

JUS COGENS IN INTERNATIONAL LAW, WITH A PROJECTED LIST

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*Jus cogens*¹ takes precedence in the realm of international law over customary and conventional international law. This article treats the nature, definition, existence, and utilization of the concept.

Frequently cited in this connection is the work of Vespasian V. Pella.² In 1950 Professor Pella, at the request of the Secretariat of the United Nations, submitted a comprehensive memorandum for use in the preparation of a "draft code of offences against the peace and security of mankind."³ With reference to "international aggression or acts constituting violations of the laws of war,"⁴ he observed: "In such cases the acts are not directed against particular governments or harmful to any political system, but they are acts which shake the very foundations on which the international community rests, acts which endanger the peaceful coexistence of nations."⁵

In its *Advisory Opinion Concerning Reservations to the Genocide Convention*,⁶ the International Court of Justice concluded that "any reservation" to that Convention made by a state by virtue of its sovereignty was illegal, stating that genocide "is contrary to moral law and to the spirit and aims of the United Nations." Further, the Court concluded that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation."⁷

In its Judgment in the Case Concerning the Barcelona Traction, Light and Power Company, Limited, *Belgium v. Spain*,⁸ the Inter-

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¹ *Jus cogens* literally translated means compelling law: *Jus*, law; *cogens*, present participle of *cogere*: to compel.

² Memorandum Concerning a Draft Code of Offenses against the Peace and Security of Mankind, U.N. Doc. A/CN.4/39 at 17 (1950) [hereinafter cited as Code of Offenses].

³ *Id.* at 17.

⁴ *Id.*

⁵ Code of Offenses, *supra* note 2, at 17.

⁶ Advisory Opinion Concerning Reservations to the Genocide Convention, [1951] I.C.J. 1.

⁷ *Id.* at 23-24.

⁸ Case Concerning the Barcelona Traction Light and Power Co., (*Belg. v. Spain*) [1970] I.C.J. 32 (2d case).

national Court of Justice recognized that international law places certain obligations upon States, *erga omnes*; that is, obligations owed to the international community as a whole, stating that "such obligations derive, for example, in contemporary international law from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."⁹

Lord McNair, discussing conflict of a treaty with certain rules of customary international law, wrote:

There are, however, many rules of customary international law which stand in a higher category and which cannot be set aside or modified by contracting States; it is easier to illustrate these rules than to define them. They are rules which have been accepted either expressly by treaty or tacitly by custom, as being necessary to protect the public interests of the society of States or to maintain the standards of public morality recognized by them. . . . For instance, piracy is stigmatized by customary international law as a crime, in the sense that a pirate is regarded as *hostis humani generis* and can lawfully be punished by any State into whose hands he may fall. Can there be any doubt that a treaty whereby two States agreed to permit piracy in a certain area, or against the merchant ships of a certain State, with impunity, would be null and void? Or a treaty whereby two allies agreed to wage war by methods which violated the customary rules of warfare, such as the duty to give quarter?¹⁰

In 1957, Sir Gerald Fitzmaurice, in discussing reprisals by a State to illegal acts of another State, observed:

There are certain forms of illegal action that can never be justified by or put beyond the range of legitimate complaint by the prior illegal action of another State, even when intended as a reply to such action. These are acts which are not merely illegal, but *malum in se*, such as certain violations of human rights, certain breaches of the laws of war, and other rules in the nature of *jus cogens*—that is to say obligations of an absolute character, compliance with which is not dependent on corresponding compliance by others, but is requisite in all circumstances, unless under stress of literal *vis major*. In the conventional field, may be instanced such things as the obligations to maintain certain standards of safety of

⁹ *Id.*

¹⁰ A. MCNAIR, *LAW OF TREATIES* 213-15 (1961).

life at sea. No amount of noncompliance with the conventions concerned, on the part of other States, could justify a failure to observe their provisions."¹¹

In his Special Report to the *Institut de Droit International* in 1973, Judge Fitzmaurice included the following list of what he described as "sundry current manifestations of naturalist-universalist thought and the principle of co-operation:"

