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# Peremptory Norms of the International Community: A Reply to William E. Conklin

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Professor Conklin's analytical effort to explain the nature of *jus cogens* is not only highly impressive, but also very timely. It demonstrates the continuing relevance of *jus cogens* as it increasingly arises in multiple areas of international law, regardless of doctrinal calls from the 1980s onwards that it should have faded away.<sup>1</sup> Since then, there have been those who have suggested that *jus cogens* does not make sense and should be abandoned,<sup>2</sup> those who suggest that *jus cogens* has merely aspirational relevance and does not make a difference on the ground,<sup>3</sup> and those who argue that *jus cogens* is merely 'primary' law, not to be applied in the area of enforcement.<sup>4</sup> What happens interestingly – and problematically – is that doctrinal debates on the conceptual rationale of *jus cogens* and on its more specific effects are often pursued separately. Conklin's contribution is a gentle reminder of the crucial issues of the background and essence of *jus cogens* that both writers and practitioners often tend to overlook when addressing the implications of *jus cogens* in specific areas of international law.

One principal consideration Conklin advocates is the reliance of the concept of *jus cogens* on the community will and interest. This presupposes its universality in articulating the interest that the international community as a whole prioritizes through the expression of its community will.

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<sup>1</sup> Turpel and Sands, 'Peremptory International Law and Sovereignty: Some Questions', 3 *Connecticut J Int'l L* (1988) 364; Weisburd, 'The Emptiness of *Jus Cogens* as Illustrated by the War in Bosnia-Herzegovina', 17 *Michigan J Int'l L* (1995) 1.

<sup>2</sup> D'Amato, 'It's a Bird, It's a Plane, It's *Jus Cogens*?', 16 *Connecticut J Int'l L* (1990) 1; Glennon, 'De l'absurdité du droit impératif', 110 *RGDIP* (2006) 529; Linderfalk, 'The Effect of *Jus Cogens* Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?', 18 *EJIL* (2005) 853.

<sup>3</sup> Charlesworth and Chinkin, 'The Gender of *jus cogens*', 15 *Human Rts Q* (1993) 63; Czaplinski, and Danilenko, 'Concepts of *jus cogens* and Obligations *erga omnes* in International Law in the Light of Recent Developments', 23 *Polish Yrbk Int'l L* (1997–1998) 87.

<sup>4</sup> See *infra* notes 13 and 17.

One implication is that individual state interests are subordinated to community interests. This is reflected in the invalidity, under Article 53 VCLT, of inter-state transactions that conflict with the community interest embodied in peremptory norms. Another implication is to limit the relevance of regional positions. It is the international community as a whole that articulates the peremptory status of the relevant norm, which structural connection is essential for primacy over the choices made through bilateral and multilateral agreements. To illustrate, the European Court of Justice in the *Kadi* case had to address the legality, in EU law in the first place, of the targeted sanctions introduced against terrorist suspects by the UN Security Council, and the claim that these sanctions, and the EU measures adopted pursuant to them, violated their human rights. The Council derives its powers from a treaty – the UN Charter – and violations could be identified only if the relevant human rights were peremptory.<sup>5</sup> Treaty-based organs can validly exercise only such powers as parties to that treaty can validly delegate to them. The ECJ evaded the issue and annulled the relevant EU measures solely on the basis of EU human rights standards, regardless of the fact that their adoption was linked to Security Council decisions.<sup>6</sup> But despite the ECJ's choice to do so, the relevant human right being grounded within the EU law cannot, by itself, affect the power of the Security Council to act in breach of that right because, quite simply, considerations of EU law are not among those that determine the basis of and limits on the Council's delegated powers. Therefore the *Kadi* judgment effectively demonstrates that the exemption of sanctions introduced by the EU organs from *jus cogens* equals their exemption from the entire system of international law. Protection of human rights was secured through the exclusion of international law from the equation. That was the outcome because, apart from *jus cogens*, there was no other set of rules of international law whereby the ECJ could judge the legality of sanctions imposed by the Security Council. The *Kadi* judgment thus asserts regional exclusivity but projects a duality of legal positions – EU Member States still being bound by the relevant Security Council resolutions pursuant to Articles 25 and 103 of the UN Charter – and therefore is not that helpful for protecting the fundamental rights of those individuals.

