



## The Peacemaker's poison pill: Jus cogens and the Dayton Accords

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### ABSTRACT

The rigid invalidating effect of jus cogens on a conflicting peace treaty may risk blocking a pathway to peace. This article tests this tension through a case study of the 1995 Dayton Peace Agreement, employing a doctrinal analysis of treaties, case-law, and international materials. It contrasts textual and functional interpretations under the Vienna Convention on the Law of Treaties. The analysis finds that while Dayton is textually valid for ending atrocity, it functionally conflicts with jus cogens by entrenching territories born of ethnic cleansing. It concludes that the international community's endorsement has tempered this conflict for the sake of stability, but it also proposes a legal compromise: partial invalidity of entrenching clauses paired with positive obligations for restitution and minority return. This ensures peace is disciplined, preventing a violation of fundamental norms, and a return to armed conflict.

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### 1. Introduction

Under Article 53 of the Vienna Convention on the Law of Treaties (VCLT) reflecting customary international law (Murphy, 2023), any treaty that conflicts with a peremptory norm (*jus cogens*) is void. Yet the "norm-conflict" test, formulated by Vranes (Yip, 2024), and implicitly endorsed by the International Court of Justice (ICJ) in *Jurisdictional Immunities of the State*, neuters this principle. It assumes that a peace treaty conceding territory to an aggressor breaches neither the prohibitions on force, nor annexation, since the illegality occurred before the treaty. This reasoning reduces *jus cogens* to a technicality, a rule guarding words, and not outcomes, and in doing so, betrays its purpose. As Murphy (2023) notes in the ILC's discussion, the scope of *jus cogens* must evolve beyond abstraction, for it to remain normatively effective in a system that is increasingly defined by political compromise (Murphy, 2023). Tladi (2025) has argued that reparations in *jus cogens* violations have been explored (Tladi, 2025), few works have examined how these principles apply to post-conflict peace agreements that consolidate coercive demographic outcomes. This paper addresses that gap, offering a functionalist critique of Dayton that expands the doctrinal reading of *jus cogens* into the sphere of peacemaking. After

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all, the relevance of *jus cogens* in peace agreements endures precisely because modern peacemaking still runs into its hard edges. Negotiators continue to propose amnesties, territorial deals, or power-sharing arrangements that touch on prohibitions e.g. genocide, ethnic cleansing, and compromise on the duty to prosecute grave crimes. These tensions surface repeatedly in contemporary conflicts, reminding us that political convenience must not override peremptory norms. At the same time, today's legal landscape is comparably denser, than in the time of *jus cogens*' birth. Courts and human rights bodies (as exemplified later by *Sejdić* and *Finci* judgments of the European Court of Human Rights) increasingly review peace provisions that may violate *jus cogens*, affecting the enforceability of amnesties, territorial clauses, and transitional justice measures. The problem is therefore very concrete: *jus cogens* still shapes what peace agreements can legally contain and how legitimate they remain in the eyes of the international community.

This article asks whether *jus cogens*, through its rigid and uncompromising nature, can *ipso facto* become an obstacle to lawful peace? The Dayton Peace Agreement ("Dayton Accords"; "Accords") offers a test case: it is a treaty which ended mass violence by incorporating territorial and demographic outcomes born of coercion. Signed in November 1995 at an American Air Force Base in Dayton, Ohio by the presidents of Bosnia, Croatia and Serbia respectively, Alija Izetbegović, Franjo Tuđman, and Slobodan Milošević, it marked the formal end of the Bosnian War and, generally, the violent dissolution of the Socialist Federal Republic of Yugoslavia, which has raged from President Tito's death in 1992 to 1995 (Peter & Houghton, 2025). The dissolution was not a process of a peaceful, negotiated separation, but one of protracted, brutal ethnic war marked with mass atrocities. If *jus cogens* exist to prevent coercion from ever producing lawful results, then treaties that entrench such results must also be read as conflicting with it. A textual reading leaves Dayton intact; a functional one exposes its paradox.

