

THE PROBLEM OF *JUS COGENS* FROM A THEORETICAL PERSPECTIVE

Teorik Perspektiften Jus Cogens Sorunu

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ABSTRACT

With the concept of *jus cogens* a new and independent source of international law is introduced. *Jus cogens* norms owe their validity to a norm of c

ustomary international law which is reflected by Article 53 of the Vienna Convention on the Law of Treaties. The detailed analysis of this article reveals that *jus cogens* norms are hierarchically located between customary international law and international treaties. Although *jus cogens* norms are hierarchically inferior to customary international law, a primacy of application is granted to *jus cogens* norms over any customary rule. The concept of *jus cogens* is afflicted with many formal and material ambiguities. However, the difficulty of determining which obligations constitute *jus cogens* mainly stems from the fact that the procedure envisaged by Article 53 for the creation of *jus cogens* norms is ambiguous. Since the article provides an identification test for *jus cogens* norms solely on formal basis, once these procedural and formal requirements are enlightened it needs to be conceded that any norm fulfilling these criteria, regardless of its content, is *jus cogens* as no material requirement in relation to *jus cogens* norms exists.

Keywords: *Jus cogens*, hierarchy of norms in international law, primacy of application, customary international law.

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ÖZ

Jus cogens kavramıyla birlikte uluslararası hukukta yeni ve bağımsız bir kaynak ortaya çıkmıştır. *Jus cogens* normlar geçerliliklerini Viyana Antlaşmalar Hukuku Sözleşmesi'nin 53. maddesinde yansımaları bulan bir uluslararası örf ve âdet hukuku normuna borçludur. Bu maddenin detaylı analizi, *jus cogens* normların hiyerarşik olarak uluslararası örf ve âdet hukuku ile uluslararası antlaşmalar arasında yer aldığını göstermektedir. *Jus cogens* normlar hiyerarşik olarak uluslararası örf ve âdet hukukunun altında yer alsa da, uluslararası teamül kuralları önünde bir uygulama önceliğine sahiptirler. *Jus cogens* kavramı pek çok şekli ve maddi belirsizliklerden mustarıdır. Ancak, hangi yükümlülüklerin *jus cogens* teşkil ettiğini belirlemekteki güçlük temel olarak 53. madde tarafından öngörülen *jus cogens* normların yaratılması sürecinin belirsizliğinden kaynaklanmaktadır. Madde *jus cogens* normları için şekli kriterlerden oluşan bir tanımlama testi sağladığı için, prosedürel ve şekli gereklilikler aydınlatıldığında, bu kriterlere uyan bütün normların içeriklerinden bağımsız olarak *jus cogens* olduğunu kabul etmek gerekecektir.

Legal theoreticians have not failed to doubt the legal character of international law. British positivist tradition especially represented by Austin and Hart does not place emphasis on international law¹. Austin establishes his theory on the concept of the "sovereign". This sovereign

¹ In our view, it is not possible to speak of a systematic theory of natural law. Natural law theories focus on the legitimacy of the legal order rather than the coherent explanation of the existent ones. Therefore, it is not surprising to see that theoretical background of international law is under the influence of natural law theories since any attempt based on theories aspiring after a total and systematic explanation of law such as legal positivism has, in the past, failed to found the theoretical basis of international law. It can even be asserted that the fact that legal positivists tend to reject the legal character of international law has created an impression that it is obligatory to adopt natural law views in order to study international law. However, the role played by natural law theorists such as Grotius, Vitoria and Suarez in bringing international law into open as a discipline - even if not a science - does not stem from the negative attitude of legal positivism towards international law. Even Jeremy Bentham who can be named as the first legal positivist was born much after these natural law theorists.

is said to be the person or any collectivity that is habitually obeyed in the society although s/he displays no such obedience to anyone². Likewise, it is possible to conceive of a body of persons as the sovereign. In case international law is characterized as law in Austin's theory, the so-called sovereign in the society will not truly be sovereign as s/he will be bound by certain international and superior rules³. It can be observed that, considering the consensual character of international law, the sovereign does not obey another sovereign but is bound by a norm which still emerges as a result of his/her consent. Nevertheless, such observation would meet the following objection in Austin's understanding: the sovereign cannot be bound, it is illimitable⁴. Therefore, it cannot be argued that a combination of several sovereigns' will (e.g. an international treaty) bind any of these sovereigns. This is only possible if the national sovereign is merely a so-called sovereign and there is a true, legally unlimited sovereign at international level. And here it is no longer possible to speak of a truly international relationship as the singularity of the sovereign hints at the singularity of the society.

In fact, Hart's account of international law is much milder than Austin's. Hart examines the reasoning behind the arguments begrudging international law the legal character. His first target is the claim that international law is unsanctioned or that, even if it comprises certain sanctions, it is an inefficacious normative system. Hart rejects Austinian conception of law as "orders backed by threats" and argues that legal norms can be unsanctioned and they are still efficacious in case individuals willingly conform to the requirements of the norm. The fact that individuals can and do conform to unsanctioned norms cannot be explained by "*orders backed by threats*" understanding⁵. Besides Hart believes that international law comprises a certain sanctioning mechanism albeit its restrictedness⁶. However, the fact that

² Austin, 2001, p. 166-167.

³ Regarding the legally unlimited sovereign please see. Fuller, 1958, p. 634; Raz, 1980, p. 16.

⁴ Raz, 1980, p. 8.

⁵ Hart, 2012, pp. 217-218.

⁶ See *ibid.*, p. 217.

international legal order does not have legislative, executive and judicial organs similar to the ones in municipal legal orders prevents international law from qualifying as a legal system⁷. This is due to the fact that according to Hart, a legal system consists of the unity of two kinds of norms: primary rules which directly regulate the behavior of the individuals they are addressed to and secondary rules which regulate the determination of the legal rules to be applied and how these rules are amended and which determine the authorized bodies to resolve legal disputes⁸. Without the presence of the mentioned secondary rules one can only talk about a bundle of primitive social rules and not a legal system⁹. Therefore, according to Hart, international law which lacks central legislative, executive and judicial organs can be thought of as a group of primal social rules existing between the states¹⁰.

Our purpose in this article is not discussing the legal quality of international law. However, a relatively new concept is emerging in international law which can be put forward against the arguments of "sovereignty" and "centrality". The idea that there are some norms of international law which apply to all states although not necessarily consented to by all states will definitely decrease the effect of the arguments centered around centrality and sovereignty. The centrality arguments will weaken because such rules of international law apply to everyone, allegedly without being consented to by everyone. Moreover such rules are still rules created by the international community rather than being natural law-like transcendental postulates. The sovereignty argument will also weaken. What nurtures the argument in favor of the non-existence of a sovereign in international law is the equal

⁷ *Ibid.*, pp. 232-233.

⁸ In fact Hart draws attention to the roles of international tribunals, courts and the Security Council as possible equivalents of judicial and executive bodies. He concludes, however, that although some sort of analogy exists here, it is not sufficient to render international law a legal system (Hart, 2012, pp. 232-233.). It is argued that in case the Vienna Convention on the Law of Treaties dated 1969 existed in the time *The Concept of Law* was written, Hart's could have thought differently as this Convention regulates how other treaties shall be entered into or amended (Waldron, 2013, p. 388.). Nevertheless, it must be observed that Hart's opinion on the issue remained the same and no changes have been adopted in the related chapters of the book although new editions of the book have been made after 1969.

⁹ Hart, 2012, pp. 214, 232-233.

¹⁰ *Ibid.*

sovereignty presupposition in the classical theory of international law. If some states are bound by certain rules although their consent thereto is not a necessary condition for the legally binding force of these rules, one may well speak of the existence of a sovereign in international law. As stressed above, Austinian understanding of a sovereign does not necessarily require existence of a single superior entity. Therefore, whatever entity constitutes such rules which cannot be derived from and bind everyone can be considered as the sovereign in international community.

Hans Kelsen emerges as the knight of international law in the tradition of legal positivism. Kelsen's theory of international law, although some objections can be voiced regarding certain parts thereof, is a courageous step in order to establish the normative structure of international law. Positivist international lawyers have mostly followed Kelsen's path. The fact that Kelsen has, at least relatively, succeeded where Austin and Hart failed can be associated to the "mere normative" understanding adopted by the thinker. Law is the obedience of men to the rule rather than another person¹¹ and in case there is a system consisting of rules which can be dissociated from transcendental religious and moral norms and which are more efficacious than other social norms, there seems to be little reason to outcast this system of norms as non-legal. Arguments related to centrality and the sovereign find the source of law in sociology and such approach is already problematic in the view of the pure theory¹².

Below we will evaluate the concept of *jus cogens* norms within the context of legal qualities and content of these norms. Definition of a concept is generally given first in legal literature. However, we believe that such a method is not apt concerning controversial concepts. The meaning and definition of a legal concept cannot be separated from its legal qualities and content. In a case like ours where this quality and content of the concept is disputed, it is not possible to draw a definition

¹¹ Gözler, 2013a, p. 15 ("*men have invented law in order not to obey men*").

