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<b>Author:</b>	Parimal Wagh Saniya Sunil Ahir

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## JUS COGENS AND ENVIRONMENTAL DEMOCRACY: A LEGAL EXAMINATION OF THE AARHUS CONVENTION'S CORE PRINCIPLES

PARIMAL WAGH<sup>1</sup> & SANIYA SUNIL AHIR<sup>2</sup>

### ABSTRACT

*The interplay between jus cogens norms and environmental democracy represents a critical area of inquiry within international law. Jus cogens, or peremptory norms, are fundamental principles from which no derogation is permitted, reflecting the highest values of the international legal order. Simultaneously, environmental democracy promotes public participation, access to information, and access to justice in environmental matters, thereby empowering individuals and communities to engage in sustainable decision-making processes. The Aarhus Convention, a landmark international treaty, embodies the principles of environmental democracy and seeks to strengthen the relationship between environmental protection and democratic governance. This paper examines the legal dimensions of the Aarhus Convention and its alignment with the normative framework of jus cogens. It explores whether the principles enshrined in the Convention—access to information, public participation in environmental decision-making, and access to justice—can be elevated to the status of peremptory norms. The analysis reveals that while the Aarhus Convention significantly contributes to promoting environmental democracy, its classification as a peremptory norm remains contentious due to the need for broader consensus and legal formalisation.*

### INTRODUCTION

The term *jus cogens* can also be written as *ius cogens*, with the latter adhering more closely to classical Latin usage. Historically, the spelling *ius cogens* reflects its original Latin roots, as the letter "j" was not part of the classical Latin alphabet. Instead, "i" served both vowel and consonant functions. The modern spelling *jus cogens* gained prominence after the invention of the Gutenberg press, when stylised first letters of chapters often used "j" as a decorative variation of "i". Notably, the concept of *jus cogens* itself, referring to peremptory norms in international law, only emerged in the 19th century, long after the classical Latin period had ended.<sup>3</sup> *Jus cogens* refers to foundational norms of customary international law, often called "peremptory norms" in English. These norms are unique in two key ways: they are mandatory, compelling lawmakers to adhere to specific standards, and any treaty provision conflicting with a *jus cogens* norm is rendered invalid to the extent of the conflict. For a norm to qualify as *jus cogens*, its mandatory nature must be universally recognised by the international community, which confines these norms to prohibitions against grave violations such as

<sup>1</sup> Advocate at High Court of Judicature at Bombay.

<sup>2</sup> 4<sup>th</sup> Year B.L.S. LL.B. Student at Government Law College, Mumbai

<sup>3</sup> ROBERT KOLB, PEREMPTORY INTERNATIONAL LAW – JUS COGENS, (Hart Publishing 2015)

crimes against humanity, genocide, slavery, and human trafficking. While attempts have been made to expand the scope of *jus cogens* to include other rules, rights, and obligations, these efforts have generally been unsuccessful.<sup>4</sup>

Unlike regular customary laws, which rely on the consent of states and can be changed through treaties, peremptory norms, also known as *jus cogens*, are absolute and cannot be overridden by any state. These norms take precedence over treaties, local practices, or general customary rules that do not carry the same authority. Their importance in modern international law is highlighted in Article 53 of the Vienna Convention on the Law of Treaties (1969) (“VCLT”)<sup>5</sup>, developed with strong support from Third World and socialist nations during the 1960s. According to this provision, any treaty that conflicts with a peremptory norm is invalid. Peremptory norms are defined as principles recognised by the global community as binding and unchangeable, except through new norms of the same kind. While the Vienna Convention does not explicitly list these norms, it mentions prohibitions on the threat or use of force and coercion in treaty-making, emphasising their role in maintaining global peace and fairness. These norms ensure universal adherence to essential principles like the prohibition of genocide, slavery, and crimes against humanity.

The United Nations Economic Commission for Europe (“UNECE”) Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters, known as the Aarhus Convention, was adopted in Aarhus (Århus), Denmark, in 1998 and entered into force on 30 October 2001.<sup>6</sup> It has since been ratified by the European Union and forty-six countries across Europe and Central Asia, highlighting its widespread acceptance as a key legal instrument for promoting environmental democracy. The Aarhus Convention is widely recognised as a robust embodiment of procedural environmental rights, which are integral to ensuring the right to live in a healthy environment. Procedural rights refer to the mechanisms that enable individuals and communities to exercise and enforce their legal entitlements—in this case, their ability to access environmental information, participate in environmental decision-making, and seek justice in environmental matters. These rights align with the Convention's preamble, which draws on Principle 1 of the Stockholm Declaration<sup>7</sup>, affirming the right to a healthy environment, and Principle 10 of the Rio Declaration<sup>8</sup> on Environment and Development, which emphasises access to information, public participation, and access to justice as essential for achieving sustainable development.<sup>9</sup> The Aarhus Convention establishes a direct connection between these procedural rights and the substantive right to a healthy environment in Article 1, reinforcing the idea that empowering individuals and communities is essential for effective environmental governance. Through its three pillars, the Convention ensures that environmental democracy is upheld: the right to access information promotes transparency, public participation allows citizens to contribute

<sup>4</sup> CORNELL LAW DICTIONARY - LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/jus\\_cogens](https://www.law.cornell.edu/wex/jus_cogens) (Dec. 13, 2024)

<sup>5</sup> Vienna Convention on the Law of Treaties (VCLT), (May 23, 1969), 1155 U.N.T.S. 331.