## 2. Method

This article employs a qualitative doctrinal method grounded in the careful reading of legal texts. It examines how the mandatory character of *jus cogens* interacts with the political compromises embedded in peace agreements, using the Dayton Accords as its primary case study. The Accords is selected because its thirtieth anniversary in 2025 underscores its durability, but also because its constitutional framework was built atop territory shaped by mass atrocities and ethnic cleansing. Despite this origin, no new armed conflict occurred after its signing.

Source selection is guided by key terms concerning *jus cogens*, treaty validity, norm conflict, and international law in constitution-making across databases such as Heinonline, and the footnotes stemming from the material. Authoritative materials, as defined in accordance with Article 38(1) of the ICJ Statute form the backbone of the analysis. These include Articles 52-53 of the Vienna Convention on the Law of Treaties, the UN Charter, relevant ICJ and ICTY jurisprudence, and the ILC's Draft Conclusions on *jus cogens*. Academic commentary is used as persuasive authority and is treated as such: a means of identifying competing interpretations rather than establishing binding rules.

The study's approach reflects a hybrid legal stance, it accepts the structural importance of enforcing *jus cogens*, but rejects the idea that it should *ipso facto* invalidate peace settlements that end atrocity or stabilise post-conflict societies. Lastly, the research triangulates scholarly claims against primary norms and formal interpretations. Indeed, the article's focus is the Dayton Accords, but the analysis rests on general rules of international law and can therefore be cautiously extended to comparable peace agreements.

## 3. Analysis and Results

This section examines how the Accords, as a peace agreement which render permanent the territorial and demographic outcomes of the dissolution of Yugoslavia, interact with the

peremptory norms of international law. It explores whether a treaty that consolidates coercive results, without expressly endorsing aggression or annexation, can still amount to a *de facto* violation of *jus cogens*.

### **3.1. The Pragmatic Peace of Dayton: Lawful Settlement or Legal Contradiction?**

The Dayton Accords present a fundamental legal paradox: it established a peace while institutionalising territorial and political outcomes derived from systematic ethnic cleansing and genocide, grave violations of peremptory norms (*jus cogens*). This analysis examines whether the Accords, by consolidating these coercive realities, engages in a *de facto* conflict with fundamental international law, while not explicitly endorsing the underlying crimes.

As previously described, the Accords are the legal and political conclusion to Yugoslavia's violent dissolution (Peter & Houghton, 2025), whose lengthy process was marked not by peaceful separation, but by bloody and violent fragmentation. After Tito's death, rising nationalism and Slobodan Milošević's centralisation of power in Republic of Serbia, led to the secessions of Slovenia, Croatia, and, decisively, Bosnia and Herzegovina. Upon Bosnia's independence in 1992, Bosnian Serb forces backed by Serbia launched a campaign to create a "Greater Serbia" through systematic ethnic cleansing, a term encompassing genocide, crimes against humanity, and war crimes (Arnaut Haseljić, 2021). This strategy sought to establish ethnically homogeneous territories via forced displacement and violence, creating a demographic and territorial reality forged through gross violations of *jus cogens* (Peter & Houghton, 2025). By the time of the Dayton negotiations, the resulting territorial control, particularly that of the Serb-held areas which became *Republika Srpska* within Bosnia and Herzegovina, was fundamentally shaped by illegality. Thus, the Accords faced a core tension: how to achieve peace while operating within a landscape created by the very acts international law unconditionally prohibits.

As Saunders argues, international constitution-making is rarely a neutral process of state-craft but it is one that is coloured with legacy structures of peace-imposition and power relations (Saunders, 2023), a dynamic clearly visible in post-Dayton Bosnia's constitutional design. It reconstituted Bosnia and Herzegovina as a single sovereign state but established a deeply decentralised constitutional order, defined by the war's ethnic divisions (Agarin & Jarrett, 2025). It was achieved through several interdependent provisions. The Accords created two highly autonomous Bosnian entities: the Federation of Bosnia and Herzegovina (FBiH) and the *Republika Srpska* (RS). The Inter-Entity Boundary Line (Annex 2) awarded 49% of the state's territory to the RS, thereby formalising territorial control achieved through ethnic cleansing (Žila, 2021). This division was cemented by a constitutional framework (Annex 4) which institutionalised ethnicity as the organising principle of political life, establishing a tripartite presidency and legislative veto powers for the three constituent peoples (Bosnians, Croats, Serbs) (Tahirović & Kuka, 2021).