¹² Regarding the necessity of distinguishing law and other social sciences see Kelsen, 1973, p. xi.

for the concept unless such controversial points are resolved. However, any contrary attempt is also doomed to fail. Without at least a basic definition or without knowing what needs to be considered in determining the legal quality and content of a concept, any discussion on possible qualities and the content of the concept would be futile.

In this contradiction we prefer to grasp the core of the concept of *jus cogens* before taking on the debate regarding its qualities and content. Any suggestion we might have regarding the so-called "core" of the concept is not final and may alter as the discussion progresses especially in light of positive provisions of the Vienna Convention on the Law of Treaties dated 1969 (hereinafter the "Vienna Convention"). The main goal of the article is to discuss whether *jus cogens* category of norms exists and what kind of properties such existent category can display. While doing so, the article will refrain from arguments based on natural law perspective and attempt to find an explanation for *jus cogens* category from a normative-positivist point of view.

Another difficulty to be faced below is distinguishing *jus cogens* norms from *obligatio erga omnes*. There is some doubt in literature and also court decisions as to whether these two categories signify different sets of norms. Therefore, some attention needs to be paid to the distinction of these two concepts and whether they have the same meaning while establishing the independent category of *jus cogens* norms.

I. The Concept of *Jus Cogens* In Broadest Strokes

Under this heading we will evaluate the concept of *jus cogens* in the broadest way possible. Later on we will attempt to distinguish this concept from another important and disputable concept of international law, *obligatio erga omnes*.

1. The Concept of *Jus Cogens* Generally

In the classical understanding of international law there are two sources: customary law and treaties. It is widely accepted that there is no hierarchy between these sources¹³. The reason for this lack of

¹³ See for example Cassese, 2005, p. 198; Kaczorowska, 2010, p. 28; Rozakis, 1976, p. 20; Crawford, 2012, pp. 22-23.) . On the other hand, Kelsen thought that there is a hierarchy

hierarchy between the sources of international law is the fact that states claimed to be equal sovereigns do not wish to be bound by any norm they have not consented to. This is why, although customary norms of international law may also be considered to emerge as a result of direct or even tacit consent of the state, it has not been acknowledged that norms created via custom can alter or repeal a provision of international treaty¹⁴. Due to the assumption that no hierarchy exists between the sources of international law¹⁵, any collision between different sources need to be resolved according to the principles of *lex posterior derogat legi priori* and *lex specialis derogat legi generali*.

However, with the entrance of the concept *jus cogens*, the situation in international law starts to change. Since we are looking to define this concept as broadly as possible here, the concept of *jus cogens* indicates the existence of such international norms that treaties contrary to these are invalid and custom cannot be the reason for derogation therefrom¹⁶.

between these sources. Accordingly, the principle of *pacta sunt servanda* lies at the foundation of international law - not as the basic norm but as the first posited norm deriving its validity from the basic norm, just like the historically first constitution in municipal legal systems-. There is no superior or more fundamental positive norm than *pacta sunt servanda* in international law. Consequently, since this norm itself is a customary norm, the basic norm of international law needs to be one that allows for the creation of legally binding norms via custom. Validity of international treaties on the other hand stems from this *pacta sunt servanda* principle. Therefore, international treaties and customary norms cannot be considered to hold the same hierarchical power, but customary norms are hierarchically superior (Kelsen, 2008, pp. 323-324.). A detailed account of the hierarchy (or lack of hierarchy) between the sources of international law is not our focus. We can only be interested in the hierarchy between *jus cogens* norms and other norms of international law.

¹⁴ The expression belongs to Cassese (Cassese, 2005, 198.). However we need to make a clarification to prevent misunderstandings: in fact, if it is accepted that no hierarchy exists between customary norms and treaties, a later customary norm may amend or repeal a prior treaty norm on the same matter. This fact is recognized by Cassese (Cassese, 2005, p. 199.). The goal here is to refrain from granting customary norms a universal superiority to customary norms over treaty law. On the other hand, the emergence of a customary norm is much more difficult than the emergence of a treaty provision. Therefore, it may be concluded that repeal of a customary norm by a later treaty is much more probable than the contrary.

¹⁵ We need to stress again that this is not a personal opinion, but the situation that is accepted by the majority.

¹⁶ Linderfalk thinks that customary international law contrary to *jus cogens* norms are also invalid (Linderfalk, 2008, p. 854.). We intend to show below that such conclusion cannot be drawn from Article 53 of the Vienna Convention which stands as the only written legal source for the concept of *jus cogens*. To put it briefly, this is because the fact that customary norms

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*. In fact, a further step may be taken here. The principle of *lex superior* applies to instances where a superior norm and an inferior norm contradicts, in other words if a superior and an inferior norm encapsulates contradicting provisions in relation to the same matter, the superior norm is applied. That is to say the inferior norm is not invalidated, but merely disapplied. However, in case an international treaty collides with a *jus cogens* norm, such norm shall be invalid. Consequently, the principle of *lex superior* is not sufficient to describe the hierarchical relationship between international treaties and *jus cogens* norms as in the case of *lex superior* the inferior norm maintains its validity while it becomes invalid in case of contradiction with a *jus cogens* norm¹⁷.

Lexical meaning of the concept of *jus cogens* is "compelling law". Within this context, we can observe that the concept we attempted to explain above is in harmony with this meaning. However, the concept of *jus cogens* is also expressed under different names. 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 law¹⁸. 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, peremptory rules in international law stemming from "public order" and any treaty contrary thereto is

of international law cannot derogate from *jus cogens* norms does not necessarily indicate a normative hierarchy between the two sources and that there is a significant difference between an invalid norm and a disapplied or disregarded norm.

¹⁷ The idea expressed here asserts that a collision between an inferior norm and a superior norm does not always lead to invalidity of the inferior norm. In other words, the principle of *lex superior derogat legi inferiori* does not always mean that the inferior norm needs to be invalidated, but simply disapplied. For more on this discussion please refer to Gülgeç, 2016, p. 23, fn. 87. For examples of inferior norms which cannot be invalidated due to a collision with the superior norm please see Gülgeç, 2016, pp. 152-153, 206-207.

¹⁸ Schwelb, 1967, pp. 948-949; Kadelbach, 2006, p. 21; Schmahl, 2006, p. 44-45; Christenson, 1987, p. 95.

invalid¹⁹. The hierarchical relationship between *jus cogens* and norms of customary international law needs a more detailed approach and we will try to clarify this relationship below while discussing the procedural issues associated with the concept of peremptory norms in international law.

2. Distinguishing the Concepts of *Jus Cogens* and *Erga Omnes*

It is difficult to distinguish the concept of *jus cogens* from *erga omnes* obligations. In fact it is disputed whether any reliable criteria related to this distinction exists. It is generally acknowledged that *jus cogens* norms are also *erga omnes*, meaning they bind every state and actor, while not all *erga omnes* obligations constitute *jus cogens*²⁰. For example, prohibition of slavery and genocide and similar obligations are acknowledged as *jus cogens*. Since all *jus cogens* norms are concurrently *erga omnes*, such prohibitions apply to every actor in international law. However, some other obligations such as diplomatic immunity are *erga omnes* although they do not constitute *jus cogens*²¹. What is the criterion for this distinction? What qualifies a norm as *erga omnes* but not as *jus cogens*? Frankly, literature does not offer much in relation to the concrete criteria of distinguishing *erga omnes* and *jus cogens* norms other than bluntly indicating that certain obligations are considered to be *erga omnes* but not as *jus cogens*. There might be a concrete difference between these categories and it relates to the peremptory quality of *jus cogens* norms. It may be asserted that it is possible to diverge from *erga omnes* obligations by a later treaty or customary norm albeit this is not possible regarding *jus cogens* norms. It is not possible to diverge from *jus cogens* regardless of the recency or particularity of the subsequent regulation.

According to Kaczorowska, the difference between *erga omnes* and *jus cogens* relates to their legal qualities: *jus cogens* norms express certain obligations generally accepted by the international community

¹⁹ For a general comparison of the concept of public order in municipal legal systems and international law please see Denk, 2001, pp. 54-55.

²⁰ Kaczorowska, 2010, p. 51.

²¹ Mangır, 2011, p. 76-77.

while *erga omnes* obligations relate to the moral value of the obligations²². We think that this view is problematic. First of all it fails to explain why any moral value, regardless of this value's magnitude, leads to legal obligations. Even if this point was clarified, it is possible to diverge from moral obligations by legal regulations unless a legal norm states otherwise²³. This is basically true due to the legal perspective we adopt for this article. Normative positivism asserts that legal norms derive their validity from legal sources, that is to say other legal norms²⁴. It can only be defended from a natural law point of view that legal norms or behaviors of legal subjects need to conform to certain moral principles. However, the author concedes that states cannot be free of *erga omnes* obligations²⁵. Secondly, since the author seems to suggest that neither *jus cogens* norms, nor *erga omnes* norms allow derogation, distinguishing *jus cogens* norms from *erga omnes* obligations could be problematic where the content of the *jus cogens* norm is also pre-eminent from a moral point of view.

