Treaties, Peremptory Norms and International Courts: Is the Hierarchy Theory Treading Water?

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INTRODUCTION

In its recent report, the ILC addressed two main outstanding issues relating to *jus cogens* norms: the existence of regional *jus cogens* and the possibility of an illustrative list.[1] The report concludes with draft conclusion 24, which proposes a non-exhaustive list of the "most widely recognised"[2] peremptory norms, such as the prohibition of genocide and aggressive use of force. Peremptory norms are no doubt a "positive part of international law,"[3] yet are still conceptualised by some as "a dramatic (or threatening) magic."[4] The ILC's report is perhaps an attempt to concretise *jus cogens* as, in Kolb's words, an "operational concept of law", rather than a mere extension of natural law theory or lofty ideals. This post offers the thesis that, whilst such a mission is admirable, the operation of peremptory norms as envisaged by the 'hierarchy theory'[5] remains impeded by the dominance of treaties as a source of international law. Furthermore, this seems unlikely to change in the immediate future because treaties are a primary vehicle for the enforcement of state sovereignty, which remains paramount in an international legal sphere dominated by positivist notions of state consent. The

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[1] ILC, 'Fourth report on peremptory norms of general international law (jus cogens)' 71st session (9 April - 7 June; 8 July - 9 August 2019) UN Doc A/CN.4/727.

[2] ibid 63.

[3] Robert Kolb, *Peremptory International Law: Jus Cogens, A General Inventory* (Hart Publishing 2015) 128.

[4] ibid.

[5] Lee M Caplan, 'State Immunity, Human Rights, and *Jus Cogens:* A Critique of the Normative Hierarchy Theory' (2003) vol. 97, no. 4 AJIL 741.

conflict is thus characterised by the dichotomy between *realpolitik* and international ideals.

'Treaty' will be used in the sense envisaged by Article 2(1)(a) VCLT – "[a]n international agreement concluded between states… and governed by international law…". This post proceeds from the definition of 'peremptory norm' offered by H.R. Fabri, who characterises it as a "hierarchy (of norms) … linked in turn with the idea of safeguarding… a supposedly universal, common core of human values."[6] Another critical feature of **jus cogens** norms is pointed out by Kolb, who states that such a norm "does not allow derogation"[7]; likewise, Ragazzi highlights the "disability" of States to "contract out of" a norm of *jus cogens*.[8] The non-conditionality of peremptory norms would seem to make their applicability a simple matter, but this is not borne out in reality for several reasons. Firstly, the article considers the treatment of peremptory norms and treaties by international courts; secondly, it considers the socio-legal importance of treaties and *jus cogens* norms.

The issue of the hierarchy theory, and the operation of peremptory norms versus treaties, remains important despite the large volume of literature on the subject. If peremptory norms are to assume the role assigned to them – to protect normative ideals and prevent gross infringements of human rights – they must have practical bite. The obstacles to progression must therefore be recognised in order to be overcome. There is otherwise the danger that peremptory norms become merely a theoretical ideal.

I. COURTS AND THE HIERARCHY THEORY

The consequences of *jus cogens* norms are made explicitly clear by Art. 53 VCLT 1969: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." Furthermore, Art. 64 gives retrospective application to *jus cogens*: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." This embodies the 'hierarchy' or 'trumping'

6 Hélène R Fabri, 'Enhancing the rhetoric of *jus cogens*' (2012) European Journal of International Law Vol. 23 Issue 4, 1049, 1050.
7 Kolb (n 3) 2.
8 Ragazzi, *The concept of international obligations erga omnes* (OUP 1997).

argument, as expressed by Bates: *jus cogens* norms are to prevail over all other sources of international law, including treaties.[9] However, although *jus cogens* are certainly acknowledged by international courts, it is argued that they are a less favoured means of deciding cases than treaties. Crawford admits that they remain "something of a curiosity"[10]. Hence, "few are the instances in which a court or tribunal has applied the concept so as to determine the outcome of a case."[11] This is a critical observation illustrated by the case of *Al-Adsani.*[12]

