**The Application of *Jus Cogens* Norms in UN Peacekeeping Missions: A Possible Source of Conflict with the UN Charter?**

**Primjena ius cogens normi u mirovnim misijama Ujedinjenih nacija: Mogući izvor konflikta sa Poveljom Ujedinjenih nacija?**

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***Summary:*** *Peacekeeping missions represent an important and significant part in the United Nations (UN) security system. Although this peacekeeping missions (PKM) aim to protect human rights, maintain security and peace, within this operations regularly human rights violations and other misconduct by peacekeepers is reported. In the Nuhanovic case (2011) the Dutch Court of Appeals, as the first national court, used the effective control test which confirmed the principle that troop- contributing states can be liable for internationally wrongful acts of their troops who are embedded in the UN peacekeepers. This case represents a key shift in the theory and practice when dealing with state liability for human rights violations attributable to states operating under an international organisation. This article has created a more creative approach, to the complex matter of liability in UN PKM, even going further then the Dutch courts did, showing that jus cogens norms, have priority over all other international law and that troop contributing states can always rely on this concept when engaging their troops through UN PKM.*

***Ključne riječi:*** *Mirovne misije Ujedinjenih nacija, ius cogens ljudska prava, podijeljena odgovornost, test učinkovite kontrole*

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***Sažetak:*** *Mirovne misije igraju važnu i značajnu ulogu u sigurnosnom sistemu Ujedninjenih nacija (UN). Iako mirovne misije (MM) za cilj imaju zaštitu ljudskih prava, te održavanje sigurnosti i mira, u okviru ovih misija redovito se prijavljuju kršenja ljudskih prava i drugih oblici nedostojnog ponašanja, što iziskuje pitanje odgovornosti. U slučaju Nuhanović (2011.), nizozemski žalbeni sud, kao prvi nacionalni sud, koristio je test učinkovite kontrole (eng.“effective control test“), koji je potvrdio načelo da države mogu biti odgovorne za međunarodna protupravna djela njihovih vojnika koji su sastavni dio mirovnih snaga UN-a. Ovaj slučaj predstavlja ključni pomak u teoriji i praksi po pitanju odgovornosti država za kršenja ljudskih prava pri mirovnim misijama UN-a, a koja se mogu pripisati državama, te stoga će biti polazna tačka za ovu analizu,   
dopunjena drugim relevantnim slučajevima, teorijama i pravnim dokumentima. Ovaj članak ima kreativniji pristup ovom složenom pitanju odgovornosti pri mirovnim misijama UN-a, pa tako čak ide korak dalje nego što su to nizozemski sudovi učinili, pokazujući da ius cogens norme, imaju prioritet nad svim ostalim međunarodnim pravom, te da se države-kontributori uvijek mogu osloniti na ovaj koncept pri mirovnim misija UN-a.*

**INTRODUCTION**

Peacekeeping missions[[1]](#footnote-1) (PKM) represent an important and significant part in the United Nations (UN) security system. Although this peacekeeping missions aim to protect human rights, maintain security and peace, which is the key task of the UN determined in the Charter of the UN, within this operations regularly human rights violations and other misconduct by peacekeepers is reported (see more in: Ladley, 2005). The UN peacekeeping system itself is a complex construct which does not have a clear line of command and thus line of responsibility. As some writers have pointed out, the command and control structures of UN PKMs are straightforward in theory, but seldom so in practice (Murphy, 2007).

On the other hand, there is a strong and coherent dogmatic view in the theory, which is supported by the jurisprudence of national and the relevant international courts, that the UN enjoys immunity (see more in: Neumann, 2006 & Brockman-Hawe, 2011). In this situation there is no effective remedy for victims of human rights violations during UN PKM, having especially in mind that the UN did not develop an effective system of compensation for damages that occurred in PKM and which can be attributed to the UN (see more in: Brockman-Hawe, 2011).

This raises the question: Could troop – contributing states (TCS) be responsible in international law for internationally wrongful acts committed by their troops under formal UN command? This question was directly answered in the *case Mothers of Srebrenica vs. Netherlands (2010)*, where the Dutch Court of Appeal noticed that there are “…*two categories of parties liable for the damages incurred by the Mothers of Srebrenica, namely the perpetrators of the genocide and the State*.” After this in the *Nuhanović* case (2011) the Dutch Court of Appeals confirmed the principle that troop-contributing states can be liable for internationally wrongful acts of their troops who are embedded in the UN peacekeepers.

The “dual attribution” concept that the Dutch Courts have adopted by applying the “*effective control test*” to resolve the issue of liability in UN peacekeeping missions is obviously necessary because of the specific and complex structure of UN PKM where formally peacekeepers are under the command of the UN but factually under national command. In the middle of this continuum, in factual situations where both the state and the UN have normative control and are factually involved, dual attribution seems to be the proper approach.

This “effective control” approach opens clearly the door for a possible liability of troop contributing states (TCS) for wrongful acts, mainly human rights violations, of their contingents during PKM. Because of that, it is of special interest to resolve the possible conflict that would arise if a state engages its troops in UNPKM where clear *jus cogens* human rights violations occur. Is there an obligation to the TCS to obey *jus cogens* norms of the general international law when having effective control over the situation on ground? Or even a more sensitive question, can and should TCS disregard orders of the respective UN command that are in direct violation of *jus cogens human rights* protected by the international law, or even act *ultra vires* when massive human rights violations occur and the UN command does not respond to the situation?

This questions will be addressed in this article, that is divided in three parts, of which the first part is dealing with the overall framework of UN PKM, the second with the question of imputability and responsibility of TCS in UN PKM and the third part with the question of hierarchy of norms in international law. Based on this, we will draw conclusions regarding our research questions.

This article uses a legal dogmatic approach. The comparative law method combined with the case law study method will be used extensively to draw a picture of the different jurisprudence before national and international courts regarding the problem of state liability for wrongful acts in UN peacekeeping missions. As primary sources, international instruments and court decisions will be used, complemented by secondary sources based on a range of scholarly literature on this topic.

