

Unilateral acts and peremptory norms (*Jus Cogens*) in the international law commission's work

Ibrahim Sief Abdel Hameed Menshawwy
Faculty of Economics and Political Science, Giza, Egypt

Abstract

Purpose – This paper aims to explore the evolution of the notion of peremptory norms (*Jus Cogens*) in international law through the work of the International Law Commission on unilateral acts.

Design/methodology/approach – The study depended on analyzing the work of the International Law Commission on two topics: Unilateral Acts 2006 and Reservations to treaties 2011 to reveal the relation between *jus cogens* and unilateral acts.

Findings – *Jus cogens* restrict unilateral acts like treaties due to the recognition of the importance and necessity of the concept of *jus cogens* in protecting the fundamental interests of the international community.

Practical implications – States must be compatible with *jus cogens* when making any reservation on a treaty and also when taking any unilateral act.

Originality/value – This paper reveals the importance of *jus cogens* in promoting the values of the international community and the need of such notion to protect the common interest of that community.

Keywords *Jus Cogens*, Peremptory norms, Reservations to treaties, Unilateral acts, Unilateral declaration

Paper type Research paper

1. Introduction

The relation between unilateral acts and *jus cogens* gave rise to an interesting doctrinal debate over whether peremptory norms apply on unilateral acts. Most of the scholars in International Law emphasize that unilateral acts must be a subject of *jus cogens*, as the prohibition of derogation from peremptory norms which is adopted in article 53 of the Vienna Convention on the Law of Treaties was a comprehensive prohibition that covered not only international conventions but also, *prima facie*, unilateral acts. So any act or legal position based on the will of any international person must conform to *jus cogens*, or otherwise be null and void (Hannikainen, 1988; Saab, 1967; Allain, 2001; Meron, 1986, 1988; Ford, 1994; Zemanek, 2010; Jennings, 1967; Meron, 1986; Czaplinski, 1990; Provost, 1994; Tomuschat, 1999).

Moreover, this fact is conclusively confirmed by the preparatory work of the Vienna Convention in two occasions: First, the former Soviet Union explained that the purpose of draft articles 50 and 61 on *jus cogens* was to prevent the use of treaties as a means of



legitimizing acts that violated the fundamental principles of international law (Schwelb, 1967). Second, the International Law Commission emphasized during the drafting of the peremptory norms provisions of the Vienna Convention on the Law of Treaties, that the invalidity of a treaty which conflicts with *jus cogens* stems from the fact that such rules are so essential and fundamental which deprive any conflicting act or position from its legitimacy. International judicial practice also reveals a similar approach. The Inter-American Court of Human Rights has recognized the expansion of *jus cogens* to areas beyond the Law of Treaties such as State responsibility and all legal acts (Commission, 1966).

On the other hand, some scholars rejected the previous approach, claiming that *jus cogens* could not apply to unilateral acts, as unilateral acts fell outside the scope of the Vienna Convention on the Law of Treaties because it concerned only bilateral or multilateral acts rather than unilateral acts. Thus, according to this view, it is not reasonable to say that unilateral acts represent a departure from peremptory norms to consider them invalid (Zimmermann, 1995; Sztucki, 1974).

In any case, the International Law Commission itself recognized that unilateral acts are fundamentally limited by *jus cogens* norms, as any unilateral act conflicts with such norms is invalid, through its work on unilateral acts of States 2006 and reservations to treaties 2011.

2. *Jus Cogens* in international law

The peremptory norms as a concept has been significantly influenced and raised in international law through the contributions of professor Verdross, who derived them from natural law. Verdross believed that there are rules having the character of *jus cogens* in international law as the general principles of morality or the common public policy of legal systems in civilized nations constitutes a restriction on the obligations of the contractual states. Verdross considered that these rules nullified treaties of immoral purpose which include:

- An international treaty that prevents the state from maintaining law and order on its territory.
- An international treaty that exposes the population of the state to distress.
- An international treaty binding a state to reduce its army in such a way as to render it defenseless against external attacks.
- An international treaty prohibiting a state from protecting its citizens abroad (Verdross, 1937).

After three decades, Verdross also emphasized that there are rules in international law having *jus cogens* character to satisfy the higher interest of the international community as a whole and these rules are absolute. Hence, he referred to some examples of *jus cogens* rules such as the prohibition of use of force and all rules of general international law that have a humanitarian purpose (Verdross, 1966).

These contributions influenced the work of International Law Commission on the Law of Treaties through adopting this notion in article 53 of the Vienna Convention. Therefore, the notion of peremptory norms became part of positive international law through the two articles 53 and 64 of the Vienna Convention on the Law of Treaties 1969. The treatment of both articles stems from the fact that a conflict between a treaty and a peremptory norm of public international law may be occurred (Vos, 2013). Article 53 stipulates that:

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.

Article 64 of the same convention stipulates that:

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

According to article 53 of the Vienna Convention, peremptory norms have a number of legal consequences ([Stefan Kadelbach, 2006](#)), which are:

- peremptory norms do not accept any exception even if it is unanimous;
- any reservations to provisions relating to peremptory norms are inadmissible; and
- any unilateral act leading to breach or violation of a peremptory norm may not be taken.

