

A Critical Assessment of *Jus Cogen* Nature of International Human Rights Law

Hidayat Ur Rehman*, Syed Raza Shah Gilani** & Muhammad Haroon Khan***

Abstract

International Human Rights Law is claimed to be jus cogen of International Law, a rule that preempts any other rule of International Law which is conflicting with it. To assess the jus cogen nature of International Human Rights Law the paper refers to the instances where International Human Rights Law is conflicting with other peremptory rules of International Law, State immunity, for example. The concept of jus cogen itself is so confusing that before the jus cogen nature of International Human Rights Law is assessed the paper throws light on the concept of jus cogen itself.

Keywords: International Human Rights Law; Jus Cogen; Torture; Inhumane treatment.

Introduction

While critically discussing the claim that International Human Rights Law has become *jus cogens* of International Law, I cannot resist the temptation to first discuss the very concept of *jus cogens* itself, which has divided the international legal scholars into two groups: the affirmants and the skeptics of the theory. Readers may object it to be irrelevant but the claim cannot be critically assessed unless the ‘magical character’¹ of *jus cogens* is evaluated. First part of the paper, therefore, will briefly evaluate the concept of *jus cogens* in a way that logically connects itself with the International Human Rights Law.

After having established a connection between International Human Rights Law and *jus cogens* in part one, part two of the study will critically discuss the claim of International Human Rights Law to be *jus cogens* of International Law; as, for

* Hidayat Ur Rehman, Lecturer, Department of Law, Abdul Wali Khan University, Mardan.

** Syed Raza Shah Gilani, Department of Law, Abdul Wali Khan University, Mardan. E-mail: sgilani@awkum.edu.pk

*** Haroon Khan, Department of Sharia and Law, Islamia College Peshawar

example, is there any particular list of human rights that is claimed to be part of *jus cogens*? To what extent the human rights which are agreed to be *jus cogens*, are protected by the international and domestic courts? If the *jus cogen* human right is in conflict with another norm of International Law which is claimed to be preemptory too then what? In this part we shall see that due to the evolving nature of human rights as *jus cogens* and other reasons to be discussed the courts have been hesitant to admit that violations of human rights trump other norms, for example, principle of State immunity from judicial proceedings.

After discussing different and opposing scholastic opinions, judicial practice and some provisions of international treaties in part two, the final part of the paper concludes that not all human rights have acquired the status of *jus cogens* and even those who have acquired, have not ripen enough to trump other well established norms of International Law. But the changing tilt in favor of International Human Rights Law, Law in the judicial practice will be made visible.

***Jus Cogens* – its meaning and contents**

Jus cogens, latin meaning of which is “Compelling law” that must be followed by all countries,² is a preemptory rule of International Law which overrides any rule or agreement that is in conflict with it.³ Such a norm does not permit any derogation and can be modified only by subsequent norm having the same character.⁴ Although article 53 of Vienna Convention on Law Treaties invalidates only the treaties that are conflicting with *jus cogens*, there is no reason of not invalidating other norms of International Law which derogate from it; as *jus cogens* norms are as paramount, cherished and common to international community of states as whole.

However, there is little agreement among international legal scholars about the content and scope of *jus cogens*. For one group of scholars it is an empty box, an insubstantial image of a norm lacking blood and flesh;⁵ the inderogable character to sweep away the lower ranking rules of which has turned to be an overall failure⁶ because in *jus cogens*, like other rules of International Law, one can have too much of a good thing and consequently it gets lost in the swirl debate around it.⁷ As A.D. Amato says that “the sheer ephemerality of *jus cogens* is an asset, enabling any writer to christen any ordinary norm of his or her choice as a new *jus cogens* norm, thereby in one stroke investing it with magical power”⁸ with little practical effect; as majority of the courts

judgments, to be discussed, show. On the other hand we have a group of scholars and judicial minds to whom it is a simple matter: certain rules of International Law are or ought to be so forceful or conclusive to be considered by international community for nullifying or compelling the revisiting of ordinary rules of treaty or custom conflicting with them.⁹ And who admit that the exact scope of *jus cogens* remains debated but its continuation in International Law has become a widely accepted proposition.¹⁰ Though identification of the content of *jus cogens* norms has been a debated issue yet human rights are almost 'invariable designated part of it' because majority of the case law where the concept of jus cogen is called forth is taken up with human rights and whenever students are asked to come with examples of *jus cogens* in most of the cases their answer is human rights.¹¹