<sup>6</sup> Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), (June 25, 1998), 2161 UNTS 447, 38 ILM 517

<sup>7</sup> Stockholm Convention on Persistent Organic Pollutants, (May 22, 2001) 2256 U.N.T.S. 119; 40 I.L.M. 532 (2001)

<sup>8</sup> Rio Declaration on Environment and Development, (Jun. 13, 1992) 31 ILM 874 (1992)

<sup>9</sup> Muki Haklay, Lea Shanley, Anna Berti Suman, Sven Schade, Dorte Riemenschneider, Nora Salas Seoane, Rosa Arias, and Simone Reufenacht, *Supporting Environmental Democracy and the Aarhus Convention*, SUPPORTING ENVIRONMENTAL DEMOCRACY AND THE AARHUS CONVENTION, (Oct. 6, 2020, 12:21 p.m.), <https://eu-citizen.science/blog/2020/10/06/supporting-environmental-democracy-and-aarhus-convention/>

to decision-making processes, and access to justice ensures that procedural rights are enforceable.

The concept of *jus cogens* (peremptory norms) is relevant to the Aarhus Convention because it underscores the non-derogable and universal nature of certain fundamental principles, such as the right to a healthy environment. While *jus cogens* norms are primarily associated with prohibitions on egregious acts like genocide or slavery, the growing recognition of environmental protection as a global priority suggests that aspects of environmental law could evolve into *jus cogens* norms. For example, the universal obligation to protect ecosystems critical for human survival may one day achieve the same normative status. The Aarhus Convention, with its emphasis on procedural rights, plays a pivotal role in this evolution by ensuring that individuals and communities can hold governments and corporations accountable for environmental harm. By advancing these principles, the Convention contributes to the broader international recognition of environmental rights as indispensable to human dignity and global justice.

### THE CONCEPT OF JUS COGENS IN INTERNATIONAL LAW

Many authors view *jus cogens* as a modern reflection of natural law<sup>10</sup>, as both embody universal principles of justice, morality, and fairness that transcend ordinary legal systems. Natural law, rooted in philosophy, posits the existence of inherent norms that guide human conduct and are superior to man-made laws. Similarly, *jus cogens* norms in international law are recognised as peremptory, overriding conflicting agreements or treaties and reflecting universal values binding all states. Examples such as prohibitions against genocide, slavery, or torture highlight their shared emphasis on upholding fundamental standards of justice. However, *jus cogens* departs from natural law by being grounded in positive law, requiring formal recognition by the international community of states, as outlined in Article 53 of VCLT. Unlike natural law, which is abstract and rooted in morality, *jus cogens* operates within a legal framework, ensuring its practical applicability while balancing universal principles with legal pragmatism. Despite its significance, *jus cogens* faces challenges, particularly when linked to natural law. Its integration into the legal framework lacks a formal mechanism, unlike ordinary laws with clear processes of creation. This absence can lead to uncertainty, as there is no definitive method to determine whether proposed norms belong to positive law. Natural law's influence also risks narrowing the scope of *jus cogens* by restricting its application to a minimal set of rational or moral norms. Natural law's static nature conflicts with Article 53 of VCLT, which allows for the modification of *jus cogens* norms.<sup>11</sup> Therefore, this flexibility aligns *jus cogens* with the evolving nature of positive law, ensuring its adaptability to contemporary international relations. Thus, while *jus cogens* reflects the ideals of natural law, it is better understood as a legal tool rooted in positive law rather than a philosophical extension of natural law. Recognising this distinction allows *jus cogens* to function as a dynamic mechanism of non-derogation, essential for maintaining international legal order.

The concept of *jus cogens* is often misunderstood as being absolute and unchanging, but in reality, it is a flexible and context-dependent legal technique. As part of positive law, *jus*

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<sup>10</sup> Dubois, D. (2009). The Authority of Peremptory Norms in International Law: State Consent or Natural Law?. *Nordic Journal of International Law* 78, 2, 133-175

<https://doi.org/10.1163/157181009X431730> [Accessed 22 December 2024]

<sup>11</sup> ROBERT KOLB, *supra* note 1.

*cogens* norms are neither monolithic nor static; they evolve over time and adapt to different contexts and subject areas. This adaptability is evident in three main aspects: time, space, and substance.