Fox and Jones observe that peace agreements, even when not formally binding as treaties, frequently incorporate international legal norms to bolster their legitimacy (Fox & Jones, 2025). This practice underscores the paradox in Dayton: its constitutional entrenchment of outcomes born of coercion coexists uneasily with the international legal principles that it claims to uphold. It is true in the Accords' case, it provides for remedial human rights provisions, most notably the right of return for refugees and displaced persons (Annex 7) (Tahirović & Kuka, 2021), but its implementation was structurally undermined by the very constitutional and territorial arrangements described above (Tahirović & Kuka, 2021). The political empowerment of ethnic groups within their respective territories created a vested interest in obstructing the return of minorities, leaving the demographic goals of ethnic cleansing largely intact.

### **3.2. Jus Cogens and the Legal Toolbox**

*Jus cogens* constitutes the supreme, non-derogable norms of the international legal order, and commonly understood to encompass prohibitions against aggression, genocide, and racial

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discrimination (Linderfalk, 2020). Codified in Article 53 of the VCLT, it voids any treaty conflicting with a peremptory norm. The origins of *jus cogens* themselves are rooted in reactions to coercive peace settlements, such as the Paris Treaties (Linderfalk, 2020), making Dayton's entrenchment of power through ethnic violence particularly ironic. The ILC Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*) further clarify the systemic position of *jus cogens* within the international legal order (Murphy, 2023). Adopted in 2022 after extensive deliberation, the Draft Conclusions reaffirm that peremptory norms derive from the collective recognition of the international community as norms from which no derogation is permitted (Lobo, 2024). Yet, courts remain hesitant to enforce *jus cogens* proactively. As Fabri & Steppioni shows, international tribunals often relegate it to rhetorical devices, avoiding full confrontation with its invalidating implications (Ruiz-Fabri & Steppioni, 2021).

Draft Conclusion 3 identifies such norms through both substance and source, linking their authority to universal acceptance and recognition (Lobo, 2024). Draft Conclusions 10 and 11 delineate their legal consequences: any treaty, unilateral act, or international agreement conflicting with *jus cogens* is *void ab initio*, and produces no legal effects. ILC also emphasises that breaches of *jus cogens* engage obligations *erga omnes*, requiring all states to refrain from recognition or assistance and to cooperate in bringing violations to an end, consistent with Articles 40 and 41 of the ARSIWA. In this formulation, it operates not merely as an ethical aspiration but as a systemic safeguard, ensuring the coherence and integrity of international law when confronted with competing instruments or political exigencies.

The functional test views Dayton as a treaty whose object and effect fundamentally frustrate the purpose of *jus cogens*: it demonstrates that systematic ethnic coercion, if sufficiently successful on the ground, can be transformed into a legitimate and enduring constitutional framework (Agarin & Jarrett, 2025), thereby undermining the deterrent authority of the entire peremptory order. This is the prevailing test in the *corpus* (Lobo, 2024). From this perspective, a peace agreement that formally recognises territorial gains or demographic changes achieved through aggression or ethnic cleansing is itself in conflict with *jus cogens*. By transforming facts on the ground established by genocide or crimes against humanity into a legally sanctioned constitutional order, the treaty frustrates the very objective of these norms to eradicate the consequences of coercion. It provides a lawful veneer for the outcomes of the world's most serious crimes. Brunk and Hakimi challenged the clarity of territorial annexation as a peremptory norm (Brunk & Hakimi, 2024), which complicates the legal implications of Dayton's demographic cementation.

Applied generally to peace agreements, however, this legal absolutism generates a profound practical paradox, creating a tension between the imperative of justice and the necessities of conflict resolution. A restrictive, textualist interpretation of Article 53 of the VCLT, often aligned with the "norm conflict" test as argued by Vranes (Yip, 2024), offers one path through this dilemma.

