THE CONCEPT OF *JUS COGENS* IN THE LAW OF TREATIES

V. NAGESWARA RAO

A DISSERTATION SUBMITTED FOR THE PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE DEGREE OF MASTER OF PHILOSOPHY OF THE JAWAHARLAL NEHRU UNIVERSITY, SCHOOL OF INTERNATIONAL STUDIES.

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V. NAGESWARA RAO

ABBREVIATIONS

AJIL	American Journal of International Law
BYIL	British Yearbook of International Law
CLP	Current Legal Problems
ICLQ	International and Comparative Law Quarterly
IJIL	Indian Journal of International Law
JILI	Journal of the Indian Law Institute
Mod. L.R.	Modern Law Review
Tex. L R	Texas Law Review
Tu L R	Tulane Law Review
UNCLT	United Nations Conference on the Law of Treaties
UTLJ	University of Toronto Law Journal
VJIL	Virginia Journal of International Law
YBILC	Year Book of International Law Commission
YBWA	Year Book of World Affairs

Chapter I

INTRODUCTION

Chapter I

INTRODUCTION

The Vienna Convention on the Law of Treaties of 1969 is, undoubtedly, a most significant landmark in the annals of codification and progressive development of international law in general, and of the law of treaties in particular.[1] The Convention was substantially the handiwork of the International Law Commission (ILC)[2] which, with a bold and innovating spirit,

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1. The former Secretary General U Thant said: "History will surely prove this Convention to be one of the most significant ever adopted in the course of the progressive development and codification of international law." Quoted in J.S. Stenford, "The Vienna Convention on the Law of Treaties", University of Toronto Law Journal (hereinafter quoted as UTLJ), vol. 20 (1970), p. 18.

2. The International Law Commission (ILC) was engaged in the codification and progressive development of the law of treaties from 1949 to 1966. Four eminent international lawyers - all belonging to the United Kingdom - worked successively as Special Rapporteurs and assisted the Commission in its work. J.L. Brierly, the first Rapporteur, submitted in all three Reports (First Report A/CN.4/23, Yearbook of International Law Commission (hereinafter referred to as YBILC), vol. 2 (1950), pp. 222-43; Second Report, A/CN.4/43, ibid., vol. 2 (1951), pp. 70-73; Third Report, A/CN.4/54, ibid., vol. 2 (1952), pp. 50-56). On Brierly's resignation, Sir Hersch Lauterpacht was elected unanimously as Special Rapporteur and he submitted two Reports (First Report, A/CN.4/43, ibid., vol. 2 (1953), pp. 90-162; Second Report, A/CN.4/87, ibid., vol. 2 (1954), pp. 123-9); on Sir Hersch's appointment as a judge of the International Court of Justice, Sir Gerald Fitzmaurice became Special Rapporteur and submitted five Reports (First Report, A/CN.4/101, YBILC, vol. 2 (1956), pp. 104-28; Second Report, A/CN.4/107, ibid., vol. 2 (1957), pp. 16-70; Third Report, A/CN.4/115, ibid., vol. 2 (1958), pp. 20-46; Fourth Report, A/CN.4/120, ibid., vol. 2 (1959), pp. 37-81; Fifth Report, A/CN.4/130, ibid., vol. 2 (1960), pp. 69-107). Sir Humphrey Waldock succeeded Sir Gerald as Special Rapporteur on the latter's elevation to the Bench of the ICJ and submitted in all six Reports (First Report,

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attempted to bring about an element of order and systematization in the law of treaties which has always been notorious for its uncertainty and imprecision.[3] The Commission has, indeed, struck

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A/CN.4/144, YBILC, vol. 2(1962), pp. 27-80, with an addendum, A/CN.4/145, ibid., vol. 2(1962), pp. 80-83; Second Report, A/CN.4/156 and Add. 1-3, ibid., vol. 2 (1963), pp. 36-94; Third Report, A/CN.4/167 and Add. 1-3, ibid., vol. 2 (1964), pp. 5-65; Fourth Report, A/CN.4/177 and Add.-1-2, ibid., vol. 2 (1965), pp. 3-72; Fifth Report, A/CN.4/183 and Add. 1-4, ibid.,vol. 2 (1966), pp. 1-50; Sixth and final Report, A/CN.4/186 and Add. 1-7, ibid., vol. 2 (1966), pp. 51-103). These Reports of Special Rapporteurs formed the basis of discussion by the International Law Commission, which, in turn, submitted periodical Reports to the General Assembly. The contribution of Sir Humphrey Waldock has been substantial on the final formulation of the Draft Articles by the ILC. The ILC's final draft articles (see Report on the work of its eighteenth session to the General Assembly, A/6039/Rev.1, YBILC, vol. 2 (1966), pp. 172-4) formed the basis for the deliberations of the U.N. Conference on the Law of Treaties at Vienna convened by the General Assembly in pursuance of its Resolution 2166 (XXI) of 5 December 1966. The Conference was held in two sessions; the first was held from 26 March to 24 May 1968 (United Nations Conference on the Law of Treaties (UNCLT), First Session, Official Records, 1968) and the Second Session from 9 April to 23 May 1969 (UNCLT, Second Session, Official Records, 1969). The ILC Draft Articles were first considered by the Committee of the Whole consisting of the delegations of all the 110 States participating in the Conference. Fifteen International Organisations also sent observers to the Conference. The Committee of the Whole passed the articles with or without amendments by a simple majority. The Committee's Report was later considered by the Conference in a Plenary Session where the requisite majority for adopting an article or an amendment to it was two-thirds of the members present and voting. The Convention as finally adopted consists of 85 Articles and an Annex (UNCLT, First and Second Sessions, Official Records, Documents of the Conference, pp. 289-301). The Convention was opened for signatures on 23 May 1969. As on 31 December 1972, seventeen States have ratified or acceded to the Convention. See Multilateral Treaties in Respect of Which the Secretary-General Performs Depository Functions: List of Signatures, Ratifications and Accessions etc. as at 31 December 1972, Doc. ST/LEG/SER/6 (New York, 1973), pp. 423-4.

3. As Sir Hersch Lauterpacht pointed out, in the law of treaties, apart from the principle of pacta sunt servanda, "there is little agreement and there is much discard at almost every point". American Journal of International Law (hereinafter quoted as AJIL), vol. 49 (1955), p. 17.

a balance between lex lata and lex ferenda[4] in its draft articles; and while it preserved what was found acceptable in the existing customary international law on the subject, it did not hesitate to fill in the gaps and offer solutions to hitherto unresolved problems in the law of treaties.

Jus Cogens Provisions - Important and Controversial

By far the most important and, in retrospect, the most controversial[5] of the provisions of the Convention on the Law of Treaties, are the provisions relating to the invalidity of treaties conflicting with rules of jus cogens. Those provisions are important because they represent the incorporation for the first time in a multi-lateral convention a principle based on municipal law analogy which renders void a treaty whose object is illegal or against public policy. Unlike the other articles on invalidity of treaties, the articles regarding jus cogens relate to the legality of the object of the treaty rather than to the circumstances of its conclusion.[6] These articles have

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4. See the statement of the Indian Member at the 906th Meeting of Sixth Committee of the General Assembly, General Assembly Official Records (GAOR), Sixth Committee, 1966, p. 27.

5. The main provision relating to jus cogens in the Convention has been characterized as "one of the most controversial articles produced by the Commission." Richard D. Kearney and Robert E. Dalton, "The Treaty on Treaties", AJIL, vol. 64 (1970), p. 535; and also as having "the formidable reputation of being one of the most difficult provisions", de Dresson, French Delegate at the Vienna Conference, United Nations Conference on the Law of Treaties (UNCLT), Official Records of the First Session, Vienna, 26 March - 24 May 1968, Meetings of the Committee of the Whole, p. 309, para 26.

6. Stanford, n. 1, p. 65.

also become controversial principally for two reasons: Firstly, those provisions of the Convention seek to set limits on the hitherto practically unbridled treaty-making power of States[7] and are, therefore, considered as restricting their "sovereignty". Secondly, the very existence, scope and effects of jus cogens in international law are considered to be doubtful and, consequently, it is felt that a hasty reception of that concept without adequate conceptual analysis and procedural safeguards may only lead to a situation in which unscrupulous and irresponsible states would use it as a handy instrument for unilateral denunciation of treaties for unburdening themselves of inconvenient obligations.[8] It was said that jus cogens as a new ground of invalidity might only join the ranks of its sister-doctrine of Rebus sic stantibus and endanger the very stability of treaty relations on which the very existence and future of international law depend.

Support for International Jus Cogens

However, the protagonists of the concept of jus cogens argue that the present lack of clarity of its content and effects is no justification for its outright condemnation and

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7. See the observations of de Luna, YBILC, vol. 1 (1963), p.72.

8. See generally the criticism of Georg Schwarzenberger, "International Jus Cogens?", Texas Law Review, March 1965; Reprinted in the Concept of Jus Cogens in International Law, Papers and Proceedings of Conference on International Law at Lagonissi (Greece), held under the auspices of Carnegie Endowment for International Peace (European Centre) in 1967, pp. 117-40; and also reprinted with some changes as "The Problem of International Public Policy", in Current Legal Problems, 1965, p. 191 ff.

rejection. In the case of International Law which, to a great extent, is a "law in the making", it would be unwise to make the evolution of normative order always depend on a parallel development of institutional safeguards; otherwise International Law would never develop.[9] It is said that evolution of new substantive norms will find its own level in the course of time in the evolution of corresponding procedural norms. While it is true that there is always a possibility of abuse of the concept of jus cogens, it is equally true in the case of many other concepts not only of international law but also of municipal law. If the concept is found necessary it must be recognised and adopted at the earliest. The possibility of its abuse is no argument for its abandonment.

Need for Jus Cogens

There is little doubt that a structure of world public order founded upon the "stability" of international relations derived from illegal and unlawful treaties, is bound to be too weak and shaky and may crumble even at the slightest jolt. International law and international lawyers cannot afford to

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9. Yasseen (Iraq) stated that it is "dangerous to subordinate the development of substantive rules of the international legal order to the development of its institutions. If the absence of institutional machinery were to be invoked as a ground for not formulating substantive rules which were already part of contemporary international law, the development of international legal order as a whole would be placed in jeopardy." UNCLT, First Session, 1968, Official Records of the Committee of the Whole, p. 296, para 25. (Statement by members and delegates in the International Law Commission, the Sixth Committee of the General Assembly and at the Vienna Conference are herein quoted as they are reported in the Official Records even though they are only summary records.)

live too long in a make-believe world abandoning the treaty, one of the principal sources of International Law, to the vagaries of the untrammelled treaty-making power of 'sovereign' states. Any system that does not incorporate built-in controls over the law-creating processes, would be like a rudderless ship in a stormy sea - all drift and no direction. Even at the risk of encountering initially a rash of unfounded claims of invalidity based upon jus cogens, it is necessary that treaty-making power, which is also an important law-making instrument, be subjected to certain legal controls so that the future of International Law is not imperilled by one of its own limbs.

But that is not to say that everything is perfect with the concept of jus cogens or with its formulation in the Vienna Convention. It will be shown in the following pages that, in spite of prolonged and sustained efforts on the part of the International Law Commission, the provisions in the Vienna Convention have not been able to completely solve the problem of identification and precise definition of jus cogens. The solutions to some of the problems relating to jus cogens and its effects, perhaps, lie in the future. The International Court of Justice, on which compulsory jurisdiction has been conferred for the interpretation and application of the provisions relating to jus cogens, will have an enormous role to play in the delineation of the content of rules of jus cogens and their application in terms of fast changing needs of contemporarneous society.

Plan of Work

An attempt will be made in the following pages to examine historically and analytically the various provisions of the Vienna Convention relating to *jus cogens*. An enquiry into the *travaux preparatories* and the juristic writings on the subject would, it is hoped, reveal the intricacies of the problems involved and the tenability of the solutions found. For the sake of facility of enquiry, the subject has been divided into chapters dealing separately with different aspects of the concept of *jus cogens*.

After making a brief enquiry into the historical background of the concept of *jus cogens*, an attempt has been made in Chapter II to examine the relationship of *jus cogens* with the municipal law concepts like public policy. Particular attention has been given to the views of publicists in favour of and against the concept of *jus cogens* in international law. It is sought to be emphasized that the paucity of judicial dicta specifically recognising and applying peremptory norms should not be regarded as a rejection of the concept of international *jus cogens*.

Chapter III deals with the drafting history of Article 53 (existing rules of *jus cogens*) and Article 64 (emergence of new rules of *jus cogens*) of the Vienna Convention. The problems of identification of rules of *jus cogens* have been brought under sharp focus and it is sought to be shown that while those problems are difficult and acute, they are not insurmountable.

The extent of the applicability of the principle of separability of treaty provisions to a treaty conflicting with

jus cogens, has been examined in Chapter IV.

The provisions of the Vienna Convention relating to the procedure for the settlement of disputes arising out of *jus cogens* provisions have been discussed in Chapter V. The questions relating to *locus standi in judicio* in those disputes and the status of the treaty pending settlement of the disputes have also been studied.

Chapter VI deals with the effects and consequences of the invalidity of a treaty for conflict with a peremptory norm. It is also sought to be established that Articles 53 and 64 of the Convention (dealing with conflict with an existing and emergent peremptory norms, respectively) have retroactive effects owing to the fact that the two articles incorporate rules of *lex lata* and not *lex ferenda*.

In the VIIth and last chapter, conclusions are drawn in the light of the discussion in the previous Chapters and it is believed that the provision for compulsory jurisdictions of the World Court in disputes relating to *jus cogens* would substantially mitigate the dangers of unilateral denunciation of treaties. It is also believed that the Court is likely to adopt a cautious approach in interpreting the *jus cogens* provisions of the Convention so as to produce the least disturbance on the existing treaty relations. The Chapter ends with a brief discussion on the attitude of the Afro-Asian states towards *jus cogens*.

Chapter II

THE CONCEPT OF JUS COGENS - ORIGIN, NATURE AND IMPORTANCE

Chapter II

THE CONCEPT OF JUS COGENS - ORIGIN, NATURE AND IMPORTANCE

Jus Cogens[1] has been defined by Professor Eric Suy as "the body of those general rules of law whose non-observance may affect the very essence of the legal system to which they belong to such an extent that the subjects of law may not, under pain of absolute nullity, depart from them in virtue of particular agreements."[2] As is obvious, the above definition does not concern itself only with jus cogens under International Law but with the peremptory norms of any legal system whose observance is absolutely obligatory and whose non-observance carries with it a penalty. The definition also brings out its salient feature, namely, that the "general rules of law" to be treated as jus cogens must constitute "the very essence of the legal system" so as to be indispensable in such a manner that they do not permit of any derogation by those to whom they apply. It is also significant to note that the above definition has the merit of narrowing down the scope of effects of contravention of jus cogens to "particular agreements". In other words, the scope of jus cogens is not extended to all the individual acts and omissions of the subjects but is confined

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1. Jus Cogens, a Latin term, has been translated into English as "Cogent Law" by Hans Kelsen. See Principles of International Law (New York, 1952), p. 89.

2. Eric Suy in a paper "The Concept of Jus Cogens in International La" printed in The Concept of Jus Cogens in International Law, Papers and Proceedings of Conference on International Law at Lagonissi (Greece) held under the auspices of Carnegie Endowment for International Peace (European Centre, Geneva, 1967) (Hereinafter referred to as Lagonissi Conference, Papers and Proceedings), p. 18.

only to contracts or treaties, as the case may be.

The origin of the concept of jus cogens is sometimes traced to Roman Law but it is doubtful whether the term was used in that legal system in the sense it has come to be known.[3] Even though the term jus cogens does not occur in any writings prior to the nineteenth century, "the idea of a law binding irrespective of individual Parties runs like a red thread through the whole theory and philosophy of law."[4] Among the later writers, however,[5] jus cogens has come to be used in contradistinction to jus dispositivum[6] which means rules that

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3. Georg Schwarzenberger refers to two statements in the Digest of Justinian: privatorum Conventio juri publico non derogat; and Juri publicum privatorum pactis mutari non potest; see Schwarzenberger's International Law and Order (London, 1971), p. 27 and "International Jus Cogens?" in Lagonissi Conference, Papers and Proceedings, p. 118. However, jus publicum is to be understood in a very wide sense so as to include not only State-made law but also rules of public policy. Suy, n. 2, p. 18. However, it appears that jus publicum was used synonymously with jus cogens so as to include all law. H.F. Jalawicz, Roman Foundations of Modern Law (London , 1957), p. 51. Thus, while the idea behind the concept of jus cogens was already prevalent, the term jus cogens as such did not occur in its present connotation in any of the writings of Roman jurists. Ibid.

4. Suy, n. 2, p. 19.

5. The term jus cogens appears to have been first used by D.C.F. Gluck; Jalowicz, n. 3, p. 51, f.n. 4.

6. Schwarzenberger defines jus dispotivum as "law capable of being modified by contrary consensual engagements" and jus cogens as "law binding irrespective of the will of individual parties": International Law and Order (London, 1971), p. 5. Kelsen translated jus dispositivum in English as "yielding law": n. 1, p. 89. However, von Gluck makes a distinction between jus cogens and jus permissivum, the latter being synonymous to jus dispotivum. Suy, n. 2, p. 19.

yield to the will of the contracting parties. This distinction appears to generally coincide with the other distinctions made by naturalist writers, like Wolff and Vattel, between jus necessarium (necessary law) and jus voluntarium (voluntary law); while the former could not be altered by the will of the parties, the latter was a product of the presumed, express or tacit will of the parties.[7] However, jus cogens as a code of rules binding on parties irrespective of their will, was obviously repugnant to the positivist school and did not merit any recognition in the writing of the jurists belonging to that school.

Jus Cogens and Public Policy

Sometimes, jus cogens is used as a synonym to the concepts of ordre public, offentliche ordnung or public policy[8] which are in vogue in civil and common law systems. While public policy[9] has nowhere been satisfactorily defined, it may be stated that the concept represents the ethical and moral standards of contemporaneous society. The concept of public

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7. Alfred Verdross, "Jus Cogens and Jus Dispositivum", American Journal of International Law (AJIL), vol. 60 (1966), p. 55.

8. These terms are considered to be analogies from natural law. See Lloyd, Public Policy (1953), and Wangler, "The General Principles of Private International Law", Recueil des Cours, vol. 104 (1961), pp. 430-42.

9. A detailed discussion of "public policy" in Municipal Law and Private International Law may be found in Suy, n. 2, pp. 20-25, and on public policy generally, in Lloyd, n. 8.

policy is not susceptible to precise definition[10] because it is not a static but a dynamic and ever-changing phenomenon.[11] While it is true that there is much common ground between the concepts of *jus cogens* and public policy, it would be inaccurate to treat both of them as entirely synonymous.[12] As Professor Ganshof van der Meersch points out, "public policy is not identical with *jus cogens*. The object of a rule of *jus cogens* does not necessarily relate to public policy. On other hand, every rule of public policy belongs by its very nature to the *jus cogens*."[13] The concept of *jus cogens* covers much wider ground than public policy[14] if the latter is conceived of in the narrower sense as

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10. The Permanent Court of International Justice observed that the definition of public policy "in any particular country is largely dependent on the opinion prevailing at any given time in such country itself." *The Case Concerning the Payment of Various Serbian Loans Issued in France*, P.C.I.J. Series, A, no. 14 (1929), p. 46; and the *Case Concerning the Payment in Gold of the Brazilian Federal Loans Issued at France*, P.C.I.J. Series A, no. 15 (1929), p. 125. Sir Percy Spender observed: "Public policy in every country is in a constant state of flux. It is always evolving. It is impossible to ascertain any absolute criterion. It cannot be determined within a formula. It is a conception." Separate opinion in the *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants*, ICJ *Reports*, 1958, pp. 122-3.

11. The volatility of the concepts like public policy and morality may be gauged from the strikingly different attitudes the courts have adopted in course of time regarding socially sensitive issues like use of contraceptives and artificial insemination. For a detailed discussion of the case law in this regard, see L.C. Green, "Law and Morality in a Changing Society", *UTLJ*, p. 422 ff.

12. See Egon Schwelb, "Some Aspects of International Jus Cogens", *AJIL*, vol. 61 (1967), p. 948.

13. Quoted in Suy, n. 2, p. 19.

14. B.S. Murthi, "Jus Cogens in the Law of Treaties", a paper read at the Fifth Conference of the Indian Society of International Law, held on 12-14 January 1968, at New Delhi, *Proceedings* (1968), p. 10.

being confined to the circumstances in which national courts refuse to enforce a contract.[15] On the other hand, *jus cogens* is the sum of absolute, ordering prohibiting rules whose application to a particular situation cannot be excluded by the will of the parties.[16]

Jus Cogens and International Law

The application of *jus cogens* as a set of rules excluding individual consent, is particularly significant in the law of contracts. The freedom of contract is one of the general principles of law that finds universal acceptance in municipal legal systems. While the law delimits and demarcates the scope of individual action by a series of legal prohibitions, it also leaves a considerable area of freedom of actions to the individual through what are called permissive laws. Acting within that permitted or unprohibited field, the individuals are free to work out their relations *inter se* on contractual basis. Thus by entering into agreements, the parties lay down the terms of contract which will bind them for the future and regulate their conduct *inter se*. It is said that a contract creates a *vinculum juris* or a legal bond. The terms of the contract are *lex inter partes* or the law between the parties. The term 'lex' here is not 'law' strictly so-called but 'lex' in a most generic sense of the term. It is 'lex' because it binds them and its violation is attendant

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15. Sinclair, *Vienna Convention on the Law of Treaties* (1973), pp. 111-12.

16. Schwalb, n. 12, p. 948.

with certain evil consequences. That is why it is said modus et conventio vincunt legum - by mode of agreement law is created.

However, the 'law-creating' power of contracts is not absolute as the municipal law places many restrictions on the contractual freedom as to capacity, consent, consideration and, in particular, object. Hence, a contract entered into for an illegal or immoral purpose is considered void as being contra bonos mores.[17] The courts of law have the power to declare contracts void if they are found to be for illegal or unlawful purposes or if they are against public policy. While the individuals enjoy considerable contractual freedom, they can act only within the law and not without it.

These considerations of public policy or order public[18] which are akin to the concept of jus cogens, ought to apply with a greater force to the law of treaties because of the following considerations. A treaty is, in many respects, the international legal counterpart of the 'contract' of municipal law. However, in spite of the apparent similarities treaties and contracts differ in some vital respects, and particularly with regard to the parties and content; while individuals are generally parties to a contract, it is States which are parties

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17. Cheshire and Fifoot, Law of Contracts (London , 1972), edn 8, pp. 318-25.

18. A discussion on these concepts, as grounds for restriction on individual freedom in the context of human rights, may be found in GAOR, Third Committee, Summary Records, 1959, p. 237 ff, and 1961, p. 61 ff. However, it may be stated that "ordre public" should not be confused with "public order" of common law systems.

to a treaty. A 'treaty' has been defined in Article 2, paragraph 1(a) of the Vienna Convention as "an international agreement concluded between States in written form and governed by international law...." States are incomparably more powerful than individuals in every respect. More than that, doctrine and law have conferred upon States the almost omnipotent attribute of 'sovereignty'. This metaphorical exaggeration of 'independence' of States was, indeed, the damnosa hereditas of the positivist-consensualist doctrine from which the present day International Law and lawyers are struggling to free themselves but without significant success.

The other distinction between treaties and contracts is regarding their content. Though a treaty is essentially an agreement between states, it is something more also. While a treaty can do the function of a contract or a conveyance as in the case of cession of territory, it can also be the fundamental document or constitution of an international organization like the Charter of the United Nations. More than anything else, a treaty is, in the present unorganized international society, one of the most important sources of international law itself.[19] While a contract is 'law' in the metaphorical sense of the term, treaty is 'law' in a very real sense.

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19. Sir Humphrey Waldock stated: "... Treaties today serve many different purposes: legislation, conveyance of territory, administrative arrangements, constitution of an international organization etc. as well as purely reciprocal contracts." Waldock's Second Report, YBILC, vol. 2 (1963), p. 56, para 14; see also the remarks of Yasseen (Iraq): "In International Law, however, the contracting parties themselves were the legislators and created the rule of law". Ibid., vol. 1 (1963), p. 63, para 39.

The maxim pactus at conventio vincunt legum has, naturally, greater application in international law than in municipal law.[20]

The heady doctrine of 'sovereignty of States', combined with the truly law-creating efficacy of treaties, has naturally given a fillip to the positivist doctrine that nothing is binding on sovereign States unless they give their consent to it. Though the consensual basis of the binding nature of a rule of law is a patent contradiction in terms, the Positivism-Consensualism has succeeded in holding its sway right up to the present day because of the unholy effects of the "Holy Alliance" of 'sovereignty' and 'law-making treaty'. This has led some jurists to believe that there are practically no legal limits on the treaty-making power of States.