*Firstly*, *jus cogens* norms change over time. The number and scope of these norms expand as the international legal community evolves and recognises new fundamental principles. For example, norms that were once unacknowledged may now be widely accepted as peremptory due to shifts in global consensus; *Secondly*, *jus cogens* can vary regionally. While some norms may have universal acceptance, others might hold peremptory status only within specific regions, reflecting the diverse legal and cultural traditions of states; *Thirdly*, *jus cogens* operates differently across various areas of international law. In treaty law, *jus cogens* serves to invalidate agreements that conflict with fundamental norms, while in state responsibility or human rights law, its application focuses on ensuring accountability for violations of universally accepted principles.<sup>12</sup>

In the context of *jus cogens* in international law, the Aarhus Convention gains relevance as it embodies norms that could align with the evolving peremptory standards of international law. While the Aarhus Convention is not formally recognised as a *jus cogens* norm, its principles resonate with *jus cogens*' emphasis on universal justice and fairness, especially regarding environmental rights—a sphere increasingly acknowledged as vital to human survival and dignity. The Aarhus Convention's contribution to environmental justice could potentially influence the recognition of environmental protection as a *jus cogens* norm. The principles of access to information, public participation, and justice in environmental matters are increasingly seen as fundamental to upholding human rights, particularly in the face of climate change and ecological crises. As environmental degradation and its impacts on humanity gain international attention, the Aarhus Convention could serve as a foundational framework for recognising environmental rights as peremptory norms, further embedding them in the fabric of international law. Thus, its principles support the dynamism and universality characteristic of *jus cogens*.

## THE CORE PRINCIPLES OF THE AARHUS CONVENTION

The General Part of the Aarhus Convention encompasses its foundational elements: Article 1 (objective), Article 2 (definitions), and Article 3 (general provisions). The objective situates the Convention within international environmental law and sustainable development, providing an overarching aim to guide interpretation and application. Unlike the non-binding preamble, the general provisions are binding obligations enshrined in the main text, outlining rules and principles essential for its application. These provisions establish a framework for implementation, embodying core values crucial to the Convention's operation. The Aarhus Convention's three-pillar system ensures public participation, access to information, and access to justice in environmental matters.

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<sup>12</sup> Ch, Tomuschat and JM Thouvenin, *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Leiden/Boston, 2006) 15–16.  
DOI: <https://doi.org/10.1163/ej.9789004149816.i-472>

### **Pillar One: Access to Information**

According to Payne and Samhat, “...*participation is only effective when access to information is freely available to all*”.<sup>13</sup> Access to information is the first “pillar” of the Convention. Environmental rights in the preamble rely on public access to environmental information, active public participation, and access to justice, ensuring transparency, accountability, and enforcement for effective environmental protection. This section discusses both Article 4 on access to environmental information and Article 5 on the collection and dissemination of environmental information as the two components of the access to information pillar. The Convention's access to information provisions are detailed in Article 4 and Article 5 of Aarhus Convention. Article 4 establishes individuals' general right to request and access existing environmental information, known as “passive” access, while Article 5 focuses on proactive collection and dissemination of such information to ensure public awareness and transparency.

Pillar one of the Aarhus Convention emphasises the shift from the need to the right to know, reflecting the cosmopolitan all-affected principle. Knowledge empowers individuals to make informed decisions that protect them from harm. While knowledge itself doesn't liberate, it is a tool for protecting autonomy and preventing harm. By requiring both passive disclosure and proactive information sharing between the state and citizens, the pillar upholds human autonomy, enabling individuals to safeguard their environment and well-being. Knowledge, enshrined as a human right, is essential for health and freedom. Rights, grounded in moral urgency, address needs critical to avoiding harm. Nonetheless, these concerns should not detract from the pillar's positive progress. Cosmopolitanisation occurred within established political structures, with solidarist ethics strengthening the existing system. This is more practical and preferable than radical ideas of people's power taking control of knowledge, resources, and sovereignty. Applying the all-affected principle within traditional frameworks offers a chance for states to adopt global values and improve the political system from within, making it more just and stable.

### **Pillar Two: Public Participation**

According to Elliot, “*Participatory 'rights' run the risk of becoming most meaningful for those NGOs and other stakeholders that are well-organised, well-financed and well-informed. The emphasis on democratic efficiency...takes little account of the relations of power and powerlessness which mute local or marginal voices.*”<sup>14</sup> Public participation allows individuals and communities to influence decisions that could harm them. The Aarhus Convention provides robust participatory provisions, focusing on two main benefits: legitimacy and problem-solving, both of which empower people to have a say in decisions that impact them. The second pillar of the Convention aims to enhance decision-making by expanding the diversity of values and information considered in the process. The Convention mandates public participation to be timely, effective, and formal, emphasising essential elements like information sharing, notification, open dialogue, thoughtful consideration of inputs, and providing a meaningful response.

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<sup>13</sup> Duncan Weaver, *The Aarhus Convention: towards a cosmopolitan international environmental politics*, Keele University, 1, 71, (2015)

<sup>14</sup> *Id.* at 83.