It limits invalidity to treaties that explicitly command or authorise conduct prohibited by *jus cogens*. Under this narrow approach, a peace settlement that merely recognises territorial or demographic realities created by prior aggression or ethnic cleansing does not, *ipso facto*, constitute a breach of the peremptory norm. The unlawful act is understood as antecedent to the treaty, which itself functions as a pragmatic instrument to halt violence. This interpretation carves out a crucial, albeit constrained, space for legality, allowing negotiators to secure a ceasefire without the immediate threat that their entire agreement will be deemed *void ab initio* (Yip, 2024). The ICJ themselves has used this test in *Jurisdictional Immunities*, when it found that Germany's conduct before the settlement treaty with Italy did not violate *jus cogens* (International Court of Justice, 2012).

### 3.3. Dayton as a Paradox: When Law Forbids Peace and the Limits

Having established the two interpretations of *jus cogens*, this section now subjects the Dayton Accords to both tests to determine its consistency with international law. Applying the

framework of Articles on Responsibility of State for Internationally Wrongful Act, the analysis will evaluate whether the Accords constitutes an internationally wrongful act by testing it against two distinct tests that were introduced by the previous section. The conclusion will determine if the Accords, in ending one crisis, created a permanent breach of its foundational norms.

The European Court of Human Rights has exposed Dayton's inherent discrimination, ruling in *Sejdić and Finci* that its ethnic power-sharing model violates fundamental rights (Pepic, 2023). However, these rulings remain unimplemented (Agarin & Jarrett, 2025), as reforming the constitution risks destabilising the fragile peace. This impasse captures the agreement's core paradox: it prioritises stability by institutionalising inequality.

A functional analysis reveals Dayton's conflict with *jus cogens* through its effects, not stopping at its textual provisions. First, it legally ratified territorial gains achieved through ethnic cleansing (International Criminal Tribunal for the Former Yugoslavia, 2004; see also International Criminal Tribunal for the Former Yugoslavia, 2009 and International Residual Mechanism for Criminal Tribunals, 2021), transforming conquest into constitutional fact (Arnaut Haseljić, 2021).

Second, it constitutionalised ethnicity-based democracy (Tahirović & Kuka, 2021), creating a discriminatory political structure that the European Court of Human Rights found incompatible with human rights law. Lastly, its framework systematically undermined the right of refugee return by empowering local authorities opposed to reintegration (Tahirović & Kuka, 2021), thereby cementing the demographic results of coercion. The facts on the ground support the functional reading, Dayton sustains the benefits of the original wrongs, thus it would find Dayton in continuing violation of *jus cogens*, triggering international obligations of non-recognition.

Yet, as later described, the international community chose to enforce and fund this arrangement, overriding normative concerns for the sake of peace. This leaves an unresolved tension: a restrictive legal view saves the peace but hollows out *jus cogens*, while a functional view saves the norms but casts it into legal doubt. In contrast to the functionalist critique, a strict, textualist reading of the same agreement arrives at a radically different conclusion regarding its legality.

The restrictive reading, as favoured by many positivists, treats the Accords as formally compliant with *jus cogens* because it neither authorises nor perpetuates aggression, genocide, or racial discrimination. This perspective views it as a distinct juridical act concluded after the cessation of hostilities, aimed merely to regulate the consequences of prior wrongdoing, rather than to legitimate them. Under this view, the treaty's legality is insulated from the underlying illegality of the conflict that preceded it. As Richmond noted, international law distinguishes between "acts of settlement" and "acts of aggression," allowing post-conflict instruments to stand independently of the wrongful conduct they address (Richmond, 2025).

As previously stated, this reading aligns with the norm conflict test articulated by Vranes and implicitly by the ICJ in *Jurisdictional Immunities of the State*. There, the Court held that a subsequent legal act, e.g. a treaty or domestic measure, does not necessarily violate *jus cogens* merely because it engages with facts originating in a prior breach. Positivists such as Crawford (Yip, 2024) and Orakhelashvili (Urs, 2025) emphasise that *jus cogens* are only engaged only when a treaty directly conflicts with a peremptory norm at its signing, not when it indirectly addresses the aftermath of an earlier violation.

