

THE INTERNATIONAL LAW'S HIGHER NORMS: A REVISIT ON THE EVIDENCE OF *JUS COGENS*

KHO FENG MING

ABSTRACT

Jus cogens norms (preemptory norms) as a source of law in Public International law has attracted much debates among the judges and scholars. Its' existence was briefly mentioned in the Vienna Convention on the Law of Treaties 1969 (VCLT), yet the knotty state of affairs occur because the Convention has failed to lay down a proper legal framework to regulate on the method of identification of jus cogens norms. With the present laws being in limbo, it can be perceived that the judges have acted with discretions when adjudicating case laws concerning jus cogens. Establishing a proper method for identifying these jus cogens norms is in fact becoming important than ever, chiefly due to the fact that jus cogens norm is an international law higher norms, it voids statute, treaty, or conduct of the government which are in conflict with them, and it is an arduous task to diminish it once it is elevated to the status of 'higher norms'. Hence if a judge considers a norm as a jus cogens norm, no other laws can contradict to such international law higher norms. Using the approach of historical and analytical methodology of research, this paper intends to identify the variety of evidence of jus cogens in VCLT, the negotiating history of VCLT, some important judicial decisions, and the writings of scholars. The paper further highlights the urgent need to establish a proper method of identification on these international law higher norms.

Keywords: international law; *jus cogens*; evidence; problems.

INTRODUCTION

International law has often been appraised as a 'non-law' discipline and mere window dressing (Oona Hathaway, 2005). A sentiment frequently reflected in academia is that it is politics dressed in the language of the law. Hence it was once considered as unenforceable and unserious (Abass, 2014, p 2). The cynical attitude of most States towards international law can be summed up by a famous English adage: (1995)

"... English law is law, foreign law is fact, and international law is fiction..."

Contemporaneously, international law has nonetheless developed and evolved into the most effective weapon, *inter alia* preserving of global peace and security, regulating behaviour of one State towards another, and even to the extent of matters concerning protection of human rights (Oppenheim, 1908; Abass, 2014). In the words of Philpott, this theoretical and doctrinal development of the international law tradition is dedicated to extending to the entire globe a set of commitments to which States give their active assents (2007, p 17). Be that as it may, one of the most perennially perplexing and challenging questions facing international scholars till now is when and why States comply with international law. There are well over 50,000 pieces of international treaties currently in force, covering every aspect of international affairs and nearly every facet of State authority. Yet relatively few of these treaties have what is considered as 'central enforcement regime'. As a result, some people challenge the regimes as ineffective and perhaps meaningless (Oona Hathaway, 2012). On the bases of the doctrine of State sovereignty and the consensual theory of international law (Abdul Ghafur, 2011, p 206), it was thought that all rules of international law were *jus dispositivum* (voluntary rules which could very well be altered or amended by the agreement of the States). However, there were endeavours especially by developing and socialist States to upgrade certain fundamental rules of international law to the status of *jus cogens*: the preemptory norms or compelling rules from which no derogation is permitted (Abdul Ghafur, 2011; Prosper Weil, 1983). Although the Western countries were in the beginning somewhat reluctant, they gradually accept the initiative on condition that some mechanism for judicial determination of preemptory norms be set up (A. Cassese, 2001, pp 138-139). To date, most international lawyers recognised that the international legal system has a category of higher ethical norms, *viz jus cogens*. Most international lawyers also agreed as to the operation or effect of *jus cogens* norms within the system: such norms void conflicting lesser norms (O'Connell, 2012). Ever since it has then received widespread of acceptance (Tavernier, Kadelbach, 2006, pp 1, 21) and has in fact, signifies the doctrine of *jus cogens* a good example of consensus in the international legal community (O'Connell, 2012). Nonetheless, the consensus begins to break down over how to identify *jus cogens* norms. Such uncertainty regarding identification leads to debate over just which norms qualify as *jus cogens* (Tavernier, Kadelbach, 2006). Although there is widespread acceptance of *jus cogens*, the international legal community lacks consensus on important aspects of how to identify *jus cogens* norms (O'Connell, 2012). Hence it can be regarded that the doctrine of *jus cogens* attracts fierce advocates as well as strong sceptics, who debate the nature, functions and even the existence of such norms (Shelton, 2015). One notable remark is well illustrated by Anthony D'Amato: (2010)

"... What we require-like the third bowl of soup in the story of the three bears-is a theory of *jus cogens* that is Just Right. I do not know if such a theory is possible. I don't even know if one is conceivable. But if someone conceives it, that person deserves the very next International Oscar. To qualify for the award, the theory must answer the following questions:

- (1) What is the utility of a norm of *jus cogens* (apart from its rhetorical value as a sort of exclamation point)?
- (2) How does a purported norm of *jus cogens* arise?
- (3) Once one arises, how can international law change it or get rid of it?

