbie* case, ICJ Reports, 1992, pp. 3, 24.

extradition include: the principle of double criminality, i.e. that the crime involved should be a crime in both states concerned; the principle of specialty, that a person surrendered may be tried and punished only for the offence for which extradition had been sought and granted; the practice of excluding political crimes as a reason for extradition; the principle *aut dedere aut judicare* which refers to the legal obligation of states to either extradite or prosecute persons whose extradition is requested⁶⁹.

If we analyze these principles we can reach the conclusion that none of them is in contradiction with the procedural effect of *jus cogens* whatsoever. *Jus cogens* norms refer to universal norms, so the principle of double criminality is by definition satisfied. Violation of these norms can never be defined as a 'political crime'. Finally, since the *ratione* for the *jus cogens* concept in human rights enforcement is judicial, criminal proceedings in a case when a state is willing to prosecute the *jus cogens* effect is no longer needed. In other words, a state can opt either to prosecute or to extradite.

Jus cogens, due to its normative impact as a non-derogable norm, represents an argument more over state discretion within the sphere of jurisdiction. However, 'the duty to prosecute or extradite is more inchoate than established, other than when it arises out of specific treaty obligations'⁷⁰ even though there is a strong *rationale* for using the *jus cogens* notion in extradition. 'Recognizing certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite'⁷¹ since the values it protects are the fundamental norms of the international legal order: 'the existence of an international community (a *civitas maxima*) with a common interest in repressing international crimes'⁷². It is a substantive value of peremptory norms which in case of violation calls for immediate judicial proceedings, since these norms are fundamental to the international community. Thus, leaving this issue to the discretion of the state would be unreasonable.

⁶⁹ *Ibid.*, pp. 686, 687.

⁷⁰ M. Cherif Bassiouni *op. cit.*, p. 67.

⁷¹ *Ibid.*, p. 66.

⁷² Robert Cryer et al., *op. cit.*, p. 72.

Another issue regarding extradition might be interesting for discussion. In a case when a person accused of a serious violation of human rights which amounts to *jus cogens* prohibition was abducted the normative impact of a peremptory norm could make the abduction (or 'irregular rendition') legitimate, and consequently legal. These cases are in some courts justified according to the maxim '*male captus, bene detentus*'. The phenomenon, also known as the 'Eichmann exception' has been argued with regard to 'universally condemned offences', which clearly corresponds to the violation of *jus cogens* human rights.⁷³ This line of argumentation, recognized in the practice of states, suggests that if the crime in question amounts to *jus cogens*, which is a universally accepted norm from which no derogation is allowed, it consequently justifies irregular extradition. In other words, the need to establish the legal order prevails over the method used for capture.

The *jus cogens* character of some rights prohibits the right of the state to extradite in cases when extradition can lead to a serious violation of human rights: torture, the death penalty or other grounds. 'This is in keeping with commitments made in certain human rights treaties and the Soering principle that a State is bound by its human rights obligations with respect to extradition.'⁷⁴ The significant impact of *jus cogens* on human rights enforcement is in this aspect unambiguous.

To summarize, peremptory norms confront state sovereignty in the field of extradition. They render an additional legal basis for enforcement of the *aut dedere aut judicare* principle and provide justifications for irregular rendition and abduction in cases when a state is not willing to extradite. They limit state discretion in extradition in cases when the extradition process can lead to human rights violations of a *jus cogens* character.

⁷³ *Ibid.*, p. 101.

⁷⁴ *Ibid.*, p. 98.

3.1.2. *Jus cogens* and universal jurisdiction

Establishing jurisdiction over crimes involving human rights violations and persons involved is a starting point in criminal proceedings. Thinking about gross violations of human rights around the world with the idea that the perpetrators will never face justice due to procedural issues is a pessimistic picture. The reasons for this situation range from failed/failing states, or a weak judicial system to the level of development, political culture and human rights standards of a certain state. If a state is unwilling or unable to prosecute a perpetrator, what are the chances that justice will ever be satisfied?

Jurisdiction is one of the features of state sovereignty. 'The concept of jurisdiction revolves around the principles of state sovereignty, equality and non-interference.'⁷⁵ It would be hard to imagine one legal concept without the other. Jurisdiction is granted to a formally constituted legal body in order to deal with and make pronouncements on legal matters and to administer justice within a defined area of responsibility. In the 1970 U.N. Resolution 2625 (XXV) juridical equality is stipulated as an element of the sovereign equality of states.

The application of *jus cogens* brings in a new concept of jurisdiction, which is neither territorially nor personally based. The basis of jurisdiction, the legal basis for its legitimacy, is the universality of the value that is jeopardized by the commission of certain crimes. The concept of universal jurisdiction as a justification for extra territorial application of the domestic law of a certain state over a person and crime which are not necessarily linked to a 'sovereign jurisdiction', is often based on *erga omnes* obligations. There are authors who state that 'the . . . principle [of universal jurisdiction] should now be seen as having its theoretical basis in the concept of *erga omnes* obligations'⁷⁶ However formulated, via *jus cogens* or *erga omnes*, the notion of universal jurisdiction has to be based on universal values and must be articulated through a legitimate legal interest for the protection of these values. As stated in broad terms by the Supreme Court of Israel

⁷⁵ Malcolm N. Shaw, *op. cit.*, p. 697.