Under a strict, textual reading of Article 53 of the VCLT, a treaty is void only if its provisions, as it is concluded, mandate or authorise conduct prohibited by a peremptory norm (Yip, 2024). Measured against that narrow yardstick, the Dayton Accords do not on its face breach *jus cogens*. None of its eleven annexes directs the commission of genocide, the use or threat of

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force, the institutionalisation of racial discrimination, or any other act generally listed among peremptory prohibitions. Instead, the Accord's operative clauses concern cease-fire modalities, territorial boundaries, constitutional architecture and implementation machinery, the matters that regulate post-conflict governance rather than prescribe wrongful conduct actively, which would trigger international responsibility on side of the 3 signing states (Croatia, Bosnia and Herzegovina, and Serbia).

Annex 2, for example, delineates the Inter-Entity Boundary Line that allocates 49% of Bosnia and Herzegovina to *Republika Srpska*. The strict test asks one question only: does this section order or endorse an illegal act? The physical displacement and ethnic cleansing had already occurred prior to the signing, it merely records existing control, rather than commanding future expulsions. Based on the same logic, Annex 4's ethnic power-sharing constitution may entrench previously achieved demographic realities, yet it does not, in its text, instruct anyone to commit crimes against humanity or to deny equal protection outright. The Accords therefore occupy the role of regulatory instrument, not tool of prohibition.

The ICJ's reasoning in *Jurisdictional Immunities of the State* underscores this distinction between antecedent wrongs and subsequent juridical acts. It held that a legal measure addressing the consequences of prior violations does not itself violate *jus cogens* unless it repeats or perpetuates the wrongful conduct in its own terms (International Court of Justice, 2012). Dayton Accords falls squarely within that sheltered space: it stabilises a military stalemate but refrains from re-authorising armed aggression, or discrimination. Positivist scholarship, from Crawford, Orakhelashvili, to Vranes, converges on the conclusion that Article 53 is triggered only by direct, textual conflict, and that post-conflict settlements retain a presumption of validity unless they command fresh peremptory breaches.

Had the functional interpretation is accepted, it triggers a distinct and cascading chain of legal consequences for the international community, as outlined in ARSIWA. A breach of a *jus cogens* norm, which safeguards the international community's most fundamental values, automatically creates obligations *erga omnes*, this means all states have a legal right to invoke responsibility for the violation (Linderfalk, 2020). The initial violation is an internationally wrongful act, engaging the responsible state's liability. If the act is ongoing, like an unlawful occupation, it is a continuing breach. This means the state remains in violation for the entire duration and has a persistent duty to cease its illegal conduct.

The collective interest of states then becomes specific, positive duties. Under ARSIWA Articles 40 and 41, all states must not recognise the unlawful situation as legal and must not aid or assist in maintaining it, as has been observed in the annexation of Crimea by Russian Federation, and its annexation of the Ukrainian *oblasts* (Marhold, 2023). This prohibits any political, legal, or material support that would legitimise the breach (Ruiz-Fabri & Steppioni, 2021). States must also cooperate to end the breach, forming a legal basis for sanctions or other multilateral action. This persistent illegality also creates a non-negotiable duty of reparation. The primary form is *restitutio in integrum*: the restoration of the situation that existed before the wrongful act occurred (Tladi, 2025). This could mean reversing territorial conquest or dismantling discriminatory systems. If restitution is impossible, the state must provide compensation or satisfaction instead.

A functional reading of *jus cogens*, i.e. one that extends peremptory norms beyond textual conflict, to include the legal effects of coercion, could have rendered the Accords from its inception. By formalising territorial and demographic outcomes produced through aggression and ethnic cleansing, it might have been viewed as validating a continuing breach of *jus cogens* norms under Article 53 of the VCLT, and Articles 40–41 of ARSIWA. Yet this did not occur. Karreth et al demonstrates that third-party actors critically shape how peace agreements transition into implementation (Karreth et al., 2022), a key factor that helps explain why Dayton's constitutional settlement survives despite persistent *jus cogens*-norms conflicts.