If an International Oscar were awarded for the category of Best Norm, the winner by acclamation would surely be *jus cogens*. Who has not succumbed to its rhetorical power? Who can resist the attraction of a "supernorm" against which all ordinary norms of international law are mere 97-pound weaklings?..."

Similarly, D. Shelton opined: (2015)

"... Like Sherlock Holmes, the idea of *jus cogens* emerged as a concept in the imagination of writers. Over time both Sherlock Holmes and *jus cogens* have generated widespread belief in their reality, but it is a reality that is subjectively shaped by each follower..."

This main focus of this paper is to provide the readers on the variety of evidence of *jus cogens*, by highlighting the provisions in The Vienna Convention on the Law of Treaties 1969 (hereinafter as "VCLT"), the negotiating history of VCLT, some important judicial decisions which discussed particular norms belonging to the category, and the writings of scholars. Although vast majority of papers have been written on the method of identifying a *jus cogens* norm, be it using public policy method, or natural law theory technique, or using judges-scholars' interaction approach, yet it can be perceived that the relevant organisation in international arena has not make any initiative to tackle this complication. This paper, with a hope that the relevant authority will act swiftly to eliminate this difficulty in international law, as such, further highlights the reasons and the need to resolve the underlying problem faced by *jus cogens* in international law urgently, viz by establishing a proper method of identification of these international law's higher norms.

EVIDENCE OF *JUS COGENS*

The concept of *jus cogens* is rooted in the writings of Vitoria, Grotius, Christian Wolff and Emmerich de Vattel, although the concept was not named as such. These authors are the first to refer to certain rules superior to the customary or treaty-based rules of international law (Kadelbach, 2006, p 36). Available evidence suggests that international *jus cogens* originated as a construct of writers, in this case in the efforts of early publicists to explain an emerging legal system governing sovereign states, where rulers often claimed absolute power unrestrained by law (AG, 1982). Scholars sought to understand the nature and source of obligations that could limit the power of governments internally and internationally, binding them to a set of legal norms to which they did not necessarily express consent (Haimbaugh, 1987, pp 207-211; Kadelbach, 2006, p 21). However, the source of peremptory rules in the writing of this era was natural law (Gulgec, 2017, p 83). The prohibition against slavery and slave trade in the 19th century, the first Geneva Convention of 1864 and The Hague Conventions on *jus in bello* can be indicated as crucial milestones in the development of *jus cogens* concept. However, the consolidation of *jus cogens* category of norms has taken place after the Second World War and is a product of the 20th century (A. Cassese, 2001, p 200). Some remarks were made which are in line with this analysis: UN Conference on the Law of Treaties Official Records (1st Session, 1968, pp. 312-313, par. 55) where the delegate of Romania indicates that:

"...It could never be sufficiently emphasised that in the contemporary world, normal relations, based on confidence and mutual respect, could not develop between States without strict observance of the fundamental principles of international law. Those principles were intended to defend the values forming the common heritage of all peoples, for example peace and international security, for they represented the keystone of coexistence and co-operation between States..."

It is observed that the Charter of Nuremberg Military Tribunal and the Charter of the United Nations have led to a new era for *jus cogens* norms and developments regarding the responsibility of states and law of treaties in this era has caused a shift of paradigm. The change of paradigm, in the words of Yahya Gülgec: (2017, p 84)

"... This change of paradigm signifies a shift from an international law where the principle of equal sovereignty was acknowledged without any exceptions to another understanding of international law where states may be subjected to certain supreme and peremptory rules not necessarily as a result of their direct consent..."

The descriptions of *jus cogens* norms indicates that they are not derived from the three primary sources of international law-treaties, customary law, and general principles of law (see Article 38 of the Statute of International Court of Justice). From the perspective of international law, *jus cogens* norms are superior to all other norms, and they are, in fact, the most powerful principles we possess today. While not so very long ago, peremptory international law was regarded by international lawyers as an idea of little more than academic interest, today it is part of the common rhetoric of the international legal profession, where international lawyers resort to *jus cogens* for the construction and reinforcement of legal arguments (Linderfalk, 2009 and 2011). Although they are limited in nature, yet no statute, treaty, or conduct of the government may conflict with them (O'Connell, 2012, p 80). *Jus cogens* norms operates in the manner of public policy norms in a national contract law, which can void a contract but not prescribing duties (Farnsworth, 1984; Re Baby M, 537 A.2d 1227 (N.J. 1988)). Some scholars (Schwarzenberger, 1965, p 100) described *jus cogens* norms as a kind of public policy in international context. It is asserted that this concept exists because an understanding similar to the concept of public order in national legal systems also exists in international law (Schwelb, 1967; Kadelbach, 2006; Schmahl, 2006; and Christenson, 1987). Just as the peremptory norms protecting the worker in labor law and those norms in contract law rendering contracts *contra bonos mores* invalid, there are some superior, preemptory rules in international law stemming from "public order" and any treaty contrary thereto is invalid (Erdem Denk, 2001, pp 54-55). In domestic legal systems, a judge may strike down contracts between parties because the contracts violate public policy (O'Connell, 2012, p 82). Even though a contract is complete, in the sense that it contains the necessary elements of a valid contract, namely, offer, acceptance, consideration, capacity, intention to create legal relations, free