⁷⁶ Rosanne van Alebeek, 'The Pinochet Case: International Human Rights Law on Trial', 71 BYIL (2000), p. 34.

in the Eichmann case, 'it is the universal character of the crimes in question which vests in every State the authority to try and punish those who participated in their commission'.⁷⁷

If the international community recognized a vast majority of political rights as a set of universal values and gave it non-derogable character it seems reasonable and legally justified to introduce a concept of *jus cogens* and universal jurisdiction in order to achieve a UN Charter proclaimed goal – protection of human rights. The interrelation between *jus cogens* and *universal jurisdiction* is well supported by the doctrine⁷⁸.

Some conventions establish what might be termed a quasi-universal jurisdiction in providing for the exercise of jurisdiction upon a variety of bases by as wide a group of states parties as possible coupled with an obligation for states parties to establish such jurisdiction in domestic law. In many instances the offence involved will constitute *jus cogens*. The views sometimes put forward that where a norm of *jus cogens* exists, particularly where the offence is regarded as especially serious, universal jurisdiction as such may be created.⁷⁹

The elaboration of universal jurisdiction can be found in the *Furundzia* case, at the International Criminal Tribunal for the Former Yugoslavia, based on the prohibition of torture as *jus cogens* norm. It elaborates the scope of universal jurisdiction entitling a state to investigate, prosecute, punish or extradite individuals accused of committing the crime of torture.

[I]t would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.⁸⁰

Furthermore, it elaborates the effects of *jus cogens* towards state sovereignty: in the sense of *jus contrahendi*, state capacity to get into contractual relations, it is clearly limited and

⁷⁷ See Attorney-General of the Government of Israel v. Adolf Eichmann 36 I.L.R. 298;

⁷⁸ R. van Alebeek, *op. cit.*, p. 29.

⁷⁹ Malcolm N. Shaw, *op. cit.*, p. 673. It should be noted that Prof. Shaw differentiates *quasi-universal jurisdiction* proclaimed by the mentioned treaties, which includes the presence of a person in a state exercising jurisdiction, from '*universal jurisdiction* as such, where, for example, a pirate may be apprehended on the high seas and then prosecuted in the state.' *Op. cit.*, p. 674.

⁸⁰ *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, para. 156.

draws a conclusion that there should not be a ban on the state judicially intervening in a certain matter if the crime committed arouses universal concern.

Indeed, it 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.⁸¹

Universal jurisdiction should be understood as a result of the development of human rights and international criminal law, rather than a treaty based way of determining jurisdiction. It was clear in the *Jorgic* case before European Court of Human Rights when this court supported the reasoning of the German courts and found that there had been no violation of Article 6 § 1 or Article 5 § 1 of the Convention in so far as the applicant complained about the German courts' lack of jurisdiction to try him on charges of genocide. Although the concept of universal jurisdiction was not explicitly referred to in the Genocide Convention⁸², the court found that states were under an *erga omnes* obligation to prevent and punish genocide as a crime, which gave Germany the right to establish jurisdiction *ratione materiae* and *ratione personae*. In other words, every other state *mutatis mutandis* would be entitled to prevent and punish genocide.

However, pursuant to Article I of the Genocide Convention, the Contracting Parties were under an *erga omnes* obligation to prevent and punish genocide, the prohibition of which forms part of the *jus cogens*. In view of this, the national courts' reasoning that the purpose of the Genocide Convention, as expressed notably in that Article, did not exclude jurisdiction for the punishment of genocide by States whose laws establish extraterritoriality in this respect must be considered as reasonable (and indeed convincing).⁸³

Article VI of the Genocide Convention which established jurisdiction over the crime of genocide, basing it on territoriality and the jurisdiction of international courts, was

⁸¹ *Ibid.*

⁸² See Article VI of the Genocide Convention, 'Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.'

⁸³ ECHR *Jorgic v. Germany* Judgment, July 12, 2007, para. 68.

interpreted according to the aim of the Convention. This might be a sign of an emerging practice concerning human rights conventions, whose aim is clear – to promote human rights and to prevent and punish violations. This conclusion might be extensive but still it corresponds to the main idea of international human rights as a value of the contemporary international legal order. In that way, rights given a peremptory character would give rise to the enforcement of universal jurisdiction. Unfortunately, there can be found no state or international practice regarding many human rights where universal jurisdiction is established. In the *Jorgic* case, in order to support its decision, the Court referred to the statutory provisions and case-law of numerous other Contracting States to the Convention (for the Protection of Human Rights) and by the Statute and case-law of the ICTY. However, it is still reasonable to believe that human rights development will give more prominence to *jus cogens* and its effect towards universal jurisdiction. A legitimate precedent in this matter would easily become international custom.