International Court of Justice (hereinafter "ICJ" or "the Court") has defined *erga omnes* obligations as obligations states have towards the whole of international community rather than as obligations states have towards each other in *Barcelona Traction Case*²⁶. The fact that the Court uses the term *erga omnes* and refrains from mentioning *jus cogens* norms²⁷ creates suspicion as to whether the Court holds any

²² Kaczorowska, 2010, p. 48.

²³ Let us consider the regulation in Turkish Code of Obligations regarding contracts *contra bonos mores* (Turkish Code of Obligations Art. 27/1). Accordingly, contracts contrary to morality are void. If the law did not envisage such a condition for the validity of contracts (disregarding the fact that the paragraph mentions some other criteria to evaluate the validity of contracts such as public order and personal rights) the courts would not be authorized to render contracts found to be contrary to moral values invalid. Immoral contracts could very well be considered as valid. This example signifies that morality and other similar extra-legal normative categories can affect the validity of a legal norm only if such effect is envisaged by a legal norm.

²⁴ Kelsen, 2008, p. 9.

²⁵ Kaczorowska, 2010, p. 48. "They are binding because they express moral absolutes from which no State can claim an exemption whatever its political, economic and social organisation."

²⁶ *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 32.

²⁷ Denk, 2001, p. 48-49.

distinction between the two categories²⁸. Nevertheless, our purpose is to somehow distinguish these two categories based on a solid, stabilized criterion. *Erga omnes* and *jus cogens* norms may or may not have separate existences. Perhaps one of these categories does not even legally exist. However, if these categories are to exist separately, the only legally meaningful and sustainable criterion seems to be based on the fact that *jus cogens* norms do not allow derogation, they are peremptory. Therefore, it is possible to override or alter an existent *erga omnes* obligation via later custom or treaty while such treaties or customs attempting to alter or abrogate a *jus cogens* norm is invalid *ab initio*.

II. Short History of the Concept 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 law²⁹. On the other hand, there is another argument looking for the roots of this concept in Roman Law³⁰. The basic reason for this search is the fact that law has been regarded as a result of human beings' rational nature. It is argued that if a rational nature exists some basic principles can be derived from such nature and contribute to the emergence and development of peremptory rules in Roman Law³¹. However, it is not possible to run across systematic group of peremptory rules created by the general acceptance of the international community and which invalidate contrary regulations in Roman Law. Such rules did not even exist during the days of Vitoria, Grotius or Wolff. The source of peremptory rules in the writing of this era was natural law³².

²⁸ Kadelbach, 2006, p. 36.

²⁹ *Ibid.*, p. 21.

³⁰ Hillier, 1998, p. 147.

³¹ Mangır, 2011, p. 72-73.

³² Of course, Vitoria's understanding of natural law was religious natural law while Grotius and Wolff relied on rationality. Although the sources of the peremptory rules of international law were different for these authors, one common point amongst these doctrines is that this source is transcendental.

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. 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 paradigm³³. 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 Vienna Convention is especially important within this context. During the preparatory studies of the Convention remarkable debates have taken place in relation to a category of peremptory rules which do not allow derogation or alteration by ordinary norms of international law. If we are to have a look at the general stance of states in these debates, we can observe that developing and socialist states have supported the idea of *jus cogens*. According to Cassese, the developing states have aimed to decrease the impact the colonial states have over them by introducing certain norms of international law which are applicable although such colonial states have not shown any express consent³⁴. On the other hand, the socialist states tried to settle the rules of the game between the West and the East by once and for all establishing international rules with universal and irrevocable application³⁵. We can also observe that Western countries have kept a

³³ Kadelbach, 2006, pp. 21-22.

³⁴ Cassese, 2005, p. 199. See also UN Conference on the Law of Treaties Official Records, 1st Session, 1968, http://legal.un.org/diplomaticconferences/lawoftreaties-1969/1st_sess_e.html, p. 300, par. 9. Date of Access: 10 November 2016. The delegate of Sierra Leone expresses how the draft Article 50 provides a "golden opportunity" to condemn imperialism.

³⁵ Cassese, 2005, p. 200. For some remarks in line with this analysis please see UN Conference on the Law of Treaties Official Records, 1st Session, 1968, http://legal.un.org/diplomaticconferences/lawoftreaties-1969/1st_sess_e.html, pp. 312-313, par. 55. Date of Access: 10 November 2016. The delegate of Romania indicates that "...It

certain distance between themselves and the idea of *jus cogens* and that the most serious and persistent objections to the concept of *jus cogens* have been voiced by these states³⁶. The acceptance of *jus cogens* rules would mean that Western states which have that far achieved a lot under the principle of equal sovereignty would have to encounter a fundamentally altered arena of international law. Consequently, they have not been inclined to accept the idea of certain norms being created despite lack of their express consent³⁷. As a result a certain concept of *jus cogens* or peremptory norm has been accepted in the Vienna Convention. However, it has also been added that only ICJ is authorized to determine whether a *jus cogens* norm exists with regards to a particular matter. Here we should give the definition of *jus cogens* in

could never be sufficiently emphasized 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...".

³⁶ Cassese, 2005, p. 201. See for example the remarks of the French delegate: "...The Commission had given too simple a reply to a question of obvious complexity and in reality had evaded the problem facing it. The article as it stood gave no indication how a rule of law could be recognized as having the character of *jus cogens*... Also, no provision had been made for any jurisdictional control over the application of such a new and imprecise notion... Finally, by retaining too general a wording, there was a danger that article 50 would create serious internal problems for many countries. At the constitutional level, States would ask themselves how far they could consent to a grave alienation of their sovereignty without any clear idea of the rules under which that limitation had been introduced." (UN Conference on the Law of Treaties Official Records, 1st Session, 1968, http://legal.un.org/diplomaticconferences/lawoftreaties-1969/1st_sess_e.html, p. 309, par. 29-30. Date of Access: 10 November 2016). The delegate of Switzerland joined the delegate of France in criticizing the ambiguity of the concept of *jus cogens*: "...the meaning of the expression *jus cogens* and its introduction into international law called for more thorough study than it had so far been given, and the question should be treated with great caution... He could not agree with the view that a distinction must be made between the question of the normative law and the organ responsible for applying it. It was no use trusting blindly in the future and hoping for the subsequent emergence... of the necessary institutions." (UN Conference on the Law of Treaties Official Records, 1st Session, 1968, http://legal.un.org/diplomaticconferences/lawoftreaties-1969/1st_sess_e.html, p. 323-324, par. 26, 30. Date of Access: 10 November 2016).

³⁷ On the other hand we shall assert below that consent of all states is still required for the emergence of a *jus cogens* norm. We will elaborate more on this issue while examining the formal properties of *jus cogens* norms.

the Convention without examining any further details of the issue. According to Article 53 of the Convention titled as "Treaties Conflicting With A Peremptory Norm of General International Law,"... *For the purposes of the present Convention, a peremptory norm of general international law 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.*"

III. Qualitative, Formal and Material Discussions Regarding Jus Cogens Norms

In this section further details shall be provided in relation to the discussion regarding the concept of *jus cogens*. Quality, formation and content of *jus cogens* norms as a normative category will be elaborated within this context. There are crucial debates and serious problems caused by certain presumptions on this matter. We cannot offer a solution for all these matters. However, we believe that it is equally important to attempt to enlighten which views in relation to the concept are acceptable or unacceptable from the perspective of normative positivism.

1. Some General Problems Related to the Legal Quality of Jus Cogens Concept

The first problem encountered is the legal quality of *jus cogens* norms. Do the norms in this category stem from a transcendental source like in natural law or are they a product of positive law? If they form a part of positive law, are they rooted in customary or treaty law? Do *jus cogens* norms indicate a new way of norm creation in international law?

We have mentioned above that *jus cogens* norms are defined by positive international norm (Article 53 of the Vienna Convention) as "*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*". Within this context, it may be claimed that *jus cogens* norms owe their existence to treaty law and the Vienna Convention to be more specific. However two points need to be stressed

here. Firstly, the mentioned definition of the concept of *jus cogens* is only applicable for the purposes of the Convention (Article 53). Therefore, it is possible to define the concept of *jus cogens* to be considered outside the scope of the Convention differently. Such definition may broaden or narrow the scope of *jus cogens*. Second issue is the possibility that the Convention does not in fact introduce any new norm of international law in relation to peremptory norms but simply codifies the existent and relevant rules of customary international law on the matter³⁸. We are of the opinion that it is very difficult to determine whether a rule of customary international law exists on a specific matter. We do not aim here to show that the article defining the concept of *jus cogens* was already a rule of customary international law at the time. We will assume here that the Vienna Convention codified the existing customary law on the matter of *jus cogens*.

