The Utility of Regional Jus Cogens

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ABSTRACT: This article examines a regionalised set of international legal norms and values, and expunges whether they can be reconstituted as regional *jus cogens* norms. An analysis of the Brezhnev Doctrine, juvenile executions in the Americas, and Islamic human rights will be instructive in this manner. The practical utility of regional *jus cogens* norms will also be highlighted. Steeped in a positivist stance, the article suggests that a set of higher laws of overriding importance can assist in accomplishing certain political tasks that are deemed acceptable within a specific time-period by a group of nation-states. Moreover, regional *jus cogens* norms can be replaced by another super-norm, or eliminated entirely by the passing of their usefulness. The implications for the existence and practice of regional *jus cogens* norms will be considered, notably their effect on sovereign equality and the promotion of differential treatment. Given a current international community of nation-states characterized by unprecedented heterogeneity, this article will argue that the use of regional *jus cogens* norms are demanded in limited situations.

KEYWORDS: *Jus Cogens*, Regionalisation, Sovereign Equality, Differential Treatment

INTRODUCTION

Throughout the twentieth century, the principle of *jus cogens* has steadily become an accepted doctrine of international law. The main idea being that a universal higher law of overriding importance exists, which the international community of nation-states ought to abide by. This educes the question of whether a regional set of legal norms and values exist, and subsequently, contribute to the establishment of a regional *jus cogens*? Moreover, does a general and consistent practice of a regional group of states sufficiently constitute a regional peremptory norm of general international law? This article will examine these analytical queries, as well as outline the implications for the potential existence and practice of regional *jus cogens*. In the first section, a working definition and criteria for identifying norms of *jus cogens* will be conceived. At core, the article will suggest that there is an inherent tension between natural law theories and legal positivism, hindering the evolution of a complete and coherent list of norms of *jus cogens*. This assertion provides a corollary to the second section that aims to clarify the scope of regional *jus cogens* and its potential utility for international law. An analysis of custom and treaty formations will be informative for this endeavour. Cases and instances that demonstrably testify to the norms of regional *jus cogens* will be explored in the third section – with emphasis placed on exploring the Brezhnev Doctrine, juvenile executions in the Americas, and a regional ‘human rights’ bloc in Islamic nation-states. Suffice to say, there are certain political effects that will arise by employing regional *jus cogens*. One possible impact is that regional *jus cogens* may perpetuate greater sovereign inequality and promote differential

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treatment among nation-states. The subject of the consequences of regional *jus cogens* will be dealt with in the fourth section. Finally, the last section will look at the utility of a norm of regional *jus cogens* in present-day. In sum, this article will illustrate that regional *jus cogens* can exist in international law and serve a significant purpose for a group of nation-states, albeit in limited situations.

**THE FRAMEWORK OF *JUS COGENS***

*What is Jus Cogens?*

*Jus cogens* are peremptory norms of international law that the international community of nation-states as a whole accepts and recognises as “a norm from which no derogation is justified and which can be modified only by a subsequent norm of general international law having the same character”.¹ This idea of *jus cogens* has attained a virtual ontological position in the structure of the international legal system as Article 53 of the 1969 Vienna Convention on the Law of Treaties (VCLT) continued to state: “a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”.² Similarly, Article 64 suggested a treaty becomes void and terminated if it is in contradiction with a newly emerged peremptory norm of general international law (*jus cogens superveniens*.) This stance is further reinforced in the 1986 VCLT with repetition of the same verbatim.³ In this respect, *jus cogens* can be seen as a body of universal higher law that no nation-state ought to nor should violate. If a nation-state objects to a *jus cogens* norm, the nation-state will still be obligated by this norm despite its continued opposition.

The laws governing state responsibility also stress the importance of *jus cogens* norms. The International Law Commission (ILC) outlined, in Draft Articles 40 and 41, that international crimes resulting from a breach of obligations under peremptory norms of general international law is a serious offence.⁴ Furthermore, the ruling of Judge Jennings – in the International Court of Justice (ICJ) judgment on the Nicaragua Case – is instructive in pointing out ‘particular’ rules between two or more nation-states will take precedence over general obligations, save where the latter constitute rules of *jus cogens*.⁵ The growing acceptance of *jus cogens* doctrine will, if it is not the scenario already, be reflected in an increasing reliance on specific peremptory rules by nation-states.