In this vein, it can be said that article (53) did not explain or specify what do peremptory norms mean? Consequently, there are many explanations for the origins of the peremptory norm and the basis of its obligation which imposed constraints on the will of states. In addition, the article did not indicate the process by which the rules of public international law were elevated to the level of peremptory norms and did not reveal how these norms were to be determined ([Sual, 2014](#)). Therefore, the delegates in the Vienna Conference included article 66 (a) as an attempt to remove the ambiguity surrounding the status of the peremptory norm in the Vienna Convention. The article stipulates that:

Any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration.

Despite the inclusion of this article and the recognition of the existence of peremptory norms as part of the fabric of international law, no authoritative standards have yet been found till now to determine the accurate legal content of peremptory norms and its implications within the framework of international law.

Since the inclusion of the concept in the Vienna Treaty, states, particularly the third world and socialist states, have sought to emphasize the existence of the concept of peremptory norms by including the term of peremptory norms in a number of conventions. Thus, the article (53) of the Vienna Convention on the Law of Treaties has been supported again by these states in the Vienna Conference of 1986 by restating this article and reproducing the same substantive and procedural provisions relating to peremptory norms of the Vienna Convention on the Law of Treaties between states, and international organizations or between international organizations ([Shelton, 2006](#)).

Also, the Law on State Responsibility kept pace with this development concerning peremptory norms. This was evident in article (26) of the Law of State Responsibility, which stipulates that: "Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law". This article means that, In the event of a conflict between fundamental obligations, one of which concerns a peremptory norm, the obligation of the peremptory norm has priority. It is therefore not even permissible for the state to take countermeasures which are not compliance with a peremptory legal norm. For example, the state may not commit a crime of counter-genocide and may not use the plea of necessity to violate a peremptory norm. The text of the article is so clear and strict that peremptory cannot be violated.

In addition, article (41) of the Law on State Responsibility puts a set of consequences of serious breaches of peremptory norms^[1], which are as follows:

- States shall cooperate to bring to an end, through lawful means, any serious breach within the meaning of article 40. It is, however, made clear that the obligation to cooperate applies to states whether they are individually affected by the serious breach of peremptory or not.
- The obligation of abstention, which comprises two obligations, first, not to recognize as lawful situations created by serious breaches in the sense of article 40 and, secondly, not to render aid or assistance in maintaining that situation (Czapliński, 2003).

It goes without saying that these articles concerning peremptory norms of the Law of States Responsibility have been included in the same legal drafting with minor modifications in form, and not in content in the draft of international organizations responsibility for 2011, in articles 26, 41, 42. The word “state” has been replaced by “international organization”. According to logical considerations, peremptory norms are binding rules also on international organizations as states. Therefore, international organizations cannot invoke any circumstances that precluding wrongfulness in case of non-compliance with an obligation arising under peremptory norms.

Two things should be noted about the consequences of the serious breach of peremptory norms (*jus cogens*) in the Law of State Responsibility and the Draft of International Organizations Responsibility, which are:

- (1) *First*, the consequences of breach of peremptory norms have been expanded. Previously, the only sanction resulting from the breach of a peremptory norm was invalidity in accordance with article 53 of the Vienna Convention on the Law of Treaties of 1969. However, the two drafts mentioned above also provided several consequences such as non- recognition, cooperation and other consequences.
- (2) *Second*, these consequences opened the way for the arrangement of other consequences for such breaches when the two drafts mentioned above added the phrase “under international law”. This phrase firmly reflects that the legal system of serious breaches was under development, that is, it has not significantly crystallized yet.

Furthermore, the international judiciary, especially the judiciary of the International Court of Justice (ICJ), has played a major role in crystalizing some aspects of the legal system of peremptory norms by the advisory opinions and the rulings rendered by the court in some cases in which issues of peremptory norms were raised. By reviewing these rulings and advisory opinions, there was a tangible development concerning the position of court towards of peremptory norms and its role in the international legal system. For example, in Nicaragua case (*Nicaragua v. USA*, 1986), the court pointed out only that the prohibition of the use of force is one of the norms of customary international law and It is the most prominent example of peremptory norms without specifying the nature, content and effects of those rules (*Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA)*, 70 (ICJ Reports June 27, 1986).

However, the court has recently dealt with more details concerning peremptory norms where it established some norms as peremptory norms. For example, in the case of *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the court held that: “the prohibition of torture is part of customary international law and become a

peremptory norm” ([Questions Relating to the Obligation to Prosecute or Extradite \(Belgium v. Senegal\)](#), 144 (I.C.J. Reports July 20, 2012). Also, in the case of jurisdictional immunities of states (German vs Italy), the court considered various aspects of peremptory norms, including the relation of peremptory norms to sovereign immunity from jurisdiction, and held that the rules of immunities and peremptory norms in the law of armed conflict deal with different matters. Consequently, there is no conflict between them ([Jurisdictional Immunities of the State \(Germany v Italy: Greece intervening\)](#), 143 (I.C.J. Reports February 3, 2012). The court’s provisions also indicate that the prohibition of crimes against humanity is a peremptory norm ([Orakhelashvili, 2012](#)). The court also adopted a similar view on the relationship between peremptory norms and procedural rules in the case of armed activities in the territory of Congo ([Democratic Republic of the Congo v. Rwanda](#)), concluding that the crime of genocide was certainly a peremptory norm ([Armed Activities on the Territory of the Congo, \(Democratic Republic of the Congo v. Uganda\)](#), 126 I.C.J. Reports February 3, 2006).

