



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

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### Abstract

This article offers an overview of the concept and status of *jus cogens*. The overview clarifies the concept of *jus cogens* as provided by international treaties, cases, and legal 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 the debate, the concept and status of *jus cogens* rules are enshrined in the Vienna Convention on the Law of Treaties 1969 (VCLT), and the international community treats *jus cogens* norms 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 cogens* 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<sup>[1]</sup>. These are, in fact, a set of rules, which are peremptory in nature and from which no derogation is allowed under any circumstances<sup>[2]</sup>. 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<sup>[3]</sup>. Thus the concept of *jus cogens* in the context of international law indicates that it comprises 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"<sup>[4]</sup>. *Jus cogens* rules are also known as a peremptory norm of public international law within the jurisprudence of international law.

### 2. Development and recognition of *jus cogens*

The recognition of *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 within *jus cogens* which rendered any conflicting treaty void and a *jus cogens* was unanimously recognised as a customary rule of international law<sup>[5]</sup>. However, Byers argued that the concept of *jus cogens* originates from ancient writing and was later discussed more extensively in the twentieth century<sup>[6]</sup>. Byers quoted a similar definition to that of Professor Oppenheim<sup>[7]</sup>. According to Professor Harris, the concept of *jus cogens* originated in the law of treaties, which includes a rule prohibiting states from concluding treaties that conflict with *jus cogens* norms<sup>[8]</sup>. In the judicial context the concept of *jus cogens* first recognised in the decision of the French-Mexican Claims Commission in the *Pablo Nájera Case*<sup>[9]</sup> in 1928, and secondly, it was later referenced by Schücking, the judge of the Permanent Court of International Justice (PCIJ) in the *Oscar Chinn Case*<sup>[10]</sup> in 1934. Following from the *Oscar Chinn Case*<sup>[11]</sup> judges of the International Court of Justice made similar references to *jus cogens* in a number of separate and dissenting opinions<sup>[12]</sup>. The International Court of Justice

<sup>1</sup> Wallace, Rebecca M.M. *International Law* (2<sup>nd</sup> 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.

<sup>2</sup> Kamrul Hossain, 'The Concept of Jus Cogens and the Obligation under the U.N. Charter' (2005) 3 *Santa Clara Journal of International Law* 73.

<sup>3</sup> Martin, Elizabeth A., *Oxford Dictionary of Law* (7<sup>th</sup> edn, OUP 2009) 274.

<sup>4</sup> Evan J. Criddle & Evan Fox-Decent, 'A Fiduciary Theory of Jus Cogens' (2009) 34 *Yale Journal of International Law* 331

<sup>5</sup> *Oppenheim Et Al., Oppenheim's international law: vol 1 Peace: introduction to part 1*, (9<sup>th</sup> 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.

<sup>6</sup> Byers, M., 'Conceptualizing the relationship between jus cogens and erga omnes rules' (1997) 66 *Nordic Journal of International Law* 211.

<sup>7</sup> *Ibid.*

<sup>8</sup> Harris, D. J., *Cases and Materials on International Law*, (7<sup>th</sup> edn. Sweet & Maxwell 2010).

<sup>9</sup> *Pablo Nájera (France) v United Mexican States*, Decision no. 30-A, 19 October 1928, in *U.N.R.I.A.A.*, vol, V,p, 466.

<sup>10</sup> [1934] PCIJ 2 (12 December 1934).

<sup>11</sup> *Ibid.*

<sup>12</sup> *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 hoc Fernandes); *South West Africa 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*

(ICJ) in the *Nicaragua Case* clearly affirmed the doctrine of *jus cogens* as part of accepted international law<sup>[13]</sup>. 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*’<sup>[14]</sup>.

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)<sup>[15]</sup>, it was subsequently confirmed by same treaties on 1986<sup>[16]</sup>. 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”<sup>[17]</sup>. Therefore, if a treaty, at the time of its conclusion, conflicts with a norm of *jus cogens*, which is of peremptory nature, that treaty is no longer treated as an international document<sup>[18]</sup>.

