

THE WAYS OF IDENTIFICATION OF JUS COGENS AND INVOCATION OF INTERNATIONAL RESPONSIBILITY

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Abstract: *This article deals with identification of jus cogens norms and international responsibility arising under a peremptory norms of general international law. The concept of jus cogens implies some kind of legal “superiority” of these norms over common traditional rules of international law. This concept is based on acceptance and recognition of these norms by international community of states (and of international governmental organisations) with the aim to protect its vital values and international legal order. The legal concept of jus cogens in international law was introduced by the Vienna Convention on the Law of Treaties (VCLT). This Convention, however, does not provide the explanation of the creation or identification of these norms. The idea of jus cogens norms was originally denied by the adherents of legal positivism and supported by the representatives of various natural schools. In author’s view jus cogens norms are to be identified not only in customary international law but also in conventional international law. The norms of jus cogens limit the will of states in their behaviour, protecting the fundamental values of the human civilization. Jus cogens norms are created in the same way as customary or conventional international law. When the customary or conventional rules of international law reach the status of jus cogens they acquire a special position and significance. These norms can be modified in very complicated way. Besides there is no general agreement as to which rules have this character. The main ways of jus cogens identification must be the practice of states and the decision of international courts. Violations of jus cogens norms endangering the whole international community entail special international responsibility.*

Keywords: *Jus cogens, customary and conventional international law, international responsibility, the Vienna Convention, serious breaches of peremptory norms, obligation erga omnes, identification of customary norms*

I. JUS COGENS

The concept of jus cogens norm is based upon an acceptance of fundamental and superior values within the international law system and the whole international system. It is generally recognised that peremptory norms are or may be embodied in customary law and treaty law as well. The notion of peremptory norms was so far nowhere in an official instrument defined and the qualification of it was in fact left to state practice and the jurisprudence of international tribunals. The concept of jus cogens was developed in international law doctrine, but it is still controversial with regard to the content and methods of its creation. The Vienna Convention on the Law of Treaties of 1969 introduced stipulations concerning jus cogens norms in Art. 53 and 64.

Art. 53 provides that:

“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised 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.”

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Art. 64 then stipulates that:

“If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”

The Vienna Convention of 1969 defined a peremptory norm as a norm accepted and recognised by the “international community of states as a whole” and as a norm from which no derogation is permitted and which may be modified only by a subsequent norm of general international law having the same character. Art. 66 of the Vienna Conventions stipulates that disputes involving the invalidity of treaties on the basis of violation of jus cogens norms under Art. 53 and 64 may be referred to the ICJ. The Vienna Convention adopted the conventional, consensual concept of peremptory norms. But rules of jus cogens are also embodied in customary international law, despite some controversy about their scale and content. In the author’s view of this study “jus cogens” and „peremptory norms are generally considered as synonym.

The notion of “peremptory norms” was probably established for the first time at the Vienna conference. The Vienna Convention suggests that “peremptory norms” mean the same as “jus cogens” (Art. 53 and 64). It was formerly objected, however, that the term “jus cogens” in international customary law denoted the norms whose character does not depend on “recognition” as it is in the case of the conventional concept of peremptory norms. The main drafters of the 1969 Convention Sir Gerald Fitzmaurice and Sir Humphrey Waldock originally avoided using the term “jus cogens”. They were convinced that operation of jus cogens norms is not dependent on acceptance and their recognition as such. Sir H. Waldock in his third report as a special rapporteur used the term “jus cogens” which met rather strong opposition. Nine members of the ILC had various objections against the use of this term.

The discussion at the Vienna Conference on Art. 53 confirmed the uncertainly and different views on nature and specification of jus cogens. In 1966 the ILC Report pointed out that “some jurists deny the existence of any rule of “jus cogens” in international law, since in their view the most general rules still fall short of being universal.” The emergence of rule having the character of jus cogens in doctrine of international law was a quite new phenomenon. The ILC confirmed that a treaty was void if it conflicted with a rule of jus cogens.¹ The full content of peremptory norms to elaborate was left to state practice and the jurisprudence of international tribunals. The ILC also decided not to include any examples of the rules of jus cogens into the Vienna Convention of 1969.

A legitimate question may arise what are the rules of jus cogens today? Is it sufficient only to state that they are norms or rules which safeguard the basic democratic and human values which are of concern to all states or the international community as a whole? It is generally recognised that some basic principles of international law embodied in the UN Charter represent jus cogens norms. I. Brownlie already in his Textbook of 1962 e.g. stated that “certain fundamental principles have recently been set apart as overriding principles

¹ Yearbook of the ILC. 1996, Vol. 2, p. 269.

of jus cogens which may qualify the effect of more ordinary rules”.² In the Oppenheim’s International Law of 1992 it was observed that “the full content of the category of jus cogens remains to be worked out in practice of states and in the jurisprudence of international “tribunals”. The authors of this textbook also stated that “the operation and effect of rules of jus cogens in areas other than that of treaties are similarly unclear”.³

The relationship between customary and treaty law⁴ is rather complex question. International law-making conventions are adopted to codify and to develop international customary law or (rarely) to modify it. On the other hand the treaties provisions may be replaced (infrequently) by new customary rules. There are principles *lex posterior derogat priori* and *lex specialis derogat generali*, which reflect priority of treaty or customary rules. Special position among sources of international law have “general principles of law” as a complex of norms including both custom and treaty law rules.

