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The concept and status of *Jus Cogens*: An overview

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Abstract
This article offers an overview regarding the concept and the status of *jus cogens*. The overview makes intelligible the concept of *jus cogens* as provided by the International Treaties, Cases and the Law Experts. There are still some debates regarding the concept and status of *jus cogens* among the international community. According to the proposition argued in this article, irrespective of debate, the concept and status of *jus conges* rules are enshrined in the Vienna Convention on the Law of Treaties 1969 (VCLT) and the international community treat *jus cogens* norm as one of the fundamental principles of international law.

Keywords: concept, status, *jus cogens*, international law

1. Introduction
Within the literature of customary international law, *jus cogen has* been and remains an important doctrine. *Jus cogens*, the literal meaning of which is 'compelling law,' is the technical term given to those norms of general international law that are argued as hierarchically superior [1]. These are, in fact, a set of rules, which are peremptory in nature and from which no derogation is allowed under any circumstances [2]. According to Oxford Dictionary of Law *jus cogens* refers to a rule or principle in international law that is so fundamental that it binds all states and does not allow any exception' [3]. Thus the concept of *jus cogens* in the context of international law indicates that it is a body of fundamental legal principle which is binding upon all members of the international community in all circumstances. The Influential Restatement on Foreign Relations of the United States (Restatement) defines "*jus cogens* to include, at a minimum, the prohibitions against genocide; slavery or slave trade; murder or disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination and 'the principles of the United Nations Charter prohibiting the use of force'." [4] *Jus cogens* rule are also known as a peremptory norm of public international law within the jurisprudence of international law.

2. Development and recognition of the *jus cogens*
The recognition of the *jus cogens* was established during the early nineteenth century. In his book, Professor Oppenheim stated that a number of universally recognised principles of international law existed in the *jus cogens* which rendered any conflicting treaty void and a *jus cogens* was unanimously recognised as a customary rule of international law [5]. However, Byers argues that the concept of *jus cogens* originates from ancient writing and later on it was discussed in the twentieth century [6]. Byers quoted the similar definition of Professor Oppenheim [7]. According to Professor Harris, the concept of *jus cogens* originated in the law of treaties, in which there is a rule prohibiting states from making a treaty which seeks to conflict with a rule of *jus cogens* [8].
In the judicial context the concept of *jus cogens* first found in the decision of the French-Mexican Claims Commission in the *Pablo Nájera Case* [9] in 1928, and secondly, it was found by Schücking, the judge of the Permanent Court of International Justice in the *Oscar Chinn Case* [10] in 1934. Following from the *Oscar Chinn Case* [11] judges of the International Court of Justice made similar references to *jus cogens* in a number of separate and dissenting opinions [12]. The International Court of Justice (ICJ) in the *Nicaragua Case* clearly affirmed that

[1] Wallace, Rebecca M.M. *International Law* (2nd edn, Sweet and Maxwell 1994)33; Kamrul Hossain, 'The Concept of Jus Cogens and the Obligation Under The U.N. Charter'(2005) 3 *Santa Clara Journal of International Law* 73.
[2] Kamrul Hossain, 'The Concept of Jus Cogens and the Obligation under The U.N. Charter' (2005) 3 *Santa Clara Journal of International Law* 73.
[3] Martin, Elizabeth A., *Oxford Dictionary of Law* (7th edn, OUP 2009) 274.
[4] Evan J. Criddle & Evan Fox-Decent, 'A Fiduciary Theory of Jus Cogens' (2009) 34 *Yale Journal of International Law* 331
[5] *Oppenheim Et Al.,Oppenheim's international law: vol 1 Peace: introduction to part 1*, (9th edn, Longman 1992); Kamrul Hossain, 'The Concept of Jus Cogens and the Obligation Under The U.N. Charter'(2005) 3 *Santa Clara Journal of International Law* 74.
[6] Byers, M., 'Conceptualizing the relationship between jus cogens and erga omnes rules'(1997) 66 *Nordic Journal of International Law* 211.
[7] Ibid.
[8] Harris, D. J., *Cases and Materials on Internationl Law*, (7th edn. Sweet & Maxwell 2010).
[9] *Pablo Nájera (France) v United Maxican States*, Decision no. 30-A, 19 October 1928, in *U.N.R.I.A.A.*, vol, V,p, 466.
[10] [1934] PCIJ 2 (12 December 1934).
[11] Ibid.
[12] *Application of the Convention of 1902 Governing the Guardianship of Infants (Neth. v. Swed.)*1958 I.C.J. 55 (Nov. 28) (separate opinion of Judge Quintana); *Right of Passage Over Indian Territory (Port. v. India)* 1960 I.C.J. 6 (Apr. 12) (separate opinion of Judge ad hocFernandes); *South West Aftica Case, Second Phase (Eth. v. S. Afr.; Liber. v. S. Afr.)* 1966 I.C.J. 6 (July 18) (separate opinion of Judge Tanaka); *North Sea Continental Shelf Cases (F.R.G./Den. v. F.R.G./Neth.)* 1969 I.C.J. 3 (Feb. 20) (separate opinion of Judge Nervo).

