**International Law**

**19h April, 2019.**

**In a 2010 article, Anthony D’Amato lightheartedly likened jus cogens to Superman, and declared, “If an International Oscar were awarded for the category of Best Norm, the winner by acclamation would surely be jus cogens. Who has not succumbed to its rhetorical power? Who can resist the attraction of a supernorm against which all ordinary norms of international law are mere 97-pound weaklings?” He went on to ask, “What is the utility of a norm of jus cogens (apart from its rhetorical value as a sort of exclamation point)?”**

**What is your answer to D’Amato’s question? Does the concept of jus cogens have any merit or relevance in the 21st century?**

The purpose of this paper is to deconstruct both customary international law which is jus cogens and also D’Amato’s question which is that regarding the relevance of jus cogens in the 21st century, and whether or not it serves as a mere norm, deriving only rhetorical power, rather than any real power, considering that international law is already challenged as a field and operative domain as an international law, and called more like an international morality. However, in the state of current developments, International law to a huge extent has been codified, which ultimately reduces the power of norm, rendering jus cogens not much power, but only rhetorical value. By utilizing the concept of legal pluralism[[1]](#footnote-1), the theory on principles of justice by John Rawls[[2]](#footnote-2), the crisis in the Balkans[[3]](#footnote-3) shedding light on the importance of customary law, jus cogens unnecessarily enhancing the power of the veto[[4]](#footnote-4), where the exact scope of the contents of jus cogens needs clarification[[5]](#footnote-5), with the interrelationship between state immunity and jus cogens crimes[[6]](#footnote-6), and moreover how jus cogens falls short of being universal even though it is general[[7]](#footnote-7). The political economy aspect of jus cogens will also be analyzed, whereby jus cogens is only a reflection of the parties who have opted upon it[[8]](#footnote-8) and in the face of the evolving international order where countries are drifting away from their customs in lieu of international problems such as terrorism, and where violence against terrorists although violates customary human rights law, it is a necessary means of survival in the modern day. Additionally, the human rights law will be analyzed in lieu of jus cogens, to understand whether the purpose of customary law is being fulfilled, as it was originally pioneered to[[9]](#footnote-9) or has it as per D’Amato’s saying become only a rhetorical piece.

Jus cogens is the reliance on customary international law, a prevailing norm such as for instance human rights which needs to be followed by any material international law, in that customary law precedes material law. The authority that this kind of law, with the nature of jus cogens derives is that it is considered above every other international law, and yet it is only a metaphor, as it relies to no specific laws, but rather peremptory norms which supercede all other laws. During the times prior to the World Wars, between the two wars, and right after the Cold War, was the period when the concept of jus cogens had the most relevance as international law was in the process of being codified in its most rudimentary forms, and led to the founding of the UN Charter, a charter to be followed by all countries in the international domain. With referral regarding when a usage turns into custom, Oppenheim said: – “All that theory can point out is this: Wherever and as soon as a certain frequently adopted international conduct of States is considered legally necessary or legally right, the rule, which may be abstracted from such conduct, is a rule of customary International Law.”[[10]](#footnote-10), and this jus cogens has based on D’Amato’s question is more or less becoming relevant simply because the custom is now changing, and there exist complexities, whereby the authority with which custom derived its relevance is now being questioned by its ability to influence and implement international law in various domains. This will be further explored in the paper in light of the examples provided, mentioned already in the former section.

Foremostly will the principle of legal pluralism be analyzed and in light of that principle, whereby in the international order exist countries which have completely diverse legal inclinations, but are united in the face of peremptory customs in international law, it becomes considerably difficult to bring them all together in the face of one international custom, rendering custom only a metaphorical value instead of s real one[[11]](#footnote-11). Additionally, the concept of Dualism applicable to most countries, Australia being one example, whereby its national law and its abiding of international law are seperate[[12]](#footnote-12), the ability for it and such countries to follow it becomes a reflection of not a unified but a fragmented understanding of customary international law and by this very nature, its ability to abide by customary law in a unified way is compromised, and without that exact-ness of character lacking in customary law, jus cogens becomes an ineffective channel to implement international law, and additionally via its ability to override other convention and custom in international law, it becomes a general principle creating a further lag in already implementable international laws. Additionally, the legal backdrop as is already stressed upon as being pluralistic further creates complications in the applicability of a custom, as the historical variances in legal systems come to play having on the one hand the European states who rose from the system of monarchies/aristocracies to democracies and on the other hand former colonies such as India and Indonesia that obtained their independence after the departure of their colonizers. Essentially, the fact of the matter remains, that these countries are different, with their divergent values and interests. Being united under one single banner of an international community, and also being categorized further into becomes deleterious in international law. This is primarily because of the differences that exist within all of them that it can be seen. Custom therefore is not an adequate representation of these diverse values, cultural histories and societal structure and therefore jus cogens by this nature becomes inadequate to address region specific concerns such as human rights violations for instance. The longstanding tradition of satti in India whereby women are burnt upon the death of their husband is a clear and outright violation of human rights, and goes against customary law where every individual has not only the right to live but to be treated as human (which also forms the basis of the UN Declaration of Human Rights) and yet, the custom is not adequate to overpower national authority, and hence jus cogens becomes only a rhetorical tool rather than an implementable, applicable and driving framework. The general nature of its format focusing little on the realities where international law needs to be implemented, it becomes merely a spoken tool as D’Amato states.