Its provisions are organised into three key areas: Article 6 covers participation in decisions involving activities with significant environmental impacts, such as the siting, construction, and operation of large facilities or product licensing. Article 7 addresses public involvement in the development of environmental plans, programmes, and policies at all levels, including land use and action plans. Article 8 emphasises involving the public in drafting laws and regulations, ensuring transparency, accountability, and inclusive decision-making by authorities.

### **Pillar Three: Access to Justice**

According to Rodenhoff, *“It is the third pillar on access to justice which lends the Convention its teeth.”* As Pedersen quoted, Justice is considered the “final and most contentious right” of the Aarhus Convention and the “*pièce de résistance*”<sup>15</sup> which means “the most important or notable thing.” It relies on the prior pillars—without access to information and participatory opportunities, citizens cannot effectively seek redress. It also serves as a safeguard for these pillars, providing mechanisms to challenge violations. As Crossen and Niessen note, *“rights are only meaningful if they can be enforced.”*<sup>16</sup> This pillar aims to enhance citizens' ability to access environmental information, participate in decision-making, and hold authorities accountable through legal action.

Justice in the Aarhus Convention is largely procedural, offering mechanisms to address issues like improper information disclosure or inadequate participation. The underlying idea is that effective access to information, participation, and legal remedies equips citizens to influence environmental decisions. While the Convention offers limited substantive environmental rights, this may hinder both environmental protection and broader cosmopolitan goals. As Holder and Lee observe, the Convention primarily treats rights as a means to enhance participation and improve environmental quality.<sup>17</sup>

Pillar three provides mechanisms for active participation, helping individuals fulfil their environmental responsibilities. The Convention acknowledges human responsibility in protecting the environment, reflecting Harris's vision of “cosmopolitan ethics” and Elliott’s concept of ecologically conscious cosmopolitanism, which calls for justice both among individuals across borders and between states.<sup>18</sup> However, this chapter also points out significant challenges to cosmopolitanisation, raising doubts about the real-world effectiveness of direct citizen enforcement, as what appears cosmopolitan in theory may have a limited impact in practice.

Aarhus' strong focus on procedural aspects may cause both states and citizens to overlook the substantive environmental outcomes of decisions, thereby hindering the process of cosmopolitanisation. By prioritizing procedures such as access to information, participation, and justice, the Convention could unintentionally shift attention away from the actual environmental impacts. The significant costs involved in time, effort, and financial resources may deter many citizens from pursuing environmental justice, making it less likely for them

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<sup>15</sup> *Id.* at 108.

<sup>16</sup> *Id.* at 108.

<sup>17</sup> *Id.* at 71.

<sup>18</sup> *Id.* at 119.

to engage in the process or challenge harmful decisions. It presents a practical barrier to achieving meaningful environmental change through the Convention's mechanisms.<sup>19</sup>

### THE INTERSECTION OF JUS COGENS AND ENVIRONMENTAL RIGHTS

According to Patricia Birnie, environmental rules in international law do not inherently possess a superior status over other legal norms unless they fall under the category of *ius cogens*.<sup>20</sup> However, no environmental norm has yet been convincingly identified as *ius cogens*. Birnie argues that there is also no compelling reason to treat environmental norms as automatically superior to other legal rules, even in cases where conflicts arise between environmental protection and other priorities, such as socio-economic development.<sup>21</sup> The principle of sustainable development encapsulates the delicate balance between the need for economic growth and the imperative of environmental protection. Conflicts often arise in this domain because socio-economic development initiatives, such as industrialization or urban expansion, can directly or indirectly harm the environment. Conversely, stringent environmental regulations can constrain economic opportunities and development projects, particularly in developing nations striving for growth.

Despite these conflicts, international courts and tribunals have been cautious in addressing such tensions. They have refrained from employing the concept of *ius cogens* to resolve disputes in environmental law.<sup>22</sup> Also, no automatic prioritization has been granted to human rights, environmental protection, or economic development in international legal adjudication. For instance, international courts have often sought to reconcile competing interests rather than outright favouring one over the other. While this method helps prevent conflicts from escalating, it also reflects the absence of a clear hierarchy in international law where environmental norms would uniformly override other considerations.

Singleton-Cambage concurs that environmental rights and responsibilities do not yet hold the elevated legal status of *jus cogens* norms, despite the universal importance of global environmental preservation. However, for norms to achieve *jus cogens* status, they must meet stringent criteria. These include widespread and consistent state practice over an extended period, coupled with general recognition by the majority of states that the norm is fundamental and non-derogable. The process of establishing *jus cogens* norms is gradual and heavily reliant on the development of international consensus. It requires sustained commitment and adherence by states to specific practices, thereby demonstrating that these principles are universally binding and hold a superior position within international law. Environmental law, while gaining prominence and acknowledgment in global discourse, has not yet matured to this level of normative acceptance.<sup>23</sup>

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<sup>19</sup> Ryall, Á. Chapter 6: 'The Aarhus Convention: Standards for access to justice in environmental matters', in Turner, S. J., Shelton, D. L., Razzaque, J., McIntyre, O., May, J. R. (eds.) *Environmental Rights: The Development of Standards*, 116-146, Cambridge : Cambridge University Press (2019)

