



## THE CONCEPT OF JUS COGENS AND ITS SIGNIFICANCE IN INTERNATIONAL LAW

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### ABSTRACT

*The doctrine of jus cogens represents a fundamental pillar of modern international law, embodying the collective conscience of the international community and establishing non-derogable norms that bind all states. Unlike ordinary legal obligations, peremptory norms cannot be overridden by treaties, customary law, or domestic legislation, reflecting universal values that safeguard human dignity, human rights, and global order. This paper explores the legal basis, characteristics, examples, significance, and challenges associated with jus cogens in contemporary international law. Drawing upon the Vienna Convention on the Law of Treaties (1969), customary international law, and the jurisprudence of international courts and tribunals, the study underscores how jus cogens provides a hierarchy of norms that ensures legal certainty and accountability. Key examples of peremptory norms include the prohibitions of genocide, slavery, torture, crimes against humanity, racial discrimination, and aggressive war, all of which have been affirmed by landmark cases such as Prosecutor v. Anto Furundžija (ICTY, 1998) and Bosnia and Herzegovina v. Serbia and Montenegro (ICJ, 2007). The paper also analyses the normative significance of jus cogens in limiting state sovereignty, protecting fundamental human rights, fostering international cooperation, and providing mechanisms for the resolution of conflicts between domestic law, treaties, and peremptory norms. Challenges such as definitional ambiguity, identification difficulties, enforcement limitations, and potential politicisation are discussed, highlighting the dynamic and evolving nature of the doctrine. In conclusion, jus cogens is not merely a legal construct but a reflection of shared moral and ethical principles that define the international legal order. Its recognition and enforcement remain essential for maintaining global justice, accountability, and stability, ensuring that certain fundamental norms remain inviolable regardless of political or societal pressures.*

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## INTRODUCTION

International law, unlike domestic legal systems, does not have a centralised legislature or an overarching sovereign authority. It relies on treaties, customary practices, general principles, and judicial decisions to establish norms that govern the conduct of states. Yet, within this decentralised structure, there exists a hierarchy of norms and rules so fundamental that no derogation is permitted under any circumstances. These are known as jus cogens norms, or peremptory norms of international law.<sup>1</sup>

The doctrine of jus cogens is significant because it sets boundaries on state sovereignty. While states are generally free to consent to treaties, shape their foreign relations, and decide on domestic policies, jus cogens imposes a universal restraint. It ensures that certain core principles, such as the prohibition of genocide, slavery, torture, and aggressive war, cannot be overridden by agreements between states.<sup>2</sup> In this sense, jus cogens represents both a moral foundation and a legal safeguard for the international community.

The legal basis of jus cogens is explicitly recognised in the Vienna Convention on the Law of Treaties (VCLT), 1969. Article 53 defines a peremptory norm as: “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>3</sup> This definition reflects two key features: universality (accepted by the international community as a whole) and non-derogability (no exception or opt-out).

The development of the jus cogens doctrine has been influenced by judicial decisions, academic scholarship, and state practice. The International Court of Justice (ICJ) in cases like *Barcelona Traction* highlighted the idea of obligations erga omnes, obligations owed to the international community as a whole.<sup>4</sup> Later, international tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v. Furundžija* recognised

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<sup>1</sup> Vienna Convention on the Law of Treaties 1969, art 53

<sup>2</sup> Antonio Cassese, *International Law* (2nd edn, OUP 2005) 203

<sup>3</sup> Vienna Convention on the Law of Treaties 1969, art 53

<sup>4</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, para 33

that the prohibition of torture was a jus cogens norm.<sup>5</sup> These judicial affirmations gave practical force to the doctrine, transforming it from a theoretical construct into an operational principle of law.

The significance of jus cogens extends beyond its doctrinal recognition. It plays a crucial role in safeguarding human dignity, preventing abuse of power, and ensuring that international law is not merely a reflection of political convenience but embodies universal values. At the same time, the doctrine is not without challenges. Critics argue that the open-ended nature of jus cogens creates uncertainty: which norms qualify as peremptory, and who decides? The debate over its scope continues to shape contemporary international law.

This journal seeks to provide a comprehensive exploration of jus cogens by examining its conceptual foundations, historical evolution, legal basis, case law, criticisms, and overall significance. Through this, the paper aims to humanise the doctrine by demonstrating how it operates not only as a technical legal principle but also as a safeguard of fundamental values shared by humanity.