If the general inclination of the doctrine to treat the Vienna Convention as the codification of the existent customary rules is adopted, it needs to be acknowledged that the concept of *jus cogens* is not primarily rooted in treaty law but in customary international law. However this view, just like the view establishing *jus cogens* as a treaty law-based concept leads to certain problems as discussed below. Let us say this much for now: the concept of *jus cogens* represents a category of norms owing its validity (and legal existence) to customary international law which stands as the hierarchical superior of international treaties³⁹ and cannot be derogated by such treaties or any norm of international law other than a subsequent *jus cogens* norm.

Accordingly, if *jus cogens* norms are superior to international treaties, it is no longer viable to claim that the concept is treaty-based. This is due to the fact that a norm is the superior of the other because it regulates the other's conditions of validity and the inferior norm derives its validity from the superior one⁴⁰. Therefore, it would be logically incoherent to claim that *jus cogens* norms are superior to treaty

³⁸ Regarding this possibility see Danilenko, 1991, p. 63.

³⁹ Kelsen, 2008, pp. 323-324.

⁴⁰ Heckmann, 1997, pp. 138-139, 146; Haase, 2004, p. 39; Kelsen, 1949, p. 123.

provisions after concluding that the Vienna Convention is where this concept is rooted in. In such a case it can be conceived at most that *jus cogens* norms have a primacy of application (*Anwendungsvorrang*) over treaty provisions. Nevertheless, to talk about a mere primacy of application means that the disapplied norm continues to stay valid though not applied in a particular case. This is not the situation in the Vienna Convention. According to Article 53, treaties contrary to the peremptory norms of international law cannot maintain their validity or to put it more correctly they are void or invalid *ab initio*⁴¹. As a result, we can conclude that the concept of *jus cogens* as it is defined and regulated in the Vienna Convention cannot be based on treaty law and that if such a category exists it needs to stem from customary international law. However, some problems still persist here.

The main problem here does not directly stem from the acceptance that *jus cogens* norms derive their validity from customary law. The problem relates to the procedure in which these *jus cogens* norms are created. Customary international law is an independent source of international law. What differentiates its norms from treaty provisions or any other normative category in international law is the procedure for their creation. All customary international law is created through the same procedure and by the same subjects (states). The procedure for the creation of peremptory norms is the subject of the next section. However, let us state here for the sake of the argument that one view claims *jus cogens* norms can only be created by way of custom⁴². Therefore, if it is conceived that *jus cogens* norms are created by way of custom, it can be argued that they "are" customary international law and therefore there cannot be a hierarchy between *jus cogens* norms and other customary rules of international law. This is due to the fact that the norms created through the same procedure needs to be of equal hierarchical level⁴³.

⁴¹ Regarding the type of invalidity envisaged by the Vienna Convention see Rozakis, 1976, pp. 101-115.

⁴² See for example Schmahl, 2006, pp. 49-51; Czapliński, 2006, p. 92.

⁴³ Legal science's definition of legal norms depends on procedural requirements rather than content related conditions. Therefore, norms created via the same procedure are the same norm, hence they have the same hierarchical power. For instance in Turkish legal system

As explained below in the next section, we are not of the opinion that *jus cogens* norms can only be created by way of custom. However, even if such opinion adopted it is still possible to differentiate *jus cogens* norms as a different normative category. It cannot be rejected under this assumption that *jus cogens* norms are also created by state practice and *opinio juris*. Nonetheless, it is possible to perceive the creators of these two normative categories as different subjects. Accordingly, *jus cogens* norms are created by the practice and *opinio juris* of all the states forming the "international community of States" as mentioned in Article 53 of the Vienna Convention while customary international law can be formed with the participation of individual states. In this case, however, another problem arises. Does this mean that customary law cannot be universal? Do we need to concede that universal custom is *jus cogens* and not customary international law? Here is another possibility: universal customary international law is possible and it does not have to be considered as *jus cogens* since what differentiates *jus cogens* from customary international law is not its procedure of creation but the fact that *jus cogens* norms do not allow derogation. To put it correctly, they only allow derogation by another *jus cogens* norm (Article 53 of the Vienna Convention). Nevertheless, if we are trying to differentiate customary law from *jus cogens* suspecting that these two may be the same category, the statement that *jus cogens* norms are only alterable by other *jus cogens* norms does not assist us in any way. As shown by these questions and different possibilities, the idea that *jus cogens* norms can only be created by way of custom leads to many irresolvable theoretical problems and luckily we will not share this opinion. We will in the rest of the paper try to establish *jus cogens* norms as a separate normative category deriving their validity from, therefore inferior to, customary international law and as the hierarchical superior of the international treaties. Therefore,

statute can be defined as the act created by the Parliament according to the procedure envisaged by the Constitution (Teziç, 2014, p. 15.). Therefore, any norm created according to the procedure determined by the Constitution for the creation of statutes will be a statute and, needless to say, it will have the same hierarchical power with other statutes. Similarly, German legal system also adopts a procedural approach for the definition of statutes (Ossenbühl, 2007, p. 141.).

it is crucial that we present a way of perceiving customary international law as the hierarchical superior of international treaties.

Customary international law is superior to treaties in Hans Kelsen's theory of international law. In the pure theory, the highest level international norm is the principle of *pacta sunt servanda* which serves in a fashion similar to the constitution in municipal legal systems. Kelsen believes that this principle itself is created by way of custom and treaties derive their validity from this specific principle of customary international law. Since the highest level positive norm of international law is a customary norm, Kelsen concludes that the basic norm of international law, which is a presupposed norm, needs to be a norm enabling the creation of binding legal instruments by way of custom⁴⁴. Since international treaties are valid due to a norm of customary international law Kelsen does not hesitate to conclude that customary law is superior to treaty law in international legal sphere⁴⁵. Therefore, if Kelsen's view is accepted the widespread presumption amongst the international lawyers regarding the possibility of derogating from a prior custom by a later treaty cannot be defended⁴⁶.

Here we would like to briefly touch upon the concept of sanction as, together with the concepts of normative supremacy and primacy of application mentioned above, it will play an important role in clarifying how customary international law is the hierarchical superior of *jus cogens* norms but it is still not possible to diverge from obligations originating from *jus cogens* norms via a norm of customary international law. The concept of sanction will also help explaining why international treaties are hierarchically inferior to both *jus cogens* and customary international law. We perceive invalidity or nullity as a sanction although the issue is not free of controversy⁴⁷. However, although existence of a sanction as invalidity is an indication of

⁴⁴ Kelsen, 2008, p. 324.

⁴⁵ *Ibid.*, s. 323-324.

⁴⁶ Regarding the possibility of derogating from a prior custom by a later treaty see Casses, 2005, 198-199; Goldsmith and Posner, p. 4 (stating that treaties and customary international law have the same binding force); Currie, 2008, p. 206; Shaw, 2008, p. 123; Wallace, 2002, p. 20.

⁴⁷ Hart believes that nullity cannot be described as a sanction. For details please see Hart, 2012, pp. 33-35.

normative hierarchy, it is not necessarily true that lack of sanction hints at the absence of normative hierarchy. Normative hierarchy is a function of relationship of validity. Therefore, our first premise is that a norm is inferior to the other in case the first derives its validity from the latter. This basically means that the superior norm is the norm delegating an organ or person the authority to posit the inferior norm. The second premise is that norms created according to the same procedure belong to the same hierarchical level. Sanction to be applied in case the inferior norm is contrary to the superior is an independent question⁴⁸. Kelsen suggested the nullification of the contrary inferior norm not as a prerequisite of normative hierarchy, but as a way of maintaining the coherent unity of the legal system: "*There cannot occur any contradiction between two norms from different levels of the legal order. The unity of the legal order can never be endangered by any contradiction between a higher and a lower norm in the hierarchy of law*"⁴⁹.

There are numerous examples in municipal legal systems where the collision between an inferior norm and superior norm does not result in the nullification of the inferior norm. In Turkey, for example, the Constitutional Court does not possess the authority to review the conformity of statutory decrees created during state of emergency or martial law to the Constitution⁵⁰. However, this does not mean that no hierarchy exists between the Constitution and such statutory decrees as

⁴⁸ Gülgeç, 2016, p. 23, fn. 87.

⁴⁹ Kelsen, 1949, p. 162. However, it needs to be stressed that Kelsen also seems to regard sanction as an integral and indispensable part of a legal norm. He indicates that norms without sanctions are either sanctioned by another article or piece of legislation or they relate to the application of a sanction, therefore forming a part of the sanctioning norm. Otherwise, they need to be considered as legally irrelevant (See Kelsen, 2008, pp. 51-52.). Adopting the view expressed by Joseph Raz, we do not understand why it should be necessary in pure theory of law to require that all particular norms have sanctions (See Raz, 1980, p. 81.). This is why we express in this paragraph what sanction should be perceived as in a normative-positivist understanding of a legal system and not the opinions of Kelsen on the issue.

