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ESSAY

IT'S A BIRD, IT'S A PLANE, IT'S JUS COGENS!

*by Anthony D'Amato**

If an International Oscar were awarded for the category of Best Norm, the winner by acclamation would surely be *jus cogens*. Who has not succumbed to its rhetorical power? Who can resist the attraction of a supernorm against which all ordinary norms of international law are mere 97-pound weaklings?

To be sure, a critic may object that *jus cogens* has no substantive content; it is merely an insubstantial image of a norm, lacking flesh and blood. Yet lack of content is far from disabling for a protean supernorm. Indeed, the sheer ephemerality of *jus cogens* is an asset, enabling any writer to christen any ordinary norm of his or her choice as a new *jus cogens* norm, thereby in one stroke investing it with magical power. Nor does there appear to be any limit to the number of

* Judd and Mary Morris Leighton Professor of Law, Northwestern University.

norms that a writer may promote to the status of supernorm. Consider the gaggle of substantive norms, sharing in common their newly anointed *jus cogens* status, that have been collected by Karen Parker and Lyn Beth Neylon in a recent article.[1] These authors claim that the right to life is a norm of *jus cogens*, as are the prohibitions against torture and apartheid. Indeed, having attained this measure of momentum—faster than a speeding bullet—the authors end by claiming that the entire body of human rights norms are norms of *jus cogens*.

However, Ms. Parker and Ms. Neylon, perhaps in a moment of weakness, admit that "not all commentators agree that the whole of human rights law presently constitutes imperative rules of *jus cogens*."[2] They cite Rosalyn Higgis' observation that while treaties "undoubtedly contain elements" that are peremptory, that fact alone does not lead to the view that all human rights are *jus cogens*.[3] I confess to breathing a sigh of relief when Professor Higgins' down-to-earth comment was mentioned, for I had feared that the next step Ms. Parker and Ms. Neylon might take would be the investiture of every single norm of international law—not just human rights norms—with the heady status of *jus cogens*.[4] If that had happened, we would have wound up with something like the popular caricature of German Law: "that which is not expressly prohibited is compulsory."

The long bull market in *jus cogens* stock began when Professor Grigory Tunkin proclaimed in 1974 that the Brezhnev doctrine, which he called "proletarian internationalism," is a norm of *jus cogens*.[5] Shares skyrocketed on all international exchanges when the World Court found in the *Nicaragua* case that the international prohibition on the use of force was "a conspicuous example of a rule of international

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1. Parker and Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411 (1989).

2. *Id.* at 442.

3. *Id.* (citing Higgins, *Derogation Under Human Rights Treaties*, BRIT. Y.B. INT'L L. 282 (1976-77)).

4. All of this is not to deny that there have been some valuable and interesting contributions to the theory of international law that have dealt more or less with the notion of *jus cogens*. For example, see Riesenfeld, *Jus Dispositivum and Jus Cogens in International Law: In the Light of a Recent Decision of the German Supreme Constitutional Court*, 60 A.J.I.L. 511 (1966); T. MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION 58-60 (1987); Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585 (1988); Janis, *The Nature of Jus Cogens*, in colloquy with Turpel & Sands, *Peremptory International Law and Sovereignty: Some Questions*, 3 CONN. INT'L L. J. 359, 364, 370 (1988).

5. G. TUNKIN, THEORY OF INTERNATIONAL LAW 444 (1974).

law having the character of *jus cogens*."[6] This pronouncement should be taken in context—that of a kitchen-sink approach to the sources of international law.[7] In an expansive decision, the World Court found it just as easy to promote an ordinary norm into an imperative norm as to create out of thin air an ordinary norm. The only requirement for either of these transformative processes of legal legerdemain to be effected was the garnering of a majority vote of the judges present at The Hague.

