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## **The Invalidity of International Treaties and *Jus Cogens*<sup>1</sup>**

### **The Place of Conflict with *Jus Cogens* Among the Causes of the Invalidity of International Treaties**

A conflict with a norm of *juris cogentis* ranks high among the causes of the invalidity of international treaties. If international law norms can be arranged in a hierarchy at all, it can be argued that a breach of a higher-order norm by a treaty will rank high among the causes of invalidity. When the causes of absolute invalidity are compared, i.e. a conflict with *jus cogens* and coercion, it can be concluded that a treaty made under coercion will be invalid by reason of the prohibition on the use of force, which is the least questioned norm of *juris cogentis* today. However, it is not only the prohibition on the use of force that is included in the peremptory norms of general international law. The scope of the norm providing for the invalidity of treaties in conflict with *jus cogens* is thus broader than that of norms on coercion. Had the Vienna Convention left out the provisions on coercion, treaties made under coercion would have been invalid regardless, since they breached a peremptory norm. Hence, it can be justifiably said that in the hierarchy of the causes of invalidity, a conflict with *jus cogens* occupies a principal place, reflecting the special position of the norms of *juris cogentis* among the norms of contemporary international law.

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<sup>1</sup> Translated from: J. Sandorski, *Nieważność umów międzynarodowych*, Poznań 1978 by Tomasz Żebrowski and proofread by Stephen Dersley and Ryszard Reisner. The translation and proofreading were financed by the Ministry of Science and Higher Education under 848/2/P-DUN/2018.

The special position of a conflict with *jus cogens* among the causes of invalidity is reflected not only in Article 53 of the Vienna Convention, which is specifically devoted to it, but also in the provisions on the separability of treaty provisions (Article 44), loss of a right to invoke a ground for invalidating a treaty (Article 45), and the consequences of a treaty's invalidity (Articles 69 and 71).

The question of the separability of international treaty provisions was settled by adopting the rule of the inseparability of treaties in the case of their invalidity. An exception was made to the rule in order to cover the situations where the cause of invalidity related solely to particular clauses. They will be held to be invalid if they can be separated from the remainder of the treaty, if their acceptance was not an essential basis of the consent of the other party, or if parties to be bound by the treaty as a whole and the continued performance of the remainder of the treaty would not be unjust. It follows from Article 44(5), however, that the principle of separability does not apply to treaties concluded under coercion and others remaining in conflict with *jus cogens*. The adoption of this clause ran into strong opposition from the Finnish delegation to the Vienna Conference. It was headed by a professor of international law, Erik Castrén, who emphasised the novelty and practical usability of the principle of separability and demanded that it be extended to treaties in conflict with *jus cogens* as well. The Finnish delegate argued that “*Jus cogens* was itself a new principle and some writers and governments seemed to be opposed to its introduction in the international sphere.”<sup>2</sup> This stance met with a rejoinder from the Polish delegate, Andrzej Makarewicz, who said that the rules of *jus cogens* were so fundamentally important that any conflict of a treaty with those rules was dangerous and inadvisable.<sup>3</sup> At the meetings of the Committee of the Whole, a similar stance was adopted by L. Koulichev (Bulgaria), F. Alvarez Tabio (Cuba) and K. Rattray (Jamaica)<sup>4</sup>, with the

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2 United Nations Conference on the Law of Treaties, p. 228. Hereinafter: UNCLT

3 Ibidem, p. 236.

4 UNCLT 1969, pp. 75–76.

Finnish amendment being rejected by 66 votes to 30, with 9 abstentions. At every opportunity, Erik Castrén repeated the argument of the impracticality of the solution proposed by the International Law Commission, expecting that he would primarily convince the practitioners, who outnumbered jurists at the conference. The delegates of a majority of States, however, thought it was right to underscore the special significance of incompatibility with *jus cogens* and, therefore, voted down the Finnish amendment. Hence, both coercion and a conflict with *jus cogens* were recognised as grounds for invalidity, making a treaty void as a whole, and thus inseparable.

Moreover, the importance attached to *jus cogens* in the Vienna Convention is attested by the exclusion of Article 53 from the provision on the loss of a right to invoke a ground for invalidating a treaty. Article 45 of the Convention admits revalidation only when the State has either expressly agreed to consider a treaty valid, or by reason of its conduct the State must be considered as having acquiesced in the validity of the treaty. Article 45 has made use of an *estoppel in pais* (acquiescence). In international relations, the estoppel is justified by the principle of good faith. At the Vienna Conference, its usability for the law of treaties was questioned by F. Alvarez Tabio (Cuba). He believed that the invalidity *ab initio* should dominate in the Convention.<sup>5</sup> A radically different stance was taken by the Swiss delegate, R.L. Bindschedler, who demanded that the *estoppel in pais* be extended to treaties concluded under coercion as well. He maintained that the law of treaties, as no other branch of international law, was closely related to internal law and developed on the basis of civil law. Therefore, with respect to the problem referred to in Article 45, the experience of the latter ought to be taken advantage of. The *estoppel in pais* with regard to international treaties is supported—in his opinion—by the principles of effectiveness, good faith, and the stability of international relations.<sup>6</sup> For this reason,

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<sup>5</sup> *Ibidem*, p. 79.

<sup>6</sup> *Ibidem*, p. 80.

even if a treaty has been concluded under coercion, which has relented after some time, there are no reasons why the coerced State could not give its consent to the performance of a treaty.

R.L. Bindschedler's pragmatism did not go as far as to attack in a similar manner the significance of a conflict with *jus cogens* for the invalidity of an international treaty *ab initio*. Contrary to the opinion of the Swiss delegate, at the meetings of the Committee of the Whole, arguments were put forward for deleting that part of Article 45 that concerned implied revalidation. This was the purpose of a Venezuelan amendment extensively supported by Ramón Carmona.<sup>7</sup> However, it was rejected, with the socialist countries abstaining. Article 45 was adopted by the vast majority of votes (84 States voting in favour). Despite taking opposite stances, neither side questioned the special role of incompatibility with *jus cogens* and agreed that it should be maintained as a ground for absolute invalidity.

The provisions of the Vienna Convention on the consequences of the invalidity of treaties (Part V, Section 5) highlighted the conflict with *jus cogens* by devoting a separate article to it (Article 71). The consequences of invalidity were scrutinised by the third rapporteur of the International Law Commission, Sir Gerald Fitzmaurice, who wrote that a conflict with *jus cogens* merely barred one party from demanding from the other party that it fulfil its obligations under a treaty.<sup>8</sup> The International Law Commission went much further, by specifying the consequences of invalidity and a termination of a treaty incompatible with *jus cogens* in a separate article in its 1966 draft, and stressing in a commentary that invalidity due to this cause had to be considered a special case of invalidity.<sup>9</sup> The special nature of invalidity due to a conflict with *jus cogens* follows from—in the opinion of the Commission—the fact that unlike other causes, whose effect is the restoration of a situation in the

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<sup>7</sup> *Ibidem*, p. 78.

<sup>8</sup> Yearbook of International Law Commission, vol. II, p. 25 – the third report by Gerald Fitzmaurice. Hereinafter: YILC

<sup>9</sup> Report of International Law Commission 1966, p. 93. Hereinafter: RILC.

mutual relations between the parties which would have existed, had the treaty not been concluded, in the case of a conflict of the treaty with *jus cogens*, the parties are bound to bring their relations to agreement with a peremptory norm of general international law. Similarly, a special case of termination and at the same time of invalidity involved, in the opinion of the Commission, the emergence of a new norm of *jus cogens* with which a previously concluded treaty was in conflict. Consequently, it was held that in this case invalidity did not reach *ad initium* but only to the moment when a new norm of a peremptory nature emerged. The position of the Commission was accepted by the Vienna Conference, by 87 votes to 5, with 12 abstentions. The British delegate, I.M. Sinclair, giving reasons why his delegation abstained in the voting, returned to the question of the separability of treaty provisions and charged that Article 71 of the Convention did not provide for the situation where some clauses of a treaty that was in conflict with *jus cogens* did not share this characteristic.<sup>10</sup> The delegation of the FRG concurred with these reasons.<sup>11</sup> In the opinion of the vast majority of Vienna Conference participants, however, the fundamental significance of *jus cogens* for international law called for giving special prominence to the effects of a conflict with peremptory norms.

A conflict with *jus cogens*, in agreement with the will of the majority of States attending the Vienna Conference, was recognised, like coercion, as a cause of absolute invalidity, making any treaty affected by it automatically void, i.e. not only when one of the parties alleges its invalidity. The provisions of such a treaty are inseparable and cannot be revalidated. The obligations of the parties that have concluded a treaty that is incompatible with *jus cogens* are more extensive than those in the wake of invalidity due to other causes. When such causes are arranged in a hierarchy, it is observed that within absolute invalidity, a conflict with *jus cogens* ranks higher than coercion, because the prohibition on

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<sup>10</sup> UNCLT 1969, p. 127.

<sup>11</sup> *Ibidem*.

the use of force is part and parcel of contemporary peremptory international law. Paraphrasing a well-known legal maxim, one can say that *confligere cum iure cogente est regina nullitatis*.

### **The Origins and Concept of Jus Cogens as Viewed by International Law Studies**

The conflict with *jus cogens* as defined in the 1969 Vienna Convention is a certain novelty whose highlighting makes us take a closer look at the role of *jus cogens* in contemporary international law. In its context, the international legal order is frequently mentioned and seen as crowned by the principles laid down in the UN Charter.<sup>12</sup>

Today, views questioning the existence of *jus cogens* are rare, but if they are expressed<sup>13</sup> at all they seem to derive from the idea of full freedom of contract. Hence, they argue that it is pointless to transfer the invalidity criteria characteristic of internal law to the sphere of international law that lacks the highest authority capable of imposing certain standards of international justice and morality on States.<sup>14</sup>

The opinions questioning the existence of *jus cogens* show clear traces of positivist ideas. Legal positivism developed in the heat of struggle against the ideas of natural law ideas and dominated jurisprudence in the second half of the 19th century. The common denominator of positivist ideas was recognising as law only the norms that had been enacted in one form or the other by a sovereign state organisation (so-called positive law). It was considered merely accidental whether such norms corresponded to some systems of moral, religious or social norms.<sup>15</sup> Karl Magnus Bergbohm argued that the law enacted by

12 Cf. *Zarys prawa międzynarodowego publicznego*, ed. M. Muszkat, vol. II, Warszawa 1956, p. 113; G.I. Tunkin, *Zagadnienia teorii prawa międzynarodowego*, Warszawa 1964, p. 151 ff; S.E. Nahlik, *Kodeks prawa traktatów*, Warszawa 1976, p. 387.

13 E.g. in the verbal note of Luxembourg of 23 Oct. 1964. *Law of Treaties. Comments by Governments* – A/CN.4/175, pp. 99–100.

14 *Ibidem*, p. 100.