### 3. Status of *jus cogens*

It may appear that, as a peremptory norm, *jus cogens* have derived from a custom or a treaty but not from any other sources<sup>[19]</sup>. Nonetheless, this idea leads to a self-contradiction because the *jus cogens* norm could result from natural law or other primary sources of the international law, such as general principles of international law<sup>[20]</sup>. The ambiguity exists when it is asserted that *jus cogens* is considered a part of customary international law. Customary rules are binding in the context of established *opinio juris*, which means that a state believes it is legally bound to follow a practice because it originates from a customary norm<sup>[21]</sup>. In the *Lotus Case*<sup>[22]</sup>, the PCLJ emphasised that *opinio juris* was an essential element in the formation of customary law<sup>[23]</sup>. In *North Sea Continental Shelf*<sup>[24]</sup> 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.”

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*Cases (F.R.G./Den. v. F.R.G./Neth.)* 1969 I.C.J. 3 (Feb. 20) (separate opinion of Judge Nervo).

<sup>13</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (1986) ICJ Rep 14.

<sup>14</sup> Gennady M. Danilenko, ‘International Jus Cogens: Issues of Law Making’ (1991) 2 *European Journal of International Law* 1.

<sup>15</sup> Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331.

<sup>16</sup> The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Doc. A/CONF.129/15 (1986).

<sup>17</sup> 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>.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (1986) ICJ Rep 14 at 97, 100.

<sup>20</sup> Byers, M., ‘Conceptualizing the relationship between jus cogens and erga omnes rules’ (1997) 66 *Nordic Journal of International Law* 211

<sup>21</sup> Dixon, M., *Textbook on International Law* (6<sup>th</sup> edn, OUP 2007) 34

<sup>22</sup> (1927) PCIJ Series A No.10.

<sup>23</sup> Dixon, M., *Textbook on International Law* (6<sup>th</sup> edn, OUP 2007) 34

<sup>24</sup> (1969) ICJ Rep 3

However, there are exceptions to *opinio juris*, particularly in cases where special customary international law has developed or where binding treaty rules have been concluded<sup>[25]</sup>. On the other hand, a notable aspect of *jus cogens* norms is that they are binding rules regardless of the consent of the parties concerned and irrespective of the individual states’ willingness to be bound<sup>[26]</sup>. Of course, the reason behind these strict rules is that they are too fundamental for States to escape responsibility<sup>[27]</sup>. Nevertheless, modification of *jus cogens* rules could be possible when a new peremptory norm of equal weight emerges. Due to the binding character of *jus cogens*, the majority of states accept that such norms constitute universal legal obligations for the international community as a whole<sup>[28]</sup>. However, Michel Byers has argued that *jus cogens* rules are derived from the process of customary international law, which itself forms part of the international constitutional order<sup>[29]</sup>. He has further argued that the nature of *opinio juris* resembles the non-derogable character of *jus cogens* rules, as States simply do not believe it is possible to contract out of *jus cogens* norms or to persistently object to them<sup>[30]</sup>. However, the major instrument concerning *jus cogens*, Article 53 of the VCLT 1969, contains no reference to any element of State Practice. The formulation of Article 53 of the VCLT 1969 is not free from difficulty, as there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*<sup>[31]</sup>. Moreover, the majority of general rules of international law do not possess this 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 Kennedy, *jus cogens* was termed as the super-customary norm<sup>[32]</sup>. In fact, there are two views which dominate the foundation of the concept of *jus cogens*. The first view is that *jus cogens* directly originates from international law, and the second view is that it is based on one of the existing sources of international law. Still, there are arguments and acceptance that *jus cogens* represents a wholly new source of international law consisting of binding rules. The Vienna Convention on the Law of Treaties 1969 (VCLT) has developed this idea. In the VCLT 1969, *jus cogens* rules were interpreted to indicate that they are peremptory norms which can bind the international community as a whole, regardless of the individual consent of the States<sup>[33]</sup>. Thus, it can be seen from the VCLT 1969 that there is a clear tendency to view *jus cogens* as the result of

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<sup>25</sup> Kamrul Hossain, ‘The Concept of Jus Cogens and the Obligation Under The U.N. Charter’ (2005) 3 *Santa Clara Journal of International Law* 78.