Does Jus Cogens exist in International Law?

The fact that there is a great need for the acceptance of jus cogens in international law does not necessarily prove that the concept really exists in that field.

As pointed out above, the existence of jus cogens as a body of rules that cannot be derogated from by States was entirely alien to the Positivist-Consensualist approach which traces all rules of international law to the fountain source of consent of States.[21] Legal positivism completely denuded international law of all considerations of ethical and moral

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20. Brierly, Law of Nations (New York, Oxford, 1963), Waldock, ed., edn 6, p. 57.

21. See D.P. O'Connell, International Law (London, 1970), vol. 1, p. 244; also Sinclair, n. 15, pp. 112-13.

import and derided all attempts to the contrary as founded on unrealistic hypotheses. The barren legalism of the Positivist School considerably stunted the evolution of the concept of jus cogens in international law.

In fact, a discussion on jus cogens rarely occurred in the writings of jurists of the past, and even of the modern times, and when mentioned it merited only scant or oblique reference.[22] While the Positivist writers were naturally reluctant to accept the concept of jus cogens the Naturalists unhesitatingly recognised its existence in terms of 'higher law'. As already pointed out, Wolff and Vattel asserted that all law cannot be varied by agreements. Heffter also accepted the principle of invalidity of a treaty for physical or moral impossibility as in the case of slavery and encroaching upon the rights of third states.[23] Bluntschli[24]

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22. Verdross, n. 7, p. 55.

23. Ibid., p. 56 and R.P. Dhokalia, "Problems Relating to Jus Cogens in the Law of Treaties" in S.K. Agrawala, ed., Essays on International Law (1972), p. 158.

24. Article 410 of Bluntchlis Code provides: "The obligation to respect treaties rests upon conscience and the sentiment of justice. The respect for treaties is one of the necessary bases of the political and international organisation of the world. Consequently treaties which infringe general human rights or the necessary principles of international law shall be null and void."

From the above article, it is clear that Bluntschli thought that "the respect for treaties" which was so very "necessary" was not in any way affected by a provision for invalidity of treaties which are illegal or unlawful. The word "consequently" in the last sentence of the above article indicates that such a provision would, on the other hand, strengthen the respect for treaties.

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and Fiore[25] included, in their Draft Codes of International Law, provisions akin to jus cogens.

The existence in international law of the concepts like public policy or ordre public depends upon whether or not there is a sufficient degree of community feeling in an international society. While Lauterpacht[26] and others accept the existence of

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Article 411 of Bluntschli's Code says: "Treaties which (a) introduce, extend or protect slavery; (b) deny all rights to aliens; (c) are inconsistent with the principles of the freedom of the seas; (d) provide for prosecution by reason of religious opinion; are repugnant to recognised human rights and therefore void." It is also very significant that Bluntschli's code declares, as void a treaty whose object is use of force. Thus, Article 412 provided: "the treaties the object of which is to: (a) establish the domination of one power over the whole world (b) eliminate by violence a viable State which does not threaten the maintenance of peace, are repugnant to international law and therefore void." See Brierly's Second Report, Appendix D, YBILC, vol. 2 (1950), p. 246.

25. Fiore's Draft Code entitled "International Law Codified" provides in express terms the legality of object as one of the necessary ingredients of a valid treaty. Thus, Article 748 which deals with "Requirements for the Validity of Treaty" mentions "A lawful and attainable object, according to the principles of international law" as one of such requirements. Obviously, 'a lawful and attainable object' refers to moral and physical impossibility of performance of a treaty. Thus, Article 760 of the Code dealing with "Lawful subject-matter of treaties", provides: "No State may by a treaty engage to do anything contrary to positive international law or to the precepts of morals or universal justice". Brierly's Second Report, Appendix E, YBILC, vol. 2 (1950), p. 247.

However, David Dudley Field's Draft Code did not contain any similar provisions relating to legality of object of a treaty. See Brierly's Second Report, Appendix C, YBILC, vol. 2 (1950), p. 245.

26. Oppenheim's International Law: A Treatise (1955), Lauterpacht, ed., edn. 8, vol. 1, p. 11.

such an international community, Schwarzenberger disputes its existence in the present day unorganized society of States. He observes that "to conceive international relations in terms of a community[27] requires a certain sense of humour."[28]

It is true that the present day international community is, institutionally, far from being adequate when compared to national societies, that international law is still in the initial stages of 'a law in the making' and that the amount of decentralisation and individual determination still prevalent in the system does not entitle it to be called "an effectively established order"[29], but to deny the very existence of an international community is to deny the existence of rule of law in international relations. The necessity for co-existence and interdependence and the compulsions of an ever-shrinking world have engendered a feeling of oneness, in spite of apparent diversity, among the peoples of the world, born out of a growing realisation that if ever a third global war breaks out, there will be only one victory - that is, Death. Even if this is characterised as an argument of fear, it cannot be denied that the peoples of the world share equally

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27. Schwarzenberger makes a distinction between a 'society' and 'community'. A 'society' is, according to him, "a loose type of association, as distinct from a community"; a 'community' is, on the other hand, "a social group which is more highly integrated than a society". Schwarzenberger, n. 6, p. 5.

28. Schwarzenberger, "International Law and Society", Yearbook of World Affairs(London), 1947, p. 160.

29. See Julius Stone, "The Problem of Sociology of International Law", Recueil des Cours (Leiden), vol. 1 (1956), p. 129.

the hope for survival. Apart from this, there is also the realisation that no state, however rich, is so self-reliant in every respect as to be able to live in isolation; the exploitation of economic wealth and natural resources of the earth as a common heritage of mankind has, among others, its own strong unifying effect.

However, the views of Schwarzenberger on the questions of international public policy and ius cogens need to be stated and examined in greater detail. His objections to the recognition and acceptance of concepts like public policy in international law, stem from his belief that they are all a priori postulates and that at best they are formulations de lege ferenda. Schwarzenberger points out that the concepts of public policy and ordre public in national legal systems "are an essential part of the legal fabric and are closely related to the underlying order of overwhelming physical coercion upon which every effective legal system must ultimately rest."[30] Such a coercive order is still absent in the international society and, hence, he concludes that "international law on the level of unorganized international society does not know of any rules of public policy"[31], and that "alleged rules of international public policy on no other evidence than postulates of natural law or other metalegal norms must be ignored on the level of lex lata."[32] He considers

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30. Schwarzenberger, Lagonissi Conference, Papers and Proceedings, p. 119.

31. Ibid., p. 138.

32. Ibid., pp. 119-20.

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treaties, custom and general principles of law as three exclusive law-creating processes,[33] and if the rules of *jus cogens* "have been received into international law through one of the three law-creating processes they are as acceptable as rules of international law as those of any other provenance."[34] He then proceeds to examine whether rules of *jus cogens* have been received into the corpus of international law through any of the three "exclusive law-creating processes". Regarding customary international law, his enquiry centres round what he considers to be "the seven fundamental principles of customary international law" - namely, sovereignty, consent, recognition, good faith, international responsibility, freedom of the seas, and self-defense.[35] He finds that none of those principles is entitled to the status of a rule of *jus cogens* as each of them may be modified by States in their relations *inter se*. However, he considers that "the rules underlying the principle of consent offer parties the opportunity to transform any of the rules of international customary law into *jus cogens* or to give this character to any rules of their own making."[36] While "such consensual *jus cogens* may be established on a

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33. See Schwarzenberger, *International Law* (1957), vol. 1, edn. 3, pp. 25-30; and *The Inductive Approach to International Law*, Ch. I.

34. Schwarzenberger, n. 30, p. 120, fn. 14.

35. Ibid., p. 120; see for a detailed discussion of these fundamental principles: Schwarzenberger, "The Fundamental Principles of International Law", *Recueil des Cours*, vol. 87 (1955-1), p. 195 ff. and also *Inductive Approach to International Law* (London, 1965), Ch. 4 and *International Law and Order* (London, 1971), Ch. 4.

36. Schwarzenberger, n. 30, p. 121.

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bilateral or multilateral footing", "its legal effects are limited to the contracting parties".[37] Further, "evidence to the contrary is either spurious or rests on acquiescence, recognition, or estoppel on other grounds - i.e., active or passive commitments by third parties."[38]

According to Schwarzenberger, the position is "very similar" regarding the second of the exclusive law-creating processes, namely, law-making treaty, because "treaties bind the parties, and none but the parties".[39] The contracting parties may establish rules of *jus cogens* through treaties and give them the status of 'higher law' but "the range of such treaties is limited to the contracting parties".[40]

Regarding the third exclusive law-creating process, i.e., general principles of law accepted by the civilised nations, Schwarzenberger says that "these general legal principles are the direct or indirect product of treaty law". The former type is illustrated by article 38 (1)(c) of the Statute of the World Court, and the latter, by the practice of other international judicial institutions which consider themselves authorised to apply such general principles of law as part of *jus gentium* they administer. "Because of their consensual origin, these general principles may constitute *jus cogens* only *inter partes*".[41]

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37. Ibid.

38. Ibid.

39. Ibid., p. 129.

40. Ibid.

41. Ibid., pp. 130-1.

Hence, Schwarzenberger says that "in the absence of clear evidence of international *jus cogens*, the freedom of contract of the subjects of international law is unlimited."[42] There can be only "de facto and commonsense limits"[43] on such a freedom. Treaties legalizing piracy, slave trade etc. ("Stock illustrations") are, at the present juncture, too hypothetical and if, nevertheless, such treaties are entered into, they are "symptomatic of a deeper malaise".[44] However, Schwarzenberger thinks that "the principles of the United Nations and corresponding forms of *jus cogens* present attempts at the creation of consensual rules of international public policy."[45] Nevertheless, he considers that "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 supra-national European communities, to constitute more than international quasi-orders."[46]

The above rather detailed statement of the views of Schwarzenberger is considered necessary because he is generally taken to be the greatest critic of the concept of international *jus cogens*. Before a criticism of his views is made, it must be pointed out that Schwarzenberger is not, and was never, an antagonist of the concept of public policy or *jus cogens*, as

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42. Ibid., p. 122.

43. *The Inductive Approach to International Law*, p. 100.

44. Schwarzenberger, n. 30, pp. 126-7.

45. Ibid., p. 139.

46. Ibid.

such, but he contends that any recognition of the concept in international law can be only *de lege ferenda* and not *de lege lata*.[47]

Some eminent international jurists have attempted to give an effective reply to the criticism of Schwarzenberger. As Schwarzenberger has conceded that States can, by entering into treaties, elevate the existing rules of International Law to the status of *jus cogens* or even create new rules of *jus cogens*, the whole controversy centres round the question whether the rules of *jus cogens* are already part of customary

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47. Dr W.C. Jenks observed that Schwarzenberger "rejects the concept of international public policy, and thus eliminates, on somewhat doctrinaire grounds, what may prove to be an important element in the future development of the law". See: *The Prospects of International Adjudication* (London: New York, 1964), p. 621. Dr Jenks' observations related to the views expressed by Schwarzenberger in his *International Law*, vol. 1, pp. 425-7. However, at those pages, while Schwarzenberger rejected the existence of rules of international public policy as *lex lata*, he also observed: "The very freedom which the rules underlying the principle of consent give to the subjects of international law, enables any number of them to transform by way of treaty any particular rule of existing international law into *jus cogens* or to create new rules of *jus cogens*. Until such an international public order, which has been established on a consensual basis, has reached the stage of absolute universality, it is advisable to call it an international quasi-order". *Ibid.*, p. 427. Referring to Dr Jenks' criticism, Schwarzenberger observes: "The question with which I was concerned in Volume I of *International Law as Applied by International Courts and Tribunals* was not my personal Predilection for accepting, or rejecting the 'concept of international public policy', but the issue whether any international judicial institution has actually applied rules which can be described as forming part of an international *jus cogens*." *Inductive Approach to International Law*, pp. 122-3. After referring to his statement in *International Law*, Volume I quoted above, he proceeds to ask: "Can these passages be described with any claim to accuracy as a rejection of the concept of international public policy, or as elimination of a potentially 'important element in the further development of international law'?", *ibid.*, p. 123.

international law. Verdross, a staunch protagonist of the concept of international jus cogens, opines that "the customary law of the former unorganised international society had already accepted certain limits on the liberty of states to conclude treaties by its recognition of the 'general principles of law recognized by civilised nations' as a subsidiary source of general international law."[48] Verdross observes that the principle forbidding contracts contra bonos mores is one of those general principles, "because no juridical order can recognise the validity of contracts obviously in contradiction to the fundamental ethics of a certain society or community. It may be said that no other general principle of law is so universally accepted as this one."[49] The validity of this general principle is also recognized in International Law because "no contrary norms of customary or conventional international law exist".[50] The inclusion of 'general principles in Article 38 sub-paragraph 1(b) of the Statute of the World Court, is not by way of innovation but merely codification of "an old practice of international arbitration

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48. Verdross, n. 7, p. 61.

49. Ibid. and see also "Forbidden Treaties in International Law", AJIL, vol. 31 (1937), p. 573.

50. Verdross, n. 7, p. 61.

in this field".[51]

The above approach of Verdross to the existence of international *jus cogens*, implies that he agrees with Schwarzenberger that the three sources of international law are 'exclusive'; and consequently, Verdross attempts to locate *jus cogens* in the omnibus 'general principles'. However, such an approach is not free from difficulties. Firstly, 'general principles' as a source of international law is much weaker when compared to treaties and custom, and the World Court may have recourse to these general principles only when no binding principle of customary or conventional international law is found applicable.[52] Any attempt to locate the peremptory norms of *jus cogens* in the subsidiary and amorphous source of 'general principles' in Article 38,

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51. Ibid. By saying this, Verdross impliedly rebuts the argument of Schwarzenberger that the general principles of law are the direct or indirect product of treaty law". See p. 22 above.

    However, it is interesting to note that in their works on 'general principles', neither Lauterpacht nor Bin Cheng make any mention of *jus cogens* as a general principle of law accepted by the civilised nations. See Lauterpacht, Private Law Sources and Analogies of International Law (London, 1927); Bin Cheng, General Principles of Law (London, 1953). See also Sinclair, n. 15, pp. 113-14.

52. Verdross thinks that "this argument does not take into consideration that the principle of merely subsidiary validity of the general principles of law cannot be true without exception. It is only reasonable as far as it applies to non-compulsory norms." "Forbidden Treaties in International Law", AJIL, vol. 31 (1937), p. 573. However, the attitude of the Permanent Court of Justice and also of the International Court of Justice towards 'general principles' as a source does not bear out the validity of a contention that reads into 'general principles' a segment of overriding peremptory norms.

paragraph (1) would be self-defeating and drain the essence out of such norms. Secondly, the statement of Verdross that the principle of the invalidity of treaties contra bonos mores should be treated as a 'general principle of law' because "no contrary norms of customary or conventional international law exist", demonstrates the element of self-contradiction inherent in such an approach. Thirdly, if 'general principles' imply private law analogies, the difficulties involved in automatic extension of domestic law notions to international law are too great to be resolved in the foreseeable future.[53] Even otherwise, jus cogens as a 'general principle' can only give little satisfaction to non-positivist writers because, after all, Article 38 of the Statute of the Court is itself a product of agreement between

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53. In her recent study on the concept of jus cogens Marek points out that the necessary conditions for the effective application in municipal law of nations of public policy or ordre public, are either non-existent or exist only in a rudimentary form in the contemporary international society. Those conditions are: (1) In any mature municipal legal system, there exists a hierarchy of legal norms - the Constitution, statutes, regulations, judicial decisions and administrative acts. (2) In municipal law, there is the clear distinction between subjects and legislators. The former do not, in general, have law-making authority. (3) In municipal law, legal rights of the subjects are, in general, heteronomous (subject to external and objective law) and not autonomous (created by subjects themselves). (4) Municipal Law restrictions on the freedom of contract are effectively enforced by sanctions imposed by State organs. (5) The municipal courts possess permanent and compulsory jurisdiction which enables them to define the limits of freedom of contract. Quoted in Sinclair, n. 15, p. 112.

States.[54] The statement of Verdross that the former customary rule of international law, which laid down certain limits on treaty-making power of states, is codified into Article 38, paragraph 1(c), does not make the matters any clearer. Even though the temptation to import the concept of jus cogens into international law as a private law analogy is great, its limitations cannot be overlooked.[55]

Fundamental and Transcendental Nature of Jus Cogens

It would appear that the importance of international jus cogens is more fundamental and transcendental than the

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54. Julius Stone, Legal Controls of International Conflict (London, 1954), pp. 144-6; also Schwarzenberger, n. 30, pp. 130-1.

    Schwarzenberger observes: "On the surface, the idea is appealing that the very existence of rules of public order in the world's leading systems of municipal law suggests distillation from these rules of a general principle of law applicable on the international level, yet to proceed in this way would mean ignoring three relevant aspects of the matter. First, there are significant structural differences between, on the one hand, between weak society laws, such as the law of unorganized international society and international society organized on the confederate level of the United Nations, and on the other, the laws of highly integrated national and supranational communities. Second, international customary law does not know of any division between private law and public law. Third, it would be difficult to see what such a general principle of law would add to international law as it stands. As the rules of public policy are merely disabling rules, any general principle of law concerned with international public policy would be of purely negative character. Any such principle could be imagined at the most to amount to a rule prohibiting anything contrary to supreme interests of international society." Schwarzenberger, n. 30, p. 131.

55. See also Sinclair, n. 15, pp. 113-15 for a discussion on the difficulty relating to considering jus cogens as a general principle.

so-called three exclusive sources of international law as mentioned in Article 38, paragraph 1(a) to (c). As Article 38 itself is a product of agreement between States, little purpose is served by locating jus cogens in 'general principles' and then affirming that a "compulsory general principle" is capable of nullifying conflicting customary or conventional norms falling within sub-paragraphs (a) and (b) of Article 38(1).[57]

In the ultimate analysis, the concept of jus cogens and its peremptory character depend, not on any of the 'formal' sources of international law, but on the inherent compulsions of community interest. Functionally, no society, either of individuals or of states, can exist without a hard core of norms that are founded on the considerations of morality and the general well-being which are so very essential for civilized existence. Any theory that propounds the hypothesis of absolute and unbridled treaty making power of 'sovereign' states may revel in its pseudo-objectivity but makes little sense in the context of inexhorable social

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57. For instance, Verdross says: "A treaty norm, violative of a compulsory general principle of law, is, therefore, void; on the other hand, a general norm of customary international law in contradiction to a general principle of law cannot even come into existence because customary law must be formed by constant custom based on a general juridical conviction." Verdross, n. 52, p. 573. It is doubtful whether the International Court would ever treat a "general principle of law" to be so compulsory as to nullify a conflicting treaty; it is equally so in the case of conflicting custom also.

compulsions.[58] To hold otherwise would be to deny the existence of rule of law in international society and to deny the existence of international law.[59] The concept of 'public policy' or ordre public is no more a conceptual variant of 'higher law' or 'groundnorm'; nor is it a hangover of 'naturalist' writings. It is the necessary functional concomitant of an international community;[60] it provides the necessary ballast to keep the ship of society stable and steady.

That there are certain limitations on the treaty-making power of States is not an argument founded on considerations of social ethics alone. The ethical rationale of the argument has long since crystallised into binding legal obligation of

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58. Referring to late Sir Eric Beckett's advice to test the validity of any proposition by applying it to the extreme case and see whether it held good for that, Sinclair observes: "Testing at its limits the proposition that states are free to conclude treaties regardless of their content, one can enquire whether it would be possible for States A and B to conclude a treaty declaring that all treaties which they had previously concluded, or would conclude in the future, were not binding. Such a treaty, in open violation of the principle pacta sunt servanda poses a logical conundrum, for its validity would appear to depend on the very norm which it purports to abolish. Let me take another example. Would it be possible for States A & B, by treaty, to agree to commit an act of aggression on a specified date against C? The answer is self-evidently in the negative; the stipulation is a nullity, since its execution would involve a criminal act, the planning, preparation, initiation or waging of a war of aggression having been declared to be an international crime against the peace." Sinclair, n. 15, pp. 115-16.

59. B.S. Murthy, Laconissi Conference, Papers and Proceedings, p. 81.

60. O'Connell, n. 21, p. 244.

States. It suffices to say here that the prohibition of the use of force in international relations is one of the best illustrations of legal limitation on the treaty-making power of States.

The Extent of Support for Jus Cogenus in Juristic Writings and Judicial Decisions

However, the question that naturally arises is: what is the extent of the acceptance of the concept of jus cogens in juristic writings and of its recognition and specific application by international tribunals and in State practice?

A recent and extensive survey of the writings of more than a hundred jurists has shown that a preponderant number of them support the concept of international jus cogens.[61] This survey reveals that among modern European Jurists Berber, Cavare, Dahm, Debez, Guggenheim, Marek, Menzel, Sibert, Reuter, Seidl-Hohenveldren, Verdross and Von der Heydte support the concept of jus cogens; but Jurt and Rousseau do not. Among Anglo-American writers, Briggs,[62] Brownlie,[63] Fitzmaurice,[64] Hyde,[65]

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61. Suy, n. 2, pp. 26-49.

62. Briggs was also a Member of the ILC when it was considering the draft articles on the Law of Treaties.

63. See International Law and Use of Force by States (1961), p. 409; and also Principles of Public International Law (Oxford, 1973), edn 2, pp. 499-500.

64. See "General Principles of International Law Considered from the Standpoint of the Rule of Law", Recueil des Cours, vol. 42 (1957-II), p. 122 ff.

65. See International Law, vol. 2 (1947), edn 2, p. 1374.

Jenks[66], Lauterpacht[67], McNair[68], O'Connell[69], Schwelb[70], Sinclair[71], Stanford[72], and Suzanne Antippas[73] are the protagonists of the concept of *jus cogens* or of *ordre public*. The concept also finds supports from Soviet and East European writers like Tunicin Lachs, Bartos and Andrassy.

Even though the concept of *jus cogens* is found acceptable to a majority of modern writers, it must be pointed out that there is no evidence of clear and specific application and recognition of the concept either in State practice or in

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66. Jenks supports the concept of international public policy. See *The Prospects of International Adjudication* (London, New York, 1964); *Space Law* (1965); and *Common Law of Mankind* (1958).

67. "... immoral obligations cannot be the object of an international Treaty", nor the "obligations which are at variance with universally recognized principles of International Law." Lauterpacht considered that even customary practice "against paramount principles of international public policy "can not alter the latter. See Oppenheim, *International Law*, Lauterpacht, ed., edn 8, pp. 896, 897.

68. See *Law of Treaties* (Oxford, 1961), pp. 213-14.

69. See Connell, n. 21, p. 244.

70. See "Some Aspects of International *Jus Cogens* as Formulated by the International Law Commission", *AJIL*, vol. 61 (1967), p. 946 ff.

71. See Sinclair, n. 15, pp. 110-45; and also "Vienna Conference on the Law of Treaties", *ICLQ*, vol. 19 (1970), p. 47 ff.

72. See "United Nations Law of Treaties Conference: First Session", *UTLJ*, vol. 19 (1969), p. 59 ff., and "The Vienna Convention on the Law of Treaties", *UTLJ*, vol. 20 (1970), p. 18 ff.

73. See "A Background Report on the Codification of the Law of Treaties at the Vienna Conference", *Tulane Law Review*, vol. 43 (1968), p. 798 ff.

the decisions of international tribunals.[74] However, one may find some vague and general statements in the judgements of international tribunals or some stray and oblique observations in individual concurring or dissenting judgements, suggestive of some transcendental principles of international law.

Among the cases decided by the Permanent Court of International Justice, some support for the concept of ordre public may be found in individual or dissenting judgements of Schueking and Anzillotti. The most pertinent are the oft-quoted observations of Judge Schucking in his dissenting judgement in the Oscar Chinn Case. With reference to Article 20 of the Covenant of the League of Nations, he observed:

> ... I can hardly believe that the League of Nations would have already embarked on the codification of international law if it were not possible even today to create a jus cogens the effect of which would be that once states have agreed on certain rules of law, and have also given an undertaking that these rules may not be altered by some of their number, any act adopted in contravention of that undertaking would be automatically void. 75

Schucking further observed:

> The Court would never, for instance, apply a convention the terms of which were contrary to public morality ... a tribunal finds itself in the same position if a convention advanced by the parties is in reality null and void, owing

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74. See McNair, Law of Treaties, p. 213; and also Sinclair, n. 15, p. 119; Murthy, n. 59, p. 12; Egon Schwelb, "Some Aspects of International Jus Cogens", AJIL, vol. 61 (1967), pp. 849-50. In his 1953 Report to the ILC Lauterpacht observed: "There are no instances, in international judicial and arbitral practice, of a treaty being declared void on account of the illegality of its object." YBILC, vol. 2 (1953), p. 155.

