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IMPERATIVIZATION OF INTERNATIONAL LAW: *JUS COGENS* CONCEPT IN JURISPRUDENCE

The transformation processes of perception and practical application of the institute of peremptory norms (jus cogens) in international law are analyzed in the article. The controversial character of this institute's legal nature and its influence on the formation of modern international legal order are emphasized. The trends of international law "imperativization" are examined through the prism of practice of the International Court of Justice and other judicial bodies. The author comes to the conclusion that despite the arguments of "skeptics" who believe that the jus cogens norms are an alien phenomenon in the free-minded international law, the objective reality is not only their existence, but also their effectiveness as a tool of deterrence against illegal actions of states.

Key words: peremptory norms of international law (jus cogens), obligations erga omnes, the International Court of Justice, imperativization of international law

The question on the existence of peremptory norms in the system of international legal regulation has always caused theoretical dispute: the opinions have ranged from their total rejection to their unconditional recognition as the foundation of international legal order. The acquisition of the *jus cogens* status by certain international legal norms has determined the necessity to study this international legal phenomenon of certain norms' imperativeness, which has evolved in the system of dispositive international law based on the agreement of equal subjects. Analyzing the criteria by which certain (rare) international law norms are recognized by the international community as peremptory, M.N. Shaw expresses his view that "the concept of *jus cogens* is based upon an acceptance of fundamental and superior values"[1]. There can be no "law" higher than human values– this thesis being the foundation of the *jus cogens* concept. No norm, be it of international or national law, can stand on a higher hierarchical level than the *jus cogens* norms[2].

The nature of this legal institution, its establishment and development is also causing debate among domestic and foreign scholars[3]. One should note that the concept of *jus cogens* as opposed to *jus dispositivum* exists since the times of the Roman law, although, in a practical sense it was applying to the private law. Nonetheless, the scholars at that time expressed the opinion that an international agreement cannot be considered valid if it contravenes with a fundamental principle of the law of nations. The question of what exactly is a "fundamental principle", which is common for the states to observe was interpreted differently in different times[4].

The attempt to find a balance between the highest justice priority and the freedom of expression in the international law has been evident throughout the long and controversial path of development of the international law. Rules that were deemed to limit the freedom of contractual relations between nations can be discerned in international relations through the traditional prism of the contract principle. The concept of the "highest" law, that all other interstate legal commitments must meet, is certainly associated with the theory of *jus cogens* – "hard law", which the contract law – "*jus dispositivum*" must be in accordance with. The issue of the *jus cogens* norms' appearance and legal nature has been addressed among others by such domestic and foreign scholars as L. Aleksidze, M. C. Bassiouni, A. Bianchi, I. Brownlie, M. Buromenskiy, O. Butkevych, L. Hannikainen, T. Hillier, M.W. Janis, O. Kopteva, O. Kyyivetc', U.

[1] *See*: Malcolm, N. Shaw (2008). *International Law*. 6th edition. Cambridge University Press, 126.
[2] *See*: Дрьоміна-Волок, Н.В. (2007). Норми *jus cogens* та зобов'язання *erga omnes* в сучасному міжнародному праві. *Актуальні проблеми політики, 32.* Одеса, 139-146.; Дрьоміна-Волок, Н.В. (2011). Норми *jus cogens* — сучасне jus gentium intra se. *Юридична наука, 1(1),* 187-194.
[3] *See*: Алексидзе, Л.А. (1982). *Некоторые вопросы теории международного права: императивные нормы (jus cogens).* Тбилиси: Изд-во Тбил. ун-та, 80-107.; Буткевич, О.В. (2006). Формування норм jus cogens у докласичному міжнародному праві. *Вісник Академії правових наук України, 4,* 207-218.
[4] Boas, G. (2012). *Public International Law: Contemporary Principles and Perspectives*. Edward Elgar Publishing, 5.

Linderfalk, I. Lukashuk, O. Merezhko, O.Mytsyk, R. Nieto-Navia, P. Rabinovich,C. L. Rozakis, M. N. Shaw, J. Sztucki, J.M. Thouvenin, C. Tomuschat, G. Tunkin, O. Vashanova, A. Verdross, C. de Visscher, at al.