- A. The rule of non-resort to the use of force, and the consequent non-recognition of situations brought about by its use.
- B. The rules now contained in article 52 of the Convention on the Law of Treaties, that treaties imposed by force (sometimes called 'unequal' treaties) are void *ab initio*.
- C. The interdiction of crimes against peace and humanity, including genocide and acts in the nature of genocide and near genocide.
- D. The rule that the plea of 'superior orders' is *prima facie* no answer to a charge of crime against peace and humanity or of a war crime.
- E. The recognition, also enshrined in provisions of the Vienna Convention (articles 53 and 64) of the principle commonly known as *jus cogens*, of entrenched rules of law from which in principle no release or derogation is possible, so that treaties conflicting with what is designated as a 'peremptory norm of general international law' are void.
- F. Recognition of something in the nature of a '*droit de regard*' by States, not in the sense of any right of intervention in one another's internal affairs, but of a right of concern over policies and actions that may have external repercussions adverse to the interests of others or to the general interest. This corollary can be deduced from several principles already discussed, and from the general duty of co-operation in matters of common concern to all countries.
- G. Incipient recognition of an inchoate duty of samaritanism in international relations (aid to underdeveloped countries, etc.).¹²

¹¹ Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rules of Law*, 92 RECUEIL DES COURS 120 (1957). Further, see Fitzmaurice's view on *jus cogens* set forth as a Special Rapporteur to the International Law Commission of the United Nations, *infra* note 35.

¹² Fitzmaurice, *The Future of Public International Law and of the International Legal System in the Circumstances of Today*, INSTITUT DE DROIT INTERNATIONAL 323-24 (Special Report).

Citing Friedmann's theory of "co-operation," Fitzmaurice wrote (in the same Special Report):

It seems to us on the whole not too much to regard the idea of an obligation of

Professor Verdross, a member of the International Law Commission, writing in 1966, said:

[I]n the field of general international law there are rules having the character of *jus cogens*. The criterion for these rules consists in the fact that they do not exist to satisfy the needs of the individual states but the higher interest of the whole international community. Hence these rules are absolute. The others are relative, because the rights and obligations created by them concern only individual states *inter se*.¹³

He pointed out that these two categories of general international law were also recognized by the International Court of Justice in its Advisory Opinion concerning Reservations to the Genocide Convention, where the Court stated: "The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. . . . [I]n such a convention the contracting States *do not have any interest of their own*; they merely have, one and all, a *common interest*, namely, the accomplishment of those high purposes which are the *raison d'être* of the Convention."¹⁴

Professor Schwarzenberger, writing in 1965, expressed the view that: "The evidence of international law on the level of unorganized international society fails to bear out any claim for the existence of

co-operation as being now in a fair way to acceptance as a general principle of international law. It is probably already implicitly part of the accepted obligation of good faith. . . . The main hope for the future of international law lies in a shift in emphasis which all States, new and old, must participate in, from an attitude of bare toleration of one another to one of cordiality and benevolence, from an international law of co-existence to an international law of co-operation.

Id. 123-25.

¹³ Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55, 58 (1966) [hereinafter cited as Verdross].

¹⁴ *Id.* See also Advisory Opinion Concerning Reservation to the Genocide Convention, [1951] I.C.J. 23, 69. Verdross stated that he prepared the article cited for the reason that he "felt obliged to defend article 37 of the International Law Commission's then-existing draft [on the Law of Treaties]" against "criticism directed against it by Professor Schwarzenberger," citing Schwarzenberger, *International Jus Cogens?*, 43 TEX. L. REV. 455 (1965). Verdross, *supra* note 13, at 55. For text of article 37 of the International Law Commission draft, see note 15 *infra*.

Verdross summarized his understanding of Professor Schwarzenberger's position as follows:

Professor Schwarzenberger recognizes and has always recognized that through bilateral or multilateral consensus a rule having the character of *jus cogens* can be created *inter partes*. Its legal effect is therefore 'limited to the contracting parties'. He denies, however, the existence of such rules on the level of unorganized society as it existed before the United Nations Organization. Expressly, he says that 'international law on the level of unorganized international society does not know of any rules of public policy.'

Verdross, *supra* note 13, at 60.

international *jus cogens*.¹⁵ After reiterating that “[i]nternational law on the level of unorganized international society does not know of any *jus cogens*,” he stated:

In organized world society, the Principles of the United Nations and corresponding forms of *jus cogens* in other international institutions present attempts at the creation of consensual rules of international public policy. As yet, these efforts are too precarious, as in the United Nations, or too limited *ratione personae* or *ratione materiae*, as in the specialized agencies of the United Nations or the supranational European Communities, to constitute more than international quasi-orders.¹⁶

He further commented:

Governments are unlikely to conclude isolated agreements purporting to legalize piracy, the slave trade, or white-slave traffic. If they should contemplate activities on such lines, this would be symptomatic of a deeper malaise. They would have sunk to a level of barbarism incompatible with any claim to be regarded any longer as civilized communities. This was exactly what did happen when, in the pre-1939 period and after, totalitarian States reverted to practices of forced-labor camps, concentration camps, and forcible exchanges of population. Third States were not limited to pious protestations of the invalidity of such treaties because of their incompatibility with *jus cogens*. They would have been entitled to take more drastic action in retaliation for such flagrant breaches of the minimum standard of civilization, *i. e.*, to break diplomatic