consent, the contract may still be held void on grounds of illegality (see Kho & Sakina, 2017). The decision of Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp 341, 343 has been very influential in this area of contract law:

“The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is, not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *ex dolo malo non oritur actio*.”

Hence in national legal systems, judges look to either their own perception of society's position on the matter or try to discern from legislation what “primordial values” society embraces (see Peel, 2015; Winfield, 1928; Furmston, 2001; V. Orth, 1981; Sinnadurai, 2011; and Kho & Sakina, 2017). In this public order theory, *jus cogens* norms exist as imperative and hierarchically superior to other international law in order to promote the interests of the international community as a whole and to preserve core values. According to Verdross, this is inherent in all legal systems: ‘A truly realistic analysis of the law shows us that every positive juridical order has its roots in the ethics of a certain community, that it cannot be understood apart from its moral basis’ (1937). In his third report on the law of treaties in 1958, rapporteur Fitzmaurice appeared to see *jus cogens* from the public order perspective, as he asserted that rules of *jus cogens* ‘possess a common characteristic’, namely ‘that they involve not only legal rules but considerations of morals and of international good order’ (p 41). An international tribunal might refuse to recognise a treaty or to apply it where the treaty ‘is clearly contrary to humanity, good morals, or to international good order or the recognised ethics of international behaviour’ (Fitzmaurice, 1958, p 28).

However, it can be said that judges simply consult their own conscience when identifying *jus cogens* norms. Although this approach appears to have been successful to date, the international law is still vague about the method of identifying these norms (O’Connell, 2012, pp 79-80). Invoking these norms too often or in unpersuasive way may lead to disrespect for the category (Shelton, 2004; Klabbbers, 1996). Nonetheless, respect for *jus cogens* norms is an obligation owed to all (O’Connell, 2012, p 89).

DESCRIPTIONS

The best known description of *jus cogens* can be found in the 1969 Vienna Convention on the Law of Treaties (VCLT). VCLT was drafted by the United Nations International Law Commission (ILC). Over the years, the ILC had the law of treaties on its agenda, numerous reports of ILC, conferences and discussions focused on the topic of *jus cogens* (Sztucki, 1974). The drafters of the Convention initially tried to give a clear definition of preemptory norms so as to make it easier for States to identify them when they are applied, but it was an unsuccessful attempt (Abdul Ghafur, 2011). Furthermore, the Convention does not provide the list of particular norms qualified as *jus cogens* norms, rather, it merely states that a treaty or provision of a treaty (article 64 of VCLT) which is in conflict with *jus cogens* is void *ab initio*. Article 53 of the Convention provides:

“A treaty is void if, at the time of its conclusion, it conflicts with a preemptory norm of general international law. For the purposes of the present Convention, a preemptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”

It has been said repeatedly about this definition that it is circular. If a *jus cogens* status is conferred on a rule of law because the international community of States accept and recognise this rule as non-derogate-able and modifiable only by the creation of a new norm of *jus cogens*, then the definition assumes what remains to be established: the creation of *jus cogens* (Linderfalk, 2011, p 378). Hence *jus cogens* norms are superior to the rules derived from the primary sources of international law including treaty:

- (i) If a treaty is in conflict with a first order rule of *jus cogens* created prior to the conclusion of the treaty, then the treaty shall be considered void.
- (ii) If the purport of a reservation to a treaty is in conflict with a first order rule of *jus cogens*, then that reservation shall be considered void (Linderfalk, 2004; see Tanaka, *Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands*, 1969).
- (iii) If a resolution adopted by an international organisation is in conflict with a first order rule of *jus cogens*, then that resolution shall be considered void (see Lauterpacht, *Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, 1993).
- (iv) To the extent that a claim of sovereignty over a certain territory is based on action violating a first order rule of *jus cogens*, that claim shall be considered invalid (Orakhelashvili, 2006).