Moreover, the decisions of the ICJ reveal an explicit obligation not to recognize any situation resulting from serious breaches of obligation arising under peremptory norms. This is evident in its earlier ruling concerning the case of military and paramilitary activities in Nicaragua against the USA. The court ruled that states may not recognize the legality of any acquisition of territory resulting from the use of force, based on the declaration of principles of international law concerning friendly relations and cooperation among states. In its advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory, it recognized that all states must not recognize this illegal situation and refrain from rendering assistance because the construction of this wall is a breach of a set of peremptory and fundamental norms of international law, which are: the prohibition of the use of force, the right to self-determination, human right and international humanitarian law ([Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, advisory opinion](#), 131 (I.C.J. Reports July 9, 2004).

It should be noted also that the guideline (3-4-4) of the Guide to Practice on Reservations to Treaties makes the reservation ineffective on a provision of a treaty that reflects an obligation under a peremptory norm (*jus cogens*) of public international law^[2]. In addition, the guiding principle of unilateral acts makes any unilateral declaration, which is contrary to peremptory norms, void.

In short, the concept of peremptory norms (*jus cogens*) expanded to most branches of international law and became a necessary and so essential concept in the life of the international community and the consolidation of the status of international law. The main function of these norms is to maintain the international peace and security, to protect peoples and individuals and to promote the fundamental values of the international community as a whole. According to the importance of these norms to the international community, there are a set of *jus cogens* rules accepted and recognized by it. These norms are the prohibition of use of force, genocide, slavery, racial discrimination, torture and the right of self-determination.

3. International Law Commission’s work on the codification of unilateral acts and the matter of *jus cogens*

The concept of *jus cogens* has become a preventive weapon in International Law because in practice, there are no known examples of treaties that derogate from such rules. In other words, the international practice did not witness any examples of treaties invalidity as a result of their conflict with a peremptory norm. It appears that States have attempted to circumvent the content of *jus cogens* by resorting to unilateral acts to depart from

peremptory norms rather than treaties, as unilateral acts have remained for a considerable period beyond the umbrella of restraint imposed by *jus cogens*, at least in practice (Diaconu, 2016).

However, almost of jurists, even authors that have expressed doubts about the concept of *jus cogens*, have accepted the fact that the prohibition of the use of force and the threat of the use of force in article 2 (4) of the United Nations Charter is an imperative rule from which States cannot derogate in their contractual relations and that *jus cogens* applies not only to treaties but also to unilateral acts that violate such rules (Diaconu, 2016).

This unstable relation between *jus cogens* and unilateral acts has been raised in the work of the International Law Commission on the codification of unilateral acts since 1996, which led to the adoption of the “Guiding principles applicable to unilateral declarations of States capable of creating legal obligations” in 2006 (Mik, 2013).

In the second report of the Special Rapporteur, Víctor Rodríguez Cedeño, on unilateral acts of states in 1999, he attempted to discuss the issue of the invalidity of unilateral acts in the draft article 7. Paragraph (f) of this article dealt with the invalidity of a unilateral act if it conflicts with a peremptory norm at the time of its formulation (Victor Rodríguez Cedeño, 1999). In his commentary to paragraph (f), the Special Rapporteur explained that the legality of a unilateral act and its competency to produce its legal effects depend on the legality of its object which must be consistent with the norms of so-called international public order, on the basis of the principle set out in the 1969 Vienna Convention on the Law of Treaties. As unilateral act is void if it conflicts with *jus cogens*, the latter admits of no exceptions.

A point was raised in the International Law Commission after submitting the second report by the Special Rapporteur, concerning whether it would be desirable to follow the Vienna Convention approach with respect to the invalidity of unilateral acts (Commission, 1999). However, the Special Rapporteur had settled this issue when he considered that the approach of the Vienna Convention on the Law of Treaties of 1969 was proper as the grounds for the invalidity of an act were generally similar to the invalidity grounds for treaties. A unilateral act is therefore invalid if it conflicts with *jus cogens*. Although the earlier conclusion was not fully recognized within the Commission, as one member said that *jus cogens* rules should be applied more flexibly in the case of unilateral acts. But, the Special Rapporteur rejected that opinion for not raising further discussions on that issue, and to ensure the identical application of *jus cogens* in the international law field (Victor Rodríguez Cedeño, 2000). Therefore, in the third report of Cedeño in 2000, he repeated the same article of the invalidity of unilateral acts in a new article (article 5), which stipulates in paragraph (f) that: “A State may invoke the invalidity of a unilateral act If, at the time of its formulation, the unilateral act conflicts with a peremptory norm of international law” (Victor Rodríguez Cedeño, 2000, p. 264).

During the discussion of the third report in the International Law Commission, Alain Pellet suggested that, the Special Rapporteur should take into account in the drafting article 5, especially paragraph (f), not only article 53 but also article 64 of the Vienna Convention (Commission, 2000). Besides that, there was an objection to the formulation of the reasons of invalidity in one draft article. Therefore, the Special Rapporteur tried to overcome those issues in his fifth report of 2002, following two approaches:

- (1) formulating the causes of invalidity in separate articles; and
- (2) the inclusion of a special article on the conflict of unilateral acts with a peremptory norm to merge the observations of the commission’s members into the drafting of the new text.