Conklin interestingly, and correctly, identifies the sources of law question as a wrong question to ask. And he rightly focuses on the need to identify the meaning of the international community in a world of territorially organized states. The community is subject to no overarching government. Yet the underlying community ethos, according to Conklin, links this community to a minimum set of common irreplaceable values that rise over and above bilateral relations premised on the interest and calculation by one individual state in relation to another.

Being part of the social ethos is a correct premise for *jus cogens*, but not a sufficient one. It also needs to be given a *legal* expression. Conklin partly asks this question himself by focusing on what precisely confers authority on the VCLT to articulate the

<sup>5</sup> Which the CFI confirmed, Case T-306/01 & 315/01, *Yusuf and Kadi v. Council and Commission* [2005] ECR II-3649.

<sup>6</sup> Cases C-402/05 P & 415/05 P, *Kadi v. Council and Commission*, [2008] ECR I-6351.

concept of *jus cogens* as norms from which no derogation is permitted to protect the position upheld by the international community as a whole.

The answer lies with the link between *jus cogens* and the concept of public policy whereby a legal system protects itself against transactions and acts that threaten its fundamental values. On occasions, public policy has been regarded as an 'unruly horse',<sup>7</sup> but this has only been an initial scepticism. National courts still use public policy if the forum's fundamental values have to be safeguarded.<sup>8</sup>

In international law, it is a commonplace that *jus cogens* constitutes public policy.<sup>9</sup> The function of public policy – already reflected in Article 53 VCLT – is to protect fundamental values of the legal system by elevating them to a hierarchically superior rank in relation to deals and agreements between legal entities. Public interest prevails over a private choice. To some extent, this explains its relative independence from the doctrine of sources, especially in international law the sources of which are among the means of violating *jus cogens*. But this is not unique to international law. In national legal systems, legal rules are ordinarily produced by acts of parliament, and in common law systems also through continuous judicial practice. Even so, national legal systems accept public policy derived from the overriding moral foundations of the society, even if it cannot be derived from the established sources of law. In international law, it operates the same way, being an expression of cogent international morality.<sup>10</sup>

None of this is meant to challenge positivist foundations of international law. Sources under Article 38 of the International Court's Statute remain the expression of consensual positivism. However, to deny the relative, at least, independence of public policy from sources of positive law is to argue that those who are subject to public policy can absolve themselves from it. This outcome would be absurd, because a society without public policy would merely be a loose form of coexistence, not a society properly so called. Likewise, there can be no legal system without a minimum core keeping it together.

While the above remains the background position, the elements of sources of international law could still enable us to draw an intermediate conclusion that the positivist take on *jus cogens* can be undertaken through the sources doctrine. Here Conklin's distinction between the will of states as parts of the community and their arbitrary will comes precisely to the point. The way this works is that through the sources of law the international community articulates its basic values using the channels that reveal the will of the community as a whole. What we need to search for is the ways in which the international community as a whole speaks. This leads to the evidentiary relevance of multilateral treaties and UN General Assembly resolutions. Although none of these can independently generate – as opposed to reflecting – a peremptory

<sup>7</sup> Burroughs J in *Richardson v. Mellish*, 2 Bing (1824) 229, at 252.

<sup>8</sup> *Oppenheimer v. Cattermole* [1976] AC 278; *Kuwait Air Co* [2008] 2 AC 883 (HL), at paras 114, 137–139.

<sup>9</sup> A.D. McNair, *The Law of Treaties* (1961), at 213–214.