Rather than treating Dayton as legally defective, the international community collectively declared it legitimate. The United Nations Security Council's endorsement through Resolution 1031, alongside NATO's implementation through IFOR and later SFOR, amounted to a political and legal acceptance which neutralised the invalidating effects (Barber, 2022) that the functional reading would produce. As Peters observes, the Security Council's capacity to override *jus cogens* by veto politics reflects a systemic tension between enforcement and power dynamics (Peters, 2023), one that is dynamic vividly present in Dayton.

This move represents the adoption of a purpose-driven override of the peremptory framework. By prioritising peace and stability, which *in se* are the core objectives of the UN Charter, the international community effectively subordinated *jus cogens* enforcement to systemic survival. Instead of insisting on doctrinal coherence, it invoked the principle of systemic integration under Article 31(3)(c) VCLT, interpreting the law in light of "any relevant rules of international law applicable between the parties." Peace, rather than legality, became the interpretative anchor. This way, *jus cogens* was not rejected, but reinterpreted through a pragmatic lens that privileged the Charter's maintenance of peace as a meta-norm capable of tempering even foundational rigidity. As Proukaki notes, the peremptory character of norms is not immutable (Katselli Proukaki, 2025); this suggests space for Dayton's partial invalidation rather than its outright rejection.

While the international community has opted to preserve the Dayton framework in its entirety, the sounder response would involve a deliberate revision of its problematic sections, particularly the annexes which institutionalised outcomes produced by coercion. Using mechanisms such as sunset clauses and conditionality benchmarks would allow the Accords to retain their stabilising function while progressively restoring conformity with *jus cogens*. This recalibration would transform Dayton Accords from an instrument of compromise into a framework for disciplined transition, aligning peace with the reintegration of legality.

Having also elaborated on the existing legal framework on the matter, and drawing on the ICJ's reasoning in *Jurisdictional Immunities*, the findings of this study can be readily extended to other peace agreements concluded in the shadow of *jus cogens* violations. The decision clarifies not only the hierarchical character of peremptory norms, but also how its breach does not nullify every legal act *ipso facto* connected to the underlying wrongful act, a distinction crucial for analysing post-conflict settlements. This interpretive logic allows the present analysis to be applicable beyond Dayton, and to speak to broader structural questions about the validity of other peace treaties. In turn, it demonstrates that the tension between *jus cogens* and negotiated peace is not unique to Bosnia and Herzegovina, but reflects persisting dilemmas in the legal architecture of peacemaking.

#### **4. Conclusion**

This study shows that the Dayton Accords illustrates a central tension in international law: peace can be achieved, but only through a normative suspension. A narrow reading of Article 53 VCLT suggests that Accords is not void, because it does not mandate the continuation of genocide, annexation, or other violations of peremptory norms; rather, it ends violence. Yet a functional reading reveals that it nevertheless collides with *jus cogens* to the extent that it constitutionalises coerced demographics, and stabilises territorial arrangements produced by atrocity. The research therefore demonstrates that *jus cogens* does not mechanically invalidate every peace agreement tainted by past illegality, but it also does not permit the legal consolidation of a *jus cogens*-violating status quo.

The concrete contribution of this study is to articulate a middle course between absolutist invalidity and unprincipled pragmatism. It argues that the appropriate legal response is partial invalidity, or interpretative non-recognition, of those provisions that entrench the effects of coercion, coupled with affirmative obligations of restitution, minority return, constitutional reform, and de-ethnicisation. This approach explains how peace agreements can remain

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formally valid while still generating duties of compliance and transformation under international supervision. It also clarifies why Dayton Accords endured despite its flaws: the international community collectively treated its compromises as permissible transitional measures rather than as entrenched legal outcomes.

The scope of this study is intentionally limited. It examines the Dayton Accords through a strictly normative and doctrinal lens, and the study relies on a peace agreement that has been subject to exceptional international scrutiny. Other agreements concluded in less visible or supervised contexts may not withstand *jus cogens* review as readily. As a result, the findings can inform, but not automatically govern, the assessment of peace treaties lacking Dayton's level of oversight, institutional involvement, and sustained international engagement.

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