<sup>20</sup> PATRICIA BIRNIE, ALAN BOYLE, CATHERINE REDGWELL, *INTERNATIONAL LAW AND THE ENVIRONMENT*, 3RD EDN. OXFORD UNIVERSITY PRESS, OXFORD (2009)

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Singleton-Cambage K (1995), *International legal sources and global environmental crises: the inadequacy of principles, treaties and custom*. ILSA J Int Comp Law 2:171-187



No multilateral environmental agreement (“MEA”) has been invalidated due to conflict with a *jus cogens* norm under Articles 53 and 64 of VCLT. This includes situations where a treaty or its provisions might contradict universally accepted principles of international law, including on environmental grounds. The absence of such cases reflects the unlikelihood of states deliberately drafting treaties that promote actions fundamentally at odds with the international legal order, such as genocide or deliberate environmental destruction. While environmental harm might occur indirectly through certain treaty-related activities—like the potential environmental impacts of nuclear weapons—these consequences are often incidental rather than the treaty’s primary objective. As a result, states are less likely to intentionally formulate treaties that directly contravene the core principles of *jus cogens*.<sup>24</sup>

In his treatise on *jus cogens*, Lauri Hannikainen briefly addresses environmental protection in a section titled “Prohibition of Causing Widespread, Long-term and Severe Damage to the Natural Environment.” His analysis is narrowly focused on the marine environment, approached through the framework of the law of armed conflict. His perspective limits the scope of his discussion by implying that the environment’s protection as a *jus cogens* norm is primarily associated with armed conflict and its consequences. Hannikainen’s rationale stems from the prohibition of aggressive use of force, which is widely recognised as a *jus cogens* norm. Hannikainen’s analysis raises questions about the broader implications of environmental degradation, which occurs not only in marine ecosystems but also on land and in the atmosphere. Issues such as transboundary air pollution, deforestation, and desertification highlight that environmental harm is not confined to situations of armed conflict.<sup>25</sup> The narrow framing of environmental harm in his treatise overlooks these pressing global challenges, which also undermine the collective interests of the international community. However, this focus seems restrictive, given that environmental harm, particularly in the marine context, can result from broader causes beyond armed conflict, such as climate change or overexploitation of natural resources. Despite these limitations, Hannikainen argues that it would be premature to conclude that no peremptory prohibition exists against widespread, long-term, and severe pollution of the marine environment. He contends that such pollution would fundamentally conflict with the shared interests of the international community of states. However, he posits that the existence of such a prohibition must be examined within the criteria established by the law of armed conflict. His reasoning stems from the observation that international law has not explicitly prohibited the use of nuclear weapons and other weapons of mass destruction, which are among the most significant potential causes of severe marine pollution. The nexus between armed conflict and environmental harm emphasises the gravity of weapons-related pollution but does not address other forms of environmental degradation that can occur outside the context of war. Hannikainen’s analysis, while insightful, highlights the fragmented nature of international environmental law and its relationship with *jus cogens* norms. Ultimately, Hannikainen’s work serves as a starting point for discussions about the intersection of environmental protection and *jus cogens*. It highlights the potential for future legal development in this area, emphasising that a peremptory norm prohibiting widespread environmental harm may align with the interests of the global community. But, for such a norm to gain recognition, it would require sustained advocacy, widespread state practice, and explicit acknowledgement within

<sup>24</sup> Kotzé, L.J. (2016). *Constitutional Conversations in the Anthropocene: In Search of Environmental Jus Cogens Norms*. In: Heijer, M., van der Wilt, H. (eds) Netherlands Yearbook of International Law, vol 46. T.M.C. Asser Press, The Hague (2015).

[https://doi.org/10.1007/978-94-6265-114-2\\_9](https://doi.org/10.1007/978-94-6265-114-2_9)

<sup>25</sup> HANNIKAINEN L, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS. Finnish Lawyers’ Pub Co, Helsinki (1988)

international legal frameworks. As environmental degradation continues to threaten global well-being, the recognition of environmental protection as a *jus cogens* norm may become an urgent necessity.

In the 2004 judgment of the German Federal Constitutional Court (2 BvR 955/00), the Court recognised *jus cogens* norms as including those that protect international peace, uphold states' right to self-determination, and secure fundamental human rights. Notably, the Court also acknowledged "core norms to protect the environment" within this framework. However, the judgment did not explicitly define or elaborate on what constitutes these core environmental norms, leaving their scope and application open to interpretation.<sup>26</sup> The judgment implies that environmental norms attain *jus cogens* or peremptory status only when they are intrinsically linked to rights, particularly when environmental harm infringes upon rights-related interests.<sup>27</sup> Consequently, general environmental protection measures, such as those aimed at preserving ecosystems or promoting sustainability, are not granted *jus cogens* status unless they can be tied to the protection of human rights. This perspective underscores the reliance on rights-based frameworks to elevate environmental norms within international law, highlighting both the potential and limitations of this approach in addressing global environmental challenges.