In *Yerodia* (Arrest Warrant Case) the International Court of Justice had to deal with the immunity of the Foreign Minister of the Democratic Republic of Congo, who was the subject of an international arrest warrant issued by a Belgian investigating judge. Although the primary focus was on immunities, not on jurisdiction (see *infra* note 85), so that the decision was seen as a blow to universal jurisdiction, it should be noted that the majority of judges who expressed a view on the matter supported the universality principle and only one of the judges questioned the use of universal jurisdiction where a person is found in the territory of the State asserting jurisdiction. Three of the four judges who criticized universal jurisdiction appear only to be referring to such jurisdiction being asserted *in absentia*.⁸⁴

The issue of jurisdiction is more complex than what the author refers to in this paper, which has a specific focus on argumentation as to how *jus cogens* overrides state immunity and what is the legal and legitimate basis for that. For a crime, a violation of *jus cogens* human rights, to be included in universal jurisdiction, there must be an

⁸⁴ Alain Winants, 'The Yerodia Ruling of the International Court of Justice and the 1993/1999 Belgian Law on Universal Jurisdiction' (2003) 16 LJIL 491, at p. 500.

international treaty clause or provisions of national laws which cover certain crimes, the nationality of the perpetrator, the place of commission etc. Section 134 of the Criminal Justice Act 1988, which entered into force on 29 September 1988, made torture, wherever committed, a criminal offence under United Kingdom law triable in the United Kingdom.⁸⁵ Although the author's intent is to show the procedural effects of *jus cogens* with regard to human rights implementation, procedural and practical difficulties⁸⁶ stemming from the concept of *universal jurisdiction* connected to aspects of the *jus cogens* notion were, for the reasons mentioned, omitted.

Scholars have also observed that *jus cogens* 'poses two essential problems for International criminal law: one relates to legal certainty and the other to a norm's conformity to the requirements of the principles of legality'⁸⁷. The principle of legality (*nullum crimen sine lege*) is probably not as grave an issue of *jus cogens* since violations of *jus cogens* should be universally accepted and recognized. The issue of certainty, though, due to the fact that *jus cogens* is not codified or enshrined in any document, might raise the question of progressive steps in international forums with regard to this notion. That eventual development would have a crucial significance for international human rights.

To conclude, *jus cogens* norms contribute to the enforcement of human rights, overriding state jurisdictional sovereignty, through the concept of universal jurisdiction. The implications of this legal institution which is emerging in the international legal order are obvious: human rights cannot be an exclusive issue of the judicial bodies of a sovereign state, especially when it is either unable or unwilling to treat human rights in accordance with the law. They bring *erga omnes* obligations and the other states, as members of a community to which these obligations are owed, have a legal interest to enforce human rights through their own judicial bodies. Furthermore, the final repercussion of *jus cogens* is that it narrows the margins of impunity which represent a crucial danger to the idea and reality of human rights.

⁸⁵ ECtHR., *Al-Adsani v. United Kingdom*, Judgment of 21 November 2001, available at: <http://hudoc.echr.coe.int>, para. 33.

⁸⁶ See Robert Cryer et al., *op. cit.*, 2010, pp. 60, 61.

⁸⁷ M. Cherif Bassiouni, *op. cit.*, p. 71.

3.2. Can *jus cogens* waive immunity?

When it comes to international criminal law, prosecution of international human rights violations, immunities of state officials appear to be the other name for impunity. The issue is complex due to the fact that immunities are obtained domestically, by proper laws, and their existence is confirmed in the international plane as a customary norm and through certain international treaties. As noted before, immunities on the international level are an explicit reflection of state sovereignty, and those are 'to be construed nevertheless as an essential part of the recognition of the sovereignty of foreign states, as well as an aspect of the legal equality of all states'⁸⁸. When immunities are applied, jurisdiction cannot be exercised as they preclude the usual application of a state's legal powers⁸⁹.

In 2004 the UN adopted the *Convention on Jurisdictional Immunities of States and Their Property* which stipulates in article 4 that 'a State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention. This, so called sovereign immunity, defined in this manner reflects the old Roman law principle, applied later on a state-centered world order, saying that '*par in parem imperium non habet*'.⁹⁰ In determining the scope of immunity, the appropriate assessment should answer the question whether a state acts

⁸⁸ Malcolm N. Shaw, *op. cit.*, p. 697.