75. The Oscar Chinn Case (Belgium v. Great Britain), PCIJ, Series A/B, no. 63, pp. 149-50.

> to a flaw in its origin. The attitude of the tribunal should ... be governed in such a case by considerations of international public policy. 76

In the case of S.S. Wilbledon, the question was whether, in 1921, Germany as a neutral in Polish Russian war was under an obligation to permit ships carrying contraband to Poland to pass through the Kiel Canal. The Court held that Germany was under such an obligation under the terms of Article 380 of the Treaty of Versailles. However, Schucking who, it must be pointed out, was the German national judge on the Court, observed in his dissenting opinion:

> Neutral duties must take precedence over any contractual obligations.... The violation of the duties of a neutral no doubt constitutes an offence under international law even when treaty obligations assumed towards third States can be put forward in support of such an act ... a legally binding contractual obligation cannot be undertaken to perform acts which would violate the rights of third parties. 77

In the Advisory Opinion concerning Customs Regime between Germany and Austria, observing that Article 88 of the Treaty of Saint-German "was not adopted in the interests of Europe", Judge Ansillotti stated in his individual opinion:

> It is an arguable question whether the states who in 1922 signed the Geneva protocol were in a position to modify inter se the provisions of Article 88, which provisions ... form an essential part of the peace settlement and were adopted ... in the higher interest of the European political system and with a view to the maintenance of peace. 78

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76. Ibid.

77. PCIJ, Series A, no. 1, p. 47.

78. PCIJ, Series A/B, no. 41, p. 57.

The jurisprudence of the International Court of Justice also does not contain any instance of particular application of the rules of *jus cogens*. In its Advisory opinion concerning *Reservations to the Genocide Convention*, the International Court of Justice, referring to the "high purposes which are the *raison d'etre* of the Convention", observed: "... the principles underlying the convention are principles which are recognised by civilised nations as binding on states even without any conventional obligation."[79]

However, the Court was actually concerned with the question whether any reservation can be made to the Convention. The Court emphasised that genocide is "a denial of the right of existence of entire human groups ... a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations...." Hence, the Court held that the right to make a reservation cannot be exercised in regard to the Convention of such a nature because "it is obvious that so extreme an application of the idea of State sovereignty could lead to a complete disregard of the object and purpose of the Convention."[80]

A reference may also be made to the observations of the International Court in *The Corfu Channel (Merits) Case* that the obligations of Albania to notify the United Kingdom of the existence of mine fields in the Albanian territorial waters, were founded on "certain general and well recognised

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79. ICJ *Reports* (1951), pp. 23-24.

80. Ibid.

principles, namely, elementary considerations of humanity, even more exacting in peace than in war...."[81] In the South West Africa Cases (Preliminary Objections)[82] and also in its Advisory Opinion Concerning the Status of South West Africa,[83] the Court emphasised that the agreements regarding international mandates under the League Covenant incorporated "international engagements of general interest" and that the mandate was "a sacred mission of civilisation". In South West Africa Cases (1966), Judge Tanaka observed that the rule against apartheid constituted a 'general principle of law', not because it is a principle common to various legal systems, but as a rule jus naturale "valid through all kinds of human societies" and derived from the concept of "man as a person". Hence, Tanaka stated that the validity of such a principle rests on a basis that has a "supra-national and supra-positive character".[84]

In the case concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Spain), Judge Moreno Quintana recognised the existence of international public policy which consisted of "certain principles such as the general principles of the law of nations and the fundamental rights of States, respect for which is indispensable to the legal coexistence of the

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81. ICJ Reports (1949), p. 22.

82. ICJ Reports (1962), pp. 332, 333.

83. Ibid.

84. ICJ Reports (1966), p. 291.

political units which make up the international community.... These principles - we are all quite familiar with them because they are very limited - and these rights, too, have a peremptory character and a universal scope."[85]

However, in North Sea Continental Shelf Cases, one of the issues was whether the equidistance principle embodied in Article 6 of the Continental Shelf Convention was Binding on states, who had not ratified the convention, as a general principle of customary International Law. Under Article 6, the equidistance rule is applicable only in the absence of agreement, or 'special circumstances' justifying a recourse to a different rule. Observing that Article 6, laid down "a primary obligation" to settle any disputed question of delimitation of continental shelf by agreement, the Court stated with great caution that "without attempting to enter into, still less pronounce upon any question of jus cogens, it is well understood that, in practice, rules of international law can by agreement, be derogated from in particular cases, or as between particular parties - but this is not normally the subject of any express provision, as it is in Article 6 of the Geneva Convention."[86] Notwithstanding the reluctance of the Court to enter into the question of jus cogens, the breadth of the statement of the Court is significant.[87]

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85. ICJ Reports (1958), pp. 106-7.

86. ICJ Reports (1969), p. 42.

87. It must be pointed out, however, that the judgement of the Court was delivered on 20 February 1969 whereas the Vienna Convention was opened for signature on 23 May 1969.

In a recent case, the German Supreme Constitutional Court strongly affirmed the existence of rules of customary international law having peremptory character so as to nullify contrary contractual obligations.[88] In that case, the Federal Republic of Germany passed the Equalisation of Burdens Act of 1952 under which certain taxes were sought to be imposed for the purpose of raising revenue to pay compensation for losses suffered by individuals expelled from the former German territories in the East and by war victims belonging to designated categories. The application of the Statute in question to Swiss nationals and corporations was regulated by a Convention between Federal Republic of Germany and Switzerland which contained a most-favoured-nation clause. A Swiss company which was sought to be taxed under the Law of 1952 as applied by the Convention, contended that the Convention violated a general rule of customary international law to the effect that aliens could not be compelled to contribute for the purpose of defraying expenditure resulting from war. Interpreting the argument of the Swiss company as a plea for treating the alleged general rule of customary international law as a rule of jus cogens, the Federal Supreme Constitutional Court observed:

> Customary international law is essentially jus dispositivum.... Only a few elementary legal mandates may be considered to be rules of customary international law which cannot be

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88. The facts of the case and some excerpts from the judgements have been dealt with by Stefan A. Riesenfeld in AJIL, vol. 60 (1966), pp. 511-15.

> stipulated away by treaty. The quality of such peremptory norms may be attributed only to such legal rules as are firmly rooted in the legal conviction of the community of nations and are indispensable to the existence of the law of nations as an international legal order, and the observance of which can be required by all members of the international community. 89

Applying the above test, the Court came to the conclusion that "the rule that no resort may be had to aliens for the defrayal of expenditure resulting from war consequences does not fall into two class of peremptory rules of international law."[90]

It is clear from the above rather sketchy survey of judicial dicta that support for jus cogens may be discerned only from either generalisations of principles which are too broad to be called peremptory norms, or statements tucked away in individual or dissenting judgements. One may find enthusiastic acceptance and recognition of the concept of jus cogens only in juristic opinion and not to the same extent in judicial decisions. One reason for this lack of support in judicial dicta is that the Courts have not been asked so far to give a decision regarding the nullity of a treaty specifically on the ground of contravention of a peremptory norm. As is well known, judges show extreme reluctance to be dragged into theoretical discussions when they are not pertinent to the case. Judges are not as free as Jurists to espouse the cause of any concept or doctrine and lend the weight of their support to it. Apart from

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89. Ibid., p. 513.

90. Ibid., pp. 513-14.

these considerations, it is very difficult to believe that the concept of *jus cogens* has either been rejected by judicial dicta or even failed to find favour. No legal system would last long unless it contains some built-in normative defences against self-destruction. Normative structure is not only horizontal but, - what is more important - is also vertical. Any theory which states as a principle that a treaty is supreme, must at once find the necessity of a more superior principle to legally support that principle. In this hierarchical normative structure it is impossible not to find a set of norms which constitutes its apex.

Chapter III

JUS COGENS AND THE VIENNA CONVENTION

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Need for and Importance of Jus Cogens in International Law

The provisions relating to jus cogens are undoubtedly the most important and significant of the provisions of the Vienna Convention on the Law of Treaties. Those provisions gave rise to a lively and illuminating discussions at the time of their formulation in the International Law Commission, the Sixth Committee of the General Assembly and finally in the Vienna Conference on the Law of Treaties. The main article of the draft Convention dealing with jus cogens has been characterized as "one of the most controversial articles produced by the Commission"[1] and as having "the formidable reputation of being one of the most difficult provisions"[2] of the treaty. In spite of the fact that those provisions have led to a lot of controversy, there was a substantial agreement among the members of the ILC, in the Sixth Committee and at the Vienna Conference, on the necessity for jus cogens in International Law.

Yapobi, the delegate of Ivory Coast, stated at the Vienna Conference:

> The increase in the number of independent States, the emergence of new powerful nations, the devastation of the two world wars and the appearance and proliferation of nuclear weapons which endangered the survival of mankind, had inspired a new solidarity of nations, based on

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1. Richard D. Kearney and Robert E. Dalton, "The Treaty on Treaties", AJIL, 1970, p. 535.

2. De Dresson, the French delegate at the U.N. Conference on the Law of Treaties, UNCLT, First Session, Official Records, 1968, p. 309.

> the interdependence of States, international cooperation, peaceful co-existence and assistance by the wealthier to the less favoured nations.... The recognition of jus cogens by international law was only one result of that process, which was making international relations more human in character by basing them on equality of men and that of states. The adoption of jus cogens concept would constitute an international recognition of the inescapable necessity of introducing the element of morality into inter-state relations. 3

Emphasizing the greater democratization of modern international society and the compulsions it had brought with it, de-Luna stated:

> The contractual conception of international law which did not recognize jus cogens belongs to the time when international law had been a law for the Great Powers. But modern international law had become universalized and socialized. 4

De Luna further pointed out that the bi- or tri-polarization of the ideological groups highlights the necessity for greater coordination among States. Such coordination was possible only if states submitted themselves to jus cogens. He observed:

> The notion of jus cogens ought to set bounds to the autonomy of the will of the States.... At all events, selfish national interests could not be allowed to bring the common international weal to nought. 5

Warning against any hasty rejection of the concept of international jus cogens, de Luna said that the rules of jus cogens "could not be ignored in international law, for either

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3. Yapobi (Ivory Coast), UNCLT, First Session, Official Records, 1968, p. 327.

4. De Luna, YBILC, vol. 1 (1963), p. 72, para 62.

5. Ibid.

they would ultimately prevail or else the international community would vanish."[6]

Radha Binod Pal of India observed that the emergence of many new states created a problem of co-ordinating the different social systems. That situation demanded a mental adjustment as an actual condition of survival. Hence, he stated, "public order should comprise a system of law which replaced a sense of obligation based on expediency by a higher allegiance to the principles of justice."[7]

Jus Cogens and the International Law Commission

Brierly, the first Rapporteur of the ILC on the law of treaties, did not, however, include any provision relating to jus cogens in any one of his three reports.[8] The principle underlying the concept of jus cogens made its first appearance in the draft prepared by Lauterpacht in his first report on the law of treaties.[9] But he did not use the term jus cogens or its accepted equivalent 'peremptory norms'. Section III of the first draft had its heading "Legality of the Object of the Treaty" and contained Article 15 which dealt with, as its heading indicated, "Consistency with International Law". Article 15 provided:

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6. Ibid., para 64.
7. Ibid., p. 65, para 67.
8. First Report in YBILC, vol. 2 (1950); Second Report in ibid., vol. 2 (1951); Third Report in ibid., vol. 2 (1952). Brierly's draft articles appear to have been to some extent based upon the Draft Convention on the Law of Treaties prepared by Harvard Research. Harvard Draft also did not contain any provision regarding Jus Cogens.
9. YBILC, vol. 2 (1953), pp. 154-6.

> 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.

In his Comment on the article, Lauterpacht conceded that all rules of international law were not covered by this article as there were some rules which could be modified by agreement: Modus et conventio vincunt legum. However, treaties which affected third States were unenforceable because of the maxim Pacta tertius nec prosunt nec nocent. Even if a treaty did not affect third states, it might be 'illegal' and, hence, 'void' if it violated principles such as prohibition of privateering by the Declaration of Paris of 1856, or the prohibition of slavery by the Slavery Convention of 1926. Lauterpacht pointed out that "the above mentioned instruments constitute also examples of inconsistency of a subsequent treaty with rules of international law which, although originating from a treaty concluded between a limited number of States, subsequently acquire the complexion of generally accepted - and to that extent, customary - rules of international law."[10]

Lauterpacht emphasized that "the test whether the object of the treaty is illegal and whether the treaty is void for that reason is not inconsistency with customary international law pure and simple, but inconsistency with such overriding principles of international law which may be regarded as constituting principles of international

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10. Ibid., pp. 154-5.

public policy (ordre international public)."[11]

Lauterpacht was fully aware of the fact that the concept of the illegality of the object of a treaty coupled with the conferment of compulsory jurisdiction on the ICJ might tend to dissuade states from entering into treaties which were the most effective instruments of law-making in International Law. Hence, he suggested that, de lege ferenda, "there may be room for the consideration of a principle affirming that a multilateral treaty concluded in the general international interest is valid even if departing from or contrary to what has been considered in the past to be an overwhelming rule of customary of international law."[12]

As will be evident later, Lauterpacht's draft article and comment referred to above formed the basis for further development and improvement of the principle by the later rapporteurs.

Fitzmaurice's Report

Sir Gerald Fitzmaurice, who succeeded Lauterpacht as the Rapporteur, adopted, unlike his two predecessors, the expository method in his draft. In his commentary to Article 17 of his draft which incorporated the concept of jus cogens, Fitzmaurice observed that "it is ... only as regards rules of international law having a kind of absolute and non-rejectable character (which admits of no option) that the question of the illegality or invalidity of a treaty

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11. Ibid., p. 155.

12. Lauterpacht's Note to his Comment on Article 15, ibid., p. 155.

inconsistent with them can arise."[13] The example of such invalid treaties that were given by him were treaties by which parties appropriated or asserted exclusive jurisdiction, erga omnes, over the high seas, or which provided that prisoners of war would not be taken but will be executed, or treaties of aggression. Fitzmaurice thought that it was neither possible nor necessary to state exhaustively the rules having 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."[14]

Waldock's Contribution

Humphrey Waldock succeeded Gerald Fitzmaurice as Rapporteur on the latter's nomination as a judge of the ICJ. Waldock's contribution to the Convention, though based on the work of his predecessors as he himself admitted, has been immense and substantial. In his Second Report to the ILC[15] Waldock incorporated in his draft, Article 13 which dealt with "Treaties void for Illegality". Article 13 provided:

> 1. A treaty is contrary to international law and void if its object or its execution involves the infringement of a general rule or principle of international law having the character of jus cogens.

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13. Fitzmaurice's Third Report, YBILC, vol. 2 (1958), p. 40.

14. Ibid., p. 41.

15. YBILC, vol. 2 (1963), p. 52.

> 2. In particular, a treaty is contrary to international law and void if its object or execution involves -
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> a) the use or threat of force in contravention of the principles of the Charter of the United Nations;
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> b) any act or omission characterized by international law as international crime, or
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> c) any act or omission in the suppression or punishment of which every state is required by international law to co-operate.
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> 3. If a provision, the object or execution of which infringes a general rule or principle of international law having the character of jus cogens, is not essentially connected with the principal object of the treaty and is clearly severable from the remainder of the treaty, only that provision shall be void.
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> 4. The provisions of this Article do not apply, however, to a general multilateral treaty which abrogates or modifies a rule having the character of jus cogens. 16

Article 1 of the draft articles submitted by Waldock dealt with definitions. Paragraph 3(c) of Article 1 defined jus cogens as "a peremptory norm of general international law from which no derogation is permitted except upon a ground specifically sanctioned by general international law, and which may be modified or annulled only by a subsequent norm of general international law."[17]

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16. Ibid., p. 52.

17. Ibid., pp. 38-39.

Rules of Jus Cogens are not Immutable

In his commentary on Article 13, paragraph 4, Waldock pointed out that the illustrations of jus cogens, given therein were not exhaustive and "they are merely particular applications of the principle" of invalidity of treaties contravening jus cogens.[18] Waldock also acknowledged that jus cogens rules were not "immutable and incapable of abrogation or amendment in future", and this possibility of change was reflected in paragraph 4 of Article 13 and also paragraph 4 of Article 21 which permitted a party "to call for the termination of a treaty if after its entry into force the establishment of a new rule of international law having the character of jus cogens shall have rendered the performance of the treaty illegal under international law."

"Jus Cogens" and Alternative Terminology

When the relevant draft articles were being discussed by the ILC, Waldock stated that he used jus cogens for the lack of a better term.[19] This statement of Waldock naturally gave rise to a discussion among members as to alternative terminology. While Tsuruoka[20] and de Luna[21] found jus cogens acceptable, Amado preferred a term "more generally understandable and less purely theoretical" and expressed his preference

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18. Ibid., p. 53, para 4.

19. YBILC, vol. 1 (1963), p. 62, para 25.

20. Ibid., p. 67, para 3.

21. Ibid., p. 72, para 66.

for "fundamental general rule of international law".[22] Radha Binod Pal said the term jus cogens was not found in most text books on international law and it was unfamiliar to lawyers trained in common law systems. Pal stated that in fact he also came to be acquainted with the term as a result of the ILC's discussions at the previous session.[23] Briggs said that he always avoided the use of the term jus cogens and suggested an amendment to the text of the draft by the use of "a peremptory norm of general international law".[24] Yasseen,[25] Pal,[26] Bartos[27] and Tunkin[28] favoured "international public order". As a compromise between the text and the amendment of Briggs, the Drafting Committee accepted "a peremptory norm of general international law" followed by 'jus cogens' within brackets. Prof. Suy, however, thinks that "the drafting committee suppressed the expression jus cogens in the text of the article", and that "despite the opposition in Commission it might be said that the expression jus cogens has now taken its place in the terminology of international law".[29]

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22. Ibid., p. 68, para 16.
23. Ibid., p. 69, para 31.
24. Ibid., p. 62, paras 29 and 30.
25. Ibid., p. 63.
26. Ibid., p. 65.
27. Ibid., p. 60.
28. Ibid., p. 69.
29. Suy, Papers and Proceedings of Lagonissi Conference, p.51.

Jus Cogens - Positive Law or Natural Law?

A somewhat theoretical controversy revolved around the question whether jus cogens was a principle of natural law or of positive law. Though the concept of jus cogens received greatest support in the writings of Naturalists, the opinion in the ILC favoured its positive law foundations. Szego, the Hungarian delegate at the Vienna Conference, asserted that "the principle contained in the article was not based on the theory of natural law but on the reality of relations between States".[30] The opinion that jus cogens was derived from positive law and not natural law was also expressed by Tunkin during ILC's deliberations.[31] De Luna stated the position in clear terms when he said that "if the term 'positive law' was understood to mean rules laid down by States, then jus cogens was definitely not positive law. But if positive law was understood to mean the rules in force in the practice of the international community, then jus cogens was indeed positive law."[32]

However, Waldock who participated in the deliberations of the Vienna Conference as Expert Consultant specifically clarified the attitude of the ILC towards the above question. He said that "the International Law Commission based its approach to jus cogens on positive law much more than on natural law."[33]

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30. UNCLT, First Session, Official Records, 1968, p. 309.

31. YBILC, vol. 1 (1966), pt. 1, p. 38.

32. YBILC, vol. 1 (1963), p. 75.

33. UNCLT, First Session, Official Records, 1968, p. 327.

CRITICISM OF THE PROVISIONS

The principal provisions of the Convention dealing with the existing as well as emergent rules of jus cogens have naturally attracted much attention and were subjected to close scrutiny by the ILC, the Sixth Committee and the Vienna Conference. While the incorporation of the rules of jus cogens in the draft articles by the ILC was hailed by some, there were also others who derided it. For instance, Plimpton, the U.S. member on the Sixth Committee, observed that the article on jus cogens would "do much to advance the rule of law".[34] His Government also in its Comments on the draft articles stated that "the concept embodied in this article would, if properly applied, substantially further the rule of law in international relations."[35] Emphasizing the importance of the article, the French delegate said that the article "is one of the genuinely key provisions of the draft articles."[36]

Some other members and the comments of a few governments depicted the other side of the picture. One member called the concept of jus cogens a "flying saucer" elusive to anybody's grasp.[37] Small, the delegate of New Zealand, observed that the article on jus cogens attempted to provide "a handy capsule formula", and was "highly speculative".[38] Herbert, in a bitter

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34. GAOR, session 18, Mtgs of the Sixth Committee, 1963, p. 19.

35. Comments of Governments, YBILC, vol. 2 (1966), p. 20.

36. Ibid., p. 37.

37. Mendoza (Philippines), UNCLT, First Session, Official Records 1968, p. 323.

38. Ibid., p. 312, para 80.

attack on the article, observed that "the French delegation was convinced that Article 50 (of the 1966 ILC Draft Corresponding to Article 53 of the Convention) contained the seeds of insecurity in international relations and exposed international law to an ordeal which it would be wise to avoid."[39] Luxembourg observed in its comments that the article "is likely to create a great deal of uncertainty".[40]

Problems of Identification of Rules of Jus Cogens

The main point of attack on the jus cogens provision of the draft articles was that by its failure to define precisely the content of a rule of jus cogens, it had created the difficulty in identifying objectively whether a particular norm was peremptory or not. Hubert, the French delegate at the Vienna Conference, observed that "the keynote of article 50 [i.e. Article 53 of the Convention] was imprecision as to the present scope of jus cogens, imprecision as to how the norms it applied were formed and imprecision as to its effects."[41]

Much has been said regarding the problem of identification of peremptory norms. This difficulty was admitted by Waldock when he stated in the Commentary on Article 13 of the 1963 draft that "the formulation of the rule, however, is not

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39. UNCLT, Second Session, Official Records, 1969, p. 95, para 18.

40. YBILC, vol. 2 (1966), p. 20. Luxemborg has been characterized as the "leader of the opposition", by Egan Schwelb. See AJIL, 1967, p. 962.

41. UNCLT, Second Session, Official Records, 1969, p. 94, para 9.

free from difficulty since there is not yet any generally recognized criterion by which to identify a general rule of international law as having the character of jus cogens."[42] Even the method of giving illustrations of rules of jus cogens initially adopted by Waldock did not find favour and later on the Commission preferred a general and abstract definition in the text consigning the illustrations to the Commentary instead of attempting the impossible task of giving a casuistical definition.[43] Hence, Article 53, as it finally emerged, simply states:

> 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.

Reasons for Non-Inclusion of Illustration of Jus Cogens

The reasons for the non-inclusion of illustrations in the text may be found in the ILC's commentary to Article 50 of the 1966 draft. The commentary says that "the Commission decided against including any examples of rules of jus cogens in the article for two reasons. First, the mention of some

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42. YBILC, vol. 2 (1963), p. 52, para 2.

43. Cf. Everigenis (Greek delegate), UNCLT, First Session, Official Records, 1968, p. 296, para 18. It was Waldock himself who suggested the transference of the illustrations to the commentary. See YBILC, vol. 1 (1963), p. 77.

cases of treaties void for conflict with a rule of jus cogens might, even with the most careful drafting, lead to misunderstanding as to the position concerning other cases not mentioned in the article. Secondly, if the Commission were to attempt to draw up, even on a selective basis, a list of the rules of international law which are to be regarded as having the character of jus cogens, it might find itself engaged in a prolonged study of matters which fall outside the scope of the present articles."[44]

In fact, many examples of jus cogens were suggested by the members of the ILC[45] but as every one of the suggestions was opposed by two-thirds of the members, none was found acceptable.[46] Some members thought that the existence of international jus cogens is so obvious that the mention of examples was superfluous,[47] and others believed that the text was stronger by being general.[48] It was also said that enumeration of examples would give "a restrictive connotation

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44. AJIL, 1967, p. 411.

45. These examples included prohibition of use of force, piracy and slavery, pacta sunt servanda, rebus sic stantibus, equality of states, State sovereignty, illegality of unequal treaties, non-intervention, domestic jurisdiction, freedom of the high seas and self-determination.

46. Schwarzenberger sarcastically remarks that "the Commission could reach the requisite majority on one negative proposition: against any formula by which to define international jus cogens." See "The Problem of International Public Policy", Current Legal Problems, vol. 18(1965), p. 191.