1. **A brief overview of the framework of the United nations’ peacekeeping missions**
   1. ***The legal framework***

The general legal framework for UN Peacekeeping is unclear, and policy developments have very much led the way in providing the framework for UN Peacekeeping. UN Peacekeeping evolved as a practical response to fill the gap left by the failure of the UN collective security mechanisms. There is no express legal provision for UN Peacekeeping in the UN Charter, and this may be one of the reasons for the lack of an articulated legal framework, although it is now generally agreed that UN peacekeeping is authorized as an implied or inherent power of the UN (Sheeran, 2010). But still, even the „Guiding Principles‟ of UN peacekeeping - consent, impartiality and non-use of force except in self-defense (and defense of the mandate), developed during several peacekeeping missions, do not have any formal legal status, nor have they been explicitly adopted by the UN Security Council (Sheeran, 2010).

In the majority of cases, the establishment of a peace ope­ration starts with an analysis of the conflict situation by the UN Secretariat before the UN Security Council (SC) commences discussion of the details of a particular operation. The Secretary-General will then make recommendations on the scope of the envisaged mission and the required resources. After that, the UN SC takes action and adopts a mandate which authorizes the operation for a limited period. The mandate contains not only the reasons for taking action, but also the legal framework which applies to the mission (Stock, 2011.) It should be noted here, according to Sheeran (2010), that “the language in the resolutions themselves is often difficult to discern as a result of deliberate political ambiguity. There is also often debate as to which clauses of each resolution are operational or legally binding and which are merely suggestive, and this leads to uncertainty in implementing the mandate on the ground. Commanders on the ground, and even the senior UN decision makers at the top, have been left devoid of a clear policy and legal framework within which to carry out their UN peacekeeping missions.” The UN is not a party to treaties in the same way that States are, thus making it far harder to determine which obligations are binding on the UN. Finally, and perhaps most persuasively, there is agreement in the literature reflected in various UN policy documents that the UN is bound by international human rights under customary (i.e. general) international law (Sheeran,2010).

*The 1946 Convention on Privileges and Immunities of the United Nations (the General Convention)* gives the UN and its officials and experts a very wide scope of immunities. Persons subject to immunity which are members of military contingents, enjoy immunity by virtue of the status of forces agreements (SOFAs) between the UN and the country in which they are operating. Neither the UN nor the Secretary-General can waive the immunity of many individual peacekeepers, as each soldier within the mission is subject to the exclusive criminal jurisdiction of their respective state and it is for that state to decide whether to waive immunity. The UN peacekeeping operations are subsidiary organs of the main organ by which they have been established. The legal framework for the actual conduct of peacekeepers reflects their status as UN organs, and as a result, they are also subject to the law applicable to the UN as a whole, such as laws concerning the privileges and immunities of UN personnel, and responsibility (Zantvoort, M., n.d, p.12). In this situation there is merely a small chance for victims of human rights violations to get any kind of redress for misconduct by UN peacekeepers. Even though “Local Claims Review Boards” have been created by the UN during peacekeeping missions, they cannot provide any substantial redress for victims of UN peacekeeping missions, because they are solely composed of UN personnel. This is in contrast to the ‘Claims Commissions’ envisaged in the SOFAs concluded between the UN and corresponding host states, but which have in practice never been established. These agreements provide that such ‘Claims Commissions’ would consist of personnel from both the host state and the UN (Zegveld, Sheeran, Zwanenburg, Wilmshurst 2014).

Furthermore, in the case *Mothers of Srebrenica v. The Netherlands and the UN (2010)*, the Mothers of Srebrenica Association invoked the responsibility of the Netherlands and the United Nations for their failure to prevent the Srebrenica genocide in 1995. In 2012, the Dutch Supreme Court ruled that the Dutch courts could not hear the claim as far as it was directed against the United Nations, as the United Nations “enjoys the most far-reaching immunity from jurisdiction, in the sense that it cannot be summoned to appear before any domestic court in the countries that are party to the Convention” ( see in :Parliamentary Assembly of the Council of Europe, 2013) Such a position was upheld by the European Court of Human Rights (ECHR, S*titching Mothers of Srebrenica and Others v. The Netherlands,* Application No. 65542/12, judgment of 11 June 2013).

Beside the absolute immunity of the UN and its organs before national and international courts, the UN itself is not party to any treaty, thus making it far harder to determine which international obligations are binding on the UN (this question will be addressed in this article later in more detail), especially in the case of human rights violations. It is obvious that in a such “unclear” situation troop contributing states (TCS) are in a comfortable situation where no claims for human rights violations, committed by their contingents, can be raised against them.

* 1. ***The Operational Organization***

Since the UN does not have its own peacekeeping forces, it is dependent on the preparedness of its member states to contribute troops. When states are willing to provide troops, their forces will be transferred to the operational command and control of the UN by means of a Transfer of Authority Agreement between the UN and the individual troop contributing countries (Zantvoort, M., n.d, p.33) The forces at the disposal of the UN are for the period of their deployment considered as international personnel under the authority of the UN. This means that the Security Council, or in some case the General Assembly, will maintain overall political control and authority over the mission, whereas the executive direction and control lies with the Secretary-General (Zantvoort, M., n.d, p.33).

On the ground, all components of the mission — military, police and civilian — come under the ‘operational authority’ of the Head of Mission, typically a Special Representative of the Secretary-General, but in some cases a Force Commander or a Chief Military Observer. More pertinently, peacekeepers contributed by troop-contributing states come under the ‘operational control’ of the Force Commander, the head of the military component of a PKM. In the case of military personnel provided by Member States, these personnel are placed under the operational control of the United Nations Force Commander or head of military component, but not under United Nations command. The UN has, in general, assumed responsibility for the activities of UN peacekeeping forces. Thus, the UN Secretariat has stated that:

“*As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation*.” (UN Secretariat, *Responsibility of International Organizations: Comments and Observations Received from International Organizations*, 56th sess, UN Doc A/CN.4/545, 25 June 2004, p 17.)

As it can be seen, the UN Secretariat does not seem to accept — at least overtly, as the International Law Commission (ILC) has — the possibility that peacekeepers may not always act under UN direction and could sometimes act upon national direction.