<sup>26</sup> Janis, Mark W., ‘Nature of Jus Cogens’ (1987-1988) 3 *Connecticut Journal of International Law* 359.

<sup>27</sup> *Ibid.*

<sup>28</sup> Whiteman, Marjorie M., ‘Jus Cogens in International law, with a Project List’ (1977) 7 *Georgia Journal of International and Comparative Law* 609.

<sup>29</sup> Byers, M., ‘Conceptualizing the relationship between jus cogens and erga omnes rules’ (1997) 66 *Nordic Journal of International Law* 222.

<sup>30</sup> *Ibid.*, 221.

<sup>31</sup> Report of the International law Commission to the General Assembly (1966) 2 *Year book of the International law Commission* 172.

<sup>32</sup> Kennedy, David, ‘*International Legal Structure*’ (Nomos Verlagsgesellschaft, 1987) 26

<sup>33</sup> Gennady M. Danilenko, ‘International Jus Cogens: Issues of Law Making’ (1991) 2 *European Journal of International Law* 42.

existing sources<sup>[34]</sup>. However, in this regard, France argued that if the draft article on *jus cogens* was interpreted to mean that a majority could bring into existence peremptory norms that would be valid *erga omnes*, that would create a new international source of law<sup>[35]</sup>. The obligation *erga omnes* came to the forefront shortly after the concept was included in the VCLT 1969. In the case of *Barcelona Traction Light and Power Co (Belgium v Spain)*<sup>[36]</sup> case, the International Court of Justice (ICJ) 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)*<sup>[37]</sup> 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*, Byers argued that although it is widely assumed that the concepts of *jus cogens* and *erga omnes* are closely related, international lawyers have yet to agree on the character of that relationship<sup>[38]</sup>. 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<sup>[39]</sup> 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”<sup>[40]</sup>. Though there are differences of opinion regarding the status of *jus cogens*, it is at least accepted, in the light of the VCLT 1969, that any principle in international law which conflicts with *jus cogens* rules shall be treated as void<sup>[41]</sup>. In addition, Article 64 of the VCLT 1969 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”<sup>[42]</sup>.

#### 4. Applicability and enforceability of *jus cogens*

*Jus cogens* rules have been accepted by the international

community as fundamental norms that are non-derogable. Therefore, genocide, slavery, piracy, torture, the prohibition of the aggressive use of force, war crimes, and crimes against humanity are significant parts of *jus cogens* norms.

In the context of human rights, including war crimes and crimes against humanity, the applicability and enforceability of *jus cogens* began following the Second World War. The prosecutions of Axis leaders at Nuremberg and Tokyo for war crimes and crimes against humanity in 1948 are a great example in this regard<sup>[43]</sup>. In addition to prohibiting genocide, crimes against humanity, and gross human rights violations, the Universal Declaration of Human Rights 1948 (UDHR) was introduced by the United Nations<sup>[44]</sup>. Following the UDHR 1948, the International Covenant on Civil and Political Rights 1966 (ICCPR) was adopted. International judges and lawyers have declared unequivocally that these international instruments are universal norms which bind States irrespective of State consent<sup>[45]</sup>. In other words, it can be said that these are part of *jus cogens*. These two strands of the post-war 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)<sup>[46]</sup>. Thus, it can be seen that the relationship between human rights and *jus cogens* is intrinsic; as such, they inherently possess an extraordinary force of social attraction that has an almost magical character<sup>[47]</sup>.

