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'Change in International Law: Rules of Change or Changing Rules?' Series

Between Stability and Responsiveness in International Law

The example of *Jus Cogens*

Dire Tladi*
International Court of Justice

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1. Introduction

Stability is one of the hallmarks of any legal system and this is certainly true of international law. Certain principles, we might call them fundamental principles, give a legal system its character, and these must have a degree of resistance to change. For international law, examples of such principles that should not create too much controversy would include the principles of sovereignty and *pacta sunt servanda*. Even in the face of changes in the global environment, geopolitics and context in which the legal system functions, for it to retain its character, some of these fundamental principles must

* Judge of the International Court of Justice; NRF SARChI Chair in International Constitutional Law and Future Africa Chair in Global Equity, University of Pretoria. Former member and Chair of the UN International Law Commission.

remain constant; they cannot be like candles, blowing in the wind. It is the stability of these foundational principles that give a legal system its legitimacy and pedigree.

Yet, at the same time, a legal system that is unable to change and respond to changes – technological, geopolitical, moral, scientific, social and so on – will quickly become archaic and irrelevant. In time, a legal system that is archaic and irrelevant loses its legitimacy. This is also true of international law. The international law that we know and study today is very different from the international law that was studied in the eighteenth century. International law once permitted the use of force as an instrument of foreign policy and yet today, the prohibition on the use of force has a place as one of the most important rules of international law. At the same time, with technological advancements, international law is beginning, more and more, to concern itself with questions of the operations of international law in cyber contexts.

What is more, there is nothing contradictory about the assertions that, on the one hand, international law needs stability, or put differently is resistant to change and, on the other hand, that it has to be responsive to developments and exhibit an ability to change. Having both responsiveness and stability is important for international law's utility and, above all, legitimacy. This short contribution seeks to comment on change and stability in international law through the prism of *jus cogens*, as a concept that reflects both the impulse of change and the impulse of stability in international law. The next section of the contribution will make some observations on change (see Section 2.1) and stability in international law generally (see Section 2.2). Thereafter, the contribution will make some comments on change and stability in relation to *jus cogens* in particular (see Section 3).

2. Change and Stability in International Law

2.1 On Change …

It should not be hard to see that international law, by its very nature, is a legal system that is flexible and responsive to change.[1] The first and perhaps most obvious illustration of the ability of international law to change and to be responsive is the horizontal character of the legal system, which permits its subjects to contract out of general rules subject, of course, to *jus cogens*. Contracting out of rules can take place through withdrawal from existing treaty relations or, more typically, from the conclusion of

[1] For the purposes of this paper, I interpret change broadly to include modification of rules, abrogation of rules and the emergence of new rules. On the difference between these concepts see Mehrdad Payandeh "Modification of Peremptory Norms of General International Law" in Dire Tladi (ed) Peremptory Norms of General International Law (): Disquisitions and Disputations (2021), at 97 *et seq.*

separate treaties that seek to modify, in the relations of the treaty parties, the application of an existing treaty or customary international law. The ability to contract out of international law is indicative of the ability to change in two ways. First, contracting out of rules of international law is itself reflective of change because the rules of international law, at least for those contracting out, change. Second, the act of contracting out of rules of general international law, whether through conclusion of treaties or other means, itself constitutes State practice that over time can lead to a new rule, whether through the adoption of a treaty rule, or through the crystallisation of a new rule of customary international law. Customary international law, the default source of law,[2] based as it is on the practice of states without a legislative process, also facilitates change. When states change their behaviour in response to changing circumstances, arguments for change in law, with or without new treaty instruments, become more plausible.[3] In this context, Chimni observes that arguments are often made that modern customary international law is seen (uncritically) as "helping to cope with rapid change".[4] It is interesting that for Chimni, the ability of customary international law to "facilitate swift development" has the purpose of promoting "stability" of hegemony.[5] Chimni, of course, is concerned with power relations and the marginalisation of the South, but for the purposes of this paper, his statement reflects the duality of customary international law as being capable of promoting both stability (in this case, stability of hegemony) and change (in this case, the development of tools for maintaining hegemony) and how these elements can be mutually reinforcing. The role of customary international law in the facilitation of change, or at least change achieved more rapidly than through treaties, is offered by Guzman and Hsiang. These authors state that the "consequence of a pure consent-based system is that agreement is impossible unless every affected State benefits", while customary international law "offers some modest relief" to this inflexibility of international law by allowing "a large majority of States supporting a rule" to establish a generally applicable rule.[6] Customary international law thus reveals elements of both change and stability.