## **HISTORICAL EVOLUTION OF JUS COGENS**

The idea that fundamental rules are binding upon all states, regardless of their consent, did not emerge suddenly in modern international law. Instead, it has deep historical roots that can be traced to natural law philosophy, the writings of classical jurists, and the progressive codification of international law in the twentieth century. Jus cogens reflects the tension between sovereign freedom and the need for universal limits- a tension that has existed since the earliest formulations of international order.<sup>6</sup>

**Natural Law and Early Thinkers:** The origins of the concept lie in the natural law tradition of the seventeenth and eighteenth centuries. Scholars such as Hugo Grotius, often called the “father of international law,” argued that some rules of law derived from reason and morality, not merely from the will of states.<sup>7</sup> For Grotius, prohibitions against acts like murder or treachery in war stemmed from a universal law binding on all nations.<sup>8</sup> Similarly, Emer de Vattel, writing in the eighteenth century, insisted that the law of nations was not entirely at the

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<sup>5</sup> Prosecutor v Anto Furundžija (Judgment) ICTY-95-17/1 (10 December 1998) para 153

<sup>6</sup> Antonio Cassese, *International Law* (2nd edn, OUP 2005) 198

<sup>7</sup> Hugo Grotius, *De Jure Belli ac Pacis* (1625, reprinted OUP 1925) Book I, ch I

<sup>8</sup> *Ibid*

discretion of rulers but was constrained by principles of justice.<sup>9</sup> These ideas sowed the seeds for the recognition that certain norms were so fundamental that they transcended state consent.

**19th-Century Positivism and Its Limits:** During the nineteenth century, international law became increasingly dominated by positivism- the idea that law derives solely from the consent of states.<sup>10</sup> This left little room for peremptory norms. States were seen as free to contract out of obligations through treaties, provided they agreed. However, even in this era, limitations began to surface. For instance, treaties involving the slave trade gradually came to be seen as morally impermissible, culminating in the General Act of the Brussels Conference of 1890, which suppressed the trade in slaves and arms.<sup>11</sup> These developments hinted at the possibility that some norms were too fundamental to be waived.

**Post–World War II Developments:** It was after the Second World War that the modern notion of jus cogens crystallised. The atrocities of the Holocaust, aggressive war, and mass crimes committed during the conflict demonstrated the catastrophic consequences of unrestrained sovereignty. The Nuremberg Trials (1945–46) rejected the defence of state sovereignty and emphasised that individuals could be held accountable for crimes against humanity, even if committed under domestic law.<sup>12</sup> This was a revolutionary moment: it confirmed that certain international crimes could not be justified by reference to state consent or domestic authority.

The United Nations Charter, adopted in 1945, further reinforced this trend. Article 2(4) prohibited the use of force against the territorial integrity or political independence of states, while Article 55 promoted human rights and fundamental freedoms.<sup>13</sup> Together, these provisions signal the emergence of norms from which no derogation was possible.

**Codification in the Vienna Convention:** The turning point came with the work of the International Law Commission (ILC) in the 1960s, which sought to codify the law of treaties. After much debate, the concept of jus cogens was included in Article 53 of the Vienna Convention on the Law of Treaties (1969).<sup>14</sup> This was the first explicit recognition, in a binding treaty, that certain norms override all others. The ILC acknowledged that the international

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<sup>9</sup> Emer de Vattel, *The Law of Nations* (1758, reprinted Liberty Fund 2008) Book II, ch III

<sup>10</sup> Malcolm N Shaw, *International Law* (8th edn, CUP 2017) 59

<sup>11</sup> General Act of the Brussels Conference Relative to the African Slave Trade, 2 July 1890

<sup>12</sup> Judgment of the International Military Tribunal for the Trial of German Major War Criminals (Nuremberg, 1946) 41 AJIL 172

<sup>13</sup> Charter of the United Nations, 26 June 1945, arts 2(4), 55

<sup>14</sup> Vienna Convention on the Law of Treaties 1969, art 53

community as a whole accepted such rules, even though their precise scope was left open to interpretation.<sup>15</sup>

**Judicial Recognition:** International courts and tribunals soon began to refer to jus cogens as a distinct category. In *Barcelona Traction* (1970), the ICJ recognised obligations erga omnes, which overlap conceptually with peremptory norms by affirming that certain obligations are owed to the international community as a whole.<sup>16</sup> Later, the ICTY in *Furundžija* (1998) confirmed that the prohibition of torture was a jus cogens norm, stressing that such a prohibition is binding regardless of treaty commitments.<sup>17</sup> The European Court of Human Rights (ECtHR), in *Al-Adsani v. United Kingdom* (2001), also addressed the conflict between state immunity and jus cogens, acknowledging the superior status of peremptory norms, though controversially upholding immunity in that case.<sup>18</sup>

**Contemporary Evolution:** In the twenty-first century, the scope of jus cogens continues to evolve. The ILC's 2019 Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens) reaffirmed the importance of these rules, identifying them as essential to the stability of the international legal order.<sup>19</sup> These conclusions highlighted examples such as the prohibitions of genocide, slavery, racial discrimination, crimes against humanity, and the right to self-determination.<sup>20</sup> While debate remains on the precise boundaries, the doctrine has become an established feature of modern international law, serving as both a legal compass and a moral anchor for the international community.

