Supra-State Order: Jus Cogens

Jus cogens norms were first given a textual basis in Article 53 of the Vienna Convention on the Law of Treaties, the product of an ILC examination of the area. Many would argue, however, that the idea has a much deeper history, tracing its intellectual foundations to the natural law of Grotius and Pufendorf, who argued that positive international law (treaty and customary law) would not be valid if it conflicted with the core natural law at the heart of the international legal order, the necessary law of nations. This necessary law was largely conceived as a God-given law, particularly in the work of Pufendorf, although Grotius sought always to appeal to two authorities in his construction of natural law: to sacred authority and to reason. Nevertheless, the charge that naturalistic concepts (including the 'necessary law of nations') inevitably rely on a sacred authority has remained one of the most commonly levelled criticisms of natural law thought, and jus cogens has not been insulated from such criticisms.

Jus Cogens norms—also known as peremptory norms—are defined in Article 53 of the Vienna Convention on the Law of Treaties:

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 recognized 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.

Although this defines the effects of jus cogens norms, it does not define peremptory norms themselves. Peremptory norms are non-derogable propositions which States cannot, even in their bilateral relations, consent to agree to set aside. Any norm of international law, whether it be a bilateral treaty, a customary norm, or even a multilateral treaty supported by the majority of States, which conflicts with a jus cogens norm is invalid. Only a new norm of jus cogens character can modify a jus cogens norm.

A significant question is therefore posed: which norms are of jus cogens character? No authoritative list of peremptory norms exists, although it is possible to say that certain norm either do or do not fall within the category, and the VCLT's circular definition is of little assistance. A further reason for the uncertainty surrounding the enumeration of peremptory norms is the (entirely understandable) reluctance of the International Court of Justice to declare norms to be jus cogens. Because the norms lack a rigorous definition, such an enterprise inevitably carries with it the spectre of judicial law making, and the ICJ has been accordingly reticent on the subject. Nonetheless, a number of judgements of the ICJ and other courts have allowed at least the partial enumeration of peremptory norms. The first ICJ judgement to consider the concept of jus cogens was its decision in Nicaragua. There the Court cited the ILC's description of jus cogens norms, and their characterisation of the use of force as a 'conspicuous example' of a rule of peremptory character ([190]). It also referred to the memorials of the two States, Nicaragua and the United States of America, both of which argued that the use of force is a jus cogens prohibition. Nevertheless, the Court made no finding on the subject, restricting itself to a comment that the use of force is a 'fundamental or cardinal principle' of customary international law. A similar reluctance was demonstrated in the course of the proceedings in the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro) case. The Court notably avoided any mention of jus cogens norms in its judgement on Provisional Measures (1993), and made only a passing reference to the

concept in its Judgement on the Merits (2007), finding that it was not necessary to consider Bosnia's jus cogens arguments. In a famous separate opinion, Judge ad hoc Lauterpacht declared genocide to be a jus cogens prohibition, and declared his opinion that the Security Council arms embargo at issue was, accordingly, void and without effect ([100]).

In the years that followed, however, the Court found that a number of norms had acquired jus cogens status. The Court's first finding of jus cogens referred to Genocide. In its judgement in the Armed Activities (DRC v Rwanda) case the Court held that the prohibition of genocide 'assuredly' possessed jus cogens character, although it also decided that the peremptory character of the norm was not sufficient, in and of itself, to ground the jurisdiction of the Court where one party did not consent ([64]). It also held that war crimes and crimes against humanity have acquired jus cogens status, albeit by a circuitous route. In the Arrest Warrant case the Court held that the immunity ratione personae of a serving Minister for Foreign Affairs applies before foreign courts even where the charge is of war crimes and crimes against humanity ([58]). In its later judgement in Jurisdictional Immunities of the State the Court cited its decision in Arrest Warrant, stating that 'the fact that a Minister for Foreign Affairs was accused of criminal violations of rules which undoubtedly possess the character of jus cogens did not deprive' the DRC of the immunity of its official ([95], emphasis added).

Other courts, too, have declared certain norms to be of jus cogens character. In its judgement in Furundžija v Prosecutor, for example, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia noted that 'the prohibition on torture is a peremptory norm or jus cogens' ([144] et seq). The United Kingdom House of Lords also found torture to be a jus cogens norm in its judgement in ex parte Pinochet Ugarte (no. 3) (p.198), and the European Court of Human Rights found torture to be a peremptory norm in its Al Adsani judgement. Most scholars also list slavery and apartheid as peremptory norms, and some would argue that self-determination (in the Charter-derived sense of non-interference) has acquired jus cogens status.

Even more significant than the lack of clarity over which norms are jus cogens, is their apparent lack of effect. To date, the ICJ has not relied on the jus cogens status of a norm as a key factor in making a finding. Indeed, as has been seen variously in the Arrest Warrant, Obligation to Prosecute or Extradite, Armed Activities, and Jurisdictional Immunities cases, the existence of a jus cogens violation is not sufficient to ground the jurisdiction of the Court, is not sufficient to displace ratione personae immunity, and is not sufficient to displace State immunity. Before other Courts the story is similar. Al Adsani, likewise, held that State immunity prevails even where an alleged violation is jus cogens. A notable exception is the UK House of Lords' finding in Pinochet, which held that jus cogens violations cannot be official acts for the purposes of the ratione materiae immunity of a former Head of State, and that immunity ratione materiae therefore did not bar the prosecution of a former Head of State for acts of official torture (p.203-206 et seq).

It has been argued, for example by Petsche, that jus cogens norms have a deeper significance than their mere legal effect, however. Although they have, at least formally (according to Art. 53 VCLT) a basis in the consent of States, they nevertheless carry with them the shadow of the necessary law of nations described by Grotius and Pufendorf, and thus an aura of naturalism. Even premised on consent, they make a claim that certain acts can be seen to offend the moral conscience of the world, and thus claim to be system values. They also claim a higher status: they are insulated against deliberate change by States, either individually or in consort. Indeed, it is possible that an acknowledged jus cogens norm (such

as genocide) could not be deprived of its status even by the combined action of all States. Do jus cogens norms therefore suggest a level of law which is above the State, and thus indicative of a model of international law that goes beyond a simple consent-based system of multiple sovereignties? That is not (yet, at least) clear, but it is intriguing to consider the possibility that jus cogens norms demonstrate the existence of an international polity that goes beyond mere membership of the international legal community.

- Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331, art. 53.
- Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgement, (1986) ICJ Rep 14.
- Separate Opinion of Judge Ad hoc Lauterpacht, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Provisional Measures, Order of 13 September 1993, (1993) ICJ Rep 407.
- Furundžija v Prosecutor, Judgement of 10 December 1998, Case No. IT-95-17/1-T.
- R v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3), [1999] 2 WLR 827 (HL), [2000] 1 AC 147 (HL).
- Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium), Judgement, (2002) ICJ Reports 3.
- Al-Adsani v United Kingdom (application No. 35763/97) (2002) 34 E.H.R.R. 11.
- Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v. Rwanda), Jurisdiction and Admissibility, Judgement, (2006) ICJ Rep 6.
- Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening), Judgement, (2012) ICJ Rep 99.
- Questions related to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgement, (2012) ICJ Rep 422.
- Markus Petsche, 'Jus Cogens as a Vision of the International Legal Order' (2010-11) 29 Penn St. Int'l L. Rev. 223.