47. De Castro (Spain), UNCLT, First Session, Official Records, 1968, p. 315, para 1.

48. Nachabe, GAOR, session 18, Mtgs of the Sixth Committee, 1963, pp. 26-27.

out of keeping with its flexibility and vitality".[49] Gross also preferred a simple statement of the principle of jus cogens and the nullity attached to its violation and did not consider that the failure to define jus cogens was a weakness as any definition was at best an approximation.[50]

Whatever might have been the difficulties involved in defining jus cogens with precision, it was generally recognized that, due to vagueness and uncertainty of its content, the article on jus cogens might lead to a situation where it was not possible to identify a peremptory norm by objective criteria. The main apprehension expressed was that States might indulge in what Leo Gross called "auto-interpretation" and indiscriminately resort to this amorphous 'peremptory norm' as a convenient instrument of unilateral denunciation.[51] Intractable problems of identification might encourage the States to go back on their pledged word whenever it suited them and employ legalistic jargon to give their treacherous actions a facade of legitimacy. In the absence of objective criteria with which to identify peremptory norms, one might envisage a situation where "what might be jus cogens for one state would not necessarily be jus cogens for another State."[52] Miss Laurens of Indonesia pointed out in the Sixth Committee

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49. Perdomo, UNCLT, Second Session, Official Records, 1969, p. 98, para 63.

50. YBILC, vol. 1 (1963), p. 72, para 69.

51. See Sinclair, UNCLT, First Session, Official Records, 1968, p. 304.

52. Ibid., p. 305.

of the General Assembly that the *jus cogens* Article "showed once again, that it was one thing to state a principle or rule of international law in general terms and quite another to give a detailed account of its exact scope."[63] Francis Vallat of the United Kingdom stated in the Vienna Conference that a State might contend that it had not accepted a rule as peremptory norm.[64] Hence, it was said that the content of the peremptory norm was "exceedingly speculative".[65]

In a very forthright attack on the *jus cogens* provision in the draft articles, Schwarzenberger observed:

> In this particular case, the beauty of a general - as distinct from any more specific - formula of international public policy is that it leaves everybody absolutely free to argue for or against the *jus cogens* character of any particular rule of international law. 66

Such a situation would affect the sanctity of "pledged word".[67] Schwarzenberger further pointed out that "the unilateral invocation of *jus cogens* as a justification of non-compliance with a burdensome treaty becomes a novel form of restricting the area of the rules governing the principle of consent."[68]

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63. GAOR, session 18, Mtgs of the Sixth Committee, 1963, p. 24.

64. UNCLT, Second Session, Official Records, 1969, p. 97, para 55.

65. Small (New Zealand), UNCLT, First Session, Official Records, 1968, p. 312, para 51.

66. Schwarzenberger, "The Problem of International Public Policy", Current Legal Problems, vol. 18 (1965), p. 213.

67. Ibid., p.214, para 9.

68. Ibid., . . .

Surprisingly, the main Article on *jus cogens* was approved by an overwhelming majority of the members of the ILC. While some members hailed it as an indication of its wide acceptance, others accused the members of something short of hypocrisy. Referring to the near unanimous approval by the ILC of the provisions on *jus cogens*, one delegate at the Vienna Conference observed that much need not be read into it because if one were to ask the delegates to vote on democracy everybody would vote in favour of it but later start giving their own interpretation of what democracy meant.[59] Briggs also spoke in the same vein during the ILC discussions, stating that he was puzzled over why so many States had endorsed the article on *jus cogens*. He presumed that one of the reasons was that jurists considered that the notion of international public order appropriately covered a theoretical structure. He said that it cost States nothing to adopt a high moral tone and condemn treaties that in any case they were unlikely to conclude, such as treaties promoting the use of force, traffic in slaves or genocide.[60]

Of course, the most stinging criticism came from Schwarzenberger. He observed that "as a result of those

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59. Barros (Chile), UNCLT, First Session, Official Records, 1968, p. 299, para 60.

60. Briggs, YBILC, vol. 1 (1966), p. 40. In its comments on the draft articles, the Turkish Government also remarked that States do not, in any case, enter into treaties on subjects like slave trade. In the absence of a definition of *jus cogens*, "it will be possible for each State to interpret it to fit its own needs." YBILC, vol. 2 (1966), p. 21. See also the comments of Sinclair, UNCLT, First Session, Official Records, 1968, p. 304.

deliberations (of ILC) a draft article perfectly adopted to the idiosyncracies of a hypocritical age has emerged. It has all the trappings of a fashionably 'progressive', if unrealistic thinking".[61]

Criteria for Identification of Rules of Jus Cogens

However, it is submitted that some of the criticism against the draft articles on jus cogens was misplaced because the Special Rapporteur and also the members of the ILC did make attempts to define and determine the nature and character of jus cogens. But, jus cogens, like its sister concept 'public policy' in municipal law, is intrinsically incapable of precise definition. It was aptly pointed out by a delegate at the Vienna Conference that even though terms like 'public policy' had not been adequately defined in municipal law, no insurmountable difficulties had arisen.[62] As /Ago also correctly stated, it would be hazardous to artificially fix the boundaries of jus cogens because peremptory norms were always susceptible to change. In fact, the whole basis of Article 64 of the Convention (dealing with newly emergent peremptory norms) was the assumption that the concept of jus cogens was dynamic and not static.

One can glean from the various deliberations on the articles relating to jus cogens some attempts by the

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61. Schwarzenberger, n. 56, p. 214.

62. See observations of Abad Santos (Philippines), UNCLT, Second Session, Official Records, 1969, p. 94, para 24.

participants to find some criteria for identification of peremptory norms. The suggested criteria might not be completely adequate but they do give some insight into what was actually envisaged. De Luna thought that "the essence of *jus cogens* was best defined *a contrario* by the concept of *jus dispositivum*".[63] But obviously, such a definition would not take anybody far because it would suffer from being a *petitio principii*. Yasseen was more articulate in this matter. While admitting that *jus cogens* was "hard to identify and apply", he attempted to formulate a criterion for identification. According to him, that criterion was not the number of States accepting the rule because that number was not always proportionate to the value and importance of the rule; it was not even the formal source of the rule that could be the determining factor as it was difficult to say whether it was custom or treaty that would always take precedence. "Thus, the only possible criterion is the substance of the rule; to have the character of *jus cogens*, a rule of international law must not only be accepted by a large number of States, but must also be found necessary to international life and deeply rooted in the international conscience."[64]

Sebtai Rosenne observed in the ILC:

> The concept of *jus cogens* had existed in international law for a long time, even if in inchoate form. There were, however,

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63. De Luna, n. 19, p. 72, para 63.

64. Yasseen, n. 19, p. 63, para 39.

> profound differences of opinion as to the reasons for its existence and the foundations on which it rested; some based it on positive law and others on natural law, while yet others attributed it a higher or even divine origin. But on one point there is general agreement, - namely, that the concept of *jus cogens*, expressed some higher social need.... Ultimately, it was more society and less the law itself which defined the content of *jus cogens*. [65]

Bartos said that international public order was merely the superstructure of the international community which resulted from the evolution of international society; it was the minimum of rules of conduct necessary to make orderly international relations possible.[66] Some members spoke in terms of *jus cogens* being the interest of the international community as a whole,[67] "the interest to all",[68] and "the indispensable minimum for the existence of the international community".[69] Others obviously resigned themselves to the lack of ascertainable criteria for identification of peremptory norms, and stated that it was better to have some rule, however imprecise than no rule,[70] and that "an imperfect provision is better than no provision at all".[71]

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65. Rosenne, n. 19, p. 73, para 4.

66. Bartos, ibid., p. 76, para 33.

67. Lachs, ibid., p. 68, para 7.

68. Tunkin, ibid., p. 69, para 22.

69. De Luna, n. 31, p. 39, para 34.

70. Cardieux, ibid., p. 40, para 51.

71. Santos, n. 39, p. 95, para 24.

Sinclair suggested three alternative solutions to the problem of identification of peremptory norms: (1) Exhaustive enumeration of examples of jus cogens. The ILC considered this method but decided against it. (2) Illustrative enumeration. As has been already pointed out, this method was initially adopted by the ILC but was later abandoned. (3) Writing into the article on jus cogens "some means or test".[72]

Gros, on the other hand, preferred a simple statement of the principle of jus cogens and the penalty of nullity attached to a treaty conflicting with it. He thought that international law always evolved through State practice and judicial decisions and jus cogens could also follow that course.[73]

Content of Peremptory Norms to be Worked out by State Practice

In the commentary to Article 53 of the Convention, it was stated by the ILC: "The Commission considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of jus cogens and to leave the full content of the rule to be worked out in state practice and in the jurisprudence of international tribunals."[74]

Stating that his delegation "viewed with concern" the uncertainty lurking in the above quoted commentary, the

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72. Sinclair, n. 30, p. 304.

73. Gros, n. 30, p. 75.

74. AJIL, 1967, p. 410.

delegate of the United Kingdom observed that "the adoption of such a course (i.e. leaving *jus cogens* to be worked out in state practice and judicial decisions) would be equivalent to providing in a penal code that crimes should be punished without specifying which acts constituted crimes."[75] Evolution of *jus cogens* through state practice involved the processes of customary international law and "it was unsatisfactory to leave it solely to the ambivalent processes whereby customary international law gradually emerged."[76] The U.S. delegate also stated that he viewed the *jus cogens* article with 'concern' because "instant declarations and paper resolutions did not establish customary international law, much less did they give it peremptory character."[77]

"Definition" Ultimately Included

To meet some of the criticism levelled against the 1966 draft Article 50, the Drafting Committee included a definition in what is now Article 53. It said: "For the purposes of the present Convention a peremptory norm of general international law is a norm accepted and recognized by the international community 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."

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75. Sinclair, n. 30, p. 304, para 54.

76. Ibid., p. 306, para 60.

77. UNCLT, Second Session, Official Records, 1969, p. 102, para 22.

Sinclair, whose criticism of the draft article has already been referred to, appears to have been satisfied to some extent with the inclusion of the above definition in Article 53. Even though he stated that it was more in the nature of description than definitions, he conceded that it was "some sort of a test for the identification of peremptory norms",[78] and that it "constitutes an improvement on the text originally proposed by the Commission."[79]

Interpretation of Article 53

The phrase "international community as a whole" in the so-called definition of *jus cogens* in Article 53 of the Convention, has given rise to vide divergence of opinion regarding its interpretation. In fact, the United States delegation suggested an amendment to the draft article for the purpose of making "the text more explicit by stating that individual states and groups of states should have a voice in formulating *jus cogens* and that regard must be had in determining what *jus cogens* was to the will expressed in the national and regional systems of the world."[80] This amendment

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78. Sinclair, "Vienna Conference on the Law of Treaties", ICLQ, vol. 19 (1970), p. 67.

79. Id., The Vienna Convention on the Law of Treaties (1973), p. 127. Though the definition included in Article 53 of the Convention has not completely removed uncertainty, Stanford thinks that "it is doubtful, however, whether in the present embryonic stage of this doctrine any greater precision can be attained." See, "United Nations Law of the Sea Conference: First Session", UTLJ, vol. 19 (1969), p. 66.

80. Sweeny (U.S.), UNCLT, First Session, Official Records, 1968, p. 295, para 17.

was found unacceptable for the obvious reason that the very basis of the rules of jus cogens was to exclude individual or group preferences militating against community values.[81]

At the Vienna Conference, the delegates formulated their own criteria to determine the meaning of acceptance and recognition of a rule of jus cogens as such by the international community 'as a whole'. For Rosenne (Israel), the essential point was the universal degree of recognition and not the form in which such recognition was expressed.[82] Kearney (USA) adopted a negative test and thought that the provision in the article "would clearly require, as a minimum, the absence of dissent by an important element of international community".[83] But, 'important element' part of Kearney's test is susceptible to highly subjective interpretation. According to Biloa Tang, the delegate of Cameroon, a rule of jus cogens must have secured recognition and acceptance by "the greater part if not the whole of the international community".[84] The Libyan delegate said that he was voting in favour of the article on the understanding that "as a whole" means overwhelming majority.[85] But, for Harry of Australia it was not "a matter of majority voting" and while absolute unanimity might not be necessary, the rule of jus cogens must have

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81. Cf. Alvarez Tabio (Cuba), ibid., p. 297.

82. Rosenne, ibid., p. 311, para 40.

83. Kearney, UNCLT, Second Session, Official Records, 1969, p. 102, para 22.

84. Biloa Tang, ibid., p. 98, para 60.

85. El Baccouch, ibid., p. 106, para 63.

secured "the substantial concurrence of all the principal legal systems".[86] For the French delegate the whole issue was full of riddles; does "as a whole" mean unanimous acceptance by all the States? Or by a large number of States, and if so, how many? Who would decide this question? If it was to be an arbitrator, how could he make the law and not just interpret it?[87] If the article means that the majority could bring into existence jus cogens rules valid erga omnes, "the result will be to create a new source of international law subject to no control and lacking all responsibility".[88] It would offend against equality of states who were bound only by consent.[89]

It is obvious that any insistence on absolutely unanimous acceptance of a peremptory norm is to practically exclude all possibility of its coming into existence. It is difficult to accept that "international community as a whole" amounts to "all the States in the world". It is submitted that it is sufficient to bring a peremptory norm into existence if it is accepted by a substantial majority of States representing the principal legal systems of the world.

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86. Harry, UNCLT, First Session, Official Records, 1968, p. 388, para 16.

87. Hubert, UNCLT, Second Session, Official Records, 1969, p. 94, para 11.

88. Ibid., para 17.

89. Ibid., p. 96, para 17.

IS U.N. CHARTER JUS COGENS?

The Charter As 'Value-oriented Jurisprudence'

Another aspect of *jus cogens* that was very much debated was whether the provisions of the United Nations Charter are themselves *jus cogens* by virtue of Article 103 of the Charter, which provides that the obligations under the Charter prevail over other conflicting treaty obligations. Radha Binod Pal thought that "the whole perspective of United Nations policy could be characterized as value-oriented jurisprudence, directed towards the emergence of public order in the international community under the rule law."[90] In fact, Pal introduced an amendment to the draft articles, which confined the rules of *jus cogens* to the provisions of the U.N. Charter. This amendment was later withdrawn as many members expressed themselves against such a restrictive connotation of *jus cogens*. Ago correctly pointed out that all the provisions of the U.N. Charter were not *jus cogens* and, conversely, not all rules of *jus cogens* were incorporated in the Charter.[91] Waldock also expressed the same opinion.[92] Bartos pointed out that the concept of *jus cogens* was not born in the Charter and that the Charter merely represented a stage in the process.[93] Though it would

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90. Pal, YBILC, vol. 1 (1963), p. 66, para 64.

91. Ago, ibid., p. 71.

92. Waldock, ibid., p. 97.

93. Bartos, ibid., p. 26.

be going too far to state that all the provisions of the Charter have the character of *jus cogens*, some provisions of the Charter were mentioned as examples of *jus cogens*. The use of force contrary to Charter Principles,[94] non-intervention in the domestic affairs of states,[95] state sovereignty,[96] independence of states,[97] pacific settlement of disputes,[98] sovereign equality,[99] human rights,[100] and self-determination[101] were among the Charter principles and provisions that were referred to as having the character of *jus cogens*.

The Effect of the U.N. Charter and Article 20 of the Covenant

The second aspect of the question was whether Article 103 of the Charter transformed all the provisions of the Charter into rules of *jus cogens*. Tammes argued in the Sixth Committee of the General Assembly that Article 103

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94. Maresca (Italy), UNCLT, Second Session, Official Records, 1969, p. 104; Valencia-Rodriguez, ibid., p. 96, para 35.

95. Makaravich (Ukranian SSR), ibid., p. 100; Tyurin, ibid., p. 105, para 48; Groepper, ibid., p. 96, para 26.

96. Tyurin, ibid., p. 105, para 48; Makaravich (Ukranian SSR), ibid., p. 100.

97. Maresca (Italy), ibid., p. 104.

98. Valencia-Rodriguez, ibid., p. 96, para 35; Tyurin, ibid., p. 105, para 48.

99. Valencia-Rodriguez, ibid., p. 96, para 35; Tyurin, ibid., p. 105, para 48.

100. Groepper, ibid., p. 96, para 26.

101. Tyurin, ibid., p. 105, para 48.

rendered the provisions of the Charter peremptory as far as member States were concerned.[102] However, Schwelb pointed out that the travaaux preparatoires of Article 103 of the Charter indicated that what the draftsmen of the Charter really had in their mind was the possibility of the Charter obligations conflicting with the pre-existing and not the future treaty obligations of the member-States.[103] This position can be brought out clearly when Article 103 of the Charter is compared with Article 20 of the Covenant of the League of Nations. While Article 103 says that if obligations of the members under any treaty conflict with their Charter obligations, the latter "shall prevail"; Article 20 of the Covenant specifically created an obligation on the members not to enter into treaties conflicting with their obligations under the Covenant. However, Article 103 of the Charter employs a language which is wide enough to cover both future as well as past treaty obligations of the members.[104] It is submitted that as far as past treaty obligations are concerned Article 103 can be treated only as a provision incorporated ex abundante cautela because, even without Article 103, the Charter provisions, being later in point of time, would have

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102. Tammes (Netherlands), GAOR, session 18, Mtgs of the Sixth Committee, 1963, p. 9. See also McNair, The Law of Treaties (1961), p. 217.

103. Schwelb, AJIL, 1967, p. 958.

104. In its Comment to Article 26 of the 1966 draft, the International Law Commission stated that Article 103 of the Charter and Article 20 of the Covenant contained "single clauses which look both to the past and the future". AJIL, 1967, p. 344.

prevailed over conflicting past treaty obligations. Hence, the real significance of Article 103 lies more in its effect on future treaty obligations.

Effects of Article 103

The question then arises whether Article 103 of the Charter is efficacious enough to confer on at least some of the Charter provisions the character of *jus cogens*. The answer may depend upon whether a provision in a treaty permitting no derogation of the provisions of that treaty by a subsequent treaty, would have the effect of transforming its provisions into rules of *jus cogens*. In its commentary on draft Article 50 (of 1966 draft), the International Law Commission made the position very clear. It stated:

> Nor would it be correct to say that a provision in a treaty possesses the character of *jus cogens* merely because the parties have stipulated that no derogation from that provision is to be permitted, so that another treaty which conflicted with that provision would be void. Such a stipulation may be inserted in any treaty with respect to any subject matter for any reason which may seem good to the parties. The conclusion by a party of a later treaty derogating from such a stipulation may, of course, engage its responsibility for a breach of the earlier treaty. But the breach of the stipulation does not render the treaty void.... 105

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105. AJIL, 1967, p. 410. See also the statement of Yasseen, the delegate of Iraq, UNCLT, First Session, Official Records, 1968, p. 296.

McNair, however, thought that some provisions of the Charter are of constitutive or semi-legislative character and the parties cannot contract out of them; and that any treaty contravening the provisions of the Charter is void. See Law of Treaties (1961), p. 217.

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The commentary proceeded further to state that "It is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of jus cogens."[106]

Some Suggested Illustrations of Peremptory Norms

Apart from the provisions of Charter, some suggested examples of jus cogens included prohibition of use of force, pacta sunt servanda and rebus sic stantibus. Regarding the prohibition of the use of force, there seems to have been a fundamental misconception in the minds of some of those who participated in the deliberations of the ILC, the Sixth Committee and the Vienna Conference. Some of the participants expressed the opinion that a treaty obtained by use of force was void for contravening jus cogens.[107] It is submitted, however, that a clear distinction must be drawn between a treaty whose object is use of force and a treaty whose conclusion is brought about by use of force. While the former is void for illegality of object (i.e. for contravening a rule of jus cogens), the latter is void because the consent is vitiated by coercion. Thus, the latter treaty is void not

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But, Fitzmaurice, in his Third Report to the ILC, expressed the opinion that Article 103 of the Charter does not render void a treaty conflicting with Charter obligations but only makes it unenforceable. See Fitzmaurice's Third Report in YBILC, vol. 2 (1958), p. 43. On the other hand, Schwelb thinks that, for all practical purposes, there will not be much difference between nullity and unenforceability. See AJIL, 1967, pp. 959-60.

106. AJIL, 1967, p. 410.
107. For instance, Tunkin expressed that opinion. YBILC, vol. 1 (1963), p. 235, para 35. See also Ago's statement in YBILC, vol. 1 (1964), pt. 1, p. 23.

for contravening *jus cogens* but because of vitiated consent.

As pointed out above, *pacta sunt servanda* was one of the rules of international law that was frequently referred to by the members of the ILC as having the character of a peremptory norm.[108] However, Ago pointed out that if *pacta sunt servanda* was a rule of *jus cogens*, then all the provisions in a treaty would automatically acquire the character of *jus cogens*.[109] If *pacta sunt servanda* is a rule of *jus cogens*, it means that a party to a treaty cannot opt out of it whereas the very effect of *jus cogens* is to nullify a treaty that conflicts with a peremptory norm.[110] As against the opinion that *pacta sunt servanda* itself is a rule of *jus cogens*, there is the other school of thought according to which the acceptance of such a rule would water down *pacta sunt servanda* and nullify the sanctity of the pledged word. There is an obvious contradiction in both standpoints. As Alciver of Ecuador rightly pointed out, there was no reason why a treaty which consisted of flagrant injustices should be considered sacrosanct just because it was a treaty.[111] It is submitted that the maxim *pacta sunt servanda* should be

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108. For instance Tunkin, YBILC, vol. 1 (1963), p. 197.

109. Ago, ibid., p. 200.

110. As Suy observes, "*jus cogens* together with *rebus sic stantibus* were at the antipodes of the principle pacta sunt servanda". n. 29, p. 93.

111. Alciver, GAOR, session 18, Mtgs of the Sixth Committee, 1963, p. 42.

applied only to those treaties which are otherwise valid and in conformity with *jus cogens*.

Bartos[112] and Yasseen[113] have contended that *rebus sic stantibus* doctrine is an example of *jus cogens*. If that be so, it means that a state cannot contract out of its right to denounce a treaty on the ground of vital change of circumstances.[114]

Risks Involved in 'Definitions', 'Tests', etc.

The above discussion clearly demonstrates the dangers present in making facile generalizations or in adopting unidimensional approach in attempting to find criteria to identify peremptory norms. Attempts to identify rules of *jus cogens* and classify them under broad heads have also been made by some jurists. Verdross thought that immoral treaties were those which prevent or impede states in performing their moral tasks like maintenance of law and order, defence of the country etc.[115] He classified peremptory norms into: (1) rules prohibiting encroachment on the rights of third states; (2) rules of humanitarian character; and (3) the Charter provisions. Lissitzyn thinks rules of *jus cogens* prohibit treaties that affect: (1) the interests of individuals or groups of individuals (genocide, slavery, etc.); (2) the

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112. Bartos, *YBILC*, vol. 1 (1963), p. 200.

113. Yasseen, ibid., pp. 142-250.

114. See Schwelb, *AJIL*, 1967, p. 968.

115. Verdross, "Forbidden Treaties in International Law", *AJIL*, vol. 31 (1937), p. 574.

interests of third States; and (3) the interests of the organized society itself.[116] These and many other illustrations or broad categories of alleged rules of jus cogens do not help in laying down a readily verifiable criteria to decide in a given case whether a rule is or is not peremptory. While some jurists felt, as did the International Law Commission, that the content of jus cogens must be left to be evolved by the judiciary, others thought that this solution was not acceptable because there must be some criteria even for judges to identify peremptory norms.[117] In spite of the pursuasiveness of the latter opinion, it would seem that it is not possible to construct the four corners of the concept of jus cogens with the help of any ready-made 'tests', 'definitions' or 'criteria'. Like public policy of municipal law, the content of jus cogens can be worked out and evolved slowly on the anvil of time and experience and not by a priori solutions.

EMERGENCE OF A NEW RULE OF JUS COGENS

Article 64 as a "logical corollary" to Article 53

Section III of the Vienna Convention deals with "Termination and Suspension of the Operation of Treaties" and Article 64 which was placed under this Section, has the heading "Emergence of a new peremptory norm of general

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116. Lissitzyn, Papers and Proceedings of Lagonissi Conference, p. 91.

117. Tunkin, ibid., p. 86.

international law". Article 64 provides:

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

As has been already pointed out, the above provision owes its existence to the suggestion made by Lauterpacht in the Commentary to his draft Article 15. The rationale of Article 64 is that jus cogens is not static but dynamic[118] and the existing rules of jus cogens are not immutable but subject to change and modification.[119] Article 63 of the Convention itself recognizes the dynamic element in jus cogens by providing that a rule of jus cogens "can be modified only by a subsequent norm of general international law having the same character". As the ILC stated, Article 64 is indeed a "logical corollary" to Article 63.[120]

However, it was argued by Bishota, the Tanzanian delegate at the Vienna Conference, that the latter part of Article 63 quoted above weakened the text and that new peremptory norms can only add to the existing ones but not derogate from them. Thus, he pleaded against the modification or abrogation of the existing rules of jus cogens even by new

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118. Waldock, UNCLT, First Session, Official Records, 1968, p. 327; and also Ustor, GAOR, session 18, Mtgs. of the Sixth Committee, 1963, p. 40.