¹⁵ Schwarzenberger, *International Jus Cogens?*, 43 *TEX. L. REV.* 455, 465-67, 476 [hereinafter cited as Schwarzenberger]. Schwarzenberger referred to the International Law Commission's draft convention on the Law of Treaties and quoted draft article 37 entitled "Treaties conflicting with a peremptory norm of general international law (*jus cogens*)," and reading "[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." *Id.* at 455. See also Schwarzenberger, *The Problem of International Public Policy*, 18 *CURRENT LEGAL PROB.* 191 (1965).

In 1966, at the Lagonissi (Greece) Conference, Professor Schwarzenberger intervened to clarify his position on the subject of "*jus cogens*." He stated that:

He did not argue *a priori* that there could be no customary *jus cogens* but failed to see any evidence for it in unorganized international society. In an organized international society, *jus cogens* could be created by treaty and extended by secondary rules, such as recognition of new States on the assumption that they accepted these principles on admission to the United Nations.

Carnegie Endowment for International Peace, *Conference on International Law, Lagonissi, April 3-8, 1966, Papers and Proceedings*, THE CONCEPT OF JUS COGENS IN PUBLIC INTERNATIONAL LAW 85, 103 (1967) (Summary Record) [hereinafter cited as Lagonissi Conference].

¹⁶ Schwarzenberger, *supra* note 15, at 476.

relations with, or even withdraw their recognition from, governments and States turned international outlaws.¹⁷

He continued:

It is . . . convenient to deal here with the proposition that certain of the rules of the law of war, such as the prohibition of the refusal to give quarter or the rules for the protection of prisoners of war or the enemy civilian population, constitute international *jus cogens*, and that agreements purporting to legalize such action are void. Again, every one of these examples concerns breaches of the standard of civilization, and any of these acts may be treated as war crimes, that is to say, while the war lasts — and, in the case of *debellatio*, also afterwards — belligerents are entitled to assume criminal jurisdiction over any persons involved in ordering, tolerating, or perpetrating such outrages. To assert the incompatibility of such acts with international public policy and the nullity of lunatic agreements aiming at legalizing such action hardly carries matters any further.¹⁸

Professor Lissitzyn, speaking at the Lagonissi Conference (1966), commented that he “found it difficult to admit that a treaty *qua* treaty could create *jus cogens*.”¹⁹ He added:

Most multilateral treaties included termination and withdrawal clauses, and all treaties could be terminated one way or another. What counted for *jus cogens* purposes was not the treaty but its content. This was consistent with Article 37 of the International Law Commission Draft. *Jus cogens* could not be created *ex contractu* but treaties declaratory of *jus cogens* rules helped ascertain the content of these rules. The source of *jus cogens* lay behind and beyond the treaty. Article 103 did not create the *jus cogens* character of the Charter [of the United Nations], it did not envisage the nullity of the treaty in question, but simply provided a solution in possible cases of conflict of obligations deriving from the Charter and from other treaties.²⁰

Jenks, writing in 1964, stated that “the *jus dispositivum* consisting of the treaty stipulations agreed between the parties thereto is not generally regarded as being governed by *jus cogens*.”²¹ However, he also stated that “we should not exclude the possibility that inter-

¹⁷ *Id.* at 465.

¹⁸ *Id.* at 465-66.

¹⁹ Lagonissi Conference, *supra* note 15, at 92.

²⁰ *Id.* at 111. See note 15 *supra* for the text of art. 37 of the International Law Commission Draft.

²¹ C. JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 504 (1964).

national public policy may increasingly have the effect of a *jus cogens* precluding the consent of States to agreements or wrongs inconsistent with international public policy."²² Writing on "Space Law," Jenks later concluded that "[t]he prohibition of appropriation [of outer space and celestial bodies] rests essentially on grounds of international public policy"²³ and that the Declaration of Legal Principles makes it clear "a State cannot escape the prohibition of national appropriation by acting jointly with other States."²⁴

Sereni in 1962 denied the existence of an international public policy and was strongly opposed to the submission of treaties to "moral norms." As to the latter, he denied the existence of "any norms relative to the morality of the subjects of international law."²⁵

Near the close of the Lagonissi Conference, Professor Erik Suy of the University of Louvain expressed the following views:

[T]he conditions of existence of a *jus cogens* had not yet materialized in international law. The International Law Commission maintained that an international *jus cogens* existed and that rules pertaining to it could be created not only by treaty but also by custom. This meant that rules of *jus cogens* were not immutable and that they could not only be created but also be changed by subsequent treaty or custom. But how could this be done? We could not do by practice what could not be done by treaty, for both would be considered as violations of a *jus cogens* rule and, consequently, without effect. The only conceivable way to change a *jus cogens* rule under these conditions would be by a universal treaty.²⁶

Professor Suy

envisaged a simpler way out of these complications, namely to consider *jus cogens* not as law but as the social infra-structure providing the basis of a real international public order. *Jus cogens* principles would not be considered as legal rules but as guiding principles reflecting the basic values of the international society in its actual stage of development.²⁷

In the *South West Africa Cases*,²⁸ the International Court of Jus-

²² *Id.* at 458.