The function of jus cogens is to protect states from contractual obligations denying general interests and values of the international community states as a whole. A treaty contrary to a custom or to a general principle part of the jus cogens “would be void or voidable”.⁵ The content of the use cogens norms has been changing in accordance with development of the basic principles of international law. Jus cogens norms are not static but evolving legal concept. The respect and observance of jus cogens norms are rooted in the legal conviction of international community of states as a whole. Art. 53 of the Vienna Convention does not explain the process of the creation of jus cogens. Most of international lawyers consider Art. 53 as reflection of customary international law. Customary jus cogens norms are created by the same processes that created customary international law. For their formation both international law practice and *opinio juris* are required.

It seems that some scholars in some way still differentiate “jus cogens norms” and “peremptory norms” stating that “jus cogens norms are deemed to be peremptory”.⁶ The authors disagree as to what constitutes a peremptory norms and as to the means to identify a peremptory norm. Some authors describe jus cogens as “general principles” of international law. In any case we may say that international customary law (ICL) is a source of jus cogens. There is still some uncertainty as to the content of the jus cogens norms. It is generally maintained that international crimes as aggression, genocide, crime against humanity, war crimes, slavery and similar slave practices, torture and international terrorism represent violations of jus cogens norms. These crimes are prohibited by a general customary law and conventional law as well. These crimes threatening the peace and security affect the interests of international community as a whole. The states characterise the jus cogens norms by their conduct and state policy not only explicitly but also implicitly: The behaviour of state may consist of commission or omission. The proponents of

² BROWNLIE, I. *Principles of Public International Law*. Oxford: Oxford University Press, 3rd ed., 1984, p. 20 and p. 513.

³ Sir JENNINGS, R., Sir WATTS, A. *Oppenheim’s International Law*. Oxford: Oxford University Press, 9th ed. 1992, p. 8.

⁴ See e.g. VILLIGER, M. E. *Customary International Law and Treaties*. Dordrecht: Martinus Nijhoff Publishers. 1985.

⁵ BROWNLIE, I. *Principles of Public International Law*. Oxford: Oxford University Press, 3rd ed., 1984, p. 4.

⁶ HANNIKAINEN, L. *Peremptory Norms (Jus Cogens) in International Law Historical Development, Criteria, Present Status*. Helsinki: Finnish Lawyers’ Publishing Co. 1988.

natural law maintain that jus cogens norms are based on higher “legal values” and legal positivism stresses the “requirements of the principles of legality” (e.g. *nullum crimen sine lege*). Jus cogens doctrine was based and developed clearly on the basis of natural law respecting some “higher values” overriding the positivist’s “freedom of contract”.

The norms of jus cogens and obligation erga omnes are often presented as two sides of the same coins. Obligations erga omnes are directed against “all states”. The jus cogens norms of general international law are binding to all states of international community as well. Logically it means that norms of jus cogens would at the same time represent norms stipulating erga omnes obligations. On the other hand it does not mean that any erga omnes obligation must necessarily reach a level of jus cogens norm. In the Barcelona Traction case the ICJ described an essential distinction between the obligations of a state toward the international community as a whole, and those arising vis- à- vis another state in the field of diplomatic protection. The obligations of state toward the international community as whole ICJ described as “obligations – erga omnes”.⁷ The relationship between jus cogens and obligation erga omnes was not clearly analyzed in the ICJ jurisprudence or legal literature. This relationship was neither satisfactorily explained in the ICJ’s advisory opinion on Reservation to the Genocide Convention in 1951.⁸ The conventional jus cogens were embodied in both Vienna Conventions on the Law of Treaties of 1969⁹ and 1986.¹⁰ The conception of jus cogens in international law was affirmed by the ICJ e.g. in the Nicaragua case. The ICJ maintained that the prohibition on the use of force has the character of jus cogens norm.¹¹ There is growing acceptance of the jus cogens norms in the argumentation not only of lawyers but also in communication of government and international governmental organizations.

Some delegation at the Vienna criticized in this respect positivist theory.¹² Jus cogens norms have broad natural and human rights foundation. The jus cogens doctrine substantially influenced the development and content of the contemporary international law. ILC already in 1966 expressed the view that there is no simple criterion by which to identify a general rule of international¹³ law as having the character of jus cogens. At the Vienna Conference in 1969 Sir H. Waldock as the special consultant maintained that the ILC “base its approach to the question of jus cogens on positive law much more than on natural

⁷ See “By their very nature the former are the concern of all states. In view of the importance of the rights involved all States can be held to have a legal interests in their protection; they are obligations erga omnes”. ICJ Reports 1970, Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), p. 32.

⁸ I.C.J. Reports, Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of Genocide, p. 15.

⁹ The Vienna Convention on the Law of Treaties, 1969, 1155 UNTS, p. 3331, see Art. 53 and 64.

¹⁰ The Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 1986, Un Doc. A/Conf. 129/15. Art. 53 of this Convention is identical with the 1969 Convention.

¹¹ I.C.J. Reports 1986, p. 100.

¹² United Nations Conference on the Law of Treaties, Official Records, Second Session, 1970, p. 100. See e.g. the statement of the representative off the Federal Republic of Germany.