However, there is no general agreement as to what specific rules of international law have attained the status of *jus cogens*. From the US Court of Appeal ruling in the Committee of United States Citizens Living in Nicaragua v. Reagan, there is a loose understanding that *jus cogens* is concerned with substantive, and not procedural obligations.⁶ Substantively, the

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² Ibid.
Nicaragua Case suggests that the prohibition on the use of force is a rule of international law having the character of *jus cogens*. The third series of *Restatement on Foreign Relations of the United States* suggested that, at minimum, *jus cogens* covers murder, torture, genocide and slavery. Arguably, the list can also be expanded to include the prohibition of crimes against humanity, the right of self-determination, and the freedom of the high seas. One of the problems in compiling a definitive list of norms of *jus cogens* is an underlying tension between natural law theories and legal positivism.

**Natural Law vs. Legal Positivism**

Natural law concepts played a prominent role in the development of *jus cogens* in international law. Natural law theories articulate that nation-states cannot be free in the absolute sense when establishing contractual relations. That is, nation-states are obligated to adhere to certain fundamental principles based on considerations of embedded moral authority and merit. As the ILC noted, the “only possible criterion” for distinguishing peremptory norms from other norms was to determine whether the substance of the norm was “deeply rooted in the international conscience”. This stance was reinforced during the 1969 VCLT, where a number of nation-states – including Mexico, Italy, and Ecuador – overtly stressed that *jus cogens* norms derived from concepts of natural law, and further, that rules of *jus cogens* are demonstrably based on the legal conscience and moral beliefs of humankind.

A preoccupation with natural law places the foundations of *jus cogens* on shaky grounds. It assumes the existence of a universalised system of norms derived from nature, that can be projected onto general rules of international law that are norms of *jus cogens*. Legal positivists have noted such claims constrain faulty logic. They contend that the existence and content of law depends not on its merits, as natural law theories posits, but on social facts; essentially, *jus cogens* norms are a social construction. Corresponding with the legal positivists' mode of thought, in its commentary on the draft articles on peremptory rules, the ILC remarked, “there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*”. The reasoning being that “it is not the form of a general rule of international law, but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*.” Put another way, a definitive ideal of what actually constitutes *jus cogens* cannot be established as it may not coincide with the social reality of present day.

In the domain of natural law, the existence of a universal higher law with overarching importance, binding on all subjects of law independent of their will, is an acceptable premise.

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By contrast, the emergence of norms of *jus cogens* in the legal positivist tradition, involves legislative processes capable of imposing peremptory rules on all members of a particular community.\(^\text{13}\) While domestic legal systems based on legislation by a sovereign are well equipped in this regard, when projected onto international community of nation-states such a proposition becomes problematic. There is a glaring disparity between the requirements of *jus cogens* and the ability to codify it into effective laws. The legal processes provided in international law for the creation of any rules are only by the consent and agreement of members of the international community of nation-states. Due to this fact, a clear criterion for identifying norms of *jus cogens* is difficult to achieve.

**Potential Criterion of Jus Cogens Norms**

The apparent necessity of having a criterion for *jus cogens* norms has been enforced by a dominant legal positivist spin. The principal criterion of peremptory rules is considered to be that they “serve the interests of the whole international community, not the needs of an individual state”.\(^\text{14}\) Furthermore, *jus cogens* norms cannot be considered as part of international law without some approval within the normative legal process. As the representative of Brazil commented in the United Nations Conference on the Law of Treaties:

... international law was by definition formed by states, and no noble aspirations or sentiments, love of progress or anxiety for the well-being of the peoples of the world could be embodied in international instruments without the collective assent of the international community.\(^\text{15}\)

This over-emphasis on validating proposed norms of *jus cogens* by the consent of nation-states has even extended to the International Court of Justice (ICJ). In the South West Africa Case, the ICJ remarked that it could take into account higher moral principles only in so far that they were given a sufficient expression in legal form.\(^\text{16}\) In short, *jus cogens* norms must be derived and expressed within the present international legal structure. Thus, such criterion asserts whom the relevant parties required to assent to particular *jus cogens* norms are, in addition to stating that higher moral principles are only applicable when expressed in official, legal form. In spite of this clarification, a vital omission remains: there is no mention of how to assess exactly what *jus cogens* norms are.

Consequently, there are serious doubts whether or not the present normative international legal processes can bring about the emergence of peremptory rules. Many delegations at the VCLT have argued about the non-necessity of having a criterion for identifying *jus cogens* norms. They have maintained that numerous domestic law constituencies have not necessarily defined ‘good custom’, with no unsolvable difficulties having arisen in their application to


specific cases. Therefore, *jus cogens* norms do not necessarily have to be identified to be effectively applied to international treaties or state responsibility.

