

Comments in Response to Christine Chinkin and in Defense of *Jus Cogens* as the Best Bastion against the Excesses of Fragmentation

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As a preliminary point, I wish to say that I have not been a member of the Working Group on the Fragmentation of International Law that Martti Koskenniemi has led so masterfully in the International Law Commission. And it was not benign neglect; I have always been a strong supporter of this topic which, contrary to several members of the Commission and many states, I fully accept as being within the ILC mandate; moreover, I see it as paving the way for a more ambitious enterprise: the starting point of a general *Restatement of International Law* by the ILC. Simply, my other commitments in and outside the ILC did not leave time to be an active participant. This being said, I must say again that I am extremely convinced by the outcome and that I regret that the ILC could not endorse the final recommendations of the Group.

Coming now to my comments of Christine Chinkin's paper, it will be apparent that, while I have enjoyed her stimulating presentation, this does certainly not mean that I agree with all and everything she said. I certainly do agree with her point of departure: indeed these questions are not of an abstract nature: which of two legal norms will prevail is an extremely concrete and practical question. Prohibition of the use of force? or right to self-determination? Prohibition of torture? or self-defence? *jus cogens*? or ... Article 103? Similarly, I am among those who are favourable to a certain measure of fragmentation and, in part at least, for the reasons given by Christine: it can be a powerful aid to the taking into consideration of the legal needs, aspirations and 'conquests' of those excluded from the mainstream international legal system – including poor, underdeveloped and neglected states. *Jus cogens* is – could be at least – a tool in the hands of these states to avoid being trapped by a formal consent extorted from them by more powerful states, to a treaty contrary to the fundamental basis of the contemporary international society. This is, I suggest,

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the main purpose of Article 53 of the 1969 Vienna Convention. And this is the main reason why, contrary to the mainstream of the French doctrine in international law, I have always been a firm defender of the concept of *jus cogens* – if reasonably conceived; but to this I'll come later. Similarly of course, in a world where non-states actors have gained 'a large measure of international legal personality',¹ including, in a limited respect, the possibility to bring claims before international legal bodies, peremptory norms could be a means to object to the application of international norms (maybe as well of domestic norms) which are in contradiction with legally (and morally – to this too I'll come back) 'superior' norms.

This being said, a first warning is in order in relation with the function or functions of the very notion of *jus cogens*. It can certainly not be a legislative instrument – I mean a tool to *change* the law, a means for the *progress* of law. This it is certainly not; in a certain sense it is a conservative notion in that it *impedes* changing existing norms: a peremptory norm is the result of a long crystallisation process; when this process is completed, the resulting legal norm is cast into bronze. Indeed, according to Article 53 of the Vienna Convention, peremptory norms of general international law can be modified (but only 'by a subsequent norm of general international law having the same character' – not that easy ...). Of course, it happens that the contemporary peremptory norms have, say, a 'progressive' connotation: most of them are human rights norms and, no doubt, the prohibition of the use of force in international relations (even if only partial) is certainly a progress compared to the, probably peremptory, norm it replaces, which made the use of force a sovereign right for states. *Jus cogens* can avoid that unacceptable norms be applied, it is of no use to promote 'better norms': whether international legal norms are the result of 'elitist and masculinist bias rights theories' or not, the fact is that they will keep their status of positive legal norms as long as they are not superseded by 'better', more people oriented and gender neutral, norms vested with a peremptory character.

Now, the general problem with Christine Chinkin's position is that it is, I feel, a 'militant' position. Human rights, or feminist, or environmentalist activism is, from my point of view, an extremely respectable posture – but it can put lawyers into trouble, as I have shown in my papers on 'human rightism' in international law.² I have just mentioned 'unacceptable norms' – but the term 'unacceptable' is ambiguous: a given

¹ See *Reparation of Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports (1949) 174 at 179.

² Alain Pellet, "Droits-de-l'homme" et Droit International', Conférence Commémorative Gilberto Amado (Palais des Nations, 18 July 2000), available at <untreaty.un.org/ilc/sessions/52/french/amado.pdf> (visited 17 August 2007); also published in 1 *Droits fondamentaux*: (2001) 167–179, available at <www.droits-fondamentaux.org/article.php?id_article=27> (visited 17 August 2007); and "Human Rightism" and International Law', 10 *Italian Yearbook of International Law* (2000) 3-16.

norm perfectly can be seen as unacceptable by a feminist activist: for example and, still, be legally binding; it will only be 'legally unacceptable' when either it will be changed through the usual channel for changing the law or when a new peremptory norm of general international law will have emerged. In both cases, human rights activists (*lato sensu*) have their word to say and, usually, will be at the origin of the improvement of the law. *But* – and, in my mind, it is an important 'but' – the lawyer is an observer of this process, not an actor.

