

ARBEITEN AUS DEM IURISTISCHEN SEMINAR  
DER UNIVERSITÄT FREIBURG SCHWEIZ

*Herausgegeben von Peter Gauch*

342

---

SÉVRINE KNUCHEL

*Jus Cogens: Identification  
and Enforcement  
of Peremptory Norms*

Schulthess § 2015

# Table of Contents

Acknowledgments	V
Table of Abbreviations	XI
Bibliography	XV
Table of Cases and Documents	LI
<b>Introduction</b>	1
I. <i>Jus cogens</i> : an obscure term for an obscure notion?	1
II. In brief: what we need to know about <i>jus cogens</i>	6
III. Focus of the present study	10
IV. Outline	15
<b>Chapter One: Setting the Stage for <i>Jus Cogens</i></b>	19
I. Background: understanding Article 53 as a secondary rule	19
II. The source of <i>jus cogens</i> ' secondary rule	21
1. An objective regime?	21
2. Custom?	22
A. Article 53 as a customary norm	22
B. Persistent objectors	28
3. General principles of law recognized by civilized nations?	32
III. The rank of <i>jus cogens</i> ' secondary rule	35
IV. Conclusion	39
<b>Chapter Two: The Sources of <i>Jus Cogens</i></b>	41
I. Background: identifying <i>jus cogens</i> from the sources of international law	41
II. Sources of <i>jus cogens</i> in the <i>travaux préparatoires</i> and in the literature	44
III. A special source?	47
IV. Article 53's first criterion	49
1. Treaties	50
2. Custom	51
3. General principles of law recognized by civilized nations	51
4. Sources not mentioned under Article 38 of the ICJ Statute	53
A. Unilateral law issued by States	53
B. Concerted non-conventional acts issued by States	54

C. Unilateral law issued by international organizations	54
5. Regional <i>jus cogens</i>	56
6. Appraising the first criterion	58
V. Article 53's second criterion	59
1. The notion of derogation	59
2. Discerning the acceptance and recognition of the international community of States as a whole in sources	61
A. 'Accepted and recognized' in the <i>travaux préparatoires</i>	61
B. Sources	72
a. Treaties	74
i. In general	74
ii. Non-derogation clauses in human rights treaties	79
b. Custom	86
i. The puzzle of customary law: the interplay of practice and <i>opinio juris</i>	88
ii. The role of States' consent	91
iii. The emergence of norms of abstention	97
iv. The issue of inconsistent practice	100
a) Classes of customary norms and interpretative accounts	102
b) Blending approaches	114
v. Application to the peremptory law-making process	124
c. General principles of law recognized by civilized nations	126
d. Sources not mentioned under Article 38 of the ICJ Statute	129
3. Appraising the second criterion	130
VI. Article 53's third criterion	130
1. Article 53's third criterion in the <i>travaux préparatoires</i> and in the literature	131
2. Analysis of the modification of <i>jus cogens</i>	133
3. Appraising the third criterion	136
VII. Conclusion	136
<b>Chapter Three: The Effects of <i>Jus Cogens</i></b>	141
I. Background: discerning the legal effects of <i>jus cogens</i>	141
II. The effects of <i>jus cogens</i> in the <i>travaux préparatoires</i> and in the literature	144
III. The invalidating effect of <i>jus cogens</i>	147
1. <i>Jus cogens</i> ' invalidating effect under the VCLT	148
A. Absolute nullity (Articles 53 and 64)	148

B.	Consequences of the invalidity of a treaty conflicting with <i>jus cogens</i> (Article 71)	150
C.	Procedure (Articles 65 to 68)	151
2.	<i>Jus cogens</i> ' invalidating effect beyond the VCLT	155
A.	Other international legal norms	156
a.	Customary norms	156
b.	Unilateral acts of States	158
c.	UNSC resolutions	162
B.	Domestic law	165
3.	The higher rank of <i>jus cogens</i>	169
4.	The paucity of evidence of <i>jus cogens</i> ' invalidating effect	171
IV.	The effects of <i>jus cogens</i> in the law of State responsibility	178
1.	Breaches of <i>jus cogens</i> versus derogations	178
2.	<i>Jus cogens</i> in the Draft Articles on State Responsibility	180
A.	Particular consequences of a serious breach of <i>jus cogens</i> (Articles 40 and 41)	182
B.	Inability to justify a breach of <i>jus cogens</i> (Article 26)	186
C.	Invocation of responsibility and measures taken by a State other than an injured State (Articles 48 and 54)	189
V.	Enforcement effects ascribed to <i>jus cogens</i>	193
1.	Universal Jurisdiction	194
A.	The concept of universal jurisdiction	194
B.	An obligation to exercise universal jurisdiction in case of <i>jus cogens</i> violations?	196
C.	Universal jurisdiction and Article 41 of the Draft Articles on State Responsibility	200
2.	State Immunity	202
A.	The concept of State immunity	202
B.	An exception to the immunity of States and their officials in case of <i>jus cogens</i> violations?	203
a.	Arguments that <i>jus cogens</i> defeats State immunity	203
b.	The case concerning <i>Jurisdictional Immunities of the State</i>	205
3.	Amnesties	212
A.	The concept of amnesties	212
B.	Invalid amnesties for <i>jus cogens</i> crimes?	214
C.	Amnesties and Article 41 of the Draft Articles on State Responsibility	216
4.	Statutes of limitations	216
A.	The concept of statutes of limitations	216
B.	Invalid statutes of limitations for <i>jus cogens</i> crimes?	218
VI.	Conclusion	219

<b>Chapter Four: The Role of International Adjudication</b>	225
I. Background: assessing the role of international adjudication with regard to <i>jus cogens</i>	225
II. The notion of international adjudication	226
III. International adjudication of <i>jus cogens</i> under the VCLT	229
1. Article 66 (a)	229
2. Reservations and objections	233
IV. International adjudication and the identification of <i>jus cogens</i>	235
1. <i>Jus cogens</i> in the jurisprudence of the ICJ	236
2. International courts and <i>jus cogens</i> : reluctant law-makers?	244
V. International adjudication and the enforcement of <i>jus cogens</i>	251
1. The hurdle of consensual jurisdiction: the example of the ICJ	253
2. Reservations to compromissory clauses contrary to <i>jus cogens</i> ?	256
VI. Conclusion	257
<b>Chapter Five: The Promise of the International Community</b>	261
I. Background: situating Article 53's reference to the international community	261
II. <i>Jus cogens</i> as evidence of an international legal community	263
III. The international community of <i>jus cogens</i>	269
1. The international community in the <i>travaux préparatoires</i>	269
2. The international community as law-maker of <i>jus cogens</i> : a legal fiction?	271
3. The issue of constituency	274
IV. <i>Jus cogens</i> as constitutional norms of the international community?	283
V. Conclusion	286
<b>Conclusion</b>	289
I. Summary	289
II. Concluding observations	291
<b>Index</b>	297