15 H. Olszewski, *Historia dokryn politycznych i prawnych*, Warszawa–Poznań 1973, p. 306.

States was set above both citizens and the State, which, however, did not lose the ability to change the norms it had enacted.<sup>16</sup> With regard to international law, this denied the existence of peremptory norms and, thus, gave full freedom to conclude international treaties. It was limited only by a prohibition on their conflicting with obligations towards other States contracted earlier.<sup>17</sup> Integral positivism in a pure form, however, did not dominate long in the theory of international law. As early as the late 19th century, Johann C. Bluntschli wrote that treaties breaching universally recognised human rights or the peremptory norms of international law were void.<sup>18</sup> Approaching *jus cogens* with great caution, Hans Kelsen did not deny its existence, but stressed that international law studies could not name the universal peremptory norms whose application could not be precluded by concluding a treaty.<sup>19</sup>

Recently, it seems that views denying the existence of *jus cogens* in international law have been revived out of sheer spite for, and in a negative response, to the unanimous position taken by the International Law Commission. When discussing the law of international treaties, it adamantly argued for introducing the conflict with *jus cogens* to the convention codifying this law.

The criticism levelled at the International Law Commission revolved around a concern about the binding force of treaties, which could be undermined by alleging that a treaty was incompatible with *jus cogens*. This concern was made specific by Georg Schwarzenberger, who claimed that the international law governing the international community was not cognisant of any norms of *juris cogentis*.<sup>20</sup> He analysed customary law, the basic principles of law and international treaties by examining the seven fundamental principles of international law, i.e. sovereignty, good faith, recognition,

16 In the work *Jurisprudenz und Rechtsphilosophie* 1892, quoted after: *ibidem*, p. 308.

17 This view was propounded by D.D. Field, *Outline of an International Code*, New York 1872.

18 J.C. Bluntschli, *Das moderne Völkerrecht der zivilisierten Staaten, als Rechtsbuch dargestellt*, Nördlingen 1872, p. 410.

19 H. Kelsen, *Principles of International Law*, New York 1952, pp. 322–323.

20 G. Schwarzenberger, *International Ius Cogens?*, “Texas Law Review” 1965, p. 476.

free expression of will, international responsibility, freedom of the seas, and self-defence. Georg Schwarzenberger concluded that there was nothing to justify the view that peremptory norms existed. He also claimed that the principle adopted by the International Law Commission enabled the parties, depending on particular interests, to undermine the binding force of a treaty by reason of its alleged conflict with peremptory norms. Incompatibility with *jus cogens*, if it was alleged by one of the parties, also allowed third States to morally condemn a treaty that had not been concluded by them or applied to them. Due to the absence of the obligatory international judiciary, a State, alleging that a treaty was in conflict with *jus cogens*, might attempt, by way of a unilateral declaration, to free itself from unfavourable international obligations. Taking all this into consideration, Schwarzenberger gain-said the principle adopted by the International Law Commission, arguing that it could be used, on an equal level with the *rebus sic standibus* clause, to undermine contracted obligations.<sup>21</sup>

Angelo Piero Sereni has also questioned the existence of *jus cogens*, with similar arguments.<sup>22</sup> He has denied the existence of norms that could allow one to speak of the morality of international law subjects. Following from this, Sereni concludes that immoral acts are not invalid, because it is difficult to prove their immorality. He maintains that the principle of free negotiations by the parties plays a crucial role in international law, while requirements of a moral and social nature, so often taken into consideration in internal law, are forced into the background and have little impact on the conduct of States.

Before specifying the norms that international law studies and practice have considered peremptory, it is necessary to explain the concept of *jus cogens*; especially as its proponents have outnumbered its opponents. This fact is reflected in the 1969 Vienna Convention. To define this concept is by no means easy, for many reasons. The very origin of *jus cogens* gives rise to many doubts, while its spelling variants (*ius*

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21 Ibidem, p. 478.

22 A.P. Sereni, *Diritto internazionale*, vol. III, Milano 1962, p. 1307.



or *jus*?) have become a symbol of the uncertainties related to the legal phenomenon behind this name.

Both the conception and concept of *jus cogens* derive from sources that cannot be precisely identified. The concept was not alien to Roman law, but the usual term for it was *jus publicum*, which referred not only to the law enacted by the State, but also the law that could not be derogated from by way of contract.<sup>23</sup> Thus, *jus publicum* resembled contemporary *jus cogens*. At this juncture, it must be noted that the term *jus cogens* had not been used in any legal text until the 19th century. This fact comes as a great surprise, because the idea of law peremptorily binding the parties to a contract had been known to the theory and philosophy of law for a long time.

The most familiar example of a theoretical conception being based on *jus cogens* is the doctrine of natural law. At the Vienna Conference, the delegate of Monaco, J.Ch. Rey, pointed out that the draft of Article 50 drew on natural law.<sup>24</sup> Can this charge be considered as detracting from the conception submitted by the International Law Commission and does the conception indeed strongly resemble the doctrine of the naturalists?

Having its origins in Aristotelian philosophy, the conception of natural law developed in the 17th century thanks to the writings of two outstanding jurists and philosophers: Hugo Grotius and Samuel Pufendorf. Both worked on the assumption that natural law rested on the precepts of reason which tells us that a certain act is morally wrong or morally necessary. Natural law is universal and timeless, comprising four fundamental principles: the duty not to trespass upon somebody else's property, the duty to compensate for damage, *pacta sunt servanda*, and the duty to suffer punishment for committed offences. Natural law was extended by its proponents to cover international relations, by claiming that a just war could be waged only in defence of threatened natural

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23 V. Kaser, *Das römische Privatrecht*, 1955, pp. 174–175.

24 UNCLT 1968, p. 324.

rights. Under them, all States enjoy an equal right to avail themselves of the seas. The principles following from natural law cannot be changed, since the nature of man cannot be changed. Therefore, the principles of international relations could be called international *jus cogens*. In this context, one can observe that the International Law Commission departed from the classic view of *jus cogens* since it did not assume that *jus cogens* was timeless and immutable. After all, in Article 50 of the 1966 draft, it stipulated that *jus cogens* could be modified only by a subsequent norm having the same character.<sup>25</sup>

One can hardly concur with the view that *jus cogens* has been introduced into international law by mechanically transposing it from internal law. The Turkish delegate to the Vienna Conference, Talât Miras, expressly charged that the International Law Commission had borrowed almost all the grounds of invalidity from civil law, including conflict with *jus cogens*.<sup>26</sup> He argued that the introduction of the concept of *jus cogens* to international law without ensuring to it guarantees provided by the legislator in internal relations of the State, opened the door to all kinds of abuse. At the same time, this was an attempt to establish a hierarchy of norms, relying on the concept of public policy (*ordre public*), which is unjustifiable in international law. The charges made by the Turkish delegate call for a brief description of the position of *jus cogens* in internal law.

Both in international and internal law, the term *jus cogens* is very rarely used. In fact, the 1969 Vienna Convention is the first multilateral treaty to use this term. With respect to internal law, the term “public policy” is much more often used. In the 1929 judgment on Serbian and Brazilian loans, the Permanent Court of International Justice referred to the term *jus cogens* and stressed that “its definition in any particular country is largely dependent on the opinion prevailing at any given time in such country itself.”<sup>27</sup> In this way, the Court drew attention to the rela-

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25 RILC 1966, p. 73 – arguments can be found in the commentary on pp. 76–77.

26 UNCLT 1968, p. 300.

27 Permanent Court of International Justice, 1929, series A, no. 20/21, p. 46.

tivity of the concept in various systems of internal law. Nevertheless, keeping in mind the differences between political systems, it is possible to determine the most important characteristics of *jus cogens*, which form a common denominator for many States.

After finding that *jus cogens* is usually identified with public policy, it must be observed that it is widely believed that the subjects of law must not disregard it. The purpose of public policy is the protection of the fundamental interests of the State and society as well as obedience to the principal laws underpinning the economic and social systems of a given State. The chief task of any legal system is the protection of the interests of society, considering the interests of individuals and the protection of the interests of individuals in their mutual relations. Thus, public policy is based on the subordination of civil-law relations to the elementary needs of society as a whole. This forces the legislator to restrict the will of the subjects of law. Their failure to respect the principles and norms of public policy makes their acts void. Public policy in internal law is, therefore, a concept which is moulded to suit the interests of the ruling class in the State and whose application restricts the autonomy of the will of the subject of law for the sake of the supreme interests of society as a whole.<sup>28</sup>

The socialist literature on this issue stresses that legal norms are not the only rules of conduct holding in relations among people. Accord-

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<sup>28</sup> The international equivalent of this concept is the public interest of the international community. It is not unambiguously defined in international law studies, though. International practice shows that the public interest of the international community is best seen when there is a *res communis* in international relations. Norms protecting this interest include space law norms that hold outer space and heavenly bodies should be free from appropriation by States capable of necessary space penetration. A prohibition on outer space appropriation cannot be imposed by the agreement of several States, ones that are the most active in space exploration. Cf. C.W. Jenks, *Space Law*, London 1965, pp. 200–201. This is an example of subordinating States' freedom of action to peremptory law on account of the interest of all the members of the international community. International practice shows that States do not intend to derogate from the prohibition on appropriation even when a heavenly body has been explored directly by man and not an automatic device sent to outer space from the Earth. There is no doubt that new norms of *juris cogentis* will emerge in the future to protect the interests of the human civilisation in pace with advances in technology and transport (e.g. atomic energy, environment protection).

ing to Marxist doctrine, both legal norms and norms of morality are rules of conduct, that is, one of the forms of social consciousness following from the material conditions of social life. The relationship between legal and moral norms has a special significance for understanding such a general concept as the principles of community life. The principles set limits on the exercise of rights following from legal norms and stipulate the invalidity of any act-in-law found to contravene these principles. Hence, they can be called principles determining the mutual relations of people under the conditions of socialist society, having been derived from the demands of socialist morality.<sup>29</sup> They are not, however, identical with moral rules, because they are not general but specific, and are tied to particular forms of social relations.<sup>30</sup> It is in them that one should look for the origins of the legal principles characteristic for socialist legal relations (e.g. principle of brotherly help and cooperation).<sup>31</sup>

It appears that—*per analogiam*—*jus cogens* should not be identified with the rules of international morality. The question of international morality has given rise to serious controversies in international law studies for a long time. The absence of any definition of this concept has served many a time as a pretext to abuse it in situations where a State was determined to void a treaty. German law studies used arguments based on international morality to undermine the binding force of the Versailles Treaty in the interwar period. They were countered by Hersch Lauterpacht, who suggested that an impartial international organ should decide whether an international treaty was moral. Any authoritative and unilateral voiding of a treaty due to its alleged conflict with international morality must be considered inadmissible.<sup>32</sup>

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29 Cf. D. Gienkin, *Sovetskoye grazhdanskoye pravo*, vol. I, Moskva 1950, p. 87.

30 Cf. A. Wolter, *Prawo cywilne*, Warszawa 1963, p. 64.

31 On the principle of mutual brotherly help, see J. Sandorski, *RWPG – forma prawna integracji gospodarczej państw socjalistycznych*, Poznań 1977, pp. 72–73.