Christine Chinkin – rightly – complains that '[d]iscrimination on the basis of race is routinely included as a contender for *jus cogens*, but sex discrimination is not'. It might be so (and, I must say, it is very probably so): while the universal (official) reprobation of racial discrimination has certainly resulted in a 'peremptorization' of the prohibition of racial discrimination (at least when committed on a large and/or systematic scale), the condemnation of gender discrimination is still limited to certain parts of the world and certain circles, which prevents it to be considered as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted' – although I would think that, if 'recognition' in words is enough, we are not far from this result (but I am not sure that this is enough and such a view might be held as pure – and probably dangerous – wishful thinking). But, regrettable as this situation might be, it is not because *jus cogens* does not cover all the desirable norms legitimately *aspiring* to such a status that one must throw out the baby with the bath water: it would be absurd to sustain that, since the prohibition of gender discrimination is not peremptory, the *jus cogens* nature of the prohibition of racial discrimination must be criticized or is of no effect.

In a way, I can make the same remarks in respect to the second part of Christine Chinkin's presentation on the various cases she has analyzed in UK Courts and the European Court of Justice (or the Court of First Instance). Here again, I share her criticisms; but, here again I would qualify my disappointment.

Indeed, as Ian Brownlie put it a long time ago: *jus cogens* is 'a vehicle that hardly ever leaves the garage'³ – and it is still true. And, when it leaves it (which sometimes happen in international courts and tribunals as well as in national judgements), the result might seem disappointing or frustrating: except in the ICTY (and I have in mind in particular the *Furundzija* case which recognizes the prohibition of torture as a peremptory norm and draws the consequences from this recognition⁴), when courts and tribunals accept the notion of *jus cogens*, either they misinterpret it or

³ Ian Brownlie, 'Comment' in Antonio Cassese and J.H.H. Weiler (eds), *Change and Stability in International Law-Making* (de Gruyter: Berlin, 1988) 110.

⁴ *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1, ICTY Trial Chamber, Judgment of 10 December 1998, at paras 153 *et seq.*

they mention it while it is obvious that no consequences⁵ can be drawn from it. By contrast with the 1999 *Pinochet* decision of the House of Lords,⁶ the Judgment of the ECHR in *Al Adsani*⁷ is probably a good illustration of this last position. The first Advisory Opinion of the Badinter Commission is a good example of the first position (misinterpretation): while it rightly underlines that the right of peoples to self-determination belongs to *jus cogens*, the Commission does not hesitate to proclaim enthusiastically that the same holds true for the rights of minorities,⁸ which is doubtful, to say the least. I would also put the Judgments in the *Yusuf* and *Kadi* cases⁹ in that category: it is more than doubtful that an arbitrary deprivation of property is contrary to *jus cogens*¹⁰ and, if it is, I have but slight difficulty to accept that, in those cases, the Claimants were victims of such deprivations. This being said, I certainly do not share the harsh criticisms which have been addressed to these decisions in that I think that they pave the way for future promising developments – including in respect to the relations between *jus cogens* and UN norms (that is Article 103 of the Charter): ‘the Court has moreover held that it has jurisdiction to review the lawfulness of the contested regulation and, indirectly, the lawfulness of the resolutions of the Security Council at issue, in the light of the higher rules of international law falling within the ambit of *jus cogens*, in particular the mandatory prescriptions concerning the universal protection of the rights of the human person’.¹¹ By itself this recognition is extremely promising.

In this respect, Christine Chinkin said, *en passant*, something rather troubling: ‘VCLT article 53’, she said, does not ‘suggest the UN organs are subject to *jus cogens*’. It might be so – but I do not quite understand what conclusion she draws from this: if treaty law is subordinated to peremptory norms, this holds true *a fortiori* for law derived from treaty law – notwithstanding Article 103, the Charter *is* a treaty; it follows – implicitly but necessarily – that all the UN organs are bound to respect the *jus cogens*.

⁵ Or only negative consequences: ‘It does not ensue from the peremptory nature of norm X that...’.

⁶ R. v. *Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, 24 March 1999, House of Lords, 119 *International Law Reports* 136.

⁷ *Al-Adsani v. United Kingdom* (2002) 34 *European Human Rights Reports* 273.

⁸ Badinter Commission. Opinion No 1, 11 January 1992, 31 *International Legal Materials* (1992) 1494 at 1496; see also Opinion No. 2, 11 January 1992, *ibid.*, at 1498 and Opinion No. 9, 4 July 1992, *ibid.*, at 1524.

