# International Law

## Discussion Questions

Gleider Hernández, *International Law* (2nd edition, Oxford University Press, 2022)

## Chapter 3, Hierarchy of Norms in International Law

**Question 1.** 'Jus cogens *is but an ephemeral characterisation that can be applied to any norm without justification; and in any event it has no legal effect on non-peremptory norms of international law*'. Discuss and analyse critically.

This question has two major parts. The first relates to the theoretical potential of *jus cogens* in that it imposes a hierarchy of norms in international law. 'Ordinary norms' of international law are equal between them, but *jus cogens* norms are considered higher, and possess certain attributes. One concern that can be levelled against norms of *jus cogens* is that there is no clear source for their validity. *Jus cogens* may have some form of moral element, according to some scholars. Equally, they seem to depend on the recognition of States for their *jus cogens* status, but there is no clarity as to how much recognition is sufficient, only that recognition must also be with respect to the *jus cogens* character of the norm (Article 53 VCLT).

Students should correctly identify that under Article 53 VCLT, norms of *jus cogens* are both non-derogable and a treaty that is in conflict with a norm of *jus cogens* becomes null *ab initio*. This applies to the treaty *as a whole* and not merely to any offending provision or provisions. Article 64 VCLT provides, moreover, that if a new norm of *jus cogens* emerges, any *existing* treaty becomes void (though not *ab initio*) and is terminated. An excellent answer would note, additionally, that a norm of *jus cogens* is of *universal application*, unlike treaties (which require consent in the form of becoming a party) or custom (to which a State may object persistently); this is a facet of non-derogability. (Bonus points if you can recall that the ILC has in fact suggested that, conceptually, 'regional *jus cogens*' can emerge.)

There are a number of further effects of *jus cogens* that are not embodied in a treaty, but have been recognised in other instruments and the judgments of international courts, and in the ongoing Reports of the ILC in the area:

1) States are under a duty to bring to an end a breach of *jus cogens* (Art 40 ARSIWA).
2) States are under an obligation not to recognise a breach of *jus cogens* as lawful, and are prohibited from providing aid or assistance in maintaining any unlawful situation arising from that breach (Art 41(1) ARSIWA; but also the League response to Japan's invasion of Manchuria, the UN response to Rhodesia's declaration of independence, to South Africa's administration of Namibia, and the annexation of Kuwait by Iraq. The ICJ's advisory opinion in *Construction of a Wall* also supports this conclusion, albeit in respect of a breach of an obligation *erga omnes*.
3) Though controversial, States may refuse to give effect to a decision of an international organisation that would breach *jus cogens* (*Kadi and Al Barakaat v EU Council*), even to the point of taking countermeasures.
4) A reservation to a treaty could be deprived of legal effect if in violation of *jus cogens* (ICTY's *Furundžija* judgment).
5) An entity aspiring towards statehood that is connected with breaches of *jus cogens* will not be recognised (ICJ advisory opinion in *Kosovo*, but citing to examples of Rhodesia and the Turkish Republic of Northern Cyprus).

The best answers will also explain how the *jus cogens* character of a norm does not invalidate the need for an international tribunal to ensure that States have consented to its jurisdiction (*Armed Activities in the Congo*), and that they do not override any claimed State immunities (*Jurisdictional Immunities of the State*).

**Question 2.** *What are the characteristics that distinguish norms of* jus cogens *from obligations* erga omnes*?*

Students can often be confused by these two categories as there is quite some overlap in practice (for example, the prohibitions on genocide, torture and slavery are all both norms of *jus cogens* and obligations *erga omnes*). Nevertheless, students should be able to distinguish the two categories both conceptually and in respect of their effects.

One of the most efficient ways to distinguish the two categories is to describe them. First recall that *jus cogens* is a substantive characterisation: it recognises the higher value of the norm as it overrides treaty law and customary law in cases of conflict, and is non-derogable. The response to Question 1 above also lists specific legal effects of characterising a norm as *jus cogens.*

However, to characterise an obligation as *erga omnes* has nothing to do with any 'higher value' to the norm: the characterisation relates to who may claim for its breach. Much as when one asks who may invoke a right *erga omnes*, an obligation *erga omnes* is owed to all (in international law, to all States and potentially to other legal subjects such as international organisations). This means that all States are deemed to have a legal interest in enforcing an obligation *erga omnes*, even if they have suffered no direct injury (see the ICJ in *Obligation to Prosecute or Extradite* or the Gambia's claim in *Rohingya Genocide*). Typically, this means that any State has standing to claim for a breach of an obligation *erga omnes*.

The best responses might invoke the example of the *Whaling in the Antarctic* judgment, in which the ICJ upheld obligations relating to non-scientific whaling (the hunting and killing of whales) in the Whaling Convention as *erga omnes partes*. Such obligations are never found on a list of *jus cogens* norms.

**Question 3.** *Can* pacta sunt servanda *be considered a norm of* jus cogens*?*

Due to the consent-based nature of international law, *pacta sunt servanda* as embodied in Article 26 VCLT is certainly a fundamental principle of the law of

treaties and of international law more generally (and thus encompassing customary international law and other sources as well). Without an obligation to respect treaty obligations, the basis of international law might fail. There are scholars that argue that *pacta sunt servanda* is *jus cogens* out of logical necessity (e.g. Kolb) because without it, States might evade their treaty obligations by arguing that they are not obliged to respect treaty obligations.

Students would have been exposed to three arguments against listing *pacta sunt servanda*. First, recall that *jus cogens* norms are 'non-derogable'. But *pacta sunt servanda* does have certain justifications for non-performance in the VCLT itself: Article 61, concerning supervening impossibility of performance, and Article 62, concerning a fundamental change of circumstances ('*rebus sic stantibus*'). Though the threshold for these is high (see how Hungary fared in *Gabcikovo-Nagymaros*), it is conceptually possible for these to be invoked, and they allow a State lawfully to stop respecting *pacta sunt servanda*.

Secondly, due to the fluid nature of custom, it is possible for an act to be a breach of a treaty obligation at the time it is committed, yet be the first act to generate a new norm of customary law—or the first act considered to crystallise the new norm. Though it may be a breach of a treaty obligation, it may not be a breach of international law but a new exception or relevant 'subsequent practice'.

Thirdly, international law recognises a whole number of 'circumstances precluding wrongfulness' (in the ARSIWA, arts 20-25) that, though accepting that there has been a breach of international law, allows a State to evade responsibility by invoking one of these circumstances. These include self-defence, necessity, and the taking of a countermeasure.

Together, these all challenge the idea that *pacta sunt servanda* is a norm that admits of no derogation.