⁸⁹ For scholarly writings supporting the idea that *jus cogens* trumps state immunity on this issue see: Bianchi, 'Denying State Immunity to Violators of Human Rights', 46 *Austrian J Public Int'l L* (1994) 195; Clapham, 'National Action Challenged: Sovereignty, Immunity and Universal Jurisdiction before the International Court of Justice', in M. Lattimer and P. Sands (eds), *Justice for Crimes Against Humanity* (2003), at 303; Reinmann, 'A Human Rights Exception to Sovereign Immunity: Some Thoughts on *Princz v Federal Republic of Germany*', 16 *Michigan J Int'l L* (1995) 403; Karagiannakis, 'State Immunity and Fundamental Human Rights', 11 *Leiden J Int'l L* (1998) 9; A. Cassese, *International Law* (2005), pp. 105-108; Reece Thomas and Small, 'Human Rights versus State Immunity: Is there Immunity from Civil Liability for Torture?', 50 *Netherlands Int'l L Rev.* (2003), 1; Bartsch and Elberling, '*Jus Cogens* vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the *Kalogeropoulou et al. v. Greece and Germany Decision*'; Belsky, Merva and Roht-Ariaaza, 'Implied Waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law', 77 *California L Rev* (1989) 365.

as a sovereign (*jure imperii*) or non-sovereign (*jure gestionis*). It is clear that immunity cannot be fully applied when the state acts in its private, *jure gestionis* capacity. Also, immunities can refer to the state as a sovereign, to its officials and agents (*ratione personae* immunities) and other functional immunities (international organization officials, ambassadors etc.).

When it comes to immunity of a state as a party in cases in front of another state's courts, the author would like to draw attention to a pending case at the ICJ, *Germany v. Italy*, referring among others to the *Ferrini* case, where the Federal Republic of Germany instituted proceedings against Italy before the International Court of Justice claiming that "Italian judicial bodies have repeatedly disregarded the jurisdictional immunity of Germany as a sovereign state."⁹¹ In the *Ferrini* judgment by the Corte di Cassazione of March 11, 2004, the Corte di Cassazione decided that Italy held jurisdiction regarding a claim brought by a person who had been deported to Germany to perform forced labour. This decision has been confirmed by the Corte di Cassazione in several decisions in 2008. In October 2008, an Italian court ordered Germany to pay compensation to the families of nine victims killed by the German army in Civitella, Tuscany in 1944. What can be interesting for us in this case is that it deals with forced labour, whose prohibition is recognized as a *jus cogens* norm. The Court's findings might be an extreme contribution to the general issue of immunities and the impact of *jus cogens*.

As far as regional human rights courts are concerned, the initial case regarding the issue of immunity waiver related to *jus cogens* at the European Court of Human Rights, was *Al-Adsani vs. The United Kingdom* (Application no. 35763/97)⁹². The Grand Chamber of the Court decided that Kuwait could rely on state immunity against a claim brought in the United Kingdom concerning acts of torture allegedly committed by a member of the Kuwaiti government. This case referenced to important legal aspects of

⁹¹ <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&k=60&case=143&code=gi&p3=6>

⁹² The applicant alleged that the English courts, by granting immunity from suit to the State of Kuwait, failed to secure enjoyment of his right not to be tortured and denied him access to a court, contrary to Articles 3, 6 § 1 and 13 of the Convention. ECtHR., *Al-Adsani v. United Kingdom*, Judgment of 21 November 2001, available at: <http://hudoc.echr.coe.int>.

the problem. Although the judgment had been reached by the narrowest possible majority of nine votes to eight, it might be useful to point out some aspects of the applicant's reasoning, elaborated and supported by dissenting opinions of several judges.

The working group of the International Law Commission (ILC), as stated in the judgment, found that national courts had in some cases shown sympathy for the argument that states are not entitled to plead immunity where there has been a violation of human rights norms with the character of *jus cogens*. This shows that the practice of national courts shows no certain, definitive attitude towards the notion of state immunity for breaches of peremptory human rights. Nevertheless, in most cases the plea of sovereign immunity had succeeded.⁹³

The ILC working group, as explained in the judgment, went on to note developments in support of the argument that a state may not plead immunity in respect of human rights violations: first, the exception to immunity adopted by the United States in the amendment to the Foreign Sovereign Immunities Act (FSIA) applied by the United States courts in two cases; secondly, the *ex parte Pinochet (No. 3)* judgment in which the House of Lords "emphasized the limits of immunity in respect of gross human rights violations by State officials".

The dissenting opinions were more focused on theoretical legal reasoning for their decisions. The argumentation line is narrowly connected to the analysis of *jus cogens* norms and their normative impact, to which the author pointed in the first part of the research. Namely, immunities guaranteed to a state in civil proceedings reasoned by comity in international relations cannot trump the legal normative potential of norms which are absolute and non-derogable.

⁹³ The cases to which the Commission referenced: (United Kingdom) *Al-Adsani v. State of Kuwait* 100 International Law Reports 465 at 471; (New Zealand) *Controller and Auditor General v. Sir Ronald Davidson* [1996] 2 New Zealand Law Reports 278, particularly at 290 (per Cooke P.); Dissenting Opinion of Justice Wald in (United States) *Princz v. Federal Republic of Germany* 26 F 3d 1166 (DC Cir. 1994) at 1176-1185; *Siderman de Blake v. Republic of Argentina* 965 F 2d 699 (9th Cir. 1992); *Argentine Republic v. Amerada Hess Shipping Corporation* 488 US 428 (1989); *Saudi Arabia v. Nelson* 100 International Law Reports 544. ECtHR., *Al-Adsani v. United Kingdom*, *ibid.* para. 23.

