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WHAT DO *JUS COGENS* NORMS DO FOR THE INTERNATIONAL COMMUNITY?

This paper aims to delve into the qualities and content of norms of general international law classified as peremptory (jus cogens). To do so, three questions will be answered: (i) how does jus cogens arise, (ii) how is jus cogens changed and eliminated and (iii) what is jus cogens "utility"? The first question will be answered by adopting a two-stage formal criterion, based on the provisions of the Vienna Convention on the Law of Treaties. In this section, it will be demonstrated that jus cogens may have trivial content. Next, it will be argued that the process of modification and elimination of jus cogens depends to a great extent on the non-verification of the necessary conditions for its emergence. Finally, the "utility question" will deal with the alleged constitutionalist function of jus cogens and its relevance, namely by limiting the power of the States and strengthening the rule of law.

Keywords: *International law, Jus cogens, Peremptory norms of general international law, Vienna Convention on the Law of Treaties.*

1. INTRODUCTION

The concept of peremptory norms of general international law (jus cogens) has been highly disputed among scholars and legal practitioners (see, for example, Focarelli 2008; Gülgeç 2017; Hameed 2014; Kolb 2015; Linderfalk 2013). In his 1990 essay, D'Amato (1990, 5) posed three questions that scholars should answer to arrive at a theory of peremptory norms of international law that would be "just right". To do so, the author claims, one had to explain (i) what the utility of the set of norms classified as jus cogens is – "utility question" – (ii) how

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such norms arise – "emergence question" – and, once they exist, (iii) how international law can modify them or get rid of them.

This paper aims to delve into the qualities and content of norms of general international law classified as peremptory, with the aid of the recent work of the International Law Commission (ILC) (2022, 10–90) on jus cogens.

As said, D'Amato raises, first, the question about the utility of jus cogens norms; only then does he bring up the "emergence question", followed by the need to know how international law can modify and eliminate these norms from the legal order. The answer to the very same questions will not, however, follow the order in which they were invoked. Since the concept of "utility" will be approached from a strictly normative and positivist point of view, there is no point in discussing the normative utility of something that may not even exist. So, firstly, the issue of emergence will be addressed, considering jus cogens as legal norms; secondly, we will focus on the problem of changing and eliminating these norms from the legal system. Only after that will the utility of peremptory norms of international law be covered.

First, the "emergence question," as Jovanović (2019, 111) names it, will be answered by adopting a two-stage formal criterion, grounded in Art. 53 of the Vienna Convention on the Law of Treaties (VCLT).

Notwithstanding the moral values that one may claim to be associated with the content of norms characterized as jus cogens, the main argument to be made on the subject of "emergence" is that for peremptory norms to be identified, there must be (1) (valid) sources of law from which general norms of international law can primarily emerge from (and it will be argued the existence of such sources); and (2) the international community of States as a whole must accept and recognize these norms as non-derogable (and it will be argued that it can be so and that one can find evidence of that acceptance and recognition based on social facts, though without committing to any particular reason that explains why States would do so).[1]

Second, the issue related to the normative utility of jus cogens will deal with the alleged constitutionalist function of peremptory norms of international law and its purported relevance, namely by

[1] Despite their possible hierarchical value, the mere fact that States accept these norms as non-derogable does not mean that they are non-derogable. The chance of derogation (and of defeasibility, as a property of norms) is not dependent on the will of the authorities acting on behalf of States (see Lopes 2014, 226).

limiting the power of the States and strengthening the rule of law. On this issue, the norms expressed in Art. 53 and 64 of the VCLT will be addressed as secondary norms (see Hart 1961, 94), as they state the following legal consequences: (i) the voidness of a treaty if, at the time of its conclusion, it conflicts with a peremptory norm of general international law and (ii) the voidness and end of a treaty if a new peremptory norm of general international law emerges and conflicts with the treaty. It will be discussed whether these norms present norm-hierarchy criteria and if that is sufficient to make a parallel with domestic law constitutionalism.