32 H. Lauterpacht, *Règles générales du droit de la paix*, “Recueil des Cours” 1937, vol. 62, pp. 307–308.

The question of international morality with regard to treaty invalidity was tackled by the rapporteur of the International Law Commission in a commentary to Article 20 of the 1958 draft. In it, he wrote that the immorality of an international treaty was not in itself grounds for voiding it in relations between the States that had concluded it.<sup>33</sup> An international court, however, may refuse to recognise such a treaty as valid if it is manifestly inhumane or is in conflict with international order and the ethical principles shared by the international community. Sir Gerald Fitzmaurice believed that the norms of *ius cogens* were both legal and moral. Hence, it was impossible to draw up their exhaustive list.

The question of international morality was also discussed by Arnold Duncan McNair. He defined the norms of *ius cogens* as ones that, adopted either expressly in international treaties or tacitly by custom, were necessary to protect the public interest of the international community and maintain the moral standards it shared.<sup>34</sup> The concept of moral standards is one of those vague ideas the definition of which runs up against major difficulties. Arnold Duncan McNair did not explain what he meant by this concept. Alfred Verdross also came to the conclusion that States were obliged to respect a minimal moral standard, by which he understood respect for the legal order prevailing among States, defence against external attack, protection of the spiritual and physical well-being of citizens and their diplomatic protection during their stay abroad.<sup>35</sup>

Alfred Verdross took the view that in the case of treaties incompatible with *ius cogens*, a party may refuse to perform its obligations without the need to demonstrate the incompatibility in question. If, however, a party denies that a treaty has some immoral content, the dispute should be settled by diplomatic channels. Should this mode prove ineffective,

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33 YILC 1958, vol. II, p. 28.

34 A.D. McNair, *The Law of Treaties*, Oxford 1961, p. 215.

35 A. Verdross, *Völkerrecht*, Berlin 1937, p. 172.

the dispute ought to be submitted to arbitration or an international court. Furthermore, Verdross stressed that every treaty incompatible with international morality had to be considered void; to support this view he analysed internal public policies. He claimed that since agreements incompatible with morality were void under internal law, the same principle must hold in international law as well.

Similar moral principles adopted in various States show that the *jus cogens* of these States may be identical, or very similar. The question arises: when public policies are similar, will a norm of international law evolve whose purpose will be identical with these policies? Some authors believe that one can speak in this context about the general principles of law set out as the third source of international law in Article 38 of the Statute of the International Court of Justice.<sup>36</sup>

Although it is difficult to indicate the formal source of *juris cogentis*, it can perhaps be suggested that it is not international morality, understood abstractly, or the public policies of States, but rather a tacit agreement between States. It is founded on the conviction that a conduct consistent with the agreement promotes the interests of the international community as a whole, along with those of particular members as well. This question needs to be revisited when discussing the development of the norms of *juris cogentis*.

The charge levelled by the Turkish delegate, namely that of establishing a hierarchy of international law norms on the model of internal law, seems ungrounded, because every legal system allows legal norms that can be neither breached nor modified by the subjects of law. On what account then would international law give up selecting norms that would make up international public policy, sometimes also known as the public order of the international community? The argument offered by Miras, i.e. that international law has no legislator who could enforce adherence to a public policy, leads to the question of sanctions. It is common knowledge, how-

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36 E.g. H. Rolin, *Vers un ordre public réellement international*, Hommage d'une génération de juristes au Président Basdevant, Paris 1960, p. 448.

ever, that attempts to depreciate law by questioning its sanctions belong to the outdated means of undermining the importance of international law norms. In contemporary international relations, there are means of finding out if the conduct of States is consistent with their obligations.<sup>37</sup> If the norms of *juris cogentis* are clearly specified, their enforcement should not pose any greater difficulty than exacting respect for the norms of *juris dispositivi*. It is hoped that, respecting *jus cogens*, States will be guided above all by the conviction that complying with it is necessary, while the fear of coercion will recede into the background with time.<sup>38</sup>

To define *jus cogens*, it is necessary, on the one hand, to make the concept more specific and, on the other, to indicate peremptory international law norms and make their intent clear. This task has been taken up by international law studies. First of all, it is necessary to determine how the concept of *jus cogens* was understood by law studies and whether it is possible, relying on suggested definitions, to differentiate between peremptory norms and other norms of international law. To assess the solution adopted at the Vienna Conference, it is necessary to take into consideration the latest views of jurists on *jus cogens*. They are very cautious in offering any definitions, which shows that the task is by no means easy. Consequently, they have only made general statements and indicated the sources of *juris cogentis*.

Karl von der Heydte wrote that *jus cogens* comprised the fundamental principles of law recognised by all civilised nations and the constitutional principles of international law related to the legal capacity of the subject of that law.<sup>39</sup> He maintained that differentiating between *jus cogens* and *jus dispositivum* was possible only by a careful analysis of the content and purpose of a norm.

Alfred Verdross defined *jus cogens* as a set of norms that States could not derogate *inter se* and emphasised that every legal system con-

37 J. Symonides, *Kontrola międzynarodowa*, Toruń 1964, p. 182.

38 The importance of conviction here in relation to compliance with legal norms is pointed out by A. Kłafkowski, *Prawo międzynarodowe publiczne*, Warszawa 1969, pp. 21–22.

39 K. von der Heydte, *Völkerrecht*, vol. I, Berlin 1958, p. 23.

tained principles that made up *jus cogens*.<sup>40</sup> With the growth of the international community, international *jus cogens* is gaining in importance. Hence, it represents the interests of the entire international community.

The problem of the sources of *juris cogentis* was addressed by Georg Dahm.<sup>41</sup> He asserted that *jus cogens* was the law that was comprised of customary norms or the general principles of law recognised by civilised nations. The peremptory nature of *jus cogens* is an exception in international relations, as the vast majority of general international law falls into the category of *jus dispositivum*.

Many definitions of *jus cogens* have referred to international morality. Rolando Quadri wrote that the body of positive law principles that cannot be derogated, reflecting the moral standards of the international community in the sphere of positive law, makes up international public policy, which he identified with *jus cogens*.<sup>42</sup> Furthermore, he emphasised that treaties incompatible with fundamental moral principles are void. However, Quadri did not treat international morality and *jus cogens* as one. The latter, he claimed, was positive law and only reflected moral principles. A different and unconvincing stance was taken by Friedrich Berber, who asserted that *jus cogens* comprised the fundamental moral principles of international law.<sup>43</sup> Treating the two phenomena in this way, he confused morality with international law principles. Were Berber's suggestions to be accepted, the false conclusion could be reached that the binding force of an international treaty fol-

40 A. Verdross, *Forbidden Treaties in International Law*, "31 American Journal of International Law" 1937, p. 572; A. Verdross, *Völkerrecht...*, pp. 171–172.

41 G. Dahm, *Völkerrecht*, vol. III, Stuttgart 1961, p. 140.

42 R. Quadri, *Diritto internazionale pubblico*, Palermo 1963, p. 131. A different position was taken by H. Mosler, who maintained that the concept of public policy of the international community was broader than the concept of *jus cogens*, on account of the fact that the latter referred only to the members of the international community acting as parties to a treaty. *International Society as a Legal Community*, "Racueil des Cours" 1974, vol. IV, p. 35. Further on, Quadri reached the conclusion that general international law rested on the decisions of the superior force of the international community. The term "superior force" was criticised as conflicting with the principle of the equality of rights of States by G.I. Tunkin, *Zagadnienia teorii...*, pp. 126–127.

43 F. Berber, *Lehrbuch des Völkerrechts*, vol. I, München 1960, p. 439.



lows from its compatibility with moral principles and that the absence of this force was a result of its incompatibility with them. A similar error was made by Vladimir Mikhaïlovich Shurshalov, who replaced morality with the concept of social development regularities.<sup>44</sup> Criticising his views, Grigorij Ivanovič Tunkin wrote that the content of the common principles of international law was ultimately determined in a broad outline by social development regularities, which are real in nature.<sup>45</sup> Thus, they are neither principles of international law nor its part. Consistency with the regularities of social development affects the effectiveness of an international law norm. However, effectiveness and legal binding force cannot be treated as one.<sup>46</sup>

Grigorij Ivanovič Tunkin did not define the concept of *jus cogens*, but made many important comments concerning its role in contemporary international law and noticed the expansion of international relations and the growth in the number of problems whose free regulation by multi- or bilateral treaties may harm the interests of other States. For this reason, a considerable growth in the number of peremptory principles and norms has been witnessed, necessarily comprising all fundamental, universally recognised international law principles.<sup>47</sup> The identification of *jus cogens* with the universal principles of international law is characteristic of Soviet international law studies.<sup>48</sup> A.N. Talalayev defined the norm of *juris cogentis* as a norm of a higher order, depriving any action or situation that was not in agreement with it of binding force.<sup>49</sup> Hence,

44 V.M. Shurshalov, *Osnovnye Voprosy Teorii Mezhdunarodnogo Dogovora*, Moskva 1959, p. 232.

45 G.I. Tunkin, *Zagadnienia teorii...*, p. 149.

46 Ibidem, p. 150.

47 Ibidem, p. 155.

48 Cf. e.g. F.I. Kozhevnikov; *Nekotorye voprosy teoryi i praktiki mezhdunarodnogo dogovora*, "Sovetskoye Gosudarstvo i Pravo" 1954, no. 2, *passim*; A.N. Talalayev, *The Fundamental Principles of International Law Soviet* "Yearbook of International Law" 1959, p. 513; E.T. Usenko, *Formy regulirovaniya sotsyalisticheskogo mezhdunarodnogo razdeleniya truda*, Moskva 1965, pp. 137–139. Soviet studies stressed the peremptoriness of the fundamental principles of international law and the invalidity of treaties that breached them – *Kurs mezhdunarodnogo prava*, vol. II, Moskva 1967, p. 13.

49 A.N. Talalayev, *Mezhdunarodnye dogovory v sovremennom mire*, Moskva 1973, p. 174.

*jus cogens* is made up of the norms of considerable importance that are general and bind all States, regardless of their political or social system. Both G.I. Tunkin and A.N. Talalayev look for the source of *juris cogen-tis* in a broadly understood agreement between States that may become apparent in the form of a customary or conventional norm. In this light, the expression “norm of a higher order” does not mean a moral norm, but a legal norm occupying the highest position in a hierarchy of norms.

In Polish international law studies, a similar stance was adopted by Stanisław E. Nahlik, who claimed that the norms of *juris cogen-tis* could be both conventional and non-conventional; the latter, according to him, comprised the principle of freedom of the seas and the fundamental rights of States.<sup>50</sup> He held *jus cogens* to mean the peremptory norms that cannot be breached by the parties to any treaty.

This brief review of the views on the meaning of *jus cogens* shows that most authors stressed the absolute inviolability of *jus cogens* and the invalidity of all acts incompatible with it. As far as the sources of *juris cogen-tis* are concerned, however, their opinions widely differed. They looked for its sources in morality, regularities of social development, general principles of law, and international customs alone, as well as in international treaties and international customs taken together.

Other authors, being aware of the difficulties encountered while attempting to define *jus cogens*, in order to make their views on this concept more specific, resorted to enumerating its norms and attempted to classify them.

In the opinion of von der Heydte, peremptory norms may be divided into three categories.<sup>51</sup> The first encompasses the norms that are necessary for any legal system to exist. Their derogation would be tantamount to depriving the whole system of its legal character. This category comprises

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50 S.E. Nahlik, *Wstęp do nauki prawa międzynarodowego*, Warszawa 1967, p. 219.