In other words, the collision between *jus cogens* norms and international treaties are resolved, not according to the principles of *lex posterior* or *lex specialis*, but according to the principle of *lex superior derogat legi inferiori* (Gulgec, 2017). *Jus cogens* norms thus can void positive-law rules, but positive rules cannot void or modify *jus cogens*. Andre de Hoogh regards these norms as “super customary law” as they are a special category of customary international law, not explainable by the standard theory of custom alone (1996). The authoritative interpretation of preemptory norms was given by Mustafa C. Yassen: (UN VCLT, Official Records, First Session, 472)

“... There was no question of requiring a rule to be accepted and recognised as preemptory by all States. It would be enough if a very large majority did so; that would mean that, if one State in isolation refused to accept the preemptory character of a rule, or if that State was supported by a very small number of States, the acceptance and recognition of the preemptory character of the rule by the international community as a whole would not be affected...”

Besides, Fitzmaurice, a rapporteur on the law of treaties for the ILC, opined that international law may be divided into two categories of rules: (1958, p 40)

“... [T]hose which are mandatory and imperative in all circumstances (*jus cogens*) and this (*jus dispositivum*) which merely furnish a rule for application in the absence of any other agreed regime, or, more correctly, those the variation or modification of which under an agreed regime is permissible, provided the position and rights of third States are not affected...”

On the other hand, Louis Henkin, the Chief Rapporteur, in the 1987 Restatement (Third) of the Foreign Relations Law of the United States (hereinafter as Restatement) opined *jus cogens* as followed: (1987)

“... Some rules of international law are recognised by the international community of states are preemptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them. Such a preemptory norm is subject to modification only by a subsequent norm of international law having the same character...”

The Restatement cited two types of *jus cogens* norms, viz the prohibition of the use of force (Article 102; McNair, 1961; Nicaragua case (1986)), and norms associated with human rights, including, *inter alia*, prohibitions on: (Article 702 of the Restatement)

- (a) genocide (see Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (advisory Opinion) (1951))
- (b) slavery or slave trade (see Barcelona Traction, Light and Power CO case (Belgium v Spain) (1970))
- (c) the murder or causing of the disappearance of individuals
- (d) torture or other cruel, inhuman, or degrading treatment or punishment
- (e) prolonged arbitrary detention
- (f) systematic racial discrimination (see South West Africa cases (Second phase) (1966); Namibia case (1971))

Article 702 of the Restatement further noted that “not all human rights norms are preemptory norms, but those in clauses (a) to (f) are, and an international agreement that violates them is void”. Besides, scholars generally agree that the organisers of the tribunal and the drafters of its charter relied on *jus cogens* for the proposition that otherwise valid national law could not be raised as a defence at the tribunal if the national law conflicted with higher norms of international law (Charter of the International Military Tribunal, United States-France-United Kingdom-U.S.S.R., 1948; and O’Connell, 2012). David Luban, with reference to the International Military tribunal in Nuremberg, Germany, quoted:

“... The Nuremberg Tribunal held individual Nazi officials responsible for acts that positive law did not forbid at the time they were committed-so-called ‘crimes against peace’ and ‘crimes against humanity’. Anticipating the defendants’ protest that they were merely following official orders that carried force of positive law, Article 8 of the Nuremberg Charter specifically provided that “[t]he fact that the defendant acted pursuant to an order of his government or a superior shall not free him from responsibility.” ... The natural law argument that unjust laws lose their obligatory character provides a straightforward philosophical justification for Article 8... [N]atural law... form[s] most obvious justification for criminalising “murder, extermination, enslavement, deportation, and other inhumane acts... whether or not in violation of domestic law...” Such crimes against humanity are radically inconsistent with the common good, and any domestic legal system that permits them must violate natural law...”

As a concluding remark, based on the above descriptions on the *jus cogens* norms, although variety of evidence have been put forward in the VCLT, the ILC discussion, and the Restatement, yet none of them prescribe the methodology for identifying *jus cogens* norms. Perhaps, it might be argued that identifying these norms is a task for the judges.

JUDICIAL OPINIONS ON *JUS COGENS*

When drafting Article 53 of VCLT, it appears that the ILC decided against including any examples of rules of *jus cogens*. The ILC is said to be believed that on the basis of State practice and international adjudication, rules having the character of *jus cogens* would be gradually established themselves in due course. After the adoption of VCLT, many rules have been suggested as candidates of *jus cogens*, yet only a few pass the test (Abdul Ghafur, 2011, p 208). It was, until now, not clear what tests have in fact been adopted to qualify what rules categorise as *jus cogens* and what are not. What is clear is that it has been a judicial task. During a 1966 discussion organised by the Carnegie Endowment for International Peace, it was provided: (1967)

“... Drawing an analogy from the concept of *ordre public* in municipal law... *jus cogens* [is] not formulated in precise rules... [C]onsequently, the only method of deriving it [is] judicial determination. Thus, it [is] left to the judge to extract *jus cogens* limitations from the legal system as a whole by transforming primordial social values directly into legal imperatives...”