⁵⁰ Although the provisions of the Constitution does not grant the Turkish Constitutional Court the authority to carry out the judicial review of such decrees, the Court has developed a weird case law enabling the conformity of such decrees to the Constitution. For detailed analyses and criticism of the Court's case law please see Gözler, 2009, pp. 1229-1237.

the latter still derives its validity from a constitutional norm. It might only mean that normative hierarchy in this case does not lead to noteworthy legal results and stays as a rational analysis without crucial legal consequences. Another example can be given from English law. It is widely recognized that while delegating legislative powers to the executive, the Parliament may exclude the instrument to be created as a result of delegated power from the judicial review of the courts⁵¹. As a result, the courts cannot annul such instruments in case they are contrary to the delegating Act of Parliament or other Acts of Parliament. Does this mean however that no hierarchy between Acts of Parliament and such instruments of the executive exists? Our answer to this question is a definite no. This is because even the fact that such instruments cannot be reviewed by the courts and that they can contradict with Acts of Parliament is owing to the fact that an Act of Parliament made such a determination.

In light of the explanation above, we can make the following observations: if the Kelsenian view on the hierarchy between customary international law and international treaties is adopted, it is still possible to explain how international treaties are invalid in case they are contrary to certain customary rules (*jus cogens*) while they can continue to be valid if they collide with other rules of customary international law. The reason is that no such sanction has been envisaged in international law. However, it is very important to note that even this normative hierarchy between customary international law and treaty law cannot explain how later treaties can diverge from prior customs. Even if normative hierarchy is not sanctioned, existence of such hierarchy may still require a primacy of application in favor of the superior norm. Therefore, just as it is in American constitutional review process, the inferior treaty may preserve its validity in case it is contrary to the norms of customary law; nevertheless, such contrary provisions of the treaties should not be applied albeit the provision of the superior custom⁵².

⁵¹ Regarding the power of the British Parliament to exclude certain delegated legislation from the judicial review process see Barnett, 2002, p. 486, 777; Stott and Felix, 1997, p. 199.

⁵² The Constitution of the United States does not envisage any sanctions against statutes contrary to the Constitution. However, American courts have developed a precedent based on the principle of *lex superiori derogat legi inferiori* to disregard (disapply) the statutes

Let us summarize what we have covered so far regarding the legal qualities of *jus cogens*: 1) *Jus cogens* norms cannot derive their validity from conventional sources of international law as treaties contrary to *jus cogens* are invalid *ab initio*. 2) Based on the widely accepted view that the Vienna Convention is a codification of the existing customary international law, it can be asserted that *jus cogens* norms owe their validity to customary international law. 3) If such assertion is made, it must also be acknowledged that customary international law as a whole is superior than treaty law as a source of international law. 4) Such acknowledgment is in conformity with international law theory of Hans Kelsen and questions arising in relation to the fact that customary international law, which is in this perspective superior to *jus cogens* norms, cannot allow states to derogate from obligations arising from *jus cogens* norms may be parried based on the analysis we have provided regarding the concept of sanction, normative supremacy and primacy of application.

So far we have accepted that customary international law is normatively superior to *jus cogens* norms as the reason for their validity and that *jus cogens* norms are hierarchically superior to conventional sources of international law. The fact that states cannot derogate from *jus cogens* based on a norm of customary international law stems from the primacy of application established by customary international law in favor of *jus cogens* norms⁵³. Below we will consider certain formal and procedural issues related to the emergence of *jus cogens* norms.

contrary to the Constitution. Moreover such statutes are disapplied only with respect to the case at hand. Therefore, unless it is the decision of the Supreme Court which is binding upon all courts due to the principle of *stare decisis*, American constitutional review only has an effect *inter partes* (See Andrade, 2001, pp. 979-980; Kommers, Finn and Jacobsohn, 2010, pp. 21-22.). In such cases the statutes continue to be valid, but cannot be applied to a particular case.

⁵³ It should be remembered that we are making this determination based on the assumption that Article 53 of the Vienna Convention reflects a rule of customary international law already existing in relation to the concept of *jus cogens*. Normatively superior norm is free to determine a primacy of application in favor of the inferior norm as seen in the example of the relationship between Acts of Parliament and norms of the European Union Law in English law. Let us briefly explain the situation in English law. As per Article 2 paragraph 4 of the European Communities Act dated 1972, norms of the European Union have a primacy of

2. Formal Discussions Regarding the Concept of *Jus Cogens*

How are *jus cogens* norms created? Who creates these norms? These are in our perspective the most important questions arising in relation to the concept of *jus cogens*. This is due to the fact that it seems like there is no restriction of positive law on the content of *jus cogens* norms. Theoretically, they can be of any content as long as they fulfill the criteria of creation.

We will consider the discussions regarding the creation of *jus cogens* norms in line with Article 53 of the Vienna Convention. The Article reads as "*A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law 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*". Based on this article we can limit the formal discussion regarding *jus cogens* with the following issues: a) the concept of general international law, b) the phrase "international community of States as a whole" as the maker of *jus cogens* norms, c) no derogation from and alteration of *jus cogens* norms, d) the consensual character of *jus cogens*: expressions of acceptance and recognition.

a. *The concept of general international law*

The first question one needs to answer in relation to the concept of *jus cogens* is the meaning of "general international law". This is of

application over municipal legal norms. This Act is the reason of validity for the European Union norms in English law. However, the relevant paragraph also envisages that in case a norm of municipal legal system, even an Act of Parliament, is in contradiction with the norm of European Union, the latter will be applied. Although some contrary views exist, the acceptance of the Act by the Parliament does not really damage the principle of parliamentary sovereignty in English legal system (Alder, 2002, pp. 196-197.). The fundamental reason for this is the fact that norms of the European Union still owe their validity in English legal system to the European Communities Act. Norms of the European Union are hierarchically inferior to Acts of Parliament. Nevertheless, normative supremacy and primacy of application are two different concepts. Acts of Parliament colliding with the European Union norms maintain their validity, however, due to a provision of an Act of Parliament, they will give way to the norms of European Union in application (For more detailed discussions see Gülgeç, 2016, pp. 404-407.).

special importance as *jus cogens* norms, as defined by Article 53 of the Vienna Convention, are norms of general international law. It needs to be indicated right away that the meaning of this expression is not free of controversy. Some use the term to refer to customary international law, others use it to signify sources of international law other than the conventional sources while according to some the term indicates those rules of international law binding a great number of states⁵⁴. However, one has to make a decision regarding the scope and the meaning of the term in order to be able to understand the formal and procedural matters related to *jus cogens* norms.

According to one view, "general international law" is the "opposite of particular international law". Some rules of international law are binding upon two or few states. Such rules of international law form "particular international law"⁵⁵. On the other hand, general international law is composed of norms "*having a general applicability among the States of the international community*."⁵⁶ It can be inferred from this distinction that general international law refers to a set of international norms applicable to a majority of states.

According to Oppenheim, general international law is a name used for a specific body of rules applicable to a great number of States⁵⁷. The criteria for such majority are not clear although it can be asserted that for a norm to have a general application, it needs to be applicable at least to the majority of the states in the international community. Oppenheim clearly distinguishes general international law from universal international law stating that universal international law binds all states of the international community without exception⁵⁸.

As it will be seen below, the fact that the text of Article 53 refers to general international law and not universal law is interpreted as an indication of the fact that *jus cogens* norms can emerge without the

⁵⁴ Gardiner, 2003, p. 98.

⁵⁵ Oppenheim, 1905, p. 3.

⁵⁶ Rozakis, 1976, p. 55.

⁵⁷ Oppenheim, 1905, p. 3.

⁵⁸ *Ibid.*

consent of all States while continuing to bind even the objectors⁵⁹. We will try to show below why such a reasoning is incoherent. For now, let us indicate that we do not think Oppenheim's differentiation of universal international law and general international law has to be interpreted as an absolute distinction. Such differentiation of the two concepts could easily be interpreted as signifying that general international law contains universal international law as undoubtedly universal international law is also applicable to a great number of states. However, not every norm of general international law is universal international law as such norms might not bind all states. Both terms, universal international law and general international law, express a juxtaposition to particular international law in that they represent some sort of, absolute or not, generality.

The general tendency of the doctrine is to interpret general international law as a reference to sources of international law other than the conventional sources or international treaties⁶⁰. The weirdness of such interpretation is aptly stressed by Gardiner in that some treaties apply to a greater number of states while it is possible for certain rules of customary law to have regional or local validity⁶¹. This brings up the question if general international law is used to refer to customary international law because it is thought that customary rules are applicable to states even in the absence of their consent. The fact that some authors while commenting on the ability of international treaties to create general international law discuss whether provisions of a particular treaty can become binding on non-signatories via custom supports this suspicion⁶². Gardiner states while elaborating on the view accepting customary law as the only source of general international law that "*The claim of custom to pre-eminence as international law... rests on the fact that... its rules apply to all states and their binding force does not depend upon the specific consent of each individual state to every rule.*"⁶³. However, as he himself has acknowledged on the same

⁵⁹ See Rozakis, 1976, p. 81-82.

⁶⁰ Tunkin, 1993, p. 535.

⁶¹ Gardiner, 2003, p. 98.

⁶² See for example Tunkin, 1993, pp. 538-540; D'Amato, 1962, pp. 1-2.