119. In its Report to the General Assembly, the ILC stated: "... it would be clearly wrong to regard even rules of jus cogens as immutable and incapable of modification in the light of future developments." AJIL, 1963, p. 264.

120. Ibid., p. 291.

rules having the same character.[121] A similar view had already been expressed by Rosenne in the ILC.[122] Pointing out the untenability of the above view, de Luna observed that emergence of new peremptory norm need not be looked upon as a negation of the existing norms but should be taken as constituting an "advance" because international law was "moving forward and not backward".[123] Emphasizing the same point, Perdomo, the Columbian delegate at the Vienna Conference, observed that the principle of jus cogens incorporated in Article 53 was "not an immutable and rigid notion, since it made it possible to eliminate obsolete rules and to introduce new rules reflecting the evolution of the international community. Its very flexibility is its vitality."[124]

New Peremptory Norms May Emerge Through Custom or Treaty

A new rule of jus cogens may emerge,[125] either through

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121. Bishota, UNCLT, First Session, Official Records, 1968, p. 294.

122. YBILC, vol. 1 (1963), p. 74. Ago thought that the possibility of modification of the existing peremptory norms by subsequent norms was only academic as norms of jus cogens are of such fundamental character that their modification is unthinkable. He also considered that the latter part of Article 53 weakened the principal part of it. Ibid., p. 65.

123. De Luna, ibid., p. 75.

124. UNCLT, Second Session, Official Records, 1969, p. 98, para 61.

125. Bindschelder, the Swiss delegate at the Vienna Conference, asked the Expert Consultant Waldock clarification on five questions: (a) How did jus cogens emerge? (b) Is it created by custom or treaty or both? (c) Should it be acceptable to all States or only to a majority of them? (d) Should the new norm contain a declaration that it is peremptory or would it follow from its content? and (e) Is the norm valid only for the parties to a treaty or erga omnes? Ibid., p. 123, para 66.

customary or conventional processes. Even though the ILC stated that "any modification of a rule of jus cogens would today most probably be effected by the conclusion of a general multilateral treaty",[126] it is obvious that the use of the words "most probably" in the ILC Commentary and the general phrase in the text of Article 53 - "norm of general international law" - indicate that the Commission did not exclude the possibility of a new rule of jus cogens emerging through customary processes.[127] The true position was admirably stated by Ago in the ILC when he observed: "Peremptory rules may be customary or even conventional in origin, provided that they had become general rules in the true sense of the term. They must accordingly be valid for all the members of the international community, and in particular they must be valid as customary rules for states which were not parties to the treaty laying them down."[128]

However, the question may arise as to how a new customary rule of jus cogens can emerge so as to modify the existing one because the new customary rule would amount to an illegality at its inception for conflicting with the existing peremptory norm. While this problem may appear to

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126. Report of the ILC, YBILC, vol. 2 (1963), p. ; AJIL, 1963, p. 264.

127. In fact, it was stated in para 1 of the Commentary to Article 45 of the 1963 draft that a new rule of jus cogens may be established "either by general multilateral treaty or by the development of a new customary rule...." AJIL, 1964, p. 291.

128. Ago, YBILC, vol. 1 (1963), p. 75.

be a formidable one,[129] it is inherent in the development and evolution of all customary rules whether of jus cogens character or not.[130]

The modifications of the existing rules of jus cogens through a general multilateral treaty is also not totally free from difficulties. Will it not be a self-contradiction to say that a treaty is void if it contravenes an existing rule of jus cogens which, however, may be modified by a general multilateral treaty?[131] If the existing rule of jus cogens itself is a product of a general multilateral treaty, can it be modified by another such treaty? If so, should the parties to the latter treaty be more in number than the prior treaty? The answer may be found in Yasseen's statement that it is not the number of the participants or the nature of the formal source but "the true intentions of the parties", which are to be examined "to discover the true force of the rule".[132]

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129. Joseph L. Kunz called this "a challenging theoretical problem which, as far as this writer can see, has not yet found a satisfactory solution". See "The Nature of Customary International Law", AJIL, vol. 47 (1953), p. 667. But Briggs thinks the question has created more difficulties in theory than in practice. See, "Columbian-Peruvian Asylum Case and Proof of Customary International Law", AJIL, vol. 45 (1951), p. 730.

130. See generally, Anthony A. D'Amato, The Concept of Custom in International Law (Cornell University Press, 1971 - Ithaca, London), pp. 4-20.

131. Everigenis, the delegate from Greece at the Vienna Conference, characterized the situation as "a vicious circle". UNCLT, First Session, Official Records, 1968, p. 295, para 19.

132. YBILC, vol. 1 (1963), p. 63.

Article 53 of the Vienna Convention states that the existing rule of *jus cogens* can be "modified" by a subsequent norm of general international law having the same character. Does it mean that the existing rule of *jus cogens* can only be "modified" and not "abrogated", or "annulled"? Does "modification" include "abrogation" also? Lauterpacht thought that the later rule of *jus cogens* may "depart from" or be "contrary to" the existing rule of *jus cogens*.[133] Waldock's original draft Article 13, paragraph 4 included the words "abrogates or modifies";[134] his draft Article 1, paragraph 3(c), which defined *jus cogens*, laid down that the existing rule might be subsequently "modified or annulled".[135] It is possible to envisage a situation where the existing rule of *jus cogens* is totally abrogated and, in its place, an entirely new rule is substituted. Such a possibility cannot be excluded even under Article 53, in spite of the terminological changes effected in its text.

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133. Lauterpacht's Note to his Comment on Article 15 of his draft, ibid., vol. 2 (1953), p. 155.

134. YBILC, vol. 2 (1963), p. 52.

135. Ibid., pp. 38-39.

Chapter IV

SEPARABILITY OF TREATY PROVISIONS AND JUS COGENS

Chapter IV

SEPARABILITY OF TREATY PROVISION AND JUS COGENS

A treaty may conflict with the rules of jus cogens not necessarily in its entirety but only in some of its provisions. Can the principle of separability be applied to that treaty so that its offending provisions only be treated as void and the rest be saved?

Article 15 of the draft articles prepared by Lauterpacht incorporated the principle of separability by providing that "a treaty or any of its provisions, is void if its performance involves an act which is illegal under international law". The words "any of its provisions" in Article 15 clearly provide for partial invalidity also. In fact Lauterpacht observed in his commentary to Article 15 that the void provisions of the treaty were separable, and that "any single provision involving an illegality does not entail the nullity of the treaty if the latter, taken as a whole, can be upheld." However, Lauterpacht observed that "this will not be possible if the provision in question constitutes an essential part of the treaty".[1]

In his Second Report, Waldock also made provision for the application of the principle of separability to treaty provisions conflicting with a peremptory norm. Article 13, paragraph 3 of his draft permitted separability if the

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1. Lauterpacht's First Report, YBILC, vol. 2 (1953), p. 155, para 6.

offending provision "is clearly separable from the remainder of the treaty" and if such a provision "is not essentially connected with the principal object of the treaty". In his commentary to Article 13, Waldock stated that "while one view may be that the treaty containing void provisions should be wholly void", it would be preferable to allow severance of provisions which involve "minor inconsistency with a jus cogens rule" and are clearly separable from the rest of the provisions.[2]

In the ILC, Lachs supported the principle of separability as formulated in paragraph 3 of Article 13 of Waldock's draft and said that it "contained a very useful and important provision that would allow parts of an international instrument not of an integral character which were illegal to be detached from the main body of the treaty. Such a provision would certainly be in the interests of the further development of treaty law".[3] On the other hand, Tabibi suggested that the treaty should, under those circumstances, be treated as wholly void.[4] He also thought that the distinction, sought to be made in the Commentary to Article 13, between "minor" and "major" infringement of rules of jus cogens was untenable.[5] Miss

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2. Waldock's Second Report, YBILC, vol. 2 (1963), p. 53.

3. Lachs (Poland), YBILC, vol. 1 (1963), p. 68, para 12. He was supported, among others, by Amado, ibid., para 18.

4. Tabibi, ibid., p. 64, para 47.

5. Ibid. Rosenne agreed with Tabibi, ibid., para 60. Ago also favoured deletion of paragraph 3 of Article 13. Ibid., p. 71, para 54.

Gutteridge (U.K.) observed in the Sixth Committee of the General Assembly that the principle of separability presented difficulties of application for most provisions of treaties were so closely interrelated that few provisions would be clearly separable from the remainder of the treaty.[6]

The opinions expressed by Tabibi and others seem to have weighed with the Drafting Committee which, as Waldock stated, "reached the conclusion that severance should not be allowed in cases covered by Article 13". The reason for such a decision was that "in view of the nature of jus cogens, it would be inappropriate to recognize separability". In such a case the parties "should take the consequences" and reformulate the treaty.[7]

Thus, while Waldock's Report permitted the application of the principle of separability to the provisions of any treaty conflicting with a peremptory norm, the Drafting Committee went to the other extreme and totally barred the application of separability to such a treaty. However, the International Law Commission seems to have ultimately decided upon a course of action which may appear to be a compromise between the two extremes. The ILC decided that, for the purpose of application of the principle of separability, a treaty which was void ab initio for conflict with an existing rule of jus cogens must be differentiated from a treaty that was valid when it was concluded but which subsequently

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6. GAOR, session 18, Mtgs of the Sixth Committee, 1963, p. 26.

7. YBILC, vol. 1 (1963), p. 291, para 21.

conflicted with a new peremptory norm that has emerged. While the provisions of the former were in all cases inseparable, in the case of the latter the test of separability might be applied. The rationale of the decision of the ILC is not far to seek. In the case of the former treaty the parties were deemed to have the knowledge of the illegality or unlawfulness of the object of the treaty and, hence, the very consent of the parties was tainted. Such a treaty had to stand or fall *in toto*. That would not be the position in the case of the latter treaty which was valid when it was concluded and had to suffer only supervening invalidity.[8] Consequently, paragraph 5 of Article 41 of the 1966 draft specifically provided that "In cases falling under Articles 48, 49 and 50, no separation of the provisions of the treaty is permitted". Thus, while in the case of a treaty void under Article 50 for conflict with an existing rule of *jus cogens*, separation of treaty provisions was explicitly excluded, such separation of provisions was, by necessary implication, permitted in the case of a treaty that became void under Article 61 (of 1966 draft) for conflict with a new rule of *jus cogens*.

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8. Commenting on the decision of the ILC not to extend the principle of separability to a treaty that conflicts with an existing rule of *jus cogens*, Schwarzenberger observes: "As if it wished to use to the utmost the destructive potentialities of this Article [i.e. Article 37 of 1963 draft corresponding to Article 53 of the Convention], the Commission also adopted, for the purpose of this Article, the doctrine of indivisibility of treaties. Thus it recommends that not only any clause alleged to be incompatible with the international *jus cogens* should be void, but that the whole treaty should share this fate." See "The Problems of International Public Policy", *Current Legal Problems*, vol. 18 (1965), p. 214.

Attempts at Vienna Conference to Revive Separability

During the Vienna Conference, attempts were again made to extend the principle of separability of treaty provisions to draft Article 50 (of 1966) also. Finland proposed an amendment[9] so as to delete the reference to Article 50 in Article 41, paragraph 5 (quoted above), so that the principle of separability could also apply to treaties covered by Article 50. The Finnish Amendment again gave an opportunity to those opposed to strict indivisibility of treaty provisions to press their point of view and seek a reversal of the decision of the ILC. Explaining the purpose of the amendment, Castren, the delegate of Finland, observed that a treaty might contain only one or two secondary provisions which conflicted with jus cogens. In such a case, why should the whole treaty be treated as void when it would suffice to invalidate only the offending clauses which were separable from the rest of the provisions? Referring to the suggestion of the ILC that in such a case the whole treaty should be revised, Castren observed that revision of a treaty was a complicated procedure because it required the consent of all the parties.[10] The United Kingdom also proposed an amendment[11] which, inter alia, sought to exclude draft Article 50 from the scope of draft

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9. UN Doc. A/Conf.39/C.1/L.144 and 293.

10. UNCLT, First Session, Official Records, 1968, p. 228, para 2.

11. UN Doc. A/Conf.39/C.1/L.25 and Corr. 1.

Article 41. Gordon Smith[12] and Francis Vallat,[13] the delegates of U.K., argued that it would be absurd to condemn the whole treaty to nullity when only comparatively unimportant provisions of the treaty were in conflict with jus cogens.

However, most of the delegates at the Vienna Conference were opposed to the amendments proposed by Finland and U.K. The strongest opposition to these amendments came from delegates of Communist countries. These delegates thought that indivisibility of provisions of a treaty void under draft Article 50 was "an essential idea and must certainly be stated" because such a treaty was void ab initio;[14] that the rules of jus cogens were of a fundamental character[15] and were so "fundamentally important that any conflict of a treaty with those rules was dangerous and indivisable".[16] The proposed amendments could not muster enough support and were lost when put to vote.[17]

ILC Decision Justified

It is submitted that the decision of the ILC to treat, for the purpose of the application of separability, the situations arising under draft Article 61 (i.e. Article 64 of the Covention) differently was justified and valid. In the case of a treaty that was valid when it was concluded but which subse-

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12. UNCLT, First Session, Official Records, 1968, p. 229, para 15.

13. Ibid., p. 386, para 5.

14. Talalaev (USSR), ibid., p. 230, para 28 and p. 449, para 29.

15. Strezov (Bulgaria), ibid., p. 235, para 25.

16. Makarewicz (Poland), ibid., p. 236, para 32.

17. Ibid., p. 483.

quently conflicted with a new form of *jus cogens*, the treaty would become void from the time of such conflict and not *ab initio*. On the other hand, a treaty hit by the provisions of draft Article 50 would be a dead letter or, if one may say so, a still-born child. As the invalidity affected the very basis of the treaty, it could not be partially revived or resurrected. Such a treaty would come into existence either totally alive or totally dead. On the contrary, a treaty that fell within the mischief of Article 61 (conflict with new *jus cogens*) was a live and valid treaty at its inception. If any of its provisions were found conflicting with the rules of *jus cogens* that had emerged subsequent to the conclusion of the treaty, those affected provisions only might be severed by a sort of forensic surgery so as to save as much of the body and soul of the treaty as possible. Thus, the Commentary to Article 61 (of 1966 draft) said:

> ... although, the Commission did not think that the principle of separability is appropriate when a treaty is void *ab initio* under Article 50 by reason of an existing rule of *jus cogens*, it felt that different considerations apply in the case of a treaty which was entirely valid when concluded but is now found with respect to some of its provisions to conflict with a newly established rule of *jus cogens*. If those provisions can properly be regarded as severable from the rest of the treaty, the Commission thought that the rest of the treaty ought to be regarded as still valid. 18

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18. *AJIL*, 1967, p. 438. Gordon-Smith, the delegate of U.K., observed at the Plenary Meeting of the Vienna Conference that "it seemed illogical to prevent separation in the case of an existing rule, but not in that of a future rule of *jus cogens*". *UNCLT*, First Session, Official Records, 1968, p. 229, para 15. It is submitted that there is no illogicality involved in such a situation.

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Nullity is the Rule: Separability Exception

In the Vienna Convention, it is Article 44 which deals with separability of treaty provisions. Paragraph 5 of the article specifically provides that "no separation of treaty provisions is permitted" in cases falling under, inter alia, Article 53. In other cases of invalidity - as under Article 64 (conflict with new jus cogens) - Article 44, paragraph 2 provides that a ground for invalidating or terminating a treaty "may be invoked only with respect to the whole treaty except as provided in the following paragraphs...." This provision clearly indicates that even in case of a treaty that becomes void under Article 64 of the Convention, the rule is the nullity of the whole treaty and the separability or partial nullity is the exception.[19]

Conditions for the Application of Separability

Article 44, paragraph 3, lays down the conditions to be satisfied before a ground for invalidity or termination of

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In the case of the existing rule of jus cogens, the maxim ignorantia juris non excusat applies and the illegality extends to the whole of the conflicting treaty and not just to the offending provisions because the parties intended to conclude a treaty and not just some of its provisions. The situation is different in the case of future rule of jus cogens, because the law does not expect men to be crystal-gazers so as to know before hand what the law would be in future. Thus, ignorantia juris non-excusat will not apply to the latter case. On the contrary, the maxim ut res magis valeat quam pereat would apply to such a situation.

19. See the observations of Rosenne (Israel), UNCLT, First Session, Official Records, 1968, p. 230, para 23. Consequently, it is for the party which wants separation of treaty provisions to prove that the conditions mentioned in Article 44, paragraph 3 which enable separation, are satisfied.

a treaty may be invoked only with respect to certain clauses. It provides:

> If the ground relates solely to particular clauses, it may be invoked with respect to those clauses where:
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> (a) the said clauses are separable from the remainder of the treaty with regard to their application;
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> (b) it appears from the treaty or is otherwise established that acceptance of those clauses which was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and
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> (c) continued performance of the remainder of the treaty would not be unjust.

Rosenne pointed out that clause (b) above had introduced a subjective element.[20] But the same thing can be said of clause (c) also unless it is applied with great caution. Clause (c) was in fact added pursuant to the acceptance of an amendment proposed by the United States.[21] It was observed by the delegate of USSR that clause (c) "introduced a new element, the concept of justice" which would only complicate the matters.[22] Though there is some truth in what the Russian delegate stated, it would appear that there is some justification for the incorporation of clause (c) in Article 44. As was pointed out by the U.S. delegate, the word 'separable' in paragraph 3(a) and the words "an essential basis" in paragraph 3(b) were liable to be interpreted too legalistically

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20. Ibid., para 24.

21. UN Doc. A/Conf.39/C.1/260. It was adopted by the Committee of the Whole at its 66th meeting. UNCLT, First Session, Official Records, 1968, p. 389.

22. Tslalayev, UNCLT, First Session, Official Records, 1968, p. 231, para 31.

and narrowly leading to the separation of the provisions of a treaty even though continued performance of the remainder of the treaty would be very unjust to the other parties.[23] The provisions whose invalidity is invoked may be, in narrow legal terms, "separable" or may not form part of the "essential basis" of the treaty, but to inflict this truncated treaty on other parties may cause grave injustice. Secarin, the Rumanian delegate, thought that clause (a) of Article 44 itself had met the concern expressed in some quarters that separability should not be accepted when continued performance of the remainder of the treaty would lead to injustice.[24] But that would be so only if the words "separable" and "with regard to their application" in clause 3(a) of Article 44 are given wider interpretation. Conflict with jus cogens as a ground of nullity of a treaty is quite different from other grounds like coercion or fraud. In the case of the latter, no equity lies on the side of other parties as their hands are not clean. But in the case of a treaty void under Article 64 for conflict with a rule of jus cogens that has subsequently emerged, all the parties to the treaty are on an equal footing as no one could have anticipated the supervening invalidity. While the right to invoke its invalidity may be exercised by only one party to such a treaty, the considerations of equity and good-faith require that the interests of the other contracting parties also must be protected. If the equities are substantially equal, they must be equally protected.

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23. Ibid., p. 230, para 17.

24. Ibid., p. 231, para 42.

Chapter V

JUS COGENS AND SETTLEMENT OF DISPUTES

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JUS COGENS AND SETTLEMENT OF DISPUTES

The Problem of Providing Procedural Safeguards

The main problem of establishing acceptable and trustworthy procedures for settling disputes arising out of jus cogens provisions of the Vienna Convention has been a most vexed one. The controversy surrounding these procedures was so great that Article 66 of the Convention, which is the cornerstone of its peremptory norm structure was the last article adopted at the Plenary Meetings of the Vienna Conference. The ultimate solution found and incorporated in Articles 65 and 66 had to run a very chequered course. Even the stale and matter-of-fact summary records of the Vienna Conference provide a vivid picture of the often disappointing and frustrating moments in which numerous proposals and amendments were discussed and debated at tedious lengths by various delegations only to find that they were not acceptable. Even though the procedural and institutional aspects of jus cogens had been recognized and acknowledged by all to be most vital, delegations and their deliberations got bogged down in a morass of group and sectional interests and of power politics.

As has already been pointed out, the main criticism against the concept of jus cogens was that it was too dangerous to incorporate in the Convention a concept of such a nebulous nature and indeterminate content without adequate procedural safeguards. It was also said that, in the absence of a reliable dispute - settlement machinery, each state would feel free to indulge in "auto-interpretation" to suit its convenience

and unilaterally denounce the treaty.

Lauterpacht, the Special Rapporteur, suggested the best possible solution to the problems arising out of jus cogens by providing for a reference to the International Court of Justice.[1] He stated that "it is the Court, and not the interested party, which is finally entitled to declare the treaty, or part thereof, to be void on account of illegality."[2]

Obvious though such a solution might seem to be, Lauterpacht was aware in 1958 of the "substantial practical and doctrinal difficulties" involved in it.[3] It was these difficulties which nearly obstructed the adoption of the final solution at the Vienna Conference held almost ten years later.

In 1963, the International Law Commission considered the solution suggested by Lauterpacht in his draft articles. In its Commentary to Article 25 of the 1963 draft, the Commission stated:

> This (Compulsory jurisdiction of the ICJ) would certainly be the ideal solution and the simplest way of guaranteeing the effectiveness of the rule pacta sunt servanda. But having regard to the difficulties which proposals for compulsory jurisdiction encountered at the Geneva Conference

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1. Thus Article 15 of the draft articles submitted by Lauterpacht in his First Report provided:
   "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."
   YBILC, vol. 2 (1963), p. 164.

2. Ibid., p. 165.

3. Ibid.

> of 1958 on the Law of the Sea, it does not seem possible for the Commission to adopt this solution. [4]

However, the International Law Commission was conscious of the "risks" involved in the failure to provide adequate unilateral interpretation and denunciation of treaties. It sought to avoid or reduce these risks by "giving as much preciseness as possible to the definition" of the grounds of invalidity and, secondly, "by procedural provisions limiting the opportunities for arbitrary action".[5] But the Commission went on to say:

> However precise the definition of these grounds may be made, the justification of any claim to annul, denounce, etc., a treaty in any particular case will often turn upon facts, the determination of which is controversial. Accordingly, it is upon the procedural provisions regulating the exercise of the right to invoke these grounds the effectiveness of this branch of the law will ultimately depend. [6]

Procedures of Article 33 of the U.N. Charter

Nevertheless, even in its final draft of 1966 - as in some of the previous drafts too -, the utmost that the International Law Commission could do was to provide in paragraph 3 of Article 62 that in case of dispute over the invalidity, termination etc. of a treaty, "the parties shall seek a solution through the means indicated in Article 33 of[7]

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4. Ibid., p. 88, para 6.

5. Ibid., p. 87, para 1.

6. Ibid.

7. Article 33 of the Charter deals with pacific means of settlement of disputes.

the Charter of the United Nations." Giving the reasons for not incorporating the compulsory jurisdiction of the International Court of Justice, the Commission stated that some members thought it was unrealistic to do so "in the present state of international practice". So, "the Commission concluded that the article represented the highest measure of common ground that could be found among governments as well as in the Commission on this question."[8]

However, Article 33 of the U.N. Charter does not provide for compulsory settlement of disputes but merely indicates various means by which the parties may settle their disputes. What would happen if the parties fail to arrive at a solution of the dispute even after recourse to the means indicated in Article 33? The International Law Commission gave a very naive answer to this question. It stated that "if after recourse to the means indicated in Article 33 the parties should reach a deadlock, it would be for each government to appreciate the situation and to act as good faith demands."[9] It is clear, therefore, that the parties would reach a cul-de-sac if the procedure laid down in Article 33 of the Charter fails to produce any results.

It was obvious for the delegates at the Vienna Conference that Article 62 of the 1966 draft would be of no avail in resolving the disputes arising out of invalidity etc. of treaties. Thus, it was said that the provisions of

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8. AJIL, vol. 61 (1967), p. 440.

9. Ibid., p. 441.

Article 62 were "shapeless and ambivalent"[10]; that Article 33 of the Charter was "one of the weakest points in that instrument" as it merely listed various means of settlement of disputes without compulsory reference to the Court[11]; and that Article 62 contained a "serious gap"[12] because it provides no means for final and definitive settlement of disputes if the procedure of Article 33 of the Charter prove ineffective.[13]

Proposals to Strengthen Draft Article 62

Many amendments[14] were proposed at the Vienna Conference for the purpose of improving and strengthening the dispute settlement procedures of Article 62.[15] The amendment proposed by Japan sought to make a distinction between the articles on *jus cogens* and other articles relating to other grounds of invalidity for the purpose of providing different procedures for settling disputes. The Japanese amendment proposed that in the case of claims relating to *jus cogens* the dispute should be referred to the ICJ at the request of either of the parties. In the case of disputes regarding other grounds of

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10. Fattal (Lebanon), UNCLT, First Session, Official Records, 1968, p. 418, para 3.