I.I. Lukashuk has expressed the view that peremptory norms existed in the international law long ago. "No legal order whatsoever is likely to do without them"[1]. O. Butkevych also believes that at different stages of establishment of the international law, peremptory norms, although changing, still were inherent to its entire history of development, creating a distinctive balance and constituting its most stable part[2]. These processes were reflected in the development of the international legal theory.

Although the theory of peremptory norms of the general international law, at a historical scale has obtained its current formulation only recently, Professor R. Nieto-Nava has emphasized the fact that the origin of the concept of *jus cogens* is associated with the Stoics' ideas, according to which the right is used internationally, due to the so-called "universal reasoning", which is not based on specific nationalities or races, but is rather common for all[3].

An unprecedented inhuman cruelty observed during the World War II and Germany's military aggression has resulted in the international community being rethought in regards to the need for a peremptory prohibition of certain conduct of States[4]. Despite the dispositive character of international law in general and the unconditional respect for the sovereignty of each state, the international community has recognized that the prohibition of certain actions should be defined at the international legal level with no derogation permitted from it. In 1937, Professor Alfred Verdross, member of the UN International Law Commission, has expressed the opinion that legal restrictions should exist on the absolute right of States to conclude treaties on any questions, if these treaties threaten the interests of the international community as a whole or of its individual members, calling such restriction *jus cogens* norms[5].

In connection with the issue that has emerged in the International Law Commission regarding the voidance of international treaties that contravene with the peremptory norms of international law, the nature of these norms has gained greater attention. A deep analysis of acute scientific debates occurring at that time can be found in the publications of a distinguished Soviet international lawyer, G.I. Tunkin[6].

As a result, the final version of the Commission draft Convention on the Law of Treaties contained controversial provisions on peremptory norms. Thus, the Vienna Convention on the Law of Treaties, adopted in 1969, stated that a *jus cogens* norm is a peremptory norm of general international law that is "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". According to Art. 53 of the Convention "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. This means that the treaty is deemed to have no effect upon its conclusion (*ab initio*). According to Art. 64 of the Vienna Convention "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates"[7].

The science of international law still does not have a consensus on the definition of the "*jus cogens* norm", nor on its place in the system of international law, or on its real applicability. Two groups of international lawyers can be distinguished based on their attitude towards the concept of *jus cogens*. The first one can be conventionally defined as the "*affirmants*" i.e., those affirming the existence and effectiveness of peremptory norms. The "affirmants" refer to Art. 53 of the Vienna Convention on the Law of Treaties, interpreting it as such, that extends the validity of the *jus cogens* norm status of the international

[1] Лукашук, И.И. (1980). *Механизм международно-правового регулирования*. Киев: Вища школа, 47.

[2] Буткевич, О. (2006). Формування норм jus cogens у докласичному міжнародному праві. *Вісник Академії правових наук України, 4,* 207-218.

[3] Nieto-Navia, R. (2003). International Peremptory Norms (jus cogens) and International Humanitarian Law. *Man's inhumanity to man: essays on international law in honour of Antonio Cassese*. The Hague; New York: Kluwer Law International, 599.

4 Mats, R. (2007). *Berdal, Spyros Economides. United Nations Interventionism 1991–2004*. Cambridge University Press, 6.

[5] *See:* Verdross, A. (1966). Jus Dispositivum and Jus Cogens in International Law. *The American Journal of International Law, 60, 1,* 55-63; Verdross, A. (1937). Forbidden Treaties in International Law. *The American Journal of International Law, 31,* 571-577.

[6] *See*: Тункин, Г.И., Шестаков, Л.Н. (общ. ред.) (2000). Теория международного права. Москва: Зерцало, 130-142.

[7] Vienna Convention on the Law of Treaties (1969). United Nations, *Treaty Series, 1155,* 331. Art. 53, 64

law in general. Some supporters of this position argue that the impact of peremptory norms goes even beyond this interpretation. The second group of lawyers, the number of which has recently started to decrease are the "*skeptics*". They recognize the provisions of the Vienna Convention on the concept of *jus cogens*, noting, however, that this concept has not gained its normative content yet. Thus, they believe that the *jus cogens* norms exist only in the theory of international law, with no positive character[1].

