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THE NORMATIVE BASIS OF 21ST CENTURY COLLECTIVE SECURITY: *JUS COGENS*
A LEGAL POSITIVIST CRITIQUE AND *APOLOGIA* OF *JUS COGENS*, WITH PARTICULAR REFERENCE TO INTERNATIONAL PROSECUTIONS AND RUSSIAN AGGRESSION

PHD DISSERTATION

THESES

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I. Summary of the research task

The fundamental premise of my research is that normativity is a constant feature of the development of international law, traditionally incorporated into positive law through natural law. This normativity was formally affirmed when the international community identified public order norms, deriving from its higher interests (i.e., international peace and security) and the fundamental values it seeks to protect (i.e., fundamental human rights, democracy, and the rule of law), as *jus cogens.*

According to the positivist approach to Article 53 of The Vienna Convention on the Law of Treaties these fundamental norms emerge through a process of customary law shaped by general principles of law. Article 53. states, "[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."

As a result, *jus cogens* possesses a dual legal function that no other legal concept can fulfil.

On the other hand, it is well known that states have also adopted certain *jus cogens* norms as international treaties or customary international law, as these imperative norms prohibit the most serious international crimes: aggression, genocide, torture, slavery, apartheid, and crimes against humanity, and protecting the fundamental rules of international humanitarian law and the right to self-determination.

It is thus logical that the emergence of the doctrine of *jus cogens* has been closely associated and overlaps significantly with international crimes. Moreover, treaties on international crimes have *expressis verbis* incorporated the fundamental tenets of the theory of *jus cogens.*

The relevance of research

Recent humanitarian disasters and the severe human rights atrocities, war crimes, and crimes against humanity committed in various armed conflicts underscore the ongoing relevance of critically analysing *jus cogens*, rethinking its practical applications, and enhancing their effectiveness.

Importantly, this includes holding those responsible for serious violations of peremptory norms accountable, which, in turn, necessitates a re-evaluation of the interplay between *ratione personae* and *jus cogens*. There are two reasons for this focus:
Firstly, individuals can also be held criminally liable for violating *jus cogens* norms under international law.
Secondly, this is inherently included in the definition of international crimes, as stated during the Nuremberg Trials: "Crimes against international law are committed by men, not abstract entities, and only by punishing such individuals can the provisions of international law be enforced."

The research thus pays special attention to the case law of *ad hoc* international criminal tribunals, special courts (including the SCSL, the EAC), and the International Criminal Court (ICC).

New Relevance of the Research

On February 24, 2022, the international community faced a new challenge and dilemma after Russia's invasion of Ukraine dealt an unprecedented blow to modern international law. This marks the first full-scale aggressive war since World War II, and as such, it receives special attention in this thesis. Additionally, until this point, it appeared that modern humanity had definitively left behind the possibility of total war, due to the prohibition of the use of force in Article 2(4) of the UN Charter.

This crisis appears critical not only because all *jus cogens* norms are continuously violated in the context of Russian aggression but also because Russia's actions have resurrected the spectres of the interwar period by trampling upon the cornerstone of modern international law. To prevent the far-reaching consequences of this, the international community and legal experts are reconsidering ways to hold accountable those responsible for the crime of aggression, once again placing the imperative norm of prohibition of aggression at the centre.

This could be achieved either by amending the ICC's *sui generis* jurisdictional regime concerning the crime of aggression or by establishing a new Special Tribunal on the Crime of Aggression (*A Special Tribunal for the Punishment of the Crime of Aggression against Ukraine*).

One of the key challenges in this regard is that since the Nuremberg and Tokyo trials, no state leader has ever been prosecuted for aggression. In this context, there is also room for legal development, making it all the more important to examine the available legal avenues in greater depth.