## LEGAL BASIS OF JUS COGENS IN INTERNATIONAL LAW

The doctrine of jus cogens derives its authority not from a single source, but from a combination of treaties, customary international law, and the jurisprudence of international courts and tribunals. Its legal basis is unique because it does not depend solely on state consent, the traditional cornerstone of international law, but rather on the recognition of certain rules as fundamental to the existence and functioning of the international community as a whole.<sup>21</sup>

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<sup>15</sup> International Law Commission, Yearbook of the International Law Commission 1966, vol II, 248

<sup>16</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, para 33

<sup>17</sup> *Prosecutor v Anto Furundžija* (ICTY Judgment, ICTY-95-17/1, 10 December 1998) para 153

<sup>18</sup> *Al-Adsani v United Kingdom* (2001) 34 EHRR 273

<sup>19</sup> International Law Commission, Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens), UN Doc A/74/10 (2019)

<sup>20</sup> *Ibid*, Conclusion 23

<sup>21</sup> Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 511

**The Vienna Convention on the Law of Treaties (VCLT):** The clearest textual basis for jus cogens is found in the Vienna Convention on the Law of Treaties (1969). Article 53 defines peremptory norms of general international law and declares that any treaty conflicting with such a norm is void.<sup>22</sup> This provision is groundbreaking for two reasons. First, it affirms that there exists a hierarchy of norms in international law, with jus cogens standing above ordinary treaty obligations.<sup>23</sup> Second, it establishes the non-derogable character of these norms, meaning that no state can “opt out” or agree otherwise through bilateral or multilateral arrangements.

Article 64 of the VCLT further strengthens the doctrine by providing that if a new jus cogens norm emerges, any existing treaty in conflict with it becomes void and terminates.<sup>24</sup> This provision demonstrates the dynamic nature of peremptory norms, allowing international law to adapt to evolving moral and legal standards of the global community.

While not all states are parties to the VCLT, the provisions on jus cogens are generally regarded as reflective of customary international law.<sup>25</sup> This means that the doctrine has binding force even for states that have not ratified the Convention.

**Customary International Law:** Apart from the VCLT, jus cogens norms are firmly grounded in customary international law. Customary rules arise from state practice coupled with *opinio juris*, the belief that such practice is legally obligatory.<sup>26</sup> However, jus cogens represents a higher tier of customary law: rules so widely accepted and so deeply rooted in fundamental values that they cannot be derogated from, even by the mutual consent of states.

Examples include the prohibitions of genocide, slavery, torture, racial discrimination, and crimes against humanity.<sup>27</sup> These prohibitions are not merely matters of practice but reflect universal legal conscience, making them binding regardless of explicit state agreement.

**Judicial Recognition:** The jurisprudence of international courts and tribunals has played a decisive role in confirming the legal status of jus cogens.

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<sup>22</sup> Vienna Convention on the Law of Treaties 1969, art 53

<sup>23</sup> Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 7

<sup>24</sup> Vienna Convention on the Law of Treaties 1969, art 64

<sup>25</sup> Malcolm N Shaw, *International Law* (8th edn, CUP 2017) 95

<sup>26</sup> *North Sea Continental Shelf (Germany v Denmark; Germany v Netherlands)* [1969] ICJ Rep 3, para 77

<sup>27</sup> International Law Commission, *Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens)*, UN Doc A/74/10 (2019) Conclusion 23

In *Barcelona Traction* (1970), the ICJ recognised the existence of obligations erga omnes, obligations owed to the international community as a whole.<sup>28</sup> While not explicitly framed as jus cogens, this reasoning laid the foundation for recognising non-derogable duties.

In *Furundžija* (1998), the ICTY explicitly held that the prohibition of torture had attained jus cogens status, noting that it bound all states regardless of treaty commitments.<sup>29</sup>

In *Jurisdictional Immunities of the State (Germany v. Italy)* (2012), the ICJ acknowledged the superior character of jus cogens norms but controversially ruled that such norms did not automatically override state immunity, leaving unresolved tensions between peremptory norms and procedural rules.<sup>30</sup>

These cases reveal that while courts consistently affirm the existence of jus cogens, they often grapple with its precise implications.

**The Work of the International Law Commission (ILC):** The ILC has been instrumental in shaping the legal framework of jus cogens. Its 1966 Draft Articles on the Law of Treaties introduced the concept, which was then incorporated into the VCLT. More recently, in its 2019 Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens), the ILC reaffirmed the doctrine and guided its identification and application.<sup>31</sup>

The ILC identified the criteria for determining jus cogens norms:

they must

- (a) be norms of general international law,
- (b) be accepted and recognised by the international community of states as a whole, and
- (c) be non derogable.<sup>32</sup>

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<sup>28</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, para 33

<sup>29</sup> *Prosecutor v Anto Furundžija* (ICTY Judgment, ICTY-95-17/1, 10 December 1998) para 153

<sup>30</sup> *Jurisdictional Immunities of the State (Germany v Italy)* [2012] ICJ Rep 99, para 93

<sup>31</sup> International Law Commission, Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens), UN Doc A/74/10 (2019)

<sup>32</sup> *Ibid*, Conclusion 3

Examples cited included the prohibitions of genocide, crimes against humanity, racial discrimination, slavery, and the right to self-determination.<sup>33</sup>