¹³ Yearbook of the ILC 1966, Vol., p. 247–248. The ILC also proclaimed that jus cogens is not the form of general rule of international law but the particular nature of the subject – matter with which it deals that may in the opinion of the Commission, give it the character of jus cogens, *ibid.* p. 248.

law”.¹⁴ At the conference many delegates believed that the form or source of jus cogens norms was not of essential importance in determining their peremptory character. Serious doubts were expressed whether it was necessary to specify the manner in which such norms came into being. The main criterion of peremptory norms was considered the fact that they served the interests of the whole international community.¹⁵ This approach was supported e.g. by A. Verdross in AJIL.¹⁶ The interests of international community and moral values to be regarded as “higher law” requires some form of universal approval of states. International law was by definition always formed by states and not only by moral aspirations without their expression in legal form. Art. 53 of the VCLT contains the requirement according to which peremptory norms should be “accepted and recognised by international community of states as a whole”. This is in fact the call for positive validation of peremptory norms through the acceptance and recognition by the community of states. This requirement brought the concept of jus cogens, “into the realm of positive law” and resulted in “a gradual positivisation of jus cogens”.¹⁷

From a legal point of view jus cogens norms creations implies also the emergence of non-consensual law-creating process. The idea that the acceptance of the jus cogens doctrine means the recognition of “a new source of law” producing generally binding rules allowing majority rule – making in the context of “higher law” has not been generally accepted. To support the contention that a new source of general international law was emerging was used Art. 53 of the VCLT. The proponents of this view argued that the sources of international law listed in Art. 38 (1) of the ICJ Statute do not involve the international community as a whole. However no new method of law – making may be assumed with regard to Art. 53 determination of jus cogens. In any case the norms of jus cogens are reflecting the fundamental interests of the international community. The question arises if and when peremptory norms “accepted and recognized by the international community of states as whole” bind even dissenters.

The existing peremptory norms bind the entire international community and no state is entitled to deny it. So the norms of jus cogens must bind even dissenters. Evidence supporting the existence of peremptory norms may be ascertained in the process of the ICL formation. The peremptory norms creations has not been a matter of majority rule making. A number of lawyers and states as well stressed the need of universal acceptance of jus cogens norms. With regard to a conventional peremptory norm accepted by a majority of states it is correct to assume that these norms would be valid for signatories of a treaty and not to all states. The conventional jus cogens norm does not apply to those states that objected to this norm from the beginning. The question is whether this position is valid also in case of ICL. It seems that a new state can't refuse to accept already existing inter-

¹⁴ UN Conference on the Law of Treaties, Official Records Vol. I, p. 327.

¹⁵ To this discussion see DANILENKO G. M. International Jus Cogens: Issues of law – Making. *European Journal of International Law*. 1991, Vol. 2, No. 1, pp. 42–65.

¹⁶ VERDROSS, A. Jus Dispositivum and Jus Cogens in International Law. *American Journal of International Law*. 1966, Vol. 60, No. 1. pp. 55–63. See p. 55, p. 58.

¹⁷ DANILENKO, M. International Jus Cogens: Issues of law – Making. *European Journal of International Law*. 1991, Vol. 2, No. 1. p. 46.

national law concerning jus cogens. The ILC stated in 1966 that the emergence of jus cogens is “too recent”.¹⁸ But nearly forty years after the concept of jus cogens remains rather unclear and practice of states is not sufficient enough to clarify the creation of jus cogens norms. The different positions relating to the “common heritage of mankind” as a peremptory norm of general international law were expressed at the UN Conference on the Law of the Sea (UNCLOS). The majority of states (mainly developing countries) supported this proposal originally submitted by Chile. A very small number of Western states clearly rejected the jus cogens character of the common heritage of mankind principle.¹⁹

There are many writers who are still very sceptical with regard to existence of jus cogens norms and their role in international law. Jus cogens has been recently described only “a vision of the international legal order”.²⁰ It is stated that the jus cogens concept have strikingly “unremarkable and highly controversial existence” with limited impact on the actual practice of international law. The jus cogens concept has been criticized for its ambivalent nature, the vagueness emptiness useless and potential for political abuse. It was claimed that jus cogens invariable relate to the practical usefulness of this concept as a rule of international law, which is devoid of any practical significance. So, in this view, jus cogens should not be viewed as a norm of international law, but rather as a basic idea or principle which exercises considerable influence on international making process.²¹ A number of the early writing on jus cogens was challenging the existence of the jus cogens norms and their conceptual basis.²² Very critical to the theory of jus cogens was e.g. Anthony D’Amato. He objected that jus cogens has “non substantive content” and it is merely an “insubstantial image of a norm, lacking flesh and blood”. He is speaking about Pandora’s Box approach to these “supernorms” and put three question awaiting their answers: “1. What is the utility of a norm of jus cogens (apart from its rhetorical value)? 2. How does a purposed norm of jus cogens arise? 3. Once arises, how can international law change it or get rid of it?”²³

Other authors were defending the concept of jus cogens and its usefulness and suggested various definitions of a jus cogens. This idea was supported already in 1937 by Alfred von Verdross. He argued that no juridical order can admit treaties which are “obviously in contradiction to the ethics of a certain community”.²⁴ In this way Verdross emphasized the natural law and moral foundation reflecting the jus cogens norms. In his article three decades later he confirmed that in the previous Article from 1937 he tried “to prove that

¹⁸ Yearbook of the ILC. 1966, Vol. 2, p. 248.

¹⁹ See UN Doc. A/Conference 62/GP/9 1980 (Chilean proposal); see e.g. statement of the US delegation: „The concept of the common heritage of making in the Convention adopted by the Conference is not jus cogens“. UNCLOS XVII, p. 243. Some authors require an examination of the role of the UNGA resolutions in peremptory norm – making.

²⁰ PETSCHKE, M. Jus Cogens as a Vision of the International Legal Order. *Penn State International Law Review*. 1989, Vol. 29, p. 250.

²¹ *Ibid.*, p. 237.

²² See SCHWARZENBERGER, G. International Jus Cogens. *Texas Law Review*. 1965, Vol. 43, p. 455, p. 469; SCHWELB, E. Some Aspects of International Jus Cogens as Formulated by the International Law Commission. *American Journal of International Law*. 1967, Vol. 61, p. 946.