Demonstrating slightly greater restraint than the judges were the rapporteurs of the Third Restatement of the Foreign Relations Law of the United States, who conceded that "not all human rights norms are peremptory norms (*jus cogens*), but those in clauses (a) to (f) of this section are, and an international agreement that violates them is void."[8] As usual, neither the rapporteurs of the Restatement nor the judges of the *Nicaragua* case give the reader the slightest clue as to how they came to know that their favorite norms have become *jus cogens* norms.

What exactly is a norm of *jus cogens*? The Vienna Convention on the law of treaties explains that "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."[9] I can imagine a candidate case. Suppose a provision of a treaty of Friendship, Commerce, and Navigation permits either party to launch an unannounced preemptive nuclear strike against the other side's civilian population centers. Such a norm—if two nations would have the temerity and absurdity to include it in a treaty—would undoubtedly conflict with some peremptory norm or other, and as a consequence would be regarded as void. I join partisans of *jus cogens* in

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6. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), 1986 I.C.J. 14 (Judgment on Merits of June 27). The Court was encouraged in this view by the statements of both Nicaragua and the United States, and by an earlier view of the International Law Commission. *Id.* at 100-01.

7. Or so I have claimed in D'Amato, *Trashing Customary International Law*, 81 A.J.I.L. 101 (1987).

8. 2 RESTATEMENT OF THE LAW (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 167 § 702 (1987). Clauses (a) to (f) include prohibitions against genocide, slavery, murder, torture, inhuman or degrading punishment, prolonged arbitrary detention, and systematic racial discrimination. The authors do not indicate how an *agreement* can *violate* a peremptory norm. One would have thought that, at best, a norm of *jus cogens* renders void any contrary provision in a treaty. But apparently the rapporteurs of the Restatement would go further, and find that merely concluding a treaty can "violate" a peremptory norm.

9. Article 53, Vienna Convention on the Law of Treaties, *opened for signature* May 23 , 1969, UNTS Regis. No. 18,232, UN Doc. A/CONF.39/27 (1969). [Hereinafter Vienna Convention].

applauding the wisdom of a preemptive rule to the effect that if two nations seek the freedom to annihilate each other's population centers, they cannot validly establish their right to do so by treaty. Any subsequent attempt to *rely on the treaty* to justify such an act would surely fail to get a majority vote in any neutral court of competent jurisdiction. By extension, of course, I am arguing that when a putative treaty provision becomes so senseless that it is unimaginable that states would actually include it in a treaty (other examples being an agreement to exchange slaves or the right to torture each other's diplomats), then *jus cogens* theory snaps into action to make sure that such senselessness, should it occur, would have no legal effect.

Nevertheless, at least one student of international law has expressed his dissatisfaction with confining *jus cogens* to the task of obliterating provisions in treaties. In a recent book designed to introduce students to the subject of international law, Professor Mark Janis confidently asserts that *jus cogens* also can vanquish customary law.[10] His version of the supernorm reminds us of Pac-Man, swallowing up and stamping out any and all norms that stand in its way.

The implications of the claims of Professors Tunkin and Janis are disconcerting. Assume that Professor Tunkin is correct that the Brezhnev Doctrine is a supernorm, and assume that President Gorbachev decided to repeal it. Suppose he wants to announce—as indeed he has already more or less announced in the wake of Afghanistan—that the Soviet Union will no longer necessarily intervene militarily in every socialist nation that has a democratic-capitalist revolution. Would international *jus cogens* scholars object that it is illegal for Gorbachev to retract the Brezhnev Doctrine? He is after all a mere mortal who dares to divest a supernorm of its power. What good is a supernorm if a head of state can retract it at will? Thus, international scholars who champion the cause of *jus cogens* might have to assert that the Soviet Union be *compelled*, as a matter of the Brezhnev Doctrine's peremptory force in international law, to intervene militarily in other states in order to preserve proletarian internationalism. What would Professor Tunkin himself say? Perhaps as the one who bestowed *jus cogens* status on the Brezhnev Doctrine, he is the only one who is entitled to revoke it.