51 K. von der Heydte, *Die Erscheinungsformen des Zwischenstaatlichen Rechts: Jus cogens und Jus dispositivum im Völkerrecht*, “Zeitschrift für Völkerrecht” 1932, vol. 16, p. 472. Quoted after: E. Suy, *The Concept of Jus Cogens in Public International Law—Lagonissi (Greece)*, Geneva 1967, p. 27.

such legal principles as *pacta sunt servanda*, *vis maior* and *civiliter ut*. To the second category, von der Heydte assigns the norms that are closely related to the nature and exigencies of international relations, the maintenance of which depends on adherence to these norms. Any newly-founded State must submit to them. The third category is made up of norms in the correct functioning of which all States—members of the international community—are interested. The division proposed by von der Heydte raises doubts, because some norms may be assigned to either the second or the third category, while the principle of *pacta sunt servanda* listed in the first category could be considered necessary for the proper functioning of the international community and placed in the third category.

*Jus cogens* norms have been divided into four basic categories by Alfred Verdross.<sup>52</sup> The first comprises norms laid down in treaties which stipulate obligations towards third States, provided that the treaties do not breach *jus cogens*. The second covers norms laid down in treaties by which States limit their sovereignty to the extent that they cannot perform their international duties on their own. Norms of humanitarian purposes make up the third category. Alfred Verdross formed the fourth category from the three principles laid down in the UN Charter. These principles are the prohibition on the use of force except in self-defence, peaceful resolution of disputes and the duty of all UN Member States to give help to the organisation in every effort it undertakes in agreement with the UN Charter.

Some authors disparaged *jus cogens* norms by enumerating treaties that remain in conflict with them. Dahm considered international treaties on offensive alliances and others violating human rights to be examples of this.<sup>53</sup> He also considered steps aimed at the annexation of an occupied State before the state of war is over to be a violation of *jus cogens*. Dahm's list is fragmentary and is not meant as an exhaustive presentation of all the treaties that can possibly be considered in this

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52 A. Verdross, *Völkerrecht...*, p. 173.

53 G. Dahm, *Völkerrecht*, vol. III, p. 140.

context. The list of treaties incompatible with *jus cogens* presented by Berber is much longer and covers such treaties as ones depriving third States of sovereignty, providing assistance to a State in breach of international law, consenting to extradition when it is known that the extradited people will be subjected to inhuman treatment in another State, treating another State arbitrarily, establishing provisions for the confiscation of property belonging to the citizens of a third State which is at war with another State, imposing obligations on third States, taking advantage of the economic crisis of another State and enacting laws which make it possible to sell its citizens abroad.<sup>54</sup>

Much more moderate in indicating the norms of *ius cogens*, Ignaz Seidl-Hohenveldern believes that the prohibition on the use of force and elementary humanitarian norms raise no doubts as to their peremptory nature.<sup>55</sup> He warns against too rashly considering the universal principles of international law as *jus cogens*. As an example of an apparently peremptory norm, he gives the principle of compensating for the damage done to a State and stresses that despite its universality it is often derogated with the consent of the aggrieved State. A treaty derogating international liability will not be invalid, because the principle it breaches does not have the character of *ius cogens*.

Stanisław E. Nahlik, citing the reports of the International Law Commission, wrote that there were already many clear reasons for believing in the existence of international *jus cogens*.<sup>56</sup> For most of present-day States, a treaty contravening the UN Charter would be invalid, as would be any treaty leading to an international tort or preventing its prosecution, or a treaty making its parties perpetrate aggression, genocide or human trafficking.

A different method for making the concept of *jus cogens* more specific was taken by Erik Suy, later a member of the Belgian delegation to

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54 F. Berber, *Lehrbuch...*, p. 440.

55 I. Seidl-Hohenveldern, *Völkerrecht*, Wien 1965, p. 40.

56 S.E. Nahlik, *Wstęp do nauki...*, p. 282.

the Vienna Conference in 1968.<sup>57</sup> In his view, to transform international law from a primitive legal system into a highly organised one, it was necessary to develop an international form of *jus cogens*. The subordination of a State to international law must be seen in absolute respect for the principles of international public policy. Any legal order is in constant flux; consequently, at each stage, there are elements in it that are already fixed and others that raise doubts. For this reason, Suy, while determining the principles of international public policy, which he identified with *jus cogens*, distinguished their definitely determined components and other uncertain ones. The former comprised a certain minimum of obligations that States cannot derogate from by means of a specific treaty.<sup>58</sup> Its peremptoriness, the minimum, is due to the principle of *pacta sunt servanda*. However, it cannot be considered universal *jus cogens* as it only binds parties to a specific international treaty. It seems that Suy could have simplified the matter if instead of introducing the concept of a minimum of obligations, he had underscored the peremptoriness of the principle of *pacta sunt servanda*. If States undertake in a treaty not to conclude any treaties inconsistent with it, then by virtue of this principle they cannot derogate from such an obligation unless all the parties to the treaty give their consent. In the same group, Suy placed the obligations whose fulfilment may be the object of claims of the entire international community (e.g. obligations following from the protection of human rights), the procedural rules of international courts and the formal rules of international treaties (the duty to register treaties with the UN Secretariat).

In contrast, Suy assigned the elementary considerations of humanity and the principles laid down in the UN Charter to the category of

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<sup>57</sup> R. Suy, *The Concept...*, pp. 70–76.

<sup>58</sup> Here, Suy has in mind treaty obligations precluding the conclusion of treaties incompatible with them. In the earlier discussion, he gave many examples of such obligations, e.g. Article 10 of the 1921 Barcelona Convention on the Freedom of Transit, which said: “Contracting States also undertake not to conclude in future treaties, conventions or agreements, which are inconsistent with the provisions of this Statute, [...]” Ibidem, p. 66.

uncertain components. The latter principles, pursuant to Article 103 of the Charter, take precedence over the obligations of UN Member States under other international agreements and make up the supreme legal order. However, Suy is right to emphasise that they are often unclear, leaving space for various interpretations and means of performance. For example, a State may conclude a treaty by which it will grant the right to interfere with its internal affairs to another State. According to Suy, under these circumstances the principle of non-intervention will not make the treaty invalid. The UN Charter principles are thus too general to provide a solid foundation for resolving all legal problems that may arise in international practice.

One can only concur with Suy's conclusion that without first precisely defining such concepts as aggression, independence or intervention, the norms of international *jus cogens* cannot be established with any accuracy. It may be added that until such time, the relevant concepts cease to remain vague, any allegation that a treaty is in conflict with *jus cogens* will trigger protracted international disputes that are difficult to resolve.

### **How do the Norms of *Juris Cogentis* Arise?**

Divergent views on the sources of *juris cogentis* in international law studies provide a stimulus for tracing how peremptory norms arise. This should facilitate an answer to the question of the legal grounds on which States are obliged to respect the norms of *juris cogentis*. Any comments made in respect of this question are worth comparing with the specific examples of the rise of *jus cogens* norms and the legal problems that accompany the process.

Against this background, a link will be seen between the difficulties with determining a legally unambiguous meaning of *jus cogens* and the practical possibility of applying the provision on the conflict of a treaty with a peremptory norm of international law.

While discussing the concept of *jus cogens* as used in the juristic literature, it was observed that some authors looked for the sources of *juris cogentis* only in international custom. It is widely accepted in international law studies that a starting point for the moulding of a customary law norm is repetition (*frequens usus*). This begets a rule of conduct that is increasingly consolidated with the passage of time, following its emergence. For a norm of international morality or courtesy to arise, *frequens usus* is enough, but for a legal norm to develop, declarations of will by States are necessary, to the effect that they consider a given rule of conduct as binding. In this manner, a State undertakes to observe the norm and acquires the right to demand from the other States that have made identical declarations of will to act in agreement with their undertakings. Thus between these States a tacit agreement is reached.

A stimulus for the rise of a customary legal norm comes from the first instance of conduct in a particular manner by a State. If another State copies this conduct, a rule of conduct will be born. The moment that States agree to treat this rule as a law, a customary norm emerges. The range of application of this norm may expand until all States join the tacit agreement. Then, a particular norm becomes a universal norm of customary law.

Tracing the stages of the rise of a universal customary norm reveals how universal norms of *juris cogentis* come about. A stimulus for the birth of a universal customary norm having the character of *juris cogentis* may come from an act or omission of one or two States, or a multilateral international treaty.<sup>59</sup> Owing to a tacit agreement of the entire international community, after going through the stages of a rule of conduct and a particular customary norm, the norm becomes a universal norm

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<sup>59</sup> An example of an act by a single State is offered by a decree of the National Assembly issued in December 1791 in which France proclaimed the principle of equal rights of States. The case of a multilateral international treaty that could be adhered to by other States is illustrated by the 1928 Briand-Kellogg Pact. It stimulated the emergence of a universal customary norm prohibiting an aggressive war. On the treaty norms that became stepping stones for the development of an identical universal international custom writes, in connection with *jus cogens*, J. Gilas, *Norma prawa międzynarodowego*, in: *Polska i świat*, Poznań 1978, p. 133.

of customary law. It will not have the nature of *juris cogentis* if States confine themselves to only giving their consent to its relative binding force.<sup>60</sup> For a norm of *juris cogentis* to arise, it is necessary to accept its peremptory nature, that is, to waive the possibility of derogating from it *inter se*. States bound by a relatively binding customary norm may establish a new norm, different from the one hitherto in force, by agreement or custom anytime. Such States must take care, however, not to breach obligations they have towards third States. No derogation *inter se* is possible if States are bound by the norm of *juris cogentis*. When the entire international community consents to it by a tacit agreement, it takes on a universal character.

The universality of the norm of *juris cogentis*, must therefore be tantamount to consent to its peremptoriness given by all States belonging to the international community. It is unacceptable for the majority of States, despite their actual predominance, to impose legal norms on the other States. After all, newly-founded States may not recognise a norm of universal international law. They must do this expressly, however, by notifying other States of their objection. Otherwise, they will be presumed to have tacitly consented to a given universal norm of *juris cogentis*.

The findings so far may suggest that the only source of universal peremptory norms is international customary law. Actually, thanks to the advances in technology and transport, all members of the international community, gathered at a universal conference, can conclude an international treaty that will become a source of such norms. If, however, not all States become parties to the treaty, then a universal international custom will be the source of a universal norm of *juris cogentis*. Unless

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<sup>60</sup> For the sake of illustration, the comments by I. Seidl-Hohenveldern, referring to the universal principle of compensation for damage done to another State, can be remembered in this context. It happens that the central organs of state authority take decisions yielding to *vis maior* (e.g. flood, severe frost) that frustrate trade agreements. This gives rise to a liability of the State involved for failure to fulfil international obligations. By concluding a new trade agreement, aggrieved States often waive damages. This does not detract from the universality of the principle in question, but shows that it is not a norm of *juris cogentis*.



any State that has not adhered to the treaty objects, it can be presumed that the entire international community consents to a given norm.<sup>61</sup> This conclusion is borne out by Article 38 of the Vienna Convention, which states that “Nothing [...] precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.” A pertinent comment on the problem in question was offered by Kazimierz Kocot who wrote that “a relevant treaty is then a source not of obligations, but a source in the meaning of the evidence of an international law norm” in agreement with the rule of *consuetudo est servanda*.<sup>62</sup> It follows that States are bound to respect the peremptory norms of general international law pursuant to universal customary law, that is, the law to which the entire international community has consented. In exceptional cases, such norms will originate with multilateral international treaties.