After taking those observations into consideration, the new article was entitled “A unilateral act contrary to a peremptory norm of international law”. It stipulates that:

A State may invoke the absolute invalidity of a unilateral act formulated by one or more States if, at the time of its formulation, the unilateral act conflicts with a peremptory norm of international law (Victor Rodríguez Cedeño, 2002).

It is noticeable from the wording of this article that the result of infringement of a unilateral act with *jus cogens* is the absolute invalidity, because such acts were invalid *ab initio* (Victor Rodríguez Cedeño, 2002, p. 104 et seq.). The result of absolute invalidity is a logical consequence of *jus cogens* rules violation because it corresponds to the superior and overriding nature of those rules. On the other hand, the absolute invalidity means that the act cannot be confirmed or validated and any State could invoke its invalidity. Unlike the relative invalidity which can be confirmed or validated and only the injured State could invoke its invalidity (Victor Rodríguez Cedeño, 2002, p. 106).

In this respect, most of the International Law Commission and the Sixth Committee’s members agreed with the Special Rapporteur’s view that absolute invalidity should be a legal result of unilateral act’s contradiction to a peremptory norm. However, there were some comments made by the committee’s members on the wording of the new drafting article, which were: first, it would be preferable to use the same language as in article 53 of the Vienna Convention on the Law of Treaties with respect to *jus cogens*. Second, it was not necessary to use different wording than in the 1969 Vienna Convention as it would weaken the provisions on invalidity prescribed in the parallel text of Article 53. Third, it would be better to use the term contained in the 1969 Vienna Convention, “peremptory” norm, and article 64 of the Convention on the emergence of a new rule of *jus cogens* must also be included. Fourth, the need to distinguish between cases of invocation of the invalidity of unilateral act and cases in which the act is considered to be null and void because of incompatibility with a peremptory norm. Since the invocation of invalidity by the author State or any other State is not led to the invalidity of the act, but its invalidity is determined under international law. Hence, any act contrary to *jus cogens* is null and void, regardless of whether any State invoked the invalidity. Fifth, the need not only to refer to a unilateral act which conflicts with a peremptory norm but also to a unilateral act which conflicts with a customary rule.

Those comments drew the attention of Special Rapporteur in his final report to the International Law Commission in 2006. In this report, Cedeño tried to include those comments in the new drafting of article 5(f), guided by the main idea which means that the causes of the validity of treaties are the same as those of unilateral acts, especially if the act conflicts with a peremptory norm. For instance, any unilateral act conflicts with a peremptory norm, such as the prohibition of the use of force, slavery, genocide or otherwise, is fundamentally invalid and null.

However, in the course of the Commission’s deliberations, a suggestion was made to change the aim of the committee from drafting a set of articles to put a set of guiding principles applicable to unilateral acts. So the Special Rapporteur formulated a new guiding principle, concerning *Jus Cogens*, reads as follows: “Any unilateral act which at the time of its formulation is contrary to (or conflicts with) a peremptory norm of general international law (*jus cogens*) is invalid”. This new text is somewhat consistent with the language included in article 53 of the Vienna Convention.

Despite this progress in the codification of unilateral acts, the International Law Commission, due to time constraints, was convinced by the recommendation of the working group to limit the topic to the unilateral declaration instead of unilateral acts. As the concept

of a unilateral act is not uniform, and unilateral declarations of States are capable of creating legal obligations under International Law. In other words, the Committee preferred to study unilateral acts in the strict sense (*stricto sensu*), which taking the form of formal declarations formulated by a State with the intent to produce obligations under international law. According to the work of the Committee on the unilateral acts, unilateral declaration could be defined as “declaration publicly made by states, orally or in writing, and manifesting the will to be bound may have the effect of creating legal obligations based on good faith”.

Accordingly, the guiding principle relates to *jus cogens* rules was drafted in the final report of the international Law Commission as follows: “A unilateral declaration which is in conflict with a peremptory norm of general international law is void”.

There are a number of observations on the formulation of this earlier guiding principle, which are as follows:

- This formulation reflects that the Commission took into consideration the language of *jus cogens* in article 53 of the Vienna convention in 1969, as well as article 64 on the emergence of a new rule of *jus cogens*. This is evidenced by the deletion of the phrase “at the time of its formulation” which included in the previous draft articles as this deletion means that the unilateral act would be bound by the emergence of a new peremptory norm in the future.
- The invalidity concerns only unilateral acts of states that issued formally by the officials such as Heads of State, Heads of Governments and Ministers for Foreign Affairs and other persons representing the State in specified areas falling within their competence, while informal unilateral acts were excluded from their scope.
- The principle did not distinguish between the formal declarations which issued orally or in writing in terms of effect.
- This principle, unlike the Vienna convention on the law of treaties in 1969, has not determined the consequences of invalidity of a unilateral act which conflicts with a peremptory norm of general international law. Therefore, it raises a question, whether the text of article 71 of the Vienna convention relating to the consequences of invalidity can be applied in this case?

4. *Jus cogens* in international law commission’s work on codification of reservations to treaties

The International Law Commission decided to include the topic “Law and practice relating to reservations to treaties” in its programme of work in 1993, and appointed Alain Pellet as a Special Rapporteur for the topic at its 46th session, in 1994.