Despite the fact that the UN has the assumption that it has in principle exclusive control over the national forces of the peacekeeping operation, in practice it never exercises full command, i.e. authority and responsibility on every aspect of the military operation and administration. (Kondoch, B. in: Gill, T.D. and Fleck, D., p.520) However, the level of command and control is difficult to determine since the UN has no agreed terms to designate this. (Zantvoort, M., n.d, p.34). It is often unclear in what circumstances and what level of force peacekeepers may legally use. This lack of clarity can have a significant impact on an operation. The UN SC has often used the phrase „all necessary means‟ to signal the authorization of the use of force, but this is a broad and imprecise formulation (Sheeran, 2010). The Secretary-General Boutros-Ghali explained the term ‘UN command’ in 1994 in its report:

“*In general, UN command is not full command and is closer in meaning to the generally recognized military concept of ‘operational command’. It involves the full authority to issue operational directives within the limits of (1) a specific mandate of the Security Council; (2) an agreed period of time, with the stipulation that an earlier withdrawal requires adequate prior notification; and (3) a specific geographical range (the mission area as a whole).*” (UN Doc. A/49/681 of 21 November 1994)

Thus, the national forces remain organs of their contributing state with the result that the state retains full and exclusive strategic level command and control of its troops. (Kondoch, B. in: Gill, T.D. and Fleck, D., p.520) Consequently, as Zantvoort (n.d.) precisely stated, “the national forces fulfil a dual role since they have the obligation to act in compliance with the interests of the UN when they are transferred to the operational command and control of the UN. Sometimes this forms a problem as troop contributing states do not respect the agreements relating to command and control, resulting in for example countermanded orders or the bypassing of the chain of command. Several examples can be mentioned, such as reports stating that then President Chirac of France bypassed UN commanders during the UN peacekeeping operation in the former Yugoslavia, and the case in Somalia where some national contingents during the UN peacekeeping operation first consulted with their national capitals while taking part in the operation” (see in Zantvoort, M., n.d, p. 35).

1. **The Question of Imputability and Responsibility in UN Peacekeeping missions**

As we have seen above, it is becoming clear that the UN have a limited control, more formal and mandate based, while often TCS play the key role on the ground during peacekeeping missions, because of their possibility to directly issue orders to their contingents. Thus, the concept of attributing all the conducts of national contingents during UN PKM to the United Nations is often far from the reality and therefore is not acceptable to address the problem of responsibility for human rights violations. In general, the question of imputability and responsibility for wrongful acts in international law is quite complex, and thus will be examined in detail in this part.

***2.1. The Theory***

The essential characteristics of state responsibility in international law hinge upon certain basic factors: first, the existence of an international legal obligation in force as between two particular states; secondly, that there has occurred an act or omission which violates that obligation and which is imputable to the state responsible, and finally, that loss or damage has resulted from the unlawful act or omission (Shaw, 2008).[[2]](#footnote-2) There are contending theories as to whether responsibility of the state for unlawful acts or omissions is strict or whether it is necessary to show some fault or intention on the part of the officials concerned. The majority of academics, which is also confirmed by practice, tends towards the strict liability, objective theory of responsibility (Shaw 2008). [[3]](#footnote-3) It is also a separate question, which will be addressed in this article, if there can be an international wrongful act of a troop- contributing state if acting under the UN Charter, having in mind the provisions of Article 103 of the UN Charter.[[4]](#footnote-4) But the central issue for answering the question of state responsibility is if a conduct or omission can be imputed to a troop-contributing state. First, we will analyze this question under the consideration of the most prominent theories regarding this topic.

The state as an abstract legal entity cannot, of course, in reality ‘act’ itself. It can only do so through authorized officials and representatives. The state is not responsible under international law for all acts performed by its nationals. Since the state is responsible only for acts of its servants that are imputable or attributable to it, it becomes necessary to examine the concept of imputability (also termed attribution). Imputability is the legal fiction which assimilates the actions or omissions of state officials to the state itself and which renders the state liable for damage resulting to the property or person of an alien. Issues may also arise where an organ or an agent of a state are placed at the disposal of another international legal entity in a situation where both the state and the entity exercise elements of control over the organ or agent in question. This occurs most clearly where a military contingent is placed by a state at the disposal of the UN for peace-keeping purposes. Both the state and the UN will exercise a certain jurisdiction over the contingent (Shaw, 2008).

Leck (2009) suggests that peacekeepers are not under the effective control of the UN, but are perhaps under the dual or joint control of both the UN and the troop contributing state (TCS). He concludes that effective control only has ‘teeth’ and is realistic when the entity exercising effective control has the real authority and means to exercise it over the subjects that it controls. The numerous instances of peacekeepers taking directions from home countries over that of the Force Commander’s instructions illustrates that the UN has no real authority or means to control the peacekeepers, absent the TCS’s concurrence. Because of that, Dannenbaum (2010) introduced the “*effective control*” test as the ultimate method to resolve the question of imputability of a certain conduct in the case where it can be potentially attributed to two or more actors.[[5]](#footnote-5) Basically, “*effective control (…) is held by the entity that is best positioned to act effectively and within the law to prevent the abuse in question*” (Dannenbaum 2010, p.158). *In concreto*, he emphasizes that the effective control test can result in either troop-contributing states' or UN responsibility depending on the concrete situation. He categorized such situations in five categories guided by the criterion of an actor's potential to prevent a wrongful act. In this line, the International Law Commission (ILC) drafted *The Articles on the Responsibility of International Organizations* (2011, hereafter DARIO*).* Although so far 66 draft articles have been adopted and the text is not yet a binding instrument, it is widely accepted that most of these draft articles reflect customary international law. With regard to UN peacekeeping operations, the UN can be held responsible if one can establish that the UN had effective control over the national contingents and its soldiers while they committed an internationally wrongful act. This can occur by virtue of article 6 DARIO which states that “*the conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct*.” In general, attribution between two subjects of international law should be decided on the basis of international law.

In case peacekeeping forces are under command and control of a particular troop contributing country, the wrongful acts will be attributed to this state, because the forces are regarded as state organs (Zantvoort, M., n.d, p.37) Whether the troop contributing country can be held responsible for the conduct of its forces would depend on the facts and circumstances concerning the alleged acts and omissions, and on whether the troops were acting pursuant to the orders of their national commanders or to the orders of the UN commander. As Nollkamper (2011) noticed the definition of effective control given by the ILC makes it unclear whether there can be *dual attribution* if one of the actors involved exercises effective control and the question is whether and in what cases such factual control over specific conduct can be exercised simultaneously by two actors. But, The Dutch Court of Appeals (2011) thus deviated from the approach of the European Court of Human Rights (ECHR), and held, based on its combined construction of normative and factual control, that it is well possible that one and the same act is attributed both to the UN and to the Netherlands (Nollkampaer, 2011), not answering the question of a concrete situation where dual attribution would be possible. In its finding on the possibility of *dual attribution*, the Court of Appeal could leave aside the question whether the United Nations possessed effective control, and proceeded to examine whether the Netherlands had exercised effective control over the disputed action (Nollkampaer, 2011).