The question arises: can *use cogens* proceed from a resolution adopted by an international organisation? Those who answer in the affirmative cite the advisory opinion of the International Court of Justice on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>63</sup> In the opinion, the International Court of Justice ruled that States were bound to cooperate in the prevention of genocide. The duty in question has the nature of *juris cogentis*. Its source, however, is not the Convention, but the resolution of the General Assembly on this matter.<sup>64</sup> Shabtai Rosenne, taking into account the opinion of the International Court of Justice, said that although he did not believe

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61 G.I. Tunkin, *Zagadnienia teorii...*, contradicted himself by saying that “multilateral treaties in which all or almost all States participate [...] create situations where they become a manner of directly laying down [...] universal international law” (p. 133). Meanwhile, a few pages earlier, he wrote that “the recognition of any rule as a norm of international law by a greater number of States may give grounds for presuming that the norm has been widely recognised, but only for a presumption and not for a final conclusion” (p. 129).

62 K. Kocot, *Pacta sunt servanda w prawie traktatów*, “Sprawy Międzynarodowe” 1973, no. 12, p. 64.

63 *International Court of Justice Reports 1951, Advisory Opinion. Reservations to the Convention on Genocide*.

64 *Ibidem*, p. 27.

that every resolution of the General Assembly had *per se* the nature of *ius cogentis*, even if it was called a declaration, it nonetheless might have legal effects,<sup>65</sup> which may vary from case to case. Rosenne allowed for the possibility of laying down *jus cogens* by adopting a declaration by the UN General Assembly of special significance for the international community. An argument took place between Rosenne and Tunkin over this very view in the International Law Commission. The latter was strongly against any attempts to lend resolutions a norm-giving character.<sup>66</sup> UN General Assembly resolutions—Tunkin claimed—did play a certain role in laying down international law norms, but were not factors supplementing the lawmaking process. Roberto Ago put this thought succinctly, asserting that resolutions were not a source of international law and consequently could not be a source of peremptory norms.<sup>67</sup> The view that resolutions may play a role in the emergence of peremptory norms, without establishing them, is correct. The unanimous declarations of the General Assembly may therefore be considered evidence of a universal practice, recognised as law by UN Member States.

How a universal norm of *ius cogentis* arises can be seen from the example of the right of nations to self-determination. The example will make it easier to understand problems connected with the conflict of treaties with this right and to draw some general conclusions regarding the invalidity of treaties contravening *jus cogens*.

While due credit must be given to the French Revolution of 1789 for paving the way for the self-determination of nations, later obstructed by the policies of Legitimism, the stimulus for the emergence of the right to self-determination came from Lenin's Decree on Peace adopted by the 2nd Congress of Soviets on 8 November 1917. For the first time ever, nations were treated not as objects but as subjects of international relations. Begotten in this way, the principle of self-determination was

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65 YILC 1963, vol. I, p. 73.

66 Ibidem, pp. 65–76.

67 Ibidem, p. 75.

reflected in Woodrow Wilson's "14 points" formulated in his address to Congress on 8 January 1918.<sup>68</sup> Slowly, a rule of conduct regarding self-determination began to take shape. A milestone in the process of its transformation into a norm of customary law was the adoption of the UN Charter. With time, opinions questioning its legal character subsided but considerable differences in its interpretation continued between States.<sup>69</sup>

The right to self-determination found expression in the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights adopted on 16 December 1966. Article 1(1) of both Covenants states that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." The same Article stresses the right of peoples to freely dispose of their natural wealth and resources. For each Covenant to come into force it had to be ratified or acceded to by 35 States. The International Covenant on Economic, Social and Cultural Rights came into force on 3 January 1976 and the International Covenant on Civil and Political Rights—on 23 March 1976. States who are parties to the Covenants undertake to implement the right to self-determination and respect it pursuant to the provisions of the UN Charter.<sup>70</sup> Thus the Covenants have to be recognized as constituting evidence that the peremptory norm of

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68 It must be noted that the address of 8 January 1918 was quoted during the campaign conducted at the UN for the right of nations to self-determination. Criticising the view that the principle of self-determination was devoid of any legal consequences, a delegate quoted at the 20th Session of the UN General Assembly the words of President Wilson: "Self-determination is [...] an imperative principle of action, which statesmen will henceforth ignore at their peril and without which there cannot be and should not be peace" (GAOR (XX), Sixth Committee, 891st meeting, p. 320) – speech by Cypriot delegate, *Rossides*.

69 This conclusion is suggested by the reports and records of the sessions of the Special Committee on the Principles of International Law — doc. A/AC 125.

70 The United States refrained from taking an unequivocal stance for a long time. During the discussion on terrorism in the UN General Assembly in 1975, it clearly endorsed, however, the right to self-determination and the principle of majority rule. The significance of this fact was stressed in a press interview by the UN Secretary General, Kurt Waldheim, *Frankfurter Rundschau*, 6.08.1976, quoted after "Forum" 2.09.1976.

universal customary law, proclaiming the right of nations to self-determination, actually exists.

Establishing that the right to self-determination has the nature of the norm of a higher order does not solve all the legal problems that may arise in connection with it. The actual content of the right still gives rise to controversies and leaves much to be desired in terms of the legal precision necessary for a norm of *juris cogentis* to function properly. Differences in the positions adopted by States prevented a definitive resolution of many particularly sensitive problems. For instance, there is still no legal basis for explaining who the subject of the right to self-determination is.<sup>71</sup> The UN Charter only states that independent and sovereign States are excluded from the subjects of this right.

Another major problem that also cannot be finally resolved is the admissibility of intervention at the request of a colonial nation. Current international developments bear out the practical significance of this problem.<sup>72</sup> The delegates of African States have emphasised on many occasions that the practice of colonial powers, based on apartheid and genocide, and involving military actions as well as other repressive measures, contravenes the aims and principles of the UN Charter and is not one of the internal competences of these powers. Nations, therefore, enjoy the right to self-defence against colonial rule, which justifies an intervention in favour of a colonial nation.<sup>73</sup> In this context, with regard to the invalidity of international treaties, the question may be asked of whether a treaty in which consent to intervention is given is consistent with the right to self-determination or not. If the question is answered in the affirmative, then a doubt may arise as to the possibility

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71 *Encyklopedia prawa międzynarodowego i stosunków międzynarodowych*, Warszawa 1976, p. 349.

72 E.g. Assistance given by the Cuban government to the People's Movement for the Liberation of Angola (MPLA) in its struggle against UNITA and FNLA guerrillas in 1975 and 1976. Cf. *Angola: brzemię zwycięstwa*, "Le Monde" 2–5.09.1976, quoted after "Forum" 30.09.1976, p. 15.

73 Cf. Address by the Malian delegate, N'Diaye, at the session of the Legal Committee of the UN General Assembly – GAOR (XX), Sixth Committee, 882nd meeting, p. 249.

of the same treaty being invalid due to its conflict with another norm of *ius cogens*, namely the principle of non-intervention.

There are countless more examples of problems posed by the ambiguity of the right to self-determination.<sup>74</sup> Meanwhile, international practice has witnessed allegations of conflict between international treaties and the right to self-determination, which are aimed at proving such treaties void.<sup>75</sup> Thus, the practice bears out the claim that the catalogue of the norms of *ius cogens* is not limited solely to the prohibition on the threat or use of force.

On 21 November 1975, the text of the treaty on the Western Sahara was published, following its ratification at Rabat on 14 November 1975 by the representatives of Spain, Morocco and Mauritania.<sup>76</sup> It provided for the liquidation of Spanish administration in this territory by 28 February 1976 and the establishment of provisional Moroccan and Mauritanian administration by the same date.<sup>77</sup> The Algerian government lodged a protest against this

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74 An interesting legal question related to the right to self-determination is mentioned by Jerzy Tyranowski, *Spory graniczne i spory terytorialne a sukcesja*, “Sprawy Międzynarodowe” 1976, vol. 10. He maintains that the right to self-determination is completely consumed upon the emergence of a new and independent State. Subsequent efforts at secession are treated as violations of the territorial integrity of a State. Jerzy Tyranowski believes that present-day tendencies deny the existence of the right to secession (p. 90).

75 E.g. The Somali government challenges the treaties concluded by Abyssinia and Italy in 1897 and 1908, by Abyssinia and the United Kingdom in 1897 and the United Kingdom and Italy in 1924. The treaties delineated the current border between Somalia and Abyssinia and Kenya. The Somali authorities challenge their validity, because they breach a protectorate treaty concluded by the United Kingdom and the Somali people, and allege that the treaties are in conflict with the right to self-determination (RILC 1974, *Annex, Observations of Member States on the Draft Articles on Succession...*, A/9610/add. 1 of 13.09.1974, p. 22).

76 “Trybuna Ludu” 22.11.1975.

77 The territory of the Western Sahara had been a Spanish colony of 273,000 sq. km since 1884. In 1976 its indigenous population—mainly Arab nomads—stood at 75,000 people. Almost an identical number of Spaniards worked in the territory periodically at local bauxite mines. After many years of diplomatic efforts aimed at postponing the final decision, Spain agreed to follow the recommendations of the UN Decolonization Committee in 1975 and grant Western Sahara nomads the right to decide their fate. With respect to the Western Sahara, their right to self-determination was to be enforced. Meanwhile, neighbouring Morocco and Mauritania concluded a secret agreement on dividing the Sahara and embarked on a diplomatic campaign to defend their position in the UN. Both States filed statements with the Sixth Committee of the General Assembly, arguing in favour of their claims to the

treaty, claiming it was not valid on account of its supposed breach of the right to self-determination of the people of the Western Sahara. Challenging the treaty validity, Algeria invoked the will of the Sahara people as expressed by the Liberation Front POLISARIO. The Front, in the Amagala region granted to Morocco, set up a liberated zone, provoking the Moroccan military to an offensive against it. In late January 1976, Moroccan and Algerian forces clashed there.<sup>78</sup> Algeria reiterated its allegations of the violation of the principle of self-determination of peoples and accused Morocco of attempts to maintain control over the Western Sahara by forcing its population into loyalty, using measures of a genocidal nature.<sup>79</sup> The Algerian president, Boumedien, sent a letter to the heads of state of all the countries of the world on 28 January 1976, in which he stressed the conflict of the agreement of 14 November 1975 with international law and appealed for universal support for the people of the Western Sahara.<sup>80</sup>

Further developments in the Western Sahara conflict were of little significance for assessing the position of the Algerian government, attempting to invalidate an agreement in conflict—in its opinion—with *jus cogens*.