A closer reading of the judgment suggests that the Court limited the *jus cogens* status of environmental protection to measures directly tied to human rights. It implies an emphasis on rights-based approaches to environmental protection, such as the right to a clean and healthy environment, which intersects with fundamental human rights. By doing so, the Court implicitly excluded broader environmental rules and principles that might not have a direct human rights dimension, such as general environmental conservation or sustainability practices. It reflects a narrower application of *jus cogens* to environmental protection, aligning it more closely with established human rights frameworks. While this decision acknowledges the importance of environmental protection, it highlights the limitations of existing legal frameworks in recognising broader environmental rules as peremptory norms.

### THE AARHUS CONVENTION'S CONTRIBUTION TO INTERNATIONAL ENVIRONMENTAL LAW

In recent decades, the idea and practice of participatory democracy has gained widespread recognition as a fundamental aspect of good governance. It is increasingly acknowledged that involving the public in decision-making processes not only enhances the quality of decisions but also bolsters the credibility of the decision-making process and its outcomes.

The Aarhus Convention plays a crucial role in advancing good governance, particularly in the areas of environmental protection and law enforcement. It is regarded as the leading international instrument that bridges the gap between environmental protection and human rights. The Aarhus Convention grants rights to the public and imposes obligations on Parties

<sup>26</sup> Order of the German Federal Constitutional Court, 2 BvR 955/00, 26 October 2004, Deutsches Verwaltungsblatt 2005, at 178 para 1(c)

<sup>27</sup> Kotzé, L.J. (2016). *Constitutional Conversations in the Anthropocene: In Search of Environmental Jus Cogens Norms*. In: Heijer, M., van der Wilt, H. (eds) Netherlands Yearbook of International Law, vol 46. T.M.C. Asser Press, The Hague (2015). [https://doi.org/10.1007/978-94-6265-114-2\\_9](https://doi.org/10.1007/978-94-6265-114-2_9)

(countries or entities that have ratified the Convention) and their authorities concerning access to environmental information, public participation in environmental decision-making, and access to justice in environmental matters<sup>28</sup>. At its core, the Convention facilitates interaction between the public and government authorities, fostering an open administrative culture that contributes to greater governmental accountability, transparency, and efficiency.

The Convention's origins can be traced back to Principle 10 of the Rio Declaration<sup>29</sup> on Environment and Development, which emphasises public access to environmental information and participation in decision-making. Within the UNECE region, this principle was further developed through the creation of non-binding Guidelines on Access to Environmental Information and Public Participation in environmental decision-making. These guidelines were formally endorsed by UNECE Environment Ministers at the Third Ministerial 'Environment for Europe' Conference in Sofia, Bulgaria in October 1995, and became known as the Sofia Guidelines.<sup>30</sup>

The provisions of the Aarhus Convention are closely aligned with several key articles of the International Covenant on Civil and Political Rights<sup>31</sup>, including Article 6 (right to life), Article 19 (right to information), Article 14 (right to a fair trial), and Article 25 (right to participate in government). These connections underscore the Convention's dual focus on both human rights and environmental protection.

The Aarhus Convention's rights apply to all individuals and legal entities, regardless of nationality or residence, ensuring that anyone can exercise their rights under the Convention without fear of persecution, penalty, or harassment.

One distinctive feature of the Aarhus Convention is its extraordinary level of involvement of non-governmental organizations (NGOs) and civil society groups. These organisations have played a pivotal role in enhancing the transparency and openness of the processes governed by the Convention, contributing to the overall effectiveness of its implementation. The Convention requires that the same standards of access to environmental information and public participation in decision-making be applied not only by state bodies (national, regional, or local government entities) but also by non-state actors who perform public administrative functions under national law. According to Article 2, Paragraph 2 of the Convention, public authorities are defined broadly to include not just government entities but also any natural or legal person carrying out public administrative functions related to environmental matters, including public service providers. An example of this broad application can be seen in the findings of the Aarhus Convention Compliance Committee regarding a state-owned enterprise in Kazakhstan responsible for the atomic power industry.

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<sup>28</sup> UNECE Aarhus Convention Secretariat, *THE ROLE OF THE AARHUS CONVENTION IN PROMOTING GOOD GOVERNANCE AND HUMAN RIGHTS*

[https://www.ohchr.org/sites/default/files/Documents/Issues/Development/GoodGovernance/Corruption/ECONOMIC\\_COMMISSION\\_FOR\\_EUROPE.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Development/GoodGovernance/Corruption/ECONOMIC_COMMISSION_FOR_EUROPE.pdf) (last visited Dec. 21, 2024).