By accepting that the rule on prohibition of torture is a rule of *jus cogens*, the majority recognize that it is hierarchically higher than any other rule of international law, be it general or particular, customary or conventional, with the exception, of course, of other *jus cogens* norms. (...) In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails...⁹⁴

The judges in the dissenting opinion further elaborate that the rules on state immunity, being customary or conventional, do not belong to the category of *jus cogens*. They state that it is clear, from the historical and comparative perspective, that the rules of state immunity, deriving from both customary and conventional international law, have never been considered by the international community as rules with a hierarchically higher status.

It is common knowledge that, in many instances, States have, through their own initiative, waived their rights of immunity; that in many instances they have contracted out of them, or have renounced them. These instances clearly demonstrate that the rules on State immunity do not enjoy a higher status, since *jus cogens* rules, protecting as they do the “*ordre public*”, that is the basic values of the international community, cannot be subject to unilateral or contractual forms of derogation from their imperative contents.⁹⁵

This line of argumentation, as a reflection of legal doctrine of contemporary international law gives solid reasoning for *jus cogens* legal effect which supersedes immunity as such. Both effects, that of *jus cogens* and that imposed by immunities, are procedural, but the normative impact of *jus cogens* prevails; within a hierarchy of rules it has primacy.

Due to the interplay of the *jus cogens* rule on prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect.⁹⁶

The practice of the courts was not really in the direction of applying this legal reasoning. In *Jones v. Saudi Arabia*, the House of Lords was dealing with claims that individuals had been systematically tortured while in official custody in Saudi Arabia. In this case, the

⁹⁴ ECtHR., *Al-Adsani v. United Kingdom*, *ibid.* Dissenting Opinion of Judges Rozakis and Caflisch.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

House of Lords referred to the *Al-Adsani* case arguing that there is a substantial difference between immunity and *jus cogens*, that those cannot be put side by side. In other words a rigorous emphasis was placed on the distinction between the prohibition of torture as a *substantive rule* of law and the existence of the rule of immunity which constitutes a *procedural* bar to the exercise of jurisdiction and does not contradict the prohibition.⁹⁷ Thus, immunity as such does not fall within the hierarchy of norms since it is just a procedural bar, without a substantive element putting it in a separate set of norms. The argumentation offered cannot stand for the simple reason that procedural legal institutions such as immunity, when affecting substantive rules of international law (prohibition and punishment of torture), necessarily fall within a broader aspect of the norm hierarchy. That is the only way to enable the legal order to be consistent, as was explained in the dissenting opinions in the *Al-Adsani* case. 'A state committing the breach of *jus cogens* waives the entitlement of sovereign immunity for those breaches. Such acts are null and void and cannot generate legal benefits for the wrongdoer, such as immunity pursuant to the general principle *ex injuria jus non oritur*.'⁹⁸ These norms are to be taken as a part of a broader legal order, in their mutual relation and legal effects they generate. The outcome of that doctrine reflected in *Jones* is 'an unfortunate thread of judicial decisions, which do not properly examine the impact of the hierarchy of norms on State immunity, and consistently uphold the impunity of the perpetrators of torture as well as the denial to victims of the only available remedy'⁹⁹

The Canadian Court of Appeal affirmed in the *Bouzari* case that *jus cogens* prevails over conflicting customary law to which, in the court's view, state immunity belonged, but maintained that in view of state practice customary law still provides immunity for

⁹⁷ See [2006] UKHL 26, para. 24, para. 44.

⁹⁸ A. Orakhelashvili, *State Immunity and Hierarchy of Norms: Why the House of Lords Got it Wrong*, *European Journal of International Law*, Volume 18(5), 2007, pp. 955-970.

⁹⁹ A. Orakhelashvili, *op. cit.*, p. 955. Orakhelashvili points out another problematic aspect of this decision, regarding the interpretation of Article 14 of the UN Convention against Torture: 'Therefore, *Jones* presents with the conflict of interpretation made by the individual state party to the Convention, and that produced by the Committee that has been designated under the Convention as the body responsible for interpreting and implementing the Convention. In this sense, *Jones* displays a lack of respect for the United Nations system.', *ibid.*, p. 963.

acts of torture. As this court found, a peremptory norm of customary international law or rule of *jus cogens* is a higher form of customary law.¹⁰⁰

When it comes to criminal proceedings the situation is rather different. In *Pinochet*¹⁰¹, the House of Lords held that the former president of Chile was not entitled to immunity in respect of acts of torture allegedly committed in Chile. Pinochet was not entitled to immunity in extradition proceedings (i.e. criminal proceedings) with regard to charges of torture and conspiracy to torture where the assumed acts took place after the states involved (Chile, Spain and the UK) had become parties to the Convention against Torture, although the decision focused on head of state immunity and the terms of the Convention. That case, however, concerned criminal proceedings against an individual, not civil proceedings against the state of Chile.

