

HUMAN DIGNITY AS THE FOUNDATION OF PEREMPTORY NORMS IN INTERNATIONAL LAW: THEORETICAL CONSIDERATIONS AND PRACTICAL IMPLICATIONS

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Summary: The concept of human dignity receives considerable scholarly attention in international law. More often, however, such studies primarily focus on the genesis, definition, and functions of human dignity across various domains of international law, particularly within the ambit of international human rights law. This research seeks to inquire into a less-explored connection between human dignity and *jus cogens*. Such an attempt is made to elucidate the foundational character of human dignity for peremptory norms through the examination of *travaux préparatoires* of the 1969 Vienna Convention on the Law of Treaties, relevant treaties, as well as international and domestic jurisprudence. The overarching aim of this study is twofold: firstly, to enrich the discourse on human dignity by examining it as a general legal principle underpinning *jus cogens*, while illuminating its operational role within the international legal order; secondly, to provide further insights into the legal category of *jus cogens* by delineating the rationale for its existence and the foundations that support it.

Keywords: human dignity, human rights, international law, *jus cogens*, peremptory norms, public order.

1 Introduction

Human dignity and *jus cogens* still spark scientific debates in the international law discourse. Both have been examined from different perspectives; however, the existing interconnection between them remains barely explored. Nevertheless, such a linkage may play an important role for researchers studying these two phenomena. This role, on the one hand, is explained by the vague definition and inconsistent application of the human dignity concept, which, at the same time, appears to be the basis for different international law frameworks and the foundation for judicial decision-making in the area of human rights protection. On the other hand, it is connected to the status of *jus cogens*, which forms the bedrock of public order in international law, but whose emergence and legal authority

remain not so obvious. Therefore, a clear understanding of the nexus between human dignity and peremptory norms of international law may contribute to the clarification of the meaning attached to human dignity and the way it operates in international law by presenting it as a general legal principle underpinning *jus cogens*. Ultimately, what will follow from these findings is the possibility to forge a better understanding of the roots and legal effects of *jus cogens* that, in turn, will allow to conceive peremptory norms with greater lucidity.

2 Essence of peremptory norms of international law

As it stands, the inquiry into the interrelation between human dignity and peremptory norms should begin with a thorough understanding of the essence of the *jus cogens* concept, along with an exploration of its historical development within the international law realm.

According to the legal literature, the concept of *jus cogens* has its origins in Roman law, stems from municipal law obligations and refers to certain rules “the application of which to a particular situation cannot be set aside by the will of the parties to a contract”¹

In a nutshell, *jus cogens* represent a form of public order, establishing the limitations within which positive law can be made.²

In the context of international law, the legal category of *jus cogens* was codified with a similar intent of establishing a public order within this branch of law.

This assertion is supported by the drafting history of the 1969 Vienna Convention on the Law of Treaties.

Specifically, the suggestion to include a provision on *jus cogens* in international law can be traced back to the First Report on the Law of Treaties authored by Special Rapporteur H. Lauterpacht. The international lawyer asserted the existence of recognized limits beyond which States cannot enter into legal agreements. He called such limits “overriding principles of international law which may be regarded as constituting principles of international public policy (*ordre international public*)” and which “may be expressive of rules of international morality so cogent that an international tribunal would consider them as forming part of those principles of law generally recognized by civilized nations”³.

G. Fitzmaurice, the Third Special Rapporteur on the Law of Treaties, also referred to the category of international public policy. He argued that its introduction into international law created a distinction between two types of international legal rules — “those which are mandatory and imperative in any circumstances (*jus cogens*) and those (*jus dispositivum*) . . . the variation

1 SCHWELB, Egon. Some Aspects of International Jus Cogens as Formulated by the International Law Commission. *The American Journal of International Law*, 1967, vol. 61, no. 4, p. 948.