⁹ Case T-306/01, *Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3533; Case T-315/01, *Kadi v. Council and Commission* [2005] ECR II-3649. These Judgments have been confirmed in several occasions – see e.g.: Case T-49/04, *Hassan v. Council and Commission* [2006] II, Case T-362/04, *Minin v. Commission* [2007] II, Case T-253/02, *Ayadi v. Council* [2006] II. All these judgments are available on <www.curia.europa.eu> (visited 17 August 2007).

¹⁰ See *Yusuf*, *supra* note 9, at para. 293.

¹¹ *Ibid.*, at para. 337.

Moreover, as pointed out in Martti Koskenniemi's Report to the ILC, 'Article 103 does not say that the *Charter* prevails, but refers to *obligations under the Charter*. ... Apart from the rights and obligations in the Charter itself, this also covers duties based on binding decisions by United Nations bodies'.¹²

The only thing which can be added in this respect is that, as Sir Elihu Lauterpacht aptly noted in his Separate Opinion appended to the Court's Order of 13 September 1993 in the *Genocide* case, quoted by Christine Chinkin in her paper, it is hardly to be contemplated that the Security Council (or the General Assembly) 'would ever deliberately adopt a resolution clearly and deliberately flouting a rule of *jus cogens* ...'¹³ – and I would go even further: since peremptory norms are those recognized as such 'by the community of states as a whole', should those organs adopt a resolution of this type, it would tend to show that the opposed principles are not *cogens* since the UN probably is the best approximate representation of that 'community of states as a whole'. However, as also rightly pointed out by Judge *ad hoc* Lauterpacht, it cannot be excluded that a resolution of the Council (or the General Assembly) inadvertently leads to a situation contradicting peremptory norms. If so, no matter Article 103, *jus cogens* must prevail.

Viewed from this perspective, I would definitely be less pessimistic than Christine Chinkin: all the decisions she has cited, and, more generally, all the decisions mentioning *jus cogens*, again, pave the way for a more real and, probably, one day, more efficient world public order – and a moral value oriented public order since I maintain:

– First, that even if still very few and in their infancy, the existing rules of *jus cogens* witness the slow progress of the international society to a less uncivilized community than the old Westphalian world; and,

– Second, that progressively courts and tribunals will be more and more inclined to apply them – this with an important *caveat* however: peremptory norms are like nuclear weapons: their first role is dissuasive; as a matter of definition, they are so essential to the functioning of our modern international society, so deeply rooted in the conscience of mankind that first they are rare and, second, as a consequence, fortunately, rather rarely infringed – at least 'frontally'.

In this respect, it will be most interesting to see what the ICJ will have to say in its next Monday's Judgment on the *Genocide* case. Will it, anew, formally qualify genocide and, maybe, other crimes, as contrary to peremptory norms? Will it draw

¹² *Fragmentation of International Law: Difficulties Arising from the Fragmentation and Expansion of International Law*, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682 (13 April 2006) at 168-169, para. 331.

¹³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Provisional Measures, ICJ Reports (1993) 325, (Separate Opinion of Judge Lauterpacht), at 440-441, para. 102.

specific consequences from such qualifications? If so, it will have fully exercise its function of world quasi-legislator in fixing both the very concept of *jus cogens* in positive law and those norms in the category of *jus cogens*.¹⁴ This can be hoped in view of its recent Judgment in the case of *Armed Activities on the Territory of the Congo*, which is quite encouraging: shy as it may seem – since the Court only declared that ‘the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute’¹⁵ – it remains that, breaking off with its previous ambiguities and timorousness (appearing in laborious circumvolutions like ‘intransgressible principles of international customary law’¹⁶), it formally acknowledges the very notion (and the ‘label’) of *jus cogens*. In doing this it opens new prospects for its role in controlling the lawfulness of the acts of the states and of international organisations – the UN in the first place.

Moreover, as very aptly explained by John Dugard in his remarkable Separate Opinion appended to the ICJ last year’s Judgment in *Congo*, ‘[j]us cogens does, however, have a less spectacular role to play in the judicial process and it is this role that becomes important now that the Court has finally recognized the existence of peremptory norms’:¹⁷ it consists in helping the Court to make a choice between conflicting principles. As long as the International Court did not acknowledge the existence of peremptory norms of a superior character, it could freely pick and choose among those conflicting norms – sometimes making good choices (as it did recently in *Uganda* or, also, in the *Wall* Advisory Opinion), sometimes making the worst of all possible choices, as it did in its awful Judgment in *Yerodia*.¹⁸ And this is an important example too: while, as I have just said, the Court can have an active and welcomed role in ‘discovering’ and

¹⁴ In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports (2007, forthcoming) given after the present comments were made at the Helsinki Conference, the ICJ reaffirmed the peremptory nature of the prohibition of genocide (para. 161); but only drew limited consequences of such a characterization which was only said to be significant – among other elements – for the interpretation of the 1948 Genocide Convention (para. 162).