In *Al-Adsani*, the European Court of Human Rights (ECtHR) rejected the argument that application of the doctrine of state immunity to Kuwait, under the SIA 1978, infringed his rights under Art. 3 ECHR (prohibition on torture) and Art. 6 (right to a fair trial). The applicant argued that his claim related to torture, the prohibition of which is a *jus cogens* norm, and hence such prohibition took "precedence over treaty law and other rules of international law"[13]. A majority of 9:8 held that the Art.3 right had not been infringed: "notwithstanding" the "special character" of the prohibition of torture, the Court found itself unable to discern in the "the international instruments, judicial authorities or other materials" any basis for the applicant's argument.[14] The case is significant because, as a treaty, the European Convention on Human Rights (ECHR) should be hierarchically subordinate to the prohibition of torture as a *jus cogens* norm. Thus, according to the hierarchy theory, the ECHR was the wrong yardstick by which to measure the applicant's case.

Of particular note is the centrality of multilateral treaties in the Court's reasoning – the court noted that "none of the primary international instruments referred to (Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and Articles 2 and 4 of the UN Convention) relates to civil proceedings or to State immunity."[15] This is illuminating as it suggests that the 'hierarchy' envisaged by the VCLT 1969 is not

[9] Ed Bates, 'State Immunity for Torture' (2007) Human Rights Law Review Vol.7 Issue 4, 651, 656.
[10] Crawford, 'Foreword' in Costelloe, *Legal Consequences of Peremptory Norms in International Law* (CUP 2017) xiii.
[11] ibid.
[12] *Al-Adsani v UK* App no 35763/97 (ECHR, 21 November 2001).
[13] ibid [57].
[14] *Al-Adsani* (n 12) [61].
[15] ibid.

being enforced at the judicial level. If the hierarchy model is correct, the *jus cogens* prohibition of torture should have taken clear precedence, such that recourse to the aforementioned treaties would be irrelevant. If peremptory norms are at the apex of the hierarchy, why mention treaties at all?

Furthermore, the Court referred to the ILC's 1999 Report on Jurisdictional Immunities of States and their Property.[16] Citing the working group's findings, it noted that whilst some states had shown "some sympathy" for the idea that state immunity should be waived where it conflicted with peremptory norms, "in most cases… the plea of sovereign immunity had succeeded."[17] The Concurring Opinion of Judge Pellonpää joined by Sir Nicolas Bratza is also illuminating:

"Although giving absolute priority to the prohibition of torture may at first sight seem very 'progressive', a more careful consideration tends to confirm that such a step would also run the risk of proving a sort of "Pyrrhic victory". International cooperation, including cooperation with a view to eradicating the vice of torture, presupposes the continuing existence of certain elements of a basic framework for the conduct of international relations."[18]

This suggests a certain judicial reticence in developing international law beyond what is accepted by states. The Court's reasoning appears to be driven by two main considerations: i) the lack of state practice in waiving state immunity in favour of *jus cogens* norms; ii) the centrality of state immunity in diplomatic relations between states, and the policy implications of impeding such immunity. This is clearly at odds with the functionality envisaged by the ILC report, which requires *jus cogens* to 'trump' treaties in order to fulfil their role of safeguarding human rights considerations.

It may be argued that the hierarchical concept of *jus cogens* was nevertheless acknowledged in the *Al-Adsani* judgment: the Joint Dissenting Opinion considered that "the basic characteristic of a *jus cogens* rule is that, as a source of law in the now vertical international legal system, it overrides any other rule which

[16] *Al-Adsani* (n 12) [62].
[17] ibid.
[18] *Al-Adsani* (n 12) Concurring Opinion of Judge Pellonpää Joined by Judge Sir Nicolas Bratz [27].