International Human Rights Law Law as *Jus Cogens*

For two reasons human rights are considered as being of superior status in the normative hierarchy of International Law: First, articles 1 (3), 56 and 103 of the United Nations Charter, read together, gives the meaning that member states of UN are under obligation to contribute to the accomplishment of international cooperation for promoting and encouraging respect for human rights and fundamental freedoms for all without any discrimination. And that this obligation shall prevail over any other obligation incurred under any other international agreement, when both are in conflict. Second, article 53 of the VCLT invalidates any treaty which violates a peremptory norm of general International Law. Such peremptory norms, keeping in view the existing judicial practice, are those which protect two fundamental interests of international community: those of its primary subjects, the States, whose primary interests are protected by ensuring them sovereign equality and prohibition of force in conditions other than authorized by UN; and those of international community by preserving certain fundamental rights.

Proponents of this theory have failed to draw a detailed list of human rights to be *jus cogens*; therefore, it is difficult to rely on it. The list, reflecting the constant process of evolution of international community as whole and not of a particular state, is in constant evolution. However, certain rights, without any disagreement, have acquired the status of *jus cogens*. These include right to self-determination, prohibition on genocide, torture, slavery, slave trade, discrimination on the basis of race, apartheid, and the fundamental principles of International

Humanitarian Law applicable in armed conflict.¹² Karen even describes ‘the whole of human rights’ as a *jus cogens* but majority of scholars deems it too much generalization. The future candidates for *jus cogens*, according to D. Schutter, are the prohibition of death penalty to juveniles and prohibition of refoulement i.e. returning of a person to a state or territory where he or she most probably will be tortured or ill-treated. There are other doctrinal uncertainties, apart from the evolving nature of *jus cogens* norms, which make reliance on it difficult. As to whether the emergence of a peremptory norm could be regional rather than universal? Article 53 of VCLT refers to norms of universal nature only but to D.Schutter,

“This may be too restrictive: certain values could be fundamental to a group of States of a certain region (or ideology)¹³ and this may lead to the annulment of treaties signed by the States of that region (or ideology) which conflict with the said norm.”¹⁴

For example there are visible differences on sexual liberty, death penalty, gender equality, polygamy, etc between Islamic countries and the West. Such differences make reliance on human rights as *jus cogens* difficult.

Another difficulty pointed out by D.Schutter to rely on human rights as *jus cogens* may be summarized as: Consequences attached to human rights are debated. Articles 53 and 64 of the VCLT invalidate the treaties which are in conflict with peremptory norms. But it refers to treaties only and unless we accept these provisions as mere repetition of the form that ‘no derogation shall be permitted to a norm accepted and recognized by international community of States as whole as norm from which no derogations is permitted’, the *jus cogens* nature of a norm seems to be based not on the sense of international community that ‘no derogation shall be allowed from those norms’ but on something else; and therefore, the recognition that rules of that nature enjoy a superior status among other norms of International Law may bring different consequences. And it is recognized that breaches of peremptory norms of International Law bring some specific consequences in the area of State responsibility. For example human rights, being among the *jus cogen* norms, oblige the State not only to respect, protect and fulfill the rights in question but also to take measure that these rights will not be violated, otherwise should be held responsible for violation of *jus cogen* norms. So legal enactments adopted by a State which violate the *jus cogen* norms, for example

amnesty laws where acts of torture have been committed, should not be not be recognized by other States.¹⁵

State Immunity as a Defense to *Jus Cogens* Violations

The most debated and controversial issue which has caused a theoretical conflict among International Law jurists is International Human Rights Law as *jus cogens* versus State immunity. In majority of the cases involving *jus cogens* the defense has been the State immunity. There are a numbers of court judgments which have favored State Immunity vis-à-vis *jus cogens* nature of human rights. Reference to As-Adsani¹⁶ case will be pertinent here to explain the point.