The Carnegie Endowment Conference on the Law of Treaties (1967) further provides that the tasks of identifying *jus cogens* norms and giving effect to them is largely the work of courts (see International Military tribunal in Nuremberg, Germany). Hence, in general, the identification of *jus cogens* norms will be a matter for courts. This is a judicial task, and contemporaneously, significant numbers of courts and tribunals have, directly and indirectly, acknowledged and recognised the existence of *jus cogens* (O’Connell, 2012). The chronological review that follows begins in year 1945, the year the Allies established the International Military tribunal in Nuremberg, Germany (Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, United States-France-United Kingdom-U.S.S.R., 1945). Subsequently in 1970, the International Court of Justice (ICJ) made an indirect reference to *jus cogens* norms in its decision in the *Barcelona Traction* case, where the ICJ not only described a special category of norms but provided a list that has achieved consensus as the definitive *jus cogens* norms: (Barcelona Traction, Light & Power Co. (Belgium v Spain), 1970)

“... [A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*... Such obligations derive, for example in contemporary international law, 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...”

In 1988, the case of *Committee of U.S. Citizens Living in Nicaragua*, has directly acknowledged *jus cogens* norms: (Committee of U.S. Citizens v Reagan, 1988)

“... The Restatement acknowledges two categories of [*jus cogens*] norms: “the principles of the United Nations Charter prohibiting the use of force”, ... and fundamental human rights law that prohibits genocide, slavery, murder, torture, prolonged arbitrary detention and racial discrimination...”

Similarly, the case of Nicaragua acknowledged that *jus cogens* norms are superior to other international and national laws, and Mikva J further highlighted that the Restatement’s limiting of *jus cogens* to invalidating treaties is, in fact, too narrow (*Filartiga v Pena-Irala*, 1980). Subsequently in 1988, the Trial Judgment for the case of *Prosecutor v Furundzija* opined that the prohibition of torture is a *jus cogens* norm and that national law does not operate as a defence where torture is committed:

“... The fact that torture is prohibited by a preemptory norms of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and *void ab initio*, and then be unmindful of a state say, taking national measures authorising or condoning torture or absolving its perpetrators though an amnesty law...”

In a similar fashion, in year 2000, the Pinochet case held that torture cannot be justified by any rule of domestic or international law (ex parte Pinochet Urgate (No. 3), 2000; this decision was reaffirmed in *Prosecutor v Furundzija*, 2000). In due course, the case of *Domingues v United States* in 2003 further illustrated the *jus cogens* norms includes prohibiting the use of the death penalty to punish crimes committed by juveniles (2003). Hence it can be understood that the courts have continued to confirm the existence of the category of preemptory norms (O’Connell, 2012, p 90).

As a concluding remark, although *jus cogens* norms exist as illustrated above, nonetheless neither the descriptions nor the judicial opinions provides the proper method in identifying *jus cogens* norms. It appears that although states have now generally accepted the existence of *jus cogens* (preemptory) norms in international law, yet they have provided little guidance on how such norms are to be identified. The decision of ICJ in *Belgium v. Senegal* (2012) case illustrated that little advancement in the doctrine of *jus cogens* identification has occurred since the concept was established through the Vienna Convention of 1969 (Criddle, Fox-Decent, 2009; Woods, 2011). It is hope that some relevant parties may take initiative to willing to engage with matters of *jus cogens* identification, so as to assist with the development of a framework for the identification of *jus cogens* norms (Saul, 2014).

THE WAY FORWARD FOR *JUS COGENS*

At this juncture, it is an undisputed fact that *jus cogens* norms is a “*supernorm*”. Such higher ethical international norms void rules which are in conflict with these norms. Thus, it can be regarded as “public policy” in international arena. It is certainly an obligation to be abide to and owed to all. Nonetheless, as illustrated above, the VCLT, the Restatement, writings of scholar, and judicial opinions, merely provide the existence of *jus cogens* norms. Neither of them has in fact lay down a proper method of how to identify these norms. It is unclear that what test has been applied so as to qualify it as a new preemptory norm. Apart from those *jus cogens* norms listed above, can other human rights qualify as preemptory norms? But as of now, those rights sitting outside the sphere of *jus cogens* norms will remain being excluded, unless and until a paradigm shift takes place. In the discipline of law, it is hence not a misleading statement to say that ‘identifying these norms is a judicial task after all’. Judges simply consult their conscience in determining these norms in adjudication. And for the reader worldwide or for the educational purposes, the slightest clue as to how these norms have become *jus cogens* norms still remains in dark.