One final remark will be made regarding the utility arising from the classification of peremptory norms of international law, considering that their subject reflects the fundamental values and interests of the international community. It will be argued that, in this sense, little or no utility can be drawn from the classification itself. This claim does not have the purpose to deny the moral substrate that is associated with jus cogens. It simply intends to clarify that the moral function can be fully ensured just by the first step presented on the emergence process as necessary to identify peremptory norms. This would be the case of some customary norm that emerged grounded on some moral value. Moreover, one can also think about the case of some human rights that are not considered as having non-derogable character, or about moral rights that do not emerge from any valid source of law. Albeit not yet classified as jus cogens – precisely because they respectively fail steps (2) and (1) of the identification process – one cannot deny their fundamental role in the moral guidance of the international community. If ever the two-step criterion is satisfied, no greater legal utility arises from the norm's emergence of moral background. From the classification as peremptory norms comes no subject-matter innovation.

2. THE "EMERGENCE QUESTION"

In this section, the question "How does a norm of jus cogens arise?" will be answered. Specifically, the following topics will be addressed: (i) the formal criterion for the identification of peremptory norms of international law, grounded in Art. 53 of the VCLT, and (ii) the discussion on the possibility of jus cogens of trivial content.

The 2022 report of the International Law Commission on the work of the seventy-third session and, specifically, the "[t]ext of the

draft conclusions on identification and legal consequences of peremptory norms of general international law" states that "[a] peremptory norm of general international law (jus cogens) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"[2]. This is also the definition provided by Art. 53 of the Vienna Convention on the Law of Treaties[3].

From this definition, it is going to be argued that it is possible to extract a strictly formal identification criterion of jus cogens, which is divided into two stages. A peremptory norm of international law is:

- A norm of general international law[4];
- Accepted and recognized[5] 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.

The first condition for determining that a norm is peremptory is to identify a norm of general international law, which arises from (valid) sources of international law[6]. This is a key point to deny a purported "moral source" of jus cogens[7]. The general sources of interna-

[2] Also, there is now a non-exhaustive list of peremptory norms of international law identified by the Commission, which includes the prohibition of aggression, the prohibition of genocide, the prohibition of crimes against humanity, the basic rules of international humanitarian law, the prohibition of racial discrimination and apartheid, the prohibition of slavery, the prohibition of torture, and the right of self-determination.

[3] There are other norms of the Convention that address the topic of *jus cogens*, such as Art. 64 and 71.

[4] From the International Court of Justice (I. C. J.) perspective, norms of general international law are "those norms of international law that must have equal force for all members of the international community" (see I.C.J. Reports 1969, 3, para. 63).

[5] Those terms have their origin in Art. 38 of the Statue of the International Court of Justice, and apply, respectively, to custom, and treaties.

[6] The term "sources" has been criticized, mainly because of the multiple meanings of the term, which can lead to confusion between the binding and non-binding "sources" (see Kelsen 1960, 262–63). For the purposes of this paper, "sources" are the materials from which legal norms are formally derived. As Raz (1979, 47) states: "[a] law has a source if its contents and existence can be determined without using moral arguments (but allowing for arguments about people's moral views and intentions, which are necessary for interpretation, for example)".

[7] For that, one must accept that sources of law are not to be confused with moral sources, although there may be legal norms that deal with the same content as moral norms, as well as legal norms "inspired" by morals.

tional law have been considered treaties and customary international law (see, for example, d'Aspremont 2018)[8]. Therefore, the first condition is verified by the existence of a norm of general international law that arises from one of those sources (see Shaw 2017, 94).

The second step requires that the norm must be 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. It seems not odd to admit that (i) this acceptance and recognition may happen, and (ii) that such acts of acceptance and recognition can be empirically attested – however, the reason that explains why States do so (e.g. based on an officials' moral belief) is not relevant for the determination of a norm as jus cogens.

According to ILC's report (2022, 40), such acceptance and recognition may take a wide range of forms of evidence, such as "public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; constitutional provisions; legislative and administrative acts; decisions of national courts; treaty provisions; resolutions adopted by an international organization or at an intergovernmental conference; and other conduct of States".