⁶³ Gardiner, 2003, p. 98.

page, customary law does not have to apply to each and every state. Moreover, the assertion that customary rules do not require the specific consent of states is also misleading. It is recognized since Vattel that customary international law is also consensual albeit the said consent being a tacit one⁶⁴.

Among these two definitions and understandings of general international law we prefer the first one. Therefore, we believe that general international law is related to a norm's range of applicability. In case a norm regulates the behavior of two or few states such norm needs to be categorized as particular international law, whereas norms applicable to "a great number of states" form general international law. The second interpretation simply does not have an explanation for why these norms are general. As stated above, in case the term general international law is used to refer to the sources of international law other than the conventional sources, the fact that some customary rules of international law are regional or local while certain treaties have attained universal application cannot be explained. The argument that general international law is only customary law because only customary law is binding on the states irregardless of their consent, on the other hand, is simply misguided. This is not only because customary international law is fundamentally consensual but also due to the fact that being "general" does not in any way connote not being dependent on consent. The word "general" means "involving or relating to most or all people, things, or places"⁶⁵. Therefore, "general international law" should mean "international law relating to most or all states".

Consequently, *jus cogens* norms, as postulated by Article 53 of the Vienna Convention, need to belong to corpus of general international

⁶⁴ Vattel, 2008, p. 77. In fact, there is one last view considering general international law as those norms of customary international law also codified in treaty provisions (See Aust, 2010, p. 9.). However, we do not think that this is what the term means in the context of Article 53 of the Vienna Convention as neither the literature on the concept of *jus cogens* nor the discussions in the Vienna Conference on the Law of Treaties adopt such an approach to the concept. This is why we refrain from providing further details on this interpretation.

⁶⁵ See <http://dictionary.cambridge.org/dictionary/english/general>, Date of Access: 23 August 2016.

law. In other words, norms applying only to two or few states cannot qualify as *jus cogens*. We reject the argument that "universal international law" and "general international law" refer to two distinctly separate categories. The fact that the word "general" implies most or "all" of something supports our argument that general international law encapsulates universal international law, that all universal international law is general international law whereas not all general international law qualifies as universal international law.

b. The phrase "international community of States as a whole" as the maker of *jus cogens* norms

The second issue relates to the maker of *jus cogens* norms. Therefore, it is crucial that the expression "international community of States as a whole" is clarified. Our questions regarding the first issue are as follows: is the acceptance and recognition of all states without any exceptions necessary for the emergence of a *jus cogens* norm or is it sufficient to reach an overwhelming majority of states in order to render the said norm binding for other states? If the latter is true, what does the concept of majority exactly mean? It should be indicated in advance that such questions have been asked and some answers have been proposed. The problem is that none of these answers seem to be satisfactory from a theoretical perspective. According to one group, the acceptance or recognition of all states is not imperative for the emergence of *jus cogens* norms. It is sufficient if the overwhelming majority of the international community makes such acceptance or recognition⁶⁶. If this is accepted, it will mean that the Vienna Convention or the customary rule of international law that it reflects introduces a new method of law creation at international level⁶⁷.

⁶⁶ See for example Mangır, 2011, p. 87; Czapliński, 2006, pp. 91-92; Cassese, 2005, p. 201; Schmahl, 2006, p. 44; Bassiouni, 1996, p. 73.

⁶⁷ For a detailed and sound criticism of this interpretation please refer to Danilenko, 1991, pp. 48-57. We do not necessarily, at least for now, reject this interpretation, but let us indicate an important contradiction. Such interpretation conflicts with the principle of equal sovereignty. Equal sovereignty cannot be defended in case certain states may be subjected to the will of other states regardless of the numbers on each side and some scholars do not hesitate to declare the death of equal sovereignty. It might be argued that according to this interpretation of *jus cogens* norms states are still equally sovereign; however, this sovereignty is limited for all states with the will of majority.

If the will of the majority can create norms binding on the minority, the concept of majority needs to be clarified. Does this majority indicate a qualitative or quantitative majority? Is the important component here the number or the importance of the accepting or recognizing states for international community? If latter, what is the criterion of being important for international community? It could be suggested that the criterion for majority here is neither quantitative nor qualitative. The objection of a very strong and effective country would not prevent the emergence of a *jus cogens* norm just as mere numerical majority is not sufficient for its emergence. Honestly, what does such a determination express? This kind of an explanation could only be seen as the confession of the fact that the problem related to the concept of majority has not been resolved. While claiming to enlighten a certain vagueness it puts us in a more uncertain and unknowable area and leaves the concept of *jus cogens* to the mercy of international politics. Moreover, the wording of Article 53 of the Convention does not seem to point at any kind of majority. It seems to require the unanimity of the states rather than any kind of majority. It also needs to be stressed that this kind of an interpretation is also in conformity not only with the wording of the article but also with the principle of equal sovereignty. Otherwise, if the majority interpretation is accepted, it needs to be shown how one of the most basic principles of international law was abrogated in the face of the fact that only a limited number of states accepted the idea that they can be bound by a certain legal norm in the absence of their consent⁶⁸.

On the other hand Rozakis, who is an author stressing the consensual character of *jus cogens* norms, reiterates that the expression "international community of States as a whole" hints at law creation via will of the majority. He recognizes that the interpretation of the expression as requiring the will of all states to be bound by *jus cogens* norms is possible, nevertheless such an interpretation would be *mala fide*. The author propounds two reasons for this: first, the Drafting Committee has made it clear that their intention in including this

⁶⁸ Danilenko, 1991, p. 54.

expression was to allow law creation by some sort of majority of the states. Second, such interpretation disregards the fact that *jus cogens* norms are norms of general international law which is formed by will of majority of states and they do not constitute universal international law which requires the consent of all states⁶⁹.

Although Rozakis also stresses the need to interpret the phrase of international community of States as a whole as strictly as possible⁷⁰, we cannot agree with his inferences. First of all, the opinion of the Drafting Committee on a phrase in the Convention is not binding, authoritative or authentic in any way despite the fact that Rozakis tries to imply otherwise⁷¹. Only the reasons and intentions behind the wills of the states signing the Convention can be used while interpreting an expression in the text. As indicated before, there is little suggesting that state parties accepted the expression to mean that majority will can lead to obligations binding on the minority⁷². The second argument claiming that any interpretation requiring the consent of all states for the emergence of *jus cogens* would be *mala fide* is even more problematic and contradictory. The author relies on the fact that *jus cogens* norms are norms of general international law while trying to explain why the expression "international community of States as a whole" signifies not all but majority of states. However, as we have seen above, Rozakis himself defines general international law not based on the makers of a rule, but the rule's range of applicability. In other words, it is not about how many states constitute the rule, but about how many states the rule applies to. Nevertheless, the author concludes that "...article 53 refers to 'norms of general international law' and not to 'norms of universal law' thereby implying that a rule not accepted by the totality of the international community may nevertheless be a *jus cogens* norm..."⁷³. However the question begging to be asked is this: if norms of general international law are distinguished from particular international law by the great number of states they apply to and from universal international

⁶⁹ Rozakis, 1976, pp. 80-82.

⁷⁰ *Ibid.*, p. 80.

⁷¹ *Ibid.*, p. 81.

⁷² Danilenko, 1991, pp. 53-54.

⁷³ Rozakis, 1976, pp. 81-82.

law by the fact that they do not apply to all states, how can *jus cogens* norms, despite being a norm of general international law, apply to all states?

The only coherent way of making *jus cogens* norms applicable to all states therefore is to recognize that universal international law is a sub-category of general international law. If such recognition is made, it can no longer be argued that Article 53 of the Vienna Convention holds any contradiction because it determines *jus cogens* as a norm of general international law while also requiring the consent of all states in the international community.

c. No derogation from and alteration of jus cogens norms

Another issue we need to consider is the meaning of derogation and the fact that *jus cogens* norms may only be altered by a subsequent norm of the same character. The first sentence of Article 53 which determines that any treaty conflicting with a peremptory norm of international law is void sheds light on the concept of "derogation". First off, the fact that no derogation from the peremptory norms is allowed means that the obligations expressed by *jus cogens* norms cannot be overridden by international treaties. Besides, the fact that peremptory norms can only be altered by a subsequent norm of the same character leads us to conclude that norms of customary international law cannot alter or allow states to derogate from *jus cogens* norms. However, if *jus cogens* norms owe their validity to customary international law and therefore they are hierarchically inferior to custom, how can a norm of customary international law not derogate *jus cogens*?

It is crucial to note that Article 53 does not mention customary rules contrary to *jus cogens* being void or invalid. It simply states that states cannot evade obligations based on a *jus cogens* norm due to a later treaty or custom. Later treaty is invalid, but the same is not envisaged for a customary rule. We think that this situation can be interpreted to mean that the customary rule of international law reflected by Article 53 of the Convention establishes a primacy of application in favor of *jus cogens*. Therefore, although customary rules of international law are

normatively superior to *jus cogens* norms, in case these two sources collide the latter will take precedence in application.