²³ C. JENKS, *SPACE LAW* 200 (1965).

²⁴ *Id.* at 201.

²⁵ Sereni, 3 *DIRITTO INTERNAZIONALE* 1307 (1962).

²⁶ Lagonissi Conference, *supra* note 15, at 85.

²⁷ *Id.* at 112.

²⁸ *Southwest Africa Cases*, [1966] I.C.J. 4 (Ethiopia v. South Africa; Liberia v. South Africa) (2d Phase).

tice, in its Judgment of July 18, 1966, found that "the Applicants cannot be considered to have established any legal right or interest appertaining to them in the subject-matter of the present claims, and that, accordingly, the Court must decline to give effect to them."²⁹ The Court thus rejected the claims made by Ethiopia and Liberia. Judge Jessup dissented. On the obligations of the mandatory in the changing evolution of the historical setting, he stated (in part):

. . . this section of the opinion has shown that the standard to be applied by the Court must be one which takes account of the views and attitudes of the contemporary international community. This is not the same problem as proving the establishment of a rule of customary international law, and I have already explained that I do not accept Applicants' alternative plea which would test the apartheid policy against an assumed rule of international law ('norm'). It is therefore not necessary to discuss here whether unanimity is essential to the existence of *communis opinio juris*. It has also been plainly stated herein that my conclusion does not rest upon the thesis that resolutions of the General Assembly have a general legislative character and by themselves create new rules of law. But the accumulation of expressions of condemnation of apartheid as reproduced in the pleadings of Applicants in this Case, especially as recorded in the resolution of the General Assembly of the United Nations, are proof of the pertinent contemporary international community standard. . . .³⁰

Accordingly, Judge Jessup's category denominated by him as the "contemporary international community standard,"³¹ as explained in the above-quoted brief excerpt from his lengthy Dissenting Opinion, and also Judge Fitzmaurice's list of matters comprising "naturalist-universalist thought and the principle of co-operation,"³² speak for themselves.

In connection with the work of the International Law Commission of the United Nations on the Law of Treaties and during the 1968 and 1969 sessions of the United Nations Conference on that subject, considerable attention was given to *jus cogens* and peremptory norms in international law, particularly as affecting treaty provisions and treaties.

²⁹ *Id.* at 51.

³⁰ *Id.* at 441.

³¹ *See id.*

³² *See text at note 11 supra.*

Hersch Lauterpacht, Judge on the International Court of Justice, then Special Rapporteur to the International Law Commission, included in his 1953 Report on the Law of Treaties a draft article 15 reading: "A treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice."³³ The illegality of the object and its nullity would not, he said, result from a mere violation of customary international law but from "inconsistency with such overriding principles of international law which may be regarded as constituting principles of international public policy (*ordre international public*)."³⁴ He further stated: "These principles need not be codified, instead they may be expressive of rules of international morality so cogent that an international tribunal would consider them as forming part of the principles of law generally recognized by civilized nations."³⁵

In his 1958 Report to the International Law Commission on the Law of Treaties, Fitzmaurice, as Special Rapporteur on the subject, in commenting on then draft article 17, observed:

It being always open, *prima facie*, to any two or more States to agree, for application *inter se*, upon a rule of regime varying or departing from the rules of customary international law in the nature of *jus dispositivum*, a treaty embodying such an agreement cannot be invalid on that ground. Hence it is only if the treaty involves a departure from or conflict with absolute and imperative rules or prohibitions of international law in the nature of *jus cogens* that a cause of invalidity can arise.³⁶

In the same year (1958) the Report of the International Law Commission to the General Assembly of the United Nations included the following comments: "It is . . . only as regards rules of international law having a kind of absolute and non-rejectable character (which admit of no 'option') that the question of the illegality and invalidity of a treaty inconsistent with them can arise."³⁷ At the same time, the Commission instanced three examples of treaties that would be illegal and void under draft article 17:

³³ [1953] 2 Y.B. INT'L L. COMM'N 154.