The thesis also separately discusses the arrest warrants issued by the ICC against Russian officials, including the Russian President. Moreover, the analysis of well-known classic cases (such as the *Al-Bashir case*, the *Pinochet case*, the *Hissène Habré case,* or the *Yerodia case*) is indispensable for testing the theory of *jus cogens*, comparing it with the facts of Russian aggression, and drawing final conclusions. Moreover, the decisions made in these highlighted cases best illustrate the dilemmas concerning *jus cogens*, personal, and functional immunity, particularly considering Articles 13(b), 27(2), and 98(1) of the ICC Rome Statute.

The prominent role of the use of force in the case study and key research questions

The privileged role of the *jus cogens* norm prohibiting the use of force is not only justified by its synonymy with modern international law but also by the fact that it serves as the most suitable tool for identifying the critical weaknesses of the theory of *jus cogens* and exploring the relationship between state and individual responsibility. The prohibition of the use of force – and its most serious form, the prohibition of aggression – differs significantly from other *jus cogens* norms. In the case of aggression, which I define as the "imperative core" of the prohibition of force, far greater procedural obstacles must be overcome to hold those responsible for serious violations of the norm accountable.
Thus, Russian aggression serves as the real test for the theory of *jus cogens* and modern international law, highlighting two key issues:

(1) What happens when a *jus cogens* norm lacks "orthodox" procedural enforcement mechanisms, such as treaty obligations or binding Security Council decisions?

(2) What legal options remain when such mechanisms are unavailable, given that Russia, as a permanent member of the Security Council, wields veto power? Does anything remain at the end of the *jus cogens* equation?

The purpose of this approach is to subject the theory of *jus cogens* to its most rigorous test – because only by applying the strictest scrutiny can we determine whether a doctrine is viable.

Regarding the research questions, the fundamental problem, however, arises as follows:

If *jus cogens* must also be grounded in the methodological criteria of customary international law in order to be justified as positive law – that is, if the existence of both customary law and peremptory norms is determined by the dynamics of state voluntarism and established through inductive reasoning – then, in essence, *jus cogens* remains customary international law. The difficulty, therefore, lies in substantiating that *jus cogens* is, in practice, more than "pure and simple" customary law. For while the criteria for attaining *jus cogens* status are indeed far stricter than those for traditional customary international law, if this distinction is evident only in the demarcation criteria for achieving imperative status but is not reflected in its *sui generis* legal effects, then, in legal terms, it may be regarded as an interferential law, a *quid pluris* as Carlo Focarelli described it.

The dissertation, therefore, examines precisely what specific legal functions can be identified from the imperative status of a norm and under what circumstances they take effect. In other words, once a norm has attained jus cogens status – placing it at the top of the hierarchy of legal sources – does it have a downward causal legal effect that remains within the methodology of international law? The dissertation argues in favor of an affirmative answer to this question but does so through a rigorous positive legal critique of the theory of *jus cogens* and the legal consequences of imperative norms, thereby sufficiently removing the metaphysical burden of the doctrine.

In summary, the doctoral dissertation explores the tensions between the theoretical model of *jus cogens* and its practical application. By focusing on peremptory norms of international law, it examines the legal challenges related to the accountability of the most serious international crimes. In the context of Russian aggression, it seeks to determine whether *jus cogens* possesses autonomous legal consequences and effects.

II. Methodological approach of the dissertation

The research was conducted using theoretical, dogmatic, and largely empirical methodologies. The theoretical part is based on the International Law Commission (ILC) new '*Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries,*' which clarifies previously obscure conceptual elements within the definition of an imperative norm, including the precise criteria for acquiring *jus cogens* status and the meaning of the term "international community as a whole."

This research strictly adheres to the *de lege lata* approach, remaining within the methodological framework of international law and the boundaries accepted and justified by jurisprudence. Accordingly, the sources of law recognized under Article 38 of the ICJ Statute serve as the methodological foundation. As per paragraph 1, these include: "[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

Regarding *jus cogens*, I have methodologically followed the primary rule enshrined in Article 53 of the 1969 Vienna Convention, along with other relevant provisions of the treaty, including Article 34, which establishes the principle of the relative effect of treaties. Among international treaties, I have specifically relied on the statutes of various international criminal tribunals and the ICC Rome Statute, employing an exegetical analysis of these treaty texts.