Having in mind the structure of UN peacekeeping missions and the *effective control* test for imputability, troop contributing states, in general, have always the possibility to intervene effectively and to issue orders to their national contingents and therefore would always be responsible for internationally wrongful acts of their troops embedded in UN PKM. In this regard, Zantvoort (n.d., p.41), remarked that only in the case an UN Force Commander issues an order to commit a wrongful act the UN would be responsible, and in all other cases (which would fall under *ultra vires* acts) this acts are attributable to troop-contributing states.

Such approach could eliminate the difficult position of victims before courts where they have to prove the fact that a conduct can be imputed to a state and provide them so with an effective remedy. On the other side, such an approach would certainly lead to a radical reform of the UN peacekeeping missions because states would not easily send their troops in UN PKM without a clear command structure and line of responsibility. This would also raise the awareness of troop-contributing states for the proper preparation of their peacekeepers and would not leave space to states to “escape” and “hide” their responsibility behind an immune international organization like the UN. But it remains to see in practice how the *dual attribution* concept will develop as it cannot be entirely theoretically excluded.

* 1. ***The Relevant Case Law***

In practice, the first *effective control test* has been used by the ICJ in the *Nicaragua case* and the *Genocide case (Nicaragua v United States of America*, Judgement of 27 June 1986, ICJ Reports, 14, 62-64 and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro*).

In the *Nuhanović and Mustafić* cases the Dutch Supreme Court (2013) ruled that the criterion for attributing Dutchbat’s actions to the State is whether the State exercised *effective control* over said actions. The Supreme Court derives this criterion from Section 7 of the *Draft Articles on Responsibility of International Organizations* (hereinafter to be referred to as: DARIO). The Court of Appeals in The Hague (2011), earlier in the same case, quashed the first instance judgment of the District Court. It found that the disputed conduct was attributable to the Netherlands, that the Netherlands had acted wrongfully, and that Nuhanović has suffered and will yet suffer as a result from the death of his family members. The central question in this case was the question of attribution of conduct between the UN and the troop-contributing state. First, the Court determined that the proper standard for attribution is ‘*effective control*’. It rejected the standard for attribution of conduct that was used by the District Court (‘operational overall control’), the standard used by the ECHR (2007) in *Behrami and Saramati* (‘ultimate authority and control’) as well as the position taken by the UN that peacekeeping troops are to be considered as subsidiary organs of the UN. The Court backs away from this purely normative construction and emphasizes that effective control should be assessed in the concrete circumstances of the case, not (only) in terms of an abstract possibility to exercise control. In its reasoning, whether control is ‘*effective control*’ depends both on normative and factual control (Noelkaemper 2011). The Court of Appeals (2011) verdict resolved only the question of the active removal of family members from the compound by the Dutch Battalion but not with the question of omission or not preventing murder and torture from Serbs forces which resulted in the Srebrenica genocide. The Dutch Supreme Court (2013) considered that the ILO’s DARIO recommendations and the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (hereinafter to be referred to as: DARS) may generally be accepted as a reflection of current, unwritten international law and were apparently accepted as such even in 1995. In its judgment in the case *Mothers of Srebrenica v. Netherlands* (2014)the Hague District Court was of the opinion” that the State did hand over *command and control* of Dutchbat to the UN” and that “the UN Dutchbat was indeed placed under UN orders and operated as a contingent of UNPROFOR. (Hague District Court 2014, July 16, par.4.37) The transfer of *command and control* over Dutchbat took place for the purpose of a UN peacekeeping operation based on Chapter VII of the UN Charter to implement the mandate. But furher, The District Court stated that “*after transferring “command and control” states supplying troops at all times retain the right to withdraw them and to cease taking part in the operation (‘full command’)... The State also retained the authority to punish said military personnel by disciplining them and subjecting them to criminal law.”* Finally, The Dutch District Court in this case did find a period and territory (called “mini safe area”) which was under *effective control* of the State of the Netherlands and therefore all acts and omissions of the Dutchbat in this time frame and on this territory (namely compound) could be attributed to the Netherlands. As this acts in this period were not covered by the UN mandate there all had been qualified as *ultra vires* acts and therefore the Court reasoned “*Such action is attributable to the State supplying the troops because the State has a say over the mechanisms underlying said ultra vires actions, selection, training and the preparations for the mission of the troops placed at the disposal of the UN*. (see more in: Hague District Court 2014, July 16, par.4.57 and further)

Regarding the question of immunity of the UN, the Dutch courts in all the mentioned decisions did not deviate from the established doctrine of absolute immunity of the UN. The District Court answered this question affirmatively in its interim judgment of July 10th 2008 and declared it was not competent to take cognizance of the claim against the UN. “*Since the District Court is not competent to take cognizance of the claim against the UN it only remains to assess the claim against the State.”* (Hague District Court 2014, July 16).

The relevant case law on this issue of the ECHR is somehow inconsistent and not fully (in the sense of finity) developed. The ECHR did not formally use the “*effective control*” test, but instead did develop its own methods for attribution. First, there is the notion of ‘*ultimate authority and control’* that was addressed in the *Behrami and Saramati* (2007)cases in the ECHR. Here it was stated that where the UN had this level of control over the conduct of the troops, then such conduct should be attributed to the UN and not the troop contributing states. The ECHR declined its jurisdiction *ratione personae*. The ECHR rejected the claims, because it decided that the UN had *‘ultimate authority and control’* and therefore the troop contributing states could not be responsible. The Court concluded that since KFOR lawfully exercised delegated Chapter VII powers of the Security Powers and UNMIK was a subsidiary organ of the UN established under Chapter VII, the acts of KFOR and the inaction of UNMIK were in principle ‘attributable’ to the UN. The Court further noted that the UN possessed international legal personality separate from its member states and that it was not a party to the ECHR. Additionally, the operations were established under Chapter VII for the UN purpose to secure international peace and security which only could be effective with the support of the troop contributing countries. For these reasons the conduct of KFOR and UNMIK could not be attributed to the member states, since it neither took place on their territory nor by virtue of a decision of their authorities. Had the conduct been attributed to the involved member States, the application could have been dealt with by the Court. (Parliamentary Assembly of the Council of Europe, 2013). Also the European Convention lays down that” [*t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”,* with the reference to the concept of ‘within their jurisdiction’ rather than ‘within their territory’, the ECHR did not develop a consistent practice resolving the question of the Contracting States’ obligation to secure European Convention-based rights also out­side their territory. In *Bankovic* (2001), the ECHR went on to hold that NATO member States did not exercise effective control over Yugoslavia’s territory, and that the application was inadmissible and failed to outright endorse the principle that an individual over whom an European Convention Contracting State exercises control or authority falls, as a matter of course, within that State’s jurisdiction for purposes of the application of the Convention. (Ryngaert, 2012, p.58)