Treaty law, on the other hand, is more resistant to change than customary international law and is representative of the stability of international law. Yet even here, in connection with treaties, there is evidence of international law's ability to change and to be responsive. While amending treaty rules, or

[2] First Report of the Special Rapporteur (Michael Wood) on Customary International Law, 2013 (A/CN.4/663), at para 35.

[3] See Bill Campbell "The Dynamic Evolution of International Law: The Case for the More Purposeful of Customary International Law" (2018) 49 *Victoria University of Wellington Law Review* 2018

[4] BS Chimni "Customary International Law: A Third World Perspective" (2018) *American Journal of international Law* 1, at 9.

[5] *Ibid.*

[6] Andrew Guzman and Jerome Hsiang "Some Ways that Theories on Customary International Law Fail: A Reply to László Hsiang (2014) 25 *European Journal of International Law* 553, at 557.

even supplementing them with other treaty rules, is a complicated and difficult endeavour, treaty rules evolve. Whatever the theoretical distinction between modification (amendment) and (evolutive) interpretation,[7] it cannot be denied that, through evolutive interpretation,[8] the interpretation of treaties permits a degree of flexibility. This permits treaty law to be more responsive. As has been observed, the apparent rigidity of treaty law may have the effect of disguising what is, in fact, dynamism and innovation.[9] The customary general rule of interpretation – widely accepted to be found in Article 31 of the Vienna Convention – provides several avenues for treaty rules to "evolve" in response to new developments. The concept of "object and purpose" as a means of interpretation permits, when appropriate, an interpretation that might depart from the ordinary meaning of the words of the treaty.[10] Subsequent agreement and subsequent practice are perhaps the means most synonymous with evolutive interpretation.[11] It is subsequent practice that is often put forward for why an abstention by a member of the permanent five does not amount to a veto, although clearly the ordinary meaning of the Charter would suggest that it ought to be.[12] Finally, the notion of systemic integration, or the interpretative rule that interpreters must take into account other relevant rules of international law applicable to the parties, is also an obvious source of evolution of treaty norms.

Jus cogens is also no stranger to change in the form of flexibility and responsiveness. Yet, whether the particular nature of *jus cogens* norms entails certain constraints or particularities as far as change is concerned is a point that will be examined in more detail below in Section 3.2. Suffice it to say that although the conceptual basis of *jus cogens* may be tied to natural law and immutability, the ILC in its recent work does account for and allow for *jus cogens* to be responsive to the *Zeitgeist* and be amenable to change. However, before we turn our attention there, it is necessary to examine first what influence the counterforce of stability exerts on rules of international law, in general.

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[7] See paras 21-38 of the Commentary to Conclusion 7 of the ILC Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties, (A/73/10). See also generally Gerhard Hafner "Subsequent Agreements and Practice: Between Interpretation, Informal Modification and Formal Amendment" in Georg Nolte (ed) *Treaties and Subsequent Practice* (2013).

[8] See Irina Buga *Modification of Treaties by Subsequent Practice* (2017), at 73 who describes evolutive interpretation as serving to "enable the interpreter to account for important legal developments … without having recourse to modification."