The further scope of the research is based on relevant Hungarian and English literature, whose comparative and critical analysis – along with the rulings of international courts and ICJ's advisory opinions – plays a central role in the dissertation.

Additionally, the writings and valuable comments of my supervisors, Gábor Kardos and Gábor Kajtár, have expanded the sources I have used. I must also mention the questions and feedback from Gentian Zyberi, an international lawyer, and the researchers at the Norwegian Centre for Human Rights (NCHR), which further refined the focus of my approach. These were received at the Faculty of Law's research institute (NCHR) at the University of Oslo, where I worked as a visiting researcher.

In addition to the dogmatic analysis of international law, incorporating certain social science research methods and philosophical approaches is sometimes unavoidable. Philosophical perspectives are particularly relevant due to the natural law roots of international law. While political dimensions play a role in understanding state practices and the enforcement of international norms. However, these methods remain distinct from the doctrinal legal research. Instead, their significance lies in the broader context of the practical application of international law, or they serve as explanatory remarks in the conclusions of the chapters.

Finally, the dissertation examines the potential effects of Russian aggression on the international legal order by applying the concept of the so-called 'Grotian moment'. Using this heuristic method, it analyses whether the Russo-Ukrainian war could fundamentally transform the contemporary international legal order and whether a *jus cogens* norm could become hollowed out.

III. Outcome of the research and its possible applications

Theoretical Issues

Regarding the theory of *jus cogens*, the ILC's new 'Draft Conclusions' have made significant contributions to its development. These conclusions clarify the consequences of serious

violations of *jus cogens* norms, enhance understanding of *erga omnes* obligations, and specify procedural processes and positive obligations relating to third states.

Additionally, this document refutes at least two pessimistic predictions about the future of *jus cogens*. First, the strict demarcation criterion in the 'Draft Conclusions' ensures that the doctrine will not open 'Pandora's box. Second, it demonstrates that the stability of imperative norms does not completely hinder their evolution. In the words of *special rapporteur* Dire Tladi, they embody both "stability and responsiveness" simultaneously.

Despite these advancements, significant gaps remain regarding the scope and consequences of imperative norms. There is also a substantial divide between theoretical aspirations and practical implementation. Therefore, I explore whether the jurisprudence of international courts – though a subsidiary source of state practice – could bridge this gap, especially in cases concerning the criminal responsibility of individuals under international law. It is crucial to establish whether the prosecution and conviction of a state leader with jurisdictional immunity for a grave international crime directly result from the legal force of a *jus cogens* norm.

Practical Results and Main Findings

The central dilemma is that *jus cogens* serves as a substantive, primary norm, while jurisdictional immunity, derived from state sovereignty, is a secondary norm; thus, they do not conflict. Consequently, the *jus cogens* 'supernorm' cannot override procedural rules. Under current international law, a peremptory norm cannot include a *jus cogens* procedural element. As a result, cases concerning sovereign state immunity cannot even address substantive criminal liability, as they do not reach that stage due to the court's lack of jurisdiction resulting from immunity. Moreover, if a state explicitly excludes judicial mechanisms through a treaty reservation, it may effectively avoid liability. Therefore, the separation of procedural and substantive norms essentially eliminates the possibility of accessing justice.

The classical cases analysed in the dissertation, including *Congo vs. Rwanda*, clearly illustrate why the ICJ could not be expected to override an international law that has been accepted and recognized by the entire community of states, and which *has guided the court for over 80 years*, on the basis of an imperative norm. To do so would be a bridge too far. As emphasized in Judge Dugard's dissenting opinion, that would go beyond its legitimate judicial function. *Only States can amend Article 36 of the Court's Statute*.

Thus, any Special Tribunal on the Crime of Aggression established to hold those responsible for Russian aggression accountable, without a UN Security Council resolution acting under Chapter VII of the UN Charter, would be unable to override personal immunity under the current rules of international law, even in cases involving a serious violation of a *jus cogens* norm.