One needs also to be precise in what is meant by "the international community of States as a whole." While it seems clear that the evidence of acceptance and recognition is only meaningful if it is shown by States and no other legal subjects, the scope of "as a whole" needs to be clarified: the expression is only meant to emphasize the idea of community and collective. Therefore, it has been understood that not all States need to accept and recognize the norm as non-derogable, as long as a large majority does[9].

3. JUS COGENS WITH TRIVIAL CONTENT

It is debated whether a peremptory norm of international law can have trivial content, as they "reflect and protect fundamental val-

[8] And also "general principles of law", but it cannot be that way: general principles of law are norms, not sources of law.

[9] As Jovanović (2019, 111) addresses, otherwise, "[t]he emergence of a jus cogens norm, whose purported function is to put limits on the state's sovereign will as the source of international law-making, would eventually depend on the robustly expressed will of those very states, and all of them" (see, also, International Law Commission 2022, 40).

ues of the international community" (see, for example, Hameed 2014, 68–70)[10]. It seems that this hypothesis cannot be ruled out.

If, as stated, for the identification of norms as jus cogens it is only necessary to fulfil the formal two-step criterion presented above, then, theoretically, it is conceivable to have a peremptory norm of international law with such trivial content: it is enough that legal officials (fundamentally, agents who are authorized to act on behalf of the States) recognize any norm of general international law as having peremptory character. If that is true, the concrete content of a norm is neither a necessary condition nor a sufficient condition for its classification as jus cogens.

In practice, however, it is not surprising that States may understand that peremptory norms can only be those that reflect the fundamental values of the international community. If so, because States believe that only such matters can be considered jus cogens, they will only accept and recognize norms that deal with those matters as jus cogens. So, these norms will constitute the main type of jus cogens norms. But that is contingent; theoretically, jus cogens may have any content.

4. "CHANGING" AND "ELIMINATING" PEREMPTORY NORMS OF INTERNATIONAL LAW

This section intends to answer the question: Once one [peremptory norm of general international law] arises, how can international law change it or get rid of it? (D'Amato 1990, 5).

In this context, it will be argued that "changing"[11] a jus cogens norm will always imply that that concrete norm is no longer identified as jus cogens. Given the stated jus cogens' creation process, it seems that the "change", if it occurs, implies that the norm (N1) is de-characterized as being jus cogens and that this "change" implies that another norm (N2) becomes to be identified as jus cogens. This can happen in at least two ways: i) if the community of States interprets N1's legal

[10] As stated by International Law Commission (2022, n. 18), "[p]eremptory norms of general international law (jus cogens) reflect and protect fundamental values of the international community. They are universally applicable and are hierarchically superior to other rules of international law".

[11] In fact, "changing" presupposes a relationship between norms, whereas N2 substitutes N1, since a different interpretation of the N1 provision implies a new norm and not an N1 modification in itself.

provision differently, thus emerging N2, and meanwhile comes to accept and recognize that N2 is non-derogable, or ii) if another norm of equal status, grounded on a different legal provision from N1, entails its removal from the legal system.

As for the question of elimination of jus cogens norms, it will suffice that one of the two necessary conditions for its identification no longer verifies: either that the norm accepted and recognized by the States no longer belongs to the normative system, or that the States no longer accept and recognize this norm as non-derogable.

5. THE "UTILITY QUESTION"

Finally, this section intends to answer the question: What is the utility of a norm of jus cogens (apart from its rhetorical value as a sort of exclamation point) (D'Amato 1990, 5)?

It will be argued that there is, indeed, utility in the existence of peremptory norms of international law. The issue is going to be addressed regarding the idea of the normative utility of jus cogens based on Art. 53 and 64 of the VCLT[12].

The norms expressed in Art. 53 and 64 of the VCLT seem to be characterized as secondary rules (see Hart 1961, 94), as they state the following legal consequences:

- The voidness of a treaty if, at the time of its conclusion, it conflicts with a peremptory norm of general international law and
- The voidness and end of a treaty if a new peremptory norm of general international law emerges and conflicts with the treaty.

