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Conundrums of *Jus Cogens*: In International Criminal Law (Part I)[2]

Summary. The essence of this work is to examine the conundrums of jus cogens law and erga omnes with those of the immunity rules. The work debates different approaches to the questions of law, legality, and the judgments of international courts. It probes the roles of states and the International Court of Justice in deciphering the vital questions of law and victims, including the negation of jus cogens or even immunity aspects. The article objectively scrutinises the value of the recent international judgments of the international courts/tribunals. They rightly accentuate the kernel of intercontinental legal disciplines, but they fail to consider the metaphysical account of such phenomena. The purpose of the duty of justice has to be transparency, sheer reasoning for humanity, and love for the balance of justice.

Keywords: jus cogens, crimes, immunity, judgement.

I. Introduction

The system of international law is continually shifting for three essential reasons. These are ratifications of certain new international conventions; prohibition of the formulation of certain international conventions based on definite abolished customary rules; and the merits of the judgments of international courts. The latter is, in fact, a combination of all three reasons, with the political or legal interpretation presented by the conflicting parties before the jurisdiction of the courts. This means that the views of international courts are becoming the source of reference in most international conflicts, in the drafting of international conventions, and in the writings of international publicists[1; 2, p.97-121; 3, p. 961-977; 4, p. 235-269]. This is particularly evident with regard to questions of *jus cogens* and *erga omnes* obligations dealing with certain significant questions of law, economic, and politics.

The concept of *jus cogens* in the system of international criminal law encompasses the concept of unavoidable norms known as peremptory norms of international law, which cannot be modified in international relations as long as a clearly expressed consensus has not been achieved among states for their termination. It is, however, also very difficult to envisage that any state of the world would agree to the abolition of the conventions on genocide, torture, discrimination, humanitarian law of armed conflict, slavery, and the rights of children or human rights law. They render the basic insurance for the protection of the interests of our international legal and political community, and any infringement of these rights caters to violations of the interests of all states as a whole.

For this reason, Brownlie, in *Principles of Public International Law*, believes that there are certain principles of international law that

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make up the '*body of jus cogens law*.' [5, p. 515] Accordingly, any derogation of the given international peremptory international norm is null and void. Unfortunately, Brownlie, in another earlier publication, entirely rejects his own view and remarks that "I think '*jus cogens*' has become part of *lex lata*. At the same time, as has been pointed out, the vehicle does not often leave the garage. In other words, the concept does not seem to have a lot of obvious relevance." [6, p. 110] This means Brownlie, even though he accepts the body of law of *jus cogens* norms, gives almost no practical validity to the existence of the norms. A rapid survey of the judgments of *ad hoc* international criminal tribunals, however, proves the contrary.

One serious characteristic of a *jus cogens* norm is that it restricts the freedom of states to enter into the formulation of certain international treaties, or treaties whose subjects conflict with *jus cogens* norms do not have any binding effect and have no legal force within the jurisdictions of international courts. Another serious feature of *jus cogens* is that it is not comparable with other rules of international law like the *body of rules relating to immunity of states* or rules having a procedural nature, which is one of the serious issues regarding the peremptory norms of international law. One has to insert a vertical line *between* the *columns* of the rules of international law that have a substantive nature and the rules of international law that have a procedural one. Drawing this line is not, however, an easy task and may create certain serious conflicts between states before the jurisdiction of international courts. This is what I also call the conundrums of *jus cogens* norms.

A very fresh example is the case *Jurisdictional Immunity of the State, Germany v. Italy: Greece Intervening*, which was brought before the International Court of Justice (ICJ). The case has two core characteristics: violations of humanitarian law of armed conflict by Germany against Italian nationals in the Second World War and violations of the corpus of the sovereign immunity of the contemporary Federal Republic of Germany by the Italian Courts[1]. [7, para.64] The former is against the basic immunity of *individual rights* and the latter against the immunity of *state rights*. The key question in the proceedings, however, was whether the Italian courts violated the jurisdictional immunity of Germany. This was because Italy was certain and not Germany.

II. Reparation of International Crimes in the ICJ

As we will see, the judgment of the International Court of Justice (ICJ) at The Hague has opened a new chapter in the body of international law. Opinions about the judgment are divided into several factions[2]. Some judges and writers believe that the Court failed to adequately address the core issue of the case, i.e., the victims' rights on criminal matters; [8, p.167-183] others believe the contrary; and some opinions vary, depending on the prospect of the threat to the body of international

[1] Hereinafter *Germany v. Italy: Greece intervening*.