The lack of a common position can be explained by the extraordinary consequence of their regulatory status under the Vienna Convention and the specifics of their meaning content. Objectively, the importance and role of peremptory norms in the modern international law is clearly beyond the scope defined by the Articles 53 and 64 of the Vienna Convention on the Law of Treaties. This thesis is confirmed by the opinion of the Study Group on the "Fragmentation of International Law" of the UN International Law Commission, which has presented its report in summer, 2006, which has devoted much attention to the concept of *jus cogens*. The document states that this concept is primarily a tool of technical solutions to the conflict between different norms of international law. Thus, according to the report, the peremptory norms stipulate such a legal position: first, if the agreement entirely or as individual provisions contravenes a peremptory norm of international law, then the agreement or the provision, if it can be separated from the text of the agreement, shall be considered null and void; secondly, if the international customary law norm or the resolution of an international organization contravenes a *jus cogens* rule, then such a norm or resolution shall be considered null and void; thirdly, if any special norm of international law contravenes a peremptory norm of international law, then the latter has a priority status[2].

Moreover, a government or a state's legitimate recognition can be denied if it has violated a *jus cogens* norm, such as it used force against another State contrary to the provisions of the Charter of the United Nations, or denied extradition if a requesting State suspected of inhuman treatment or persecution[3].

The *jus cogens* status means that legal entities cannot change or revoke a norm and that a general obligation to comply with its disposition exists. One should emphasize that only the essence of the material prohibition by the *jus cogens* norms is peremptory. The process of granting such a status to a certain norm does not affect the traditional process of conventional decision-making – only the consent of the international community can support the emergence of a *jus cogens* norm. Despite the fact that the discussion over the *jus cogens* norms is far from being finished, the doctrine of international law norms hierarchy is gaining more adherents[4].

First, we should note that the *jus cogens* norms are not a separate source of international law, that is rather a special status of its certain norms that may exist in form of contract and/or custom. The "norm of *jus cogens* status"[5] expression is often employed in English writings on international law and the decisions of international courts. Charles de Visscher in his book "Theory and Practice in International Law" observes that "the proponent of a rule of *jus cogens* ... will have a considerable burden of proof"[6]. The criteria of proving primarily depend on whether we can consider the norm of *jus cogens* as the highest level of customary norms or as a general principle and, consequently, prove its existence.

Thus, I. Brownlie believes that *jus cogens* are customary law norms that cannot be waived by agreement or acquiescence, and can only be changed through the creation of new customary law norms of a different content[7]. T. Hillier defined the norms of *jus cogens* as rules or principles of public order which are

[1] Linderfalk U. (2008). The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences? *The European Journal of International Law, 18, 5,* 855.

[2] Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Chaired by Martti Koskenniemi, Report of the International Law Commission on the work of its 58th session, 1 May – 9 June and 3 July – 11 August 2006. A/CN.4/L.682, A/CN.4/L.702. <http://untreaty.un.org/ilc/documentation/english/a_cn4_l682.pdf>.

[3] Boczek, B.A. (2005). *International Law: a Dictionary.* Scarecrow Press, 19.

[4] *See, e.g.*: Київець, О.В. (2010). Ієрархія договірних і звичаєвих норм міжнародного права. *Наукові записки Інституту законодавства Верховної Ради України, 3,* 108-113.; Київець, О.В. (2010). Норми міжнародного права: анархія чи ієрархія? *Наука і правоохорона, 1,* 190-194.

[5] *See, e.g.*: Francisco F. M. (2006). *International Human Rights And Humanitarian Law: Treaties, Cases And Analysis.* Cambridge University Press.; *Prosecutor v. Anto Furundzija* IT-95-17/1-T, ICTY Trial Judgement [1995].

[6] Visscher Charles de (1953). *Théories et réalités en droit international* (4th ed.). Paris, 295-296.

[7] Броунли, Я., Тункин, Г.И. (пер. с англ.) (1977). *Международное право*. Москва, 188-189.

not possible to evade[1]. Regardless of the formulation, it is generally accepted that the main characteristics of *jus cogens* norms are their fundamentality, universality, the impossibility for the States to evade or to deny them. Thus, as P. Malanczuk writes, all States must observe 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[2].