²³ D’AMATO, A. It’s Bird, It’s Plane, It’s Jus Cogens. *Connecticut Journal of International Law*. 1990, Vol. 6, pp. 1–6.

²⁴ VERDROSS, A. Forbidden Treaties in International Law. *American Journal of International Law*. 1937, Vol. 31, p. 571.

even in international law there exist rule having the character of jus cogens, i.e. norms with which treaties must not conflict”²⁵ This second article was directed to defend the concept of jus cogens against the criticism raised by G. Schwarzenberger. A Verdross stressed that in general international law “some rules having the character of jus cogens exist, and that all treaties which are at variance with such rules are null and void”. In his view the criterion for these “absolute” rules consists in the fact that they do not exist to satisfy the needs of individual states but the “higher interest of the whole international community”. He also maintained that a norm having the character of jus cogens can “practically be created only by a norm of general customary law or by a general or multilateral convention”.²⁶

II. STATE RESPONSIBILITY

State responsibility is a basic institution of international law resulting from the international legal personality of every state.²⁷ On August 10, 2001 the ILC adopted finally the Draft Articles on Responsibility of States for Internationally Wrongful Acts,²⁸ which were approved by the UNGA 45 years after the ILC in 1956 started consideration of this topic. The first rapporteur was F. V. Garcia – Amador y Rodriguez, who submitted between 1956 and 1961 six reports. At the beginning of its work the ILC under the guidance of Garcia Amador directed its effort on the item “State responsibility for injuries to aliens and their property”. The text of Draft articles was then formulated successively under the guidance of special rapporteur R. Ago (1962–1979), who produced eight reports. W. Riphagen (1980–1986) presented seven reports, G. Arangio-Ruiz (1987–1996) elaborated also seven reports and J. Crawford was appointed in 1997. Already in 1962 it was proposed to change the definition of the topic on “the definition” of the general rules governing the international responsibility of state. The aim of this author’s contribution is not the discuss in detail the history of the topic on the state responsibility within the framework of the ILC. The purpose of this article is to describe the international responsibility of states which is entailed by a serious breach of obligations arising under peremptory norms of international law and identification of these norms as well. The great controversy in the ILC was over the notion of international crimes of state embodied in Art. 19 and 40 (3) in 1996 Draft Articles. Originally the ILC Draft articles on state responsibility in Art. 19 mentioned international crimes as distinguished to international delicts, both described in the framework of internationally unlawful acts. The breach of an international obligation so essential for the protection of „fundamental interests of the international community” as “whole” was here recognised as an international crime. All other international wrongful acts were described as „international delicts” only. A considerable number of lawyers considered the notion of state crimes for highly controversial, connecting the term „interna-

²⁵ VERDROSS, A. Jus Dispositivum and Jus Cogens in International Law. *American Journal of International Law*. 1966, Vol. 60, p. 55.

²⁶ *Ibid.*, p. 61.

²⁷ CRAWFORD, J. R. In: WOLFRUM, R. (ed.). *Encyclopedia of Public International Law*. Amsterdam, New York: North Holland, 2006; See also Draft Articles on Responsibility of States, Oxford, 2001.

²⁸ Official Records of the UNGA Fifty-sixth Session, Supplement No. 10 (A/56/10), 2001.

tional crimes” with penal responsibility of states. The ILC was originally able to justify inclusion of the international crimes into Draft articles taking into account the development in international law since 1945 (the concept of peremptory norms, recognised international criminal jurisdiction, prohibition of threats to or breaches of the peace and acts of aggression).

As examples of international crimes by states were given e.g. aggression, the colonial domination (maintenance or establishment, genocide, massive pollution of the atmosphere or the sea). In 2001 the ILC influenced by Crawford as a special rapporteur changed its approach to the concept of international crimes and decided to replace the term of international crimes by the notion of “any serious breach” by a state of an obligation arising under a peremptory norm of international law and not recognise any such situation as “lawful”.

The ILC in 1996 adopted a Draft Code of Crimes against the Peace and Security of Mankind.²⁹ The 1998 Rome Statute provides that its jurisdiction is limited to the „most serious crimes” of concern to the international community as a whole mentioning genocide, crimes against humanity, war crimes and aggression.³⁰ These crimes were formulated as crimes of individuals only (not of states) with their individual responsibility and liability in accordance with the Statue of the International Criminal Court. It is acknowledged that other international offences like e.g. prohibition of torture established also a norm of jus cogens. In many instances these acts (offences) will also constitute violation of jus cogens norms by states. In fact these jus cogens “offences” may include double meaning of responsibility: 1. international criminal responsibility and 2. international responsibility of states and international organisations. The ILC in its commentary recognised that this development had implications for the secondary rules of state responsibility originally reflected by a category of “international crimes of states” in contrast with all other cases of internationally wrongful acts (international delicts). The commentary stated that there were “no penal consequences for states of breaches of these fundamental norms” and mentioned for example, that the award of punitive damages is not recognised in international law “even in relation to serious breaches of obligations arising under peremptory norms”. The ILC in its commentary cited the judgement of the IMT in Nürnberg stating that „crimes against international law are committed by men, not by abstract entities...” On the other hand the Draft Articles did not taken into account, we may say “penal measures”, against Germany embodied in the Potsdam Agreement.