11. Miras (Turkey), ibid., p. 412, para 52; see also the statement of Mrs Adamsen (Denmark), ibid., p. 433.

12. Diop (Senegal), ibid., p. 419, para 12.

13. Wozencroft (USA), ibid., p. 406, para 46.

14. UNCLT, ibid., p. 402, f.n. 1.

15. UN Doc. A/Conf.39/C.1/L.338 & L. 339.

invalidity, if no solution was reached within twelve months through the means indicated in Article 33 of the Charter, the dispute should be referred to arbitration, unless the parties agreed to refer it to the Court. Though the Japanese amendment was not approved by the Committee of the Whole, it is significant to note that the principle of treating differently the jus cogens articles and the articles dealing with other grounds of invalidity for the purpose of providing separate dispute-settlement procedures, was ultimately incorporated in the final solution adopted at the Conference.

In view of the proposal to include a new Article 62 bis. to strengthen the existing Article 62, the proposed amendments to the latter aimed at strengthening its provisions were either withdrawn or discussion on them was postponed to a later date.[15A] Hence, Article 62 was finally adopted at the Plenary Meeting of the Vienna Conference with the hope that the proposed Article 62 bis will also be adopted.

The proposed Article 62 bis[16] provided that, if under the provisions of paragraph 3 of Article 62, the parties had not been able to find a solution to the dispute, any one of the parties may set in motion the compulsory procedure specified in the proposed Annex I to the Convention. The Annex I laid down a two-tier procedure, namely, resort to

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15A. UNCLT, First Session, Official Records, 1968, pp. 473-4.

16. The new Article 62 bis was proposed through a nineteen-state amendment. See UN Doc. A/Conf.39/C.1/L.352/Rev. 3 and Corr. 1 and Add. 1 and 2.

conciliation and, if that failed, to arbitration. The two compulsory procedures of Annex I could be set in motion only by submitting a request to that effect to the Secretary-General of the United Nations.

Political Considerations Prevail

Article 62 bis also ran into rough weather as those opposed to any form of compulsory settlement of disputes arraigned themselves against it. The opponents of Article 62 bis repeated their stock arguments that the article was too idealistic and far from realities of the contemporary international situation. In a spirited refutation of this criticism of Article 62 bis, Sir Francis Vallat of U.K. stated:

> ... it had been said that representative (sic) must keep their feet on the ground. But to which article did that remark really refer? To Article 50, whose content was completely unknown? To Article 61, whose content was entirely in the future and concerned rules which had yet to emerge? Those were the articles which were in the clouds. Article 62 bis was the parachute which would bring the Conference back to earth again. 17

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17. UNCLT, Second Session, Official Records, 1969, p. 145, para 32. Articles 50 and 61 referred to by him were of the 1966 ILC draft corresponding to Articles 53 and 64 of the Convention.

> Emphasizing the inevitable relationship between normative and institutional development, Sir Francis Vallat said in another memorable passage: "If as certain representatives argued, the world was not yet ready to adopt the necessary procedures for dealing with the legal questions that might arise out of the provisions codified by the Convention on the law of treaties, there was good reason for asking whether the world was really ready for the degree of codification embodied in the draft convention. The advance in international law which the Convention embodied called for a similar advance in procedures. Law required justice."
> Ibid., p. 136, para 37.

However, the proposed new Article bis and Annex I which were initially adopted by the Committee of the Whole,[18] failed to get the requisite two-thirds majority at the Plenary Meeting.[19] Regional and sectional interests appear to have played their own role in the failure of the Nineteen-State Amendment which proposed Article 62 bis.[20] Ruiz Varela of Columbia, one of the co-sponsors of the Amendment, lamented that "political factors had once again been allowed to prevail over legal considerations".[21] Fattal of Lebanon said that there was no need to feel disappointed over the result of the vote on Article 62 bis because as many as "sixty-two states representing every tendency except Marxism, had voted in favour of the article." However, he said that "the seed has been sown and would slowly bear fruit".[22]

The last quoted observation of the Lebanese delegate proved prophetic because, in a way, the negative vote on Article 62 bis quivered the pitch for the final solution.

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18. Ibid., p. 308.

19. In the Plenary Meeting, Article 62 bis and the Annex I obtained only 62 votes in favour and 37 against with 20 abstentions, thus falling short of two-thirds majority. Ibid., p. 153.

20. The whole of the Communist bloc, including U.S.S.R. voted against Article 62 bis and Annex I. India, Indonesia, Iran, Iraq, Malaysia and Turkey were also among the countries that voted against it. Most of the countries of the Western bloc, including Australia, France, U.K. and the U.S.A. voted in favour of the article and the Annex. Ibid.

21. Ibid., p. 154, para 7.

22. Ibid., para 11.

The delegates feared that all the efforts and labour spent over the years on drafting the Convention might prove futile and that the very future of the treaty relations might be thus threatened.[23] In a chastened mood, the delegates prepared themselves for a "compromise solution".[24]

"Compromise Solution"

But considerable amount of horse-trading appears to have preceded the "compromise solution" which came in the form of a 'package proposal' suggested by ten States.[25] The package deal consisted of a Draft Declaration on Universal Participation in and Accession to the Convention on the Law of Treaties and the proposed new Article on "Procedures for Adjudication, Arbitration and Conciliation". The ten-State proposal was ultimately adopted.

Article 62 (of the 1966 draft) and the article contained in the second part of the ten-State proposal referred to above, were incorporated in the Vienna Convention as Articles 65 and 66 respectively and were placed in Section 4 of Part V, which purports to deal with "procedure".

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23. N'Dong (Gabon), ibid., p. 155, para 14.

24. Khlestov (U.S.S.R.), ibid., p. 154, para 13.

25. UN Doc. A/Conf.39/L.47 and Rev. 1. It was said that the proposal "did not give the whole loaf to either of the two groups of delegations" but it gave "something to each". UNCLT, Second Session, Official Records, 1969, pp. 188-9. The package deal which was described by its authors as an "organic whole" (see ibid., p. 188), tried to tie up the thorny problem of universal participation with that of settlement of disputes and left no choice to the delegates except, 'take or leave it'.

INTERPRETATION OF THE PROCEDURAL PROVISIONS

Special Status for Jus Cogens Provisions

It is clear from the provisions of the Convention that the articles dealing with jus cogens are given a special status when compared to the articles dealing with other grounds of invalidity or termination. As has already been pointed out, Article 66 singles out invalidity arising out of conflict with jus cogens for providing special dispute-settlement procedures. The distinctive treatment of articles on jus cogens is evident from other articles also. For instance, Article 45 estoppes a party to a treaty from invoking the right to invalidate, terminate, withdraw from or suspend a treaty under Articles 46 to 50 and 60 to 62 if, after being aware of the facts, that party has expressly agreed to or acquiesced in the validity or continuance in force or operation of the treaty. The fact that Article 45 does not refer to Article 53 and 64 (the two main jus cogens articles) shows that a party cannot be estopped under any circumstances from invoking the right to invalidate or terminate the treaty on the ground of conflict with jus cogens.[26] As will be shown in the next Chapter, Article 71 also deals separately with the consequence of the invalidity of a treaty conflicting with jus cogens. This distinction between invalidity of treaties arising out of conflict with jus cogens

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26. In the Commentary to Article 47 of the 1966 draft (corresponding to Article 45 of the Convention), the ILC stated that "the Commission did not think it appropriate" that the principle of estopped should be admitted in the cases of jus cogens or supervening jus cogens. AJIL, vol. 61 (1967), p. 393.

under Articles 53 and 64 and other kinds of invalidity, is maintained in the Convention mainly for the purpose of preserving and emphasizing the peremptory character of the rules laid down in those Articles.

It would appear that even between Articles 53 and 64 a distinction is drawn in the convention giving greater weightage to Article 53. As has already been discussed, Article 44 paragraph 5 of the Convention specifically provides that under Article 53 no separation of the provisions of the treaty is permitted. However, such a separation of treaty provisions is permitted in the case of a treaty void under Article 64 if the conditions mentioned in paragraph 3 of Article 44, are satisfied. Article 71 also makes a distinction between Articles 53 and 64 in laying down the consequences flowing from the conflict of a treaty with those articles. The distinction between Articles 53 and 64 arises mainly from the fact that while Article 53 is placed under the category of "invalidity", Article 64 comes under "termination".

Two-tier Procedure

Articles 65 to 68 deal with "procedure". Articles 66 and 66, in particular, are the two pillars on which the procedural structure of the Vienna Convention rests. They are the means for the realization of the aims, and objectives adumbrated in the preamble to the Convention and in particular the affirmation that "disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law."

Articles 65 and 66 lay down a two-tier procedure for the settlement of disputes. Article 65 deals with the first phase of procedure and provides in paragraph 1 that a party which invokes any of the grounds for invalidity, termination etc. of a treaty must notify the other parties of its claim. The notification must indicate the measure proposed to be taken and the reasons therefor. "The measure proposed to be taken" obviously means that the claimant State has to specify whether it seeks invalidation or termination of a treaty or withdrawal from it. Such a notification by the claimant-State must, according to paragraph 1 of Article 67, be made in writing. However, paragraph 5 of Article 65 says: "Without prejudice to Article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation." As has already been pointed out, Article 45 deals with the estoppel of the claimant-State when it expressly agrees or acquiesces in the validity or maintenance in force of the treaty. Consequently, the "without prejudice" clause in paragraph 5 of Article 65 implies that its provisions apply only when the claimant-State's failure to notify does not amount to agreement or acquiescence as referred to in Article 45. As Article 45 does not apply to jus cogens articles, it means that a state claiming invalidity or termination of a treaty under Articles 53 or 64 may, under any circumstance, issue the required notification suo motu or even in reply to the other parties' demand for the performance of the treaty.

Article 65, paragraph 2, lays down that if, after the receipt of notification, no party has raised an objection within a period which, except in cases of emergency, shall be not less than three months, the notifying party may carry out the proposed measure in the manner provided in Article 67. Paragraph 2 of Article 67 requires that "any act declaring invalid, terminating, withdrawing or suspending the operation of a treaty" shall be carried out through an instrument communicated to other parties.[27]

Thus, paragraphs 1 and 2 of Article 65 deal with the modalities of invalidating, terminating etc. of a treaty when the situation does not involve any 'dispute' as such. A dispute would arise only when objection to the notification has been raised by the other parties to the treaty within the period mentioned in paragraph 2 of Article 65. Paragraph 3 of the article deals with that dispute situation and provides that in such a case, "the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations."[28] As Article 33 of the Charter leaves the choice

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27. Article 67, paragraph 2 further provides that if such an instrument is not signed by Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

28. The means mentioned in Article 33 of the Charter are negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies, or arrangements or other peaceful means of parties' choice. However, paragraph 4 of Article 65 states: "Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes."

of the means entirely to parties themselves, the article is merely recommendatory and, as noted earlier, it may not lead to any definitive settlement of disputes. Thus, paragraph 3 of Article 65 of the Convention merely restates an obligation to which the parties are already subject under Article 33 of the Charter. The loopholes of Article 65, paragraph 3 are, however, properly plugged by the compulsory means provided in Article 66.

Article 66 may be considered to be the cornerstone of the whole Convention on the Law of Treaties. If, under paragraph 3 of Article 65, the means mentioned in Article 33 of the Charter do not lead to a solution of the dispute within twelve months from the date on which the objection has been taken, the procedures mentioned in Article 66 "shall be followed". Clause (a) of Article 66 provides that if the dispute relates to "the application or interpretation of Articles 53 or 64", any one of the parties may, by a written application, submit the dispute to the International Court of Justice for a "decision", unless the parties by common consent agree to submit the dispute to arbitration. Thus clause (a) of Article 66 leaves no choice to the disputant States except compulsory arbitration or compulsory judicial settlement.[29]

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29. Clause (b) of Article 66 deals with the settlement of disputes relating to Articles other than Articles 53 and 64 of Part V and provides that any one of the parties may set in motion the compulsory conciliation procedures laid down in Annex I by a written request to that effect to the Secretary General of the United Nations.

GAPS IN ARTICLES 65 AND 66

Question of Locus Standi in Judicio

However, it is said that Articles 65 and 66 leave some of the vital aspects of dispute-settlement still in doubt. The first and foremost question is whether the invalidity of a treaty arising out of conflict with *jus cogens* can be invoked only by a party to the treaty or even by a third state. The question is a very fundamental one as it relates to *locus standi in judicio*.

In its comments on the draft articles on the law of treaties, Luxemborg raised the issue as to who would be entitled to invoke conflict of a treaty with *jus cogens* as a ground for invalidity. It said that if the parties to a treaty invoked *jus cogens* "this would mean that a party, which had itself contributed to the conclusion and entry into force of a treaty, would contradict its own act; in short, that would be a case of *venire contra factum proprium*." If according to Luxemborg, even a party to the treaty had no *locus standi* in matters of *jus cogens*, much less had a third state. Hence it stated that a third state could not claim the right of invoking *jus cogens* because "this would be inconsistent with the principle of relativity which, in the absence of supranational authority, continues still to dominate the whole subject of treaties."[30] The ultimate result of pursuing this line of approach would be to end up with the conclusion that neither

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30. Comments of Governments, YBILC, vol. 2 (1966), pp. 20-21.

the party to the treaty nor a third state has the necessary locus standi!

The argument of Luxemborg denying the right to invoke jus cogens even to a party to the treaty on a ground analogous to that of estoppel is indeed untenable and reduces the articles on jus cogens to a mockery. Article 45[31] of the Convention clearly excludes the application of the principle of estoppel in the case of a dispute relating to jus cogens. The opinion of Luxemborg that the right to invoke jus cogens as a ground of invalidity of a treaty is a case of venire contra factum proprium, is totally misconceived. By merely entering into a treaty, a state does not forego its right to invoke its invalidity later any more than does an individual lose his similar right in the case of a contract under municipal law. On the other hand, the whole law of avoidance of contracts is based on a principle which is just the opposite of Luxemborg's contention.

Then, the other question is whether third States have any locus standi in the matter of invoking the invalidity of a treaty conflicting with jus cogens. The writings on the subject of jus cogens and the deliberations of the International Law Commission and of the Vienna Conference abound in statements highlighting the universal character of jus cogens. There are several observations in terms of jus cogens being "in the interest of the whole international community"[32],

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31. Luxemborg's comments were based on the 1963 draft articles which also contained Article 47 that was analogous to Article 45 of the Convention.

32. Lachs, YBILC, vol. 1 (1963), p. 68.

"the interest of all"[33] and "an indispensable minimum for the existence of the whole international community".[34] Lauterpacht thought that the invalidity of a treaty conflicting with jus cogens was so very fundamental that even if the party which was interested in its avoidance kept silent, the treaty could not be given effect to by a Court or tribunal.[35] It is said that as jus cogens embodies the fundamental notions of ethics, morality and public policy of the international community as a whole, not only the parties to a treaty but all other states also have a legitimate interest in the avoidance of a treaty conflicting with jus cogens. Referring to the enquiry by some Governments about the locus standi of third states, Ago stated categorically that "a treaty that was in conflict with jus cogens was void and that any State could therefore invoke its absolute invalidity."[36] Speaking in the Committee of the Whole of the Vienna Conference in 1968, Truckenbrodt, the West German delegate, observed that the article on jus cogens "was designed to protect the international public order" and, hence "not only parties to a given treaty, but all states interested in the maintenance of public order, should normally be able to claim that a rule of jus cogens has been violated by the treaty."[37] The Ceylonese delegate at Vienna Conference stated

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33. Tunkin, ibid., p. 69.

34. De Luna, YBILC, vol. 1 (1964), p. 39.

35. Lauterpacht's First Report, YBILC, vol. 2 (1953), p. 155, para 6.

36. Ago, YBILC, vol. 1 (1966), pt. 1, p. 37.

37. Truckenbrodt, UNCLT, First Session, Official Records, 1968, pp. 409-10.

that even third states should have the right to get a treaty annulled for conflict with *jus cogens* because the two main articles on *jus cogens* "had implications which went beyond the relationship of the parties *inter se*."[38]

However weighty the above observations may be, it is submitted, with due respect, that the relevant provisions of either the previous draft articles on which those observations were made or of the Vienna Convention do not permit of such an interpretation. Paragraph 1 of Article 65 of the Convention starts with: "A party which, under the provisions of the present convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching its invalidity...." In this provision, 'party' means party to the treaty whose validity is sought to be impeached and it cannot be interpreted to mean "party to the present Convention". In fact, sub-paragraph 1(g) of Article 2 defines a "party" as "a state which has consented to be bound by the treaty, whether or not the treaty has entered into force." As the procedures for compulsory settlement of disputes under Article 66 are merely the continuation of the procedures in Article 65, the words "any one of the parties to the dispute" in paragraph (a) of Article 66 also refer only to the parties to the treaty. Hence it is submitted that Articles 65 and 66 confer the right of invoking the invalidity of a treaty only on the parties to it and not on third states. It is believed that it was wise not to

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38. Pinto, UNCLT, Second Session, Official Records, 1969, pp. 122-3, para 59.

confer such a right on third States for reasons other than that of privity or textual interpretation of the Convention. If the third States are also given the right to impugn the validity of a treaty in the name of "interests of international community", there will be no end to litigation and even a bilateral treaty will be at the mercy of the other 130 and odd states. One may envisage a situation where while the parties to a treaty might believe in its validity and intend performing their respective obligations under it, the third States overly anxious to "protect the interests of the international community" might question the validity of the treaty and drive the parties into vexatious litigation.

The above submission is further supported by the fact that Article 68 provides that "a notification or instrument provided for the Articles 65 and 67 may be revoked at any time before it takes effect." The 'notification' referred to is the written intimation by a party to the other parties to the treaty of its claim to invoke any of the grounds of invalidity, termination etc. under Article 65, paragraph 1. The 'instrument' referred to in Article 68 is the document communicated by the claimant State of the measure it proposes to take to invalidate the treaty when the other parties have raised no objection against the initial notification within the stipulated time. It is significant to note that Article 68 permits withdrawal of not only 'notification' but also 'instrument'. It means that Article 68 permits the claimant state to retrace its steps even after it has made the

notification intimating its claim to invalidate or terminate the treaty and the other parties raise no objection to such a claim. It is obvious that this provision of the Convention leaves the greatest possible latitude to the parties to a treaty to uphold the principle of pacta sunt servanda. In view of the above, it is difficult to concede to the third parties any locus standi in the matter of invalidity of a treaty conflicting with jus cogens.

The Status of the Treaty Pending Settlement of Dispute

It is said that Articles 65 and 66 have left another important issue in doubt. The question is asked: What will be the fate of the treaty from the time of notification by the claimant State to invoke its invalidity until the dispute is finally settled? Does it continue to be in force during that period, or is its operation suspended? Even though some discussion had taken place at the Vienna Conference on this important issue, nothing decisive seems to have emerged out of it. Stating that there were gaps in the articles on procedure, Bindschedler of Switzerland observed that, in his opinion, a treaty should remain in force till its invalidity was established.[39] Truckenbrodt (Federal Republic of Germany) observed that the use of the words "void" and "becomes void" in Articles 53 and 64 of the Convention appeared to indicate that the parties were not bound to perform the treaty obligations

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39. UNCLT, First Session, Official Records, 1968, p. 404, para 21.

during the period in question. He thought, however, that from practical point of view the only possible solution was that a treaty should be performed in good faith even by the party that invoked its invalidity.[40] Vallat (the United Kingdom) also observed that the presumption was in favour of the continuance in force of the treaty, unless there was some good reason to the contrary and whether that reason was valid or not was to be decided by a third party procedure.[41] He also suggested that a clause should be added to the 1966 draft Article 62, paragraph 3 (i.e. Article 65(3) of the Convention) providing that "meanwhile the presumption shall be that the treaty continues in force and in operation", so as to avoid any doubt as to the status of the treaty.[42] The delegates of Finland[43] and France[44] also favoured the continuance of the operation of the treaty during the period in which its validity was impugned.

It is submitted that the view that a treaty must be presumed to be continuing in force till its invalidity or termination is established, is eminently correct. Firstly, it is a fundamental principle of interpretation of treaties that the presumption is in favour of the validity of a treaty

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40. Ibid., p. 409, para 23.

41. Ibid., p. 420. Sinclair, also of U.K., reiterated the same opinion at the Second Session of the Vienna Conference. UNCLT, Second Session, Official Records, 1969, p. 281, para 55.

42. UNCLT, First Session, Official Records, 1968, p. 474, para 44.

43. Ibid., p. 423, para 58.

44. Ibid., p. 424, para 64.

till the contrary is established. In its commentary on Article 39 of the 1966 draft (i.e. Article 42 of the Convention), the International Law Commission stated that it "considered it desirable, as a safeguard for the stability of treaties, to underline in a general provision ... that the validity and continuance of a treaty is the normal state of things which may be set aside only on the grounds and under the conditions provided for in the present articles."[45] Article 42, paragraph 1 of the Convention, thus, provides that the validity of a treaty "may be impeached only through the application of the present Convention". Articles 57 and 58 of the Convention, which deal with suspension of a treaty, do not provide for any automatic suspension of the operation of a treaty but only suspension by mutual agreement.

Secondly, precipitate and automatic suspension of a treaty the moment its validity is disputed may cause considerable amount of inconvenience and even irreparable damage to the parties concerned. As the validity of even a multilateral treaty may be impeached by even one party to it, it is submitted that the treaty and the other parties to it should not be made to suffer the suspension of its operation even before its invalidity is established.

However, it may be argued that if the operation of a treaty, whose invalidity is sought to be established, is not suspended pending settlement of the dispute, the claimant-State would suffer grave injustice as it would be further

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45. AJIL, vol. 61 (1967), p. 387.

exposed to the operation of the treaty. The remedy even in such cases cannot be automatic and indiscriminate suspension of the operation of the treaty. The proper remedy for the parties to the treaties is, if possible, to arrive at an agreement and suspend the operation of the treaty in accordance with the terms of Article 57 or 58, as the case may be. If such an agreement is not possible and the dispute is being settled through arbitration or judicial settlement under Article 66, the parties can always ask for interim measures of protection.[46]

In conclusion, it may be stated that the twin provisions of Articles 65 and 66 provide adequate machinery for the settlement of disputes arising out of *jus cogens* provisions of the Convention and considerably minimise the risks of auto-interpretation and unilateral denunciation. These provisions go a long way in meeting the criticism that the ILC indulged in too much of normative innovation without providing for parallel procedural safeguards. While it is true that the advantages of the procedures laid down in Article 65 are considerable in spite of the weakness of reference in paragraph 3 to Article 33 of the U.N. Charter,[47]

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46. If, however, the position of the claimant state is such that any delay in the cessation of the operation of the treaty is intolerable, Article 65, paragraph 2 permits that party to carry out, "in case of special urgency", the contemplated measures immediately. See Quincy Wright, "Termination and Suspension of Treaties", AJIL, vol. 61 (1967), pp. 1003-4.

47. Herbert W. Briggs, "Procedures for Establishing the Invalidity or Termination of Treaties under the International Law Commission's 1966 Draft Articles on the Law of Treaties", AJIL, vol. 61 (1967), p. 989.

the incorporation of the provision for compulsory jurisdiction of the International Court of Justice would be a standing testimony to the foresight and sincerity of those who contributed to the drafting of the Convention.

Chapter VI

JUS COGENS : ITS EFFECTS AND CONSEQUENCES

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I

RETROACTIVITY

Speaking during ILC's 1963 deliberations, Sebtai Rosenne raised the interesting question whether Article 53 of the Vienna Convention annulled the treaties entered into only after the entry force of the Convention or even before. In other words, was Article 53 retroactive?[1] In its comments on the 1963 draft articles, the U.S. Government also raised the same question and considered that the relevant article did have the effect of nullifying even earlier treaties.[2]

Referring to the question raised by Rosenne, Ago observed that it was wrong to speak of retrospective effect in the particular context. He also pointed out that a rule could not be described as peremptory if it allowed treaties to subsist even if they conflicted with the rule; for that would be a contradiction in terms. Strangely, however, Ago stated that the Commission should not commit itself on that point in the article itself but the question should be left to be settled by judicial interpretation and state practice. The reason Ago gave for recommending such a course of action was that "the Commission's main concern should be to safeguard the existing treaties".[3]

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1. YBILC, vol. 1(1963), p. 75, para 27 (Ago's Observations).
2. AJIL, vol. 61 (1967), p. 1149 (Comment on Article 45).
3. YBILC, vol. 1 (1963), p. 75, para 27.