In so holding, the Court maintained the *Bankovic* principle that the European Convention only applies extraterritorially on an exceptional basis. The ECHR made allowance for only one exception to the essentially territorial application of the European Convention: the situation of inhabitants of a territory being under the effective territorial control of an European Convention Contracting State (see *Cyprus v Turkey* [GC] Appl No 25781/94, *Loizidou v Turkey* (preliminary objections) (1995), *Ilaşcu and Others v Moldova and Russia* [GC] Appl No 48787/99, *Issa and Others v Turkey* Appl No 31821/96 et. al.)

Before[[6]](#footnote-6) and after *Bankovic*, however, the Court developed case-law that appears to depart from a strict territorial or spatial model of ‘jurisdiction’, and emphasizes the intensity of control which European Convention Contracting States’ official agents exercise over individuals (the ‘State agent authority model’) (Ryngaert, 2012, p.58) The ECHR abandoned *Bankovic*’s ill-conceived *espace juridique* concept (*Al-Skeini and Others v United Kingdom, 2011, July 7,* App No 55721/07), and showed considerable sympathy for the personal or State agent authority model of jurisdiction (Ryngaert, 2012, p.59) Nonetheless, the Court hesitated to fully implement the personal model in *Al-Skeini*. Instead, it reintroduced *Bankovic* through the back door, by noting that the UK, in the specific – and exceptional – circumstances of the case, exercised ‘elements of governmental authority’ and ‘public powers’ which normally belong to a sovereign government.

It seems, as it was noted by Ryngaert (2012, p.60) that the ECHR is of the opinion that an unrestrained personal model (that the *effective control* test entails) may cast the net too wide and unjustifiably increase the obligations that States owe to individuals beyond their borders.[[7]](#footnote-7)

With regard to UN peacekeeping operations it is difficult to argue that a certain force exercises effective control over a territory or individuals during its deployment other than its own bases (see the concept of a “mini safe area in Srebrenica” in the Dutch District Court judgment of July 2014). It can be asserted that forces exercise effective control at particular times over particular locations, for example where UN forces escorted women on firewood collecting missions in Darfur. However, this is not sufficient to be able to ensure all fundamental rights of the relevant human rights instruments (Zantvoort, M., n.d, p.33). But it still remains a *questio facti et questio iuris* in every single case to which extend for example a national contingent was able to prevent a human rights violation on the ground, bearing in mind that in international and national law the principle of objective liability of states prevails.

Subsequently, the ECHR took a rather “conservative” position regarding the question of UN immunity. It highlighted that “*International law does not support the position that a civil claim should override immunity from suit for the sole reason that it is based on an allegation of a particularly grave violation of a norm of international law, even a norm of jus cogens.* (*Stitching Mothers of Srebrenica and Others v. The Netherlands*, Application No. 65542/12, judgment of 11 June 2013.) Similarly, the ECHR has held in *Al-Adsani* (Al-Adsani v. The United Kingdom, Application No. 35763/97, judgment of 21 November 2001) and confirmed in *Kalogeropoulou*, (Kalogeropoulou and others v. Greece and Germany, Application No. 59021/00, judgment of 12 December 2002) saying that “States are not under an obligation to disregard immunity, even when alleged breaches of peremptory, non-derogable norms are at stake. The ECHR, in *Stichting Mothers of Srebrenica (2013),* found that “*the risk of allowing individual States to interfere with this crucial mission of the United Nations and the Security Council meant that the Convention could not require United Nations immunity to be qualified.”* So in all these cases the ECHRrelied on the immunity of the United Nations to reject the application as manifestly ill-founded.It is a separate question now, as raised in the *Report of the Parliamentary Assembly of the Council of Europe* (2013), whether granting immunity even in cases of serious human rights violations is too far-reaching? A part of this question will be answered below, but only to the extent that is necessary to resolve the question of hierarchy of norms in international law.

1. ***Jus Cogens* Norms vs. UN Charter Obligations**

***3.1. Hierarchy of Norms and the Concept of Jus Cogens in International Law***

Article 38 of the ICJ[[8]](#footnote-8) Statute and ICJ case law clearly determined the sources[[9]](#footnote-9) of international law: principal (treaties and customs), complementary (general principles of law[[10]](#footnote-10)) and subsidiary (judicial decisions and doctrine[[11]](#footnote-11)).

But, unlike municipal law, public international law does not have a clear constitutional normative hierarchy of sources of law and legal norms (Zenović, 2012, p.14). In the international law system, as Salcedo (1997, p.583) noted, “states are simultaneously the creators and subjects of its norms; as sole authority on the laws they formulate, states themselves assess their meaning and scope”, creating so the fragmentary nature of international law. On the other side, to some extent a hierarchy of norms is recognized and accepted in international law (see in Motataianu, 2009). Namely, Article 103 of the UN Charter, also called the “supremacy clause” is seen by some scholars as an indication that the Charter is the constitution of the world community. The constitutionalist view of Article 103 appears to be based on the understanding that ‘the Charter is the supporting frame of all international law and, at the same time, the highest layer in a hierarchy of norms of international law (Kolb in Liivoja, 2008, p. 584). This Article in its entirety, reads as follows:

*“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”*

In this sense, where conflicts between obligations under the UN Charter and other obligations under any other treaty[[12]](#footnote-12) occur, including the European Convention and all the others human rights instruments, the UN Charter shall prevail. Such view was also expressed in the *Al-Jeddah* (2007) case, where the House of Lords upheld the view of the lower courts that Article 103 of the UN Charter prevails over the European Convention. There is little doubt that the duties placed on members in accordance with the UN Charter by binding decisions of the organs, are also obligations under the Charter for the purposes of Article 103, with the exception of *ultra vires* resolutions and decisions (Liivoja, 2008, p. 585).