It is worth mentioning that e.g. M. Cherif Bassiouni speaking about international crimes maintains that “jus cogens refers to the legal status that certain international crimes reach”. At the same time he is mentioning that “obligatio erga omnes pertains to the legal implications arising out of a certain crimes characterization as jus cogens”. In his view international crimes that “rise to the level of jus cogens” constitute obligatio erga omnes which are inderogable”.³¹ In respect to the consequences of recognizing an international

²⁹ Report of the ILC 1996, Doc. A/51/10, p. 9.

³⁰ Doc. A/CONF 183/9 of 17 July 1998, Art. 5, see also legal.un.org/icc/statute/99_corr/cstatue.htm.

³¹ BASSIOUNI, M. CH. International Crimes; Jus Cogens and Obligatio Erga Omnes. *Law and Contemporary Problems*. 1996, Vol. 59, No. 4, p. 63.

crime as jus cogens, Bassiouni offers the “threshold question” whether such a status places obligations erga omnes upon states or merely gives them certain rights to proceed against perpetrators of such crimes. In this writer’s view, the implications of jus cogens are “those of a duty and not of rights” otherwise “jus cogens would not constitute a peremptory norm of international law”.³²

The ILC took generally the position that the term “international crimes” are concerned with the (penal) prosecution of individuals only and not with criminal behaviour of states. It was e.g. argued that the Rome statute for an International Criminal Court of 17 July 1998 likewise establishes jurisdiction over the most serious crimes of concern to the international community as a whole, but “limits” this jurisdiction to “natural persons” (Art. 25(1)). This article at the same time specified that no provision of this Statute “relating to individual criminal responsibility shall affect the responsibility of states under international law”.³³ International crimes were defined as breaches of an international obligation “so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by the community as a whole”. Art. 19 (3) of the 1996 Draft Articles provided examples of international crimes of states. It was mainly R. Crawford as a special rapporteur who expressed his fundamental doubts about the notion “international crimes of states” indicating their criminal responsibility when “the only penalties ever imposed on states after judicial process have been civil penalties or fines within the framework of European Union (EU)”. He wrote in 2006 that “strong reservations” as to the terminology of crimes were expressed within the ILC and in the comments of many governments, although “expressed continues to support the idea”.³⁴ In Crawford’s view “this depenalization of state responsibility has been generally welcomed” and “punitive damages have no application to states”. The notion of international crimes of states was eventually deleted from the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, being replaced by the term “serious breaches of a peremptory norms” (Art. 40 and 41) which expressed the concern of international community about the most serious breaches of international obligation under jus cogens. The special duties include the obligations of the third states: 1. not to recognize such a breach or its consequences as lawful; 2. to cooperate in suppression of these violations. A distinction was taken between the injured state or other injured entity (by inference) and a state who is seeking to maintain an interest in performance of the obligation independent of any individual injury (Art. 42 and 48). It was here recognized that every state is entitled to invoke responsibility for breaches of obligations to the international community as a whole, irrespective of their seriousness (Art. 48 (2) b). The whole Chapter III (of the Part Two) of the Draft Articles is dealing with the international responsibility which is entailed by a serious breach by a state of an obligation arising from violation of peremptory norm of (general) international law (Art. 40 (1)). The minor breaches of obligations arising under peremptory norms would not be concern of Chapter III.

³² Ibid., p. 65.

³³ Roma Statute of the ICC, 17 July 1998, A/CONF.183/9, Art. 25(4).

³⁴ CRAWFORD, J. R. In: WOLFRUM, R. (ed.). *Encyclopedia of Public International Law*. Amsterdam, New York: North Holland, 2006.

R. Crawford's stated that it is significant that the ILC settled eventually on serious breaches of peremptory norms rather than obligations to the international community as a whole as the defining term of Chapter III. He remembered that the ICJ in articulating the concept of obligations erga omnes in 1970 (the Barcelona Traction Case) has been concerned with invocation and not with the status of the breach as such. He also even stated that since then the "two terms have competed" in the literature and to some extent in the case law. In Crawford's view the 2001 ILC Draft articles treat peremptory norms as "concerned with substance" and obligations erga omnes as "concerned with invocation". He admits, however, that states may assume obligations to all other states without these obligations being peremptory or directly enforceable. Nevertheless, he comes to the conclusion that "there is no plausible example of an obligation erga omnes which is not also peremptory" and suggests "the two are different aspects of a single underlying concept".³⁵ The concept of the injured states is crucial for invocation of state responsibility. The implementation of state responsibility is governed by Part Three of the Draft articles. Arts. 42 and 48 are making a distinction between invocation of responsibility by an injured state and other states.

Art. 42 describes three cases when a state may be injured by a breach of an obligation if this breach is owed to: 1) that state individually; or 2) a group of states including that states and 3) international community as a whole. In the two last cases there is a condition that the breach of the obligation specifically affects that state or is of such a character as radically to change the position of all the other states to which obligation is owed with respect to the further performance of the obligation. There is the direct parallel with stipulations of Art. 60 (2) (b) and (c) of VCLT. Under Art. 48 (1) any state other than injured state is entitled to invoke the responsibility of another state if: 1. the obligation breached is owed to a group of states including that state, and is established for the protection of international community as a whole. Under Art. 48 (2) any state entitled to invoke responsibility under para. 1 of these Articles may claim from the responsible states: 1) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance Art. 30 (cessation and non-repetition and 2) performance of the obligation of reparation in accordance with the preceding articles, in the interests of the injured state or of the beneficiaries of the obligation breached. The requirements for the invocation of responsibility by an injured state are stipulated in Art. 43 (notice of claim by an injured state), Art. 44 (admissibility of claims and Art. 45 (loss of the right to invoke responsibility) by a state entitled to do so under Art. 48 (1).