The theory on principles of justice by John Rawls which has been analyzed and furthered in the words “Many general principles of international law such as equality, human rights or good faith, may actually also be principles of justice, and international subjects may therefore have independent or additional duties of justice to abide by those principles”[[13]](#footnote-13); this specific definition adding the burden of responsibility upon all international actors to abide by this principle meaning that states (which are the primary actors of international law) need to take particular care of these principles, works as an argument for the proponents of jus cogens who state its essential nature in international law. However the question D’Amato poses right now is regarding whether jus cogens has any real authority or rather if it holds only “rhetorical” value, and not whether jus cogens should exist in the first place or not. Recognizing the importance of jus cogens and the fact that it was an evolutionary idea, forming the very basis of international law, it should also not be forgotten that international law in the 21st century is far different than it was prior to the two world wars, between them and right after them; international law too has evolved to the extent that peremptory norm or jus cogens has becomes redundant now, albeit still essential for international law (as a field) arriving at its current place. Additionally, deriving from John Rawls’ definition it is seen that he proposes the idea of jus cogens as an international morality rather than an international law, and by utilizing the theory put forth by the positivist school of thought he assists in formulating a link with D’Amato’s definition which refers to international law having only a declaratory and rhetorical value rather than any real authority, as in Rawls’ view it is indeed a morality, and a principle of justice which needs to be abided to rather than a law which will welcome sanctions if it is not followed. Within this reason is the applicability of international law questioned, as it becomes not a channel driving change, but a channel through which legal changes can be driven, in the 21st century, although it may have commanded authority in the past, where precedents such as the Treaty of Westphalia, the Treaty of Versailles, the Vienna Convention and the formation of both the League of nations and the United Nations had to occur. Custom before the existence of these frameworks commanded excessive authority, as it was the key driver of change. Now custom sits at the backseat, while conventions and treaties drive change.

A realistic display of this context can be understood via the crisis in the Balkans[[14]](#footnote-14) illustrating the importance of international law, whereby “provisional measures” are important for regulating a conflict. With the existence of diverse subjects as Bosnia-Herzegovina on the one hand and Yugoslavia on the other hand, where one disputed the legal basis of the interference of the other, it can indeed be noticed as well as concluded that such contentions in the International Court of Justice would not have occurred of there was a legal binding law with the authority to sanction countries who failed to abide by it, instead of being a peremptory norm, one that developing countries, who do not consider themselves to be among the leading, “civilized nations” feel the obligation to follow.

Another factor that works disfavorably for jus cogens, while it serves as a peremptory norm, rather than an international law is that it enhances the power of the veto[[15]](#footnote-15). In recent years, the Responsibility to Protect concept has lost much of its popularity and value and this is particularly because the Permanent five powers have used this ability to unnecessarily intervene in the matters of other states. Considering the observance of the peremptory norm, in this example being the Responsibility to protect (the R2P) the problem that comes into play is that regarding no definitive and objective basis for the governance of jus cogens. As it is general, it becomes a weapon by which the powerful countries are able to exert their influence, further downsizing the purpose for creating a peremptory norm in the first place if there are any counterproductive developments that occur in international convention, as jus cogens itself becomes the reason behind why counterproductive developments are occurring in the international order. According to the ICISS’s report in 2001, the developing countries are picking up the banner of R2P too so that it is not a weapon merely in the hands of the developed world. The reason why this becomes pertinent in light of D’Amato’s argument is that this jus cogens principle which is not a law to be followed as an obligation is that, as mentioned above, its optional nature renders it useful as a tool for the powerful countries which then seek to enhance their own abilities, further proving deleterious for the international order, as the generality of custom creates room for maneuvering, while it also supersedes other laws making it a dangerous and ineffective tool in the hands of the international community of the 21st century today. The purpose is then that jus cogens indeed as D’Amato mentions becomes a supernorm irresistible to the international order, and those which can utilize it to their favor do so and without having a uniform ability to implement and sanction those who follow it, as is and will be mentioned multiple times in this paper, it becomes a supernorm in the 21st century with no authoritative power, no international policing system to ensure its following. For these reasons, jus cogens plays not only an ineffective role in the domain of international law, but it has become severely outdated the context of the 21st century where even the developing countries seek to ascertain their authority, and are jumping on the bandwagon by bringing down the credibility of R2P and in turn jus cogens.

