



Relationship and Conflict between peremptory norms (Jus Cogens) and Obligations Erga Omnes

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Abstract

This paper aims to peruse the two predominant principles of International Law: Jus Cogens & Obligations Erga Omnes. It will provide a synoptic outline of these two principles by whirling on their relationship and dissensions. It will discuss their recognition in the 1986 Vienna Convention on the Law of Treaties, Articles on Responsibility and Barcelona Traction Case. It will accentuate their effects, historical origins and the reciprocal fields of application.

Keywords: Erga Omnes, international law, jus Cogens, peremptory norms, Vienna convention on the law of treaties

Introduction

Overview of Peremptory norms (Jus Cogens)

Jus cogens is a Latin phrase that means “compelling law,” which connotes a norm from which no derogation is permissible. It is an essential principle in the international law which is binding on the states. The peremptory norms are neither defined nor listed by any authority, but it generally includes prohibition of the use of force between states, proscription of slavery, racial discrimination, torture, genocide and people’s right to self-determination. Peremptory norms usually emerge out of case laws and changing political and social environment. Provided the finite number of peremptory norms and consequences attached to them, practice and case laws are not bountiful. In juxtaposition, more scholarly heed has been paid to this controversial topic ^[1].

Jus Cogens have been recognized in several legal instruments. The 1986 Vienna Convention on the Law of Treaties encompasses some key provisions for peremptory norms. Firstly, it provides that any treaty that contemplates with a peremptory norm is void ^[2]. Secondly, it provides safeguard to the new peremptory norms by countermanding the existing treaty which conflicts with that norm ^[3]. As per the Articles on Responsibility adopted by the International Law Commission in 2001 and 2011, the states and international organizations shall collaborate to put an end to any serious contravention of jus cogens and shall not acknowledge as licit a situation created by such a contravention or provide any assistance in maintaining such situation ^[4]. Additionally, if the states or international organizations are to infringe peremptory norms, they cannot adduce any circumstance impeding the wrongfulness of their conduct, such as necessity or force majeure ^[5]. Finally, the obligations under jus cogens shall not be affected by the countermeasures ^[6].

There are some peremptory norms that provide criminal offences must not only enforceable against the states but also the individuals. This was increasingly accepted since Nuremberg Trials (which was the first enforcement of international norms upon the individuals).

In practice, there are cases where there exist disagreements as on whether a certain case violates a peremptory norm? Generally, the state has the right to interpret the conception for themselves.

Most of the states have accepted this concept, some have ratified the Vienna Convention, some have stated in their official statements that they accept the Vienna Convention as codified law, some have applied the conception in their dealing with international organizations and other states.

Every state is bound to obey the principle of jus cogens, leaving no room for reservations by certain actors on international stage. An entity cannot claim a right to use armed force against a state on the ground that it has not signed and ratified the UN Charter. The prohibition the use of force is part of jus cogens and hence not subjected to derogations.

Overview of Obligations Erga Omnes

The term “*Erga omnes*” is a Latin phrase which implies “towards everyone”. The International Court of Justice recognized *erga omnes* in Barcelona Traction Case ^[7]. The principle of *erga omnes* implies obligations owed by the states towards the international community as a whole in order to safeguard and promote the fundamental values and common interests of everyone ^[8]. The concept of Erga Omnes, first time appeared in the following paragraphs of the Belgium v Spain case:

33. An indispensable difference should be made between the state’s obligations towards the international community as a whole and those arising with regard to another state in the area of diplomatic protection. By their very nature, the former is the responsibility of every States. With regards to the significance of the rights involved, all States can be held to have a licit interest in their protection; they are obligations *erga omnes*.

34. Such obligations derive from forbidding the acts of aggression and genocide and also from the principles and rules concerning the fundamental rights of an individual, encompassing protection from servitude and racial discrimination.

The court’s pronouncement on *erga omnes* in Barcelona Traction case has gained huge significance ever since in the International law ^[9].

In short, it is the obligation that every state owes towards the entire international community. Any state has the right to

complain about the infringement of the said rule by another state as every state has an interest in safeguarding the rules that generate *erga omnes* obligations. Illustration- it is not required for a state to be directly or indirectly involved in genocide in order to complain about it.

Relationship between peremptory norms (Jus Cogens) & Obligations Erga Omnes

Alike obligations *erga omnes*, *jus cogens* norms safeguard the common interest of the states and fundamental moral values. The examples of *jus cogens* norms that emerged during the codification of the law treaties primarily corresponded with the examples of obligations *erga omnes* given by the International Court. Also, some attributes pronouncements attaching to *jus cogens* (e.g. the international community 'as a whole') also exist in the dictum on obligations *erga omnes* ^[10].

In the Barcelona Traction case, the ICJ related them together and provided that *jus cogens* obligations would have *erga omnes* effect. Without clearly alluding to *jus cogens*, the ICJ implied as much by the types of obligations it mentioned as examples of *erga omnes* norms which encompassed the prohibition of the unilateral use of force, genocide, slavery and racial discrimination. Provided the fact that these same prohibitions are widely considered as being of a peremptory nature, it implies that when an obligation is recognized as one from which no derogation is permissible because of its fundamental nature then all the states and other subjects of international law have a licit interest in its protection.

Erga omnes status can affect the implementation of peremptory norms by way of Article 48 of the Articles on State Responsibility. The said Article has designed a system of responsibility for serious infringement of international obligations towards the international community as a whole (*erga omnes*). In confirmation with Article 48, states (other than the injured states) are authorized to invoke responsibility where the obligation violated is owed to the international community as a whole. When invoking responsibility in this manner, the invoking state may request from the responsible state cessation of the internationally wrongful act, performance of the obligation or restitution in the interest of the beneficiaries ^[11].

Conflict between peremptory norms (Jus Cogens) & Obligations Erga Omnes

The concept of *Jus Cogens* and Obligations *Erga Omnes* are closely related to each other so there is a less scope of conflict arising between the two. *Jus Cogens* rule creates an *erga omnes* obligation for states to obey the rule. Hence, an *erga omnes* obligation is the repercussion of a rule being signalized as *jus cogens*. The opposite that is 'all *erga omnes* obligations necessarily also have *jus cogens* status' is not applicable.

The contravention of *jus cogens* norms potentially incurs state liability whereas the violation of obligations *erga omnes* creates a right of enforcement.

Erga omnes is defined as rights and obligations towards all and hence in case of infringement, the infringer is liable to all. Whereas, *jus cogens* is a set of legal norms that cannot be contracted out by any agreement and hence in case of infringement of such norms, the infringer is not always liable to all.

The violation of *jus cogens* norm involves the other norm or condition void. Whereas the violation of *erga omnes* norm has procedural consequences.

Conclusion

Indeed, the concept of *Jus Cogens* and Obligations *Erga Omnes* are closely related to each other but they are distinct in their effects, historical origins and the reciprocal fields of application. If a norm is acknowledged to be non-derogable and ubiquitous as *jus cogens*, it follows that obligations emerging from that norm, imperative to its fulfilment, must correspondingly be pervasive as obligations *erga omnes*.

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