³⁴ *Id.*

³⁵ [1958] 2 Y.B. INT'L L. COMM'N 27 (Fitzmaurice's 1958 Report to Int'l L. Comm'n).

³⁶ *Id.* Then draft article 17 was entitled "Legality of the Object [of the treaty] (conflict with international law)."

³⁷ *Id.* at 40 (1958 Report of Int'l L. Comm'n to the General Assembly).

a treaty between two States providing that in any future war between them, neither side would be bound to take prisoners of war, and all captured personnel would be liable to execution; a treaty between two States, agreeing to attack a third State in circumstances constituting aggression; and an agreement between States (instanced by Oppenheim) to commit piracy on the high seas.³⁸

In his 1966 Report to the International Law Commission, Sir Humphrey Waldock, Special Rapporteur on the Law of Treaties, reviewed written replies of governments and comments of delegations in the Sixth Committee (Legal) of the General Assembly of the United Nations. He observed:

Although certain Governments express doubts as to the advisability of the inclusion of this article [draft article 17 (involving the concept of *jus cogens*), later renumbered draft article 37] unless it is backed by a system of independent adjudication, the principle contained in the article appears to meet with a large measure of approval. Indeed, only one Government—the Luxembourg Government—really questions the existence today of a concept of rules of *jus cogens* in international law.

He continued:

The Special Rapporteur does not, however, understand the Commission to have intended in article 37 to propose a completely new rule of treaty law. In paragraph 1 of its commentary the Commission 'concluded that in codifying the law of treaties it must take the position that today there are certain rules from which States are not competent to derogate by treaty arrangement.'³⁹

In his 1966 Report to the Commission, Waldock also pointed out that the Netherlands Government had suggested that it may be a

³⁸ *Id.* at 40. The International Law Commission concluded in 1958:

It is not possible—nor for present purposes necessary—to state exhaustively what are the rules of international law that have the character of *jus cogens*, but a feature common to them, or to a great many of them, evidently is that they involve not only legal rules but considerations of morals and of international good order.

Id. at 40-41.

³⁹ [1966] 2 Y.B. INT'L L. COMM'N 25. Special Rapporteur Waldock further explained: At its fifteenth session the Commission considered its correct course to be to leave the full extent of the rule—the identification of the norms which have become norms of *jus cogens*—to be worked out in State practice and in the jurisprudence of international tribunals. It felt, *inter alia*, that if it were to attempt to draw up, even selectively, a list of norms of *jus cogens*, this might involve a prolonged study of matters which belong to other branches of international law.

Id.

“pleonasm” to state, in draft article 37, “a peremptory norm from which no derogation is permitted.” He explained:

The term ‘peremptory norm’ might, no doubt, suffice by itself to convey the notion of a rule of a *jus cogens* character, if there were an existing usage clearly giving that meaning to the term. But this is not the case. Moreover, all general rules of international law have a certain peremptory character in the sense that they are obligatory for a State unless and until they have been set aside by another lawfully created norm derogating from them. A general rule possesses a *jus cogens* character only when individual States are not permitted to derogate from the rule at all — not even by agreement in their mutual relations. In short, a *jus cogens* rule is one which cannot be derogated from but may only be modified by the creation of another general rule which is also of a *jus cogens* character. Accordingly, in formulating the article, the Commission considered it essential to speak not merely of a ‘peremptory’ norm but of one ‘from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’⁴⁰

Because the present writing constitutes a study of the nature of *jus cogens* particularly as it affects or may affect international law now and *in futuro*, its purpose is not intended to be, and is not except incidentally, a commentary on the 1969 Vienna Convention on the Law of Treaties. Note should be made, however, that adoption of the Convention by the Vienna Conference was made possible (near the close of its 1969 Session) by the inclusion of provisions for reference of disputes under the *jus cogens* or peremptory norm articles to procedures under article 33 of the Charter of the United Nations, and, a solution not having been reached thereon within 12 months, reference of the dispute to the International Court of Justice.⁴¹

Article 50 (formerly draft article 37) as worded by the International Law Commission in 1966⁴² and as referred to the United Nations Vienna Conference on the Law of Treaties,⁴³ read:

⁴⁰ [1966] 2 Y.B. INT'L L. COMM'N 23-24. For an article published in 1967, just prior to the 1968 and 1969 Sessions of the Vienna Conference on the Law of Treaties, see Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946-75 (1967).

⁴¹ As to pertinent arts. 53, 64, 65, 66, 71 of the Convention, see note 44 *infra*.

⁴² Report of the International Law Commission on the work of its eighteenth session, Geneva, 4 May - 19 July 1966, [1966] 2 Y.B. INT'L L. COMM'N 247 [hereinafter cited as International Law Commission Report].