As it can be seen, this “normative supremacy” of the UN Charter is only applicable when the source of the norm is a treaty, but there is no clause in the UN Charter defining the relationship to other sources of international law. Moreover, the practice of the General Assembly and the Security Council seem to provide little support for the claim that obligations under the Charter prevail over obligations under customarylaw by virtue of Article 103 (Liivoja, 2008, p. 607). Traditionally, a hierarchical difference between treaty and custom has not existed. If the two should be in conflict, the “time-rule” applies. The most recently developed rule of law prevails. It can be concluded that in international law there is no rule which gives one formal source preeminence over another, except in cases that are covered by the Article 103 of the UN Charter. Determining the priority among these sources of norms is resolved using well‐known principles of conflict resolution between norms that relate to the same matter (*lex posterior derogate legi priori, lex specialis derogate* *legi generali,* Zenović, 2012, p.15).

In general, as noted by Salcedo (1997, p. 585), the validity of international norms, like their effects, has no other ultimate basis than the will of or acceptance by the states for which they are law without any hierarchical structuring among them. There is one key exception to this concept in international law and that is the concept of *jus cogens.* The concept of *jus cogens* was legally defined by the *1969 Vienna Convention on the Law of Treaties* (VCLT). This convention was ratified and came into force after the UN Charter, and it is not retroactive by its application (Article 4, VCLT). But it should be noted that the VCLT[[13]](#footnote-13) only legally defined *jus cogens* while its substantial character was present in international law before the convention (Zenović, 2012, p.16). Further, by article 64 of the VCLT, if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates. Similar, in the *US v. Matta- Ballestreros* case (1995) this is confirmed, thereby emphasising that the norms are: *“[…] peremptory, enjoy the highest status within customary international law, are binding upon all nations, and cannot be pre-empted by treaty*.

Regarding the etiology of *jus cogens,* the dominant views can be identified: one which sees *jus cogens* directly originating from international law, the second basing them on existing sources of international law (thus, treaties, customs etc.) and the third which recognizes *jus cogens* as an entirely new source of law, a set of generally binding rules (see Zenović, 2012, p.22). These norms reflect customary and treaty rules from which no derogation is possible. Their existence entails the state obligation to respect them, since they reflect the values of the ‘international community’ which the vast majority of states perceive as norms of international law of higher status (Zenović, 2012, p.58). This concept also reflects the influence of Natural Law thinking (Shaw, 2008, p.126). By postulating a hierarchy of rules, rather than sources, on the basis of their content and underlying values, *jus cogens* has made its way into the very heart of the system (Bianchi, 2008, p.494), which indeed created a value based hierarchy of norms in international law, rather than a hierarchy based on formal sources. Precise criteria for claiming peremptory character for a norm are not given in the VCLT. Any norm, in principle, that is “so fundamental to the respect of the human person and elementary considerations of humanityʺ (I.C.J. Reports, 1996, par.79) could be potentially classified as a *jus cogens* norm. In a such value based categorization it is often very difficult to identify what is or should be a *jus cogens* norm, but for some norms there is a general acceptance and recognition between states to have *jus cogens* status (more about these norms will be presented below). Generally, it has been accepted that the core rights which are directly related to human existence are to be classified as *jus cogens* (Tomuschat, 2008, p.37).

Beside the problem of qualification of norms as *jus cogens* norms there is also the issue in which form (source) they occur. The norms of *jus cogens*, as Zenović (2012, p.24) states, are somewhere between legal positivism, since their existence is proved through analysis of international treaties and customs, and the natural law concept. They are considered to be norms of ‘higher’ value, separate from the sphere of state contractual law. As noted above, *jus cogens* norms can be found in treaties, but most of them occur as customary law. Even *jus cogens* norms that are embedded in treaties are mostly codified norms of customary law. Since states are the key subjects of international law it is reasonable to presume that states are older than any treaty and therefore customs, as the reflection of states’ behavior in inter-state relations, are the primary source of law in international law. It can be stated that customary law consists of the rules that emerge from the experiences of states over time as they try to resolve interstate problems (Henderson, 2010, 58).[[14]](#footnote-14)

The Article 53 of the VCLT supports such a view, stating that peremptory norms are norms that are “*accepted and recognized by the international community as a whole.*” ‘Accepted’ could be easily understood as state practice and ‘recognized’ as *opinio juris*, when that practice of a state is due to a belief that it is legally obligated. But there are some dissenting opinions on this matter in academic writings and case law, preferring rather the concept of *jus cogens* as an autonomous, new source of binding rules, because *jus cogens* imposes an obligation in and of itself, even if a state has not accepted it (see in Zenović, 2012, p.23). If this concept would be acceptable, then the questions raises who decides[[15]](#footnote-15) what *jus cogens* is, or more precisely, how it can be proven that a certain value (this is what essentially a *jus cogens* norm entails) is recognized by all states, considering the cultural variety in the world. Further, it is factually impossible that a state respects an international law norm[[16]](#footnote-16) without knowing of its existence reflected at least in some kind of relevant practice, especially in the case of *jus cogens* norms. Otherwise, there would not be a tangible, measurable indicator of a *jus cogens* norm. For these reasons, it is reasonable to accept that *jus cogens* norms primary occur through customary law.

The most general accepted method of building international customary law is through actual practice that must have been followed out of a sense of legal obligation, *opinio* *iuris*. Factors playing a role with regard to the nature of the particular practice are the duration, consistency, repetition and generality of the state practice (Shaw, 2008, p.76) The proof of state practice in human rights may be found primarily in the acts of and statements by state representatives to international organisations, and in internal legislative, administrative and judicial steps implementing international human rights at the domestic level. Secondly, once the existence of a particular state practice has been established, it is necessary to determine whether this practice results from a sense of legal obligation, *opinio iuris*. The process of *opinio iuris* begins when states behave in a certain way with the belief that such conduct is law or is becoming law. It then depends upon how other states react, by either accepting or rejecting this process of law-making. (Shaw, 2008, p.87). Actual practice of states is the best indicator of customary law, or as the International Court of Justice (ICJ) stated in the *Nicaragua case (1986): “…but in the field of customary international law, the shared view of the parties as to the content or what they regarded as the rule is not enough. The Court must satisfy itself that the existence of the rule in the opinio juris of States is confirmed by practice. “*Article 38 of the *1969 Vienna Convention on the Law of Treaties* ( VCLT) confirms third parties can be bound by obligations contained in a treaty through international custom, which is one of the required qualities for a *jus cogens* norm (to be binding *erga omnes*). In this sense, it is obvious that customary law fulfills all the requirements to be a proper form for *jus cogens* norms. But the question remains what makes a norm a *jus cogens* norm, a norm of higher value than other norms contained in the same formal source. This question will be partly answered below, but as this is an issue of values, or what is perceived to be some kind of a natural right, it is often very difficult to answer this question. One approach that could be used, in the author’s view, respecting the sounding of the VCLT, to identify *jus cogens* norms in formal sources is to see if this norm is at least in the form of a custom “*accepted and recognized* *by the international community as a whole”*(Article 53 of VCLT), even only on the level of a general principle, where for ordinary customary law norms such an “unanimity” is not necessary, needing only “relevant practice by relevant subjects on a relevant matter and level”.