The prohibition of the use of force is also part of *jus cogens* regime. Article 2(4) of the Charter of the United Nations 1945 prohibits the unilateral use of force and the threat of armed force, and corresponds to pre-existing 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”<sup>[48]</sup>. Thus, it appears that the Charter’s prohibition on the use of force constitutes a norm of *jus cogens*<sup>[49]</sup>. This was confirmed in the case of *Military and Parliamentary Activities in and Against Nicaragua (Nicaragua v United States of America)*<sup>[50]</sup> by the International Court of Justice (ICJ), where it was held that the prohibition on the use of force was a recognized normative regime under customary international law even before being codified in the Charter. Therefore, it is clear that Articles 53 and 64 of the VCLT 1969 would remain effective as customary international law even where the VCLT 1969 itself

<sup>34</sup> Ibid.

<sup>35</sup> U.N. Conference on the Law of Treaties I, at 94.

<sup>36</sup> (1970) ICJ Rep 2

<sup>37</sup> (1995) ICJ Rep 90

<sup>38</sup> Byers, M., ‘Conceptualizing the relationship between *jus cogens* and *erga omnes* rules’(1997) 66 *Nordic Journal of International Law* 211

<sup>39</sup> Abi-Saab, G., ‘The Uses of Article 19’ (1999) 10 *European Journal of International Law* 339.

<sup>40</sup> 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.

<sup>41</sup> 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* (3<sup>rd</sup> edn, OUP 2010) 295.

<sup>42</sup> 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>.

<sup>43</sup> Lauri Hannikainen, ‘*Preemptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, and Present Status*’ (1988) 150.

<sup>44</sup> Ibid.

<sup>45</sup> Evan J. Criddle & Evan Fox-Decent, ‘A Fiduciary Theory of Jus Cogens’ (2009) 34 *Yale Journal of International Law* 331.

<sup>46</sup> Ibid, 336

<sup>47</sup> Andrea Bianchi, ‘Human Rights and the Magic of Jus Cogens’ (2008) 19 *European Journal of International Law* 491.

<sup>48</sup> Evans, *Blackstone’s International Law Documents* (10<sup>th</sup> edn. OUP 2011)10; <http://www.un.org/en/documents/charter/chapter1.shtml>.

<sup>49</sup> Ulf Linderfalk ‘The Effect of Jus Cogens Norms: Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences?’ (2008) 18 *European Journal of International Law* 859.

<sup>50</sup> Ibid at 126-134.

is not applicable. According to Article 53 of the VCLT 1969, ‘a treaty that is contrary to an existing rule of *jus cogens* is void *ab initio*’. Additionally, Article 64 of the VCLT 1969 provides that if a new peremptory norm of general international law emerges, any existing treaty in conflict with that norm becomes void and terminable. *Jus cogens* rules are also applicable in the context of the prohibition of slavery and military aggression. Two prominent human rights 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 from state consent”<sup>[51]</sup>. The *jus cogens* norms also include the prohibition of torture. This was confirmed in the case of *Prosecutor v Furundzija* <sup>[52]</sup>. In this case, the International Criminal Tribunal held that ‘there is *jus cogens* for the prohibition of torture’. The European Court of Human Rights has also recognized that the prohibition of torture holds *jus cogens* status <sup>[53]</sup>.

## 5. Conclusion

In light of the above discussion, it can be said that the concept of *jus cogens* in the Vienna Convention on the Law of Treaties 1969 (VCLT) was originally more in the nature of progressive development rather than codification. Of course, the *jus cogens* norm has held a 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 concerns which customary rules fall into the category of *jus cogens*. Some parties to the Vienna Convention have expressed hesitation in accepting the principle at all. Nonetheless, it is accepted 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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<sup>51</sup> Louis B. Sohn, ‘The New International Law: Protection of the Rights of Individuals Rather Than States’ (1982) 32 *American University Law Review* 1.

<sup>52</sup> (2002) ILR 213

<sup>53</sup> *Al-Adsani Vs. United Kingdom* (2002) 34 ECHR 11.