[2] One writer asserts that "Substantive rules of a jus cogens character generally leave procedural rules unaffected and, in particular, do not automatically override such rules even if, in the eyes of some commentators, they may prevent the concept of jus cogens from achieving its full potential." [12, p. 987].

human rights and humanitarian law. All three groups are also of the view that immunity should not be used as a screen where no other remedial avenues could be reached by means of negotiation.

It is true that the framework within which immunity receives priority may tend to lend itself to bad results, too. According to one author, the 'binary categorization' by the court may create a *tertium genus* for grave violations of human rights law. [9, p. 72-73] This holds particularly true when we think about the countries that are notoriously known for violations of the fundamental rights of man, e.g., Iran, China, Russia, North Korea, Israel, many Latin American states, and even the United States within its own states and in foreign countries. [10, p. 279-280] One may express similar views about the United Kingdom's dubious policy in Iraq, which was confessed by its former Prime Minster, and the ensuing devastation of Iraq's international legal personality, immunity, civilisation, and humanity. In a separate opinion, one of the judges of the ICJ correctly clarifies that 'the Court's Judgment should not be read as a licence for States to commit acts of torture, crimes against humanity or violations of international humanitarian law in situations of armed conflict. Rather, the Court examined the facts of this case and concluded that the acts committed by Germany were *acta jure imperii* and that no exception to immunity was applicable.' [11, 157, para 2.]

As the title of this article indicates, it seeks to give a picture of the *jus cogens* dilemma in the international legal system in the relations between different states of the world. In particular, I pay most attention to the judgments of different international courts relating to their positions on the body of *jus cogens* and whether they can solve the conundrums of *jus cogens* norms and immunity rules. By using the term 'conundrum,' the article aims to explain that, although the effects of *jus cogens* norms in the international legal system are clear and critical, there is not yet any clarified definition of its scope of applicability. This means damages arising from international crimes and their compensation can still be political.

What is the difference between substantive law or rules and procedural rules? In other words, rules are rules, which makes the essence of rules that of normative peremptory norms. The question is more urgent and vital when one considers that the judgment of the ICJ relating to the *Jurisdictional Immunity of the State, Germany v. Italy: Greece Intervening* has created both positive and negative consequences in the world of legal justice and in the realm of satisfaction of victims. If the victims are not satisfied, then what is the most significant aim of the system of international law in general and the system of international judgment in particular?

The key intention of rules, the top intention of the United Nations, the chief purpose of recognition of the international legal personality of states, and the basic ethic behind the establishment of the International Court of Justice is definitely the protection of the rights of individuals, in particular victims. Another core issue is also how long and to what extent an offender can be responsible for violations of peremptory norms of international law when violations have been already covered and agreements have been reached. I will discuss and explore the position of whether the objective

of international law is to solve the problems of *jus cogens* with isolated tactics or whether it should come up with a list of what does and does not constitute *jus cogens* and even whether the concept of immunity can be divided into several categories. How should the power of the *jus cogens* framework be adapted when there are serious conflicts about the rights of victims? Also, how should it not violate the jurisdictional immunity of state X?

III. *Jus Cogens* Encompassing the Source of International Law

A. Predication of Jus Cogens Norms

All the arguments surrounding the general notion of *jus cogens* result from Article 53 of the Vienna Convention, which constitutes the most serious source of *jus cogens* law. The provisions of the relevant article, without a doubt, imply the existence and impact of emerging norms of *jus cogens* in the system of international law. These norms are the most valid norms of international law and consequently equivalent to the sources of international law that are listed in Article 38 of the Statute of the International Court of Justice at The Hague. [13, p.67; 14, p.152; 15, p.19]

In addition, the ICJ's function is to decide — in accordance with international law — disputes submitted to it with effective reference to general or specific international conventions, which establish rules with due regard to the consent of states. It may also decide — with reference to customary international law — as evidence of a general practice accepted as law. The Court is also permitted to formulate its decisions with reference to general principles of law recognized by civilised nations. Finally, subject to the provisions of Article 59 of the Statute of the ICJ, the Court may refer to judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.

Apparently, Article 38 of the Statute of ICJ does not specifically deal with the question of *jus cogens* norms. One may, at first glance, think that they do not specifically constitute the 'formal' source of the international legal system and therefore do not have any effective enforceability. At second glance, however, it appears that several sources of international law are not necessarily listed in Article 38. For instance, several resolutions of the General Assembly not only belong to the integral part of conventional sources of international law, but also to the integral part of customary international law. Examples are the Universal Declaration of Human Rights and its relevant articles, which have been formulated into various international conventions on human rights law. Moreover, the body of *jus cogens* is a combination of conventional and customary international law, both constituting an integral part of Article 38 of the Statute of the ICJ[1]. Above and beyond this, *jus cogens* norms can be properly placed among the 'formal' sources because of their identification and their evolution as a legal concept within the documents of international law.