It is known that similarly to any conservative system, the international law does not welcome the introduction of new legal institutions, especially if their legal characteristic does not correspond to the traditional influence of subjects on their destiny. Not surprisingly, the International Court of Justice showed extreme caution in regard to the application of *jus cogens*, giving the skeptics a reason to deny the real effectiveness of the institute of peremptory norms of international law. Until recently, in its decisions the ICJ referred to the universal principles of international law or used other wordings, avoiding the direct use of the term "*jus cogens*".

Thus, in the *Nicaragua v. United States of America* (1986) case the Court has mentioned *jus cogens* only as the opinion of the UN International Law Commission and when citing the arguments provided in the Memorial and the Counter-Memorial of parties[3]. In its Judgment on *The Threat or Use of Nuclear Weapons* (1996) case the Court stated that "it is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case (I.C.J. Reports 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. 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"[4].

Thus, one of the most conservative international judicial bodies, the decisions of which are referred to as a source of law, has recognized the existence of certain universal (fundamental) norms and principles of international law and conferred them the status of such that requires the international community to follow them. However, in its decisions the Court has not defined them exactly as "norms of *jus cogens*", as did other international judicial institutions such as the International Criminal Tribunal for the Former Yugoslavia, which in the *Prosecutor v. Anto Furundzija* (1998) case stated that "... the prohibition of torture is a peremptory norm of *jus cogens* ...", - this statement of the Tribunal was repeatedly cited by other international judicial bodies[5].

Furthermore, in the *Al-Adsani v. United Kingdom* case the European Court of Human Rights stressed that there is sufficient case law to consider axiom the prohibition of torture being referred to peremptory norms of international law, thus emphasizing once again the existence of an absolute prohibition of certain conduct at the international legal level[6].

National courts have also applied the concept of *jus cogens* before the International Court of Justice did. In the case of *Nulyarimma v. Thompson* (1999) the Federal Court of Australia stated that "the prohibition of genocide is a peremptory norm of customary international law (*jus cogens*) giving rise to non-derogable obligations *erga omnes*"[7]. In addition, the famous cases that confirmed the existence of the practice of reference to the peremptory character of norms are *R.* v. *Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinochet Ugarte* (1999)[8]; *Ferrini* v. *Federal Republic of Germany* (2004)[9], etc.

Nonetheless, the International Court of Justice continued to avoid using the term "*jus cogens*", causing misunderstanding among many scholars and own judges. Judges of this Court have repeatedly used

[1] Hillier, T. (1999*). Principles of Public International Law*. London – Sydney, 38-39.
[2] *See*.: Malanczuk, P. (1997). *Akehurst's Modern Introduction to International Law*. Routledge, 57-58.
[3] *Nicaragua v. United States of America*, Merits, Judgment, I.C.J. Reports [1986], para 190.
[4] *Legality of the Threat or Use of Nuclear Weapons*, General List No. 95 (I.C.J. Advisory Opinion of July 8, 1996). I.C.J. Reports [1996], 266.
[5] *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, ICTY Trial Judgment, para 144.
[6] *Al-Adsani v. United Kingdom*, Application No. 35763/97, Council of Europe: European Court of Human Rights, 21 November 2001. < http://www.unhcr.org/refworld/docid/3fe6c7b54>.
[7] *Nulyarimma v. Thompson*, [1999] FCA 1192 (Federal Court of Australia 1 September 1999). <http://www.austlii.edu.au/au/cases/cth/federal_ct/1999/1192.html), (Merkel, J.)>.
[8] *Ex Parte Pinochet Ugarte*. No. 3. 1999. All English Reports, 2, 97.
[9] *Ferrini v. Federal Republic of Germany* (Italian Court of Cassation), 2005. American Journal of International Law, 99, 242.

this term in separate and dissenting opinions on various cases, thereby showing disagreement with the conservative position of the Court. As early as in the case of *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)* (1960-1966), Judge Tanaka in his Dissenting Opinion mentioned the norms of *jus cogens*[1]; in his Separate Opinion to the Order of 1993 on the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia* case) judge Lauterpacht stated that "in case of conflict between the decision of the UN Security Council and the obligations under the relevant agreement, it is not possible to solve this conflict by Article 103 of the UN Charter - through a simple hierarchy of norms - if it is a conflict between the resolution of the Security Council and a norm of *jus cogens*"[2].