**Scholarly Support:** Scholars have also provided strong theoretical justifications for jus cogens. Writers like Alexander Orakhelashvili argue that peremptory norms reflect the fundamental values of the international community and provide a safeguard against abuses of sovereignty.<sup>34</sup> Similarly, Antonio Cassese described jus cogens as the “hard core” of international law, indispensable for the maintenance of global order.<sup>35</sup>

### CHARACTERISTICS OF JUS COGENS NORMS

The distinctiveness of jus cogens lies not merely in its substantive content but also in the unique characteristics that set it apart from ordinary rules of international law. While international law generally operates based on state consent and equality of norms, jus cogens introduces a hierarchical structure, elevating certain rules above others. These features explain why jus cogens is both influential and controversial within the international legal order.<sup>36</sup>

**Universality:** Jus cogens norms are universal in nature. They are recognised and accepted by the international community of states as a whole, irrespective of cultural, political, or regional differences.<sup>37</sup> For example, the prohibition of genocide is not limited to particular treaties such as the Genocide Convention (1948) but applies to all states regardless of ratification.<sup>38</sup> This universality reflects the fact that jus cogens norms embody values common to humanity and are binding even upon states that reject or oppose them.

**Non-Derogability:** Perhaps the most defining feature of jus cogens is non-derogability. Article 53 of the Vienna Convention explicitly states that no derogation is permitted.<sup>39</sup> This means that even in situations of war, emergency, or consent between states, such norms cannot be lawfully violated. For instance, torture cannot be justified on grounds of national security, and slavery cannot be legalised under any bilateral arrangement.<sup>40</sup> This non-derogable character ensures that peremptory norms serve as an absolute safeguard against state abuse.

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<sup>33</sup> Ibid, Conclusion 23

<sup>34</sup> Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 15

<sup>35</sup> Antonio Cassese, *International Law* (2nd edn, OUP 2005) 204

<sup>36</sup> Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 512

<sup>37</sup> Vienna Convention on the Law of Treaties 1969, art 53

<sup>38</sup> Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277

<sup>39</sup> Vienna Convention on the Law of Treaties 1969, art 53

<sup>40</sup> Prosecutor v Anto Furundžija (ICTY Judgment, ICTY-95-17/1, 10 December 1998) para 153

**Hierarchical Superiority:** Unlike ordinary norms of international law, which are considered equal in rank, *jus cogens* norms possess hierarchical superiority. A treaty or rule that conflicts with a peremptory norm is void *ab initio* under Article 53 of the VCLT.<sup>41</sup> Similarly, if a new *jus cogens* norm emerges, it automatically overrides conflicting obligations under Article 64.<sup>42</sup> This hierarchical structure is unusual in international law, which otherwise lacks a clear legislative framework, and marks a fundamental departure from the traditional voluntarist conception of state consent.

**Fundamental Importance:** Another hallmark of *jus cogens* is that it protects fundamental values of the international community. These are not technical rules about trade or diplomacy, but principles essential to the survival of international order and human dignity. Examples include the prohibitions of genocide, slavery, racial discrimination, and crimes against humanity.<sup>43</sup> As the International Law Commission has noted, peremptory norms safeguard “the most basic values of the international community.”<sup>44</sup>

**Irrelevance of Consent:** In ordinary international law, a state’s obligations depend on its consent expressed through treaties or implied through consistent practice. *Jus cogens* norms, however, bind states irrespective of their consent.<sup>45</sup> Even if two states were to conclude a treaty permitting slavery, that treaty would be void from the outset because it violates a peremptory norm.<sup>46</sup> This irrelevance of consent underscores the idea that *jus cogens* reflects collective values superior to individual sovereignty.

**Modification Only by Norms of Equal Status:** Peremptory norms can only be modified or replaced by another norm of the same character.<sup>47</sup> This ensures that once a principle has attained *jus cogens* status, it cannot be downgraded by state agreement or custom. For instance, the prohibition of racial discrimination cannot be repealed or limited by treaty, but could, in theory, evolve into a broader *jus cogens* norm encompassing emerging forms of systematic oppression if recognised by the international community.

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<sup>41</sup> Vienna Convention on the Law of Treaties 1969, art 53

<sup>42</sup> Vienna Convention on the Law of Treaties 1969, art 64

<sup>43</sup> International Law Commission, Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*), UN Doc A/74/10 (2019) Conclusion 23

<sup>44</sup> International Law Commission, Yearbook of the International Law Commission (1966) vol II, 248

<sup>45</sup> Antonio Cassese, *International Law* (2nd edn, OUP 2005) 206

<sup>46</sup> Vienna Convention on the Law of Treaties 1969, art 53

<sup>47</sup> *Ibid*

**Erga Omnes Dimension:** Although technically distinct, jus cogens norms often overlap with obligations erga omnes, obligations owed to the international community as a whole.<sup>48</sup> This means that all states have a legal interest in their protection, even if they are not directly affected. For example, any state may invoke responsibility for genocide committed in another region, as it violates a peremptory norm and affects the global community.<sup>49</sup>