Because the exact scope of the contents of jus cogens needs clarification[[16]](#footnote-16), there arise multiple problems via this very notion. The most authoritative definition of jus cogens being derived from the Vienna Convention in 1969 denotes that it is more or less a norm recognized by the international community, and which by that very nature is to be followed and regarded in lieu of any legislation that may pass which should be no means contradict those norms. However there arise certain problems from this statement, which the Vienna Convention’ application in the International Court of Justice recognizes. In its sessions, what is noticed is that a shift of focus is made from “jus cogens” to “erga omnes” meaning that there is a shift from “alleged norms” to “obligations arising out of these norms”. Manifestations of international law have themselves denoted how jus cogens is inadequate, and the Vienna Convention itself stays silent over the fact that what exactly constitutes international law. Although more authority exists for jus cogens compared to any other contents of international law, the point is that authority should not only be declaratory but also operational. International law is itself only applicable if obligation is derived out of it, however in lieu of the developments in the 21st century, along with the overdeveloped state structure of countries themselves, the ability of international law itself, especially its jus cogens principle comes into question. With international law already lacking an objective trichotomy of power with no definitive bodies serving as the international legislative, the international judicial and the international executive, and the permanent five dominating the other countries despite the principle of “sovereign equality” as per the UN Charter, the domain of international law already is one lacking authoritative command and a systematic structure. This is then coupled with jus cogens, a norm which has no real authority but rather only that which it derives from its principle. Additionally, jus cogens by its very nature is a norm, and try as any system may, to impose an international norm or order or supernorm on the entire international community, with its diverse histories, cultures, values and beliefs, which more often than not are in contradiction with one another, the principle of jus cogens creates a utopian ideal to be followed. This utopian ideal is them used as a rhetorical piece as D’Amato rightly quoted for the purpose of pushing aside other norms and claiming its supremacy, however doing so without any international order or ability to impose any authority. When implemented them, jus cogens does nothing more than create complications in the domain of international law, coupled only with its ability to dilute the power of international law, as a rhetoric then, it supersedes other conventions which may have an implementation capacity, and makes the 21st century international platform more complicated than it already is.

To be explored naturally then, is the connection between the state and the international community (as states are the primary subjects of international law). By exploring with emphasis the interrelationship between state immunity and jus cogens crimes[[17]](#footnote-17), does the essay aim to proceed with its former deductions about jus cogens which have been drawn regarding how it is although a rhetorical tool, can also be used beneficially. In light of the crimes of the Chilean head of state Pinochet who committed countless human rights and torture crimes, even though heads of state are granted immunity as a jus cogens already understood, there is another jus cogens which has precedence above it which is that of safeguarding human rights. That coupled with the states ascension to international law given that what the case is is that it allows international law to be applicable in that particular domain, a level of justice is then expected as per the principles of morality and justice (already mentioned above). However, it is important to note that in the face of these narratives, there also exist counter narrative jus cogens such as the protection of human rights versus the protection of heads of state from foreign courts. Regardless, jus cogens was able to produce some form of justice or sentiment towards driving justice, however it is also important to note that jus cogens also provides the loophole, which is that of international practice to grant the heads of state immunities where they do so desire. Ultimately, what this means is that jus cogens is not a very definitive and effective law, even though it has its advantages. Its rhetorical ability being the very reason for it having both narratives and counternarratives rather than one specific rule that is immediately both applicable and implemented. Because jus cogens is that segment of international law which remains both open to interpretation and subject to the authority of more powerful nations in the international order, jus cogens loses its effectiveness as anything but a declared supernorm as D’Amato mentions, especially in the ever-changing, dynamic environment, growing more fast paced in the 21st century.