Judge Kreca in his Dissenting Opinion to the Decision of 1996 on the same case (*Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections) did not support the general approach of the court, stressing that "the norm prohibiting genocide, as a norm of *jus cogens*, establishes obligations of a State toward the international community as a whole, hence by its very nature it is the concern of all States. As a norm of *jus cogens* it does not have, nor could it possibly have, a limited territorial application with the effect of excluding its application in any part of the international community. In other words, the norm prohibiting genocide as a universal norm binds States in all parts of the world"[3].

Characteristically, the UN International Court of Justice, avoiding references to the *jus cogens* norms of international law, in the 60s of the last century introduced and consistently used the theory of the existence of *erga omnes* obligations ("towards everyone", lat.), meaning the general obligations a state has to the international community as a whole, rather than to a particular state or a group of states[4]. "The concept of *erga omnes* obligations has developed under the influence of the international judicial practice" - O. Kopteva stresses[5].

O.V. Kyyivets argues: "The relationship between the norms of *jus cogens* and the obligations *erga omnes* can be defined as follows. The *jus cogens* feature indicates the "importance" or the special value of the norms, while the obligation *erga omnes* reflects the "scope" or the "sphere of action", which is a procedural matter. The norms of *jus cogens* will necessarily have an *erga omnes* "scope", while not all obligations *erga omnes* have a *jus cogens* "importance"[6]. At the same time, as stated by O.O. Merezhko, "one may see common features when comparing the concept of obligations *erga omnes* and the concept of norms of *jus cogens*. First, they embody the concept of the international community. Secondly, the list of examples of these legal phenomena mainly overlap. Thirdly, as one may notice, both phenomena are mainly composed of moral prohibitions. In addition, from an emotional point of view, these mental experiences are enhanced by the fact that the prohibitions forming the foundation of the obligations *erga omnes* and of the norms of *jus cogens* have a double psychological nature: both legal and moral. By breaking the obligations *erga omnes* and the norms of *jus cogens* a subject thereby also violates the standards of morality, the norms of international morality"[7].

In terms of the law, when an international obligation acquires the *erga omnes* feature, it implies the existence of the *locus standi* right, even in states that are not party to the relevant international agreement. In the case of *Barcelona Traction* the Court found that there is a substantial difference between the obligations towards the international community and individual states. The former are *by nature* affecting the interests of all States, therefore, all States have the right to legal protection in case of their violation. In its judgment on this case the Court has formulated the opinion that the States' obligations *erga omnes*

[1] *South West Africa case (Ethiopia v. South Africa; Liberia v. South Africa)*, I.C.J. Reports, 1962/1966 Second Phase, Judgment [1966] I.C.J. Reports, 298.

[2] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 13 September 1993, I.C.J. Reports, 440.

[3] *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Preliminary Objections, Order of 11 July 1996, I.C.J. Reports, 1996, Dissenting Opinion of Judge Kreca. I.C.J. Reports, 1996, para. 101.

[4] *See*: Brownlie, I. (1998). *Principles of Public International Law*, 5th Edition. Clarendon Press.

[5] Коптєва, О.О. (2011). Роль Міжнародного Суду ООН у становленні розуміння зобов'язань erga omnes. *Наукові записки Інституту законодавства Верховної Ради України, 4 (7),* 134.

[6] Київець, О.В. (2011). Феноменологія норм міжнародного права через призму їх ієрархії. *Наукові записки Інституту законодавства Верховної Ради України, 3 (6),* 147.

[7] Мережко, А.А. (2011). Типология норм международного права в свете психологической теории права. *Актуальні проблеми держави та права, 62,* 285.

"derive … from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23*); others are conferred by international instruments of a universal or quasi-universal character"[1].

