

THE METHODOLOGICAL CONUNDRUM IN THE IDENTIFICATION OF *JUS COGENS* NORMS IN INTERNATIONAL LAW

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ABSTRACT

Jus Cogens norms are considered as compelling law and higher in the hierarchy of sources and over any other source of international law. The concept of jus cogens or peremptory norm of international law is based on the acceptance of fundamental and superior values of human society. These values are within the system and akin to the notion of human-kind and public policy in international legal orders. The establishment of a rule of jus cogens involves a stringent process. The situation to be careful about is that such norms are not forced upon political or ideological minorities. Articles 53 of the Vienna Convention on the Law of Treaties and the International Court of Justice in various cases have attempted to identify a method for deducting jus cogens norms. However, all these attempts are either based on customary international law or various treaties without a deeper investigation into the formulation of jus cogens norms. The International Law Commission admits that there is not, yet any generally recognized criterion developed by which to identify a general rule of international law as having the character of jus cogens. Jus cogens are not necessarily new rules of international law; they reflect the influence of natural law thinking in international law. This norm gives a legal avenue for the enforcement of human rights which is important for bringing about justice in the globalized world. The present research highlights and develops an understanding of the methodological identification of jus cogens norms by investigating into various international legal documents and scholarly publications.

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I. INTRODUCTION

The idea that international law is an effective tool for settlement of disputes on different subjects of law between nations and a discussion on the sources of international law, is gaining more momentum today than it has at any other time in the known history of the subject. Though international law largely remains at the will of the States, certain principles have emerged as core principles of the subject.¹ These principles are considered to be the bedrock of the existence and survival of humanity in general and refer to the peremptory norms² of international law. Hence the preservation of these principles is necessary for the foundational values of the world. In other words, it can be argued that these are principles whose alteration or modification, are beyond the reach of the State; since neither treaty nor customary laws can mutate these principles.³ Therefore, there is now a growing demand for a more critical analysis of this norm, as it challenges the basic foundational theory of international law which is consent based international law.

Having examined diverse literature on *jus cogens* and international law, it is found that there is hardly any intensive literature available on the methodological investigation for identification of *jus cogens* principles in international law. Most of the researches which could be found on this subject are discussions about the character and scope of the principle of *jus cogens*. Though the ICJ has had a number of opportunities to initiate this discussion, it has carefully avoided any meaningful deliberation. There are a large number of cases, including the *North Sea Continental Shelf Cases*⁴, *Legality of Threat to Use Nuclear Weapons Case*⁵,

¹ Shaw, M.N., *International law*, Cambridge University Press, 2003, at p. 50.

² Peremptory norm is known as *jus cogens* in Latin.

³ Kadelbach, S., "Jus Cogens, Obligations *Erga Omnes* and Other Rules-the Identification of Fundamental Norms", in Tomuschat, C. and Thouvenin, J. (ed.), in *The Fundamental Rules of the International Legal Order*, 2006, Brill Publishers, pp. 21-40, at p.23.

⁴ *Germany vs. Denmark*, 150ICJ (ICJ 1969), at p. 59.

⁵ International Court of Justice, "Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion" ICJ GL No 95, [1996] ICJ Rep 226, ICGJ 205 (ICJ 1996), at p.45, available at: <<https://www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>> (Last visited on April 09, 2022).

*Genocide Case*⁶, *Barcelona Traction Case*⁷, and *Nicaragua Case*,⁸ all of which have made a mention of the principle but without any meaningful discussion on the identification mechanisms. For instance, in the *Genocide Case*, the Court gave more importance to the principle of *erga omnes* rather than *jus cogens*; and in the *Barcelona Traction Case* also, in similar circumstances, the Court preferred to use *erga omnes*⁹ to justify the international obligation.¹⁰ Therefore, the primary focus of this paper is to attempt to identify the methodology or the methodological process on how international law scholars can identify *jus cogens* or peremptory norms of general international law. Though both these principles are quite related in international law, however both the concepts aren't the same. *Jus Cogens* is a norm in international law and the *jus cogens* norms create *erga omnes* obligation upon the subjects of international law. It was also noticed from the various ICJ judgments that the World Court has often used *erga omnes* while justifying its jurisdiction for violations of *juscogens* by the subjects of international law particularly by the states. Permanent Court of Arbitration in *Barcelona Traction Case* affirmed that, *erga omnes* responsibilities arise when there is a violation of *jus cogens* norms. Violations in any part of the world are a responsibility of all states to stop such violations.

The scope of international law has grown by leaps and bounds. Multiple legal topics which were traditionally considered as a core subject matter of municipal law, have, due to the over engagement between the states in present circumstances, become a topic of discussion in international law as well. This rise of application of international law is bound to affect *jus cogens* norms as well. Presently *jus cogens* norms are mostly related to human rights law, but may be in the future peremptory norms may also arise from other areas of international law too. Therefore, a study of the methodological investigation in identifying such norms becomes all the more necessary. It is a fact that increased interaction between the subjects of international law is bound to create new forms of violation of human rights and it is

⁶ *Advisory Opinion Concerning the Reservation to The Convention Preservation and Punishment of the Crime Genocide*, 15 ICJ (1951), at p.23.

⁷ *Belgium vs. Spain*, 3 ICJ (1970), at p.34.

⁸ *ibid.*, at p.19.

⁹ *supra* note 7, at p.34.

¹⁰ *ibid.*, at p. 32.