

## Book Review

Title : General International Law – *Jus Cogens*: A General Inventory  
Author : Robert Kolb  
Publisher : Oxford and Portland, Oregon: Hart Publishing, 2015.  
Book Reviewer : Irawati Handayani<sup>1</sup>

*Jus cogens* has been discussed for years by international law scholars around the world. Though there is no common agreement on the meaning of *jus cogens* of so-called peremptory norms, the majority of scholars seems to tacitly express their agreement on the highest position of *jus cogens* in international law. This book as mentioned in the title of the book is not an introductory book, refer to a book that explain the preliminary development of *jus cogens*. It is more likely an inventory that emphasizing on the key problems surround international *jus cogens* phenomenon. As underlined by Prof Robert Kolb that there are gaps in the existing discussion on *jus cogens*. He called that as “value-orientedness” of peremptory laws. The first highlight of this book is to explore the “value-orientedness” of *jus cogens*. The author has opinion that legal scholars should have more arguments on fundamental values of *jus cogens*. There should be additional steps to give these values and the legal construction that underlie them an exact setting in legal technique. The second focus of elaboration by Kolb addressed the legal literature on *jus cogens*. Most of the existing literature limits the concept of *jus cogens* as a public order norm, which is according to Kolb this is too narrow. Therefore, his book aims to deliver a full account of peremptory norm in international law outside the common view “public order” phenomena originated in the Vienna Convention on the Law of Treaties.

Prof Kolb elaborates the concept of *jus cogens* in a more comprehensive way. Means that he is not starting from the very basic knowledge of *jus cogens*, rather he attempts to define the concept in various ways that in line with legal certainty in order to assure the functionality of public order.

The book consists of eight parts. The first part discussed several definitions and the functions of *jus cogens*. Part two elaborates perspectives of the opponents of peremptory norms. The third part provides critical comments on justifying theories of *jus cogens*. The fourth part might be the significant part of this book since it offers fundamental views on the legal construction of the international *jus cogens*. The author discussed thoroughly the types of peremptory norms, their extension and the essence of peremptoriness. The sources for *jus cogens* are analyzed in the fifth part. Further, practical issues connected with effects of peremptory norms and conflict between them are discussed in part six and seven. Final part of this book provides a short conclusion.

---

<sup>1</sup> Lecturer and researcher at International Law Department, Faculty of Law Universitas Padjadjaran. S.H (Unpad), LL.M. (Raoul Wallenberg Institute-Lund University Sweden), Dr. (Unpad).

Prof Kolb in the first part of his book emphasizes that *jus cogens* is not concerning the norm itself, rather it is a legal quality of certain norms, it is peremptory or not. In other word, *jus cogens* is a quality of norm and not a norm in itself. *Jus cogens* also closely relates to the issue of “non-derogability”, which is according to Kolb it is the domain of peremptory norms. Since the core root of *jus cogens* norms is their non-derogability (p. 8). Kolb views on the nature of *jus cogens* definitely bring an inspiring perspective, not to mention also raise some doubts.

Interesting standing of this book is that Kolb refuses the justification of *jus cogens* based on natural law (pp. 31-32) while the common view confirms it. He contends that *jus cogens* as a legal technique, cannot be confused with natural law. Common view support that *jus cogens* considered as a “public order of the international community” and Kolb argues that *jus cogens* cannot limit itself solely to public order. Kolb has opinion that *jus cogens* comprises of several types and cannot be limited only to those who protect the fundamental value of international community. Kolb also confirms that *jus cogens* has nothing to do with hierarchical issue (p. 35) since in his opinion *jus cogens* is neutral and particularly concerned on relationship between *lex generalis* and *lex specialis*. Kolb further challenges the opinion that *jus cogens* is a matter of hierarchical with arguments it is not true that one superior norm will be prioritized in its application only because of its superiority. His standing has not been widely excepted and still debatable.

In his book Kolb also indicate that he supports the concept of *jus cogens* as a rule of international constitutional law which refers to fundamental general principles that underlying the existence of international legal order. However, he is not completely agreed on his own opinion and mentioned that it is too narrow to use theory of international constitutional law to justify *jus cogens*. He emphasizes that *jus cogens* has a lot of functions and not only protect the important principles of legal system. As already embodied in article 53 Vienna Convention on the Law of Treaty (VCLT) 1969, *jus cogens* is a general law which no derogation is permitted and Kolb sees this more as a legal technique inherent in law. Important point of *jus cogens* is its effect, i.e. non-derogability and clearly indicate the legal process of creation rather than the end product. The fundamental question here is that what is the normative status of *jus cogens* in international law? Still, Kolb emphasize that it is not a substantive rule rather it is only a legal technique inherent in general rule. Does it mean *jus cogens* only a formal procedural rule or a consequence of legal thinking? Is such understanding of *jus cogens* really grounded in positive law? Part four and five of this book try to answer all those questions.