The problem arises when the person whose immunity is in question is incumbent. Individuals in office (presidents, ministers of foreign affairs and ambassadors) enjoy absolute immunity based on the principle of functionality. As the International Court of Justice stated in the *Arrest Warrant* case¹⁰², although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law¹⁰³. The court explained that immunity does not grant impunity and it cannot 'exonerate the person to whom it applies from all criminal responsibility'. In paragraph 61, among other ways of determining responsibility which undoubtedly reflect state sovereignty power it exemplifies:

¹⁰⁰ *Bouzari v. Islamic Republic of Iran (Court of Appeal for Ontario)*, 30 June 2004, Docket: C38295, available at <http://www.ontariocourts.on.ca/decisions/2004/june/bouzariC38295.pdf>.

¹⁰¹ The House of Lords in *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet*(No. 3), [2000] A.C. 147.

¹⁰² *Congo v. Belgium (Arrest Warrant case)* [128 ILR 60].

¹⁰³ Their dissenting opinions in this case were focused on a crucial point, that logically the question of jurisdiction precedes that of immunity since there must be immunity from something. The court, nevertheless, found that it had not needed to determine the lawfulness of Belgium's assertion of universal jurisdiction. *Congo v. Belgium (Arrest Warrant case)* [128 ILR 60] para. 64.

Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.¹⁰⁴

That is exactly the point where *jus cogens* norms turn out to be useful, since they enable other states' forums to impose jurisdiction, which is not necessarily personally and territorially limited as was discussed in the chapter dealing with universal jurisdiction.

The development of international criminal law, enshrined in the Rome statutes, gives evidence of an opposite stream of thinking with regard to immunities. In Article 27 it is stipulated that immunities connected to the official capacity of a person will not be taken into account when exercising the Court's jurisdiction:

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.¹⁰⁵

The empirical question we can raise regarding immunity is would many war criminals in ICTY and ICTR many of them high officials (Milosevic e.g.) ever be prosecuted if their immunity was not waived by the home country authorities? How would the international criminal law system function with immunity as a procedural bar? The author believes that Article 27 is a way to put aside immunity in order to prosecute people accused of serious international crimes. The *rationale* is same as already elaborated: a procedural norm cannot override norms which are foundational and crucial to the existence of the political and legal world order.

The recognition of sovereign immunity as a bar to determining jurisdiction, especially in civil suits and proceedings against officials who enjoy immunities, reflects the predominant doctrine in national and international jurisprudence. Nevertheless, our argumentation clearly pointed out the importance of *jus cogens* recognition related to immunities and gave substantial arguments. It reflects the doctrinal trend, which favours the primacy of *jus cogens* over state sovereignty. 'It is no longer possible, if it

¹⁰⁴ *Ibid.*

¹⁰⁵ Art. 27, Rome Statute of the International Criminal Court, available at <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

ever was, to consider that the view of primacy of *jus cogens* is an isolated trend of the small minority, while the majority of scholars support the 'traditional' or 'orthodox' blanket understanding of state immunity'¹⁰⁶.

The hierarchy of norms has to be thoroughly considered as a precondition for preserving international law and the values the world is based on today. It is a matter of values which are protected, which give the essence to the legal order, but also the victims who seek justice, as a goal without which human rights are simply inconceivable.

3.3. State responsibility for breach of *jus cogens*

Apart from the Vienna Convention on the Law of Treaties, the international document where *jus cogens* obtained a significant normative value is '*Articles on state responsibility for internationally wrongful acts*' (ARS), formulated first by the International Law Commission and later attached to a UN General Assembly resolution¹⁰⁷. Although the legal impact of this document is limited, due to the form of its adoption, the fact that it reflects customary law is sufficient for us to reflect on this document in the light of peremptory norms.

In the previous parts the normative impact of *jus cogens* with regard to criminal law and sovereign immunities was elaborated. In this part the author's aim is to show another legal avenue of human rights enforcement through the concept of *jus cogens* within the domain of state responsibility. In *Prosecutor v Furundzija*, para. 142, the ICTY said: 'Under current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torturers.'¹⁰⁸ If certain rights, whose *jus cogens* character is universally accepted, are systematically abused directly by acts, or indirectly

¹⁰⁶ A. Orakhelashvili, *op. cit.*, p. 964.

¹⁰⁷ UN General Assembly resolution 56/83 on the report of the Sixth Committee (A/56/589 and Corr.1).

¹⁰⁸ *Prosecutor v Furundzija*, *op. cit.*, para 142.

by state omissions, can the state be rendered responsible and what would be the eventual consequences of that responsibility?

The normative value of *jus cogens* has already been elaborated. These norms reflect customary and treaty rules from which no derogation is possible. Their existence entails the state obligation to respect them, since they reflect the values of the 'international community' which the vast majority of states perceive as norms of international law of higher status. Thus, any conduct of the state, as act or omission, which leads to violation of human rights with *jus cogens* status necessarily represents a breach of international obligation and leads to state responsibility.