<sup>10</sup> H. Lauterpacht, Report on the Law of Treaties, *Yrbk ILC* (1953-II), 155; for further details regarding national legal systems see A. Orakhelashvili, *Peremptory Norms* (2006), ch. 1.

norm, they serve as evidence of the community attitude to the relevant norm's content and status.<sup>11</sup>

There can thus be overlap between the way of emergence of a *jus cogens* rule and ordinary sources of law, especially customary law, under Article 38 of the International Court's Statute. If need be, international courts can, as they have repeatedly done, apply the requirements of custom-generation – state practice and *opinio juris* – in the way that explains the emergence of *jus cogens* rules.<sup>12</sup> The task is to identify whether the status of the relevant rule is supported by the will of the community as a whole, not necessarily by every single state or most states individually. State practice matters, but Article 38(1)(b) of the International Court's Statute does not limit the acceptable headings of practice. Treaty practice and collective multilateral practice can be just as good as practice performed by states individually. The overall positivist balance thus is observed: the more widespread the support expressed for the rule through the channels of the community will, the more obvious the evidence of *opinio juris*. This way *jus cogens* can be understood in positivist terms, and consequently the natural law versus positive law dichotomy can be put aside.

Another wrong question to ask, as is mostly done in relation to prosecution of international crimes and immunities of states and their officials, is whether in relation to particular areas international law has developed to the point where it allows for the effect of *jus cogens*.<sup>13</sup> Putting the question this way overlooks the inherent rationale of *jus cogens* grounded in public policy and normative hierarchy, and essentially engages in searching for the justification for *jus cogens* alternative to its ordinary, or mainline, justification, treating that ordinary justification as insufficient or irrelevant.

As *jus cogens* embodies the overriding community values, it is also supposed to provide for the supremacy of these values in relation to particular acts, situations, and transactions. The parameters of the general doctrine of *jus cogens* are initially reflected in Articles 44–45, 53, 71 VCLT, and then replicated in multiple 'non-treaty' areas. It was known as early as at the stage of VCLT codification that *jus cogens* is not limited to the law of treaties.<sup>14</sup> Were this not so, not just a legal, but also a moral, dilemma would

<sup>11</sup> The flipside is that most human rights and humanitarian law treaties are conventional equivalents of customary *jus cogens*, not subject to derogation prohibited under Art. 53 VCLT. This was recognized by the ILC in the 1960s when the codification of the VCLT was underway, and overwhelmingly reflected in judicial practice and doctrine since then. Evidence is discussed in detail in *ibid.*, at ch. 4. Most recently, the decision of the ECtHR in *Othman* specified that 'UNCAT reflects the clear will of the international community to further entrench the *ius cogens* prohibition on torture by taking a series of measures to eradicate torture and remove all incentive for its practice': App. No. 8139/09, *Othman v. UK*, 17 Jan. 2012, at para. 266. This point further undermines the argument that the denial of the immunity of a former head of State by the HL in *Pinochet* [1999] 2 All ER 97 was undertaken on the basis of the CAT 1984 as completely separate from *jus cogens*. UNCAT and *jus cogens* was also interchangeably used by the HL in *A v. Secretary of State* [2005] UKHL 71.

<sup>12</sup> For a detailed analysis of the practice consisting of decisions of the ICJ, ICTY and national courts to this effect see Orakhelashvili, *supra* note 10, at ch. 5.

<sup>13</sup> E.g., Sivakumaran, 'Impact on the Structure of Treaty Obligations', in M. Scheinin and M. Kamminga, *The Impact of Human Rights Law on General International Law* (2009), at 133, 149.

<sup>14</sup> The ILC referred to the effect of *jus cogens* on 'any [conflicting] act or situation', 2 *Yrbk ILC* (1966–II) 261.

arise as to whether the relevant universal values can be genuinely meaningful if they can be protected in some areas but be abandoned in others.

In all areas where *jus cogens* applies, it deals with situations arising after the wrongful act has taken place. Apart from the Vienna Convention, the areas of state responsibility, statehood and recognition, waiver and acquiescence, or acts of international organizations, are virtually unanimous in recognizing the effect of *jus cogens* in relation to situations produced after the violation of the relevant peremptory norm.<sup>15</sup> The principal effect of *jus cogens* is consequentially to deny the rights, privileges, and qualifications the relevant state action would command but for the peremptory status of the rule that the conduct in question violates. It is precisely the underlying community interest that leads to that result. The principal essence of public policy in any legal system is that rights and privileges of states cannot be used in conflict with that public policy.<sup>16</sup>