2 ORAKHELASHVILI, Alexander. *Peremptory Norms in International Law*. Oxford: Oxford University Press, 2008, p. 10.

3 LAUTERPACHT, Hersch. First Report on the Law of Treaties. *Yearbook of the International Law Commission*, 1953, vol. II, p. 155.

or modification of which...is permissible”.⁴ According to the Rapporteur, while it may be difficult to compile an exhaustive catalogue of international law peremptory rules, a feature common to these rules can be identified. Such a feature implies that imperative international law norms “involve not only legal rules but considerations of morals and of international good order”.⁵

As T. Weatherall highlights, this understanding of peremptory norms through the concept of public order holds significant meaning as it elucidates the authority of *jus cogens* in international law. In line with his observations, public order by definition embodies the protection of values that are vital to the social coexistence of its members. In the same manner, T. Weatherall extends the concept of public order to the international community, implying that peremptory norms, as “representatives” of public order, safeguard values that are crucial to the coexistence of international community members.⁶

This point is substantiated by the observations of the International Law Commission (ILC) in relation to the understanding of peremptory norms. Particularly, Mr. Bartoš, the Chairman of the 828th meeting of the ILC at the time, emphasized that membership in the international community “required the respect of certain rules. If that were not so, society would remain in the condition of savagery...which had lasted until the First World War and had prevailed almost unchallenged in the inter-war period. By becoming members of the international society, States recognized the existence of a minimum international order, which was none other than *jus cogens*”.⁷

Another commentary of the ILC, but with regards to the articles on State responsibility, also maintains that *jus cogens* are needed to “prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values”.⁸

Simultaneously, considering that international law’s public order is intended to safeguard the common interests and values of the international community, it is appropriate to assert that the substantive content of *jus cogens* as a manifestation of public order is intertwined with these common interests and values.

This assertion was corroborated by the ILC and even elaborated further. Specifically, the Commission underscored the logical outcome of this reasoning, affirming that it “is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may...give it the

4 FITZMAURICE, Gerald. Third Report on the Law of Treaties. *Yearbook of the International Law Commission*, 1958, vol. II, p. 40.

5 FITZMAURICE, Gerald. Third Report on the Law of Treaties. *Yearbook of the International Law Commission*, 1958, vol. II, pp. 40–41.

6 WEATHERALL, Thomas. *Jus Cogens: International Law and Social Contract*. Cambridge: Cambridge University Press, 2015, p. 23.

7 United Nations, Yearbook of the International Law Commission: Summary Records of the Second Part of the Seventeenth Session, vol. I, pt. I, 1966, p. 39.

8 United Nations, Yearbook of the International Law Commission: Report of the Commission to the General Assembly on the Work of Its Fifty-third Session, vol. II, pt. II, 2001, p. 112.

character of *jus cogens*”.⁹ This subject matter should be understood as the interests of the whole international community.¹⁰

Along the same lines, A. Orakhelashvili argues that the connection between the international community interests as distinct from the individual interests of States should be a key characteristic of a peremptory norm.¹¹

3 Interests of the international community as an integral element of the *jus cogens* concept

What do the interests of the international community entail? The resolution to this inquiry can be deduced from the concept of the “international community” itself. Here, the term “community” implies a collective with shared interests and values, while the adjective “international” points to the scope of this collective, which embraces “the whole of mankind”.¹² In this context, the conceptualization of the “international community” also suggests the subject of the collective values – the whole of mankind, the unit of which is the individual human being. This standpoint was put forward by A. Verdross, who affirmed that “norms having the character of *jus cogens*” are those “related to the interests of the international community, in other words, to those of all mankind”.¹³

Hence, it can be concluded that the interests of the international community, which give *jus cogens* their legally supreme character, are directed toward the protection of the values and interests of mankind, with an individual being the recipient thereof.

In the *Michael Domingues* case, the Inter-American Commission of Human Rights reiterated this idea while examining the rules governing the establishment of peremptory norms. In particular, the Inter-American Commission of Human Rights stressed that *jus cogens* derive their status from fundamental values embraced by the international community. Insofar as violations of such norms are regarded as shocking the conscience of humankind, they obligate the international community as a whole, regardless of any “protest, recognition or acquiescence”.¹⁴

Indicatively, further review of the literature reveals that such an understanding of the interests of the international community persists throughout the discourse

9 United Nations, Yearbook of the International Law Commission: Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session including the Reports of the Commission to the General Assembly, vol. II, 1966, p. 248.

10 VERDROSS, Alfred. *Jus Dispositivum and Jus Cogens in International Law*. *The American Journal of International Law*, 1966, vol. 60, no. 1, pp. 57–59.

11 ORAKHELASHVILI, Alexander. *Peremptory Norms in International Law*. Oxford: Oxford University Press, 2008, p. 47.

12 WEATHERALL, Thomas. *Jus Cogens: International Law and Social Contract*. Cambridge: Cambridge University Press, 2015, p. 25.