In his tenth report about reservation to treaties, which was submitted to the committee in 2005, Pellet dealt with the reservations incompatible with the object and purpose of the treaty, including reservations to provisions related to peremptory norms. It was clear from the drafting of this report that Pellet had supported the inadmissibility of making reservations to provisions relating strictly to *jus cogens*, whatever the object of the reservation (Pellet, 2005). A reservation to a treaty provision involving a peremptory norm of general international law could not be formulated and the agreement would be null and void. According to Pellet, the invalidity of reservation is not based on article 19 of the Vienna Convention on the Law of Treaties (1969)[3], but on article 53, which recognized the essential and absolute nature of *jus cogens*.

However, the matter of making reservations to peremptory norms provisions was controversial in jurisprudence. Some writers in international law rejected to suspend effect

of the reservation on *jus cogens*, as the question of reservation validity depends on the self-judgment of the treaty parties and the provisions of article 20 (2) of the two Vienna Conventions (1969, 1986). Hence, the validity of the reservation under the treaty regime depends on whether the reservation is admissible or inadmissible by the other State, and not on the basis of compatibility with the object and purpose of the treaty. Therefore, the incompatibility of reservations with the object and purpose of the treaty has no practical legal significance, if the matter was to be self-judgment by the state at the end (Ruda, 1975). Also, article 53 on *jus cogens* did not in itself recognize such a prohibition (Sztucki, 1977).

On the other hand, most jurists stress the need to restrict the reservation to provisions that provide for peremptory norms. This is due to the fact that such reservation *per se* is not compatible with the object and purpose of the treaty (Ababu, 2010). In fact, a reservation, which is to be incompatible with peremptory norms, leads to violation of the reserving state and the state accepted the reservation of international law, as the reservation is a special treaty between the reserving state and the state accepting the reservation (Coccia, 1985). This means that such reservation is null and void (Edwards, 1989). This trend has been echoed in the international practice. The Human Rights Committee stated, in its general comment No. 24 on reservations to ratification or accession to the International Covenant on Civil and Political Rights on 2 November 1994, that reservations violating peremptory norms (*jus cogens*) are not to be compatible with the object and purpose of the Covenant (Committee, 1994).

Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, or deny freedom of thought, conscience and religion.

Such matters cannot be reserved (Redgwell, 1997; Linderfalk, 2004; Schabas, 1994).

Certainly, when the state makes a reservation to a provision in a treaty, it wished to absolve itself of the rule on which the reservation was based. When the matter relates to a peremptory norm of general rules of international law, such as the prohibition of genocide, the prohibition of torture or the prohibition of discrimination and apartheid, making reservation in question becomes impossible. These peremptory norms protect the very fundamental interests of the international community. How these norms are undertake their functions at a time when some states make reservations to them. This logic is not consistent with the absolute nature of peremptory norms (*jus cogens*). This absolute nature is evident in restricting “the rule of the persistent objector”.

Therefore, Alain Pellet stressed, in his tenth report, the need to prohibit any reservation to a peremptory norm because such reservation threatens first the integrity of a peremptory norm, whose application should be uniform (Pellet, 2005, p. 176). As a result of his faith in the special character of peremptory norms, Pellet specified a special draft in his report (the draft guideline 3-1-9) and did not consider them as a part of the draft guideline (3-1-8) relating to provisions of customary rules[4]. This indicates, *inter alia*, that:

- Pellet recognized the special and substantive character of *jus cogens* as a special category of general rules of international law.
- Pellet did not recognize the customary character of these rules because the customary character of the rule stipulated in any treaty provision does not constitute a constraint *per se* that precludes making a reservation.

It is understood that the customary rules adhere to “the rule of persistent objector”, so the reservation may be the means of persistent objector to show its determination to his objection.

During the discussion of the International Law Commission of the tenth report on reservations to treaties for 2005, a number of members expressed support for the report on peremptory norms, and considered any reservation to a provision involving a peremptory norm null and void for two main reasons^[5]:

- (1) The state must comply with the conditions for the formulation of reservation such as conditions relating to form (as eligibility), conditions relating to content (as compatibility) with the object and purpose of the treaty and the absence of conflict with a rule of *jus cogens* (Commission, 2005).
- (2) The need to maintain international public order by not making reservations to peremptory norms whatever their importance (Commission, 2005, p. 200 et seq.).

Sreenivasa went beyond support, emphasizing that a guideline for peremptory norms is needless and any provision of treaty or any reservation to it that violates a peremptory norm becomes unenforceable virtue of that very concept. This is due to the fact that the principles of peremptory norms are of a higher category, and then the Commission should not associate these principles with a discussion of reservations (Commission, 2005, p. 198). While Fathi Kemicha illustrated that the comment to guideline (3-1-9) should demonstrate that this prohibition was not a result of article 19 (c) of the Vienna Convention, but rather was a consequence of the principle set out in article 53 of that convention (Commission, 2005, p. 199).

On the other hand, some doubts have been raised in the commission that the draft guideline (3-1-9) is useful. Giorgio Gaja objected to the absolute prohibition on reservations concerning peremptory norms imposed by the guideline, arguing that the state providing such reservation did not attempt to retain the right to violate the norm. According to Gaja, the prohibition of reservations to peremptory norms will be only absolute, if the reserving state aims, by modifying the legal effect of the provision, to purport to introduce a rule contrary to *jus cogens*. This would be the case if the state made a reservation to a treaty providing for the right of intervention to affirm that such intervention could include, where appropriate, the use of force (Commission, 2005, p. 193). Hanqin Xue has not been reassured about reservations to peremptory norms because they raise broad legal issues such as the relationship between the sources of law and the general principles of Treaties Law (Commission, 2005, p. 202).