⁴³ United Nations Conference on the Law of Treaties, Official Records (1st and 2d Sess.)

Article 50. Treaties conflicting with a peremptory norm of general international law (jus cogens). 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.⁴⁴

My independent reading of the records of the 1968 and 1969 Sessions of the Vienna Conference on the Law of Treaties leads me to the conclusion that objections to then draft article 50 (numbered article 53 as finally adopted by the Conference and included in the 1969 Convention on the Law of Treaties) were for the most part not

at 67 n.3, U.N. Doc. A/Conf. 39/23/Res. 1. [hereinafter cited as Conference on the Law of Treaties].

⁴⁴ International Law Commission Report, *supra* note 41, at 247; Conference on the Law of Treaties, *supra* note 42, at 67. Article 53 of the Vienna Convention on the Law of Treaties (successor article to draft article 50 quoted above), as adopted at the 1969 Session of the Vienna Conference, and certain related provisions (articles 64-66) of the final text of the Convention, provide:

Article 53: *Treaties conflicting with a peremptory norm of general international law (jus cogens).*

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose 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.

Vienna Convention on the Law of Treaties *opened for signature*, May 23, 1969, UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES, OFFICIAL RECORDS 296, U.N. Doc. A/Conf.39/27 (1971).

Article 64: *Emergence of a new peremptory norm of general international law (jus cogens).*

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

Id. at 297. Article 65 of the Convention treats the "Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty." *Id.* at 248. Article 66 treats judicial settlement, etc. It provides:

Article 66: *Procedures for judicial settlement, arbitration and conciliation.*

If, under paragraph 3 of article 65 [invocation of procedures for pacific settlement of disputes under article 33 of the Charter of the United Nations], no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(a) any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration.

Id. Article 71 of the Convention treats the "consequences of the invalidity of a treaty [under article 53 or 64] which conflicts with a peremptory norm of general international law." *Id.* at 299.

objections to, or indications of non-acceptance of, the existence of the concept of "*jus cogens*" in international law. Rather, they were objections to inclusion of the article in the Convention being drafted because of difficulty in formulating a fool-proof or even a satisfactory text.⁴⁵

A sampling of views particularly as to the nature and origin of *jus cogens* in public international law, put forward during consideration at Vienna of draft article 50 (53 of the Convention) follows. The representative of Iraq (Yasseen) stated, "The existence of such rules [*jus cogens*] was beyond dispute." "States could not," he said, "by treaty override those higher norms which were essential to the life of the international community and were deeply rooted in the conscience of mankind."⁴⁶ The representative of Belgium (Devadder) "strongly supported the retention of the concept of *jus cogens*, as introducing into international law the essential concept of morality on which the fundamental principle of good faith was also based."⁴⁷ The representative of Finland (Castren) observed that "it should be emphasized in [draft] article 50 that *jus cogens* was concerned with fundamental rules which were universally recognized by the international community."⁴⁸ The representative of Zambia (Molimba) stated that he "agreed with Professor Verdross that the criterion for rules of *jus cogens* was that they served the interests of the whole international community, not the needs of individual States."⁴⁹ The representative of Poland (Nahlik) stated with reference to rules of *jus cogens*:

The form or source of such rules was not of essential importance in determining the peremptory character. Some were conventional and some customary. Some first emerged as custom and were later codified in multilateral conventions. Some, on the other hand, first appeared in conventions and only passed later into customary law. . . .⁵⁰

⁴⁵ The representative of the Philippines (Mendoza) observed, for example, on May 7, 1968: "The debate had shown nearly unanimous acceptance of the concept of *jus cogens*." *U.N. Conference on the Law of Treaties, 1st Sess., Vienna, 26 Mar. - 24 May, 1968, Official Records*, at 323, U.N. Doc. A/Conf. 39/11 [hereinafter cited as 1st Sess. Conference]. Sir Humphrey Waldock (Expert Consultant), speaking on the same day, called attention to the fact that "the majority of delegations had not contested the principle of the [draft] article [50], but only the adequacy of the formulation, or the possibility of giving it adequate expression." *Id.* at 328.

⁴⁶ *Id.* at 296.

⁴⁷ *Id.* at 320.

⁴⁸ *Id.* at 294.

⁴⁹ *Id.* at 322.

⁵⁰ *Id.* at 302.