[9] Campbell McLachlan "The Evolution of Treaty Obligations in International Law" in Nolte (above note 8), at 73

[10] See Jan Klabbers "Treaties: Object and Purpose" 2006 *Max Planck Encyclopedia of Public International Law,* para 21, describing "object and purpose" as infusing "some common sense and flexibility" and allowing interpreters to account for "things [that] drafters simply cannot envisage."

[11] See Buga (above note 9) and Hafner (above note 8).

[12] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports* 1971, p.16, para 22.

2.2. On Stability …

As mentioned above, international law, by its very nature, is a legal system that is flexible and responsive to change. Yet for all this apparent flexibility, ability to change and responsiveness, international law is a highly stable (and thus inflexible) legal system. Customary international law was described above as a reflection of the flexibility and responsiveness to change. Yet, think about what it takes, according to the ruling theory of customary international law, to modify a "mere" rule of customary international law – at least in theory: a widespread and general practice of states, accepted as a law.[13] Widespread and general is difficult enough, but this practice must be virtually uniform to form the basis of customary international law. Customary international law becomes infinitely more difficult to modify when one throws in the second requirement, *opinio juris*, the notion that this widespread and virtually uniform practice must be undertaken with a sense of obligation. This may raise the question, not central to this contribution, whether this construction of customary international law is real, or merely a façade intended to give the privileged the right to determine the content of international law.

Admittedly there is a degree of inconsistency here. On the one hand, this contribution suggests that customary international law exhibits characteristics of change. On the other hand, the same contribution states that the requirements for customary international law are so rigorous as to make evolution of customary international law difficult. At the heart of the inconsistency is the tangential question of whether the process of identifying customary international law is a mere façade. In 2021, I had an interesting exchange with the then President of the International Court of Justice on the standard for the identification (and thus evolution) of customary international law.[14] In the exchange, I suggested that the two-element approach in the ILC Draft Conclusions endorsed by the President was based wholly on the Court's jurisprudence rather than on state practice, and that therefore it could be argued that the two-element approach itself was suspect. In response, the President was quoted as following:

She had thought and read extensively about the formation and existence of customary international law, including alternatives to the two-element test … It was her strong belief that the two-element approach involved more than a mechanical exercise of seeking the views of States and trying to take stock of their practice. Whenever that approach … was taken, the conclusion almost always drawn

[13] See Conclusion 2 ILC Draft Conclusions on Identification of Customary International Law, 2018 (A/73/10).
[14] See ILC Summary Records (A/CN.4/SR.3548), 7.

was that there was no customary international law rule, since evidence of State practice and opinio juris was so difficult to find.[15]

This seems to suggest that customary international law is rigid and difficult to modify or move forward. However, if one knows how to play the game, the façade of instability and inflexibility can be overcome. This same sentiment can probably be expressed with treaty law. Treaties are notoriously difficult to amend, and yet there are countless examples of treaty evolution, particularly through interpretation that, at the time, might seem difficult to reconcile with the provisions of the treaty. Mention has already been made of the evolution of the treaty rule concerning the veto within the Security Council, but there are other examples. There is currently a strong push to abrogate Article 98 of the Rome Statute through "interpretation".[16] Thus, what we see with treaty law is stability (resistance to change), with avenues for change, primarily through interpretation.

The point made above is that change and stability are both realities that are accounted for in international law-making. Moreover, both change and stability are a necessary part of the framework. Without change, the legal system stagnates and cannot keep up with developments. Without stability, the certainty that a legal system should strive to achieve is undermined, as is its legitimacy and pedigree. It is thus unsurprising that the main sources of international law exhibit both elements of stability and change.

This tension (and compatibility) between stability and change in international law is also reflected in *jus cogens*, and the place that it holds and role it plays in international law. Both in terms of its place and in terms of its role, *jus cogens* displays elements of change but also of stability. Nonetheless, the particular positioning of *jus cogens* norms at the apex of the normative pyramid of international law, their *raison d'être* and the history of evolution of the concept of *jus cogens*, are all factors that raise the important question of whether and to what degree the discussion and findings on stability and change mentioned in Section 2, are *en bloc* transferable to *jus cogens*, or whether *jus cogens* demands a more nuanced approach.