Al-Adsani, a Kuwaiti-British, was allegedly tortured by a Shaikh, (ab)using State machinery, in Kuwait. Al-Adsani, when returned to UK, instituted a civil suit for damages against the Shaikh and State of Kuwait. The action failed for Kuwait took the plea of State Immunity. Applicant went to ECtHR and alleged violation of articles 3 (prohibiting torture and inhuman or degrading treatment or punishment) and 6 (which ensure right to fair trail) of European Convention on Human Rights, 1950. The court making reference to various provisions of international instruments accepted that prohibition of torture has achieved the status of *jus cogens*, but held that it is not able to determine in International Law instruments, judicial authorities or any other substance before it any solid grounds to conclude that, as matter of International Law, a State is no more immune from civil suit in courts of another State where the torture is allegedly committed.¹⁷ But one can raise the point, as the dissenting opinion of some judges said, that when once the *jus cogen* status of prohibition of torture is accepted then a State violating this norm cannot seek State immunity, hierarchically lower principle, to keep off the consequences of illegality of its actions. Binachi thinks the judgment to be inspired by consideration of political expediency and judicial policy and deems *jus cogens* as of uncertain utility and minimal practical influence which has become a failure by and large.¹⁸

One may raise the point that the Al-Adsani case, a civil suit, should be differentiated from a criminal case, where a State official is prosecuted for violation of human rights and where State immunity holds no ground. But International Court of Justice judgment in Democratic Republic of Congo v. Belgium¹⁹ can be a good example to counter this point, where the DRC contended that Belgium court, by issuing an international arrest warrant against its

Minister for Foreign Affairs, who was charged with the crimes against humanity and violations of the Geneva Conventions of 1949 and its additional protocols had breached the principle that “a State may not exercise its authority on territory of another State,” ‘the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the United Nations’ Charter,’ as well as ‘the diplomatic immunity of the Minister for Foreign Affairs of a sovereign state, as recognized by the jurisprudence and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations.’” ICJ held after having a careful observation of State practice, national legal systems and those few judgment of higher courts, like the French Court of Cassation and House of Lords that it was not able to infer from this practice that there existed under international customary law any exception to the rule extending immunity from jurisdiction in criminal jurisdiction and inviolability to current Ministers for Foreign Affairs, when they are alleged of committing war crimes or crimes against humanity. Concluding by thirteen votes to three Court found that Kingdom of Belgium violated its legal obligation towards the Democratic Republic of Congo in respect of immunity from criminal jurisdiction and the inviolability which the incumbent Foreign Minister of Congo enjoyed under International Law. Similarly in the Armed Activities in the Territory of Congo between Democratic Republic of Congo and Rwanda,²⁰ International Court of Justice, in reply to the argument of Congo that Rwanda’s reservation to article IX of the Genocide Convention should be considered without legal effects because it was conflicting with the peremptory norm of prohibition of genocide, stated that the jurisdiction of the court is always based on the consent of the parties and peremptory nature of an international rule may not provide it.²¹

This trend in favor of immunity vis-à-vis human rights as *jus cogens* can be found in domestic courts as well, in cases involving International Law. For example in Bouzari Case²² the Canadian Supreme Court held that International Law is founded on the concept of sovereign equality and non-interference of States in the internal affairs of each other and that Iran was immune from the suit of Bouzari in Canada.

But the concept of State immunity has changed over centuries, it is argued. The period of absolute immunity, when there was no difference between the King and the State, and the State official were enjoying absolute immunity from the domestic

jurisdiction of foreign States, is over. Due to excessive involvement of States in commercial activities, the Western nations adopted a restrictive approach of immunity in nineteenth century. Now there is a theoretical distinction between *acta jure imperri*, state conduct of public nature for which immunity is granted, and the *acta jure gestionis*, state conduct of commercial nature for which it is not.²³ Therefore, a State or its officials may not seek public immunity for each and every act. Secondly, after the Second World War, the concept of foreign sovereign immunity further changed when international agreements imposing criminal liability for human rights violations were signed. The Nuremberg Charter asserted that a head of the State is not free from responsibility for crimes against humanity due to his official position.²⁴ Thirdly, it is also argued that States do not have the sovereign right to violate human rights: International Human Rights Law as a whole abrogates traditional notion of state sovereignty.²⁵ This argument is supported by M. Caplan. According to him a State loses its immunity in two ways: a State is said to waive its entitlement to immunity when it commits a *jus cogens* violation and/or a State conduct that *violates jus cogens* norm is said to fall outside the category of protected State conduct, *acta jure imperri*²⁶. Such conduct is devoid of legitimacy because it is in conflict with the will of international community. Principle of State immunity is, therefore, trumped by *jus cogens* violation. These arguments can be fully explained and supported by the discussion of the following cases:

Regina v. Bartle and The Commissioner of Police for the Metropolis and others, ex parte Pinochet (No. 3) judgment of March 24, 1999 [2000] A.C. 147

In pursuance of two international warrants from Madrid, Pinochet, who was charged with killing of Spanish citizens during his dictatorship in Chile, was arrested in Britain on 16 October, 1998. Pinochet, having a Chilean diplomatic passport, insisted immunity. High Court granted him the immunity but the decision of High Court was reversed by the House of Lords.

The House of Lords in its second decision, as the first one which reversed HC judgment, was set aside due to the potential bias of one Law Lord, determined two issues: First, whether the charges against Pinochet were extraditable offences? Second, was he entitled to immunity?

After analyzing Convention against Torture and its binding nature upon UK, Spain and Chile and the relevant British domestic

laws, Law Lords held that Pinochet could be extradited for crimes committed after 1988. Second issue was dealt with as: immunity of a head of State is not limited for the acts performed in his official capacity. To decide whether crimes alleged are official acts, it is necessary to determine whether they constitute private acts committed for Pinochet's own gratification, or governmental acts executed to promote State interests. If the acts are official functions performed on behalf of the State then head of the State is protected from prosecution with two exceptions. First exception, when the acts are committed for sovereign's own pleasure. Second exception, acts that violate *jus cogens*. The Lords held that even in the case of *jus cogens* violation international customary law does not recognize that a head of State loses his immunity. Convention against Torture does not provide for denial of immunity, however, when it was being adopted the International Law was developed so that individuals were held responsible for international criminal conduct. Furthermore, Convention against Torture applies to State officials, a head of State, therefore, cannot claim immunity for acts that are violating the Convention. Therefore, Pinochet, it was held, does not have any immunity for acts of torture committed after 1988.

One may criticize the judgment on the ground that Lords denied immunity to Pinochet on the ground of violation of Convention against Torture and not on the ground of *jus cogens* violation. But still it is hopeful as it is established that immunity is not absolute and is no defense against a human right violation. We can make our point i.e. human rights as *jus cogens* trump the State immunity stronger by reference to *Prefecture of Voiotia v. Federal Republic of Germany*²⁷ where the Greek Court of first instance used comparatively strong words in favor of *jus cogens* vis-à-vis State immunity. The court held that a sovereign cannot reasonably expect to receive immunity for grave violations of International Law and he/she constructively waives the privilege by committing *jus cogens* act. The court further held that a sovereign does not act within his or her authority when he/she commits an act forbidden by *jus cogens*; the action is devoid of requisite character of being a sovereign act warranting immunity. Furthermore, an act conflicting with peremptory norm is by definition null and void and so cannot be a source of legal rights and privileges, such as a claim to immunity. Court found that granting immunity for acts prohibited by *jus cogens* is equivalent to collaboration in the violation of *jus cogens*, therefore, it should be denied. Lastly, a sovereign abuses his right to immunity by invoking it in cases of *jus cogens*

violation. Thus a sovereign loses his claim to immunity when he or she violates *jus cogens* norm.

Over and above all discussion of *jus cogens* vs. State immunity, M. Caplan contends that State immunity is not an absolute right under International Law rather it operates as an exception to the principle of adjudicatory jurisdiction. Therefore, it is the forum State not the foreign defendant State which enjoys authority to modify foreign State's privilege of immunity. He hints a conflict between *jus cogens* and adjudicatory jurisdiction and not between *jus cogens* and State immunity. By discussing this view, we will cross our words limit but certainly he cannot be agreed with fully, if we look at the history of State immunity in International Law and the case law on the point.

Conclusion

The exact content and scope of *jus cogens* has been debatable issue but there is consensus among international legal scholars that some human rights, not all, have acquired the status of *jus cogens*. However, the constant evolution of the human rights to become *jus cogens* and other doctrinal issues make reliance on it difficult. Human rights as *jus cogens* have been challenged by another norm of International Law, State immunity, which is also claimed by some scholars to be a peremptory norm. At international level, courts have held that human rights have acquired the status of *jus cogens* but they have not reached the level to trump the State immunity, a principle well established in International Law. But domestic courts of the prominent countries opined that concept of immunity has changed and can be overridden by the *jus cogens* nature of human rights. This view is getting wider recognition among scholars and this is really a positive development. However, generally speaking, both the views are so right and each, in the right situations, is so wrong that it is hard to decide which one should be supported or opposed at the cost of other.