Peremptory norms, as defined in the Vienna convention, are those 'accepted and recognized by the international community of *States*'. It is reasonable to conclude that since those norms are recognized by states that states are the main subjects in international law who should provide for compliance with norms of *jus cogens* status. Furthermore, since states are the most responsible agents in human rights protection and promotion, since they contractually accept the obligation to enforce these rights, the issue of state responsibility in this regard is apparent. 'Where there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail'¹⁰⁹.

Article 26 clearly points out that the circumstances precluding wrongfulness in chapter V of Part One (counter-measures, necessity etc.) cannot approve or excuse any derogation from a peremptory norm of general international law.¹¹⁰ If the circumstances, thus legal facts, are such that put the state in a condition that justifies derogation from a

¹⁰⁹ *Articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, (ARS with commentaries) p. 85 (available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf). In the *East Timor* case, the Court said that '... assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable'. *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, para. 29.

¹¹⁰ *Ibid.*

dispositive norm (contractual or customary) the conflict with peremptory norms would not be acceptable:

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

While in Art. 26 *jus cogens* is enshrined in a secondary rule of state responsibility and does not identify if there was a breach of primary obligation, Chapter III of Part Two entitled “Serious breaches of obligations under peremptory norms of general international law” sets out certain consequences of specific types of breaches of international law, namely *jus cogens*. These are the norms that give a legal interest in their protection to every state to invoke responsibility. Every State, by virtue of its membership in the international community, a legally organized unit with norms that define the interrelation among the states, has a legal interest in protection of the basic rights and accomplishment of essential obligations. As was elaborated in the *Barcelona traction* case:

By their very nature the former (the obligations of a State towards the international community as a whole, *author*) are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.¹¹¹

Peremptory norms, as explained in the first part, are characterized by their substantive and procedural aspect. The ‘dual nature’ of *jus cogens* norms which are on one hand fundamental norms that protect essential community values, and on the other hand *erga omnes* obligations owed to the community, giving rise to the legal interest of all states, reflects in the field of state responsibility.

What is the impact on human rights that are considered to be *jus cogens*? First, serious breaches of obligations arising under peremptory norms of general international law make a state, whose conduct is questioned, responsible. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to

¹¹¹ *Case concerning the Barcelona Traction, Light and Power Company (Belgium v Spain)* [1970] ICJ Rep 44, para. 33.

fulfill the obligation (Article 40, ARS). As explained in the commentaries, this article refers to ‘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’¹¹². Nevertheless, it can attract supplementary consequences, not only for the responsible State but for all other States. Article 41 of ARS stipulates that States must cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40 (Art. 41.1) and no State can recognize as lawful a situation created by that serious breach nor render aid or assistance in maintaining that situation (Art. 41.2).¹¹³ This rule, unlike the others in the ARS, has the legal value of a primary rule and significantly contributes to the normative impact of *jus cogens*. It fits into the framework of this study that human rights issues, especially when they obtain gravity and ‘trigger’ the notion of *jus cogens*, cannot be an exclusive matter of a sovereign state. The practical impact of this rule is immensely significant for human rights: cases in which states sell weapons to belligerent states, financially support dictatorships, sanctions and other diplomatic means of communication among states that affect human rights recognized as *jus cogens* are all to be seen through the lens of this article.

Secondly, Article 42 of ARS stipulates that a State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to the international community as a whole. Although procedural ARS articles might be useful in human rights implementation in cases when a state, on whose territory these rights were violated by another state, waives the right to invoke responsibility, human rights standards are notably different from state to state. In theory, this might lead to a situation in which states more sensitive to a human rights dimension with higher standards would be enabled to invoke responsibility of the third state (Article 48, ARS).

¹¹² *ARS with commentaries*, p. 112.

¹¹³ Although the articles represent customary law, Article 41 paragraph 1 and the positive duty of cooperation that it entails might reflect progressive development of international law. See *ARS with commentaries*, p. 114.

To conclude, the concept of *jus cogens* renders additional legal avenues for responsibility for violations of human rights that are attributable to the state. Additionally, Articles of state responsibility, reflecting customary law, impose obligations on states through *jus cogens* ensuring that the illegal consequences of a breach will not be accepted in the community. States are obliged to cooperate in order to annul a breach of *jus cogens*, i.e. in the perspective of this research paper: violation of rights recognized as peremptory norms.

CONCLUSION

It is a unanimous conclusion among scholars and practitioners that the time of human rights formulation is coming to an end, that the time of human rights' implementation has come. This is a reflection of the world in which numerous human rights are proclaimed, despite the unsatisfactory state of human rights standards in the vast number of states around the world. The study is, in its essence, focused on the question of *lex lata*, the *status quo* of international law, and *lex ferenda*, what the law will be, or should be. The changing nature of international law legitimises questioning the state of the art of present and dominant legal doctrines. It does not mean that the dilemma and collision between the principle of sovereignty of states and the idea of human rights, focused on the dignity of an individual or group can be easily resolved. This research, focused on the impact of *jus cogens*, should be understood as an examination of the legal spheres which give more prospects to effective human rights implementation.