does not have the same status."[19] Thus, the hierarchy theory is acknowledged by at least some amongst the judiciary. However, this does not convince as a counterargument. As Bates points out, *jus cogens* "only really featured in the reasoning of the minority, with the majority taking their stand on different reasoning."[20] This post has already illustrated how the reasoning of the majority centred around multilateral treaties and policy considerations. Moreover, Bates persuasively suggests that this is not merely an outlier amidst a sea of acceptance of the hierarchy theory: he cites the *Arrest Warrant Case*[21] as illustration of the fact that "a *jus cogens* norm did not automatically make ineffective other rules of international law."[22] Both the *Arrest Warrant Case* and the case of *Jones*[23] are examples of rulings in which claims to state immunity were upheld despite suspected violations of jus cogens norms. In *Jones*, the House of Lords upheld Saudi Arabia's claim to state immunity despite the applicants' allegations of torture at the hands of Saudi officials. This "hammered another nail in the coffin"[24] of the hierarchy theory, and indeed it submitted that the theory is currently treading water. Whether it will remain so in the future is beyond the scope of this post.

A final possible counter-argument against this state of affairs may be found in the argument of Cassese, who suggests that no "consistent practice"[25] of *jus cogens* norm by states is necessary to render them operational; it is sufficient for members of the international community to "evince" acceptance of the norm. The rejection of 'consistent practice' as the benchmark of recognition would seem to imply that any statement by a state indicating acceptance of a norm as *jus cogens* would do. The implications of this argument are thus that enforcement of the hierarchy theory by courts is neither here nor there: *jus cogens* are operational, whether or not this is reflected in practice. This is superficially attractive as an

[19] *Al-Adsani* (n 12) Joint Dissenting Opinion [1].
[20] Bates (n 9) 656.
[21] *Case Concerning the Arrest Warrant of 11 April 2000 (DRC v Belgium)* (Judgment) 2002 < https://www.icj-cij.org/files/case-related/121/121-20020214-JUD-01-00-EN.pdf> accessed 22 July 2019.
[22] Bates (n 9) 657.
[23] *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and another (Secretary of State for Constitutional Affairs and others intervening); Mitchell and others v Al-Dali and others* [2006] UKHL 26.
[24] Bates (n 9) 657.
[25] Cassese, 'For an Enhanced Role of *Jus Cogens'* in Cassese (ed.) *Realising Utopia: The Future of International Law* (OUP 2012) 158.

argument: it seems to adhere to the intuition that the highest human rights ideals, such as prohibition of genocide and torture, should not depend for their existence on the whims of States or courts. For example, it is not seriously contested that prohibition of torture is a *jus cogens* norm, even though States have and do torture individuals.

However, Cassese ultimately provides the correct answer to the wrong question. "Most" international lawyers accept the existence of *jus cogens* and also accept their "operation" within a system of international law, as pointed out by O'Connell.[26] What this post questions, however, is the practical operation of *jus cogens vis-à-vis treaties*. In this sense, Cassese is over-idealistic. The idea that peremptory norms trump all other sources of international law is a hollow statement if courts reject the hierarchy in the first place. According greater importance to treaties becomes an easier way of ensuring that the development of international law does not too often outpace what is accepted by states (since treaties, by definition, are built around the intentions of the parties). Lord Lloyd-Jones concurs with the approach in *Al-Adsani*: there is a need for "judicial restraint in developing international law beyond what is accepted by States."[27] Cassese himself acknowledges the lack of 'bite' of *jus cogens*: it has "never had the effect proper to the notion,"[28] i.e., to nullify a treaty contrary to its content. Cassese conversely posits that *jus cogens* have "perhaps"[29] fulfilled a deterring role by forestalling the conclusion of agreements contrary to peremptory norms, and thus cannot be characterised as a "flop". However, this is firstly very difficult to prove beyond doubt, and secondly, as seen by the examples given in section 2), States can and do enter into and revoke treaty obligations even if this will have a deprecative effect on *jus cogens* norms (for example, the withdrawal from a treaty designed to impede aggression and/or use

[26] Mary Ellen O'Connell, '*Jus Cogens*: International Law's Higher Ethical Norms' in Donald Earl Childress, III, (ed.) *The Role of Ethics in International Law* (CUP 2011) 78.
[27] Lord Lloyd-Jones, '40 Years On: The State Immunity Act 1978 at 40', Grotius Lecture (18 October 2018) p.18 < https://www.supremecourt.uk/docs/speech-181018.pdf> accessed July 2019.
[28] Cassese (n 25) 160.
[29] Cassese (n 25).

of nuclear weapons).[30] It is ultimately difficult to reconcile Cassese' faith in the theoretical success of *jus cogens* with the practice of states and courts.