Yasseen also thought that the emergence of a new peremptory norm would have the effect of voiding the existing treaties but such effect is not retrospective effect but the immediate effect of jus cogens.[4] Bartos, stating that he agreed with Ago, observed that new rules of public order became operative as from the time of their acceptance and they produced an immediate effect on treaties concluded earlier.[5] Waldock, intervening in the debate, stated that he assumed that "inter-temporal law" would apply to such treaties. He proceeded to say that "in other words, all treaties would be covered by such a provision and the appearance of a new jus cogens would affect such pre-existing treaties as did not accord with it by making them no longer capable of being executed, though not invalidating the performance of the treaties in the past."[6]

It is obvious that Rosenne and the U.S. Government on the one hand, and Ago, Yasseen, Bartos and Waldock on the other, were speaking on different wave-lengths. The question raised by Rosenne and the U.S. Government was whether the 1963 draft article 37 (corresponding to Article 53 of the Convention) had retroactive effect so as to invalidate treaties entered into prior to the Convention. Ago and others were stating that a new rule of jus cogens operated prospectively in the sense that the treaty was not void ab initio but would become void from the date of emergence of the new rule; in effect,

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4. Ibid., p. 76, para 31.

5. Ibid., para 35.

6. Ibid., p. 78, para 47.

they were merely re-stating the rule in Article 45 of 1963 draft (Article 64 of the Convention).[7]

Retroactivity of Jus Cogens and Retractivity of Articles on Jus Cogens

Schwelb has correctly pointed out that "there are obviously two different problems involved which must be considered separately: (1) whether a rule of jus cogens has retrospective effect; and (2) whether draft Article 50 (of 1966 draft corresponding to Article 53 of the Convention) has retrospective effect."[8] The difference between the two propositions must be kept in mind because the discussions in the ILC and also the commentary on the draft articles appear to have assumed that the two propositions are synonymous. The consequences that follow from the two propositions may be stated as follows: The statement that a rule of jus cogens has no retrospective effect means that the treaties entered into prior to its emergence do not become void

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7. Oribe of Uruguay suggested in the Sixth Committee of the General Assembly three possible solutions to the problem. 1. Article 37 of the 1963 draft should affect only future treaties signed after a certain date agreed upon in advance; 2. it should take effect as soon as Article 37 was adopted as a part of an international Convention and 3. in view of the great importance and fundamental nature of the article, it should be applicable not only to treaties signed after the adoption of the Convention but also to those signed at any time in the past. See GAOR, session 18, Mtgs of the Sixth Committee, 1963, p. 58, para 25.

8. Egon Schwelb, "Some Aspects of International Jus Cogens as Formulated by the International Law Commission", AJIL, vol. 61 (1967), p. 969.

ab initio but only from the date of the emergence of the new rule. But the statement that the draft article 50 has no retrospective effect means that a treaty entered into prior to the Vienna Convention would not be considered to be void even if that treaty had conflicted with the then existing rule of jus cogens; in other words, it means that the draft Article 50 applied only to the treaties entered into after the coming into force of the Vienna Convention and not to those entered into earlier.

Having stated the "two different problems", Schwelb proceeds to ascertain the position under the draft articles from what the ILC stated in its commentary.[9] It is submitted, however, that such an enquiry was not likely to bear fruit because the ILC's commentary itself did not appear to have taken into account the distinction between the implications of two propositions discussed above. For instance, paragraph 6 of the commentary to draft Article 50 said: "The second matter is the non-retroactivity of the rule in the article. The article has to be read in conjunction with Article 61 (emergent peremptory norm) ... and in the view of the Commission there is no question of the present article (i.e. draft Article 50) having retrospective effects. It concerns where a treaty is void at the time of conclusion[10] by reason of the fact that its provisions are in conflict with an already existing rule of jus cogens.... Article 61, on the

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9. Ibid.

10. Emphasis in the original.

other hand, concerns cases where a treaty, valid when concluded, becomes void and terminates by reason of the subsequent establishment of a new rule of ius cogens with which its provisions are in conflict."[11]

The confusion in the above statement stands out clearly from the commentary to draft Article 61 where it is said: "In paragraph (6) of its commentary to Article 50 the Commission has already emphasized that a rule of ius cogens does not have retroactive effects."[12] As Schwelb has pointed out, paragraph 6 of the commentary to draft Article 50 did not say that "a rule of ius cogens does not have retrospective effects" but only said that "there is no question of the present article having retroactive effects". Hence, the statement in the Commentary that Article 50 does not have retrospective effects should, in view of the confusion, be taken to mean that a rule of ius cogens does not have retroactivity.

Thus, the question that still remains unanswered is whether draft Article 50 does or does not have retroactive effect so as to nullify treaties concluded prior to the coming into force of the Vienna Convention. Article 24 of the 1966 draft of the ILC, which corresponds to Article 28 of the Vienna Convention states the principle of "non-retroactivity of Treaties". It provides:

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11. YBILC, Vol. 2 (1966), p. 248, para 6.

12. Ibid., p. 261, para 4.

> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that treaty.

Hence, by virtue of the above article, Article 50 of the 1966 ILC/(i.e. Article 53 of the Convention) draft will not have retrospective effect, "unless a different intention appears from the treaty or is otherwise established". The text of draft Article 50 permits of an interpretation that would enable the article to be applied to the past as well as future treaties.[13] However, the statement in the ILC commentary that there was no question of this article having retroactive effects, adds to the ambiguity of the text of draft Article 50, particularly because of the confusion between retroactivity of a rule of jus cogens and of the draft Article 50. Schwelb, on the contrary, thinks that the "commentary seems to proceed from the assumption that under the draft any treaty is void which at the time of its conclusion - in the past or in the future - was or is in conflict with an already existing rule of jus cogens."[14] With due respect, it is submitted that there is nothing in the commentary to justify such an inference and even if such an inference could be drawn, it is unreliable because of the contradictions in the commentary already referred to and to which even Schwelb has drawn attention.

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13. Cf. Schwelb, n. 8, pp. 969-70.

14. Ibid., p. 970. Emphasis added.

In view of the provisions of Article 24 of the 1966 draft, non-retroactivity is the rule and retroactivity is the exception. According to Article 24, retroactivity of a treaty can be established "if either such an intention appears from the treaty or is otherwise established". Then, is there any provision in the Vienna Convention that indicates or establishes such an intention?

Article 4 of the Vienna Convention deals with, as its heading indicates, "Non-retroactivity of the present Convention", and provides:

> Without prejudice to the application of any rules set forth in the present convention to which treaties would be subject under international law independently of the Convention the Convention applies only to treaties which are concluded by states after the entry into force of the present Convention with regard to such states. 15

Consequently, Article 53 of the Vienna Convention will not have retroactive effects unless the rule incorporated in that article would apply to treaties as a rule of international law independently of the Convention. Now, the question is: Did the rules of jus cogens exist as rules of international law prior to the Vienna Convention? Is incorporation of Article 53 in the nature of codification or progressive development of International Law?

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15. In all fairness to Schwelb, it must be pointed out that there was no provision in the 1966 draft corresponding to Article 4 of the Convention. Suarez, the Mexican delegate at the Vienna Conference, assumed that Article 24 of the 1966 draft itself was a guarantee against retroactive effects of Article 50 of that draft. But, he does not seem to have noted the implications of the initial part of that Article. See UNCLT, First Session, Official Records, 1968, p. 294, para 9.

In view of the provisions of Article 4 of the Convention, Article 53 would not have retrospective effects if it is incorporated de lege ferenda. It will have retroactive effects if it is lex lata.

Is Article 53 lex lata or lex ferenda?

The preamble to the Vienna Convention states that the States-parties to the Convention believed that it achieved "the codification and progressive development of the law of treaties". In its 1966 Report to the General Assembly, the ILC stated that "the Commission's work on the law of treaties constitutes both codification and progressive development of international law in the sense in which those concepts are defined in Article 15 of the Commission's Statute, and, as was the case with previous drafts (on the law of treaties), it is not practicable to determine into which category each provision falls."[16] The commentary went on to make the significant statement that "some of the commentaries (to draft articles), however, indicate that certain new rules are being proposed for the consideration of the General Assembly and of the Governments."[17]

In its commentary on draft Article 50 (of 1966 draft corresponding to Article 53 of the Convention), the ILC stated that, even though some jurists deny the existence of jus cogens in international law "the view that in the last analysis there is no rule of international law from which

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16. AJIL, vol. 61 (1967), p. 262.

17. Ibid.

states cannot at their own free will contract out has become increasingly difficult to sustain."[18] The commentary also mentioned that out of all the Governments that submitted their comments on the draft articles, "only one questioned the existence of rules of jus cogens in the international law of today". Hence, the commentary stated that, "accordingly, the Commission concluded that in codifying the law of treaties it must start from the basis that today there are certain rules from which states are not competent to derogate at all by a treaty arrangement."[19]

In fact, many members of the ILC and also the delegates at the Vienna Conference emphasized that the rules of jus cogens already existed in international law. Ago said that jus cogens was not new;[20] Yasseen put the question whether jus cogens existed in international law and answered in the affirmative;[21] Rosenne thought that the concept of jus cogens existed in international law for a long time, even if in an inchoate form;[22] and Bartos said that evolution of jus cogens is a continuous process and that the U.N. Charter was a stage in that process.[23] Rodriguez stated in the Vienna Conference that "Article 50 (of the 1966 draft) stated a rule of lex lata";[24]

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18. Ibid., p. 409.
19. Ibid., p. 410.
20. YBILC, vol. I (1963), p. 75.
21. Ibid., p. 63.
22. Ibid., p. 73.
23. Ibid., p. 76.
24. Valencia Rodrigues (Ecuador), UNCLT, First Session, Official Records, 1968, p. 96.

this opinion was shared by many other delegates.[25]

As Schwelb points out, it is true that some comments of the members of ILC and of Governments suggested that incorporation of the concept of *jus cogens* in the draft articles was in the nature of progressive development of International Law. For instance, Tammer, the Cypriot member of the Sixth Committee of the General Assembly, said that the ILC "made a very constructive contribution to the progressive development of international law;[26] Pratt from Israel said that the draft article on *jus cogens* showed "the progressive trend of the Commission's thinking".[27] With due respect, it is submitted that much cannot be read into these statements because some of them implied, paradoxically that *jus cogens* was both *lex lata* and *lex ferenda*.[28] Schwelb refers to Pechota's statement that the draft article was a "remarkable step forward in the development of the law of treaties", but Pechota, in fact, followed

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25. See for instance, Ogudendere (Nigeria), ibid., p. 298; Meguid (U.A.R.), ibid., p. 298; Barros (Chile), ibid., p. 299; Dadzie (Ghana), ibid., p. 301; Ratsimbazafy (Madagascar), ibid., p. 301; Nahlik (Poland), ibid., p. 302. Lachs of Poland was emphatic that by incorporating the concept of *jus cogens* in the draft articles, the ILC has "implicitly recognized that they were part of *lex lata*". GAOR, Mtgs of the Sixth Committee, 1966, p. 27. Kenneth Bailey (Australia), on the other hand, thought that jurists would reject international *jus cogens* as both *lex lata* and even as a proposal *de lege ferenda*. Ibid., p. 67.

26. GAOR, Mtgs of the Sixth Committee, 1963, p. 9.

27. Ibid., p. 27.

28. Schwelb, n. 8, p. 971.

it up by saying that the article "confirmed a rule largely supported by state practice and international law and also stressed by many authorities on international law...."[29] Jiminez of Philippines also made a similar self-contradictory statement when he said that he "welcomed the Commission's decision to recognize the existence of peremptory norms of international law (jus cogens)" and considered that the draft articles on jus cogens "represented a breakthrough in the progressive development of international law".[30] A similar conflicting statement was made by the Italian Member of the Sixth Committee when he said that in recognizing the existence of jus cogens, the ILC "had successfully met the requirements of the progressive development of international law".[31] Blagojevic of Yugoslavia followed suit and stated that in draft Articles 37 and 45 (of 1963 draft corresponding to Articles 53 and 64 of the Convention), the ILC extended "a welcome recognition to the existence of peremptory norms of international law" and that "the Commission's recognition of these two postulates was an important step in the progressive development of international law".[32]

It is difficult to believe that in the statements quoted above the phrase "progressive development of

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29. Pechota (Czechoslovakia), GAOR, Mtgs of the Sixth Committee, 1963, p. 31, para 25.

30. Ibid., p. 46, para 10.

31. Ibid., p. 62, para 11.

32. Ibid., p. 11, paras 13 and 14.

international law" was used in the technical sense it was used in Article 15 of the Statute of the ILC. Hence, the phrase "progressive development of International Law" in those statements can only be taken to mean what Cribe meant when he said that the rule of ius cogens had been "established for the first time in a legal text as a basis for deciding the nullity of a treaty".[33]

Waldock, the Special Rapporteur, has thrown considerable light on the inter-temporal aspects of the question whether the formulation of the articles on ius cogens was de lege ferenda. He observed:

> Admittedly, if the rule embodied in Article 37 (of 1963 draft) were to be regarded as a total innovation in international law, the time element would present itself in a different light. On that hypothesis, the application of the article would logically be confined to treaties concluded after the entry into force of a general convention on the law of treaties incorporating the article. 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 a treaty arrangement'. In other words, it recognized that some rules of ius cogens already exist in international law and in Article 37 merely drew the logical consequences from that fact. [34]

The above statement of Waldock really clinches the issue and makes it plain that, firstly, the Commission thought that rules of ius cogens were lex lata and, secondly, "the time element" would operate so as to give the draft

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33. Ibid., p. 58, para 23.

34. YBILC, vol. 2 (1966), pp. 24-25, para 6.

articles on *jus cogens* retrospective effect.

At the Vienna Conference, the United States proposed an amendment[35] to Article 50 of the 1966 draft so as to add "at the time of conclusion" immediately after "A Treaty is void if" in the initial part of the Article. This amendment was later accepted[36] and it now forms part of Article 53 of the Convention. Thus, the initial part of Article 53 provides that "a treaty is void if, at the time of conclusion, it conflicts with a peremptory norm of general international law". The purpose of the amendment was to make it abundantly clear that a rule of *jus cogens*, when it emerges, does not render void *ab initio* a treaty concluded before its emergence. In other words, a treaty is void *ab initio* only if it conflicts with a peremptory norm already existing "at the time of conclusion" of the treaty. Hence, it is submitted that the acceptance of the U.S. amendment does not by itself, negative the retroactivity of the article. It provides against the retroactivity of the rule of *jus cogens* in Article 53 and not of the article itself.

Of particular interest in this regard is the Amendment proposed by Mexico at the First Session of the Vienna Conference.[37] The purpose of the amendment was to introduce a specific provision in Article 50 of the 1966 draft to clearly

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35. UN Doc. A/Conf.39/C.1/L.302.

36. UNCLT, First Session, Official Records, 1968, p. 333.

37. UN Doc. A/Conf.39/C.1/L.266.

lay down the non-retroactivity of the article itself.[38] Some delegates supported the amendment on the assumption that it expressly confirmed that Article 50, "as was clearly indicated in the Commentary" would not have retrospective effect.[39] It was already shown above that this assumption was not justified from what was stated in the Commentary. However, all the issues involved in the Mexican amendment were brought into sharp focus by Alvarez Tabio, the Cuban delegate. Stating that his delegation could not accept the Mexican Amendment, he said that a treaty which conflicted with an existing peremptory norm was void ab initio; that point did not require any further elaboration. If, however, the purpose of the amendment was to provide that nullity should not operate ex tunc, it should be categorically rejected. Tabio pointed out that "a decision which found a treaty to be null and void because it conflicted with a rule of jus cogens was purely declaratory; the void treaty was a nullity from the start and

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38. Suarez, the Mexican delegate, who introduced the Mexican Amendment, does not appear to be very clear regarding the distinction between retroactivity of a rule of jus cogens and of the article itself. He said: "In view of the varying character of the rules of jus cogens it was essential to stress that the provisions of Articles 50 and 61 did not have retroactive effect. The emergence of a new rule of jus cogens would preclude the conclusion in the future of any treaty in conflict with it...." UNCLT, First Session, Official Records, 1968, p. 294, para 9. De La Guardia (Argentina) thought that the Mexican Amendment provided against retro-active effect of Article 50 as applied to "situations which had arisen before the Convention came into force". Ibid., p. 308, para 24.

39. See, for instance, the statement of Cole of Sierra Leone, ibid., p. 301, para 12; and also of Ruiz Varela (Columbia), ibid., p. 302, para 29.

the decision would merely acknowledge the fact." Of particular significance is the statement of Tabio that his delegation could not accept "the proposition that Article 50 should not affect treaties already included before its provisions entered into force. No breach of the principle of non-retroactivity was involved where a legal norm was applied to existing questions or matters, even if they had originated earlier."[40]

During the second session of the Vienna Conference, another attempt was made to provide for absolute non-retroactivity of the whole of the Convention. Venezuela introduced an amendment to incorporate a new draft article to specify that the Convention applied only to treaties concluded "in the future".[41] This proposal also met with strong opposition on the ground that it would exclude the application of those principles of International Law which are already in existence but are merely codified in the Convention. It is significant to note that the Venezuelan delegate had himself admitted that the rules of *jus cogens* were part of *lex lata* and applicable even before the entry into force of the Convention.[42]

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40. UNCLT, ibid., p. 297, para 37 (emphasis added). The Mexican Amendment was later withdrawn.

41. UN Doc. A/Conf.39/C.1/L.399.

42. A Five-State Amendment (UN Doc. A/Conf.39/C.1/L.400) providing for non-retroactivity of the Convention but preserving the application of *lex lata* only to the extent of customary principles was also not favoured. Ultimately, the Seven-State Amendment (UN Doc. A/Conf. 39/C.1/L.403) which also provided for non-retroactivity of the Convention but saved the application of the whole of *lex lata*, customary or otherwise, was adopted by the Committee of the Whole and also at the plenary

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In the light of the above discussion, it may be concluded that Article 53 of the Vienna Convention has the retrospective effect so as to nullify even a treaty entered into prior to the coming into force of the Convention. The above conclusion is based on the following compelling considerations:

1. Article 53 itself permits of such an interpretation.

2. Article 28 provides against retroactivity of a treaty unless "a different intention appears from the treaty or is otherwise established".

3. Such "a different intention" appears from Article 4 of the Convention which provides for prospective application of the Convention but "without prejudice to the application" of the existing rules of international law which would bind the parties independently of the Convention.

4. Independently of the Convention, the States are bound by rules of jus cogens which are lex lata and not lex ferenda.

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Meeting of the Vienna Conference. The Seven-State proposal was incorporated as the new Article 77 (i.e. Article 4 of the Convention). While most of the delegates accepted the new Article 77 without any mental reservations, Rubert of France stated that he would vote in favour of the article on the understanding that while the rules set forth in the Convention may apply independently of it as part of lex lata to past treaties, the article on jus cogens would not, however, invalidate treaties concluded prior to coming into force of the Convention. UNCLT, Second Session, Official Records, 1969, p. 166, para 18. A very interesting discussion on the three amendments referred to above may be found in ibid., pp. 323-41. See also Briggs, "Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice", AJIL, vol. 68 (1974), no. 1 (January), pp. 52-53.

5. Travaux preparatoires of Article 53 of the Convention, which can be referred to as "supplementary means of interpretation" under Article 32, clearly indicate that, firstly, overwhelming majority of the members of the ILC, the delegates at the Vienna Conference and the Governments considered that rules of jus cogens were incorporated in the Convention de lege lata and not de lege ferenda. Secondly, amendments which were aimed at providing against retrospective operation of the articles on jus cogens were not approved.

In contrast to a treaty that is void ab initio for conflict with the existing rule of jus cogens a treaty that is valid when entered into but which conflicts with a rule of jus cogens that has emerged subsequent to the conclusion of the treaty, is not void ab initio but becomes void from the time of the emergence of new peremptory norm. The latter case of supervening invalidity is covered by Article 64 of the Convention, which provides: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

Non-retroactivity of a New Rule of Jus Cogens

This article also raised some doubts as to whether a new rule of jus cogens would have retrospective effects so as to nullify a treaty that conflicted with it even from the date on which the treaty had been concluded. The Commentary to Article 61 of the 1966 draft (corresponding to Article 64 of the Convention) makes it very clear that the effect of the article on a treaty "is not to render it void ab initio, but

only from the date when the new rule of *jus cogens* is established".[43] It was, however, pointed out by Verdross that while the word "terminates" in Article 61 (of 1966 draft corresponding to Article 64 of the Convention) denoted *ex nunc* operation of the provision, the words "becomes void" implied an effect *ex tunc*; while the former indicated prospective operation, the latter suggested retroactivity.[44] But, as has been correctly pointed out by Yasseen, under draft Article 61 a treaty "terminates" because it "becomes void".[45] The draft Article 61 clearly provides that a treaty "becomes" void whereas Article 50 (of 1966 draft i.e. Article 53 of the Convention) says a treaty "is" void.[46]

It was suggested by some members of the ILC that it would be more convenient to group draft Articles 50 and 61 under one article.[47] The Commentary to Article 45 of the 1963

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43. AJIL, vol. 61 (1967), p. 291.

44. Verdross, YBILC, vol. 1 (1963), p. 257. He was supported by Castren and Bartos, ibid.

45. YBILC, vol. 1 (1963), p. 257.

46. Yasseen suggested that the text of Article 61 could be made clearer by substituting 'when' for 'if' in the initial part of the article - "If a new peremptory norm...." He thought that 'when' would explicitly indicate the time element and would suggest that the invalidity of the treaty commences from the time of emergence of new peremptory norm with which the treaty conflicts. YBILC, vol. 1. (1963), p. 257. But Waldock thought that having regard to the nature of the rule contained (in the draft article), the conditional 'if' seems more appropriate. Ibid., vol. 2 (1964), p. 45. Waldock preferred 'if' because it suggests that the emergence of a new rule of *jus cogens* is exceptional, whereas 'when' would imply that those rules change frequently.

47. The Indian delegation proposed an amendment to that effect at the Vienna Conference also. UN Doc. A/Conf. 39/C.1/L.254.

draft (i.e. Article 64 of the Convention) stated that "the Commission discussed whether to include this rule in Article 37 (i.e. Article 53 of the Convention), but decided that it should be placed among the articles concerning the termination of treaties. Although the rule appears to deprive the treaty of validity, its effect is not to render it void ab initio, but only from the date when the new rule of ius cogens is established; in other words, it does not annul the treaty, it forbids its further performance."[48] However, the last sentence in the above statement that Article 45 (of 1963 draft) "does not annul the treaty, it forbids its further performance" was clearly wrong as it suggests that the treaty's validity is not affected whereas the article itself says that the treaty "becomes void".[49] Consequently, the Commentary to the corresponding article of the 1966 draft was recast and it states that the new rule of ius cogens "does not annul the treaty, it forbids its further existence and performance".[50]

Article 64 also Retroactive

Strangely, it seems to have gone totally unnoticed that even Article 64 of the Vienna Convention may have retroactivity. Suppose a treaty was entered into in 1910 and a new rule of ius cogens has emerged in 1945 - both the year of conclusion of the

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48. AJIL, vol. 58 (1964), p. 291.

49. Alvarez Tabio (Cuba) stated at the Vienna Conference that the commentary was, in this respect, "in flat contradiction with the rule stated in the article...." UNCLT, First Session, Official Records, 1968, p. 448, para 13.

50. AJIL, vol. 61 (1967), p. 437; emphasis added.

treaty and the year of emergence of a new peremptory norm being prior to the Vienna Convention of 1969. Can it be said that, under Article 64 of the Convention, the treaty of 1910, "becomes void and terminates" right from 1945 being the year of the emergence of new peremptory norm? As the considerations that have led to the conclusion that Article 53 is retrospective apply to Article 64 also, the necessary conclusion would be that Article 64 affects the treaties of the kind mentioned in the above illustration. Consequently, Article 64 also is capable of retrospective effect, even though, admittedly, a new jus cogens does not possess that efficacy.

Articles 53 and 64 have all the potentialities of raising a harnet's nest of doubts and disputes about the validity of treaties entered into in the past ad infinitum[51] and may prove themselves to be a veritable "Pandoras box"[52].

II

INTER-TEMPORAL ASPECTS

As jus cogens consists of prohibitory rules with a preventive function, the effects and consequences that they produce on a conflicting treaty are of utmost importance. The immediate effect of a peremptory norm on a treaty conflicting with it is the invalidity of the treaty. Article 69 of the

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51. Fears that retroactivity may apply into the past ad infinitum were expressed in the ILC. See for instance, the statement of Reuter, YBILC, vol. 1 (1966), pt. II, p. 17.