According to Art. 48 any state may invoke responsibility for breach of an obligation owed to the international community as a whole (obligations erga omnes). Art. 48 rejected the idea of 1980 Draft that breach of certain obligations made all other states into "individually injured states". The present wording allows the invocation of the responsibility of the wrongdoing state by any one of the states identified and in the case of obligation to the international community as a whole to all states. R. Crawford stated that "this is public

³⁵ CRAWFORD, J. R. In: WOLFRUM, R. (ed.). *Encyclopedia of Public International Law*. Amsterdam, New York: North Holland, 2006, point 34.

interests standing, not the expression of a subjective rights". In his view new formulation in 2001 Draft articles permits states to act "in the collective public interest, a welcome development for the implementation of the international responsibility of states in areas concerning collective good or the common welfare."³⁶ Draft articles were not embodied in any international convention. The ILC itself recommended for the time being not to adopt a convention. The UNGA in 2001 and 2004 also endorsed this position.³⁷ Nevertheless international courts and state practice are relying on the Draft articles as a source of international law on state responsibility. In general most provisions reflect customary international law. Some provisions, including Arts. 40, 46 and 51 may have controversial character. Besides a dispute over some problems of state responsibility will not be always limited to the Draft articles, which in general articulate the secondary rules of state responsibility. There is still possibility to adopt international convention on state responsibility on some future, depending on the position of states". In the meantime the Draft article play very important role in consolidating norms on international responsibility. Draft articles stipulate in Chapter 5 of the Part One that "every international wrongful act entails the international responsibility of that state" (Art. 1). An international wrongful act of state occurs when conduct consisting of an "action" or "omission": 1. is under international law attributable to the state and 2. constitutes a breach of an international obligation of the state (Art. 2). The characterization of an act of state as internationally wrongful act is governed by international law and such characterization is not affected by internal law (Art. 3).

Chapter III is dealing with a breach of an international obligation by a state which exists when an act of that state is not in conformity with what is required of its origin or character (Art. 12). A breach of international obligations may also occur through a series of actions or omissions – breach consisting of a composite act (Art. 15). Chapter IV is devoted to responsibility of state in connection with the act of another state. A state which aids or assists another state in the commission of an internationally wrongful act is internationally responsible if 1. that state acted so with knowledge of the internationally wrongful act and 2. that act would be international wrongful if committed by that state (Art. 16). A state which coerces another state to commit an internationally wrongful act is internationally responsible (Art. 18). Chapter V is dealing with circumstances precluding wrongfulness as "valid consent" to the commission of a given act by another states (Art. 20) or if the act constitutes "a lawful measure of self-defence" taken in conformity with the UN Charter (Art. 21). The wrongfulness of an act of a state not in conformity with an international obligation toward another state is preceded if and to the extent that the act constitutes a countermeasure (Art. 22).

Art. 26 relates to compliance with peremptory norms stating that nothing in this chapter precluded 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. Part Two of the Draft articles describes the content of international responsibility of states

³⁶ Ibid., point 46.

³⁷ UNGA Res. 56/83 and UNGA Res. 59/35.

in Arts. 28–38 including “continued duty of performance” (Art. 29), “cessation and non-repetition” (Art. 30) and “reparation for the injury” (Art. 31). Injury includes any damage, whether material or moral, caused by the international wrongful act of a state (Art. 31 (2)). Chapter II describes in Art. 34–39 the forms of reparation as restitution, compensation and satisfaction, either singly or in combination, in accordance with this chapter.

In the ICJ’s advisory opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory the consequences of breaches by Israel of its obligation to respect the right of the Palestinian people to self-determination and obligations under international humanitarian law and international human rights law were discussed. The ICJ held that third states were under an obligation not to recognize the illegal situation resulting from the construction of the wall with regard to the character and the importance of the rights and obligation involved.³⁸ In R. Crawford view that although the ICJ made no express reference to Art. 40 and 41 “it did use, unacknowledged, actual words drawn from Art. 41”. Moreover the ICJ’s reference to the character and importance of the rights and obligations involved can be read as “an elliptical reference to the peremptory character of the norms in question rather than their erga omnes character.³⁹ Judge Kooijmans while agreeing on the illegality of the construction of the wall and on the consequences for responsible Israel he did not agree on the consequences for third states. He had “great difficulty in understanding what involves the duty of third states not to recognize an illegal act”.⁴⁰

R. Crawford was trying to explain this third states obligation not to recognize as lawful a situation by a serious breach of a peremptory norm as a prevention to “legitimate” the illegal act.⁴¹ R. Crawford also stated that the 1996 Draft articles (part one) covered all questions of responsibility arising from the breach of any international obligation of states. They were not limited to obligations of state owed to other states as distinct to obligations to all states or to the international community as a whole (obligations erga omnes). The obligations towards the international community as a whole were affirmed by the ICJ in the Barcelona Traction case.⁴² The ICJ noted that there exists an essential distinction between the obligations of a state towards the international community as a whole and obligations arising vis-à-vis another state. With regard to the obligations to international community, these obligations are erga omnes reflecting the interest of all states. The ILC in connection with rights and obligations enshrined by the Genocide Convention mentioned their character erga omnes taking into account the ICJ Reports of 1996.⁴³ According to the ILC commentary the recognition of the concept of peremptory norms in Art. 53 and

³⁸ I.C.J. Reports 2004, Advisory Opinion, para 159, 14.

³⁹ CRAWFORD, J. R. In: WOLFRUM, R. (ed.). *Encyclopedia of Public International Law*. Amsterdam, New York: North Holland, 2006, point 37.