A fear has been articulated that having such a state-centred approach to determine *jus cogens* norms could be a recipe for abuse by nation-states themselves. The international community of nation-states is constructed along the lines of a myriad of interests, moral codes, values, beliefs and socio-legal structures. It is thus quite difficult, if not impossible, to create an amalgamated international legal order in which norms of *jus cogens* can arise from. In such an environment, agreeing on *jus cogens* norms may run the risk of the silencing certain nation-states and perhaps regional groupings. Indeed, negotiations during the 1969 VCLT heralded behaviour by nation-states that reinforced the possibility of such an occurrence. Different nation-states put forward diverging examples of alleged rules of *jus cogens* reflecting their own preferences. The United Kingdom delegation to the United Nations Conferences on the Laws of Treaties summarised it best with, “what might be *jus cogens* for one State would not necessarily be *jus cogens* for another”.

Thus, norms of *jus cogens* can be understood and explained through two polar positions. On one side, a *jus cogens* norm is taken to be universal in-itself; that is, it cannot be modified. No mention is made as to how such an initial peremptory norm arose or can arise, save the general arguments on natural laws. At the other extreme is the practical argument, whereby a norm of *jus cogens* can be modified by any subsequent or concurrent norm. In effect, a norm of *jus cogens* is exactly like any other norm since its existence is only tested by its usefulness, else it will be replaced by another super-norm. Justification for the existence of regional *jus cogens* will lie mainly with the latter version in this dichotomy of explanations.

**IN SEARCH OF REGIONAL JUS COGENS**

*The Scope of Regional Jus Cogens*

Regional *jus cogens* are peremptory norms whose source lies within a regional set of higher laws of overriding importance. Regional *jus cogens* are not simply norms that have the breadth and scope of *jus cogens*, except in a regionalised setting. The main difference between these two concepts lies in their purpose and roots. *Jus cogens* norms as we have seen in the previous section, can be defined twofold: the universal position and the practical position. Regional *jus cogens* serve best to subscribe solely to a practical position.

To entertain the concept of a regional *jus cogens* norm that is universal in-itself would entail a contradiction. The universal in-itself approach is derived from the claim that there are certain inherent fundamental principles, based on considerations of moral merit and likely steeped in natural-laws, embedded in all nation-states and societies. If such norms exist at a regional level, then they cannot be fundamental in an absolute all-encompassing sense. Hence the

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19 Regional *jus cogens* does not necessarily restrict to the same geographical region of the world. Regional groupings could be made based on commonalities or similarities in political, social or other affinities.
contradiction, and the reasoning why a regional *jus cogens* norm cannot subscribe to a universal in-itself position.

The practical position suits the concept of regional *jus cogens*. The underlying principle being that a set of higher laws of overriding importance assist in accomplishing certain political tasks that are intentionally and overtly deemed acceptable within a specific time-period by a group of nation-states. Moreover, such regional *jus cogens* norm can be replaced by another super-norm, or eliminated entirely by the passing of its usefulness. It is important to note that the regionalisation of international law is not a novel concept. In fact, this practice can be found embedded in custom and treaty-formation.

**Custom**

By no means is the regionalisation of custom a new concept. As Michael Akehurst explained, “in theory there could be customs existing among groups of States which are linked to one another, either through historical, racial, political or other affinities”.20 In practice, the ICJ effectively paved the way for the existence of regional custom in the Asylum Case (Colombia v. Peru). Although the Court found against the existence of regional custom in this particular case, its ruling observed that a state may unilaterally rely on regional custom, provided that:

(1) The custom is the subject of a continuous and uniform practice by the states in question;
(2) Such a rule was invoked by the state exercising it as a right;
(3) The rule is respected by the states against whom it has been enforced as a duty.21

Furthermore, after the existence of regional custom is established, it must be shown that the state with whom the custom is being enforced upon has not repudiated the custom through non-adherence to it.