the rules of *jus cogens* as an accepted doctrine in international law [13]. The ICJ relied on the prohibition on the use of force as being "a conspicuous example of a rule of international law having the character of jus cogens [14]." In the context of the international instrument the doctrine of *jus cogens* first embodied in the Vienna Convention on the Law of Treaties 1969 (VCLT) [15], it was subsequently confirmed by same treaties on 1986 [16]. The Vienna Convention on the Law of Treaties 1969 has recognised the norms of *jus cogens* in Article 53. Article 53 of the VCLT 1969 provides that: "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 recognised 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 [17]." Therefore it means that if a treaty at the time of its conclusion conflicts with the norm of *jus cogens,* which are peremptory nature, that treaty is no longer treated as an international document [18].

3. Status of the *jus cogens*

It may appear that as a peremptory norm, the *jus cogens* have derived from a custom or a treaty but not from any other sources [19]. Nonetheless, this idea gives raises self-contradiction because the *jus cogens* norm could be the result of the natural law or any other primary sources of the international law or general principle of international law [20]. The ambiguity exists when it is asserted that the *jus cogens* are considered as customary international law. The Customs are binding in the context of an established *opinion juries and* the doctrine of *opinion juris* means and includes that a state believes to be bound by a said practice due to its creation from the customary rule [21]. In the *Lotus Case* [22], the PCLJ emphasised that *opinio juris* was an essential element in the formation of customary law [23]. In *North Sea Continental Self* [24] the court said in dicta regarding *opinio juris* that *"...* The states concerned must, therefore, feel that they are conforming to what amounts to a legal obligation." However, there are exceptions to the rules *opinion juris* which can supersede the binding nature due to the development of rules of special customary international law and the conclusion of treaties [25]. On the other hand, the noticeable point in the context of *jus cogens* rules is that it is a binding rule regardless of the consent of the parties concerned and regardless of the states' own individual opinion to be bound [26]. Of course, the reason behind these strict rules is that these rules are too fundamental for the States to escape responsibility [27]. Nevertheless, Modification of the *jus cogens* rules could be possible when a new peremptory norm of equal weight is inaugurated. Due to the binding character of the *jus cogens,* majority of the State accepted that such norm that it is the amount of universal legal obligation for the international community as a whole [28]. However, Michel Byers argued that *jus cogens* rules are derived from process of customary international law which is itself a part of the international constitutional order [29]. In addition, he argued that the nature of the *opinio juris* is like the non-detractable character *of jus cogens* rules because States simply do not believe that it is possible to contract out of *jus cogens* rules or to persistently object to them [30]. However, the major instrument regarding *jus cogens* Article 53 of the Vienna Convention on the Law of Treaties 1969 does not contain any reference to any element of practice. The formulation of the Article 53 of the VCLT 1969 is not free from difficulty since there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens* [31]. Moreover, the majority of the general rules of international law do not have that character, and States may contract out of them by treaty.

Nonetheless, someone could term *jus cogens* as a strengthened form of a custom. According to David Kenndy *jus cogens* was termed as the super-customary norm [32]. In fact, there are two views which dominate the foundation of the concept of the *jus cogen.* The first view is that *jus cogens* are directly originated from international law and the second view is that it is based on one of the existing sources of international law. But still, there are argument and acceptance that the *jus cogens* are a wholly new source of international law consisting of binding rules. The Vienna Convention on the Law of Treaties 1969 has developed this idea. In the VCLT 1969, the *jus cogens* rules were interpreted to indicate that it is a preemptory norm which can bind the international community as a whole, regardless of the individual consent of the states [33]. Thus it can be seen from the VCLT there is a clear tendency to view that *jus cogens* are the result of existing sources [34]. However, in this regard, France argued that if the draft article on *jus*