## EXAMPLES OF JUS COGENS NORMS

The content of jus cogens norms, while not exhaustively listed in the Vienna Convention, has been clarified through judicial pronouncements, treaties, and scholarly consensus. These norms represent fundamental principles of international law, the violation of which is considered unacceptable under any circumstances. The following examples illustrate the core peremptory norms widely recognised by the international community.<sup>50</sup>

**Prohibition of Genocide:** The prohibition of genocide is perhaps the most universally acknowledged jus cogens norm.<sup>51</sup> Defined in the Genocide Convention (1948) as acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, genocide represents an attack on the very fabric of humanity.<sup>52</sup>

The International Court of Justice (ICJ), in the *Bosnia and Herzegovina v. Serbia and Montenegro* case (2007), affirmed that the prohibition of genocide is a peremptory norm of international law, binding on all states irrespective of treaty obligations.<sup>53</sup> The ICJ emphasised that states have both negative obligations (to refrain from committing genocide) and positive obligations (to prevent and punish genocide).<sup>54</sup>

**Prohibition of Slavery:** Slavery and the slave trade have long been condemned by the international community.<sup>55</sup> While earlier treaties addressed specific instances, the peremptory status of the prohibition was codified in the Slavery Convention (1926) and reaffirmed in subsequent instruments.<sup>56</sup>

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<sup>48</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* [1970] ICJ Rep 3, para 33

<sup>49</sup> *Ibid*

<sup>50</sup> Antonio Cassese, *International Law* (2nd edn, OUP 2005) 206

<sup>51</sup> *Ibid* 207

<sup>52</sup> *Convention on the Prevention and Punishment of the Crime of Genocide* 1948, 78 UNTS 277

<sup>53</sup> *Bosnia and Herzegovina v Serbia and Montenegro* [2007] ICJ Rep 43, paras 166–167

<sup>54</sup> *Ibid*, para 431

<sup>55</sup> Malcolm N Shaw, *International Law* (8th edn, CUP 2017) 60

<sup>56</sup> *Slavery Convention* 1926, 60 LNTS 253

In judicial practice, the prohibition of slavery has been recognised as non-derogable. In *S.S. Lotus* (1927) and later human rights instruments, it was consistently affirmed that no state may legally enter into arrangements allowing slavery or forced labour.<sup>57</sup> This norm protects individual autonomy and human dignity, forming a core element of international humanitarian law.

**Prohibition of Torture:** Torture is universally prohibited under jus cogens. The Convention Against Torture (CAT, 1984) codifies state obligations to prevent torture and prosecute perpetrators.<sup>58</sup>

The ICTY, in *Furundžija* (1998), explicitly recognised torture as a jus cogens norm, stating that it binds all states regardless of treaty commitments.<sup>59</sup> Torture violates not only human rights but also international public order, making its prohibition absolute and non-derogable.<sup>60</sup>

**Prohibition of Crimes Against Humanity:** Crimes against humanity, including widespread or systematic attacks on civilians, also qualify as peremptory norms.<sup>61</sup> The Nuremberg Principles and subsequent international criminal tribunals, including the ICTY and the International Criminal Court (ICC), have reinforced the non-derogable nature of these obligations.<sup>62</sup>

These crimes are not contingent upon armed conflict and represent a violation of the collective conscience of the international community.<sup>63</sup> As with genocide and torture, no state may consent to them, and they give rise to universal jurisdiction in certain cases.<sup>64</sup>

**Prohibition of Aggression:** The prohibition of aggressive war, or use of force against the territorial integrity or political independence of states, is another jus cogens norm.<sup>65</sup> Article 2(4) of the UN Charter (1945) codifies this principle.<sup>66</sup>

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<sup>57</sup> *S S Lotus* (France v Turkey) PCIJ Ser A No 10 (1927) 18

<sup>58</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85

<sup>59</sup> *Prosecutor v Anto Furundžija* (ICTY Judgment, ICTY-95-17/1, 10 December 1998) para 153

<sup>60</sup> Antonio Cassese, *International Law* (n 1) 208

<sup>61</sup> *Ibid*

<sup>62</sup> Judgment of the International Military Tribunal for the Trial of German Major War Criminals (Nuremberg, 1946) 41 AJIL 172; Rome Statute of the International Criminal Court 1998, art 5

<sup>63</sup> Malcolm N Shaw (n 6) 62

<sup>64</sup> Rome Statute of the International Criminal Court 1998, art 7

<sup>65</sup> Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 514

<sup>66</sup> UN Charter 1945, art 2(4)

The Nuremberg Trials (1945–46) held state leaders criminally responsible for planning and waging aggressive wars, establishing that sovereignty does not legitimise acts of aggression.<sup>67</sup> The ICJ has further recognised this principle in advisory opinions and contentious cases as reflecting a non-derogable rule of international law.<sup>68</sup>

**Prohibition of Racial Discrimination:** Racial discrimination and apartheid are considered peremptory norms, as reflected in the International Convention on the Elimination of All Forms of Racial Discrimination (1965).<sup>69</sup> This prohibition ensures equality and human dignity, transcending state consent or domestic legislation.<sup>70</sup>