Case law also offers other evidence in support of the existence of regional custom. In the Barcelona Traction case, Judge Gros suggested that the Court should consider whether there was a custom among capitalist States giving Belgium *locus standi*.22 It was only until the Rights of Passage over Indian Territory Case that regional custom was established as a firm possibility. The Court observed that a bilateral custom between India and Portugal should be honoured, as there was:

no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two states.23

Such a regional custom essentially prevailed over the general custom (*lex specialis derogate generali*) in this particular case. One must point out however that there is a general difference

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21 Asylum Case (Colombia v. Peru), 266 ICJ Reports (1950), pp. 277-278.
23 Rights of Passage over Indian Territory Case, ICJ Reports (1960), p. 6.
between the formation of a general custom and regional one. General custom has an assumption that the nation-state has acquiesced or agreed to it, unless the nation-state objects to the formation of that custom. Regionally, silence equals a rejection. Essentially the ICJ has set out harder rules for regional custom, since a world which is fractured into regional variations may not be appealing, even though this may be the case in numerous instances.

A critic may further argue that although there is a possibility that regional custom may exist in international law, suggesting that this may equate to the existence of a regional *jus cogens* is far-fetched. Whereas customary international law, even the regional kind, derives solely from the consent of nation-states, norms of *jus cogens* usually transcend such consent. Thus, the existence of regional *jus cogens* is difficult to establish. To this, one may rebut that a *jus cogens* norm that transcends consent is the universal in-itself kind. Regional *jus cogens* are not concerned with this type, as pointed out. Its primary attention lies with the practical position, which is quite compatible with the logic of regional custom. That is, there are norms which have been intentionally and overtly elevated to super-norms by a regional group of states; to serve certain political tasks within a specific temporal context.

**Treaty Arrangements**

The formation of treaty arrangements can also serve to highlight a regionalization of international law. In fact, during the course of drafting articles on the Law of Treaties, the ILC Special Rapporteur’s Waldock First Report went as far as to suggest dividing multilateral treaties into two categories: those which concern a few States only (plurilateral treaties) and those which are of interest to all States (multilateral treaties).24 When it comes to treaty-making, a tacit and somewhat overt understanding exists in the international community that all nation-states will not agree upon certain principles due to regional realities. This becomes quite evident when looking at the idea of reservations for selected international treaties.

The concept of reservations, codified in article 2 of the 1969 VCLT25, plays a key role in reinforcing the idea of regional realities taking some precedence. Reservations effectively occur when nation-states accept as many of the rights and obligations under a treaty as possible, while expressly stating that they cannot accept certain provisions of the treaty. Put in inferential terms, without the concept of reservations, an international society of nation-states comprised of various socio-political, economic, development and legal interests will not be able to agree upon an effective treaty.

Reservations can even plausibly allow nation-states to bypass certain key elements of a treaty, thereby allowing a regionalization of obligations to a particular treaty. Even though Article 19(c) of the 1969 VCLT attempted to curb this procedure – stipulating that if the reservation contradicts the purpose and object of the treaty, then the reservation is void – many nation-states appear to be able to waive this requirement in practice, especially in terms of human rights treaties. The United Nations Human Rights Commission, the monitoring body of the International Covenant on Civil and Political Rights (ICCPR), in its General Comments 24 stated that:

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… the Committee believes that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations.26

This is certainly not the accepted view of certain nation-states in regards to the ICCPR. France, Libya, the United States and the United Kingdom have all argued that their reservations in human rights treaties are an essential part of a State’s consent to be bound by a particular treaty.27 Embedded in their statements is an understanding that regional realities must be factored before assenting to a human rights treaty.

So, the regionalisation of international law is not a new concept. Although the international community seeks a uniform and constant practice, the actual scenario is quite different. This is especially evident when viewing the formation of regional custom(s) and the role of reservations in treaty making. In the next section the focus will shift to identifying cases of regional *jus cogens* practice in action.

**REGIONAL JUS COGENS IN PRACTICE**

*Brezhnev Doctrine*

During the Cold War, particular Socialist ideals were seen as distinct to the rest of the world. This logic also extended to international law, accordingly delineating a powerful regional legal order. A classic case in point was the adoption of Brezhnev Doctrine, referring to the right and duty of any Socialist nation-state to come to the fraternal assistance of any other Socialist nation, in the event of a threat to Communist rule. It was famously invoked in Czechoslovakia in August 1968 by the Soviet Union, along with other Socialist nation-states. As Soviet leader, Leonid Brezhnev articulated in a speech made in November 1968 at the Fifth Congress of the Polish United Workers' Party:

> the correlation and interdependence of the national interests of the Socialist countries and their international duties [is of] acute importance. The measures taken by the Soviet Union, jointly with other Socialist countries, in defending the Socialist gains of the Czechoslovak people are of great significance for strengthening the Socialist community, which is the main achievement of the international working class.28