In the course of the 1968 Session of the Conference, the representative of Mexico (Suarez) observed that “[a]lthough no criteria was laid down in [draft] article 50 for the determination of *jus cogens*—the matter being left to State practice and to the case law of international courts—the character of these norms was beyond doubt.”⁵¹ Summarizing, he said:

In international law the earliest writers, including the great Spanish forerunners of Grotius, had been deeply imbued with the principles of the then prevailing natural law. They had therefore postulated the existence of principles that were derived from reason, principles which were of absolute and permanent validity and from which human compacts could not derogate.⁵²

His formulation of a definition of *jus cogens*, “[w]ithout attempting to formulate a strict definition suitable for adoption in a treaty”—read, “the rules of *jus cogens* were those rules which derived from principles that the legal conscience of mankind deemed absolutely essential to coexistence in the international community at a given stage of its historical development.”⁵³ As to the nature of *jus cogens*, he further observed:

There had always been principles of *jus cogens*. Although few in number at the time when inter-state obligations were equally few, they had been increasing since and would continue to increase with the expansion of human, economic, social and political relations. The norms of *jus cogens* were variable in content and new ones were bound to emerge in the future, for which provision was made in [draft] article 61. Others might cease in due course to have the character of *jus cogens*, as had happened in Europe in regard to the doctrine of religious unity and the law of the feudal system.⁵⁴

The representative of Lebanon (Fattal), speaking during the same Session, said:

For the first time in history almost all jurists and almost all States were agreed in recognizing the existence of fundamental norms of

⁵¹ *Id.* at 294. In the course of the same Session of the Conference, Sir Humphrey Waldock (Expert Consultant) explained that “the International Law Commission had based its approach to the question of *jus cogens* on positive law much more than on natural law” and that “[i]t was because it had been convinced that there existed at the present time a number of principles of international law which were of a peremptory character that it had undertaken the drafting of article 50.” *Id.* at 327-28.

⁵² *Id.* at 294.

⁵³ *Id.*

⁵⁴ *Id.* See art. 64 of the Vienna Convention, quoted in note 44 *supra*.

international law from which no derogation was permitted, and on which the organization of international society was based. The norms of *jus cogens* had a long history but had crystallized only after the Second World War. In spite of ideological difficulties, a shared philosophy of values was now emerging and the trend had been sharply accelerated by the growth of international organizations.⁵⁵

The representative of the Federal Republic of Germany (Groepper) observed:

The emergence of the notion of *jus cogens* in international law was a direct consequence of social and historical evolution, which had had a far-reaching influence on the development of international law. Technical interdependence and the multiplication of links between States had produced a situation where the ordered coexistence of States became impossible not only in the absence of some sort of international public order but also for want of certain concrete rules from which derogation was not permitted.⁵⁶

The representative of Austria (Verosota) pointed out:

In paragraphs (2) and (3) of the Commentary the [International Law] Commission had listed a number of negative criteria concerning rules of *jus cogens*: first, there was no criteria for such a norm; second, the majority of the rules of international law did not have that character; third, a provision in a treaty was not *jus cogens* merely because the parties stipulated that no derogation from that provision would be permitted; fourth, it was not the form of a rule but the nature of the subject matter with which it dealt that might give it the character of *jus cogens*; and fifth, peremptory norms of international law were not immutable.⁵⁷

Of these five criteria, he observed, "the fourth, concerning subject matter, was particularly important."⁵⁸

While there was practical unanimity that there exist rules of *jus cogens* in public international law, there was considerable opposition voiced during the 1968 and 1969 Sessions of the Vienna Conference as to inclusion of draft article 50, particularly because of objection to its drafting and the scope of the text.⁵⁹ Delegates of certain

⁵⁵ *Id.* at 297.

⁵⁶ U.N. Conference on the Law of Treaties, 2d Sess., Vienna, 9 Apr. - 22 May 1969, Official Records, at 95-96, A/Conf. 39/11/Add.1 [hereinafter cited as 2d Sess. Conference].

⁵⁷ 1st Sess. Conference, *supra* note 44, at 303.

⁵⁸ *Id.*

⁵⁹ 2d Sess. Conference, *supra* note 55, at 105.

countries objected that the article contained no definition or at least no "satisfactory" definition of *jus cogens*;⁶⁰ that there was "no criteria for identifying the rules of *jus cogens*;"⁶¹ that the text was "too wide" in scope;⁶² that it "defined norms of *jus cogens* by their effect, not by their content;"⁶³ and that the "effect of [draft] article 50 was to render void the treaty as a whole."⁶⁴ In addition to objecting that there was no indication in the article as to the actual content of existing rules of *jus cogens*,⁶⁵ it was objected that the article did not give absolutely clear guidance as to the manner in which rules of *jus cogens* emerged and could be identified.⁶⁶ A number of countries favored a listing in the article of rules of *jus cogens*, or even some listing by way of illustration.⁶⁷ Further, it was urged that the article was "imprecise"⁶⁸ and that it "would only be a source of uncertainty."⁶⁹