The explanation for *jus cogen's* lack of bite is helpfully spelled out by the Carnegie Endowment for International Peace, as referenced by O'Connell.[31] This stated that:

> "… the only method of deriving [*jus cogens*] [is] judicial determination. Thus, it [is] left to the judge to extract *jus cogens* limitations from the legal system as a whole…"[32]

Hence, the 'hierarchy theory', despite its embodiment in Arts. 53 and 64 VCLT, appears to have been declawed by the Courts. Peremptory norms may not depend on state practice for their existence but, in realistic terms, they depend on judicial enforcement for their operation as the 'trump cards' of international law. It is submitted that this will significantly impede the fulfilment, in practice, of Kolb's conception of *jus cogens* as an "operational concept of law". Deprived of a bite, *jus cogens* cede their position in the normative hierarchy of international law to treaties.

II. *JUS COGENS* AS NEW INTERNATIONAL LAW?

On a final note, this article turns to the argument that *jus cogens* will supersede treaties as a source of international law because they are representative of a 'new' international order, in which human rights concerns prevail. Cassese aptly summarises this position: *jus cogens* are a "hallmark" of the "*new* international community" – for the first time, peremptory norms restrain the "hitherto unlimited law-making power of states."[33] They thus represent a "novel approach" to international relations in which "community concerns", to some extent, prevail

[30] Oliver Milman, David Smith and Damian Carrington, 'Donald Trump confirms US will quit Paris climate agreement' (*The Guardian*, 1 Jun 2017) < https://www.theguardian.com/environment/2017/jun/01/donald-trump-confirms-us-will-quit-paris-climate-deal> accessed July 2019.
[31] O'Connell (n 26) 82.
[32] Carnegie Endowment for International Peace, "The Concept of Jus Cogens in International Law," Lagonissi Conference: Papers and Proceedings (Washington, D.C.: Carnegie Endowment for International Peace, 1967) 11.
[33] Cassese (n 25) 161.

over States' self-interest. The inference is that peremptory norms are the better means of delivering outcomes which adhere to international human rights standards, whilst treaties are somewhat outmoded because they promote state or party sovereignty.

There is the potential for discussion on this point which far exceeds the scope of this post. Nonetheless, it is sufficient for our purposes to briefly point out that this argument falls into the familiar trap of over-simplification. It is true that *jus cogens* represents an inroad into 'traditional' sources of international law, insofar as they are normative safeguards of the most basic human rights. However, it is a mistake to suppose that i) treaties are no longer 'contemporary', or that ii) there is no overlap in normative function between treaties and *jus cogens* – treaties can also play a role in safeguarding human rights. International law is "shaped and constrained" by the "norms" of international society,[34] but this is not the exclusive purview of *jus cogens* alone.

Recent developments are an apt reminder of the prevalence of treaties as a source of international obligations. In 2017, the US withdrew from the Paris climate agreement.[35] Stalled negotiations between the EU and Switzerland over a treaty have disrupted "cross-border share trading and strained bilateral ties."[36] As of August 2nd, 2019, the US formally withdrew from the 1987 INF Treaty.[37] Treaties, rather than *jus cogens*, still form the blueprint for many international agreements and developments. Treaties concretise the intentions of states and, thus, reaffirm state sovereignty. This is not a function which can be overtaken by peremptory norms as these are not concerned with States' self-interest. This is nonetheless not to say that the two share some roles; notably, their mutual capacity to safeguard normative ideals.