[13] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (1986) ICJ Rep 14.
[14] Gennady M. Danilenko, 'International Jus Cogens: Issues of Law Making' (1991) 2 *European Journal of International Law* 1.
[15] Vienna Convention on the Law of Treaties,1969, 1155 UNTS 331.
[16] The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Doc. A/CONF.129/15 (1986).
[17] Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N. Doc. A/Conf. 39/ 27, 1155 U.N.T.S. 331, available at http://treaties.un.org/doc/Publication/UNTS/Volume%201155/v1155.pdf.
[18] Ibid.
[19] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (1986) ICJ Rep 14 at 97, 100.
[20] Byers, M., 'Conceptualizing the relationship between jus cogens and erga omnes rules'(1997) 66 *Nordic Journal of International Law* 211
[21] Dixon, M., Textbook *on International Law* (6th edn, OUP 2007) 34
[22] (1927) PCIJ Series A No.10.
[23] Dixon, M, Textbook *on International Law* (6th edn, OUP 2007) 34
[24] (1969) ICJ Rep 3
[25] Kamrul Hossain, 'The Concept of Jus Cogens and the Obligation Under The U.N. Charter'(2005) 3 *Santa Clara Journal of International Law* 78.
[26] Janis, Mark W., 'Nature of Jus Cogens' (1987-1988) 3 *Connecticut Journal of International Law* 359.
[27] Ibid.
[28] Whiteman, Marjorie M., 'Jus Cogens in International law, with a Project List' (1977) 7 *Georgia Journal of International and Comparative Law* 609.
[29] Byers, M., 'Conceptualizing the relationship between jus cogens and erga omnes rules'(1997) 66 *Nordic Journal of International Law* 222.
[30] Ibid, 221.
[31] Report of the International law Commission to the General Assembly (1966) 2 *Year book of the International law Comission* 172.
[32] Kennedy, David, '*International Legal Structure'* (Nomos Verlagsgesellschaft, 1987) 26
[33] Gennady M. Danilenko, 'International Jus Cogens: Issues of Law Making' (1991) 2 *European Journal of International Law* 42.
[34] Ibid.

cogens was interpreted to mean that a majority could bring into existence peremptory norms that would be valid *erga omnes* and that will create an international source of law [35]. The obligation *erga omnes* came to the forefront shortly after the concept was included in the VCLT. In the case of *Barcelona Traction* Light and Power Co *(Belgium v Spain)* [36] case, the International Court of Justice referred to obligations *erga omnes* which means 'as against all'. The obligations of *erga omnes* involve the international community as a whole and it is a concern of all States. Obligations *erga omnes* were also referred to the *Case Concerning East Timor (Portugal v Australia)* [37] and Application of the Convention on the Prevention and Punishment of Crimes of Genocide, Preliminary Objection of the ruling (the rights and obligations contained in the Genocide Convention (1948). Regarding the relationship between *jus cogens* and *erga omnes* Byres argued that, although it is widely assumed that the concepts of *jus cogens* and *erga omnes* are close related, international lawyers have yet to agree on the character of that relationship [38].

However, still, the complexity remains in the interpretation of Article 53 of the VCLT 1969, regarding the phrase: "acceptance and recognised by the international community of States as a whole". In the International Law Commission (ILC) Commentary to the Articles 19 of the State Responsibility, the meaning of 'as a whole' in the context of international recognition of international crimes [39] as : "This certainly does not mean the requirement of unanimous recognition by all the members of the community, which would give each state an inconceivable right of veto. What it is intended to ensure is that a given international wrongful act shall be recognised as an 'international crime', not only by some particular group of states, even if it constitutes a majority, but by all the essential components of the international community [40]." Though there are differences of argument regarding the status of *jus cogens* but it is at least acceptable in the light of VCLT 1969 that if any principle in international law conflicts with *jus cogens* rules shall be treated as void [41]. In addition, Article 64 of the VCLT provides that: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates [42]".

4. Applicability and enforceability of *jus cogens*

The *Jus cogens* rules have been accepted by the international community in such a way that it as fundamental rules which are non-deroagable. Therefore Genocide, Slavery, Piracy, Torture, Prohibition on the Aggressive use of force, War Crimes and Crimes against Humanity etc are the significant part of *jus cogens* norm.

In the context of Human Rights including war crimes and crime against humanity the applicability and enforceability of the *jus cogens* started following the Second World War. The prosecutions of Axis leaders at Nuremberg and Tokyo for the war crimes and crime against humanity in 1948 are the great example in this regard [43]. In addition to prohibiting genocide, crime against humanity, and gross human rights violations the Universal Declaration of Human Rights 1948 (UDHR) was introduced by United Nation [44]. After that following UDHR 1948, International Covenant on Civil and Political Rights 1966 (ICCPR) was introduced. The International Judges and the Lawyers have declared unequivocally that these international instruments are universal norms which bind the States irrespective of State consent [45]. In other words, it can be said that these are the parts of *jus cogens*. These two strands of the postwar human rights movement-multilateral Conventions and peremptory norms-converged in a remarkable way during the 1950s and 1960s with the United Nations International Law Commission's (ILC) preparation of the Vienna Convention on the Law of Treaties 1969 (VCLT) [46]. Thus it can be seen the relationship between human rights and *jus cogens* are intrinsic, as such, they inherently possess an extraordinary force of social attraction that has an almost magical character [47].