⁴⁰ I.C.J. Reports 2004, para 231–32.

⁴¹ CRAWFORD, J. R. In: WOLFRUM, R. (ed.). *Encyclopedia of Public International Law*. Amsterdam, New York: North Holland, 2006.

⁴² Case Concerning the Barcelona Traction, Light and Power Co Ltd., para 33.

⁴³ I.C.J. Report 1996, Application of the Convention on the Prevention and Punishment of the Crime, p. 595, 616, para 31.

64 of the Vienna Convention „recognise” the existence of „substantive norms of a fundamental character, such that no derogation from them is permitted even by treaty”. This “recognition” in the Vienna Convention was marked as a “development”.⁴⁴ No distinction was drawn between treaty and non- treaty obligations. Art. 40 of 1996 Draft articles defined the term of “injured state” to broadly, allowing any injured state to take countermeasures. Any state could take countermeasures in response to an international crime, a breach of human rights, or the breach of certain collective obligations.

The 2001 Draft articles in Art. 48 are allowing countermeasures by other states than the injured states in two cases: 1. at the request and on behalf of any state injured by the breach, to the extent that the state may itself take countermeasures; 2. in response to the serious breaches (in Part Two Chapter III). Individually any state could take countermeasures in respect of such a serious breach. A number of responsibility items remained outside this 2001 codification topic governing the general rules on the international responsibility of the state. The ILC in 2006 e.g. adopted articles on diplomatic protection and in 2001 Draft Articles on Liability for Injurious Consequences of Conduct not Prohibited by International Law. Many separate topics within the problems of state responsibility were embodied in special conventions and treaties. The obligations of non-recognition imposed by Art. 41 are already embodied in general international law. For example genocide, aggression, apartheid and forcible denial of self-determination are mentioned as prohibited by peremptory norms of general international law, constituting “wrongs which shock the conscience of mankind”.⁴⁵

III. IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW

The identification of CIL is a new topic of the ILC. Sir Michael Wood as special rapporteur prepared already his fourth report. This essay is trying to address relationship between two constituent elements (state practice and *opinio juris*) of the international customary rule and to examine the role of treaties and resolutions of UNGA in the formation of customary law. Considerable role in the identification of CIL plays the ICJ jurisprudence. According to the preliminary ILC conclusions it is primarily the practice of states that contributes to the formation or expression of rule of CIL, which may take a wide range of forms. The practice must be general, widespread, representative and consistent. No particular duration of the “practice” is required. The customary rule is not opposable to the state concerned for so long as it maintains its objection (persistent objector). We may distinguish the traditional methods for the recognition of ICL and non-traditional approaches to identification (changes in technical means (internet) performing international practice).

It is important not to overemphasize only the role of “practice” in the creation and identification of ICL (e.g. with regard to the use of force). The second requirement (a subjective

⁴⁴ CRAWFORD, J. R. In: WOLFRUM, R. (ed.). *Encyclopedia of Public International Law*. Amsterdam, New York: North Holland, 2006.

⁴⁵ *Ibid.*, point 40.

element) *opinio juris sive necessitatis* has to be also met and must be regarded as mandatory. In the literature we may find two identification methods: 1) strict inductive method when e.g. the ICJ declares the existence of *jus cogens* norms only if it has been demonstrated that the “two requirements of Arts. 38 are present” (this approach was applied the North Sea Continental Shelf case; and 2) flexible deductive approach which has been found in the Nicaragua case. According flexible approach a) a complete uniformity of state practice is not necessary for customary rule to emerge; b) the loosening of the requirements of the existence of *opinio juris* if forthcoming; c) the recognition that ICL does not lose such nature when it is embodied in multilateral treaties. The strict approach was criticized on the ground that its formation was not representative in consequence of a few states practice only. In the flexible approach the international customary rule are declared on the basis of treaties or UNGA resolutions endorsed by a “large number” of states. This approach restraints the significance of “practice” and the role of “dissenting” states for the formation of international law. The reason for this “moderns” approach has been found in values as human rights environment and even prohibition of the use of force. This approach has been criticized for not strictly reflecting state “practice” and mostly “aspirational goals”.

International custom as “evidence of a general practice accepted as law” is listed in Art. 38 (1) (b) of Statute of the ICJ: a general practice and 2. acceptance of rule as law by states (*opinio juris*). The evidence of international law results from practice of states, including the executive, the legislature and the judiciary (mainly international). The evidence has to be found in various sources like government’s statements, communiqué’s from international conferences and meetings of international organizations, diplomatic communications etc., judicial decision, from legal literature.

The practice and *opinio juris* of states are distinct from practice and *opinio juris* of international organizations. Nevertheless the practice of international organizations may also contribute to the formation of ICL. Sometimes it is claimed, that some treaty provisions represent already evidence of the existing ICL, being so declaratory of CIL. The ICJ confirmed in the Nicaragua case that the treaty law and CIL can co-exist. The establishment of ICL is closely related to the precedents in international law. To identify when practice accompanied by acceptance has given rise to customary rule) of international law as *lex non scripta* is a rather difficult task. The Committee on the Progressive Development of International Law. and its Codification already in 1947 recommended in its report to the UNGA that the ILC considers “ways and means for making the evidence of CIL more available”.

Supporting the “two-elements” approach, the ILC enforced the role of *opinio juris*, significance of which was essentially mitigated in the approach taken e.g. by the ILA in its Statement of Principles Applicable to the Formation of General Customary International Law. Humphrey Waldock in his General Course on Public International Law in the Hague stated that recognition of the practice as law was “the essential basis of customary law”. Sir M. Wood as a rapporteur also wrote, that the test of ICL “must always be general practice that is accepted as law”. Very important is the relationship between the treaty law and a rules of ICL.