[15] Ibid. In the full video recording, available at https://media.un.org/en/asset/k11/k11dzifl33 (accessed 22 June 2022), the President continues to say ": "but I don't know a better way [and] I know its frustrating. It's a fair to point to say but where does that come from. I just don't have a better answer …" (minute 53:01).

[16] See for general discussion Dire Tladi "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited" (2017) 60 *German Yearbook of International Law* 43.

3. Jus Cogens

3.1. On Stability …

If the horizontality of international law suggests flexibility and openness to change as suggested above, *jus cogens* is a concept that challenges that notion. It restricts – in fact prohibits – the possibility of contracting out of general international law and in that way makes it more difficult for at least some rules to change. Paradoxically, the critique against *jus cogens*, when the Commission first sought to entrench it in international law, was precisely that *jus cogens* threatened the stability of treaty relations.[17] Thus, the same *jus cogens* that promotes stability by preventing states from contracting out of rules (and thus changing them), undermines it, at the same time, by threatening the validity of rules otherwise legitimately created.

The content of *jus cogens* is itself supposed to be fairly stable. Indeed, the classical notion of *jus cogens*, based as it was on conceptions of natural law, was that the norms were immutable – the ultimate measure of stability and resistance to change.[18] Under this classical notion, *jus cogens* status existed independent of time and space.[19] If one accepts, as the ILC put forward in the Conclusions adopted in 2022,[20] that *jus cogens* protects fundamental values, then it would be expected that *jus cogens* would generally be resistant to change. In the course of adopting the Conclusions, a debate arose on values and their resistance to change, with some members taking the view that fundamental values underlying jus cogens norms were subject to change while other suggested that they were resistant to change.[21] Eventually, the Commission stated as follows:

It is unnecessary and, indeed, impractical to specify the fundamental values to which draft conclusion 2 refers. These values are not static and may evolve over time. While the values often associated with *jus cogens* are generally humanitarian in nature, other values, as long as they are shared by the international community, may also underlie peremptory norms of general international law (jus cogens).[22]

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[17] See generally First Report of the Special Rapporteur (Dire Tladi) on Jus Cogens, 2016, (A/CN.4/693), at para 36).

[18] Gennady Danilenko "International *Jus Cogens*: Issues of Law-Making" (1991) 2 *European Journal of international Law* 42, at 44; Levan Alexidze "The Legal Nature of *Ius Cogens* in Contemporary International Law" (1981-iii) *Recueil de Cours de l'Académie de droit international de La Haye* 219, 228.

[19] See First Report (above note 18), at para 29.

[20] ILC Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), (A/77/10).

[21] See ILC Summary Records, A/CN.4/3595, at 6-8.

[22] See para 7 of the Commentary to Conclusion 3 of the ILC Conclusions on *Jus Cogens* (above note 21).

Thus, the Commission accepts that fundamental values change, and as discussed below, that *jus cogens* norms themselves are not immutable. Thus, the duality of change and stability is reflected also in the doctrine of *jus cogens*. Yet, even within the understanding that *jus cogens* is capable of change in response to changing values (and other stresses), the threshold for change is incredibly high: acceptance and recognition by the international community of states as a whole as a norm from which no derogation is permissible.[23]

This high threshold explains, *in part*, why, notwithstanding important geopolitical changes, the prohibition on the use of force, one of the most elementary norms of jus cogens, remains unchanged. There has been a constant and consistent call from some quarters for the prohibition to be modified; specifically, to make the right to use force in self-defence more permissive, to account for a changing geopolitical landscape. The charge that the basic rules on the prohibition of the use of force be modified comes from at least two perspectives, both seeking to broaden the scope of the right to use of force and to narrow the prohibition.[24] First, it has been suggested that the right to use of force in self-defence can now be exercised even if the initial "attack" emanated from a non-state actor without *any* attribution to the territorial state.[25] A second contention is that the prohibition on the use of force, which initially admitted only self-defence and Security Council authorisation as exceptions, now permits also humanitarian intervention.[26]