Another explanation could be made by adopting the view that the Vienna Convention defines the concept of *jus cogens* for its own purposes as expressly stated by Article 53 and that another (perhaps broader?) concept of *jus cogens* exists. It could then be argued that customary international law contrary to this broader understanding of concept is also invalid. It cannot be denied that the wording of Article 53 leaves the door open for such possibility. However, this should not mean that there certainly exists another definition of *jus cogens* which envisages the invalidity of customary international law contrary thereto. The legal basis for invalidating customary norms of international law contrary to *jus cogens* norms still needs to be accounted for. It does not need to be stressed that such demonstration faces fundamental theoretical difficulties as the only viable legal source for the concept of *jus cogens* seems to be customary international law and it would be incoherent to conclude that customary international law, as the reason for validity of *jus cogens* norms, can be invalidated based on incompatibility with a *jus cogens* norm. The only way out of this incoherency would be to establish a brand new theory of international law where *jus cogens* norms are shown to be normative superiors. Moreover, the fact that the wording of Article 53 refers to the alteration of *jus cogens* only by a subsequent *jus cogens* and not by treaties or custom hints that the Vienna Convention does not merely regulate the relationship between *jus cogens* and international treaties. We, therefore, have preferred a view conceiving of Article 53 of the Vienna Convention as the only existent definition of and the identification criterion for *jus cogens* norms.

d. *The consensual character of jus cogens: expressions of acceptance and recognition*

Article 53 of the Vienna Convention envisages that *jus cogens* norms are accepted or recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can only be altered by a subsequent norm of the same character. Therefore, it is imperative that the meaning of the terms accepted and

recognized is clarified. What kind of acceptance or recognition is needed? Can this acceptance and recognition be performed by way of convention or is custom the only way of expressing such acceptance and recognition?

The fact that *jus cogens* norms need to be accepted and recognized shows that *jus cogens* norms are also consensual in nature⁷⁴. The consent here is a double consent. First, the particular *jus cogens* rule needs to be accepted or recognized. However, this is not sufficient. In order for this rule to constitute *jus cogens* "international community of states as a whole" also needs to accept and recognize that derogation from the norm is not allowed and that it can only be altered by another norm of the same nature⁷⁵. Therefore, emergence of *jus cogens* would require the consent of the states in relation to the content of the rule. However, it also needs to be accepted and recognized by the states that such content cannot be derogated by international treaties or customary international law unless such treaty and the rule of customary international law also emerges as *jus cogens*.

The second issue regarding the acceptance and recognition of the states is how this acceptance and recognition can be formed. Is customary international law the only way of creating *jus cogens* rules or are conventional sources also suitable for the task? We have mentioned above that there is a view regarding "general international law" to compose of rules of customary international law only. Consequently, if *jus cogens* also belongs to general international law it needs to be concluded that the consent of the states in relation to such norms needs to occur in the form of *opinio juris*. However, as previously discussed we are not convinced that the term "general international law" refers to a specific source of international law. Rather, the terms seems to concern the range of applicability of any international legal norm. Nevertheless, the idea that general

⁷⁴ See Rozakis, 1976, pp. 52-53. This does not mean however that Rozakis thinks *jus cogens* norms need to be consented to by every state to be bound with it. The author only stresses that consent of the states is still an indispensable element of norm creation in international law.

⁷⁵ Regarding the discussions related to the double consent see Rozakis, 1976, pp. 73-76.

international law has led some jurists to conclude that *jus cogens* norms can only emerge by way of custom and acceptance and recognition of the states can only be given in the form of *opinio juris*⁷⁶. We have sided with the view asserting that conventional sources are capable of giving rise to norms of general international law. We will not repeat our reasons here but simply state that it is not rare to come across authors accepting treaties as a vehicle of state's acceptance and recognition in relation to *jus cogens* norms⁷⁷. This is because treaties can also give rise to obligations under general international law and there is nothing in the Vienna Convention which prevents the usage of conventional sources to express the acceptance and recognition in relation to the *jus cogens* norm. If no restriction exists as to how the consent will be given, states should be free to use all vehicles available to them. Therefore, we can conclude that the acceptance and recognition of the states can take place via treaties as well as by way of custom.

It needs to be stressed that the fact that *jus cogens* norms can emerge either by way of custom or through universal treaties does not hinder *jus cogens*' place as an independent source of international law. Custom and treaty should be viewed as methods of law creation just like the voting in a national parliament is. Imagine a national legal system where parliament is authorized to make statutes and as well as amend the constitution. Most of the constitutions around the world are rigid constitutions, determining a more difficult procedure for amending the constitution than what is required for making statutes⁷⁸. Therefore, the threshold determined for the majority of the parliament is usually higher in constitutional amendment than in statute making. The same organ with the same basic method of law creation (voting) is authorized to create different norms forming two different sources of based on the majority reached in the parliament.

⁷⁶ See for example Schmahl, 2006, p. 50; Czapliński, 2006, p. 92; Linderfalk, 2008, p. 862 [requiring the double consent to be *opinio juris*.]; Dixon, 2013, p. 41 [stating that *jus cogens* norms are norms of customary international law].

⁷⁷ See for example Danilenko, 1991, p. 63 [although the author grants treaties only a limited role in the formation of *jus cogens* norms, he does not reject that universal treaties can give rise to obligations under general international law]; Denk, 2001, p. 58; Mangir, 2011, p. 89; pp. 66-73; Karakaş, 2007, p. 67.

⁷⁸ Gözler, 2011, pp. 117-118.

The same situation exists in international law regarding the formation of *jus cogens* rules. What distinguishes them from other sources of international law is not the method states use while expressing their consent in favor of the norm, but the quantity of the wills required for the emergence of the norm. Accordingly, a customary norm applicable to every state and recognized as a norm which allows no derogation and which can only be altered by a subsequent norm of the same character is no longer a part of customary international law but a part of *jus cogens*. Similarly, A norm of a universal treaty which is recognized as non-derogable and only alterable by a subsequent norm of the same character is no longer a treaty provision but a *jus cogens* norm.

3. Discussions Regarding the Content of the Concept of *Jus Cogens*

This section is an attempt to draw attention to the difficulties in determining which obligations are *jus cogens*. International lawyers seem to agree that there is no consensus among themselves on which obligations constitute *jus cogens*⁷⁹. Issues like the amphiboly in the definition of the concept (e.g. not all States but international community of States as a whole) and the uncertainty regarding the legal quality of the concept contribute to the difficulties faced in determining the content of the *jus cogens* category of norms.

According to one view on the matter, the category of *jus cogens* norms can be examined under three headings. The first comprises of rules which constitute a logical essentiality and derogation from which cannot be imagined. The principle of *pacta sunt servanda* is given as an example to this group of norms. This principle constitutes the foundation of international law and in order for international law to exist states must not be able to diverge from this principle via treaties

⁷⁹ Czapliński, 2006, p. 87 (that the determination of a catalogue for *jus cogens* norms has been left to the practice and that the Vienna Convention did not provide a definition for the content of *jus cogens* norms); Yarwood, 2011, p. 66; Christenson, 1987, p. 97 (that the content of the *jus cogens* norms is not agreed); Linderfalk, 2008, p. 855.

or customs⁸⁰. If treaties shall not be binding, any treaty deciding so should also not be binding. The treaty regulating that treaties shall no longer be binding is a definitive example of a paradox.

The second group consists of certain norms content of which is morally indispensable. For instance, prohibition of genocide and slavery are considered to be *jus cogens* due to the moral value of their content. It cannot be imagined that derogation from such norms is allowed⁸¹. As can be understood from our previous explanations regarding the distinction of *jus cogens* and *erga omnes*, we cannot accept this explanation regarding the second group of norms. Moral value of a norm's content is devoid of power to determine its legal qualities. Legal qualities of legal norms are determined by law itself. This very difficult task of determining a norm's legal properties based on its moral value can only await lawyers' attention when a legal norm determines that the moral value of a norm's content shall be considered while determining its legal qualities. Needless to say, there is no legal norm making such determination for *jus cogens* norms.

Lastly, according to this view, the third category comprises of *jus cogens* norms created by way of custom. It is stressed that problem of determining the content of *jus cogens* norms truly involves this category as it needs to be shown that a certain custom is applicable universally to all states⁸².

The problems regarding the content of *jus cogens* norms or to be clearer the difficulty of determining which obligations constitute *jus cogens* has also emerged with respect to the Vienna Convention. Western states and socialist block could only be persuaded by the addition of a provision into the treaty which envisages that the ICJ is authorized to decide whether a *jus cogens* norm exists regarding a certain matter⁸³. The process before the ICJ could only be initiated in

⁸⁰ Lowe, 2011, p. 58.

⁸¹ *Ibid.*, p. 59.

⁸² *Ibid.*

⁸³ Cassese, 2005, p. 200.

case the State Parties to the Convention would claim the invalidity of a treaty due to a *jus cogens* norm⁸⁴.