In view of time constraints and the impossibility of reaching agreement on the draft guideline (3-1-9), the International Law Commission postponed the consideration of the draft guideline, concerning the compatibility of the reservation with the object and the purpose of a treaty and the question of the validity of reservations, to the 85th session of 2006 (Commission, 2006). The subject was discussed again in 2006, and then an initial consensus on draft guideline concerning peremptory norms has been occurred. Subsequently, this draft was transmitted to the drafting committee, which decided to change the title of the guideline from "Reservations to a provision setting forth a rule of *jus cogens*" to "Reservations contrary to a rule of *jus cogens*". The committee also decided to change the text to read: "A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law". Yamada, the chairman of the Drafting Committee, explained that the reason for this was due to Commission (2007b), Summary records of the meetings of the 59th session:

- There is a divergence of views on the usefulness of this guideline. In particular, some depended on the draft guideline of customary rules on the grounds that it introduces a solution which is applicable to peremptory norms. However, this trend has been rejected. It was believed that a draft guideline should be singled out for

peremptory norms due to its distinctive character. This character has been expressed by the ICJ in many of its provisions.

- The draft guideline did not deal with, in its original form, the case where the treaty does not include peremptory norms. However, a reservation to that treaty could affect one of those norms. Therefore, the Commission of International Law decided to deal with the issue from the perspective of the reservation itself, as a reservation could not, by its legal effects, modify a treaty in a manner that is contrary to a peremptory norm.

This means that the draft guideline, as it had appeared in the 2007 report of the International Law Commission, is a compromise between two opposing trends within the International Law Commission. Supporters emphasized that the peremptory character of *jus cogens* made the reservation void. However, opponents justified the validity of this reservation as long as it did not affect the norm *per se* (Commission, 2007a). The first trend found its supporters in the sixth Commission of the United Nations General Assembly, such as Austria, which had approved the draft guideline concerning peremptory norms and had not made any critical comments (Committee, 2007a). Similarly, the second trend has its supporters. For example, China held that the formulation of independent guidelines concerning peremptory norms is an inappropriate matter because reservations incompatible with a rule of *jus cogens* were usually incompatible with the object and purpose of the treaty (Committee, 2007a). The Philippines also stressed the need to reconsider inclusion the guideline (3-1-9) in the draft guideline (3-1-8). This is due to not only the theoretical problems surrounding the concept of *jus cogens* but also the article 65 of the Vienna Convention did not specify a means through which the conflict between a reservation and peremptory norm, arising from the application of the draft guideline in question, could be settled (Committee, 2007b). This indicates that the Philippines appealed against the draft guideline on peremptory norms because there was no clear mechanism for settling disputes between reservations and peremptory norms.

However, the International Law Commission adopted Guide to Practice on Reservations to Treaties in 2011. Also, recommend to the General Assembly to take note of the Guide to Practice and ensure its widest possible dissemination (Commission, 2011). The Commission has incorporated the draft guideline (3-1-9) in the guideline (4-4-3) titled: “Absence of effect on a peremptory norm of general international law (*jus cogens*)” (Commission, Report of the Commission to the General Assembly on the work of its sixty-third session, 2011, p. 43), which stipulates that:

- A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such between the reserving State or organization and other States or international organizations.
- A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.

Some observations on the previous text can be made, which are as follows:

- This text did not exclude the question of reservations to a peremptory norm, but at the same time emphasized that such reservations did not affect the binding character of *jus cogens*. This binding character of *jus cogens* continues to apply in the relationship between the reserving state or organization and the states or

organizations that have accepted the reservation, that is, peremptory norms have not lost its binding character of making reservation.

- The text obligates both states and international organizations to adhere to peremptory norms in their mutual relations.
- The text refers to the need not to making reservation on provisions in a treaty because the reservations to such provisions may lead to conflict with a peremptory norm of general rules of international law.

Although, this guideline is progressive *per se*, given the relative novelty of the concept of peremptory norms of international law, it has poor drafting. On the one hand, the text did not prohibit the reservation to treaties involving peremptory norms, and it did not refer to the consequences of a state's reservation to provisions involving peremptory norms or reservation to provisions that conflict with existing peremptory norms on the other hand. Not to mention the fact that the text did not address the case in which new peremptory norms appear under article 64 of the Vienna Convention on the Law of Treaties of 1969.

5. Conclusion

It is clear, from the review of the work of the International Law Commission on unilateral acts and reservations to treaties, that the subject of peremptory norms has formed a major part of the work of commission. Indeed, the issue of peremptory norms was a source of great interest within the Commission. The inclusion of this notion in the works of the Commission on the unilateral acts reveals the stability of the notion of peremptory norms in the conscience of the international community as a whole, and the expansion and penetration of this notion in all areas of international law. Because the applicability of peremptory norms to unilateral acts was a matter of considerable controversy in the field of international law before the work of Commission.