While it is doubtful that the asserted evolution of the law has taken place under the normal rules for the evolution of law, it seems clear that, because the prohibition is *jus cogens,* the high threshold for the modification of *jus cogens* would be a further hurdle to the evolution of law in that direction.[27] In this context, it should be recalled that a shift of law in this area, save in the unlikely event of an

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[23] See Dire Tladi "Grotian Moments and Peremptory Norms of General International Law: Friendly Facilitators or Fatal Foes?" (2021) 42 *Grotiana* 335, at 346. See Payandeh (above note 1).

[24] For a response to both assertions, see Dire Tladi "The Extraterritorial Use of Force against non-State Actors" (2021) 418 *Recueil de Cours de l'Académie de droit international de La Haye*

[25] Christian Tams "The Use of Force against Terrorists" (2009) 20 *European Journal of International Law* 359; Michael Byers "Terrorism, the Use of Force and Self-Defence after 11 September" (2002) 16 *International Relations* 155; Oscar Schachter "The Extraterritorial Use of Force against Terrorist Bases" (1989) 11 *Houston Journal of International Law* 309; Theresa Reinold "State Weakness, Irregular Warfare, and the Right to Self-Defence Post 9/11" (2011) 105 *American Journal of International Law* 244; Jordan Paust "Self-Defence Targeting of Non-State Actors and Permissibility of US Use of Drones in Pakistan" (2010) 19 *Journal of Transnational Law and Policy* 237.

[26] Milena Sterio "Humanitarian Intervention Post-Syria: A Grotian Moment?" (2014) 20 *ILSA Journal of International and Comparative Law* 343; Michael P Scharf "Striking a Grotian Moment: How the Syria Airstrikes Changed International Law Relating to Humanitarian Intervention" (2919) 2 *Chicago Journal of International Law* 586.

[27] See generally Mary Ellen O'Connell "Self-Defence, Pernicious Doctrines, Peremptory Norms" in Mary Ellen O'Connell, Christian J Tams and Dire Tladi *Max Planck Trialogues on the Law of Peace and War (Vol 1): Self-Defence against Non-State Actors* (Cambridge, 2019); Tladi (above note 24) at 346; Payandeh (above note 24).

amendment of the Charter, would take place through the evolution of customary international law or the (re)interpretation of the Charter. Yet, while both are possible even in the case of *jus cogens*, *jus cogens* places strict limitations on the possibility of such evolution.[28]

It should be said that while I am of the view that the resistance offered by *jus cogens* is desirable from a policy perspective – this is certainly the case in respect of attempts to modify the narrow content of the right to use force in self-defence – it can also serve as obstacle to progress in some cases. There are, in my view, norms most deserving of peremptory status that remain generally unacknowledged on account of the high threshold for the identification of *jus cogens* rules, while other norms seem to have made the cut mainly due to historical reasons. Examples of norms whose acknowledged status is based on historical reasons include piracy. Examples of deserving norms that are seldom acknowledged include the prohibition of discrimination on the basis of gender and certain norms of international law concerning the protection of the environment.[29] The Commission's decision not to include these norms has been questioned both in the literature[30] and within the Commission.[31]

3.2. On Responsiveness ….

For all the theories linking it with stability and resistance to change, the current ruling theory of *jus cogens* also reflects the necessity for responsiveness and change. While, as described above, *jus cogens* is a concept based on natural law with connections to immutability, the conception of *jus cogens* endorsed by the ILC, and which can now be regarded as the ruling conception of *jus cogens*, does envision change. The very definition of *jus cogens* in Article 53 of the Vienna Convention refers to change (modification),[32] and this is buttressed by Article 64 of the Vienna Convention, which provides for the possibility of emerging norms of *jus cogens*.