On this subject, A. Bianchi states that the "The fact that the ICJ was never fond of *jus cogens* – admittedly not a legal category of its own creation – is further attested to by the Court's alternative use of the notion of obligations *erga omnes*. While the two notions may be complementary, they remain distinct, and to consider them as synonyms risks undermining the legal distinctiveness of each category"[2].

The contradictory consequences of this approach are evident in the Advisory Opinion on the case of *Israeli Wall*, where the International Court of Justice endorsed the position of the International Law Commission regarding the consequences of a serious violation of peremptory norms, but formulated it as a violation of *erga omnes* obligations[3].

It is extremely important that in its recent decisions the International Court of Justice has changed its own formal approach directly within the decisions, rather than in judges' separate opinions, having mentioned the norms of *jus cogens*, since many traditionally minded international lawyers in their debates on the existence of *jus cogens* norms have taken notice of the fact of indefinite position of the ICJ on this issue. In the case *Concerning Armed Activities on the Territory of the Congo* (New Application, 2002), the Court allowed itself the following wording: "...the Court observes, however, as it has already had occasion to emphasize, that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things" … and that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute. The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties"[4].

The revolutionary language of the Court which, however, did not lead to practical implications on the case was commented in Judge Dugard's Separate Opinion on this case, who noted the following: "This is the first occasion on which the International Court of Justice has given its support to the notion of *jus cogens*. It is strange that the Court has taken so long to reach this point because it has shown no hesitation in recognizing the notion of obligation *erga omnes*, which together with *jus cogens* affirms the normative hierarchy of international law. Indeed, the Court itself initiated the notion of obligation *erga omnes* in 1970 in the *Barcelona Traction* case (*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain),* Second Phase, Judgment, I.C.J. Reports 1970, p. 32) and has recently confirmed its adherence to the notion in its Advisory Opinion in the case concerning *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (I.C.J. Reports 2004, p. 136, para. 155). Until the present Judgment the Court carefully and deliberately avoided endorsing the notion of *jus cogens* despite the many opportunities it had to do so". According to Judge Dugard, the fact that the Court supports the concept of peremptory norms of international law will increase the efficiency and integrity of international law by encouraging the adoption of solutions that meet the overall objectives of the international legal order. As Judge mentioned, peremptory norms "are a blend of principle and policy" and hold the highest level in the hierarchical system of international law because they not only "affirm the high principles of international law, which recognize the most important rights of the international order … but they also give legal form to the most fundamental policies or goals of the international community"[5].

[1] *Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain*) (1962-1970), Second Phase, Judgment [1970]. I.C.J. Reports, paras. 33-34.

[2] Bianchi, A. (2008). Human Rights and the Magic of Jus Cogens. *The European Journal of International Law, 19, 3,* 502.

[3] *Legal Consequences of the Construction of a Wa11 in the Occupied Palestinian Territory*, Advisory Opinion [2004]. I.C.J. Reports, 136, para. 159.

[4] *Armed Activities on the Territory of the Congo* (New Application: 2002) (*Democratic Republic of the Congo v. Rwanda*), Jurisdiction and Admissibility, Judgment [2006]. I.C.J. Reports, paras. 64, 125.

[5] *Armed Activities on the Territory of the Congo,* (New Application: 2002), Separate Opinion of Judge Ad Hoc

In the decision of 2007 on the case *Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), the Court reiterated its adherence to the validity of the concept of *jus cogens*, noting that the argument of Bosnia regarding the acts genocide and other unlawful acts committed against "non-Serbs" outside the territory of Bosnia and Herzegovina (as well as on its territories) "might relate to non-Bosnian victims, it could raise questions about the legal interest or standing of the Applicant in respect of such matters and the significance of the *jus cogens* character of the relevant norms, and the *erga omnes* character of the relevant obligations"[1].