The development of peremptory norms at the international level can be attributed to:

- The recognition of the importance and necessity of the concept of peremptory norms in protecting the fundamental interests of the international community.
- The firm belief that it is not possible to derogate from these basic norms in the life of the international community. The norms of the prohibition of the use of force, genocide, torture, slavery or the right to self-determination cannot be the object of any act, whether was treaty or unilateral, which violates these norms.
- The recognition of the moral aspect of international law as the peremptory norms represent the rules of international public order.
- The recognition of the primacy and supremacy of these peremptory norms from other rules of international law, reflecting the existence of a kind of hierarchy between the rules of international law.

Therefore, these peremptory norms prohibit any treaty or unilateral act that conflicts with it.

Accordingly, peremptory norms have become an indispensable concept nowadays. The judiciary of the ICJ is guided by these norms and has been directly referred to them in a number of cases such as the case of *Jurisdictional Immunities of the State: (Germany v. Italy: Greece Intervening)* and case of *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. Furthermore, peremptory norms have extended to the law of state responsibility, the draft of international organization responsibility, the field of extradition, the decisions of Security Council and the universal jurisdiction.

Notes

1. Article 40 of Responsibility of States for Internationally Wrongful Acts 2001, stipulates that:“(1) This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law. (2) A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation”.

Article 41, stipulates that:“(1) States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40. (2) No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation. (3) This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law”.

2. This guideline stipulates that:“(1) A reservation to a treaty provision which reflects a peremptory norm of general international law (Jus Cogens) does not affect the binding nature of that norm, which shall continue to apply as such between the reserving State or organization and other States or international organizations. (2) A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law”.
3. Article 19 of the Vienna Convention on the Law of Treaties stipulates that:” A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) The reservation is prohibited by the treaty; (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) In cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.
4. The guideline (3-1-9) stipulated that: “A State or an international organization may not formulate a reservation to a treaty provision which sets forth a peremptory norm of general international law”.
5. The guideline was supported by a number of the International Law Commission’s members such as Maurice Kamto, Paula Escameia, Fathi Kemicha and Constantin Economides. While opposed by Giorgio Gaja and Hanqin Xue.

References

- Ababu, M. (2010), “Some problems related with reservations to international treaties: focus on human rights treaties”, *Bahir Dar University Journal of Law*, Vol. 1, pp. 74-78.
- Allain, J. (2001), “The Jus Cogens nature of non- refoulement”, *International Journal of Refugee Law*, Vol. 13 No. 4, p. 535.
- Armed Activities on the Territory of the Congo, (Democratic Republic of the Congo v. Uganda), 126 I.C.J. Reports February 3 (2006).
- Coccia, M. (1985), “Reservations to multilateral treaties on human rights”, *California Western International Law Journal*, Vol. 15 No. 16, p. 48.
- Commission, I.L. (1966), “Session, documents of the second part of the seventeenth session and of the eighteenth”, *Yearbook of the International Law Commission*, Vol. 2, p. 261.
- Commission, I.L. (1999), “Session, report of the commission to the general assembly on the work of its fifty-first”, *Yearbook of the International Law Commission*, Vol. 2, p. 133.
- Commission, I.L. (2000), “Session, summary records of the meetings of the fifty-second”, *Yearbook of the International Law Commission*, Vol. 1, p. 137.
- Commission, I.L. (2006), “Report of the commission to the general assembly on the work of its fifty-eighth session”, *Yearbook of the International Law Commission*, Vol. 2, pp. 133-135.
- Commission, I.L. (2007a), “Rebort of the commission to the general assembly on the work of its fifty-ninth session”, *Yearbook of the International Law Commission*, Vol. 2, pp. 46-48.

-
- Commission, I.L. (2007b), "Summary records of the meetings of the fifty-ninth session", *Yearbook of the International Law Commission*, Vol. 1, p. 106.
- Commission, I.L. (2011), "Report of the commission to the general assembly on the work of its sixty-third session", *Yearbook of the International Law Commission*, Vol. 2, pp. 12-18.
- Commission, I.L. (2005), "Session, summary records of the meetings of the fifty-seventh", *Yearbook of the International Law Commission*, Vol. 1, p. 193.
- Committee, S. (2007), *Summary Record of the 22nd Meeting*, General Assembly, sixty-second session, Official Records, A/C.6/62/SR.22, New York, NY.
- Committee, S. (2007), *Summary Record of the 23rd Meeting*, General Assembly, Sixty-second session, Official Records, A/C.6/62/SR.23, New York, NY.
- Committee, U.H. (1994), "CCPR general comment no. 24: issues relating to reservations made upon ratification or accession to the covenant or the optional protocols thereto, or in relation to declarations under article 41 of the covenant", available at: www.equalrightstrust.org/ertdocumentbank/general%20comment%2024.pdf
- Czaplinski, W.A. (1990), "Conflicts of norms in international law", *Netherlands Yearbook of International Law*, Vol. 21, p. 9.
- Czapliński, W.A. (2003), "UN codification of law of state responsibility", *Archiv Des Völkerrechts*, Vol. 41, pp. 64-71.
- Diaconu, I. (2016), "Jus Cogens – developments in international law", *Romanian Journal of International Law*, Vol. 16, p. 37.
- Edwards, R.W. (1989), "Reservations to treaties", *Michigan Journal of International Law*, Vol. 10, p. 393.
- Ford, C.A. (1994), "Adjudicating Jus Cogens", *Wisconsin International Law Journal*, Vol. 13, p. 153.
- Hannikainen, L. (1988), *Peremptory Norms (Jus Cogens) in International Law*, Publishing Company, Helsinki.
- Jennings, R.Y. (1967), "General course on principles of international law", *Recueil Des Cours*, Vol. 121, p. 564.
- Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), 143 (I.C.J. Reports February 3 (2012)).
- Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, advisory opinion, 131 (I.C.J. Reports July 9) (2004).
- Linderfalk, U. (2004), "Reservations to treaties and norms of Jus Cogens – a comment on human rights committee general comment no. 24", *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony and Reconciliation*, Leiden/Boston, MA, Brill | Nijhoff, pp. 213-234.
- Meron, T. (1986), "On a hierarchy of international human rights", *American Journal of International Law*, Vol. 80 No. 1, p. 19.
- Meron, T. (1988), *Human Rights Law – Making in the United Nations: A Critique of Instruments and Process*, Oxford University Press, Oxford.
- Mik, C. (2013), "Jus cogens in contemporary international law", *Polish Yearbook of International Law*, p. 69.
- Military and Paramilitary Activities in and Against Nicaragua (Nicaragua. v. United States), 70 (ICJ Reports June 27) (1986).
- Orakhelashvili, A. (2012), "Jurisdictional immunities of the state (Germany v. Italy; Greece intervening)", *The American Journal of International Law*, Vol. 106 No. 3, pp. 612-616.
- Pellet, A. (2005), "Tenth report on reservations to treaties", *Yearbook of the International Law Commission*, Vol. 2, p. 173.
- Provost, R. (1994), "Reciprocity in human rights and humanitarian law", *British Year Book of International Law*, Vol. 65, p. 442.
- Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), 144 (I.C.J Reports July 20) (2012).