The Advisory Opinion on Namibia (1971) by the ICJ emphasised that discriminatory practices imposed by an occupying power were contrary to fundamental international law and therefore violated peremptory norms.<sup>71</sup>

**Right to Self-Determination:** The right to self-determination is increasingly recognised as a *jus cogens* norm.<sup>72</sup> Rooted in the UN Charter and reaffirmed in General Assembly resolutions, this principle allows peoples under colonial rule or foreign occupation to freely determine their political status.<sup>73</sup> Denial of self-determination is seen as a violation of fundamental human rights and international law.<sup>74</sup>

## SIGNIFICANCE OF *JUS COGENS* IN INTERNATIONAL LAW

The doctrine of *jus cogens* occupies a central role in the architecture of international law, serving not only as a set of binding norms but also as a moral and legal compass guiding the behaviour of states. Its significance can be understood across multiple dimensions: legal, moral, and practical.<sup>75</sup>

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<sup>67</sup> Judgment of the International Military Tribunal for the Trial of German Major War Criminals (Nuremberg, 1946)

<sup>68</sup> Legality of the Threat or Use of Nuclear Weapons [1996] ICJ Rep 226, para 79

<sup>69</sup> International Convention on the Elimination of All Forms of Racial Discrimination 1965, 660 UNTS 195

<sup>70</sup> Antonio Cassese (n 1) 209

<sup>71</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) [1971] ICJ Rep 16

<sup>72</sup> Malcolm N Shaw (n 6) 64

<sup>73</sup> UN Charter 1945, arts 1(2), 55

<sup>74</sup> International Law Commission, Draft Conclusions on *Jus Cogens* (2019) UN Doc A/74/10, Conclusion 23

<sup>75</sup> Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 514

**Protection of Fundamental Human Rights:** One of the most important functions of jus cogens norms is the protection of fundamental human rights.<sup>76</sup> By establishing non-derogable prohibitions such as those against genocide, slavery, and torture, jus cogens ensures that states cannot circumvent obligations by invoking domestic laws or political expediency.<sup>77</sup>

The ICTY, in *Furundžija* (1998), emphasised that the prohibition of torture binds all states regardless of treaties or domestic legislation.<sup>78</sup> Similarly, the ICJ, in the *Bosnia and Herzegovina v. Serbia and Montenegro* case, highlighted the universal obligation to prevent genocide, reinforcing the idea that the protection of human dignity transcends state consent.<sup>79</sup>

**Limiting Abuse of Sovereignty:** While sovereignty is a foundational principle of international law, jus cogens imposes limits on state autonomy to prevent egregious abuses.<sup>80</sup> For example, no state may justify aggression, slavery, or racial discrimination as a matter of domestic law or foreign policy.<sup>81</sup>

This limitation ensures that sovereignty is not absolute and reinforces the idea that international law is not merely permissive, but also prescriptive, binding states to certain universal standards.<sup>82</sup>

**Providing Legal Certainty and Hierarchy:** Jus cogens norms introduce a hierarchical structure within international law, resolving conflicts between ordinary treaties and peremptory norms.<sup>83</sup> Article 53 of the Vienna Convention on the Law of Treaties (1969) explicitly declares that treaties in conflict with jus cogens are void.<sup>84</sup>

This hierarchy provides legal certainty by establishing that certain principles cannot be overridden, ensuring predictability in the application of international law.<sup>85</sup> For instance, a treaty permitting torture or slavery would automatically be invalid, giving states, courts, and international bodies a clear standard of enforcement.

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<sup>76</sup> Antonio Cassese, *International Law* (2nd edn, OUP 2005) 206

<sup>77</sup> Vienna Convention on the Law of Treaties 1969, art 53

<sup>78</sup> *Prosecutor v Anto Furundžija* (ICTY Judgment, ICTY-95-17/1, 10 December 1998) para 153

<sup>79</sup> *Bosnia and Herzegovina v Serbia and Montenegro* [2007] ICJ Rep 43, paras 166–167

<sup>80</sup> Malcolm N Shaw, *International Law* (8th edn, CUP 2017) 62

<sup>81</sup> UN Charter 1945, art 2(4); Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277

<sup>82</sup> Cassese (n 2) 207

<sup>83</sup> Vienna Convention on the Law of Treaties 1969, arts 53–64

<sup>84</sup> *Ibid*, art 53

<sup>85</sup> Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 12

**Facilitating International Cooperation and Accountability:** Jus cogens norms serve as a foundation for international cooperation and accountability.<sup>86</sup> Because these norms are binding on all states, they justify collective action against violations. Mechanisms such as universal jurisdiction for crimes against humanity or genocide demonstrate this function.<sup>87</sup>

For example, under the Geneva Conventions and the Rome Statute of the ICC, states are obligated to prosecute or extradite perpetrators of grave violations of peremptory norms.<sup>88</sup> Such obligations strengthen global governance and foster accountability beyond national borders.