To curb this problem, some scholars advocated these norms is identifiable via a natural law theory (O’Connell, 2012; Byers, 1997). In some other instances, it was suggested that the interaction of scholars and judges may be a fruitful cooperation in determining these peremptory norms (Matthew Saul, 2014). Be that as it may, it is an encouraging phenomenon (Zemanek, 2011; Kolb, 1998), because at least, there are initiatives towards formulating a proper test so as to serve as a guideline in identifying *jus cogens*. Identifying a proper test is very important because the critics against *jus cogens*, accompanying by arguments filling with substance and basis, have provided invaluable thoughts. As in the words of Di ‘Amato, who succinctly phrased his thoughts in his work “It’s A Bird, It’s A Plane, It’s *Jus Cogens!*”, as followed: (2010)

“... To be sure, a critic may object that *jus cogens* has no substantive content; it is merely an insubstantial image of a norm, lacking flesh and blood. Yet lack of content is far from disabling for a protean *supernorm*. Indeed, the sheer ephemerality of *jus cogens* is an asset, enabling any writer to christen any ordinary norm of his or her choice as a new *jus cogens* norm, thereby in one stroke investing it with magical power. Nor does there appear to be any limit to the number of norms that a writer may promote to the status of *supernorm*. Consider the gaggle of substantive norms, sharing in common their newly anointed *jus cogens* status, that have been collected by Karen Parker and Lyn Beth Neylon in a recent article (Parker & Neylon, 1989). These authors claim that the right to life is a norm of *jus cogens*, as are the

prohibitions against torture and apartheid. Indeed, having attained this measure of momentum—faster than a speeding bullet—the authors end by claiming that the entire body of human rights norms are norms of *jus cogens*...”

Hence it is important to formulate the method of identifying norms which are preemptory norms. Because once the *supernorm* arises, there is nothing any group of states or group of persons can ever do to replace it or even whittle it down to size. If the wrong one gets invented, watch out!, because as Di 'Amato quoted 'and since we are talking about international law, there will be no safe haven in which to obtain asylum against the *supernorm*'. (2010)

CONCLUSION

As a concluding remark, when putting all those pieces of evidence for *jus cogens* together, all of them share one common ground: its' unusual failure to provide a proper method on identifying *jus cogens* norms. Through judicial decisions some norms were categorised as preemptory norms, but it failed to give readers a helpful insight as to what test has been applied so that a norm can be qualified as a preemptory norm. Currently, it is certain and undisputed fact that we are still unclear on what attributes and qualities must a norm possessed so as to justify its qualification under the *jus cogens* category. It may be said that it depends on the conscience of the judges, or that it is based on the natural law theory, or even the public order theory in international law. However, the impact of *jus cogens* norms to the world is that such norms void conflicting lesser norms. It voids statute, treaty, or conduct of the government which are in conflict with them. Once this 'supernorm' arises, no derogation is permitted by any States, and not even the asylum can afford excuses to them for not abiding to *jus cogens* norms. Hence it is indeed look forward that initiative coupled with proactive steps may be taken by relevant parties to eliminate such problem in public international law.

ACKNOWLEDGEMENT

The author is grateful for the financial assistance provided by Dr. Asma Hakimah Ab. Halim, Senior Lecturer, Faculty of Law, Universiti Kebangsaan Malaysia.