What is frequently misunderstood, and is also responsible for the widespread but fallacious perception that *jus cogens* is merely about substantive standards of conduct as opposed to consequential implications,<sup>17</sup> is the difference between the *content* of the norm to outlaw the relevant conduct and its peremptory *effect*. The former relates to individual norms; the latter relates to the general doctrine of *jus cogens*. The implication is that once rule X reaches the status of *jus cogens*, it yields the effects and consequences that the doctrine of *jus cogens* provides for. To say, for instance, that the rationale and effect of a peremptory prohibition not to commit torture or war crimes is restricted to the injunction 'do not commit torture or war crimes' would be nonsensical. The prohibition itself merely states the substantive standard regarding the prohibited conduct. However, the effect of the norm thus elevated to the status of *jus cogens* arises on a basis separate from the substantive content of that norm, and is due to consequential implications envisaged under the general doctrine pursuant to the VCLT or general international law. This is the dual impact of an individual norm and of the general doctrine. This way, the general doctrine of *jus cogens* is a tool at the hands of the community to assert consequences for the breach of any such norm that it individually includes into the class of *jus cogens*.

And, as it happens, the reasoning as to the separation of the substance of peremptory norms from their mandatory consequences, notably in immunity cases,<sup>18</sup> has

<sup>15</sup> The ILC's Arts 40–41 on State Responsibility, *ILC Report* (2001), GAOR, Fifty-sixth session, Supplement No. 10 (A/56/10). States shall not 'recognise as lawful a situation created by a serious breach' of *jus cogens* (Art. 41). Arts 41–42, ILC Articles on the Responsibility of International Organizations, 2nd reading, 2011, A/66/10; *Prosecutor v. Furundzija*, Judgment of 10 Dec. 1998, IT-95-17/I-T, at para. 155.

<sup>16</sup> As in national legal systems see *Riggs v. Palmer*, 22 NE 188 (1889), to the effect that ordinarily individuals are entitled to declare will, but that will operate as trimmed down to the extent necessary to accommodate the dictates of public policy.

<sup>17</sup> H. Fox, *The Law of State Immunity* (2001), at 524–525; H. Aust, *Complicity and the Law of State Responsibility* (2011), at 39–40; Rensmann, 'Impact on the Immunity of States and their Officials', in Scheinin and Kamminga, *supra* note 13, at 151, 164–165.

<sup>18</sup> *Jones v. Saudi Arabia* [2006] UKHL 16, at paras 44–45; *Jurisdictional Immunities of the State (Germany v. Italy)*, ICJ, Judgment of 3 Feb. 2012, General List No. 143, available at: [www.icj-cij.org/docket/files/143/16883.pdf](http://www.icj-cij.org/docket/files/143/16883.pdf).

looked only at the substantive content of the specific prohibition, and overlooked the effect of that specific norm that the general doctrine of *jus cogens* accords it. The reasoning in these cases is flawed for overlooking obvious issues, but also morally problematic for denying victims of atrocities their only available remedy to be obtained by suing foreign states domestically.

Projecting the effect of *jus cogens* as extending to some areas but not others is a socio-political choice performed by a writer, official, or judge at the relevant time and in relation to a particular case. The unfortunate truth is that the projection, and an essentially 'copy-and-paste' repetition, of the substance versus consequences dichotomy reflects an unofficially formulated party line enabling courts to explain away *jus cogens* without addressing it properly. Situational choices like this undermine the position of the community that the relevant peremptory norm should be able to generate the relevant legal consequences through which the community choice in protecting those values can be asserted in realistic terms.

Professor Conklin has provided a fascinating examination of the link between community values and interest and the concept of *jus cogens*. This is an area where the boundary between philosophical and juridical reasoning may sometimes appear to blur, but this is precisely what compels the need to identify the precise line of that boundary. The difference between common sense and scholarship is that the latter can apply rigour and reasoning to areas that the former finds difficult to comprehend. By raising and following through this complex issue, Professor Conklin has demonstrated the indispensability of *jus cogens* as a paramount element of international law. For, without public policy, no legal system can be a legal system.