**Moral and Ethical Significance:** Beyond legal enforcement, jus cogens carries profound moral and ethical significance.<sup>89</sup> It reflects shared values of the international community and embodies the principles that define civilisation itself. By elevating norms like the prohibition of genocide and slavery to non-derogable status, the international legal system signals the universal condemnation of acts that shock the conscience of humanity.<sup>90</sup>

Scholars such as Antonio Cassese have described jus cogens as the “hard core” of international law, emphasising that its significance lies not only in legality but also in affirming global moral order.<sup>91</sup>

**Role in Conflict Resolution:** The doctrine also plays a crucial role in resolving legal conflicts between treaties or between domestic and international law.<sup>92</sup> When a treaty violates a jus cogens norm, Article 53 of the VCLT renders it void, providing a clear mechanism to address conflicts without ambiguity.<sup>93</sup>

Similarly, in cases where domestic law permits actions contrary to jus cogens, for example, state-sanctioned torture or racial discrimination, international law provides a superior normative standard to challenge such conduct.<sup>94</sup>

**Strengthening the International Legal Order:** Finally, jus cogens contributes to the stability and legitimacy of the international legal order.<sup>95</sup> By codifying non-derogable norms, the

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<sup>86</sup> Shaw (n 6) 63

<sup>87</sup> Rome Statute of the International Criminal Court 1998, art 7

<sup>88</sup> Geneva Conventions 1949; Rome Statute 1998

<sup>89</sup> Cassese (n 2) 208

<sup>90</sup> Orakhelashvili (n 11) 14

<sup>91</sup> Cassese (n 2) 206–208

<sup>92</sup> Vienna Convention on the Law of Treaties 1969, arts 53–64

<sup>93</sup> *Ibid*, art 53

<sup>94</sup> Shaw (n 6) 65

<sup>95</sup> Brownlie (n 1) 516

international community affirms that certain rules are inviolable, regardless of changing political or social contexts.<sup>96</sup> This stability is essential for maintaining trust among states, supporting human rights, and ensuring the rule of law at the global level.

## CHALLENGES AND CRITICISMS OF JUS COGENS

While jus cogens is widely acknowledged as a cornerstone of international law, its application and interpretation are not without challenges. Scholars and practitioners have identified conceptual, procedural, and practical difficulties in defining, enforcing, and expanding peremptory norms. Understanding these criticisms is essential for a balanced analysis of the doctrine.<sup>97</sup>

**Lack of Clear Definition and Scope:** A major challenge lies in the ambiguity surrounding the definition and scope of jus cogens.<sup>98</sup> Article 53 of the Vienna Convention on the Law of Treaties provides a general description, but it does not enumerate which norms qualify.<sup>99</sup> This has led to debates over whether emerging norms such as environmental protection or cybersecurity could attain peremptory status.<sup>100</sup>

Scholars argue that the open-ended nature of jus cogens may create legal uncertainty, as states may disagree on what constitutes a peremptory norm.<sup>101</sup> For instance, while the prohibition of genocide is universally accepted, the status of other norms, such as the right to humanitarian intervention, remains contested.<sup>102</sup>

**Identification Problems:** Closely related is the difficulty of identifying and proving peremptory status. Courts and tribunals must determine whether a norm is accepted by the international community as a whole, and whether it is non-derogable.<sup>103</sup>

The ICJ in *Jurisdictional Immunities of the State (Germany v. Italy)* (2012) highlighted this tension: while acknowledging the superior character of jus cogens norms, the Court found it difficult to reconcile peremptory rules with procedural rules such as state immunity.<sup>104</sup>

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<sup>96</sup> Cassese (n 2) 209

<sup>97</sup> Antonio Cassese, *International Law* (2nd edn, OUP 2005) 210

<sup>98</sup> Malcolm N Shaw, *International Law* (8th edn, CUP 2017) 66

<sup>99</sup> Vienna Convention on the Law of Treaties 1969, art 53

<sup>100</sup> Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 20

<sup>101</sup> Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 520

<sup>102</sup> Shaw (n 2) 67

<sup>103</sup> Orakhelashvili (n 4) 21

<sup>104</sup> *Jurisdictional Immunities of the State (Germany v Italy)* [2012] ICJ Rep 99, paras 73–93

Similarly, some commentators have noted that relying on judicial recognition alone may create inconsistencies across different tribunals.<sup>105</sup>

**Conflict with State Sovereignty:** Jus cogens inherently limits state sovereignty, which can provoke resistance from states unwilling to accept external constraints.<sup>106</sup> Some states may view the doctrine as an imposition of values by powerful states, especially in areas like human rights enforcement or international criminal law.<sup>107</sup> This tension between peremptory norms and sovereign autonomy creates practical challenges in international relations and treaty negotiations.<sup>108</sup>

**Enforcement Challenges:** Although jus cogens establishes non-derogable norms, enforcement remains a challenge.<sup>109</sup> International law lacks a central enforcement mechanism, relying instead on collective action, treaties, and international tribunals.<sup>110</sup> As a result, violations of peremptory norms such as torture, genocide, or aggression may go unpunished if states fail to cooperate or if political interests obstruct accountability.<sup>111</sup>

The case of *Al-Adsani v. United Kingdom* (2001) illustrates this dilemma.<sup>112</sup> While acknowledging the superior status of jus cogens, the European Court of Human Rights upheld state immunity, effectively limiting the practical enforcement of peremptory norms in certain contexts.