Warnings have been voiced against the excessive reliance on *jus cogens* nature of human rights at a time when there are so many uncertainties as to who, and by what process, will identify the human rights to be *jus cogens*. A harmonious rule of interpretation is suggested to cope with the cases which involve *jus cogens* nature of human rights and State immunity.

Notes and References

- ¹ Andrea Bianchi, “Human Rights and the Magic of *Jus cogens*”, *The European Journal of International Law*, Volume 19, Number 3 (2008): 491
- ² “Jus Cogens- Law and Legal Definition”, Available at: <http://definitions.uslegal.com> (Accessed December 26, 2011)
- ³ Article 53, *Vienna Convention on the Law of Treaties*, (1969)
- ⁴ *ibid*
- ⁵ Anthony D. Amato, “It’s a Bird, It’s a Plane, It’s *Jus cogens*”, *Connecticut Journal of International Law*, Volume 6, Number 1 (1990)
- ⁶ Andrea Bianchi, “Human Rights and the Magic of *Jus cogens*”, *op.cit.*
- ⁷ Ed Morgan, “Fear and Loathing in *Jus cogens*: A Journey to the Heart of International Law”, *International Journal*, Volume 63, Number 1, (2007): 101
- ⁸ *ibid.*
- ⁹ Christensen, “*Jus cogens*: Guarding Interests Fundamental to International Society”, *Virginia Journal of International Law*, Volume 28 (1988): 585
- ¹⁰ Lee M. Caplan, “State Immunity, Human Rights and *Jus cogens*: A Critique of the Normative Hierarchy Theory”, *The American Journal of International Law*, Volume 97 (2003): 722
- ¹¹ Andrea Bianchi, “Human Rights and the Magic of *Jus cogens*”, *op.cit.*
- ¹² Olivier De Schutter, *International Human Rights Law* (New York: Cambridge University Press, 2010), 131; See also Karen Parker, “*Jus Cogens*: Compelling The Law of Human Rights”, *Hastings International and Comparative Law Review*, Volume 12 (1988): 411
- ¹³ Words in parenthesis added by the present author.
- ¹⁴ Olivier De Schutter, *International Human Rights Law*, *op.cit.*, 131
- ¹⁵ *ibid.*, 135
- ¹⁶ *Al-Adsani v United Kingdom*, (2001-XI) ECtHR 79, 34 EHRR (2002)
- ¹⁷ *ibid*
- ¹⁸ Andrea Bianchi, “Human Rights and the Magic of *Jus cogens*”, *op.cit.*
- ¹⁹ “Democratic Republic of Congo v. Belgium”, *ICJ Reports* (2002), 3
- ²⁰ “Armed Activities on the Territory of the Congo” (New Application: 2002) ‘Dem. Rep. Congo v. Rwanda’, Jurisdiction and Admissibility (2006) ICJ Rep. 1
- ²¹ A. Binachi (n.1)
- ²² Cited by Noah Benjamin Novogrodsky, “Immunity for Torture: Lessons from Bouzari v. Iran”, *European Journal of International Law*, Volume 18, Number 5 (2008): 939
- ²³ Lee M. Caplan, “State Immunity, Human Rights and *Jus cogens*: A Critique of the Normative Hierarchy Theory”, *op.cit.*
- ²⁴ Jodi Horowitz, ‘Comment: Regina v. Bartle and the commissioner of police for the metropolis and others, ex parte Pinochet: universal

jurisdiction and sovereign immunity for jus cogens violations, *Fordham International Law Journal*, Volume 23, Number 2 (1999)

²⁵ Karen Parker, “*Jus cogens*: Compelling The Law of Human Rights”, op.cit.

²⁶ Lee M. Caplan, “State Immunity, Human Rights and *Jus cogens*: A Critique of the Normative Hierarchy Theory”, op.cit.

²⁷ Case No. 137/1997 (Court of First Instance Leivvadia, Greece, 1997)