<sup>29</sup> Rio Declaration on Environment and Development, Jun. 13, 1992 31 ILM 874 (1992)

<sup>30</sup> DECLARATION by the Ministers of Environment of the region of the United Nations Economic Commission for Europe (UNECE) 25 October 1995,

<https://unece.org/fileadmin/DAM/env/efe/history%20of%20Efe/Sofia.E.pdf> (last visited Dec. 21 2024)

<sup>31</sup> United Nations (General Assembly). International Covenant on Civil and Political Rights. Treaty Series, 999, 171. (1966)

However, the definition of public authority explicitly excludes bodies acting in a judicial or legislative capacity. Nevertheless, courts are expected to apply the principles of the Convention in environmental cases and ensure access to justice in line with Article 9 of the Convention. The strength of the Aarhus Convention lies in its binding obligations on public authorities to ensure access to environmental information, public participation in environmental decision-making, and access to justice. These obligations are supported by an effective compliance mechanism, subsidiary bodies, and a work programme that helps facilitate the implementation of the Convention's provisions. The Convention establishes minimum standards, but it also allows Parties to adopt measures that go beyond these requirements, thereby encouraging further progress in the areas of information access, public participation, and environmental justice.

Implementation of the Aarhus Convention is monitored through national reporting (as per Article 10 of the Convention and Decision I/8 of the Meeting of the Parties) and a compliance mechanism detailed in Article 15. Since the Convention's entry into force, over 70 public communications have been submitted to the Aarhus Convention Compliance Committee, highlighting its role in facilitating public participation in the enforcement of environmental rights. Further support for the implementation of the Convention's provisions is provided through initiatives like the UNECE Strategy for Education for Sustainable Development (ESD), which links education, public participation, and accountability in environmental governance. The third phase of this strategy emphasises creating synergies between the Aarhus Convention and other relevant processes, reinforcing the integration of participatory decision-making and accountability in the environmental policymaking process.

Though initially a regional agreement for UNECE member states, the Aarhus Convention has inspired broader international principles and is regarded as a model for environmental governance worldwide. Several countries beyond the UNECE region have adopted similar frameworks inspired by the Convention's principles. The Aarhus Convention has helped to shape and reinforce the legal framework for MEAs, promoting transparency and public engagement as essential components of sustainable environmental governance. It has influenced the adoption of similar public participation provisions in agreements such as the Convention on Biological Diversity (CBD) and the United Nations Framework Convention on Climate Change (UNFCCC). The Aarhus Convention also aligns closely with the United Nations' Sustainable Development Goals, particularly Goal 16, which focuses on promoting peaceful and inclusive societies, access to justice, and effective, accountable institutions.

In a nutshell, the Aarhus Convention is a groundbreaking instrument that has not only advanced environmental governance but has also strengthened the democratic governance of environmental policies. It continues to serve as a model for international cooperation and public participation in environmental decision-making, with ongoing efforts to enhance its application and impact worldwide. By connecting the principles of access to information, public participation, and access to justice, the Aarhus Convention has set a precedent for integrating democratic values into environmental policymaking, positioning it as one of the most crucial instruments in global environmental law today. One of the most important objectives of the Aarhus Convention refers to the protection of the planet and its ecosystems by creating a participatory democratic system. Therefore, the Convention represents the shared concern of the parties to ensure government accountability and responsiveness in the environmental field. The transposition of the requirements of the Aarhus Convention

represents a valuable contribution to the process establishing good environmental governance.<sup>32</sup>

With its forward thinking approach, the Aarhus Convention has empowered the public to play an active role in environmental issues and has redefined the role of civil society in holding governments accountable for their environmental obligations. Its influence extends well beyond the UNECE region, shaping the development of environmental law and policy across the globe.

## LEGAL ANALYSIS OF AARHUS CONVENTION PRINCIPLES AS JUS COGENS & ITS IMPLICATIONS

The Aarhus Convention enshrines the principles of environmental democracy, establishing public rights in three key areas: access to information, participation in decision-making, and access to justice concerning environmental matters. The concept of jus cogens (peremptory norms) refers to principles of international law that are universally recognised and binding, permitting no derogation. Analysing the Aarhus Convention principles in light of jus cogens involves examining their universal applicability, significance to the international community, and their interplay with state sovereignty. Upon its ratification by the EU and subsequent entry into force, the Aarhus Convention was integrated into EU law, becoming binding on all Member States. The EU Court of Justice holds the authority to interpret and enforce the convention, providing legal clarity and ensuring consistent application across Member States. This alignment strengthens environmental governance within the EU and promotes adherence to international environmental standards. All EU Member States have been party to the Aarhus Convention since 2012.