Prior to Brezhnev’s speech, arguments had been made stating that the actions of certain Socialist nations ran counter to the principle of sovereignty and self-determination. Brezhnev’s response to this critique was that such reasoning was groundless, based on an abstract, non-class approach to these principles. His logic was that the people of Socialist nations have the freedom to determine ways of advancing their respective nation. A condition does apply in that the decisions they make must not “damage either Socialism in their country or the fundamental

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interests of other Socialist countries, and the whole working class movement, which is working for Socialism”. 29 In short, the sovereignty and self-determination of each Socialist nation-state cannot stand in opposition to the interests of Socialism more generally. Ultimately, this also infers that each Socialist nation-state is responsible for its own people, along with those of other Socialist nations. Herein lies the Socialist international duty. In his November 1968 speech, Brezhnev quoted Lenin, when he argued:

a man living in a society cannot be free from the society, one or another Socialist state, staying in a system of other States composing the Socialist community, cannot be free from the common interests of that community. 30

This thinking led Grigory Tunkin to declare the Brezhnev Doctrine, which he called “proletarian internationalism”, a norm of jus cogens. 31 In present day terms, this can be classified as a norm of regional jus cogens, predominantly applicable to Socialist nation-states. The Cold War represented a “struggle and co-operation of states of the two opposing social and legal systems”. 32 Socialist nation-states were intricately interdependent upon each other, hence the utility and justification for the existence of a norm of regional jus cogens in the form of the Brezhnev Doctrine. Again, the words of Leonid Brezhnev – from his infamous 1968 speech – are informative in this manner:

From a Marxist point of view, the norms of law … cannot be interpreted narrowly, formally, and in isolation from the general context of class struggle in the modern world … This is an objective struggle, a fact not depending on the will of the people, and stipulated by the world's being split into two opposite social systems. Lenin said: ‘Each man must choose between joining our side or the other side. Any attempt to avoid taking sides in this issue must end in fiasco’. 33

Not everyone was convinced about the usefulness of this particular regional jus cogens norm. Anthony D’Amato professed certain reservations about the Brezhnev Doctrine serving as regional super-norm. 34 At the time, he posed this thought-experiment: Assume that the leader of the USSR decides to repel the Doctrine, would it be illegal to retract it? What good is a super-norm if a head of state can retract it at will? D’Amato raised interesting questions, with the unfolding of history acting as the guide to his answers. That regional jus cogens norms are useful within a specific time-period must be emphasised. As noted earlier, they can be replaced by another super-norm, or eliminated altogether. In this case, with the collapse of the Soviet Union and the demise of the Socialist bloc, the usefulness of the Brezhnev Doctrine ceased. As

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29 Ibid.
30 Ibid.
33 Brezhnev, ‘Polish United Workers’ Congress Speech’.

Tunkin himself remarked, “imperative principles obviously are not immutable”.35

The Brezhnev Doctrine can be seen as a recent historical example of regional jus cogens norm in action. It reinforces the idea that regional jus cogens norms can serve a practical purpose within a specific time-period.

Juvenile Executions

Certain human rights’ principles can be interpreted as regional jus cogens norms, with the prohibition on juvenile executions of notable interest. Its evolution, from becoming an accepted norm of regional jus cogens in the Organization of American States (OAS), to an international jus cogens norm appropriated from the Domingues judgment, can be tracked. Provisions against juvenile executions are demonstrative of the practical utility of a norm of regional jus cogens in certain, specific situations. There are instances, including this case during the 1980s, where the international community of nation-states cannot readily agree upon the merit and/or specifics of an international jus cogens norm. Subsequently, a regional jus cogens norm may emerge to suit a practical position. Prohibitions on juvenile executions operate as a reference for a regional group of nation-states to enact what they deem as higher law in lieu with a regional socio-political belief structure surrounding juvenile executions. A norm of regional jus cogens can also serve as a quasi-starting reference point, denoting legal arguments in favour or its opposite, for an international jus cogens norm.

In 1987, the Inter-American Commission on Human Rights held that the execution of children violated a regional jus cogens norm.36 The Commission found that in the member-states of the OAS there was a recognised norm of jus cogens, whereby the prohibition of state executions of children was apparent. The United States government had reaffirmed this stance by stating, “all [American] states have juvenile justice systems; none permits its juvenile courts to impose the death penalty.”37 At the time of writing, the United Nations Commission on Human Rights Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions took the position that the implementation of the death penalty against juvenile offenders was a per se violation of an evolving international jus cogens norm.38 In other words, this norm was not universally fixed within the international legal system, but was slowly gathering momentum. In the interim, it effectively enjoyed the status of a regional jus cogens norm in OAS member states.