In regard to the UN and its relationship to *jus cogens* norms, it is generally accepted that subjects of international law can also be bound by international customary law. Although the application of customary law is to international organizations such as the UN is not as obvious as it is for states, the UN, as a subject of international law, is certainly subject to *jus cogens* and as many would argue, to customary norms of human rights as well. (Zantvoort, M., n.d, p.13) In respect of human rights treaties, despite its international legal personality, the UN is, in most cases, not able to become a party to international instruments, because statehood is frequently a condition for acceding to such instruments. This is the consequence of the fact that the UN is an international organization and does not possess juridical or administrative powers to discharge many of the obligations that are enshrined in international treaties (Zantvoort, M., n.d, p.14)

* 1. ***The Jus Cogens Nature of Some Human Rights***

The importance of human rights during operations led by international organizations, as the UN by its peacekeeping missions, is a rising issue today. The most obvious accountability mechanisms to individuals for remedying human rights violations are the national judicial systems. But, most international organizations enjoy jurisdictional immunity before national courts, in order to be enable to fulfil their functions independently from their member states. Even where immunity of international organizations is granted only as far as it is required for the effective fulfilment of their functions (“functional immunity”), or is subject to other restrictions, this has often been interpreted widely, granting *de facto* absolute immunity (Parliamentary Assembly of the Council of Europe 2013) For these reasons, it seems reasonable to focus on the obligations of states to obey human rights during UN peacekeeping missions, if a human rights violation can be attributed to their contingents within UN PKM (see more above), because it is the only efficient way for victims to get redress before national courts, as the relevant practice shows (see above). As noted before, the “supremacy clause” of the UN Charter derogates all human rights treaties, including the European Convention on Human Rights (European Convention), so an invocation of relevant provisions of a human rights instrument before a national court against a TCS seems pointless. But, as shown, *jus cogens* norms entailed in customary law do not fall under the scope of the supremacy clause and the UN is bound by *jus cogens* norms, as every international organization. In this sense, if troop-contributing states (TCS) would act contrary to UN Force Commander instructions on the ground in the intention to prevent *jus cogens* violations, they would not act *ultra vires* because they would act in accordance with general customary international human rights law which essence the UN itself represents. The importance of human rights for the UN follows, as Zantvoort remarks (n.d.p.15), from the UN-Charter which places a high emphasis on international human rights standards. Besides the fact that the preamble to the UN-Charter states that it is one of the purposes of the UN “*to reaffirm faith in* *fundamental human rights, in the dignity and worth of the human person, in equal rights of* *men and women*”, article 1(3) of the UN-Charter expressly refers to the protection and promotion of a respect for human rights as one of the UN’s purposes. For this reason it can be concluded that the UN has an obligation to consider and promote human rights in all its work, thus including UN peacekeeping. Besides article 1(3), also article 55 and 56 of the UN Charter explicitly refer to human rights. The UN and peacekeeping forces can be bound by international human rights law by means of its own internal legal order, i.e. by examining the UN-Charter, the UN resolutions, UN reports, the Capstone Doctrine, and the different documents with regard to the specific peace operations. This perspective emphasizes that the UN’s internal legal and constitutional order obliges the organization to pursue its own purposes and principles (Zantvoort, M., n.d, p.19). *So,* if *jus cogens* is a reflection of existing law, a form of customary law that existed in the international legal order, it is clear that the UN charter and its interpretation necessarily need to correspond to these norms (Zenović, 2012, p.17). On the other side, if a TCS does not act to prevent, or even commits (its contingent) human rights, (that have *jus cogens* status) violations, thereby having effective control over its national contingent, it would be acting against general customary human rights law which makes the respective state liable under international[[17]](#footnote-17) and national law. Further, as it is stated in the *Commentary of Articles on Responsibility of States for Internationally Wrongful Acts* (p.85), “*where there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail.”*

To apply this to TCS that are faced with possible human rights violations, it is necessary to identify which concrete human rights fall under the scope of *jus cogens* norms in general international human rights law. It should be noted, as Zenović (2012, p.25) remarks, that both *human rights* and *jus cogens* are considered to have the same source: natural law. There is an almost intrinsic relationship between peremptory norms and human rights (Bianchi, 2008, p.491). But, it is clear that *jus cogens* norms, due to the supreme legal character and high normative threshold, cannot cover every individual human right. It is undisputed that the right to life, the prohibition of torture and degrading treatment, the prohibition of arbitrary deprivation of liberty and the prohibition of systematic racial discrimination are now recognized as rules of customary international law binding on all states (Zantvoort, M., n.d, p.18). Examples are several provisions of the Universal Declaration on Human Rights (UDHR) that have reached the status of customary law with the result that they are legally binding upon all states. Some norms embodied in the UN Charter also have *jus cogens* status. Regarding the European Convention, several non-derogable rights enumerated in Article 15 of the European Convention on Human Rights: namely the right to life; the right not to be subjected to torture or inhuman or degrading treatment; the right not to be held in slavery and the right not to be punished by retroactively imposed law, have *jus cogens* status. The Dutch Court of Appeals (2011, at par.6.3) reasoned that the acts (referring to the Dutchbat) were also wrongful based on a breach of the principles contained in Articles 2 and 3 European Convention on Human Rights and 6 and 7 ICCPR (right to life and right to freedom from inhumane treatment), arguing that these principles have to be considered as part of customary international law that bind the state.

**CONCLUSIONS**

It is evident that human rights contained in international treaties, cannot be applied during UN PKM since the “supremacy clause” of Article 103 of the UN Charter overrides it. But, on the other hand, it is possible for victims to invoke before national courts of the respective TCS, through the “backdoor”, human rights violations which represent *jus cogens* norms in general international law (namely the right to life; the right not to be subjected to torture or inhuman or degrading treatment; the right not to be held in slavery and the right not to be punished by retroactively imposed law) and to seek compensations for damages suffered from such violations. Doing so, moving from treaty law to customary law, the jurisdictional aspect could be disconnected from the substantive right which would lead to a better access to legal remedies and compensations for human rights violation victims. This has been powerfully demonstrated by the recent decisions of the Dutch courts.