The representative of France (M. de Bresson) stated that "to recognize the existence of international norms of *jus cogens* was merely to acknowledge reality."⁷⁰ However, he sought a definition of *jus cogens*, explaining:

Where national jurisdictions were concerned, certain States like France, which incorporated treaty law directly into internal law, would have reason to fear that the fact that those jurisdictions would have to assess the validity of treaties in relation to a supreme, undefined law, would lead to the utmost confusion.⁷¹

Several delegations were concerned about "political misuse of article 50 in the future."⁷² On the meaning of *jus cogens*, the representative of Switzerland (Ruegger) called for "more thorough study than it had so far been given," stating that "the question should be treated with great caution."⁷³ And the representative of Norway (Dons) urged that the International Law Commission "had tried to

⁶⁰ *Id.* at 97, 107.

⁶¹ 1st Sess. Conference, *supra* note 44, at 320, 323.

⁶² *Id.* at 326.

⁶³ *Id.*

⁶⁴ 2d Sess. Conference, *supra* note 55, at 98.

⁶⁵ *Id.* at 97, 106.

⁶⁶ *Id.* at 97; 1st Sess. Conference, *supra* note 44, at 301.

⁶⁷ 1st Sess. Conference, *supra* note 44, at 316, 318, 324.

⁶⁸ 2d Sess. Conference, *supra* note 55, at 93-94.

⁶⁹ *Id.* at 103.

⁷⁰ 1st Sess. Conference, *supra* note 44, at 309.

⁷¹ *Id.*

⁷² *Id.* at 312, 324.

⁷³ *Id.* at 323.

do too much too quickly."⁷⁴

In sum, there exist overriding rules of *jus cogens* in international law. There are, however, comparatively few holdings or writings as to the international rules or peremptory norms *jus cogens* that override, or in future will override, other rules of customary or conventional international law. A listing, that is to say, identification in a general way of certain peremptory norms of rules of international law (*jus cogens*) existing at any period of time cannot be done with complete precision, enveloped as such rules of *jus cogens* or peremptory norms are bound to be in word symbols definable by more precise interpretations with the passage of time. Also, because of changes and developments as civilization moves on, such listing can never be completely invariable or exhaustive.

Nevertheless, faced with world conditions as they are, there is, in my view, a need for further clarification and utilization of *jus cogens* in international law. A starting point may be the identification and listing of certain peremptory norms (*jus cogens*) that now exist, or may be (or should be) developing and in the offing. After all, the identification and listing of human rights in the Declaration of Human Rights of the United Nations gave considerable impetus to world progress in that direction.

I submit my own projected list identifying certain matters presently outlawed or needing to be outlawed by world consensus under international law (*jus cogens*):

A PROJECTED LIST OF PEREMPTORY NORMS OF INTERNATIONAL LAW (JUS COGENS)

The following acts are outlawed:

1. Genocide.
2. Slavery and the slave trade.
3. Piracy.
4. Political terrorism abroad, including terroristic activities.
5. Hijacking of air traffic.
6. Recourse to war, except in self-defense.
7. Threat or use of force against the territorial integrity or political independence of another State (intervention).
8. Armed aggression.
9. Recognition of situations brought about by force, including fruits of aggression.

⁷⁴ *Id.* at 324-25.

10. Treaty provisions imposed by force.
11. War crimes ("Superior orders" *prima facie* no answer to war crimes).
12. Crimes against peace and humanity ("Superior orders" *prima facie* no answer).
13. Offenses against the peace and/or security of mankind.
14. Dispersion of germs with a view to harming or extinguishing human life.
15. All methods of mass destruction (including nuclear weapons) used for other than peaceful purposes.
16. Contamination of the air, sea, or land with a view to making it harmful or useless to mankind.
17. Hostile modification of weather.
18. Appropriation of outer space and/or celestial bodies.
19. Disruption of international communications with a view to disturbing the peace.
20. Economic warfare with the purpose of upsetting:
 - (a) the world's banking systems;
 - (b) the world's currencies;
 - (c) the world's supply of energy; or
 - (d) the world's food supply.

Subjects encompassed within the above list offer serious challenge to statesmen, international lawyers, and humankind the world over. Hopefully, considerable progress will be made in international law and its strengthening in these and others matters of grave international concern by the year 2000 A.D. and in the years beyond. Otherwise, human existence on Planet Earth may become unbearable, if not impossible. International law has "miles and miles to go."

GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW

VOLUME 7

1977

ISSUE 2

1976-1977
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