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Western Sahara. Algeria objected to the claims, —A/C.4/SR. 2125. Due to the differences that had arisen between the States interested in the Sahara's fate, the General Assembly adopted Resolution 3292 (XIX) on 13.10.1974, in which it requested the International Court of Justice to give an advisory opinion. The Court was to answer the following questions: Was the Western Sahara a no-man's-land (*terra nullius*) at the moment of its colonial acquisition by Spain? And, if not, are there any legal ties between the territory in question and Morocco, and Mauritania? In the opinion dated 16.10.1965, the International Court of Justice reaffirmed the right of the population to self-determination but also found that in the past it had recognised the authority of the rulers of Morocco—*International Court of Justice Reports* 1975, p. 68. Western Sahara. Advisory Opinion of 16 October 1975, p. 68. The opinion provoked Moroccans to organise a liberation march to the territory of the Sahara. Algeria filed a protest and the Liberation Front of the Western Sahara POLISARIO decided to take military action against the march participants. In these circumstances, the march was stopped, and the Moroccan diplomacy negotiated the agreement of 14 November 1975.

78 "Trybuna Ludu" 28.01.1976.

79 The measures involved primarily the bombing of civil camps located close to the town of Dakhla on the Atlantic coast.

80 "Trybuna Ludu" 30.01.1976.

The position of the Algerian government spawned two legal issues. The first boils down to the question of whether Algeria, not being a party to the agreement of 14 November 1975, had the right to challenge its validity. The issue of the right of a third State to challenge the validity of an international treaty on account of its incompatibility with peremptory norms has not been properly settled in Article 65 of the 1969 Vienna Convention.<sup>81</sup> It appears that not only the States that have concluded a treaty have the right to challenge its validity on account of a conflict with *jus cogens*. A party to such a treaty places itself in an awkward position if it subsequently denies its validity, since it thereby takes action against the legal effects that it wanted to bring about. Thus the curtain is drawn, setting oneself in contradiction to one's own previous conduct (*venire contra factum proprium*). Nevertheless, there is no doubt that a party to a treaty may take action aimed at finding it void. It also appears that the same right is enjoyed by any third State because of the fact that a breach of a norm of *ius cogens* by a treaty incompatible with it harms the entire international community. It is the duty of the international community to take care that obligations following from *jus cogens* are fulfilled. Since there is no organ that would be authorised to question the validity of treaties inconsistent with *jus cogens* on behalf of the international community, States making up the community must try to expose any violations of the peremptory norms of universal international law and deprive treaties perpetrating such violations of any legal effects. In this light the stance of Algeria seems right, even more so as

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81 To the issue of the role of a third State in challenging the validity of international treaties, attention was drawn by the government of Luxembourg in a 1965 commentary. However, it did not propose any specific resolution of the issue whether a third State has the right to allege that a treaty in conflict, in its opinion, with a peremptory norm of general international law is invalid—*Law of Treaties. Comments by Governments*, A/CN. 4/175, p. 100. Articles 65 and 66 of the Vienna Convention, reserving the right to raise the allegation of the invalidity of a treaty on account of its conflict with *jus cogens* only to the parties to the treaty, were quite rightly criticised by Ch.L. Rozakis, *The Concept of Jus Cogens in the Law of Treaties*, Amsterdam–New York–Oxford 1976. Cf. review by A.A. Fatouros – 71 “American Journal of International Law” 1977, p. 574.

the Algerian authorities have shown considerable concern about the fate of Sahara nomads.

The other legal issue raised by the protest of the Algerian government involves the question of whether the agreement of 14 November 1975 indeed violated the right of nations to self-determination. On account of the fact that there are no international agreements that would derogate from this right in bi- or multilateral relations and that States do not question its peremptoriness by unilateral declarations, it may be considered *jus cogens*. It is doubtful whether an agreement concluded by a former colonial power and States neighbouring on the colony in question, and ignoring the will of its people, could be considered a step towards the enforcement of the right to self-determination. The problem of whether the agreement of 14 November 1975 breaches a norm of *jus cogens* could be easily solved were it not for the 1961 statement of the Moroccan government claiming that the Western Sahara “is an integral part of Morocco and its colonial status is in conflict with international law, sovereignty and territorial integrity” of this State.<sup>82</sup> The Moroccan government remained steadfast in its opinion and denied that the Western Sahara was *terra nullius* when Spain took possession of it.<sup>83</sup> Hence, the agreement of 14 November 1975 was, in the opinion of the Moroccan authorities, consistent with the principle of sovereignty and territorial integrity of States, which is a peremptory norm of general international law.

The question whether the agreement between Spain, Morocco and Mauritania should be considered void is thus hard to answer, because of the involvement of the competing norm of *juris cogentis* with which the agreement is supposedly consistent. In this context, the complex problem of the relationship of individual norms of *juris cogentis* to one another and their interference arose. It has not been tackled yet in any meaningful way by the international law studies. Without precisely de-

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<sup>82</sup> *International Court of Justice Reports*, 1975, p. 25.

<sup>83</sup> *Ibidem*, p. 22.



fining the content and scope of the norms of *ius cogens* or related concepts, international practice in relation to the above will continue to run up against obstacles difficult to surmount. Little help in this respect is offered by international court decisions<sup>84</sup>, while the codification of norms of *ius cogens* so far, due to the varied opinions of States, can hardly be considered sufficient if one thinks of the practical need to improve them legally. The reasons why legal problems related to *ius cogens* accumulate should be sought, above all, in the way peremptory norms arise. They do so chiefly as norms of universal customary law the content of which is much harder to establish than that of norms laid down in international treaties. For this reason, it is imperative to transform the norms of *ius cogens* from customary to conventional ones by increasingly detailed codification that would eliminate any uncertainties.

### **The Conflict of a Treaty with Jus Cogens In the 1969 Vienna Convention— Antecedents and Problem Resolution**

International practice has shed little light on problems connected with *ius cogens*. The discussion of the provision on the conflict of a treaty with *ius cogens* was therefore dominated by the authoritative juristic literature and only rarely did it refer to practice and international court decisions in the International Law Commission and at the Vienna Conference.

In 1963, Humphrey Waldock suggested formulating a norm finding a treaty to contravene international law and thus to be void if it entailed a breach of a general norm or principle of international law,

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<sup>84</sup> Certain general comments on *ius cogens* can be found in the judgment by the International Court of Justice of 9.04.1949 regarding the Corfu Channel Incident, *International Court of Justice Reports* 1949, p. 22 (notification of the existence of mine fields is a duty following from the fundamental requirements of humanitarianism). Such comments are also included in the advisory opinion in the matter of reservations to the Genocide Convention, *International Court of Justice Reports* 1951, pp. 22–24 (Convention principles are recognised by civilised nations as binding even when they are not parties to the Convention).

having the nature of *juris cogentis*.<sup>85</sup> His two predecessors—Lauterpacht and Fitzmaurice—were also in favour of such a norm. Lauterpacht claimed that treaties were invalid if their enforcement led to an act that would be unlawful from the point of view of international law.<sup>86</sup> Fitzmaurice was of a similar opinion and was the first rapporteur to use the term *jus cogens*.<sup>87</sup> The fourth rapporteur of the International Law Commission suggested holding void “in particular” such treaties whose subject and performance entailed a threat or use of force in contravention of the UN Charter, an act or omission considered an international tort under international law or an act or omission the prosecution and punishment of which is the duty of every State. Waldock believed it was advisable to adopt a rule that provisions on the invalidity of treaties incompatible with *jus cogens* did not apply to multilateral treaties, which abolished or modified a norm having the nature of *jus cogens*. Such treaties must be universal, though, in this light.

The proposal made by Waldock in the form of Article 13 of the 1963 report was extensively discussed by members of the International Law Commission. No member questioned the point of departure for the proposal, namely, the assertion that peremptory norms existed. Many members, however, objected to the term *jus cogens*. It was to be replaced by such terms as: a peremptory norm of general international law, international public order, generally recognised principles of international law from which States could not derogate, fundamental principles of international law, or a general peremptory norm of international law from which derogation is not permitted.<sup>88</sup>

The criticism levelled at the term *jus cogens* chiefly concerned chiefly its theoretical character and diversity of interpretations, remaining un-

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85 YILC 1963, vol. II – the second report of Humphrey Waldock, p. 52.

86 YILC 1953, vol. II – the first report of Hersch Lauterpacht, p. 154.

87 YILC 1958, vol. II – the third report of Gerald Fitzmaurice, p. 28.

88 Herbert Briggs said that *jus cogens* should be replaced by another term but none of the suggested terms was fully convincing to him – YILC 1963, vol. I, p. 62.

der the influence of civil law.<sup>89</sup> The criticism did not eliminate the term but resulted in the change of the title of Article 50, which in the final version adopted by the International Law Commission in 1966 read as follows: “Treaties conflicting with a peremptory norm of general international law”<sup>90</sup> and was followed by the term *jus cogens* in parentheses. The article itself read as follows: “A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

The criticism of Article 50 should be viewed in its two main aspects: the denial of the rightness of the article *in principio* and challenge to the solutions adopted in it *in merito*.

The position taken by the International Law Commission had in principle already been accepted by the Legal Committee of the 18th Session of the UN General Assembly in 1963.<sup>91</sup> Legal Committee members stressed that it would be absurd to continue to uphold the unrestrained principle of the freedom of contract. In times when the principle is constantly restricted in public and private internal law by the use of the principle of social justice, its domination should be curbed in international law as well.<sup>92</sup> The International Law Commission was universally held to have been right to reject the classical principle of freedom of contract and find international law to be comprised of *jus cogens* norms.<sup>93</sup> Some members of the Legal Committee were in favour of the solution adopted by the International Law Commission aimed at shifting the burden of defining which norms had the nature of *juris cogentis* onto practice and international court decisions. However, voices were also heard encouraging drafters to make the concept more specific. They expressed the concern that an overly general wording of the convention

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<sup>89</sup> The question of interpretation was emphasised by Milan Bartoš – YILC 1963, vol. I, p. 66.

<sup>90</sup> RILC 1966, p. 76.

<sup>91</sup> *General Assembly. Summary Records 1973. Legal Committee.*

<sup>92</sup> *Ibidem*, Quintero (Panama), p. 47.

<sup>93</sup> *Ibidem*, Angelov (Bulgaria), p. 33.

could have an adverse impact on the application of its provisions in the future. The representatives of socialist countries put forward a proposal to consider international law principles related to friendly relations and cooperation between States laid down in the UN Charter as *jus cogens*.<sup>94</sup> They had in mind mainly the prohibition on the threat and use of force, non-intervention in the internal affairs of States, the peaceful resolution of disputes and the sovereign equality of States.

Opinions claiming that the International Law Commission was wrong to adopt the principle in question were contained in the commentaries sent by States before February 1965.<sup>95</sup> Out of the overall number of 21 commenting States, two were clearly against including a provision on the conflict of treaties with *jus cogens* in the Convention on the Law of Treaties. The government of Luxembourg maintained that there was no competent organ in international relations that could determine which norms were absolutely binding on the international community.<sup>96</sup> Hence, the clause proposed by the International Law Commission could only cause serious legal problems. The Turkish government, in turn, believed that the draft provision lacked an exhaustive definition of the concept of *jus cogens*. In the opinion of this government, the examples given in the commentary were not that important, as modern international practice did not witness any treaties whose purpose would be the use of force, slave trade or genocide. Including a provision on the conflict of treaties with *jus cogens* in the draft Convention on the Law of Treaties was therefore held to be pointless, especially as there was no mechanism of compulsory jurisdiction that would enable the International Court of Justice (ICJ) to settle disputes between States over *jus cogens*.<sup>97</sup>

The International Law Commission did not heed the critical comments sent in by the States that were against the principle. In the commentary to Article 50 of the 1966 draft (Article 37 of the 1963 draft), noticing some dissatisfaction transpiring from the commentaries by States, the

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94 Ibidem, Wyzner (Poland), p. 35, Angelov (Bulgaria), p. 34 among others.