¹⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, Judgment of 3 February 2006, ICJ Reports (2006, forthcoming) at para. 64; see also *Genocide Case*, Judgment of 26 February 2007, *supra* note 14, at para. 147. Such a finding must certainly be approved: the Court’s jurisdiction has nothing to do with the nature of the norms it is called to apply.

¹⁶ Cf. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports (1996) 226 at 257, para. 79. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports (2004) 136 at 199, para. 157.

¹⁷ *Congo Case*, *supra* note 15, (Separate Opinion of Judge Dugard), at para. 8.

¹⁸ *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports (2003) 3.

consolidating peremptory norms, it can too exercise a most unfortunate influence in preventing or, at least, slowing down the advent of new norms – whether peremptory or not – as it precisely did in the *Yerodia* case, where, to borrow again Judge *ad hoc* Dugard's words, it did not allow 'the *jus cogens* character of the crime to prevail over the plea of immunity'.¹⁹

The worse is not always sure and it can be hoped that the Court – which has now formally acknowledged the existence of *jus cogens* – will, in the future, exercise its jurisdiction in such a way that it will favour and not prevent the acknowledgment of the peremptory character of new norms inasmuch as they mature as such within the community of states as a whole.

Interestingly, it can probably be upheld that there is, from this point of view, a dialectic movement between the fragmentation and the 'peremptorization' of international law. As Christine Chinkin has very convincingly shown at the beginning of her presentation, the demand for new rules of *jus cogens* usually emanates from non-state actors and, in a first time, prospers (if it prospers ...) in a 'fragmented area': either in a specialized 'box' (human rights, environment, humanitarian law) or on a regional basis, or both. Then, but only then, the principle in question can migrate to the universal and global level and acquire its statute as a peremptory norm of general international law. (In parenthesis, I am among those who think that regional *jus cogens* does exist – there *is* a European system of peremptory human rights which is certainly more elaborate and more demanding than the very loose network of 'cogens' human rights at the world level –, and that the passage at the regional level can be the entrance door for a wider recognition).

Coming back to the initial question (is this all 'abstract', if not vain?), I'm afraid that this is the impression this debate could give. But it is, I think, an erroneous impression – or, more exactly, the reflection of a temporary situation. While I have no doubt that the existence of norms of a superior value is as ancient as international law, the conceptualization of *jus cogens* is recent and tightly linked with the elaboration, then the adoption, of the Vienna Convention. Several decades have then been needed for the general acceptance of this concept – and, among the pockets of resistance was ... France but also, less anecdotally, the ICJ itself (both not being without any link ...). Now, the way has been cleared: Asterix has stopped its rearguard action against the notion; progressively the case law acknowledging the existence of such a legal object as *jus cogens* has increased and strengthened – and I wish to make a remark in this respect: it is usual to deplore the scarcity of the jurisprudence referring to *jus cogens*; this is no more tenable. As explained in the Koskenniemi's Report, '[t]he extent of

¹⁹ *Ibid.*, para. 11.

case-law on *jus cogens* is vast²⁰. And this now quite abundant case law is of great help to draw a reasonable list of peremptory norms. And the recent development of this case-law begins to deny the qualification added by the Koskenniemi's Report according to which: 'Yet the number of cases in which *jus cogens* has appeared from the viewpoint of norm conflict is considerably more limited':²¹ this second phase seems to be on its way even if, up to now, this case-law of the 'second generation' shows more which consequences do *not* ensue from the peremptory character of a principle than those these norms produce.

But this is, no doubt, a transitory situation. With the progress of the globalization, the absolute necessity of a 'minimum world legal order' will become even more apparent and *jus cogens* will appear as the best bastion against, both, the excesses of the fragmentation and those of the globalization itself. This optimistic conclusion calls however for another *caveat*: this conclusion is under the *sine qua non* condition that the 'Imperial Power' stops its destabilizing policy and stops trying to impose to the rest of the World values and principles which are its own only. Peremptory norms are those which are accepted and recognized as such by the international community of states as a whole and, probably to-day, by the international community *tout court* (as reflected for example in the ILC Articles on the Responsibility of States for Internationally Wrongful Acts²²).

²⁰ ILC, Report of the Study Group, *supra* note 12, at 190, para. 377.

²¹ *Ibid.*, at 191.

²² Report of the International Law Commission on the Work of its Fifty-third session, UN Doc. A/56/10. See Articles 25(1)(b), 33(1), 42(b) and 48(1)(b).