International practice (*usus longaevis*) is itself not able to create a rule of ICL. The classical theory of international law (the two – elements theory) requires for creation of ICL an established and widespread practice of state and *opinio juris*. These two elements are

closely intertwined. It seems that *opinio juris* is in some cases more substantial and state practice proves then the existence of *opinio juris* and so the existence of customary norm. There are cases where there is insufficient practice, but the states believe in the existence of customary law. There is often divergence between state's position in observation of particular rule of ICL and their, with an existing customary rule, inconsistent practice.

Some lawyers insist that the *opinio juris* raises more problems in part from serious conceptual difficulties "how one identifies it". There is also a substantial question of what constitute "general practice". It is not clear how widespread and uniform state practice must be. In theory the practice is supposed to be "general" in the sense that almost all of the nations of the world accept it. But "practice" is usually based on a highly selective survey of state practice that includes major powers and "interested nations". A general practice does not probably require to be universally accepted, and there is no indication how widespread a practice must be. It is e.g. stated that it is sufficient if such a practice reflects "wide acceptance" only among the states "particularly involved in the relevant activity". In this way in fact no acceptance of "international community as a whole" as a prerequisite for becoming general international law is required. The argument in favour of this statement has been found e.g. in the law of sea where the practice of sea powers and maritime nations will have greater significance than the practice of land-locked states and also in outer space law where the practice of the US and Russia or China will exert more dominant influence than other states. The exceptional position of certain nuclear states in this field is also clear.

IV. BRIEF CONCLUSIONS

Jus cogens norms were originally regarded more as an moral idea than a legal concept. As legal concept jus cogens is closely associated with application of certain legal norms contained in customary and conventional international law. These norms enjoy superiority over ordinary rules of international law. Art. 53 and 64 of the 1969 VCLT do not explain the creation of jus cogens norms. It only reflect their existence in international law. Besides this provision according its wording applies only for "the purposes of the present Convention". Nevertheless most of international lawyers consider stipulation of Art. 53 as a reflection of ICL. Customary jus cogens may be established naturally by the same norm – creating process that form customary international law. As a rule practice of states and *opinio juris* is required. According to some critics the definition in Art. 53 is "circular" and of "peculiar" wording. Art. 53 of the VCLT envisages the possibility that jus cogens norms may be changed, but no procedure was mentioned except the phrase that jus cogens norm "can be modified by a subsequent norm of general international law". According to Art. 53 "no derogation" is permitted from a norm of jus cogens. Some authors expressed the view that it was not clear whether peremptory international law has significance outside treaties.⁴⁶ ILC however stipulated that "it is not the form of a general rule of interna-

⁴⁶ American Branch of the ILA, Committee on the Formation of Customary International Law, Report on "The Role of State Practice in the Formation of Customary and Jus Cogens Norms of International Law", January 19, 1989, p. 7.

tional law but the particular nature of the subject matter with which it deals that may...give it the character of jus cogens.⁴⁷ The emergence of jus cogens norms presupposes their acceptance and recognition by the international community of states as a “whole”. This “threshold” requirement of “universality”, “acceptance and recognition” for the emergence of jus cogens is corresponding to the requirement of general customary law.

Despite some controversy and uncertainties about the jus cogens concept, it is useful and necessary to deal with this crucial problem in the development international law. On the other hand it is also important to exclude any political misuse of unilateral invocation of jus cogens. The definition of jus cogens or peremptory norms is still insufficient. The existence of a jus cogens norm could be probably established by subsequent practice. The task to elaborate the notion and content of peremptory norms remains rather ambitious and perspective for the building of new public order in the interest of the international community. There is still lack of clarity of the peremptory norms concept. Unfortunately no generally accepted definition of jus cogens exists. This study also reflects the jus cogens violations, which may have serious impact on the state responsibility. The international community of states accepts some international law norms as non-derogable which can be modified only by the creation of a new jus cogens norms. The concept of the conventional and customary peremptory norms in international law raises some substantial questions concerning their doctrinal background and the process of their creation. The concept of jus cogens norms implies “superiority” of these norms over “ordinary” international law norms. The norms which contradict to jus cogens shall be considered void. The creation of a peremptory norm depends on the acceptance and recognition of this legal status by the international community. No legal instrument, including the Vienna convention on the Law of Treaties (see Art. 52 and 53) pretend to explain the creation of jus cogens. Besides in the theory there is a problem of the relationship between “general” international law, customary international law and conventional international law. In the author’s view the contemporary general international law comprises both customary and conventional rules and norms of international law. The influence of considerations of jus cogens in international law is substantial despite some uncertainty in determination of these norms protecting fundamental values. There are certainly some norms and principles which satisfy this basic criterion as prohibition of crimes against humanity, the prohibition of genocide, racial discrimination, apartheid, torture, etc. There are numerous opinions that the principles of the UN Charter are jus cogens. Nevertheless, there is a question, which principles of the Charter have this character. Some authors are of the opinion that the “principles” of the UN Charter cannot be jus cogens while principles are not proper “rules”.⁴⁸ In 2014 ILC started its work on the study of jus cogens. The result of this work may provide answer to some questions and contribute to the development of jus cogens theory.

⁴⁷ *YILC*. 1966, Vol. II, p. 248.

⁴⁸ PETRIČ, E. Principles of the Charter of United Nations – Jus Cogens? *CYPPL*. 2016, p. 17.