The *first pillar*, access to environmental information, ensures transparency by obligating public authorities to provide information about environmental matters. Transparency is essential for holding governments accountable and empowering individuals to make informed decisions about environmental risks. The universal need for environmental protection aligns this principle with the jus cogens norm of safeguarding human rights, particularly the right to a healthy environment.<sup>33</sup> The *Second pillar* empowers individuals to participate in decisions affecting their environment, reinforcing democratic governance and sustainability. The principle resonates with the broader human rights framework, such as the right to self-determination, and strengthens procedural equity, which is increasingly recognised as a cornerstone of international environmental law.<sup>34</sup> The *Third pillar* ensures remedies for violations of environmental laws, bridging the gap between procedural and substantive rights. The recognition of access to justice as a fundamental principle of rule of law underscores its

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<sup>32</sup> Milan Počuča, Marijana Mladenov, Predrag Mirković, *The Analysis Of The Aarhus Convention In The Context Of Good Environmental Governance*, Economics of Agriculture, Year 65, No. 4, 2018, (pg nos. 1615-1625), Belgrade, 1623 (2018)

<sup>33</sup> The First pillar concerning the right to receive environmental information was implemented at EU-level was DIRECTIVE 2003/4/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on public access to environmental information and repealing Council Directive 90/313/EEC (28 January 2003)

<sup>34</sup> The second pillar on the right to participate in environmental decision-making was implemented by DIRECTIVE 2003/35/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (26 May 2003)

potential *jus cogens* status. It establishes that the public must have the legal capacity to challenge decisions that threaten environmental integrity, reinforcing accountability.<sup>35</sup>

### Implications of Recognising Aarhus Convention Principles as *Jus Cogens*

- Recognising these principles as *jus cogens* would impose non-derogable obligations on all states, ensuring uniform adherence irrespective of domestic laws or conflicting treaties.
- Elevation to *jus cogens* status would empower international courts and tribunals to prioritise environmental democracy over conflicting norms, enhancing global environmental governance.
- Acknowledging these principles as *jus cogens* would reaffirm environmental protection as an intrinsic part of human rights, influencing the interpretation of existing human rights treaties.
- While the universality of *jus cogens* norms ensures global applicability, significant disparities in legal systems and political will could hinder uniform enforcement. The principle of state sovereignty may also conflict with the imposition of universal norms, especially in regions with weak legal frameworks.

### CONCLUSION

At its core, the Aarhus Convention recognises the intrinsic link between environmental integrity and human rights. Access to information ensures transparency, enabling individuals and communities to make informed decisions about environmental issues that directly affect their lives. Public participation empowers citizens to influence environmental policymaking, fostering inclusivity and accountability. Access to justice ensures that individuals and groups can challenge violations of environmental laws or decisions that threaten ecological well-being. Together, these pillars create a dynamic system that aligns with established human rights norms, such as the rights to life, health, and a clean environment. Environmental degradation disproportionately affects vulnerable populations, exacerbating inequalities and undermining fundamental rights. The elevation of Aarhus principles to *jus cogens* would impose uniform obligations on all states, irrespective of their domestic laws or treaty commitments. Unlike customary international law, which allows states to opt out through persistent objection, *jus cogens* norms are universally binding and non-derogable. This would prevent states from evading their environmental responsibilities by citing competing treaties or prioritising economic interests over ecological sustainability. It would also create a consistent legal baseline for environmental governance, ensuring that all nations adhere to the same standards. Such a framework is vital in an era of escalating global environmental crises, where unilateral actions by states can have far-reaching and irreversible consequences.

The third pillar of the Aarhus Convention, access to justice, underscores the critical role of judicial mechanisms in holding both public and private actors accountable for environmental harm. Recognising Aarhus principles as *jus cogens* would reinforce the rule of law in environmental governance, empowering individuals and communities to challenge decisions

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<sup>35</sup> The third pillar, access to justice, is reflected in Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (6 September 2006)

or policies that threaten ecological integrity. It would strengthen the global commitment to accountability and transparency, ensuring that environmental violations are addressed effectively and equitably. However, the elevation of Aarhus principles to *jus cogens* also presents challenges, particularly for states with economies heavily reliant on natural resource exploitation. Stringent environmental governance frameworks often entail increased regulatory oversight and transparency, which can raise the cost of development projects and deter investment. For instance, the emphasis on public participation and inclusivity may delay project approvals, heighten public scrutiny, and discourage investors seeking quicker returns. These challenges are especially acute in regions where poverty alleviation and economic development are pressing priorities, as the implementation of Aarhus principles could require significant economic sacrifices.

Despite these concerns, the urgency of addressing global environmental challenges outweighs the potential costs. Climate change, biodiversity loss, and pollution pose existential threats that demand immediate and collective action. The elevation of Aarhus principles to *jus cogens* should therefore be accompanied by a collaborative framework that accommodates the diverse capacities and priorities of states. Mechanisms for financial and technical assistance, equitable sharing of responsibilities, and flexibility in implementation can help address the challenges faced by resource-constrained nations. Such a framework would foster international cooperation and solidarity, enabling all states to contribute meaningfully to environmental protection without compromising their sovereignty or economic interests. Ultimately, recognising the Aarhus principles as *jus cogens* would represent a progressive step toward environmental justice and sustainable development. It would embed environmental democracy at the highest level of international legal hierarchy, reinforcing the imperative of safeguarding ecological integrity as a fundamental human right. By prioritising inclusivity, transparency, and accountability, the global community can address the twin crises of environmental degradation and inequality, ensuring a sustainable future for generations to come.