It is noteworthy that the very recognition and acceptance of the concept of *jus cogens,* and particular norms that we now recognise as having *jus cogens* status, can be traced to responsiveness to particular geopolitical or social problems. In an earlier contribution, I have suggested that there was no authority for the concept of *jus cogens*, and that it was yet accepted almost without much

[28] See Panos Merkouris *Interpretation of Customary International Law: of Methods and Limits* (XXXX)

[29] Para 134 of the Report of the Special Rapporteur on Peremptory Norms of General international Law (*Jus Cogens*), (A/CN.4/727).

[30] See e.g. Nilufer Oral "Environmental Protection as a Peremptory Norm of General International Law: Is it time?" in Tladi (above note 1) and, in the same volume, Mary Hansel "'Magic' or Smoke and Mirrors? The Gendered Illusion of *Jus Cogens*".

[31] Mr Jalloh's statement can be found in (A/CN.4/SR.3461),

[32] Article 53 of the Vienna Convention on the Law of Treaties provides that *jus cogens* is a norm that can only "be modified" by another *jus cogens* norm.

resistance, largely in response to the atrocities of the Second World War.[33] Similarly, the acceptance of the prohibition of the use of force and the prohibition of genocide as norms of *jus cogens*, for example, are no doubt linked to the atrocities of the Second World War. The prohibition of racial discrimination as *jus cogens* is no doubt a response to Apartheid policy of the SA government and the concerted action of the UN in response.

Yet, as described above, this same resistance to change makes it difficult for deserving norms to receive recognition as *jus cogens*. There is, thus, a tension between *jus cogens* as open to change and responsiveness and *jus cogens* as promoting stability and thus resistant to change. Given this tension, it is not surprising that the Commission did not address the issue of modification, which would go to the heart of the tension between resilience and change. Some members of the Commission, for example, held the view that *jus cogens* was not modifiable.[34] This, of course, was not the position of the Commission. The Commission clearly accepts that *jus cogens* norms are not (completely) resistant to change, by virtue of the definition it puts forward, which includes the element of modification by a subsequent *jus cogens* norm. But furthermore, the Commission, having acknowledged the debate, essentially suggests the debate is much ado about nothing.[35]

Conclusion

International law, like any legal system, reflects both the imperatives of stability, as well as the need to be responsive to change. The stability and responsiveness of international law is reflected in the main sources of international law. Customary international law, for example, which can be said to reflect responsiveness since it evolves on the basis of practice, also provides evidence of stability since the accepted requirements for customary international law are so difficult to achieve. Indeed, this inconsistency may even lead to questions about whether the requirements for customary international law are, in fact, a façade not grounded in reality. Treaty law can similarly be seen as reflecting both stability and responsiveness. A similar duality of impulses can be observed in respect of treaty law. This delicate balance, where sources of international law reflect both stability and responsiveness to change, is transposed on *jus cogens,* which is, at once, resistant to change and

[33] Tladi (above note 24), at 340-344.

[34] Hmoud (A/CN.4/SR.3566), at 8. See also Hmoud (A/CN.4/SR.3597), at 8 ("For the record, his view was that, in practice, it was impossible for a rule of customary international law that acquired a peremptory character to modify a pre-existing *jus cogens* norm ...").

[35] See para 7 of the Commentary Conclusion 14 of the Conclusions (above note 21), in which the argument is given a short thrift: "this means that there must be, at the point of the emergence of a [*jus cogens*] norm, a practice accepted as law (*opinio juris*) and which the international community of States as a whole, at the same time, accept and recognize as having peremptory character."

yet the norms of which emerge principally as a response development. This tension, I suggest, is both necessary and, more importantly, reflective of the mature legal system that international law is becoming.

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