13 United Nations, Yearbook of the International Law Commission: Summary Records of the Second Part of the Seventeenth Session, vol. I, pt. I, 1966, p. 37.

14 *Michael Domingues v. United States*, Report No. 62/02, Case No. 12.285 (2002), Inter-American Commission on Human Rights, para. 49, 22 October 2002. [online]. Available at: <<https://www.cidh.org/annualrep/2002eng/USA.12285.htm>> Accessed: 05.03.2024.

of international law. An illustrative instance is the observation made by H. Mosler, who posited that international law is dedicated to common interests, which include “the protection of the dignity of man”.¹⁵ In a similar vein, A. A. Cançado Trindade pointed to the growing significance of “basic considerations of humanity” in shaping international law, which derive from human conscience and are “shared by the international community as a whole and humankind”, thus transcending the will of individual States.¹⁶

As it appears, the individual-oriented nature of the international community interests is often expressed through various concepts such as, for example, basic considerations of humanity and the conscience of humankind. However, as noted by T. Weatherall, these concepts often lack precision. In this regard, the scholar offers to determine a more accurate category that can grasp the aforementioned concepts and effectively articulate the interests of the international community. He selects the general legal principle of human dignity¹⁷ as such a category, which itself is often used to represent the interests of the international community and captures other suggested formulations of these interests.¹⁸

4 Human dignity as the basis of peremptory norms

The conclusion that human dignity, as a general principle of law, embodies the interests of the international community, which are to be protected by *jus cogens* norms, and thus serves as the basis of *jus cogens*, can be drawn from the analysis of norms with peremptory status, international treaties that codify them, and both international and domestic jurisprudence.

4.1 Catalogue of peremptory norms

While there exists no definitive, officially recognized catalogue of peremptory norms, K. Karklina argues that there is a set of norms, which are most commonly cited for the attainment of the *jus cogens* status. These are believed to include prohibitions on the use of force, genocide, torture, crimes against humanity, slavery and the slave trade, racial discrimination and apartheid, as well as basic rules of international humanitarian law and the right to self-defence.¹⁹ In relation to these norms, K. Karklina asserts that it is beyond doubt that their objective

15 MOSLER, Hermann. *The International Society as a Legal Community (Volume 140). Collected Courses of the Hague Academy of International Law*. Leiden: Brill | Nijhoff, 1974, p. 70.

16 TRINDADE CANÇADO, Antônio Augusto. *International Law for Humankind: Towards a New Jus Gentium (II) General Course on Public International Law (Volume 317). Collected Courses of the Hague Academy of International Law*. Leiden: Brill | Nijhoff, 2005, pp. 19–20, 272.

17 LE MOLI, Ginevra. The Principle of Human Dignity in International Law. In ANDENAS, Mads, FITZMAURICE, Malgosia, TANZI, Attila, WOUTERS, Jan (eds). *General Principles and the Coherence of International Law*. Leiden: Brill | Nijhoff, 2019, p. 359.

18 WEATHERALL, Thomas. *Jus Cogens: International Law and Social Contract*. Cambridge: Cambridge University Press, 2015, pp. 33–34.

19 KARKLINA, Kate. Human Dignity as a Foundational Value of Peremptory Norms in International Law. *RGSL Research Paper*, 2020, no. 22, p. 23.

lies in the protection of human dignity since “the right to be free from genocidal attacks, torture, slavery, crimes against humanity addresses the very basic notion of human dignity – the integrity of a person in a physical, mental, moral sense”.²⁰

For instance, genocide, defined as an act committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group,²¹ is understood to threaten the lives of individuals and their pursuit of other basic ends.²²

Slavery, in turn, is an evident violation of the intrinsic worth inherent in every individual and, akin to torture, infringes upon his basic interests: both human rights violations run counter to a number of the basic goods and treat individuals as means and not ends.²³

Crimes against humanity are a specific type of inhumane acts, widespread and systematic in their nature, that are directed against civilian population.²⁴ According to A. Cassese, “these crimes are particularly odious offences in that they constitute a serious attack on human dignity or grave humiliation or a degradation of one or more human beings”.²⁵

Additionally, the evidence of the role of human dignity as a general principle is also ensured by a number of international treaties codifying specific *jus cogens* norms, where human dignity is expressly identified as the operative general legal principle giving rise to them.

