BLOGS

Doctrine of Jus Cogens: Public International Law

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Can States make a treaty permitting genocide, slavery or torture? The answer is no. Some rules are considered so fundamental that no State can contract out of them. These rules are referred to as *jus cogens* or peremptory norms of general international law. *Doctrine of Jus cogens* is a significant topic in Public International Law because it creates a hierarchy of laws that regulate international relations. Ordinary treaties, customs and domestic laws cannot override a peremptory norm. At the same time, not every important rule automatically becomes jus cogens. The norm must satisfy a strict legal test and must be accepted and recognised by the international community of States as a whole.

This article explains the meaning, features, sources, examples, legal effects, leading cases and limitations of the doctrine of *jus cogens.*

Meaning of Doctrine of Jus Cogens

The expression *jus cogens* is Latin for “compelling law”. A jus cogens norm is a fundamental rule from which no departure is permitted. It binds all States, even if a particular State has not agreed to be bound by it through a treaty.

The modern treaty-law definition appears in Article 53 of the Vienna Convention on the Law of Treaties, 1969 (VCLT). It describes a peremptory norm as a rule of general international law accepted and recognised by the international community of States as a whole as a rule from which no derogation is permitted and which can be modified only by a later norm having the same character.

In simple terms, ordinary international rules may sometimes be changed by agreement. A jus cogens rule cannot be set aside by a special treaty between two or more States.

Main Features of Jus Cogens

- Universal force: it binds all States and does not depend only on an individual State's consent.
- No derogation: a treaty or domestic law cannot create an exception to the rule.
- Higher status: it prevails over an ordinary treaty or customary rule.
- Limited modification: it can be changed only by a later norm of the same peremptory character.
- Community interest: it protects basic interests of humanity and the international community as a whole.

Article 53 of the Vienna Convention

Article 53 contains two important consequences. First, it defines the nature of a peremptory norm. Second, it declares that a treaty is void if, at the time of its conclusion, it conflicts with a jus cogens norm.

For example, if two States enter into an agreement authorising slavery or genocide, the agreement cannot become valid merely because both States consented to it. Consent cannot legalise conduct prohibited by a peremptory norm.

This rule is closely connected with the principle of pacta sunt servanda, under which treaties in force must be performed in good faith. *Pacta sunt servanda* protects treaty stability, but it cannot protect a treaty that conflicts with *doctrine of jus cogens*. Read CLATalogue's article on the Doctrine of Pacta Sunt Servanda under Public International Law for this connection.

Article 64: A New Peremptory Norm

Article 64 deals with a later development. If a new *jus cogens* norm emerges, any existing treaty that conflicts with it becomes void and terminates.

The effect is different from an ordinary treaty amendment. The conflicting treaty does not continue simply because it was made earlier. The later peremptory norm prevails because of its higher legal character.

Article 71 also deals with the consequences of a treaty becoming void because it conflicts with *doctrine of jus cogens*. The parties are released from further performance, but legal situations created before termination may continue only if maintaining them does not itself conflict with the new peremptory norm.

How is a Jus Cogens Norm Identified?

The VCLT gives the basic definition but not a complete list. The International Law Commission's framework requires two cumulative findings:

1. The rule must be a norm of general international law.
2. The international community of States as a whole must accept and recognise it as non-derogable and changeable only by a later norm of the same character.

Customary international law is the most common basis, although treaty provisions and general principles may also help establish the rule. Evidence may include official State statements, diplomatic correspondence, legislation, national court decisions, treaty practice and resolutions of international organisations. Every State need not agree, but acceptance by only a small group is insufficient.

Examples of Jus Cogens Norms

The VCLT does not give an exhaustive list. Widely recognised examples or strong candidates include the prohibitions of genocide, slavery and the slave trade, torture, crimes against humanity, aggressive war, racial discrimination and apartheid, and piracy in certain formulations. Students should be careful that a rule being important or customary does not automatically proves that it is *jus cogens*. Its non-derogable status must also be established.

Doctrine of Jus cogens and Erga Omnes Obligations

Doctrine of Jus cogens is often confused with *erga omnes obligations*. They are related but not identical. An *erga omnes* duty is owed to the international community as a whole. It is a legal interest of all States to protect it. Accordingly, in appropriate circumstances, States other than the directly injured State may have standing to invoke responsibility.

Doctrine of Jus cogens, however, is about the higher status and non-derogable nature of a norm. A rule may produce obligations owed to all states without every discussion of *erga omnes* implying that it is jus cogens. So for the purpose of the exam remember the distinction, *erga omnes* has to do with the community-wide character of the obligation and *jus cogens* has to do with the superior and non-derogable character of the rule.

Landmark Cases

Prosecutor v. Furundzija (ICTY, 1998)

In the case of *Prosecutor v. Furundzija*, the International Criminal Tribunal for the former Yugoslavia recognized the prohibition of torture as jus cogens. The case is important in linking the doctrine with individual criminal responsibility and human dignity.

Bosnia and Herzegovina v. Serbia and Montenegro (ICJ, 2007)

The case was about allegations of genocide and Serbia's responsibility under the Genocide Convention. On the basis of the evidence before it, the International Court of Justice found Serbia liable for failing to prevent genocide, but not liable for committing or being complicit in genocide. The present case is of importance in light of the prohibition of genocide and the obligation to prevent and punish it.

Nicaragua v. United States (ICJ, 1986)

In Military and Paramilitary Activities in and against Nicaragua, the ICJ found that the United States had violated customary international law by using force against Nicaragua and interfering in its affairs. The case is important for the prohibition of the use of force and for the relationship between treaty and customary law. State carefully whether a particular rule has*jus cogens* status.

Quick Revision Points for CLAT PG

- **Article 53**: a treaty conflicting with an existing jus cogens norm is void.
- **Article 64**: a later jus cogens norm makes a conflicting existing treaty void and terminates it.
- **Article 71**: provides consequences of a treaty becoming void under Article 53 or Article 64.
- **Core test**: general international law plus acceptance and recognition as non-derogable by the international community of States as a whole.
- **Common examples**: genocide, slavery, torture and aggressive war.
- Do not confuse jus cogens with erga omnes.
- *Furundzija* is central for torture, *Bosnia v. Serbia* for genocide, and *Nicaragua v. United States* for the prohibition on force.

For broader revision, read CLATalogue's Sources of International Law, Public International Law: Nature, Scope and Sources, and Statehood and International Responsibility. Students can also revise Landmark Judgments in Public International Law and practise with CLATalogue's Public International Law MCQs.

Conclusion

Jus cogens represents the highest level of protection given to certain fundamental values in international law. Its central idea is that State consent has limits. A treaty cannot legalise genocide, slavery, torture or another rule that the international community recognises as non-derogable. **Article 53** invalidates conflicting treaties at the time of conclusion, while **Article 64** deals with a new peremptory norm that conflicts with an existing treaty.

Also, always remember to distinguish *jus cogens* from *erga omnes* and ordinary customary law. The former defines the superior hierarchical status of a peremptory norm that cannot be overridden, while later defines the universal scope of its enforcement by giving all states a legal interest in upholding it.