It was only until the Domingues judgment in late 2002 that the Inter-American Commission on Human Rights spelled out an overt recognition of juvenile executions as an international jus cogens norm.39 The Commission argued Michael Domingues, a U.S. citizen, sentenced to the death penalty for crimes committed in 1993 when he was 16 years old, violated an international norm of jus cogens. The Commission wrote:

35 Tunkin, A Theory, p. 125.
37 Ibid.
A norm of international customary law has emerged prohibiting the execution of offenders under the age of 18 years at the time of their crime … this rule has been recognized as being of a sufficiently indelible nature to now constitute a norm of *jus cogens*.

In effect, the prohibition of juvenile executions had moved from a norm of regional *jus cogens* in the Americas to an accepted international *jus cogens* norm after the Domingues judgement.

Caution must be strongly expressed not to confuse the underlying thinking here with arguments that all human rights could follow this path, and/or fit the billing of international or regional *jus cogens* norms. What has been demonstrated is that certain human rights-oriented judicial decisions, with the case of juvenile executions as one example, illustrate that regional *jus cogens* can and have existed in public international law. Moreover, it is quite plausible to have a movement from a regional to an international *jus cogens* norm, further testifying to the practical utility of regional *jus cogens*. Additional evidence of this idea will be presented when looking at the human rights practices of Islamic nation-states as a potential candidate for satisfying regional *jus cogens* norms.

*Islamic States Human Rights Practice*

For some theorists, international human rights legal doctrines are, in large part, a product of the European States system and Judeo-Christian tradition. The line of thinking thus follows that international *jus cogens* norms on human rights, for the most part, reflect European world-views and experiences. In spite of this strain of thought, Islamic nation-states have long asserted that they are bound by shared regional institutions, laws and norms. When speaking of human rights, Islamic nation-states often take the stance that international human rights legal doctrines cannot be compared with the duties rights and freedoms sanctioned by *Allah* (God.) This has led to the creation of the 54-member states’ Organization of Islamic Conference (OIC) backed by the 1981 Universal Islamic Declaration on Human Rights based on the *Qur’an* and the *Sunnah*. Later developments which followed suit include the OIC’s 1990 Cairo Declaration on Human Rights in Islam and the Council of the League of Arab States’ 1994 Arab Charter on Human Rights. The underlying belief in these declarations is summarised in the Universal Islamic Declaration of Human Rights “that *Allah*, and *Allah* alone, is the Law Giver and the Source of all human rights”. In short, regional *jus cogens* norms on human rights enjoy widespread practice in OIC nation-states, reflecting the rights and freedoms contained in Islamic jurisprudence.

Interestingly, regional *jus cogens* norms in OIC nation-states are legitimated substantially through natural laws. As pointed out earlier, legal positivists have critiqued such *jus cogens* norms...
norms as illogical, failing to incorporate changing social facts. Notwithstanding, this does not undermine the notion that regional *jus cogens* norms found in OIC nation-states serve a practical position. The existence of a regional *jus cogens* reinforces the positioning of Islam as a source of law and authority in OIC nation-states. As Article 25 of the Cairo Declaration asserted, “Islamic Shari’ah is the only source of reference for the explanation or clarification” of human rights.\(^{46}\)

This sharply differs from the 1948 United Nations’ Universal Declaration of Human Rights which prominently stated that it, “does not refer to any religion or the superiority of any group over another, but stresses the equality of all human beings”.\(^{47}\) At the surface level, this does not necessarily make Islamic regional *jus cogens* norms on human rights less effective than Universal Declarations’ rights. Bernhard Trautner pointed out:

> the UN Declaration makes the violation of human rights a more or less theoretical offence by states against their citizens. The OIC Declaration makes human rights violations an immediate individual responsibility and it elevates them to the level of an abominable sin.\(^{48}\)

In fact, if one looks at the historical evolution of Universal Declaration of Human Rights, it would be wrong to regard its founding as adhering to positive law. The Universal Declaration qualifies its own foundation by declaring such international *jus cogens* norms on human rights as inalienable. It thereby, conceals its historical and substantial roots both in natural law from antiquity to Kant\(^ {49}\) and in Judeo-Christian teachings. Conversely, the OIC Declaration does not conceal its philosophical basis. It is important to note, that the Universal Declaration was not the endpoint, but rather a starting point for the development of contemporary human rights today.

