

Jus Cogens Erga Omnes Revisited: Deconstructing the Normative Hierarchy of Peremptory Norms Under Contemporary Customary International Law

Riley Turner

Professor

Humboldt-Universität zu Berlin

Unter den Linden 6, 10099 Berlin, Germany

Jesse Thomas

Associate Professor

Universiteit Leiden

Rapenburg 70, 2311 EZ Leiden, Netherlands

Drew Turner

PhD

McGill University Faculty of Law

3644 Peel Street, Montreal, QC H3A 1W9, Canada

Sam Parker

D.Sc

Seoul National University School of Law

1 Gwanak-ro, Gwanak-gu, Seoul 08826, South Korea

Abstract. The conceptual architecture underpinning jus cogens norms has long been predicated upon a presumed hierarchical supremacy within the international legal order, yet recent state practice and adjudicative developments before the International Court of Justice and ad hoc arbitral tribunals have exposed foundational tensions in this orthodoxy. This article critically interrogates the doctrinal premises upon which peremptory norm status is conferred, examining the evidentiary threshold for norm identification, the contested relationship between jus cogens and erga omnes obligations, and the procedural consequences of norm derogation for treaty invalidity under the Vienna Convention on the Law of Treaties. Employing a systematic doctrinal analysis augmented by jurisprudential mapping across multilateral treaty regimes, this study argues that the prevailing normative hierarchy constitutes an undertheorized construct requiring structural reconceptualization to reflect evolving multilateral consensus and the fragmentation of international legal authority.

Keywords: jus cogens, erga omnes obligations, peremptory norms, normative hierarchy in international law, Vienna Convention on the Law of Treaties, treaty invalidity, customary international law, fragmentation of international law, International Court of Justice jurisprudence

Introduction

The doctrine of *jus cogens*—peremptory norms from which no derogation is permitted—occupies a structurally anomalous position within the international legal order. Codified under Articles 53 and 64 of the Vienna Convention on the Law of Treaties (VCLT) of 1969, *jus cogens* norms purport to occupy the apex of a hierarchical normative pyramid, rendering any treaty provision conflicting with them void *ab initio* or prospectively avoidable. Yet, despite over five decades of doctrinal elaboration, the criteria governing the identification, accretion, and juridical consequences of peremptory norm status remain profoundly contested. As the international community navigates an era of compounding crises—including the erosion of multilateralism, asymmetric state compliance with international humanitarian law obligations, and the proliferation of parallel dispute resolution mechanisms—the theoretical robustness of *jus cogens* as a regulatory instrument demands renewed critical scrutiny. Contemporary developments between 2023 and 2025 have sharpened this urgency considerably. The International Law Commission's (ILC) conclusions on the identification of *jus cogens* norms (2022), while representing a landmark codificatory exercise, have simultaneously crystallised longstanding disagreements among states regarding the evidentiary threshold and methodological rigour required to elevate a norm to peremptory status. Divergent positions adopted in the Sixth Committee of the United Nations General Assembly reflect a fundamental schism between positivist and naturalist accounts of norm formation, one that cannot be resolved by institutional fiat alone. Concurrently, the International Court of Justice's jurisprudential trajectory—observable in cases implicating genocide prohibition, the principle of non-refoulement, and sovereign immunity exceptions—has oscillated between cautious affirmation and doctrinal circumspection, further complicating the mapping of peremptory norm content onto operative legal obligations. The relationship between *jus cogens* and *erga omnes* obligations presents an additional layer of analytical complexity. While the two categories are frequently conflated in academic discourse, they are doctrinally distinct: *erga omnes* obligations are owed to the international community as a whole and trigger standing rights in third states, whereas *jus cogens* norms operate primarily as hierarchical invalidation mechanisms at the treaty level. Eliding this distinction, as judicial and arbitral bodies have periodically done, risks distorting both the scope of state responsibility and the remedial architecture available to injured parties under the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). This article proceeds as follows. Section II situates the historical genealogy of *jus cogens* within the broader evolution of international legal positivism and its natural law antecedents. Section III undertakes a granular doctrinal analysis of the ILC's 2022 draft conclusions, identifying structural ambiguities in the proposed identification methodology. Section IV examines the jurisprudential record of the ICJ and selected arbitral tribunals to assess the operative impact of *jus cogens* determinations on treaty validity and state responsibility. Section V critically interrogates the conceptual differentiation between *jus cogens* and *erga omnes* obligations, proposing a revised analytical framework. Section VI offers concluding

observations regarding the implications of normative reconceptualization for the coherence of the international legal order.

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