REFERENCES

- A Contributor. (1995). Is international law justiciable in english courts?. *Cambridge Law Journal*, 54, 230.
- Abdul Ghafur Hamid @ Khin Maung Sein. (2011). *Public international law: a practical approach*. Subang Jaya: Sweet and Maxwell Asia.
- Ademola Abass. (2014). *International law: text, cases and materials*. 2nd edition, United States of America: Oxford University Press.
- AG. (1982). Le ius cogens international: sa genese, sa nature, ses fonctions. *Recueil des Cours*, 172, 9–217.
- Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, United States-France-United Kingdom-U.S.S.R.*, August 8, 1945, 59 Stat. 1544, 82, U.N.T.S. 279 (1945).
- Alain Pellet, Special Rapporteur, Tenth Report on Reservations to Treaties, submitted to the International Law Commission at the occasion of its 57th session (UN Doc. A/CN.4/588/Add.1).
- Alexander Orakhelashvili. (2006). *Preemptory norms in international law*. Oxford: Oxford University Press.
- American Law Institute (1987). *Restatement (Third) of the Foreign Relations Law of the United States*. St. Paul: American Law Institute.
- Anthony D'Amato. (2010). It's A Bird, It's A Plane, It's *Jus Cogens*!. *Connecticut Journal of International Law*, Fall 1990, Vol. 6, No. 1, 1.
- Antonio Cassese . (2001). *International law*. Oxford: Oxford University Press.
- Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, further Requests for the Indication of Provisional Measures, Order of 13.9.1993, ICJ Reports 1993, 325.
- Barcelona Traction, Light & Power Co. (Belgium v Spain)*, 1970 I.C.J. 3, 32 (February 5).
- Carnegie Endowment for International Peace. (1967). *The concept of jus cogens in international law*. Paper presented at Lagonissi Conference: Carnegie Endowment for International Peace Papers and Proceedings, Washington D.C.
- Charter of the International Military Tribunal, United States-France-United Kingdom-U.S.S.R.*, August 8, 1948, 59 Stat, 1544, 82 U.N.T.S. 279 (1945)
- Christenson, Christenson, Gordon A. (1987). The world court and jus cogens. *The American Journal of International Law*, 81, 1. *Committee of U.S. Citizens v Reagan*, 859 F.2d 929, 939-942 (D.C. Circuit 1988).
- Daniel Philpott. (2007). Global Ethics and the International Law Tradition. In William M. Sullivan & Will Kymlicka (eds.), *The globalisation of ethics*. Cambridge.
- De Hoogh, Andre. (1996). *Obligations erga omnes and international crimes: A theoretical inquiry into the implementation and enforcement of the international responsibility of states*. Boston: Martinus Nijhoffs.
- Denk, Denk, Erdem. (2001). Uluslararası antlaşmalar hukukunda jus cogens kurallar. *Ankara Üniversitesi Siyasal Bilgiler Fakültesi Dergisi*, 56, 2.
- Dinah Shelton (ed.). (2004). *Commitment and compliance: the role of non-binding norms in the international legal system*. Oxford.