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[34] Robyn Eckersley, 'Soft law, hard politics, and the Climate Change Treaty' in Christian Reus-Smit (ed.) *The Politics of International Law* (CUP 2004) 80.
[35] Milman (n 30).
[36] Michael Shields, Jane Merriman, "Miracle' needed for quick EU-Swiss treaty deal, Swiss minister says' (*Reuters,* 4 August 2019) <https://uk.reuters.com/article/uk-swiss-eu-idUKKCN1UU0CD> accessed 4 August 2019.
[37] Jonathan Marcus, 'INF nuclear treaty: US pulls out of Cold War-era pact with Russia' (BBC News, 2 August 2019) https://www.bbc.co.uk/news/world-us-canada-49198565 accessed 10 August 2019.

In her May 2019 lecture at the Blavatnik School of Government, University of Oxford, Leila Sadat[38] dealt extensively with the role of the Rome Statute in establishing the International Criminal Court (ICC) and the challenges posed to the Treaty by protectionist State policies. This serves as a pertinent example of a treaty which, in establishing the ICC, performed a human rights function in ensuring a mechanism by which perpetrators of the worst abuses could be brought to justice.

Admittedly, however, the need to remain vigilant as to the implications of *realpolitik* and state practice remains: for example, US National Security Advisor John Bolton has previously attacked the ICC,[39] potentially undermining the work of the court in enforcing *jus cogens* norms in relation to crimes against humanity. The US is also not a State Party to the Rome Statute, despite its ratification by many other States. Politics has the potential to outflank legality insofar as state sovereignty remains decisive. Thus, the problem of less-than-ideal political realities in enforcing *jus cogens* is not fully satisfied either by a reliance solely on treaties or solely on courts. Nonetheless, the power of treaties as a source of international law remains strong because they are a convenient means of safeguarding the interests of individual states. Peremptory norms often do not have this advantage, unless they happen to be embedded in treaties which provide some service to the interests of states: for example, Art. 2(4) of the UN Charter prohibits the "threat or use of force" against the "territorial integrity or political independence" of any State. This embodies the peremptory norm against aggression or use of force. However, it is also beneficial to states insofar as it provides some protection for their territorial and political sovereignty.

In sum, it is perhaps a disservice to peremptory norms to compartmentalise them wholly from treaties. If *jus cogens* are to be effective, they must represent concrete action as well as lofty ideals. This is best understood when it is recognised that *jus cogens* are merely one route to a common destination. Future enforcement of *jus cogens* may, in theory, be made more effective by a flexible

[38] Leila Sadat, 'Current challenges to international justice: lean in or leave?' (Lecture, 13 May 2019) Blavatnik School of Government, University of Oxford.
[39] Max du Plessis, 'Bolton's Attack on the International Criminal Court May Backfire' (*Chatham House*, 20 September 2018) < https://www.chathamhouse.org/expert/comment/bolton-s-attack-international-criminal-court-may-backfire> accessed 22 August 2019.

approach which considers treaties and *jus cogens* (especially where a treaty purports to represent *jus cogens*) in tandem. Unfortunately, the discussion of the *Al-Adsani* case in section 1) above demonstrates the judicial tendency to consider *jus cogens* in isolation from treaties and to give preference to the treaties.

CONCLUSION

Kolb rightly concludes that "there can be no doubt as to the necessity of the notion of *jus cogens* in a fully-fledged legal order whose development has moved beyond the most primitive stages…".[40] Peremptory norms play a vital function in policing the normativity of international law. However, at least two significant problems have emerged from this discussion: i) peremptory norms are dependent on judicial enforcement and thus their efficacy is compromised, as the case of *Al-Adsani* demonstrates; ii) reliance on treaties remains a tempting alternative in cases where policy or state practice would render the enforcement of a *jus cogens* norm inconvenient. The cumulative effect of these issues is to remove the practical bite from Arts. 53 and 64 VCLT. Without implementation by international courts, the hierarchy argument is little more than a theoretical ideal. Hence, whilst the ILC Report is right to highlight other issues, such as the controversy over regional *jus cogens*, the comprehensive image of peremptory norms envisioned by the report's draft conclusion 24 is as yet an ideal. The chasm between the archetype and the reality is something which must be resolved if peremptory norms are to keep up with treaties as a means of resolving cases in international law. Hopefully there may yet be a reconciliation of Cassese' faith in *jus cogens* and political realism.

[40] Kolb (n 3) 127.