The prohibition of the use of force is also a part of *jus cogens* rule. Article 2 (4) of the Charter of the United Nations (1945), prohibits the unilateral use of force and threat of armed force and corresponds to the pre-existent norms of international law. Article 2 (4) of the Charter provides that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations [48]". Thus it appears that the Charter in relation to the prohibition on the use of force is a norm of *jus cogens* [49]. If was confirmed through the case of *Military and Parliamentary Activities in and Against Nicaragua (Nicaragua v United States of America)* [50] in the International Court of Justice (ICJ) that the prohibition of the use of force was a recognised normative regime before under the rules of customary international law before invoked in the Charter [51]. Therefore it is clear that Articles 53 and 64 of the VCLT would be effective as a customary international law where the VCLT 1969 would not be effective. According to

[35] U.N. Conference on the Law of Treaties I, at 94.
[36] (1970) ICJ Rep 2
[37] (1995) ICJ Rep 90
[38] Byers, M., 'Conceptualizing the relationship between jus cogens and erga omnes rules'(1997) 66 *Nordic Journal of International Law* 211
[39] Abi-Saab, G., 'The Uses of Article 19' (1999) 10 *European Journal of International Law 339*.
[40] Summary Records of the 1374th Meeting, [1976] 1 *Year Book of International Law Commissions 73*, U.N. Doc. A/CN.4/291 and Add.1-2.
[41] Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N. Doc. A/Conf. 39/ 27, 1155 U.N.T.S. 331, available at http://treaties.un.org/doc/Publication/UNTS/Volume%201155/v1155.pdf.; D. Evans, Malcolm, *International Law* (3rd edn, OUP 2010) 295.
[42] Vienna Convention on the Law of Treaties, May 23, 1969, art. 64, U.N. Doc. A/Conf. 39/ 27, 1155 U.N.T.S. 331, available at http://treaties.un.org/doc/Publication/UNTS/Volume%201155/v1155.pdf.
[43] Lauri Hannikainen, '*Premptory Norms (Jus Cogens) in International Law : Historical Development, Criteria, Present Status*' (1988)150.
[44] Ibid.
[45] Evan J. Criddle & Evan Fox-Decent, 'A Fiduciary Theory of Jus Cogens' (2009) 34 *Yale Journal of International Law* 331.
[46] Ibid, 336
[47] Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 *European Journal of International Law* 491.
[48] Evans, *Blackstone's International Law Documents* (10th edn. OUP 2011)10; http://www.un.org/en/documents/charter/chapter1.shtml.
[49] Ulf Linderfalk 'The Effect of Jus CogensNorms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' (2008) 18 *European Journal of International Law* 859.
[50] [1986] Rep 14.
[51] Ibid at 126-134.

Article 53 of the VCLT 'a treaty that is contrary to an existing rule of *jus cogens* is void ab initio.' Additionally, Article 64 of the VCLT contains that Vienna Convention provided that if a new peremptory norm of general international law emerges, any existing treaty in conflict with that norm becomes void and terminable. The *jus cogens* rules are also applicable in the context of prohibition of slavery and military aggression. Two prominent human right specialists Louis Henkin and Louis Sohn have suggested that 'the *jus cogens* norms such as the prohibitions against slavery and military aggression derive their peremptory character from their inherent rational and moral authority rather than state consent' [52]. The *jus cogens* norms include the prohibition of torture as well in its part. It was confirmed in the case of *Prosecutor v Furundzija* [53]. In this case, *the* International Criminal Tribunal held that 'there is *jus cogens* for the prohibition of torture'. The European Court of Human Rights also assumed that the prohibition of torture has *jus cogens* status [54].

5. Conclusion

In the light of the above discussion, it can be said that the concept of *jus cogens* in the VCLT originally was more in the nature of progressive development rather than codification. Of course, the *jus cogens* norm obtained its strong position since 1969. However, there is still disagreement about the concept of *jus cogens and* its role in the law of treaties. In particular, the disagreement is which customary rules fall into the category of *jus cogens*. Some Parties to the Vienna Convention has expressed hesitation in accepting the principle at all. Nonetheless, it is given that a treaty will be void if it conflicts with a rule of *jus cogens.* This appears to compromise a State's ability to create international obligations through express consent. Nevertheless, there appears to be broad acceptance of the concept of *jus cogens* and so it must follow that treaties which conflict with those rules are void.

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22. http://www.un.org/en/documents/charter/chapter1.shtml
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[53] (2002) ILR 213

[54] *Al-Adsani Vs. United Kingdom* (2002) 34 ECHR 11.