One might assert that a *jus cogens* norm is simply a technical term. This is because the concept of *jus cogens*

[1] For the complete article, see the Statute of the ICJ.

is not against the interests of any state and is rather to the benefit of all states. A *jus cogens* norm implies a method or technique for solving certain conflicts occurring between diverse sources of international law[1]. This means that the purpose of *jus cogens* is to prevent contradiction between different legislations and therefore avoid part of a prior treaty, which contradicts with one or several concepts of peremptory norms, from terminating its function[2]. Yet, when a norm of *jus cogens* is found to be in contradiction with an ordinary norm of the customary source of international law or the provisions of certain resolutions of the Security Council or any other international organization, the power of the customary norm or the resolution should not be considered valid and instead void. Similarly, when a *jus cogens* norm is proven to be in discord with an ordinary source of international law governing certain matters of interest within the context of an international convention, the merit of a *jus cogens* norm should be given priority.

B. Jus Cogens Arising from Jus Naturale Necessarium

The concept of *jus cogens* as entered into the Vienna Convention on the law of treaties is not an innovation in the system of international law. The concept did not exist under the term *jus cogens*, but has been understood from the provisions of natural law referring to certain rights that should not be altered by the provisions of positive law. One may even assert that the fundamental basic human rights entered into the Universal Declaration of Human Rights in 1948 were an integral part *jus naturale necessarium* in international law, yet not under the wording *jus cogens*. This idea of fundamental rights covering all human beings and their unchangeable characters can be analysed in the ideology of Spanish theologians of the 16th century and the theory of classical writers.

These writers believed that certain principles existed implying the concept of necessary natural rights or a *jus naturale necessarium*. Natural law therefore denoted "necessary law which all states are obliged to observe." [27; p. 56] Hugo Grotius maintained that natural law principles were without a doubt immutable, so that not even divine law could modify its values. [28; 1, Ch.1, X, 5] Accordingly, "Natural law was the dictate of right reason involving moral necessity, independent of any institution — human or divine." [23, p.30] In addition, the German philosopher Christian Wolff and the Swiss philosopher Emer de Vattel, whose work *The Law of Nations* was influenced by the former, believed that "necessary law" of all humankind existed and that the provisions of treaties and customs could not modify this. The respect for necessary law was mandatory in all states and any contract or legislation ignoring its value was null and void. This unchangeable notion of natural law is also known as universal law governing all human beings in any parts of the world. [23, p. 30]

C. Jus Cogens Originating from Positive Law

The dominance of natural law was, however, conquered by the concept of positive law, and this was one of the

[1] See, generally [16; 17].

[2] Consult [18, p. 3-22; 19; 20; 21; 22; 23; 24; 25; 26].

essential reasons that certain rules of natural law and natural rights (divine law) were slowly formulated in written law. The doctrine of positive law became the borderline for distinguishing between substantive rights, procedural rights, and the legal hierarchy between rights and rights. The international legal personality of states and their full independence to enact rules and enter into all types of treaties therefore became the leading role of international law up until the creation of the League of Nations. This had a crippling effect: from the beginning, an almost private international organisation proved to be not so good for the recognition of certain permanent rights in practice.

A clear example is the Versailles treaty in 1919 and the domination of political power over the immunity rights of a state. One can easily see that this was the first treaty that violated the *natural peremptory* rights of the international legal personality of the state of Germany at the beginning of the twentieth century. The provisions of the treaty seriously infringed the provisions of the League of Nations and the Statute of the Permanent Court of Justice. This was truly a conundrum of international law and a conundrum of the definition of justice under the League and the Court. The provisions of the treaty went against the established views on doctrines of natural law.

Although *jus cogens* norms were not recognised in 1919, writers of international law were determined to accept the existence of peremptory norms on a casual basis for the prevention of the content of treaties, which could go against the normative customary basic principles of international law. [29, p. 213] In the early twentieth century, Oppenheim and, two decades later, Hall believed the following:

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A number of "universally recognised principles" of international law existed which rendered any conflicting treaty void and that the peremptory effect of such principles was itself a 'unanimously recognised customary rule of International Law. [30, p.528]

... the requirement that contracts shall be in conformity with law invalidates, or at least renders voidable, all agreements which are at variance with the fundamental principles of international law and their undisputed applications, and with the arbitrary usages which have acquired decisive authority. [31, p. 382]