A regional *jus cogens* norms on human rights can serve a similar practical function, as we have seen in the juvenile executions human rights case above. It can serve to assist in the dialogue on the merits of an international *jus cogens* norm within modern day socio-political realities. For the time being, OIC regional *jus cogens* norms on human rights will continue to exist, whilst there remains a wide-gap between the social and political rooting of mainstream international human rights law based on Judeo-Christian and Islamic underpinnings. This present day reality may come with the consequence of perpetuating sovereign inequality and promoting differential treatment in the international system.

**EFFECTS OF REGIONAL *JUS COGENS***

**Sovereign Inequality**

The principle of sovereign equality is of grave importance to the international community of nation-states. In fact, Article 2(1) of the United Nations Charter reinforces this point, stating “the Organization is based on the principle of the sovereign equality of all its Members”.\(^ {50}\)

\(^{46}\) Cairo Declaration on Human Rights in Islam.


essence, all nation-states have equal rights and duties, and are equal members of the international community, despite differences of an economic, social, political, development or other nature. In particular, sovereign equality includes the respect of the personality of other nation-states, whereby each State has the “duty to comply fully and in good faith with its international obligations and to live in peace with other nation-states”.\textsuperscript{51} International \textit{jus cogens} norms are congruent with this idea of sovereign equality. Before the international community of nation-states, international \textit{jus cogens} norms are universally applicable to all nation-states, whether willing or not.

Stated differently, international \textit{jus cogens} norms correspond to a formal equality of international law. It postulates that all subjects of the law should be treated in a similar fashion.\textsuperscript{52} Rules are usually deemed to be just if they apply to all without discrimination. International \textit{jus cogens} norms such as prohibitions against genocide are applicable to all nation-states, irrespective of any objections. In contrast, the practice of employing regional \textit{jus cogens} norms may be at a ‘cost’ of violating the principle of sovereign equality, and the promotion of formal equality in international law. Legally, all nation-states will not be truly equal in terms of their rights and obligations in the international system. Certain nation-states will have to abide by a set of regional \textit{jus cogens} norms, whereas others do not.

This is not necessarily a terrible matter of affairs in light of considerations of promoting substantive equality, i.e. looking at a rule’s results or effects in deeming its equality value.\textsuperscript{53} Since the international system is built on the rule of sovereign equality, in which the weak and strong are treated equally in international law, one may posit that the least favoured nation will continue to be relatively disadvantaged. Thus, the equality of international legal rights does not necessarily bring forth equality of outcomes, especially in an international society of states characterized by a disparity of resources and capabilities. The international legal system is premised on the desire to bring stability and coherence to nation-states’ relations with each other. It does not however follow that rules should apply uniformly to all states. There are different factors and circumstances that may arise which prevent adhering to a strict reliance on the principle of sovereign equality and in kind, practicing formal equality. Norms of regional \textit{jus cogens} can be one of these factors since it can be intimately embedded in the promotion of differential treatment.

\textit{Differential Treatment}

The concept of differential treatment refers to instances where the principle of strict sovereign equality is sidelined to accommodate extraneous factors.\textsuperscript{54} Given an international environment that supposes the rule of international law applies to all nation-states without discrimination, differential treatment is about creating distinct categories to achieve a goal that an adherence to formal sovereign equality cannot reach in many cases. At core, differential treatment calls for positive discrimination in favour of a given nation-state or a group of nation-states. Herein lies

\textsuperscript{54} Cullet, ‘Differential Treatment’, p. 551.
another utility of regional *jus cogens* norms. It can potentially create equitable results within the existing international legal system by fostering substantive equality in the international community of nation-states.

In practice, regional *jus cogens* norms – such as Islamic human rights – fit the billing of differential treatment in action. It calls for different human rights commitments for Islamic nation-states in order to best reflect Islamic nations’ social and political codes. The concept of justice and equality echoed here is best summarized by Judge Tanaka, in his dissenting opinion in the South West Africa case. He wrote:

> the principle of equality before the law does not mean absolute equality … but it means relative equality, namely the principle to treat equally what are equal and unequally what are unequal … To treat unequal matters differently according to their inequality is not only permitted but required.\(^{55}\)

Judge Tanaka statements testify to the notion that formal sovereign equality of nation-states is a basic principle of international law, but one which is not absolute by any stretch of the imagination. Such logic can allow for a regional *jus cogens* norms such as Islamic human rights to be a recognizable, regional, legal principle.