**Risk of Politicisation:** The doctrine can also be politicised, as states or international actors may selectively invoke jus cogens to advance strategic interests.<sup>113</sup> For example, claims of humanitarian intervention or the application of international criminal law may sometimes reflect political considerations rather than purely legal obligations.<sup>114</sup> This undermines the universality and legitimacy of jus cogens and highlights the tension between law and geopolitics.

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<sup>105</sup> Cassese (n 1) 211

<sup>106</sup> Shaw (n 2) 68

<sup>107</sup> Ibid

<sup>108</sup> Brownlie (n 5) 522

<sup>109</sup> Orakhelashvili (n 4) 22

<sup>110</sup> Shaw (n 2) 69

<sup>111</sup> Cassese (n 1) 212

<sup>112</sup> *Al-Adsani v United Kingdom* (2001) 34 EHRR 273, paras 55–58

<sup>113</sup> Orakhelashvili (n 4) 23

<sup>114</sup> Shaw (n 2) 70

**Challenges in Evolution and Adaptation:** Finally, while jus cogens norms are dynamic, the process of evolving new norms is slow and contentious.<sup>115</sup> Emerging areas such as climate change, cyber law, and human genetic rights may eventually raise peremptory concerns, but formal recognition requires broad international consensus.<sup>116</sup> Until such a consensus is reached, states may remain uncertain about their obligations, limiting the practical utility of the doctrine in addressing contemporary challenges.

## CONCLUSION

The doctrine of jus cogens represents one of the most fundamental pillars of modern international law, embodying the collective conscience of the international community and setting non-derogable standards for state behaviour.<sup>117</sup> From its codification in the Vienna Convention on the Law of Treaties (1969) to its recognition by international courts and tribunals, jus cogens has transformed the landscape of international legal obligations.<sup>118</sup>

At its core, jus cogens serves a dual purpose: it protects fundamental human rights and limits the misuse of state sovereignty.<sup>119</sup> By prohibiting acts such as genocide, slavery, torture, racial discrimination, aggression, and crimes against humanity, the doctrine safeguards human dignity and reinforces the principles of justice, equality, and international accountability.<sup>120</sup>

The significance of jus cogens extends beyond morality; it establishes legal certainty and hierarchy, ensuring that peremptory norms override conflicting treaties or domestic laws.<sup>121</sup> This hierarchical framework provides clarity in situations of conflict, enabling courts, international organisations, and states to navigate complex legal disputes with reference to universally accepted principles.<sup>122</sup>

However, the doctrine is not without challenges. Issues such as ambiguity in definition, difficulties in identification, enforcement obstacles, and the risk of politicisation highlight the practical limitations of jus cogens.<sup>123</sup> Despite these challenges, the doctrine remains dynamic,

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<sup>115</sup> Cassese (n 1) 213

<sup>116</sup> Orakhelashvili (n 4) 24–25

<sup>117</sup> Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 514

<sup>118</sup> Vienna Convention on the Law of Treaties 1969, arts 53–64

<sup>119</sup> Antonio Cassese, *International Law* (2nd edn, OUP 2005) 206–208

<sup>120</sup> Convention on the Prevention and Punishment of the Crime of Genocide 1948; *Prosecutor v Anto Furundžija* (ICTY Judgment, ICTY-95-17/1, 10 December 1998) para 153

<sup>121</sup> Vienna Convention on the Law of Treaties 1969, art 53

<sup>122</sup> Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 12–15

<sup>123</sup> Malcolm N Shaw, *International Law* (8th edn, CUP 2017) 66–70

capable of evolving in response to emerging threats such as environmental degradation, cyber conflicts, and mass violations of human rights.<sup>124</sup>

Looking forward, the continued recognition and strengthening of jus cogens norms will be essential for maintaining the integrity and legitimacy of the international legal system. It offers a framework through which the international community can collectively condemn egregious violations, promote accountability, and foster a more just and equitable world order.<sup>125</sup>

In sum, jus cogens is not merely a set of abstract legal principles; it is a living embodiment of the values that define the international community. By codifying non-derogable norms, it ensures that certain fundamental standards remain inviolable, even in the face of changing political landscapes, national interests, or societal pressures.<sup>126</sup> Its continued relevance underscores the enduring power of international law to shape, restrain, and guide state behaviour in accordance with the highest ideals of justice and humanity.<sup>127</sup>

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<sup>124</sup> Orakhelashvili (n 6) 24–25

<sup>125</sup> Brownlie (n 1) 516

<sup>126</sup> Cassese (n 3) 209

<sup>127</sup> Shaw (n 7) 70