The question on the list of existing peremptory norms in the modern international law also does not have a clear answer given the nature of this legal institute. To prove the existence of *jus cogens* norms one should refer to the international treaties, the decisions of international judicial institutions, first of all of the International Court of Justice, as well as the decisions of national courts, international declarations and the works of well-known reputable scholars. The analysis of the abovementioned sources suggests that the peremptory status is conferred to the norms prohibiting aggressive use of force, racial discrimination, genocide, slave trade, piracy and torture. Such a list is recognized by authoritative international lawyers[2], and international and national courts. There is a view supported by the International Criminal Tribunal for the former Yugoslavia and some scholars that the prohibition and punishment of crimes against humanity and war crimes are also norms of *jus cogens*, but still no worldwide univocal recognition of these norms as peremptory can be acknowledged[3]. The International Criminal Tribunal for the Former Yugoslavia in the *Kupreskic* case stated: "most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character"[4].

One should note that the norms of *jus cogens* are substantive prohibitive provisions, most of which concerns the protection of fundamental human rights as the highest values. As early as in the case of *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)* (1960-1966), in his Dissenting Opinion Judge Tanaka stated that "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 the *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*"[5].

Enhancing the role of peremptory norms in the regulatory system of international law, which is dispositive by nature, indicates the emergence of an unconventional consensus on the recognition of the special, "above-subject" character of some international legal norms, showing the tendency towards international law "imperativization"[6]. It is not about total "imperativization", but rather an increase in the role of mandatory elements in the mechanism of international legal regulation. The larger practical application of the concept of *jus cogens* norms demonstrates understanding by the international community of the need to improve legal guarantees of compliance with certain provisions of international law that prohibit behavior that is internationally recognized as the most threatening to the world peace. The agreement of the States to confer a peremptory status to certain norms, the observance of which cannot be

Dugard, 88, paras. 5-10.

[1] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia *and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007, para. 185.

[2] *See*: Brownlie, I. (2002). *Principles of Public International Law*, 5th Edition. Oxford University Press.; Malcolm, N., Shaw, QC. (2003). *International Law*. Fifth Edition. Cambridge University Press, 115-119.; Hillier, T. (1999). *Principles of Public International Law*. London – Sydney, 38-39.; Cassese, A. (2005). *International Law.* 2nd edition. Oxford University Press.; Murphy, J.F. (1999). *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution.*

[3] *See*: Cassese, A. (2005). *International Law.* 2nd edition. Oxford University Press.; Bassiouni, M.Ch. (1997). International Crimes: Jus Cogens and Obligatio Erga Omnes. *Law and Contemporary Problems, 59, 4*; *Al-Adsani v. United Kingdom*. ECHR Judgment Nov. 4, 1950, 213 UNTS 222; *see also Legality of the Threat or Use of Nuclear Weapons*, General List No. 95 (I.C.J. Advisory Opinion of July 8, 1996), para. 79.

4 *Prosecutor v. Kuprescic et al*, 14 January 2000, ICTY, (Trial Chamber), para. 520.

[5] Op. cit.: *South West Africa case*, 298.

[6] *See*: Дремина-Волок, Н.В. (2010). «Императивизация» международного права в контексте эволюции доктрины универсальной уголовной юрисдикции. *«Марку Ефимовичу Черкесу – 80»*. Одеса: Фенікс, 60-70.

derogated by any subject, in other words, to recognize their highest legal force and to change their legal character from discretionary to mandatory proves the overall trend of international law "imperativization"[1].

Finally, it seems appropriate to quote from the Dissenting Opinion of Judge Kreca to the 1996 Judgment on the *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*)*: "*Jus cogens* creates grounds for a global change in relations of State sovereignty to the legal order in the international community and for the establishment of conditions in which the rule of law can prevail over the free will of States"[2]. As noted by Professor M. Buromenskiy, "peremptory norms form the foundation of the regulatory system of the modern international law, and define the validity or voidance of its norms"[3].

The emergence of the concept of existence of peremptory legal norms by their legal force is a proving that the international community has recognized the need for positive legal measures to ensure world order. Despite the skeptics' arguments that *jus cogens* norm are an alien phenomenon in the free-spirit international law, an objective reality is not only their existence, but also their efficiency as a tool to refrain states from committing illegal actions.

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[1] See: Дрьоміна-Волок, Н.В. (2011). Міжнародна кримінальна юрисдикція і злочини *jus cogens* у контексті імперативізації міжнародного права. *Право України, 9,* 363-376.

[2] Op. cit.: *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide* (1996), para 43.

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