In an international community of nation-states characterised by the idea that all states are not procedurally on equal footing, differential treatment is rightfully needed. Regional *jus cogens* norms are just one manifestation of the application of differential treatment.

**ARE REGIONAL JUS COGENS NORMS NEEDED TODAY?**

In an international community of ever increasing heterogeneity, regional *jus cogens* are a needed concept that ought to be considered for selected implementation. Yet, a critic will adamantly argue that a divided application of international law to various nation-states serves the opposite end-goal of international law – by fragmentation and division of the international community of nation-states. Therefore, such an approach is deemed unnecessary and/or undesirable, as the ICJ has adamantly suggested in its rulings on regional custom. There is certainly merit to this stance. One can easily suppose an instance where nation-states are equally divided into two groups of roughly equal size, with one group following one regional *jus cogens* norm and the other following another regional *jus cogens* norm. If a dispute arises, between a State in the first group and a State in the second group, then which norm will supersede? Will either group be bound to the regional *jus cogens* norm of the other group? This is certainly not a new problem. Grotius, writing in the 1600s, was acutely aware of this possibility, as he stated:

> The law of nations ... has received its obligatory force from the will of all nations, or of many nations. I added ‘of many nations’ for the reason that … there is hardly any law common to all nations. Not infrequently in fact, in one part of the world there is a law of nations, which is not such elsewhere.\(^{56}\)

In a heterogeneous international community, pale in comparison to the times of Grotius, different

\(^{55}\) South West Africa Cases: Second Phase.

\(^{56}\) Quoted in Akehurst, ‘Custom’, p. 30.
States will have different views about managing their relations with others States. The realization of regional *jus cogens* norms may provide a resolution to social, economic and political problems which might otherwise be almost insoluble. If one rule applies among one half of the international community and another rule applies among the other half, disputes between States in the first group can be settled by applying the second rule. This can be more satisfactory than trying to find an international *jus cogens* norm in many instances.

But this still does not solve the dilemma posed earlier. If indeed a dispute does arise between States from the first group and the second, what is to be done? The solution may be three-fold. As Tunkin suggested in his ‘Theory of International Law’, an admission that there are gaps in international law is permissible and potentially essential.57 Another possibility is to return to an older rule, prior to the realization of a regional *jus cogens* norm by both groups. This tactic may not be acceptable to both sides, as it may involve applying an outdated rule to which neither group of States subscribes to in its present form. A third option involves having both groups take into consideration the underlying thinking and background for the existence of both regional *jus cogens* norms, and progressing to seek a satisfactory dialectical compromise in the form of an international *jus cogens* norm. Of course, this requires careful empathy, deliberative discussion, and a recognition and acknowledgement of differences by both groups. Although the most satisfactory route if executed properly, the option to compromise is often the less travelled path.

In spite of these difficulties, the contemporary utility of applying a regional *jus cogens* norm should not be forgotten. In order to promote substantive equality and differential treatment, regional *jus cogens* norms are a much needed concept that ought to be recognized for selected implementation.

**CONCLUSION**

Modern international law has developed to the point where it has placed the principle of *jus cogens* as an important doctrine. This article suggests a regional set of legal norms and values can exist, and play a crucial role in establishing a norm of regional *jus cogens*. International law has a tradition, albeit a limited one, of accepting regional legal interpretations. The Brezhnev Doctrine, juvenile execution cases in the Americas, and human rights’ norms in Islamic nation-states all illustrate that the litmus test for the existence of regional *jus cogens* has been passed. They demonstrate that a regional group of nation-states can establish and implement a general and consistent practice, reconstituted as a norm of regional *jus cogens*. Moreover, they reinforce the idea that regional *jus cogens* norms have a practical, intrinsic purpose – to assist in accomplishing certain social and political tasks that are acceptable to a group of nation-states in a specific time period. Regional *jus cogens* can be replaced by another super-norm or eliminated entirely by the passing of their usefulness. Their existence is very much a product of – as well as in line with – the positivist account.

Nevertheless, the existence of regional *jus cogens* norms through the promotion of regional divisions and variations in international law is an affront to our current sensibilities. Even so, in a modern-day international community whereby nation-states are characterised by unprecedented heterogeneity, norms of regional *jus cogens* are demanded in limited situations; in the hopes of promoting substantive equality and differential treatment, in spite of perpetuating greater

sovereign inequality. Denying a regional group of nation-states their collective legal thought – embodied as a regional *jus cogens* only invites the maintenance of privileged perspectives. This should be an affront to our sensibilities.