- Redgwell, C.J. (1997), "Reservations to treaties and human rights committee general Comment No. 24 (52)", *International and Comparative Law Quarterly*, Vol. 46 No. 2, pp. 390-412.
- Ruda, J. (1975), "Reservations to treaties", *Recueil des cours*, Vol. 95, p. 190.
- Saab, A. (1967), "The concept of Jus Cogens in international law", *Lagonissi Conference: Papers and Proceedings*, Vol. 2, *Carnegi Endowment for International Peace, Greece*, p. 10.
- Schabas, W.A. (1994), "Reservations to human rights treaties: time for innovation and reform", *Annuaire Canadien de Droit International*, Vol. 32, pp. 39-81.
- Schwelb, E. (1967), "Some aspects of international Jus Cogens as formulated by the international law commission", *The American Journal of International Law*, Vol. 61 No. 4, p. 961.
- Shelton, D. (2006), "Normative hierarchy in international law", *The American Journal of International Law*, Vol. 100 No. 2, p. 300.
- Stefan Kadelbach, I. (2006), "Jus Cogens, obligations Erga Omnes and other rules: the identification of fundamental norms", *The Fundamental Rules of the International Legal Order: Jus Cogens, Obligations Erga Omnes*, Martinus Nijhoff Publishers, Netherlands, pp. 28-35.
- Sual, M. (2014), "Identifying Jus Cogens norms: the interaction of scholars and international judges", *Asian Journal of International Law*, p. 4.
- Sztucki, J. (1974), "Jus Cogens and the Vienna convention on the law of treaties", *Netherlands International Law Review*, Vol. 23 No. 1.
- Sztucki, J. (1977), "Some questions arising from reservations to the Vienna convention on the law of treaties", *German Yearbook of International Law*, Vol. 20, p. 295.
- Tomuschat, C. (1999), "International law: ensuring the survival of mankind on the eve of a new century: general course of public international law", *Recueil des cours*, Vol. 281, p. 82.
- Verdross, A. (1966), "Jus Dispostivism and Jus Cogens in international law", *American Journal of International Law*, Vol. 60, pp. 57-59.
- Verdross, A.V. (1937), "Forbidden treaties in international law: comments on professor Garner's report on the law of treaties", *The American Journal of International Law*, Vol. 31 No. 4, pp. 574-576.
- Victor Rodríguez Cedeño, S.R. (1999), "Second report on unilateral acts of states", *Yearbook of the International Law Commission*, Vol. 2.
- Victor Rodríguez Cedeño, S.R. (2000), "Third report on unilateral acts of states", *Yearbook of the International Law Commission*, Vol. 2.
- Victor Rodríguez Cedeño, S.R. (2002), "Fifth report on unilateral acts of states", *Yearbook of the International Law Commission*, Vol. 2.
- Vos, J.A. (2013), *The Function of Public International Law*, T.M.C. Asser Press, The Hague.
- Zemanek, K. (2010), "The metamorphosis of Jus Cogens: from an institution of treaty law to the bedrock of the international legal order", in Cannizzaro, E. (Ed.), *The Law of Treaties beyond the Vienna Convention*, Oxford University Press, Oxford, p. 393.
- Zimmermann, A. (1995), "Sovereign immunity and violations of international Jus Cogens – some critical remarks", *Michigan Journal of International Law*, Vol. 16 No. 2.

Corresponding author

Ibrahim Sief Abdel Hameed Menshawy can be contacted at: i_menshawy@feps.edu.eg

For instructions on how to order reprints of this article, please visit our website:

www.emeraldgroupublishing.com/licensing/reprints.htm

Or contact us for further details: permissions@emeraldinsight.com