As an example may serve the Martens Clause, which appears in the preamble to the 1899 and 1907 Hague Conventions. The Clause clearly establishes legal obligations, which stem from the laws of humanity and the dictates of the public conscience:

*“Until a more complete code of the law of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience”.*²⁶

20 KARKLINA, Kate. Human Dignity as a Foundational Value of Peremptory Norms in International Law. *RGSL Research Paper*, 2020, no. 22, p. 24.

21 UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, United Nations, Treaty Series, vol. 78, 9 December 1948. [online]. Available at: <<https://www.refworld.org/legal/agreements/unga/1948/en/13495>> Accessed: 05.03.2024.

22 DUBOIS, Dan. The Authority of Peremptory Norms in International Law: State Consent or Natural Law? *Nordic Journal of International Law*, 2009, vol. 78, no. 2, p. 162.

23 DUBOIS, Dan. The Authority of Peremptory Norms in International Law: State Consent or Natural Law? *Nordic Journal of International Law*, 2009, vol. 78, no. 2, p. 163.

24 UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, ISBN No. 92-9227-227-6, UN General Assembly, p. 3, 17 July 1998. [online]. Available at: <<https://www.refworld.org/legal/constinstr/unga/1998/en/64553>> Accessed: 05.03.2024.

25 CASSESE, Antonio. *International Law. Second Edition*. Oxford: Oxford University Press, 2005, p. 250.

26 Second International Peace Conference, *The Hague, Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of*

In addressing the lack of an established positive law through references to those categories as laws of humanity, the public conscience, and usages of civilized people, the Clause exposes them as authorities that ought to guide the conduct.²⁷ In this manner, it is believed that the category of *jus cogens* filled the gap by “positivizing” the dictates of morality deriving from considerations of human dignity.²⁸

Another illustration is the Preamble of the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery that defines further content of the international treaty by confirming that “freedom is the birthright of every human being” and that “the peoples of the United Nations reaffirmed in the Charter their faith in the dignity and worth of the human person”.²⁹

Furthermore, the Preamble of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid stipulates that “in the interests of human dignity, progress and justice, an end must be put to colonialism and all practices of segregation and discrimination associated therewith”.³⁰

The Preamble of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, expressing the desire to “make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world”, refers to “the equal and inalienable rights of all members of the human family” that emanate from “the inherent dignity of the human person”.³¹

Therefore, each of these instances demonstrates that human dignity explicitly features as the general principle of law that acts as a source of the corresponding peremptory norms.

4.2 International and domestic jurisprudence

The international and domestic jurisprudence also recognizes the capacity of human dignity to serve as the general legal principle that underlies *jus cogens*.

War on Land, –, International Conferences (The Hague), 18 October 1907. [online]. Available at: <<https://www.refworld.org/legal/agreements/hague/1907/en/31788>> Accessed: 05.03.2024.

27 MERON, Theodor. *Human Rights and Humanitarian Norms as Customary Law*. Oxford: Clarendon Press, 1989, pp. 41–42.

28 WEATHERALL, Thomas. *Jus Cogens: International Law and Social Contract*. Cambridge: Cambridge University Press, 2015, p. 80.

29 UN Economic and Social Council, *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956. [online]. Available at: <<https://www.refworld.org/legal/resolution/ecosoc/1956/en/116014>> Accessed: 05.03.2024.

30 UN General Assembly, *International Convention on the Suppression and Punishment of the Crime of Apartheid*, A/RES/3068(XXVIII), 30 November 1973. [online]. Available at: <<https://www.refworld.org/legal/agreements/unga/1973/en/26955>> Accessed: 05.03.2024.

31 UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations, Treaty Series, vol. 1465, p. 113, 10 December 1984. [online]. Available at: <<https://treaties.un.org/doc/publication/unts/volume%201465/volume-1465-i-24841-english.pdf>> Accessed: 05.03.2024.

By way of illustration, it will suffice to recall the International Criminal Tribunal for the former Yugoslavia (ICTY), which, in the *Furundžija* judgment, asserted that:

*“The general principle of respect for human dignity is the basic underpinning and indeed the very raison d’être of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape.”*³²

Thus, in making this decision, the ICTY considered human dignity as a principle that supports broadening the scope of the definition of torture within its jurisdiction to include rape as a punishable crime.