The fundamental, starting point of the study is that *jus cogens* can be a legal exit from the dead-end road in which states are formally taking responsibilities for human rights implementation and turn out to be not responsible to anyone in cases when those are violated and justice not satisfied. Gross violations of human rights remain within the borders of sovereignty interpreted through various legal and political notions: state immunity, territorial jurisdiction, state internal affairs. Although there is not so much case law, which is actually the problem point of the research – a state centred international order which blocks the application of new legal concepts like *jus cogens* – the study gives argumentation supported by authorities, dissenting opinions and other legal sources to show that human rights implementation should not be blocked by the ubiquitous state sovereignty doctrine. The problem, however, remains dominantly present in international law, while sociology, political sciences and world studies clearly point out that sovereignty is significantly encroached on by globalization and all the processes it includes. The bedrock principle of the Westphalian system in the

seventeenth century seems to be losing its *raison d'être* in the present time. Redefining state sovereignty and its scope is needed within the sphere of public international law. The first part of the research reflected on this issue, putting sovereignty as a principle and sovereignty as a ground for the whole legal doctrine *vis-à-vis* the *rationale* of human rights law. There is no legal basis to put sovereignty so high among legal principles that peremptory norms cannot challenge it.

The second part of the research allowed the author to point out the correspondence between the norms of *jus cogens* and human rights norms. The inspiration of these norms, stemming from the natural law perspective, lies in the idea that certain values override written legal positivism and the contractual nature of international law. The author, however, remained within the reasoning and advocacy of the applicable international law. The philosophy of *jus naturalis* was given just as an image of the strong motivational power coming from the human rights perspective, changing the boundaries of contemporary international law.

The formation of *jus cogens*, however, differs from the formation of human rights. Customary rules allow objectors to abstain from a certain rule while international human rights treaties are open for signing, with the state's right to opt obligations. *Jus cogens*, on the contrary, represent *rules* which, by definition, require objectors' obedience. They do represent a certain type of international consensus on the existence of fundamental norms, but once they are recognized the state cannot neglect their normative impact. Being so highly positioned in the hierarchy of norms within the international legal order, they give an additional legal significance to human rights, and consequently their implementation.

The problem with the implementation of social, economic and cultural rights, as tested in a subsidiary hypothesis, will remain outside the scope of the *jus cogens* effect. The normative status of these rights remains within international treaties, the nature of their enforcement and loose state obligations do not reach the necessary threshold for recognition of a peremptory norm. The study examined the possibility of these human

rights to achieve the effects of peremptory norms through the concept of derivative *jus cogens*.

The third part gave the answer to the starting and main hypothesis of the research: the human rights implementation process can be advanced by the use of *jus cogens* impact on legal concepts associated with state sovereignty. That impact is capable of overriding the legal scope of other principles, such as state immunity or territorial jurisdiction for serious crimes, on the basis of the fundamental values that are protected and the legal right of the community of states to legitimately express their legal interest in the matter. The first part focused on criminal law, and the impunity of criminals empowered by the prerogatives of the state – arbitrary extradition, immunities for officials, exclusive jurisdiction etc. Universal jurisdiction, a new concept of determining the right judicial forum, based on the severity of a crime, is a direct result of the development of human rights and international criminal law, more than it is treaty based. It is a reflection of the human rights stream which defines certain crimes as universal and their punishment a legal duty of the community. The same reasoning was applied in the case of extradition. When it comes to state immunity, although it represents a customary norm, there is no legal basis for putting this procedural and functional norm on a higher level than norms which are substantially important for the international community. It would contradict the basis and the existence of the international order, cause impunity and deeply question the future of human rights.

In the last chapter of the third part the author advocated the possibilities of determining state responsibility in cases when *jus cogens* norms dealing with human rights are jeopardized. States have the primary obligation to render null and void all the legal consequences of *jus cogens* breach and to end the situation that subsequently emerged. It brings an additional value to human rights implementation.

States will, without any doubt, remain the strongest guarantees of human rights. The problem we face is the unwillingness or incapability of states to implement rights through their own executive and judicial mechanisms. However, in cases when other states and the international community can intervene, there must be a *rationale* for that

kind of intrusion into state sovereignty. That is how we see *jus cogens* norms, being norms of the highest normative, fundamental importance for the community. Defined as such, peremptory norms have a legal impact that challenges state sovereignty attributes and opens a legal avenue for overriding them with the unique aim of making human rights implementation viable. In that sense, implementing human rights via *jus cogens* is still a *lex ferenda*, human rights perspective of international law. Taking into consideration the development of international human rights and its institutions, changes in global society, and, above all, the legal argumentation advocated in this research paper, it is certain that this approach to human rights is slowly becoming part of the current, applicable *lex lata*.