Jus cogens: a law to trump all laws?

It's arguably the most important rule of international law, trumping all domestic legislation. Malcolm Bishop KC examines *jus cogens* in the context of the Rwanda Bill

IN BRIEF

- *Jus cogens* comprises peremptory norms which may not be violated by any state, even in time of war.
- This rule of international law prohibits the facilitating or subcontracting of torture, thus making the Rwanda Bill unenforceable.

Jus cogens—what is it? A trendy health drink? A boiled sweet? No, it is a rule of international law. In fact, it is arguably the most important rule of international law. Its reach extends throughout the civilised world and trumps all domestic legislation, international agreements or treaties. Put shortly, *jus cogens* is a fundamental principle of international law, which is accepted by the international community of states as a norm from which no derogation is permitted, even in time of war.

Unlike ordinary customary law, which has traditionally required consent, and allows the alteration of its obligations between states through treaties, *jus cogens* comprises peremptory norms which may not be violated by any state 'through international treaties or local or special customs or even general customary rules not endowed with the same normative force'.

Discussions of the necessity of such norms can be traced back as far as 1758 (in Vattel's The Law of Nations) and 1764 (in Christian Wolff's Jus Gentium). It is clearly rooted in principles of natural law. But it was the judgments of the Permanent Court of International Justice that indicate the existence of such a peremptory norm, in the *SS Wimbledon* case in 1923. While not mentioning peremptory norms explicitly, the court held that state sovereignty is not inalienable.

Under Article 53 of the Vienna Convention on the Law of Treaties, any treaty that conflicts with a peremptory norm is void. The treaty allows for the emergence of new peremptory norms, but does not specify any particular one, although it does mention the prohibition on the threat or use of force, and on the use of coercion to conclude an agreement.

Enforcement and scope

So far so good, but like most international provisions the problem arises in its enforcement and scope. Generally included are prohibitions on waging aggressive war, crimes against humanity, aritime piracy, genocide, apartheid, slavery, and torture. As an example, international tribunals have held that it is impermissible for a state to acquire territory through war (President Putin, please note).

Nowadays, most states accept that piracy, genocide, slavery, waging war and crimes against humanity are unlawful. Even those that commit them pretend it is not happening. But what about torture? The prohibition of torture has now been recognised as a rule of customary international law—*jus cogens*. The International Criminal Tribunal for the former Yugoslavia so held in Prosecutor v Furundžija. It also stated that every state is entitled 'to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction'.

The United States Court of Appeals for the Second Circuit stated in Filártiga v. Peña-Irala (1980) that 'the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind'.

Article 1 of the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is the first instrument to provide a definition. It provides:

> '1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.
> 2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.'

So, presumably the odd slap in the face will not do, whereas the practices common in the Elizabethan Tower of London, such as the rack, would qualify. So would the savage mistreatment of Ukrainian citizens by Russian soldiers and, it is submitted, the violent rape of women, whether in Ukraine or Israel. In this respect, England was ahead of the game because the very first acts of the Long Parliament in 1640 was to abolish the Court of Star Chamber, where torture was permitted, and since then no warrant for torture has been issued by this country.

But torture or other internationally prohibited misconduct can be carried out by individuals, not states. Does *jus cogens* extend to the torturers, the rapists and murderers? Some peremptory norms define criminal offences considered to be enforceable against not only states but also individuals. That has been increasingly accepted since the Nuremberg trials (the first enforcement in world history of international norms upon individuals) and now might be considered uncontroversial. However, the language of peremptory norms was not used in connection with these trials; rather, the basis of criminalisation and punishment of Nazi atrocities was that civilisation could not

tolerate their being ignored because it could not survive their being repeated.

Facilitating or sub-contracting torture

There are often disagreements over whether a particular case violates a peremptory norm. As in other areas of law, states generally reserve the right to interpret the concept for themselves. But, although a breach of the rule may be difficult to identify, the reach of *jus cogens* also extends to facilitating or subcontracting the practice of torture. This is the *raison d'être* of the non-refoulement provisions, which represent international accepted norms and which are the basis for refusing to send asylum seekers back to their home country, where they might suffer torture, mistreatment or death.

Rwanda was held by the Supreme Court, on unchallenged evidence, to be guilty of these prohibited practices. The government, in seeking to address these concerns, has agreed a new treaty with Rwanda, which, it is claimed, will ensure that no asylum seeker sent there will be in danger of being deported to their country of origin and would not be mistreated in Rwanda itself.

The government has sought to fend off legal challenges by disapplying some (but not all) provisions of the ECHR as enacted in the Human Rights Act 1998. It is asserted that parliamentary sovereignty permits this, even though it involves disapplying numerous international treaties and putting at risk agreements beneficial to this country such as, for example, the Horizon scheme for scientific co-operation.

The Safety of Rwanda (Asylum and Immigration) Bill permits individual challenge on specific grounds. This is sensible because access to the courts has been a fundamental right of individuals in the UK since the Bill of Rights 1689. But even if an individual appeal is confined to narrow limits, that cannot bind the Strasbourg court and aggrieved individuals can still appeal directly to that body, as used to be the case before the 1998 Act.

Whether the novel provision that an interim order to prevent a flight taking off until an appeal has been determined can succeed is a moot point. Certainly to confine the determination of a legal question to the opinion of a minister or official is somewhat novel. As Lord Atkin observed in *Liversidge v Anderson* [1942] AC 206, 'If A has a broken ankle' does not and cannot mean 'If A thinks he has a broken ankle.'

And such a situation might indeed attract Lord Atkin's celebrated reference to Humpty Dumpty: '"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means what I choose it to mean, neither more or less."' But the courts are not entirely ousted because such a decision can always be scrutinised by way of judicial review.

Rewarding failure?

A somewhat quaint feature of the Bill is that an applicant cannot be removed from Rwanda except to the UK. This suggests that a failed applicant must either stay in Rwanda, in which case the asylum application is rather pointless, or be returned to the UK, which was the applicant's goal in the first place. This sounds like rewarding failure!

Be that as it may, the government asserts that parliamentary sovereignty permits these measures, but parliamentary sovereignty is not absolute. No parliament can bind its successor, and there are some aspects of our constitution which are immune from parliamentary scrutiny, such as the Scottish legal system and the position of the Church of Scotland, which the King swore to preserve, both at his accession council and his coronation.

In a case concerning the Hunting Act 2004, a number of the Supreme Court judges queried whether parliamentary sovereignty was absolute. Baroness Hale of Richmond, with characteristic forthrightness, held that: "The courts will treat with particular suspicion (might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny." But this bold assertion has been described by a leading academic as 'jurisprudentially absurd'. That case, of course, was concerned with the interpretation of a wholly domestic statute, where an international norm such as *jus cogens* was not engaged.

It has been argued that nothing less than the 'full fat' solution of abolishing the Human Rights Act in its entirety, and all the other international instruments, will be necessary to secure the Rwanda policy. But will it that be sufficient? The common law will still remain, battered but unbowed, and embedded within it lie the overriding norms of customary international law—*jus cogens*.

The Supreme Court held on unchallenged evidence that Rwanda was unsafe for asylum seekers, predominately but not wholly because the risk of refoulement, which it held to be 'a core principle of international law, to which the United Kingdom government has repeatedly committed itself on the international stage, consistently with this country's reputation for developing and upholding the rule of law' (para 26). If this be correct, then any treaty, agreement or memorandum, including an act of parliament incompatible with *jus cogens*, is writ in water and is of no force or effect. As Macbeth exclaimed: 'It is a tale told by an idiot, full of sound and fury, signifying nothing.' **NLJ**

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