

## **ius cogens**

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#### **A. Notion**

- 1 Many legal systems make the distinction, well-known in Roman law, between *ius strictum* and *ius dispositivum*. While parties may disregard rules of *ius dispositivum* in their contractual relationships, their legal acts must comply with the *ius strictum*, otherwise they are void or at least not completely valid. Arts 53 and 64 of the → *Vienna Convention on the Law of Treaties* (1969) ('VCLT') have formally recognized that the same distinction exists in public international law. Art. 53 VCLT reads:

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.

- 2 This principle was the subject of no little dispute when the VCLT was drafted. France voted against the Convention because it saw the sanctity of treaty obligations threatened by the recognition of *ius cogens*. For this reason Art. 66 (a) VCLT makes it possible to submit any dispute on the existence of such a norm and the conflict between it and a treaty to the → *International Court of Justice* (ICJ), the Western Powers insisting on this procedure to avoid uncertainties.

#### **B. Development**

- 3 Viewed from the perspective of international law as understood in the first part of the 20<sup>th</sup> century, *ius cogens* seemed hardly conceivable, since at that time the will of States was taken as paramount: States could, between themselves, abrogate any of the rules of → *customary international law*. During the formative phase of international law, this view was not the prevailing one. A great deal of the discussion between the early Spanish scholars centred on the question as to what kind of limits had to be respected by States under all circumstances. The index of Grotius' *De jure belli ac pacis* (edition of 1758) has 15 entries under '*ius strictum*'. Reference was made to the double nature of voluntary law as *ius humanum vel divinum*, the latter by its very nature necessarily being *ius strictum* (Liber I, Cap I, XIII). As late as in the 19<sup>th</sup> century it was quite natural to state that treaties must have an object which is physically and morally possible. Heffter regarded as impossible treaties which were 'contraire à l'ordre moral du monde et notamment aussi à la mission des États de contribuer au développement de la liberté humaine'. He expressly referred to agreements maintaining slavery or aiming at the cessation of all commerce between several nations to the detriment of their mutual physical and moral needs (at 192). After World War II the international community became conscious of the necessity for any legal order to be based on some consensus concerning fundamental values which are not at the disposal of the subjects of this legal order. As Mosler rightly stressed, there is a close connection between *ius cogens* and the recognition of a 'public order of the international community' (Mosler (1980) 19; see also → *History of International Law, since World War II*).
- 4 Without expressly using the notion of *ius cogens*, the ICJ implied its existence when it referred to → *obligations erga omnes* in its judgment of 5 February 1970 in the → *Barcelona Traction Case* (*Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase)*). The ICJ spoke of the 'obligations of a State towards the international community as whole' which were 'the concern of all States' and for whose protection all States could be held to have a 'legal interest' (at 32). These obligations are seen as fundamentally different from those existing vis-à-vis another State in the field of → *diplomatic protection*. Since 1970 the ICJ has implicitly recognized the existence of *ius cogens* in several cases. It has stated that the question whether a norm is part of the *ius cogens* relates to the legal character of the norm

(*Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* 258; see also *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* 38–39; → *Gabčíkovo-Nagymaros Case (Hungary/Slovakia)*).

- 5 National courts have also recognized the existence of rules of *ius cogens* in public international law. In a decision of 1965 the German Federal Constitutional Court expressly referred to those rules which are essential for the existence of international law and are deeply entrenched in the *opinio iuris* of States (*AG in Zürich Bundesverfassungsgericht* [German Federal Constitutional Court 2<sup>nd</sup> Senate] (7 April 1965) 449). A United States court has characterized the prohibition of torture as a rule of general international law applicable under all circumstances (*Filártiga v Peña-Irala*; → *Torture, Prohibition of*). It can thus be said that the existence of *ius cogens* in public international law is recognized today by → *State practice*, by codified treaty law and by legal theory.

### C. Rules Having the Character of *ius cogens*

- 6 Art. 53 VCLT defines a peremptory norm but gives no examples. The commentary to Art. 50 Draft Articles on the Law of Treaties of the → *International Law Commission (ILC)* mentions as examples a treaty contemplating the use of force contrary to the principles of the Charter of the United ('UN Charter'), a treaty contemplating the performance of any other act criminal under international law, and a treaty contemplating or conniving at the commission of acts such as trade in slaves (→ *Slavery*), → *piracy*, or → *genocide*, in the suppression of which every State is called upon to co-operate. Treaties violating → *human rights*, the equality of States (→ *States, Sovereign Equality*) or the principle of → *self-determination* are also mentioned. In the *Barcelona Traction Case* the ICJ gave examples of obligations *erga omnes* which by their nature must also form part of *ius cogens*:

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination (at 32 para. 34).