Professor Tunkin may indeed have anticipated the day when he might be called upon to revoke the *jus cogens* status of the Brezhnev

10. M. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 54 (1988).

Doctrine when he wrote, in an earlier section of his 1974 book, that "[i]mperative principles obviously are not immutable. As all other principles and norms of general international law, they may be modified by the agreement of states, by means of treaty or custom."[11] But he did not explain to us how, if a *jus cogens* norm *invalidates* treaty provisions, a later treaty may *modify* the *jus cogens* norm itself. This would be like saying that Superman is stronger than any criminal in Metropolis except for any particular criminal who comes along who is in fact stronger than Superman.

In any event, it appears that Professor Janis was not quite so prudent as Professor Tunkin. When Professor Janis converts a norm into a supernorm, even he as its author appears powerless to demote it. For Professor Janis, a norm of *jus cogens* "is a sort of international law that, once ensconced, cannot be displaced by states, either in their treaties or in their practice."[12] This is at least a forthright position. Once you've created a supernorm, monster or not, you've got to live with it. So, if Professor Janis were to include the Brezhnev Doctrine in his list of supernorms (a purely hypothetical case, of course, designed only to test his logic), he would have to disagree with Professor Tunkin and instead insist that the Soviet Union *must* continue to intervene militarily in the affairs of other states.

What shall we do with the Pandora's Box approach to supernorms taken by Professor Janis? Can't we find a little weakness in it? Isn't there some kryptonite that will sap the powers of these invincible supernorms? The Vienna Convention on the Law of Treaties made an attempt along these lines. It provides that a norm of *jus cogens* "can be modified only by a subsequent norm of general international law having the same character."[13] At least this introduces a second, competing Pac-Man—one supernorm can be swallowed by a subsequent one. But the drafters of the Convention failed to tell us how such a subsequent norm can itself arise. Perhaps that is no serious omission; after all, they did not tell us how the initial peremptory norm arose, so they should not be faulted for failure to reveal the origins of subsequent norms. But conceding that much to the drafters of the Vienna Convention, would it not be the case that as soon as one of their subsequent peremptory norms starts to arise and attempts to "modify" a previous supernorm, the existing supernorm will do a reverse flip and stomp out the subse-

11. TUNKIN, *supra* note 5, at 159.
12. JANIS, *supra* note 10, at 54.
13. Vienna Convention, *supra* note 9, at art. 53.

quent norm? After all, it is only normal to expect that any established supernorm will be on the lookout for incipient competitive supernorms, turn sharply upon them as soon as they get close, and rub them out.

We seem to be left with two polar positions. On one side, represented by Professor Tunkin, is the idea of a norm of *jus cogens* that can be modified by *any* subsequent norm, conventional or customary. One the other extreme, represented by Professor Janis, is the idea of a norm of *jus cogens* that can *not* be modified by any subsequent norm. The polar opposites thus seem to represent Too Cold and Too Hot. Professor Tunkin's view is Too Cold, because it says in effect that a norm of *jus cogens* is exactly like any other norm; it is imperative so long as it remains in place, but loses its imperativeness whenever it is modified or changed by any other subsequent norm. Professor Janis' view is Too Hot, because once the supernorm arises, there is nothing any group of states or group of persons can ever do to replace it or even whittle it down to size If the wrong one gets invented, watch out! (And since we are talking about *international* law, there will be no safe haven in which to obtain asylum against the supernorm).

What we require—like the third bowl of soup in the story of the three bears—is a theory of *jus cogens* that is Just Right. I do not know if such a theory is possible. I don't even know if one is conceivable. But if someone conceives it, that person deserves the very next International Oscar. To qualify for the award, the theory must answer the following questions:

(1) What is the utility of a norm of *jus cogens* (apart from its rhetorical value as a sort of exclamation point)?

(2) How does a purported norm of *jus cogens* arise?

(3) Once one arises, how can international law change it or get rid of it?

With all that has been written about *jus cogens*, these would appear to be rather elementary questions. I await their answers with keen interest, though I have no current plans to be measured for evening clothes in expectation of the award ceremony.