A similar position is reflected in the *Aleksovski* case, also considered by the ICTY. In this case, the Trial Chamber deliberated that the purpose of Common Article 3 to the four Geneva Conventions of 1949 is “to uphold and protect the inherent human dignity of the individual”.³³ Later on, the Appeals Chamber went even further in the same case and directly reaffirmed the role of human dignity as a foundation of peremptory norms. The ICTY Appeals Chamber found that where a violation of the laws or customs of war (outrages upon personal dignity) has been previously addressed, the emphasis was placed on the broader concept of human dignity. Moreover, the Chamber referred to the sentiments articulated in the *Furundžija* judgement, pointing out that the judgement “speaks of human dignity as being the important value protected by the offence”.³⁴

Domestic jurisprudence also underscores the connection between *jus cogens* and human dignity. A premier example of such practice is the *Milde* case examined by Italian courts. The question at stake was related to seeking redress for atrocities committed by German troops during the occupation of Italy. Courts regarded these issues as requiring a balancing of a State immunity against the obligation of reparation that arises upon the commission of an international crime as a result of the breach of *jus cogens*. It was held that the restriction of immunity appears to be a reasonably balanced solution “in cases of individuals bringing lawsuits to

32 *Prosecutor v. Anto Furundžija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), p. 72, 10 December 1998. [online]. Available at: <<https://www.refworld.org/jurisprudence/caselaw/icty/1998/en/20418>> Accessed: 05.03.2024.

33 *Prosecutor v. Zlatko Aleksovski (Trial Judgement)*, IT-95-14/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), p. 17, 25 June 1999. [online]. Available at: <<https://www.refworld.org/jurisprudence/caselaw/icty/1999/en/34882>> Accessed: 05.03.2024.

34 *Prosecutor v. Zlatko Aleksovski (Appeal Judgement)*, IT-95-14/1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), p. 15, 24 March 2000. [online]. Available at: <<https://www.refworld.org/jurisprudence/caselaw/icty/2000/en/17044>> Accessed: 05.03.2024.

obtain redress for a grave breach of the most fundamental principles of human dignity granted by *jus cogens*”.³⁵

In a similar vein, the Italian Court of Appeal in the *Milde* decision identified a legal collision regarding the State's immunity and respect for peremptory norms. Addressing this conflict, the Court stipulated that:

“Compliance with each person’s inviolable rights is a fundamental principle of international law. It has the effect of reducing the scope of other traditional principles based on the sovereign equality of States, such as the customary norm granting every State immunity from the civil jurisdiction of foreign States. In fact, the jurisdictional immunity of foreign States is not absolute and cannot be invoked in proceedings relating to acts amounting to international crimes, i.e. acts violating the universal values based on respect for human dignity which transcend, as such, the interests of a particular State community”.³⁶

To this extent, the rationale in the *Milde* case acknowledges human dignity as the general legal principle from which norms of *jus cogens* originate and posits that it serves as the foundation of the legal effects of these norms.

5 Conclusions

The emergence of the concept of *jus cogens* in international treaty law, the codification of specific peremptory norms and their adjudication by international and domestic courts provide substantial evidence supporting the assertion that human dignity forms the basis of the interests of the international community, giving rise to *jus cogens*. It is this connection that grants a hierarchically superior normative status to peremptory norms, by virtue of the values enshrined by those rules and, in turn, their importance to the maintenance of social order within the domain of international law.

In this sense, it follows that human dignity, as the general legal principle underpinning *jus cogens*, serves several functions in international law fora. Firstly, human dignity should be considered an obligation-creating principle, constituting a primary source of legal obligations expressed in *jus cogens*. In light of this, human dignity is capable of serving an axiological function as it represents a value around which there is broad acceptance within the international community that it must be protected.

Furthermore, the principle of human dignity may also perform an auxiliary function, clarifying ambiguities when primary sources of law are inadequate. This role manifests when human dignity operates in judicial practice as (1) a method to interpret the application of *jus cogens*, as demonstrated, for instance, in the

35 Counter-Memorial of Italy, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, International Court of Justice, p. 79, 22 December 2009. [online]. Available at: <<https://www.icj-cij.org/sites/default/files/case-related/143/16648.pdf>> Accessed: 05.03.2024.

36 IOVANE, Massimo. Criminal Proceedings Against Josef Milde. *Italian Yearbook of International Law*, 2008, vol. 18, pp. 325–326.

Furundžija case, as well as (2) a means to fill gaps in the governing positive law, as illustrated by the example of the Martens Clause of the Hague Conventions of 1899 and 1907.

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