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I am not here defending the full concept of international legal personality, which has no room in the system of international law, but I am concentrating on the fact that certain fundamental principles of the international legal personality of Germany should have never been violated by the victorious states, even at the time of imposition of peace treaties[1]. The situation can also be clearly deduced from the statement of Judge Schücking of the Permanent Court of International justice in 1934. He mentioned the existence of the spirit of *jus cogens* norms. [33, p. 149]

The key message here is that the above text passage and the system of international customary and conventional international law indicate that certain norms in the content of the treaties or customary law had the character of *jus cogens* law. However, they were under the label of mandatory obligations of

[1] Consult my views in [32].

positive law. These were undeniable under any circumstances, even by the law of The Hague Conventions of 1899 and 1907 specifically concerning the humanitarian law of armed conflict, which means states had to obey and not deny their legal validity in time of peace or war.

D. Jus Cogens Arriving at International Courts

The League of Nations was followed by the establishment of the United Nations and adoptions or ratifications of certain significant conventions on human rights law, in particular the Declaration of Human Rights and the Convention on Genocide in 1948. The intentions of these instruments were to restrict the international legal personality of states. This meant that, although the international legal personality is the leading role for the existence of independence of a state, it is still to be limited by certain rules of international law that are considered to be common and relevant to the international natural, legal, and political community as a whole. This also meant that the system of international law was moving towards the official recognition of a system in which all states had similar interests. With regard to the Genocide Convention, the International Court of Justice (ICJ) clearly expressed the following in 1951:

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its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the Contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d'être* of the convention…. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of its provisions. [34, p. 15, para. 23]

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The comment by the ICJ vividly portrays the existence of certain rules in the body of international law that not only have legal characteristics, but are also connected to elementary moral principles. According to the Court, peremptory norms are not a matter of private interest, and therefore the values of their nature belong to the public; this is called *common interest*. Regrettably, neither the provisions of the Convention on Genocide, nor the provisions of other similar conventions have been respected under the international legal personality of states. In fact, the provisions of the Convention on Genocide are the most frequently violated provisions of public international law in general and the system of international criminal law in particular. [35, p.673-723; 36]

IV. Conclusion

The international legal and political community certainly has a strong tendency to prevent the concept of any rule that prevents or derogates the unavoidable character of *jus cogens* norms. This is particularly obvious in the case of genocide. The chief intentions of *jus cogens* norms and *erga omnes* should not be ignored by any means. Therefore, as Immanuel Kant asserts, self-interest, self-love, and self-interpretation of norms must be limited in good time, before they violate the integrity of justice or the integrity of

[1] As one author notes, the higher authorities of a state may control the ICJ decision, as, for instance, in the Arrest Warrant Case. [37, p.238]

the immunity of a state[1]. Governments must not perceive norms of *jus cogens* as the prevention of their sovereign freedom. On the contrary, they should see their positive potential to create human rights and true justice for all.

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Фархад Малекян

Головоломки *jus cogens*: в міжнародному кримінальному праві (ч. 1).

Анотація. Сутність цієї роботи полягає в дослідженні головоломок права jus cogens і erga omnes пов'язаних з імунітетом. Стаття розглядає різні підходи до питань права, легальності та рішень міжнародних судів. Вона вивчає ролі держав і Міжнародного суду ООН в розшифровці ключових питань права і жертв, включаючи заперечення jus cogens або навіть аспектів імунітету. Стаття об'єктивно оцінює значення недавніх міжнародних судових рішень міжнародних судів/трибуналів. Вони правильно акцентують ядро міжконтинентальних правових дисциплін, але не враховують метафізичні особливості таких феноменів. Метою правосуддя повинні бути прозорість, чисте міркування про людство і любов до балансу справедливості.

Ключові слова: jus cogens, злочини, імунітет, судові рішення.

Фархад Малекян

Головоломки *jus cogens*: в международном уголовном праве (ч. 1).

Аннотация. Сущность этой работы состоит в исследовании головоломок права *jus cogens* и *erga omnes* связанных с иммунитетом. Статья рассматривает разные подходы к вопросам права, легальности и решениям международных судов. Она изучает роли государств и Международного суда ООН в расшифровке ключевых вопросов права и жертв, включая отрицание *jus cogens* или даже аспектов иммунитета. Статья объективно оценивает значение недавних международных судебных решений международных судов/трибуналов. Они правильно акцентируют ядро межконтинентальных правовых дисциплин, но не учитывают метафизические особенности таких феноменов. Целью правосудия должны быть прозрачность, чистое рассуждение о человечестве и любовь к балансу справедливости.

Ключевые слова: *jus cogens, преступления, иммунитет, судебные решения*