- Dinah Shelton (2015). Sherlock Holmes and the mystery of jus cogens. In M. den Heijer & H. van der Wilt (eds.). *Netherlands Yearbook of International Law 2015*. t.m.c. assers press and the authors 2016 (DOI 10.1007/978-94-6265-114-2_2).
- Domingues v United States*, Case 12.285, Merits, Inter-Am, Commission on Human Rights, report No. 62/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2003).
- E. Allan Farnsworth. (1984). *Contracts*. 4th edition. New York: Aspen.
- Evan J. Criddle And Evan Fox-Decent. (2009). A fiduciary theory of jus cogens. *Yale Journal of International Law* 331.
- Ex parte Pinochet Urgate (No. 3)*, [2000] 1 AC 147 (House of Lords, United Kingdom)
- Filartiga v Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).
- Furmston, M.. (2001). *Cheshire, fifeot and furnston's law of contract*. 14th edition. Butterworths: London.
- G.G. Fitzmaurice. (1958). *Special Rapporteur, Third report on the law of treaties*. 10th session of the ILC, A/CN.4/SER.A/1958/Add.1, 1958.
- Georg Schwarzenberger. (1965). *The inductive approach to international law*. Stevens and Sons: London.
- Haimbaugh G. (1987). Jus cogens: root and branch: an inventory. *Touro Law Review*, 3, 203.
- Jan Klabbers. (1996). The redundancy of soft law. *Nordic Journal of International Law*, 65, 167.
- Jerzy Sztucki. (1974). *Jus cogens and the vienna convention on the law of treaties: a critical appraisal*. New York: Springer-Verlag.
- John V. Orth. *The role of the judiciary in making public policy*. NC Insight Vol. 4, Issue 1, April 1981.
- Karl Zemanek. (2011). The metamorphosis of jus cogens: from an institution of treaty law to the bedrock of the international legal order. In Enzo Cannizzaro (ed.). *The law of treaties beyond the vienna convention*. Oxford: Oxford University Press.
- Kho Feng Ming, Sakina Shaik Ahmad Yusoff. (22nd-23rd July 2017). *Public policy in contracts: the legal inconsistencies in Malaysia*. Paper presented at the 7th Kuala Lumpur International Communication, Education, Language & Social Science Conference, The Role of Social Sciences in the Harmonisation of Diverse Communities, Hotel Bangi-Putrajaya, Bangi, Selangor, Malaysia.
- Mary Ellen O'Connell. (2012). Jus cogens: international law's higher ethical norms. In Donald Earl Childress III (ed.). *The Role of Ethics in International Law*. United States of America: Cambridge University Press
- Matthew Saul. (2014). Identifying jus cogens norms: the interaction of scholars and international judges. *Asian Journal of International Law*, 1.
- Michael Byers. (1997). Conceptualising the relationship between jus cogens and erga omnes rules. *Nordic Journal of International Law*, 66, 211.
- Michael Woods. (2011). What is public international law? the need for clarity about sources. *Asian Journal of International Law*, 1, 205.
- McNair. (1961). *The law of treaties*. 2nd edition. Oxford: Clarendon Press.
- Nicaragua case* (1986) ICJ Rep 14.
- North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment of 20.2.1969, ICJ Reports 1969,
- Oona A. Hathaway. (2005). Between power and principle: an integrated theory of international law. *Chicago Law Review*, 72, 469.
- Oona A. Hathaway. (2012). Between power and principle. In Donald Earl Childress III (ed.). *The Role of Ethics in International Law*. United States of America: Cambridge University Press.
- Oppenheim. (1908). The science of international law: its task and method. *Asian Journal of International Law*, 2, 313.
- Parker and Neylon. (1989). Jus cogens: compelling the law of human rights. *Hastings International & Comparative Law Review*, 12, 411.
- Paul Tavernier. (2006). L'identification des regles fondamentales, un probleme resolu? & Stefan Kadelbach. (2006). Jus cogens, obligations erga omnes and other rules-the identification of fundamental norms. In Christian Tomuschat and Jean-Marc Thouvenin (eds.). *The fundamental rules of the international legal order, jus cogens and erga omnes*. Boston: Martinus Nijhoff.
- Peel, Edwin (Ed) (2015). *Treitel: The Law of Contract*. 14th edition. London: Sweet and Maxwell.
- Prosecutor v Furundzija*, Case No. IT-95-17/1-T, Trial Judgement, 155 (International Criminal Tribunal for Former Yugoslavia December 10, 1988).
- Prosecutor v Furundzija*, Case No. IT-95-17/1-T, Appeal Judgement, 155 (International Criminal Tribunal for Former Yugoslavia July 21, 2000).
- Prosper Weil, 'Towards Relative Normativity in International Law?', (1983) 77 American Journal of International Law 413.
- Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, [2012] I.C.J Rep. at 9.
- Re Baby M*, 537 A.2d 1227 (N.J. 1988).
- Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (advisory Opinion)* (1951) ICJ Rep at 23.
- Robert Kolb. (1998). The formal source of jus cogens in public international law. *Zeitschrift fu r o ffentliches Recht*, 53, 69.
- Schmahl, Stefanie. (2006). An example of jus cogens: the status of prisoners of war. In Christian Tomuschat and Jean-Marc Thouvenin (eds.). *The fundamental rules of the international legal order, jus cogens and erga omnes*. Boston: Martinus Nijhoff.
- Schwelb, Egon. (1967). Some aspects of international jus cogens as formulated by the international law commission. *The American Journal of International Law*, 61, 4.
- Sinnadurai, Visu (2011). *Law of Contract*. 4th edition. Petaling Jaya: LexisNexis.
- South West Africa cases (Second phase)* (1966) ICJ Rep 6, Namibia case (1971) ICJ Rep 78-81.
- Statute of the International Court of Justice. (1945, June 26). 59 Stat. 1031, 3 Bevans 1179.

- Third Report of the Special Rapporteur on the Law of Treaties, (1958) 2 Y.B. International Law Commission 40, UN Doc. A/CN.4/115 and Corr.1.
- Ulf Linderfalk. (2004). Reservations to treaties and norms of jus cogens—a comment on human rights committee general comment no. 24. In I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime*. Boston: Martinus Nijhoff.
- Ulf Linderfalk. (2011). The creation of jus cogens—making sense of article 53 of the vienna convention. *ZaöRV*, 71, 359.
- Ulf Linderfalk. (2009). Normative conflict and the fuzziness of the international ius cogens regime. *ZaöRV*, 69, 961.
- United Nations Conference on the Law of Treaties, Vienna, Official Records, First Session, 472.
- United Nations Conference on the Law of Treaties Official Records. (1st Session, 1968). Retrieved from http://legal.un.org/diplomaticconferences/lawoftreaties-1969/1st_sess_e.html). Date of Access: 10 November 2016.
- United Nations Convention on the Law of Treaties. (May 23, 1969). 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (1969).
- von Verdross A. (1937). Forbidden treaties in international law: comments on professor Garner's report on 'The Law of Treaties'. *Am J Int Law*, 31, 571.
- Winfield, P.H. (1928). Public policy in the English common law. *Harvard Law Review*, 42, 76.
- Yahya Berkol Gülgeç. (2017). The problem of jus cogens from a theoretical perspective (teorik perspektiften jus cogens sorunu). *Ankara Üni. Hukuk Fak. Dergisi*, 66(1), 73.

KHO FENG MING

Faculty of Law, Universiti Kebangsaan Malaysia
winkhomedic@yahoo.com.my