Most importantly, jus cogens falls short of being universal even though it is general[[18]](#footnote-18). This is simply because general international law does not have the ability of imposing obligations upon states, take for instance the principle of sovereign quality, a founding principle of the UN however the UN is at times utilized as a platform by which the more powerful countries for instance the permanent five powers channel authority. The ability to exercise the veto is an additional advantage conferred upon them as a restriction imposed of international law, in that if it wants to create an international executive for this order it must compromise on some basic principles. To ensure all the international values are followed in “good faith”, means that a regulatory international executive is require, and because an international executive is required, the principle of sovereign equality is compromised. What becomes the problem then is that the domain has several competing jus cogens principles, which become too broad, too general, and at times contradictory to be implemented universally, and for this reason international law loses its ability to implement itself. Already being a weak law and struggling for effectiveness in the 21st century, with the UN requiring reform to take place as well, international law requiring a specific list of guidelines that need to be followed not only via jus cogens but also through an obligation to follow these norms is what the international community needs. Exactly as per these requirements was why D’Amato mentions and compares jus cogens to superman being a supernorm which all countries find a very lucrative channel to use, however the disparities that are present between states create the usage of jus cogens as a “dangerous” tool whereby it can be used to achieve economic or other goals.

The political economy aspect of jus cogens is also important whereby jus cogens is only a reflection of the parties who have opted upon it[[19]](#footnote-19) and in the face of the evolving international order where countries are drifting away from their customs in lieu of international problems such as terrorism, and where violence against terrorists although violates customary human rights law, it is a necessary means of survival in the modern day. This is a neoliberal perspective favoring the usage of jus cogens but also simultaneously criticizing its ability to enable such change, simply because there are far too many actors on the international domain, and while cooperation is the most favorable option, more integration is required, and more giving up of the state’s sovereignty is required if jus cogens as a peremptory norm is required to be effective.

Additionally, the human rights law will be analyzed in lieu of jus cogens, to understand whether the purpose of customary law is being fulfilled, as it was originally pioneered to[[20]](#footnote-20) or has it as per D’Amato’s saying become only a rhetorical piece. In light of what is mentioned in the slides, the acceptance as law (opinio juris)[[21]](#footnote-21), the requirement being, as a constituent element of customary international law, that “the general practice be accepted as law (opinio juris) means that the practice in question must be undertaken with a sense of legal right of obligation”. This legal duty must be recognized as an obligation, rather than an existent rules of principles which can be optional to be followed. In light of the fact that states are in the 21st century, with the changes in norms taking jus cogens as an option rather than an obligation is the reason behind its failure to exercise any real power. Lastly, jus cogens would be the ideal law if followed under the principles of sovereign equality, and with a more homogenous international community. Until then, D’Amato’s statement stands corrected.

Conclusively, as per D’Amato’s astute comment, this paper after considerable analysis has derived that peremptory customary norm which is jus cogens is indeed only a law deriving rhetorical value, and also weakens the ability of international law itself by applying a general norm which has no implementation ability to impact the real world scenarios or shape relations between its subjects. It is instead derived out of the relations between it subjects and is therefore dependent upon them rather than their being dependent upon it to shape the way the international community is governed under international law. For this reason, D’Amato’s statement stands validated, regarding how jus cogens derives only “rhetorical value” and is merely a supernorm in the 21st century, despite how it may have commanded former “real” authority in the past.

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2. See Besson, Samantha (2009) when addressing their 16th footnote and expanding upon John Rawls’ idea on justice regarding how the principles override the law [↑](#footnote-ref-2)
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5. See Yang, X (2006) where in Section B he illustrates how jus cogens lacks preciseness of norms [↑](#footnote-ref-5)
6. See Zaman, Rebecca (2010) on page 58 [↑](#footnote-ref-6)
7. See Stepan, Sasha (1992) on the second page, second paragraph [↑](#footnote-ref-7)
8. See Stephan, Paul B. (2016), in the abstract, review [↑](#footnote-ref-8)
9. See Simma, Bruno; Alston, Philip (1988-1989) on page 2 of 27 in the third paragraph [↑](#footnote-ref-9)
10. See the slides on International Law [↑](#footnote-ref-10)
11. See Tamanaha, Brian Z (2008) in their second section on “Legal Pluralism in the Past and the Present”. [↑](#footnote-ref-11)
12. See the slides on International Law [↑](#footnote-ref-12)
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21. Slides on International Law [↑](#footnote-ref-21)