The paradox of jus cogens

It has also been concluded that, paradoxically, if one could deduce legal consequences from a *jus cogens* norm based solely on the values it protects, without further empirical evidence (state practice and *opinio juris*), it would undermine the rule of law. Specifically, if any Special Tribunal on the Crime of Aggression were to allow the prosecution of Russian senior officials (Putin, Lukashenko, or Lavrov) while they are in office, thus overriding immunity *ratione*

personae without a UN Security Council resolution, it would be acting *ultra vires* – outside the methodological framework of international law.

The method outlined in the ILC's Draft Conclusions supports the view that not only is the rule of aggression a *jus cogens*, but so is the norm of prohibition of the use of force. But, despite aggression being considered the most serious crime under international law, there are far fewer opportunities for holding the perpetrators accountable compared to other imperative norms. Consequently, it appears that the status of *jus cogens* could not exert any truly significant legal effect.

Nevertheless, it cannot be denied that the imperative norm operates as law in this form, just as it cannot be denied that natural law functions if it is *believed and obeyed*. However, this is not a matter of positive law. So, the question remains: does the imperative status of a rule indeed offer greater protection against norm violations?

Further Results

While the criticisms of *jus cogens* are entirely valid, at least three specific legal effects were identified during the research. These include:

- Restriction on states' legislation from concluding treaties on subject conflict with *jus cogens.*
- An indirect role derived from its imperative status, such as the catalytic function that activates the current mechanisms of international law, most notably the Security Council's resolutions, to legally override major obstacles such as personal immunity.
- So called 'downward causality', confirmed by the *jus cogens* norm of the prohibition of the use of force in the last chapter through the heuristic method of the 'Grotian moment'.

My main conclusion regarding the latter is that *jus cogens* also functions as a new, *quasi* 'strongly emergent', objective category of norms in international law. It creates a higher-level structure that causally influences the subordinate substructure. This contrasts with the reductionist view held by Michael J. Glennon, and most notably by Carlo Focarelli, that all causal effects occur at the most basic level (customary law, treaty obligations). I argue that the 'emergent' nature of *jus cogens* explains why imperative norms not only reinforce or reflect existing customary international law but also prevent norms from hollowing out.

Possible applications

The latter effect, however, is difficult to prove because *jus cogens* norms are such that they reflect custom through "omission." Therefore, as Thomas Weatherall pointed out, state practice does not only mean adherence to multilateral treaties and the practices of intergovernmental organizations. However, state practice can only demonstrate "custom" through use and thus may be of particularly limited significance for "measuring" the legal effect of the imperative norm. This stems from the fact that a state's 'behaviour', such as not torturing or not attacking its neighbour with armed force or not committing genocide, does not appear to be the clearest form of state practice and does not 'take place' between states.

In any case, my findings suggest that there is no clear reason why negative state practices, such as abstentions and omissions, should also have probative value in this respect. One example is

that there was no precedent for full-scale aggression after World War II until the Russian invasion.

Finally, in addition to large-scale, general findings, the thesis also yielded some less large-scale, but even more significant conclusions about the theory of *jus cogens*, which have practical significance.

These were the so-called *molecular legal effects*. This term implies that it can now be assumed that decisions of international tribunals are indirectly influenced by the weight of the issues raised and the *jus cogens* status of the norms. These effects have also been observed in cases before the SCSL and the ICC, which demonstrated the potential and extent of the evolution of an imperative norm.

Moreover, following the Russian aggression, a significant shift in state practice was observed regarding *erga omnes* obligations on third states – particularly Article 41 of the ARSIWA, *to bring to an end, through lawful means, any serious breach by a state of an obligation arising under a peremptory norm.*
The effect has been to strengthen the international customary law status of Article 41 and to outline the content of the rule. Moreover, the *jus cogens* character of the prohibition of the use of force was further strengthened.

IV. List of relevant publications

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