This article tried to create a more creative approach, to the complex matter of liability in UN PKM, even going further then the Dutch courts did, showing that *jus cogens* norms have priority over all other international law and that TCS can always rely on this concept when engaging their troops through UN PKM. In this sense, there cannot be any legal excuse for TCS, having effective control over their contingents in UN PKM, not to secure and protect human rights that have *jus cogens* status.

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1. The article will focus solely on the attribution of the conduct of formed ‘blue-helmet’ military contingents in UN peacekeeping missions, and not that of UN military observers, civilian police or civilian personnel, which have a different status as experts or officials on mission and are governed by different rules and arrangements. [↑](#footnote-ref-1)
2. Article 1 of the International Law Commission’s Articles on State Responsibility reiterates the general rule, widely supported by practice, that every internationally wrongful act of a state entails responsibility. [↑](#footnote-ref-2)
3. Article 7 of the ILC Articles provides that the conduct of an organ or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the state under international law if acting in that capacity, even if it exceeds its authority or contravenes instructions. This shows the general acceptance of the objective theory of responsibility. [↑](#footnote-ref-3)
4. To resolve this issue there has to be an analysis of the matter of hierarchy of norms in international law. [↑](#footnote-ref-4)
5. On the other side, Lichtermann (2012) narrows this method and states that the *effective- control test* applies only in civil liability cases and not in criminal liability cases where the “*overall control*” standard is to be used. [↑](#footnote-ref-5)
6. For example: “*where a state exercise effective control over foreign territory, the human rights treaty to which this state is a party is applicable to its conduct in that foreign territory*.” (see ECHR, *Loizidou v. Turkey* (Merits), 1996, § 52) [↑](#footnote-ref-6)
7. Contrary to this opininion The Human Rights Commission (HRC) declared in its 1998 Report about Belgium and its troops in Somalia under the auspices of the UN Operation UNOSOM II that “*the Covenant automatically* *applies when it [the State party] exercises power or effective control over a person outside its* *territory, regardless of the circumstances such power or effective control was obtained, such* *as forces constituting a national contingent assigned to an international peacekeeping force* *or peace support operation. The State party should respect the safeguards established by the* *Covenant, not only in its territory but also when it exercises its jurisdiction abroad, as for* *example in the case of peacekeeping mission or NATO military missions, and should train the* *members of such missions appropriately.”(* Concluding Observations of the Human Rights Committee, 1998, par. 6) [↑](#footnote-ref-7)
8. The jurisdiction of the International Court of Justice (hereafter ‘the ICJ’) remains voluntary, even for members of the United Nations, who are as such parties to its Statute. There exists, however, a large and continually growing number of treaties, bilateral and multilateral, providing for each of the parties to bring a dispute with another party before the ICJ, or before another instance having powers of binding settlement (see: Thirlway, 2014). [↑](#footnote-ref-8)
9. The formal source is ‘the source from which the legal rule derives its legal validity’, while the material source ‘denotes the provenance of the substantive content of the rule. … [T]reaties are one formal source, and custom is another: thus, for example, the formal source of a particular rule may be custom, although its material source may be found in a bilateral treaty concluded many years previously, or in some state’s unilateral declaration (Jennings & Watts, p.23). [↑](#footnote-ref-9)
10. *The general principles of law* were included as a precaution, bearing in mind that international treaties and international custom could not supply an answer to every legal question that might arise before the international tribunal. Exactly what general principles may be invoked is controversial; what was originally envisaged seems to have been that a principle developed in national systems of law might be relied upon in an inter-State dispute which was in some way parallel to the circumstances of the national case (Thirlway, 2014). [↑](#footnote-ref-10)
11. *The judicial decisions and teachings of publicists* are specifically stated to be invoked merely ‘as subsidiary means for the determination of rules of law’. This last phrase goes to the question of hierarchy of sources: it is clear that the opinion of even the most highly qualified publicist cannot prevail over a rule clearly laid down in a treaty or established in customary law. They are also ‘subsidiary’ in another sense: they do not normally purport to be ultimate sources, but rather intermediaries (Thirlway,2014). [↑](#footnote-ref-11)
12. *Treaties and conventions* are a major feature of international relations; their defining function is to impose agreed duties on the parties to them. The binding force of treaties rests on a principle usually expressed as *pacta sunt servanda*—what has been agreed to is to be respected (Thirlway, 2014). [↑](#footnote-ref-12)
13. Article 53 of VCLT 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. “* [↑](#footnote-ref-13)
14. On the other side, for customary law to be seen as clearly established, several important questions are at stake: how many states must adhere, over what period of time, and with how much consistency before a custom is a firm rule of international law? The 1969 *North Sea Continental Shelf* case that came before the UN’s International Court of Justice (ICJ) is instructive regarding the number of states and even the amount of time needed to bolster customary law. The ICJ, did, however, for the first time, substantiate the thesis that provisions in treaties can sometimes generate new norms as customary law for non-treaty states. A treaty should have the support of a strong majority of states before the claim is made that a given treaty can imply norms applicable to the non-treaty states( see more in: Henderson, 2010, 59-64).For example, no one questions that the UN Charter, ratified by the vast majority of states, applies as customary law for the few states which have not joined the world body. However, it is difficult to say exactly how much time must pass for a custom to become customary law. Besides the number of states supporting a custom and the length of time in development, the consistency of state practice regarding a customary rule is important. (see more in :Henderson, 2010, p.59-64). [↑](#footnote-ref-14)
15. Especially bearing in mind that „*international norms in no way differ from each other as their legal value and their effects are ultimately based on the will or acceptance of the states alone. One cannot in fact find in international law either the centralization of power that guarantees respect for the law, nor the hierarchical distinction between modes of elaborating general and individual rules.”* (Salcedo, 1997, p. 585). [↑](#footnote-ref-15)
16. Law to be considered as law has to be accessible and foreseeable. [↑](#footnote-ref-16)
17. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfill the obligation (Article 40, DARS). Article 41 of DARS stipulates that States must cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40 (Art. 41.1) and no State can recognize as lawful a situation created by that serious breach nor render aid or assistance in maintaining that situation (Art. 41.2) [↑](#footnote-ref-17)