95 *Law of Treaties, Comments by Governments – A/CN. 4/175*.

96 Ibidem, p. 99.

97 Ibidem, pp. 145–146 — verbal note of 15 Jan. 1965.

Commission admitted that drafting the provision was by no means easy, because there was no criterion for identifying a general norm of international law having the nature of *juris cogentis*.<sup>98</sup>

The negative response of some jurists and States to the stance adopted by the International Law Commission at the Vienna Conference triggered opinions criticising the very idea of putting the principle forward. The inclusion of the provision on conflict with *jus cogens* met with strong opposition from Talât Miras (Turkey), Paul Rügger (Switzerland), Jean Charles Rey (Monaco) and Erik Dons (Norway).<sup>99</sup> In 1969, L. Hubert (France) spoke against Article 50.<sup>100</sup> In his long speech, he mentioned almost all the arguments that had been used to strike out the article from the draft of the Convention on the Law of Treaties. The French delegate expressed his appreciation for the noble intentions guiding the article proponents, but observed that in life intentions had to yield to facts. The facts included the invalidation of the entire group of treaties without specifying either them or the norms the breach of which made them void. Hubert criticised the mechanical transfer of the concept of *jus cogens* from internal to international law and warned that the validity of international treaties was threatened by the retroactivity of the provision in question.

Besides the charges well-known to the authoritative literature on international law, he also cited the argument of compulsory jurisdiction. He maintained that any organ resolving disputes over *jus cogens* would not only interpret the law, but would have to make it, which had to be considered undesirable.<sup>101</sup> However, the absence of compulsory jurisdiction would lead disputes up blind alleys by a conciliation procedure. For these reasons, the French delegate decided that Article 50 posed a danger to international relations and announced that he would vote against its adoption.

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98 RILC 1966, p. 76.

99 UNCLT 1968, pp. 323–325.

100 UNCLT 1969, pp. 93–95. A similar stance was taken by Brazil (Australia), p. 95.

101 Ibidem, p. 94.

The criticism of Article 50 *in merito* at the Vienna Conference relied in part on the same arguments as the ones used by the provision opponents. It was driven by both views expressed in legal studies and opinions held by some members of the International Law Commission. In the context of these criticisms, a discussion was held at the Vienna Conference as to whether the concept of *jus cogens* could be made more specific by enumerating treaties in conflict with it. The question was discussed by the International Law Commission as early as in 1963. The enumeration of treaties contravening *jus cogens* made by Waldock at this time was held to be incomplete.

Most International Law Commission members objected to the enumeration, claiming that it wrongly suggested that only actions leading to international torts breached *jus cogens*. Therefore, it was suggested that either the list be supplemented or case law be given up altogether.

In contrast, two Commission members—Shabtai Rosenne and Mustafa K. Yasseen—strongly stressed the need to solve the problem on the basis of examples of treaties in conflict with *jus cogens*. Rosenne was adamant that their omission would harm the entire draft of the law on treaties.<sup>102</sup>

The examples given by Waldock in Article 13 of the 1963 draft give rise to many questions that are crucial for the practical application of the article. First and foremost, why did the rapporteur of the International Law Commission, out of many possibilities, choose only three and ignore others? Presumably, his choice might have been motivated by two reasons. First, the *jus cogens* with which the enumerated treaties were in conflict was formulated in multilateral international treaties. Second, it was reflected in international court decisions, which can be considered an additional touchstone of its peremptoriness. For instance, the prohibition on the threat and use of force, mentioned in Article 13, features in the UN Charter. The prohibition has its origins in the Briand-Kellogg Pact of 1928 and was recognised as *jus cogens* by the International Military Tribunal in Nuremberg.

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102 YILC 1963, vol. II, p. 74.

The treaties leading to international torts listed by Waldock are associated with the judgements of the International Military Tribunal and other tribunals that punished war criminals. The Tribunal, hearing the case of Krupp, implicitly found a treaty concluded by Germany and the Vichy government to be invalid. The treaty made it possible for French prisoners to be employed in German munitions factories.<sup>103</sup> The Tribunal found the treaty to be inconsistent with international morality. The obligation binding States to refrain from actions that could lead to international torts followed from the Hague Conventions of 1899 and 1907. It was also the Conventions that provided grounds for the obligation of States to prosecute and punish war criminals.

Since 1948, the obligation of States in this field has additionally stemmed from the Convention on the Prevention and Punishment of the Crime of Genocide. In 1951, in connection with the Convention, the ICJ issued an advisory opinion on reservations, cited previously. In the opinion, the ICJ defined genocide as the violation of the right to exist of entire groups of humans. The violation is in conflict with morality, and the spirit and goals of the UN Charter. In the opinion of the ICJ, the principles underpinning the Convention are recognised by civilised nations as binding on States even when there are no relevant obligations following from international treaties.<sup>104</sup> Hence, the Convention principles are peremptory. The ICJ opinion reflected the conception of international public policy that had limited freedom of contract by eliminating the possibility of making reservations.<sup>105</sup>

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103 *Law Report of Trials of War Criminals*, vol. X, 1949, p. 141.

104 *International Court of Justice Reports 1951, Advisory Opinion. Reservations to the Convention on Genocide*, pp. 23–24.

105 R. Szafarz was right to observe that the elimination of reservations depended on the subjective assessment by other parties to a treaty, who may file an objection and claim that the reservation in question is inconsistent with *jus cogens*. In the absence of an objective assessment mechanism, the ineffectiveness of filing such a reservation will thus manifest itself only *ex post*. Cf. R. Szafarz, *Zastrzeżenia do traktatów wielostronnych*, Warszawa 1974, pp. 87, 97. This finding attests to the subjectivity of assessments of the legal nature of norms made from the perspective of their peremptoriness. The subjectivity is a result of both the absence of unequivocal rules for determining which norms have the nature of *juris*

Waldock was aware that the partial enumeration of the norms of *ius cogens* he had made was only a half measure for solving a difficult problem. Bowing to pressure from the majority of International Law Commission members exerted during a discussion in 1963, the Commission's rapporteur not only refrained from extending the list of examples, but also dropped the examples he had included in Article 13 of the draft. In doing so, he avoided the difficult task of specifying the norms of *ius cogens* currently in force. The task was left to practice and international tribunals. This manner of proceeding adopted by the International Law Commission accelerated its work, but had an impact, too, on the significance of the provision on the conflict of a treaty with a peremptory norm of international law for international practice.

The delegates criticising *in merito* Article 50 of the draft made by the International Law Commission did not hide their conviction that the absence of a guideline on which norms constituted *jus cogens* was a major deficiency of the proposed solution. To eliminate it, in 1968 the British delegation proposed an amendment to introduce the rule whereby the norms of *ius cogens* would be placed in protocols to the convention negotiated already after its conclusion. Speaking in support of the amendment, I.M. Sinclair expressed the opinion that it would help codify norms reflecting international morality and international public policy.<sup>106</sup> Codification could not be replaced, the British delegate maintained, by any system of compulsory jurisdiction. Even if it were put in place, the ICJ could hardly be expected to find whether a given international law norm was peremptory and if so,

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*cogens* and the absence of bodies equipped with the necessary competences to adjudicate on this matter. Caution is recommended in judging Rosenne's proposal to consider the inadmissibility of reservations to be an objective assessment criterion of the nature of an international law norm – YILC 1963, vol. I, p. 74. In the opinion of Rosenne, the criterion of inadmissibility of reservations is more certain than the criterion of derogation. An international convention that admits the filing of reservations does not comprise any norms of *ius cogens*. Otherwise, it is presumed that articles of a convention in fact constitute *jus cogens*. The proposed criterion's disadvantage is the fact that it would be applicable only to *jus cogens* formulated in multilateral treaties. Meanwhile, the criterion of derogation can be applied to both *jus cogens* following from treaties and general customary international law. 106 UNCLT 1968, pp. 304–305.



as of when. The British amendment, despite the fact that many States were in favour of it<sup>107</sup>, was withdrawn by its authors because of the support they lent to an American amendment. The purpose of the latter was to adopt the rule that the norms of *juris cogentis* had to be recognised by various legal systems—both national and regional.<sup>108</sup> To make the picture complete, it must be mentioned that some state delegations to the Vienna Conference were against the British amendment, alleging chiefly that the enumerative wording of the provision would contravene codification principles.<sup>109</sup>

The final wording of the provision on the conflict of a treaty with *jus cogens* was arrived at after the adoption of two amendments: an American one and another one proposed together by Finland, Greece and Spain. The first supplemented Article 50 by expressing that a treaty was void if, “at the time of its conclusion”, it conflicted with a peremptory norm. The expression “at the time of its conclusion” was accepted by the Conference.<sup>110</sup> The amendment of Finland, Greece and Spain, in turn, intended to make the concept of *jus cogens* more specific by introducing the rule of the recognition of *jus cogens* by the international community into the provision. The Greek delegate, Dimitrios Evrigenis, arguing in favour of the common amendment on behalf of the three countries, stressed that the essential element of international *jus cogens* was its universality, i.e. its recognition by the international community.<sup>111</sup> The amendment was referred to the drafting committee who used it in the final wording of the article. The committee chairman explained that following the example of Article 38 of the ICJ statute, besides the word “recognised”, the word “accepted” was introduced.<sup>112</sup> Moreover,

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107 Among others by Adolfo Maresca (Italy), *ibidem*, p. 311, who said that the amendment accounted for the constant evolution of law. In the same spirit, R. L. Harry (Australia) spoke, who however denied protocols bore any codifying character and reduced them to the role of lists of existing peremptory norms. *Ibidem*, p. 317.

108 *Ibidem*, p. 330.

109 This stance was adopted among others by S.E. Nahlik (Poland), *ibidem*, p. 302.

110 *Ibidem*, p. 333.

111 *Ibidem*, p. 295.

112 *Ibidem*, p. 471, explanation by Mustafa Yasseen.

the committee divided the article into two sentences of which the first laid down the rule and the second defined the concept. Thus, Article 53 of the Vienna Convention was drafted to have the following final wording:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

It appears that the second sentence of Article 53 formulated in this way should have been included in Article 2 of the Convention where the terms used in it are defined. Ultimately, Article 53 was adopted with 72 votes for, 3 against and 18 abstentions.