The description of an 'international crime' in Art. 19 *Draft Articles on State Responsibility (1980)* clearly referred to the most important rules of *ius cogens*:

- (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
- (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
- (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;
- (d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas (see also → *Apartheid*; → *Environment, International Protection*; → *Atmosphere, International Protection*).

- 7 When adopting its Draft Articles on Responsibility of States for Internationally Wrongful Acts ('Draft Articles on State Responsibility (2001)'; → *State Responsibility*) the ILC refrained from giving examples for what it called 'a serious breach of an obligation arising under a peremptory norm of general international law' in the text of Art. 40 Draft Articles on State Responsibility (2001). The Draft Articles on State Responsibility (2001) list the prohibition of → *aggression*, the prohibitions against slavery and the slave trade, genocide, and racial discrimination (→ *Racial and Religious Discrimination*) and apartheid from the Draft Articles on the Law of Treaties. In the commentary to Art. 40 Draft Articles on State Responsibility (2001) the ILC added the prohibition against torture, the basic rules of international humanitarian law (→ *Humanitarian Law, International*) which the ICJ describes as 'intransgressible' and the right of self-determination (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* 136 para. 157; → *Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)*).

- 8 It is generally recognized that the fundamental principles of the UN Charter, especially the prohibition of the use of force (Art. 2 (4) UN Charter), have the character of *ius cogens*, from which derogation is never possible. It also seems clear that fundamental human rights form part of *ius cogens*, although details may be open to doubt. Other rules mentioned

frequently are the principles of self-determination, of humanitarian law in armed conflict and the freedom of the → *high seas*. It would seem correct to assume that all basic values of the international legal order may give rise to rules of *ius cogens* which thereby protect the community as a whole.

#### D. Legal Consequences of *ius cogens*

- 9 According to Art. 53 VCLT, a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (→ *Treaties, Validity*). If a new rule of that nature emerges, any existing treaty which is in conflict with that norm becomes void and terminates (Art. 64 VCLT; → *Treaties, Termination*). Under Arts 65 and 66 VCLT, however, specific procedures must be followed when a party to a treaty invokes its invalidity, also on the basis of a conflict with *ius cogens*. According to Art. 69 VCLT only a treaty whose invalidity is established under the VCLT is void. Thus, before the procedure is terminated no party may treat the agreement as a nullity (→ *Nullity in International Law*). This would seem to be the result of the compromise reached at Vienna between procedural provisions and the concept of absolute nullity favoured by the ILC for these cases. However, for third States it seems quite possible to argue that a treaty which conflicts with *ius cogens* is void. In this respect the VCLT has introduced a rather sophisticated system: while parties to a treaty may not free themselves without using the established procedures, third States and international organizations may well take up the matter (see Verosta 689; Rosenne 35 n 97, and 54 n 168). Certainly an international court may disregard a treaty because it conflicts with a rule of *ius cogens*. The → *Inter-American Court of Human Rights (IACtHR)* confirmed that a treaty dealing with slavery could not be invoked before it (*Aloeboetoe Case (Judgment)* paras 56–7). It is generally recognized that the Security Council, exercising its powers under Chapter VII UN Charter, is bound by *ius cogens*. The → *European Court of Human Rights (ECtHR)* correctly held that the qualification of the prohibition of torture as *ius cogens* does not overrule State immunity, which is an independent category of international law (*Al-Adsani v The United Kingdom*; → *Al-Adsani Case*).
- 10 Violations of *ius cogens* will in most cases also be violations of obligations *erga omnes*. The question then arises how far third States may react to such violations by recourse to → *reprisals*. It would seem that in extreme cases such a possibility is recognized by present-day international law (see also → *Obligations erga omnes*).

#### E. Evaluation

- 11 The notion of *ius cogens* became essential for the understanding of international law at a time when it was again realized that the individual and arbitrary agreement of States could not be the highest value in the international community, and that the goal of preserving peace and protecting peoples and individuals presupposed the recognition of some basic values. As Kant wrote as far back as 1785, the idea of a peaceful community of nations is not only an ethical but also a legal principle because of the limited space available on the globe (*Grundlegung zur Metaphysik der Sitten 'Rechtslehre'* Part 2 para. 62; → *Ethos, Ethics and Morality in International Relations*).

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