Prof Kolb discussed three formal sources of *jus cogens*: treaties, customs and general principles with emphasize on the “non-derogability” as a ground of *jus cogens*. However, question arises with regard to other sources of *jus cogens* that might be as “meta-source”. Kolb does not answer this question clearly and provide a convincing argument. While he posits clearly that Article 53 of the VCLT 1969 is the only source that mentioned all international *jus cogens*. Therefore, it seems that his view on *jus cogens* and its justification rather incomplete. He admitted that the

discussion on the questions of what considered as sources of international law that underlie *jus cogens* is still vague and confusing (p. 89). The position of Kolb on *jus cogens* placed that *jus cogens* based on general and particular international law. Part of “public order” of *jus cogens* is place in sources of general international law, whereas the “public utility” aspect is based on particular international law. This position actually may lead to fragmentation of normativity of *jus cogens*. Further, Kolb also underlines that the relativity of *jus cogens* is in the domain of legal technique, which can be assumed a norm can be technically *jus cogens* and yet bind all states (p.95). This definitely raises some doubts, whether the relativity of *jus cogens* does not injure its peremptoriness? From this book we may conclude that the issues are not solved yet.

In the four part of this book, Kolb explains three types of *jus cogens*. The first consists of public order *jus cogens*, which refers to fundamental norms which protect basic values for the international community and its nature is non derogable. The second consists of public utility *jus cogens* that not particularly linked to the basic values or fundamental norms but directed to norm where the legislator has a common interest to sustain a firm, integrated and functionable legal system. The example of this second type of *jus cogens* is a constitutive treaty of international organization. The Statute of International Court of Justice is one of the common examples. The third type of *jus cogens* consists of logical *jus cogens*. According to Kolb, it encompasses the principles *pacta sunt servanda* and good faith (p. 56). However, the differentiation between these three types still unclear. The question is that is it necessary to make distinction between logical *jus cogens* with other two types? Both *pacta sunt servanda* and *bona fides* cannot be derogated without making contradiction in every legal order, since both norms are considered as primary general principles of law. The understanding of general principles lies at the center of peremptoriness in law, including international law. It confirms that *jus cogens* basically embodied in general principles. The nature of non-derogability of any rules of principle cannot be justified without *bona fides*, *pacta sunt servanda* and *estoppel*. It can be concluded that as matter of fact, *jus cogens* as a quality of a norm is something more than a legal technique and logical *jus cogens*. It is more than just a tool for international legal rules and provision. This might be different with Kolb’s standing.

Seventh part of this book offer an interesting discussion. Conflicts between *jus cogens* norms always become debatable issues. The example can be seen in the discussion of humanitarian intervention in the wake of the Kosovo intervention (1999) and emerging concept of “Responsibility to Protect”. Conflict emerges in both sides that said to be peremptory. The core challenge is to solve the problems and Kolb has listed some set of relations in term of peremptoriness. The first category is possible conflict between public order and public utility *jus cogens*; secondly conflict between public utility *jus cogens*; and thirdly conflict between public order *jus cogens*. The first category is not common to occur but it is possible to happen. The simple example as Kolb explain is the opposition between the duty to provide

remedies for breaching fundamental norm and the jurisdiction of international tribunal, such as International Court of Justice (p. 118). It is considered that both norms have a peremptory aspect, the former would be public order *jus cogens* and the latter is public utility *jus cogens* since it regulated by Statute of International Criminal Court (article 36). The real question is that is there really a conflict? Kolb argues in his book that there is no real conflict between *jus cogens* proposition. Conflict only occurred if there is a public order rule of international law that required any international organ to assume jurisdiction in respect of such breaches, and if moreover this rule were peremptory. The second category which conflict between public utility *jus cogens* norms considered as a complex problem. Taking example that not all norms inside the United Nations Charter and International Humanitarian law are public order. Conflict that occur between them can be framed as conflict between public utility *jus cogens*. Kolb underlined that the conflict solved by “meta-rules” on the competence UN organ in favour of the other *jus cogens* norms (p. 121). There is a limitation of UN organ, particularly through Security Council Resolution which leads to nullity in its operation if it is contrary to *jus cogens* norms. The last category which is conflict between public order *jus cogens* norm is mentioned by Kolb as the core problem of the conflict existing. Kolb mentioned the most common examples are the conflict between peremptory non-use of force and peremptory fundamental human right (such as prohibition of genocide) to be protected if necessary by military intervention. It is important to make sure that there is relevant norm in positive international to manage the conflicts among those norms. This third category offer a solution that if exist such conflict it should consider the substance of the rules that directly interact and a way out should be found by harmonizing legal interpretation (p. 123). So, it is not a matter of hierarchy nor prioritization.

Over all, the questions still arise with the fact that some substantive rules and principles related to fundamental values are recognized as *jus cogens*, while others are not. Kolb does not elaborate in detail to this question which actually quite interesting since it relates to the issue of legitimacy of international law and particularly the importance of state consent within it. However, this book also triggered the reader to rethink basic problems of international law and Kolb’s work has contributed a valuable thought for international law scholars.