We can observe that there is a consensus in literature regarding the *jus cogens* quality of at least some norms. Moreover, it can also be observed that this consensus extends to include the idea that such obligations are also of a moral nature and states (at least discursively) agree on the binding nature of this sort of obligations. Norms such as prohibition of slave trade and genocide or the principle of *pacta sunt servanda* can be included in this category. The problem is partially rooted in the insufficiency of the theoretical background of such presumption and consensus. Considering that *jus cogens* norms can also emerge by way of custom, the difficulty of determining the existence of a customary practice on a certain matter also contributes to the problem. Additionally, the fact that the ICJ refrains from using the expression *jus cogens* and generally has precedents regarding *erga omnes* obligations rather than *jus cogens* norms and the difficulties in distinguishing these two normative categories are factors to bear in mind while considering the content of *jus cogens* norms. However, we are of the opinion that no matter how difficult it is to determine the content of *jus cogens* norms, such problems are not as essential as problems encountered in formal qualities of this category. Looking at the definition in the Vienna Convention one can observe that the concept is defined by formal criteria and usage of material criteria is avoided. This means that difficulty in determining the content of *jus cogens* norms is rooted primarily in difficulties faced while trying to determine the formal and procedural properties of the concept. This is because legally, as Article 53 of the Vienna Convention shows, *jus cogens* norms can have any kind of content, the content of these norms is not restricted.

The fact that it is difficult to determine which obligations are *jus cogens* does not affect its legal existence as long as the procedural and formal problems are resolved. As rightly stated, it is also difficult to determine the exact content of concepts such as public order or public welfare in municipal legal systems which are generally associated with

⁸⁴ *Ibid.* pp. 203-204.

peremptory norms⁸⁵. It is true that such uncertainties regarding the content of *jus cogens* damages legal predictability and invites politics into the area of legal science. Nevertheless, considering the fact that application of *jus cogens* in international law has so far been very limited and that even the ICJ tries to evade tackling with the problems posed by the concept, we may conclude that right now problems regarding the content of *jus cogens* are only of a secondary importance. However, before increasing the number of international law mechanisms operating around the concept of *jus cogens* and making the concept play a central role in international law, the concept needs to be rid of formal or material discrepancies and uncertainties so that international law can protect its autonomous field from international politics and already existing doubts regarding the legal quality of international law are kept at bay⁸⁶.

CONCLUSION

The concept of *jus cogens* indicates a certain need on an international platform where states keep getting closer with the effect of globalization and international relations gets more intricate. It is natural that states in this intricate web of relations are disturbed by the uncertainty and decentralized state of international law. We certainly do not deny the existence of such need. However, law cannot be regarded as the direct product of needs and necessities. Therefore, views regarding *de lege ferenda* need to be restrained while interpreting positive law. Consequently, whether law sufficiently addresses certain needs in international relations needs to be evaluated after the necessary discussions regarding the positive law are performed. Law is unlikely to have proper responses to newly emerged needs and necessities and there is nothing wrong with this unlikeliness. This is why we have chosen to stay away from perspectives and approaches based on natural law understanding while attempting to comprehend what the concept of *jus cogens* means. Our choice also seems to represent the general tendency of the literature on the matter. The concept is analyzed in light

⁸⁵ Mangır, 2011, p. 26.

⁸⁶ Regarding the dangers of dealing with an ambiguous concept of *jus cogens* see Rozakis, 1976, p. 44.

of positive regulations although certain interpretations of positive legal texts carry the traces of natural law theories. This general inclination towards the grammatical interpretation of the concept is due to the fact that analyses based on the nobility, importance or indispensability of certain moral values are far from being convincing. The British delegation has expressed the danger of determining content-based criteria for the concept of *jus cogens* plainly but brilliantly: "What might be *jus cogens* for one State would not necessarily be *jus cogens* for another."⁸⁷

As a result, the first thing we need to reiterate is that a category of *jus cogens* residing at the top of the normative hierarchy in international law needs to be rooted in a source other than treaty law. This is because if *jus cogens* norms owe their validity and legal existence from a treaty provision, it is no longer possible for the peremptory rules to be hierarchically superior than international treaties. Even if *jus cogens* norms are granted a primacy of application over treaty provisions, this does not mean that they are also granted normative superiority. If they lack normative superiority over treaties, it is not possible, from the perspective of legal theory, to invalidate international treaties conflicting with *jus cogens* norms. Therefore, the first sentence of Article 53 of the Vienna Convention would not have any meaning in the perspective of normative positivism.

Determination of customary international law as the source of validity for *jus cogens* seems to be in accordance with the normative positivist claim that customary international law is hierarchically superior to treaty law. Therefore, the first sentence of Article 53, which is in fact a repetition of the customary rule on the same matter, establishes the hierarchy between *jus cogens* norms and international treaties. However, the fact that the rest of the article indicates that derogation from *jus cogens* norms is only possible in case the

⁸⁷ The words have been said by the UK delegate at the 53rd session of the Vienna Conference on the Law of Treaties. See http://legal.un.org/diplomaticconferences/lawoftreaties-1969/docs/english/1stsess/a_conf_39_c1_sr53.pdf, at 305, 64th paragraph (Date of Access: 18 August 2016). Our attention to this statement has been drawn by Danilenko (Danilenko, 1991, p. 46.).

derogating norm is also a *jus cogens* norm without making a distinction between customary international law and treaty law can be interpreted to mean that although customary international law is hierarchically superior to *jus cogens*, there is a primacy of application in favor of the latter. This situation should not be surprising from a theoretical perspective because a similar situation exists in municipal legal systems. Normative supremacy and primacy of application are two different things. In this case, customary international law is normatively superior to *jus cogens* norms as *jus cogens* norms owe their legal validity and existence to a norm of customary international law which is reflected and repeated by Article 53 of the Vienna Convention. However, the same customary rule belonging to the supreme normative category of international legal system, indicates that when a custom and *jus cogens* norm collide, *jus cogens* will be applied. The fact that Article 53 mentions the invalidity of treaties contrary to *jus cogens* norms but not the invalidity of customary rules is noteworthy as it hints that non-divergence from *jus cogens* norms even via customary norms of international law is not due to the normative superiority of *jus cogens*. If this had been the case, the customary rule conflicting with *jus cogens* would have been declared invalid.

We have also touched upon another possibility. Accordingly, if it is conceived that the Vienna Convention simply defines the concept of *jus cogens* for its own purposes as expressly stated by Article 53 and that in fact there exists a broader definition of *jus cogens* in customary international law, it might be viable to assert that such broader definition envisages norms of customary international law contrary to *jus cogens* norms to be invalid. Such an assumption, though, is flawed with theoretical and logical inconsistencies. If customary international law is the reason for validity of *jus cogens* norms and if it is yet to be shown that some kind of hierarchy exists between different norms of customary international law, it cannot be defended that customary international law contrary to *jus cogens* norms is invalid. We have shown based on the notion of primacy of application that sometimes inferior norm contrary to the superior norm may be applied. However, the superior norm, although disapplied, is never invalid due to a collision with the inferior norm. Legal validity and primacy of

application, therefore, are separate notions. As a result, it cannot be coherently defended that customary norms of international law are also invalid in case they collide with a *jus cogens* norm while simultaneously accepting that the legal basis of the *jus cogens* concept lies within customary international law.

It is true that the content of *jus cogens* norms and determination of which obligations amount to be *jus cogens* is still problematic. However, as long as the procedural and formal matters in relation to the concept are resolved, the effect of this difficulty on the coherent existence of *jus cogens* as a legal concept will decrease since *jus cogens* norms can be identified by formal and procedural criteria and the relevant positive law does not specify any material conditions for *jus cogens* norms. Accordingly, trying to identify *jus cogens* norms by the content of these norms or the moral value such content holds is a futile attempt as *jus cogens* norms can have any content whatsoever.

Jus cogens norms should be considered as another source of international law besides customary international law and treaties. They derive their validity from customary international law and therefore are hierarchically inferior to customary rules while they are, as determined by the custom related to *jus cogens*, superior to international treaties. Customary international law is also superior to *jus cogens*. However, this superiority, just like the superiority of statutory decrees in Turkey during martial law or state of emergency, does not have concrete legal consequences. *Jus cogens* norms conflicting with any particular custom are not invalid. In fact the source of validity for *jus cogens*, the customary international law itself has established a primacy of application in favor of *jus cogens* norms over customary international law. Therefore, in case a customary rule conflicts with a *jus cogens* norm, *jus cogens* norm will be applied although the customary rule maintains its validity.

Our purpose in this article was to examine the theoretical background of the concept of *jus cogens* based on positive legal norms. We believed that, if succeeded, the notion of *jus cogens* could shelter international law from arguments against its legal character, especially

against the arguments based on sovereignty and centrality. This could have been the case if we could argue that *jus cogens* norms do not require the consent of all states to be bound. However, apparently this is not the case and the positive regulations of international law still respect the principle of equal sovereignty which recognizes that no state can be bound by an international norm in absence of its consent. Consequently, the criticism directed at international legal system based on centrality cannot be easily blown away by the concept of *jus cogens*.

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