### **An Assessment of the Legal Solution Adopted in Article 53 of the 1969 Vienna Convention**

The need to include a provision on the conflict of a treaty with *jus cogens* in the Convention on the Law of Treaties should not give rise to any major doubts in the age of peaceful coexistence and cooperation of States. Provisions on *jus cogens* dialectically develop the principles of *pacta sunt servanda* and *consuetudo est servanda*.<sup>113</sup> In principle, they are to prevent arbitrary acts by States and reaffirm the principle of their equality before the law. Undeniably, these provisions carry great weight in the process of elevating the legal rank of the norms the observance of which guarantees peace and security to the whole international community. The threat of invalidity posed by Article 53 for treaties incompatible with the international public policy should discourage States from concluding agreements universally considered unlawful. Does the wording of Article 53

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113 K. Kocot, *Pacta...*, p. 65.

constitute a reliable guarantee of attaining this goal? In other words, does the legal solution adopted by the Vienna Conference guarantee an effective use of Article 53 against these States, ones that have violated the peremptory norms of general international law by concluding international treaties that remain in conflict with these norms?

The discussion so far supports certain critical reflections on Article 53, its wording and meaning that shall be presented below. Focusing on the way of defining *jus cogens* and its emergence will provide answers to the above questions.

1. Defining the concept of *jus cogens* without naming which norms are peremptory does not seem the best solution to the problem of the inconsistency of treaties with *jus cogens*. The general definition of the concept included in Article 53 in itself does not raise any major objections and shows that the codifiers approached the task entrusted to them with care. Considering the state that international law is in today, it does not suffice, however, to give a general answer to the question of what *jus cogens* is. Furthermore, for the sake of international practice, it is necessary to name the norms that have been considered higher order norms.

The conduct of States in today's international relations shows that they are aware of the necessity to respect these norms. Still in the early 20th century, certain canons of sovereignty justified the claim that States did not have to agree to any limitation of their full freedom of action.<sup>114</sup> With time, the view on the conception of sovereign equality began to change. The view began to gain ground that States were indeed sovereign, but were not absolutely free in their conduct.<sup>115</sup> It was stressed that the Hegelian conception of sovereignty, coming down to the acceptance of any conduct arbitrarily considered appropriate by State authorities, underpinned the German doctrine of law in the period of fascism and brought anarchy to the world. The awareness of the consequences of the

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114 Cf. M.S. Korowicz, *The Problem of the International Personality of Individuals*, "American Journal of International Law" 1956, p. 533.

115 Cf. G. Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, "Recueil des Cours" 1957, vol. 92, p. 5.

implementation of the doctrine of absolute freedom underlays peaceful coexistence. Its legal dimension is moulded by the fundamental principles of contemporary international law.

States are aware that they avail themselves of their sovereignty in a specific environment. This is why they consult their policies with other States and consent to reciprocal limitations, following from far-reaching interdependencies found in the international community. Hence, the traditional view of sovereignty had to be modified. The rise of the principle of peaceful resolution of disputes and the prohibition on the use of force has abolished the classic prerogative of sovereign states that the right to declare and wage war had been, regardless of its character. The supremacy of international law, developed in the interest of human civilisation as a whole, over sovereignty understood an absolutist manner, is clearly evident in this case. The principal characteristic of modern sovereignty is, therefore, equality of States and independence from one another, which does not mean independence from the law they have made. The law is peremptory and universal if the international community as a whole consents to it. Therefore, there is no conflict between the concept of *jus cogens* and the principle of the sovereignty of States.<sup>116</sup>

It is by no means easy to ascertain to which norms of *juris cogentis* the international community has already consented; those *in statu nascendi* and those only apparently peremptory, whereas in reality they are merely norms of general international law. An attempt was made above to show that as long as the norms of *juris cogentis* stay primarily in the sphere of general customary international law, their identification remains difficult. Meanwhile, it is indispensable for finding an international treaty void pursuant to Article 53.

Article 53, lacking a specification of the norms of *juris cogentis* that are binding on States, can be compared to a provision of the Criminal Code which says that immoral deeds will be punished with impris-

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116 For more on the question of sovereignty in today's international relations see J. Sandorski, *RWPG...*, pp. 34–59.

onment without explaining which immoral deeds are crimes or mentioning the norm they violate. Politicians and jurists must know which norms have the nature of *jus cogens* so that treaties concluded by their States would not contravene them. The lack of an unassailable codification of the norms of *juris cogens* prevented the drafters from limiting Article 53 to a general definition of the concept in question. The Vienna Conference, was not able, however, due to the shortage of time, to deal with such a time-consuming problem as the codification of the norms of *juris cogens*. In the absence of a procedure for establishing the norms of *juris cogens*, the task should have been shouldered by the most competent organ, i.e. the International Law Commission. It had two options to choose from. The first involved drawing up a full list of the norms of *juris cogens* while the second was to include the least controversial norms of *juris cogens* in the draft article. The more exhaustive such a list would be, the narrower the margin of uncertainty, and this would reduce the threat of international disputes arising over *jus cogens*.

From the opinion of jurists cited earlier, and the speeches of delegates at the Vienna Conference, it can be assumed that such a list should above all include the following: the prohibition on the use of force, the duty to settle disputes peacefully, the principle of sovereign equality, the principle of *pacta sunt servanda*<sup>117</sup> and the principles of human rights protection. *There are arguments in favour of including some other principal rules of the UN Charter (e.g. self-determination) in the list of the norms of juris cogens, as well as certain rules of the law of the seas and space law. In the future, the list will no doubt see the inclusion of rules of international environmental protection. The progressive development of international law would require the list to be updated every now and then. This would be best done in the form of annexes to the Vienna Convention.*

The argument made against drawing up an incomplete list, and attempting to show that the norms left outside it would be depreciated,

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117 Cf. a right statement—on this issue—by H. Gröpper (FRG) – UNCLT 1969, p. 96.

does not seem convincing. After all, a State invoking one of such norms could produce proof that would rebut the presumption that it is not a norm of *ius cogens*.

The International Law Commission chose the most opportunistic option, whereby the burden of the task it failed to carry out was shifted to practice. This choice reduced the chances for the full implementation of the idea of depriving treaties contravening *ius cogens* of binding force. By ignoring the British amendment, the Vienna Conference abandoned this opportunity, thus seriously weakening the practical usability of Article 53.

2. The concept of *ius cogens* was made considerably more precise by introducing to Article 53 the expression: “a norm accepted and recognized by the international community of States as a whole.” However, the expression calls for an explanation as it is not absolutely clear whether the emergence of a norm of *ius cogens* requires the unanimous consent of all States—members of the international community—or only of a majority of States.

When asked by the delegates to the Vienna Conference, M.K. Yasseen, chairman of the drafting committee, commented on the matter.<sup>118</sup> He said that including the words “as a whole” in Article 53, the committee did not believe it was necessary for all States to adopt and recognise a norm. It is enough if this is done by a large majority. Thus, the chairman of the drafting committee continued, if a single State or a small number of States declined to adopt a norm, it would have no impact on the recognition of the norm as peremptory by the international community as a whole. An individual State does not have the right of veto in such circumstances.<sup>119</sup>

The explanation given by M.K. Yasseen actually blurs the picture. It begs the question of what the purpose of the expression “as a whole” introduced by the drafting committee was, since the concept of

<sup>118</sup> UNCLT 1968, p. 472.

<sup>119</sup> Ibidem, p. 471. A member of the drafting committee, S.E. Nahlik, argued in favour of interpreting the expression “as a whole” in the sense of a relative and not absolute whole (a considerable majority of States belonging to all groups), *Kodeks...*, p. 326.

the international community covers all the existing States active in the international arena as subjects of international law. During a discussion on the concept of the international community at the International Law Commission (1949), a view was expressed identifying it with UN membership. The view was subsequently criticised as incompatible with the concept of universality.<sup>120</sup> However, it appears that because of its past associations, States approved the expression “as a whole” at the Vienna Conference in an attempt to express their belief that all States had to participate in the making of a norm of *ius cogens*. The expression “as a whole” would be unjustified in Article 53 if it could be interpreted in the sense of a relative whole.

This interpretation is founded on an artificial construction of the concept of the international community and assumes that it has supranational competences. As such, it strikes at the heart of international law, which would cease to exist if the sovereign equality of States were abolished.<sup>121</sup> Adopting the interpretation that a majority of States may create a peremptory norm of general international law binding *erga omnes* would be tantamount to accepting the existence of a new source of laws binding States which are in a minority against or against their will. Such states, if they were forced to comply with norms enacted without their consent, would lose the position of equality before the law with other States. This situation would be a glaring violation of the principle of sovereignty laid down in the UN Charter.

For these reasons, the expression “as a whole” must be held to emphasise that a peremptory norm must be adopted and recognised by a universal tacit agreement or a universal international treaty by all the existing States active in the international arena. The attitude towards one or a small number of States, ignoring their will, makes it necessary to decide a difficult problem of quantity, namely, how many States make a large majority. The attitude also begets a dilemma: will a norm of *ius*

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120 Cf. A. Klafkowski, *Prawo...*, p. 23.

121 *Ibidem*, p. 23.

*cogentis* arise if only a single State objects to it, but the State is a great power? There is no doubt that the position of a majority of States, in particular, of great powers, is crucial for establishing peremptory norms of general international law. However, this finding is a fact of life. In the eyes of the law, the consent of each State is equally important for the rise of *jus cogens*. Coercing a State into giving consent by presenting it with a “law accompli” would be a violation of international law.

Every State may raise an objection to the universality and peremptoriness of a legal norm. The objection may be limited to peremptoriness without challenging universality. It was in this way that the universal principles of international law that are not peremptory came into being. Their existence among the fundamental principles of international law laid down in the UN Charter does not permit, as was already pointed out while discussing departures from these principles, considering them *en bloc* as *jus cogens*. The objection of a State must be either express or implied and raised when a norm, to which some States ascribe universality and peremptoriness, is being formulated. A tacit agreement by States precludes any unilateral or multilateral action aimed at revoking it once a norm of *juris cogentis* has arisen. This would be tantamount to an attempt to derogate from it *inter se*. It appears that a newly founded State may declare its will to evade the legal consequences of the norm of *juris cogentis* that has arisen prior to its foundation. A declaration by such a State will not deprive the norm of its proper character, while the objecting State must take into account the consequences that may be brought about by its leaving the norm’s sphere of influence. In the absence of such a declaration, it can be presumed that the newly founded State consents to the peremptoriness of legal norms governing the international community.

At the Vienna Conference, it was universally agreed that *jus cogens* was positive law,<sup>122</sup> i.e. enacted by States. The universality of the enact-

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122 Still in 1963, opinions on this subject varied in the International Law Commission. A. de Luna, speaking on the concept of “positive law”, maintained that if it was held to mean norms enacted by States, *jus cogens* was not positive law. In contrast, understanding positive law as norms in force in the international community justified considering *jus*



ment made it an expression of *voluntas civitatis maximae*. Any attempts to treat *pars pro toto*, i.e. to identify the will of the international community with that of a majority of States, not only have no grounds in the sphere of international law, but also pose a threat to its proper operation.

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*cogens* as positive law – YILC 1963, vol. II, p. 75. At the Vienna Conference in 1969, there was agreement on this matter. Critical of Article 53, L. Hubert (France) stressed that one of the few advantages of the proposed solution was the incorporation of *jus cogens* into positive international law – UNLCT 1969, p. 95.

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## SUMMARY

### **The Invalidity of International Treaties and *Jus Cogens***

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