Accordingly, Art. 53 determines that the validity of treaty norms depends on their conformity with peremptory norms of general international law and that the legal consequence of such invalidity is the voidness of the treaty; on its side, Art. 64 determines that, if the emergence of a subsequent norm of jus cogens conflicts with an already existing treaty norm, that implies the voidness of the treaty and its removal from the legal system. The consequence of these norms seems to admit that jus cogens norms have a status of superior hierarchy concerning treaty norms.

[12] See, also, Art. 71, of the VCLT.

On this topic, it has been discussed whether peremptory norms of general international law have a "constitutionalist function" (Jovanović 2019, 116), since jus cogens, such as constitutional norms might restrain the validity of other norms.

Some constitutional norms have indeed the status of superior hierarchy since there are norms from which their validity depends on those higher norms, either because constitutional norms may define the conditions for the emergence of such norms, or because there is a third norm that establishes the higher status of a constitutional norm. The same hierarchy seems to happen with peremptory norms of international law. Art. 53 and 64 of the VCLT confer to peremptory norms of international law the status of a higher law: it is established that a treaty norm cannot contradict a jus cogens norm[13].

Since that norm-hierarchy criterion exists, jus cogens norms may have a relevant utility for the international rule of law: the sovereignty and will of States, at the time of the treaty's conclusion, is limited by jus cogens norms. The existence of a treaty is dependent on its conformity with peremptory rules of international law that may arise.

Finally, one last remark will be made regarding the utility arising from the classification of peremptory norms of international law, considering that their subject might reflect, as seen, fundamental values and interests of the international community.

It seems important to stand out that, if one commits to the formal-step criterion presented, little or no utility, aside from the formal one, can be drawn from the classification of a norm as jus cogens itself. It has been already conceded that jus cogens may have a moral substrate and that they can reflect fundamental values. The point to be made here is to clarify that the moral or "fundamental values" can be fully ensured just by the first step presented on the emergence process as necessary to identify peremptory norms: thus, there comes no content innovation from the classification of a peremptory norm as such, since the alleged "fundamental" or "moral" value is already part of the legal system, by the mere existence of the norm of general international

[13] Strictly speaking, it cannot be that the treaty norms are the ones that confer this status. The understanding that the norms conferring this status are of customary source seems to be the one to support. Clarifying this issue and highlighting the difference between normative superiority and primacy of application, when it comes to the relation between *jus cogens* and customary law, see Gülgeç (2017, 73–115).

law – for example, it could be so if one thinks about the case of some customary norm that emerged grounded on a certain moral value.

Moreover, one can think about human rights that are not considered as having non-derogable character, or about moral rights that do not emerge from any valid source of law: albeit not being yet classified as jus cogens – precisely because they respectively fail step (2) and (1) of the identification process – one cannot deny that those norms may have a fundamental role in moral guidance of the international community. If ever the two-step criterion is satisfied, no greater utility, besides the hierarchical one, arises. From the classification as peremptory norms comes no subject-matter innovation.

6. CONCLUSION

This paper attempted to address and clarify some of the problems raised by jus cogens, as well as to highlight the role that these norms can have for international law. It has answered the three questions posed by D'Amato: the question of emergence, the question of revision, and the question of the utility of peremptory norms of international law.

The conclusions drawn are that:

A formal criterion for identifying jus cogens norms can be drawn from Art. 53 of the Vienna Convention on the Law of Treaties;

The two conditions for the identification of a peremptory norm of general international law are the existence of a norm of general international law and the recognition or acceptance by the States that this norm is non-derogable;

The criterion presented, theoretically, allows for the existence of jus cogens with trivial content;

It is possible to "change" and "eliminate" this type of norm from the legal system;

Changing a peremptory norm of general international law seems to imply its removal from the normative system because it implies its de-characterization as jus cogens. It is understood that this process occurs in a relationship between norms (N2 replaces N1);

For a peremptory norm of general international law to be removed from the legal system, it is sufficient that one of the two conditions for its identification no longer exists;

The utility that is derived from the existence of jus cogens norms has a normative character and comes from the fact that there are norms that consider them hierarchically superior to other norms;

The hierarchical superiority of the jus cogens norms allows for a constraint on the sovereignty of the will of States when making international treaties.

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