52. Vallat described Article 53 as "a Pandora's Box", UNCLT, First Session, Official Records, 1968, p. 330, para 32.

Vienna Convention states in paragraph 1: "A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force". The invalidity of a treaty can be established under the Convention in accordance with the provisions of Articles 65 to 68 which have been discussed in the previous Chapter. The statement in paragraph 1 of Article 69 that "the provisions of a void treaty have no legal force" is misleadingly simple. Paragraph 2 of Article 69 itself makes substantial inroads into the effectiveness of the statement in paragraph 1, and provides:

> If acts have nevertheless been performed in reliance on such a treaty:
>
> (a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;
>
> (b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

Paragraph 3 of Article 69 states that "in cases falling under Articles 49, 50, 51 and 52,[53] paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or coercion is imputable." Nevertheless, the mitigating provisions of paragraph 2 of Article 69 do not apply also to Article 53 (conflict with existing _jus cogens_) because, as was stated in the Commentary to the 1966 draft

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53. These four articles deal, respectively, with fraud, corruption of a representative of a State, coercion of a representative of a State and coercion of a State by the threat or use of force.

counterpart[54] of Article 69, "the case of a treaty void ... by reason of its conflict with a rule of jus cogens is not mentioned in paragraph 3 because it is the subject of a special provision"[55], in Article 71 of the Convention. So, also, Article 70 dealing with "consequences of the termination of a treaty" does not apply to Article 64 (supervening jus cogens) because the latter is separately dealt with in Article 71.

Article 71 deals with "consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law". It provides:

> 1. In case of a treaty which is void under Article 53 the parties shall:
>
> a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law;
>
> b) bring their mutual relations into conformity with the peremptory norm of general international law.
>
> 2. In the case of a treaty which becomes void and terminates under Article 64, the termination of the treaty:
>
> a) releases the parties from any obligation further to perform the treaty;
>
> b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

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54. Article 65 of the 1966 draft.

55. AJIL, vol. 61 (1967), p. 443.

Reasons for Grouping Together

It is obvious that Article 71 clubs together the consequences of a treaty that is void under Article 53, and also of a treaty that becomes void and terminates under Article 64. The reason for grouping them together were given in the Commentary to Article 67 which was the relevant provision of the 1966 draft. Firstly, it was stated that "the consequences of the nullity of a treaty under Article 50 and of the termination of a treaty under Article 61[56] both being special cases arising out of the application of a rule of jus cogens, the Commission decided to group them together in the present article."[57] It was also stated that "the nullity of a treaty ab initio by reason of its conflict with a rule of jus cogens in force at the time of its conclusion is a special case of nullity". Similarly, "the termination of a treaty which becomes void and terminates under Article 61 by reason of its conflict with a new rule of jus cogens is a special case of termination (and indeed also a special case of invalidity, since the invalidity does not operate ab initio)."[58] Thus, the case of treaty falling under Article 64 of the Convention is a hybrid between invalidity and termination. The explanation in the Commentary for dealing with the effect of both the jus cogens articles under one article, also explains why the invalidity

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56. Articles 50 and 61 referred to in the Commentary are of the 1965 draft articles, corresponding to Articles 53 and 64 of the Convention, respectively.

57. AJIL, vol. 61 (1967), p. 448, para 2.

58. Ibid.

of a treaty conflicting with *jus cogens* was dealt with separately from other cases of invalidity.

Another reason that was given in the Commentary for grouping the consequences of both Articles 53 and 64 in Article 71 was that "their juxtaposition would serve to give added emphasis to the distinction between the original nullity of a treaty [under Article 53] and the subsequent annulment of a treaty [under Article 64] as from the time of the establishment of *jus cogens*."[59] However, it may be asked why for the very same reason both the cases of conflict with a peremptory norm were not juxtaposed in one article in Part V of the Convention? The answer may be found in the fact that the Indian amendment[60] proposing clubbing together of what are now Articles 53 and 64 of the Convention into one article was not accepted on the ground that while Article 53 deals with invalidity, Article 64 relates to termination and hence, they have to be placed under the respective Sections of Part V of the Convention. While it may be so, it is, indeed, strange that the distinction between "invalidity" and "termination" was given a go-by in Article 71 and the consequences flowing from Article 64, which is placed under Section 3 dealing with termination and suspension of treaties, were also mentioned in Article 71 which purports to deal with "consequences of the *invalidity* of treaty which conflicts with a peremptory norm

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59. Ibid.

60. UN Doc. A/Conf.39/C.1/L.254.

of general international law".[61]

Difference Between General Invalidity and Invalidity Caused by Jus Cogens

A comparison of Article 69 paragraph 2(a) and Article 71, paragraph 1(a) would reveal that the terminology employed in the two provisions is totally different. While the former provides that "each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed", Article 71, paragraph 1(a) on the other hand, directs that "the parties shall eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law." The difference in terminology shows that while the provision in Article 69 aims at the restoration of status quo ante by the parties, Article 71, paragraph 1(a) merely requires the elimination of the consequences of an act performed under the offending provisions of the treaty. However, both the provisions contain the flexible phrase "as far as possible" so as to provide against demands for mathematical exactness in the restoration of status quo ante under Article 69 and the elimination of consequences under Article 71. The phrase "as far as possible" also covers a situation where it is impossible to comply with the provisions of the two articles in

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61. In fact, Article 67 of the 1966 draft (i.e. Article 71 of the Convention) maintained the distinction and purported to deal with "consequences of the nullity or termination of a treaty conflicting with a peremptory norms of general international law". However, "invalidity" was substituted in the place of "nullity and termination" at the Vienna Conference.

which case the questions of state responsibility would necessarily arise. Even though it is true that the phrase "as far as possible" is so malleable that it is susceptible to abuse, there is no denying the fact that its non-inclusion would have caused greater problems.[62] It may be noted that while

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62. "As far as possible" occurred in the relevant provisions of the drafts of the International Law Commission. See, Article 27 of the draft articles incorporated in Waldock's Second Report (YBILC, vol. 2 (1968), p. 93); Article 52 of the ILC Report of 1963 (AJIL, vol. 58 (1964), pp. 302-3); Articles 65 and 67 of the ILC Report of 1966 (AJIL, vol. 61 (1967), pp. 444 and 447). Some members of ILC were, however, not in favour of the inclusion of the phrase. At the fifteenth session of the ILC, Lachs observed that by including "as far as possible" in the draft article, the Special Rapporteur "conceded that it was not always possible to restore the status quo ante." (YBILC, vol.1 (1963), p. 229). Yasseen was also in favour of the deletion of the phrase on the ground that "if it was impossible to restore the previous position - and no one would be bound to do the impossible - other general theories, such as the theory of responsibility would come into operation." (Ibid.) Obviously because of the opposition in the Commission, the Drafting Committee dropped the phrase in the articles resubmitted by it (Ibid., p. 281). However, the phrase staged a comeback in the subsequent draft and encountered some opposition again in the Commission but this time successfully. Thus during the 1966 discussions of the Commission, de Luna said that he did not like the expression "as far as possible" because, if it was impossible to re-establish the position existing before the treaty was invalidated, then provisions of the article would not be applied. He said that he would prefer the expression to be dropped, as "the elastic qualification 'as far as possible' would be dangerous". (YBILC, vol. 1 (1966), pt II, pp. 12 and 13). However, the phrase received strong support from Bartos who thought that its inclusion was "well-advised". He said that "logic might perhaps require that it be dropped, but formal and abstract logic was far removed from the realities of everybody life." (Ibid., p. 13). Waldock's statement was almost the final word on the matter. He said: "The phrase 'as far as possible' had been discussed at some length at the fifteenth session and its weakness recognized, but the Commission had decided to keep it for realistic reasons." He said

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Article 71, paragraph 2(a) employs mandatory language in "the parties shall eliminate" etc. Article 69, paragraph 2(a) leaves the option to the parties by saying "each party may require" etc.[63]

'Separability' Through Back-Door

It is submitted that Article 71, paragraph 1(a) introduces an element of ambiguity when it states that the parties shall eliminate the consequences of any act performed in reliance on "any provision" which conflicts with the rule of *jus cogens*. It means that Article 71, paragraph 1(a) makes a distinction, for the purpose of elimination of the consequences, between acts performed in reliance on those treaty provisions which do not conflict with a peremptory norm and those acts which conflict with such a norm. Does it also mean that the

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that he agreed with Bartos that it would be undesirable to impose an unrealistic obligation on the parties. (Ibid., p. 15). The above discussion took place with reference to what is now Article 69 of the Convention but it is submitted that the points raised and debated during the discussion are highly relevant to even Article 71.

63. Jimenez de Arechaga suggested that the phrase "each party may require" be made "more imperative and precise" (YBILC, vol. 1 (1966) pt. II, p. 11). However, Waldock stated that "the clause could not be made obligatory, because both or all the parties might agree to allow certain effects of acts performed under the treaty to continue. Such a measure of option to the parties to determine their course of conduct in the light of developments as time went on, was necessary." Ibid., p. 15.

consequence of an act performed in reliance on any treaty provision which does not conflict with a peremptory norm, need not be eliminated? The answer, in terms of Article 71, paragraph 1(a) would be in the affirmative. On the contrary, Article 44, paragraph 5 excludes in express terms the application of the principle of separability to the provisions of a treaty void under Article 53. It necessarily follows from the provision in Article 44 that a treaty whose validity is sought to be tested under Article 53, has to stand or fall as a whole. Hence it is submitted that the terms "any provision" in Article 71, paragraph 1(a) would bring through the back door the application of the principle of separability as to acts performed under a treaty prior to the establishment of its invalidity under Article 53, even though such application of the principle of separability is not permitted under Article 44, paragraph 5.[64]

A further comparison of Article 69 paragraph 2 and Article 71 paragraph 1 shows that while the former states that "acts performed in good faith before the invalidity was invoked

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64. See the observations of Sinclair (U.K.), UNCLT, First Session, Official Records, 1968, p. 449. In spite of the fact Article 44, paragraph 5 expressly excludes the application of separability to a treaty void under Article 53, Sinclair stated that it was the understanding of his delegation that with respect to those treaty provisions which did not conflict with a peremptory norm, the provisions regarding general invalidity under Article 69 rather than Article 71 would apply. (UNCLT, Second Session, Official Records, 1969, p. 127, para 16). This is obviously an attempt to bring the principle of separability into Article 53 through a devious route and amounts to a clear negation of the express provisions of Article 44, paragraph 5.

are not rendered unlawful by reason only of the invalidity of the treaty", the latter does not contain a similar provision. The reason is that in the case of a treaty coming under Article 71, paragraph 1(a), the parties have, in concluding the treaty, transgressed a peremptory norm of general international law and hence, it would not be open to any party to speak of acts performed in "good faith".[65] Consequently, Article 71, paragraph 1(a) directs that "the parties shall eliminate ... the consequences of any act performed".

Reestablishment of Relations in Conformity With Jus Cogens

Article 71, paragraph 1(b) provides that the parties shall "bring their mutual relations into conformity with the peremptory norm of general international law".[66] This provision appears to be pedantic and hortatory and was the subject of much discussion in the International Law Commission. This provision did not occur in any of the relevant articles of the drafts prepared prior to 1966. Explaining the reasons for its inclusion in the 1966 draft, Waldock stated that the Drafting Committee thought that it was not sufficient to make an express provision denying the parties to the treaty void under Article 53 the benefit of saving the acts performed in "good faith";

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65. Cf. the statement of Waldock in his Sixth Report, YBILC, vol. 2 (1966), p. 54, and vol. 1 (1966), pt II, pp. 16 and 320.

66. The official draft Article 53 (bis) as was introduced by the Drafting Committee at the 865th Meeting of the ILC contained a slightly different language in its paragraph 1(b). It provided that the parties 'shall establish their mutual relations on a basis which is in conformity with the peremptory norm of general international law". YBILC, vol. 1 (1966), pt. II, p. 180.

"for a proper formulation of the rule in the matter, it was necessary to state in a more positive manner the consequences of the invalidity...." He said that the Drafting Committee accordingly included a provision "requiring the parties to establish their mutual relations on a basis which was in conformity with the rule of jus cogens in question".[67] The statement of Waldock did not allay the doubts of the members of the Commission regarding the desirability of including that provision. Tsuruoka stated: "Since the whole draft related to the law of treaties, it appeared to mean that States were required to enter into treaty relations in conformity with the peremptory norms of general international law. But all that states were required to do was to conform with the norm unless, of course, the norm also ordered them to enter into treaty relations. The paragraph was open to an interpretation which was not in accordance with the Commission's intentions."[68] Bartos also shared the above opinion.[69]

The original draft Article 63 (bis) of the 1966 draft contained the words "establish their mutual relations"[70] in

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67. YBILC, vol. 1 (1966), pt. II, p. 161.
68. Ibid.
69. Ibid.
70. Both draft Article 63 (bis) and Article 71, paragraph 1(a) of the Convention contain the phrase "mutual relations" which may give rise to the doubt whether not only treaty relations but also political and other relations of the parties must be reformulated. Rosenne thought that "the misunderstanding could perhaps be dispelled by introducing the word 'legal' before relations in paragraph 1(b)." He stated that "it had clearly not been the intention of the Drafting Committee to refer to relations in fact or to diplomatic relations". YBILC, vol. 1(1966), pt.II, p. 161. It is submitted, however, that as the Convention relates only to treaties "mutual relations" has to be interpreted as "mutual treaty relations".

the relevant provisions and this created the impression that the parties were required to enter into new treaty relations once the treaty conflicting with a peremptory norm was declared void. Waldock, attempting to clear the fog around paragraph 1(b) stated: "The hypothesis envisaged in paragraph 1 was that the parties had established their relations on a basis that was not in conformity with the rules of jus cogens. Consequently, sub-paragraph (a) called on the parties to eliminate as far as possible the consequences of any act done in reliance on treaty provisions which conflicted with the rules of jus cogens, while paragraph (b) called on them to place their relations on a plane of full conformity with international law; it did not of course call on the parties to create any new treaty relations. In fact, the provisions of paragraph 1(b) were perhaps self-evident; they had been included ex abundante cautela."[71] It may be said, however, that the provisions of paragraph 1(b) did not seem to be that 'self-evident' because, even after Waldock's explanation, Yasseen said that he also thought that paragraph 1(b) "raised a problem". He stated: "The parties must not only eliminate the consequences of their act in accordance with paragraph 1(a), but also must establish certain mutual relations in accordance with paragraph 1(b). Under the proposed wording the latter operation seemed to comprise two stages: first, the establishment of relations on a certain basis and then steps to ensure that that basis was in conformity with the peremptory norm. But States might not

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71. Ibid.

wish to seek such a basis, and might prefer to make their relations directly subject to the norm."[72]

Even though the word 'establish' in Article 53 (bis) had been replaced by 'bring'[73] and also the words "on a basis which is" were dropped in Article 71, paragraph 1(b), the doubts raised by some members of the ILC regarding the provision still persist. As has already been pointed out, a rule of jus cogens is essentially a prohibitory rule with a preventive function. It merely invalidates a treaty conflicting with it. It does not require the parties to formulate their relations in conformity with it even though States proposing to establish viable treaty relations would naturally intend to conform with it. A rule of jus cogens does not compel conformity with it but only nullifies a violation of it.

CONSEQUENCES OF INVALIDITY AND TERMINATION OF A TREATY UNDER ARTICLE 64

Article 71, paragraph 2[74] deals with the consequences

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72. Ibid.

73. While, Reuter suggested the word 'define', Amado proposed "adopted" as substitutes for 'establish'. It was Tsuruoka's suggestion that was finally accepted. Ibid.

74. Excepting the initial part and the proviso in sub-paragraph (b), the provisions of Article 71, paragraph 2 are in pari materiae with paragraph 1(a) of Article 70 which deals with "Consequences of the termination of a treaty". Article 70, paragraph 1 provides "unless the treaty otherwise provides or the parties otherwise agree, the termination of treaty under its provisions or in accordance with the present Convention: (a) releases the parties from any obligation further to perform the treaty; (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination."

of a treaty that becomes void and terminates under Article 64. Sub-paragraph 2(a) of the article says that in the case of a treaty affected by Article 64, the termination of the treaty "releases the parties from any obligation further to perform the treaty". Of course, the release from obligation to perform the treaty is the natural consequence of its termination. However, it may be argued that the words "the treaty" in the above provision are not in order because they give the impression that the parties are released from the obligation to perform the whole of the treaty though Article 44 permits the application of the principle of separability to a treaty that becomes void under Article 64.[75] This is not, however, a serious lacuna as, in any case, Article 71 has to be read subject to Article 44.

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75. See Sinclair's observations in UNCLT, Second Session, Official Records, 1969, p. 449.

Briggs suggested a clarification in paragraph 1(a) of Article 66 of the 1966 draft (corresponding to Article 70, paragraph 1(a) by way of insertion of the words "or part thereof" immediately after "termination of the treaty" in the initial part of paragraph 1, and also the consequential change in sub-paragraph 1(a) to read: "... further to perform the provisions of the treaty that have terminated". UNCLT, First Session, Official Records, 1968, p. 448, para 6. The clarification suggested by Briggs would have applied with equal validity to Article 71, paragraph 2(a) also. If the clarification was incorporated, Article 71, paragraph 2(a) would have read: "In the case of a treaty which becomes void and terminates under Article 64, the termination of the treaty or part thereof:

(a) releases the parties from any obligation further to perform the provisions of the treaty that have been terminated". The words underlined above are the suggested additions to the existing provision.

MAINTENANCE OF PAST RIGHTS, OBLIGATIONS ETC.

Paragraph 2(b) of Article 71 provides that the termination of a treaty under Article 64, "does not affect any right obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law." This provision is a necessary corollary to Article 64 under which a treaty becomes void not from its inception but from the time of conflict with the new peremptory norm. Termination of a treaty under Article 64 is the direct result of the supervening invalidity. On the other hand, a treaty affected by Article 53 is simply void and does not 'terminate'; it does not terminate because it is deemed never to have been in existence. What does not exist, cannot 'terminate'.

Distinction Between Articles 53 and 64

Consequently, the vital distinction between Articles 53 and 64 necessarily produces different effects on a treaty. As under Article 53, a treaty is void *ab initio*, whatever acts were done by the parties in pursuance of that treaty are also tainted by the same invalidity and are also rendered void *ab initio* and *in toto*. However, the position is not so under Article 64 because the new rule of *jus cogens* operates *ex nunc*; hence, the treaty and the acts done under it are perfectly operative and valid till the date of their supervening invalidity. It must be pointed out, however, that the above statement can be

an oversimplification because very often it may not be feasible to 'ring the curtain', so to say, on the past acts performed under a treaty. Hence, the inter-temporal aspects of the emergence of a new peremptory norm require a more detailed enquiry.

Inter-Temporal Application of a Rule of Jus Cogens

A treaty does not exist in a legal vacuum; it operates in a factual continuum. While some acts performed under a treaty may have a certain amount of definitiveness as in the case of surrender of territory, other acts may not have the same character and may produce a sort of chain-effect in releasing a series of successive consequences. The snow-balling effect of such a chain of causation may ultimately result in a drastic change in legal and factual positions and relations of the parties. A new norm of jus cogens that has emerged after the treaty has been in force for some time seeks to bar the progress of a treaty conflicting with it and to snap suddenly the chain of causation set in motion by the execution of the treaty. It may be true that the emergence of a new rule of jus cogens may not be that sudden and that it may slowly evolve through customary processes; but that does not materially alter the situation created by its birth. A customary rule of jus cogens might be still relatively inchoate at the time of the conclusion of a treaty but could subsequently emerge in its fullness while the treaty was in the course of performance and execution.[76] In consequence, the slow and inconspicuous

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76. See the comments of Lachs, YBILC, vol. 1 (1966), pt. II, p. 12.

emergence of a new rule of jus cogens may produce devastating effects on a conflicting treaty and on the expectations of the parties. Thus, the application of the maxim tempus regit actum can produce far-reaching consequences on a treaty, particularly when the treaty, in the course of its execution, comes under successive and varying rules of jus cogens.

Need to Maintain Balance Between Past Validity and Fresh Invalidity

The draftsmen of Article 71, paragraph 2(b) seem to have been caught on the horns of a dilemma because they had to strike a balance between the past validity of the treaty and of the acts done under it and its prospective invalidity and termination under Article 64. As already pointed out, acts performed under a treaty may not always have a definitive character and, hence, acts performed prior to the invalidity and termination of a treaty may produce effects which telescope into post-invalidity period. Moreover, there are treaties which provide for continuing obligations of the parties even after their denunciation or termination.[77] Thus, it is highly inequitable that the acts which were valid when they were performed under a treaty, should suffer because of the new rule of jus cogens operating ex post facto.[78] It is necessary

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77. Article XIX of the Convention on the Liability of Operators of Nuclear Ships expressly provides that even after the termination of the Convention liability for a nuclear incident is to continue for a certain period with respect to ships the operation of which was licensed during the time the Convention was in force.

78. See the observations of Harry (Australia), in UNCLT, First Session, Official Records, 1968, p. 450, para 33.

that past acts and accrued rights and the situations created by them should, if they are otherwise valid and lawful, be protected from the effects of subsequent invalidity of the treaty. At the same time, one has to recognize the absurdity of allowing those past acts, rights and situations to continue even after the treaty has become void and terminated if the treaty provisions under which those rights etc. had arisen had become invalid.[79] This problem would not have arisen if the effects of Article 64 were of termination, simplicitiy, of a treaty and not of cumulative invalidity and termination.[80]

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79. Alvarez Tabio (Cuba) made a distinction between past acts whose performance had been completed by the time the treaty became void and terminated under Article 64, and those acts which had been performed while the treaty was valid but which continued in existence after the treaty had become void. He thought that, in the latter case the acts could not be continued "without express consent of the parties". Otherwise, "the treaty would not be void, it would be terminated". Alcivar Castillo (Ecuador) fully endorsed the views expressed by the Cuban delegate. See ibid., pp. 448-9.

80. Waldock, the Special Rapporteur, pointed out time and again that the words "becomes void and terminates" in Article 71, paragraph 2(a). He stated that in drafting the article on 'consequences', "the terminological difficulty was partly due to the Commission having chosen the forceful expression 'a treaty becomes void' in article 45 [i.e. Article 64 of the Convention], and if it had used some such wording as 'the development of a new rule of jus cogens renders illegal the further performance of the agreement and terminates the treaty', it would have been easier to draft...." YBILC, vol. 1 (1966), pt. II, p. 15. Waldock also stated: "The doctrine of jus cogens rule making a treaty void subsequently had involved serious problems of presentation.... In the past, the Commission had deliberately taken the line that the emergence of a new rule of jus cogens rendered a treaty in conflict with it void, but for general purposes it had treated that case as being one of termination." Ibid., p. 26. On another occasion,

....contd. on next page

Thus, the draftsmen had to distinguish between the effects of termination simpliciter under Article 70 and the effects of invalidity-cum-termination under Article 71, paragraph 2(b). This they did by first providing in both the articles that the termination of the treaty "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination", but adding a proviso only in Article 71, paragraph 2(b) to the effect "that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law."

Article 71 2(b) Not Happily Worded

It would appear that the proviso in Article 71, paragraph 2(b) is not very happily worded and may give rise to theoretical and practical difficulties. If a treaty is void

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(contd. from last page)

Waldock stated that he "had left the wording 'a treaty becomes void' in order to meet the wishes of the Commission." Stating that personally he would prefer a different expression to describe the effects of the emergence of a new rule of jus cogens, he said that in his view the situation in Article 45 of 1966 draft [i.e. Article 64 of the Convention] was that "performance had become contrary to international law and the treaty was therefore terminated." Ibid., pt. I, p. 87.

However, both the expressions "becomes void" and "terminates" are necessary in Article 64, because if "terminates" is dropped a treaty would have to be treated as void ab initio and "if becomes void" is omitted, it becomes a case of mere termination and the notion of invalidity caused by a peremptory norm would be totally obscure.

under Article 53, the whole of the treaty goes and along with it all the acts, rights or situations arising out of it. If a treaty becomes void under Article 64 and its provisions are separable under Article 44, paragraph 3, the acts, rights etc. arising out of the invalid provisions of the treaty are also affected. However, it is obvious that the invalidity of the acts, rights etc. is not the direct result of their conflict with the rule of ius cogens; they are invalid because the treaty provisions under which they originated are later invalidated. The Vienna Convention on the Law of Treaties purports to apply the rules of ius cogens to test the validity of treaties and not of acts, rights or situations as such. If two States enter into a treaty by which they agree not to confer any immunities and privileges to their respective diplomatic agents, the act of abstaining from conferring immunity is justifiable because the treaty under which it is done is itself valid. So also, if a State stations its armed forces in the territory of another State in pursuance of an agreement with that other State, the act of stationing the troops in the other State's territory, however unlawful it may be in itself, would be perfectly valid because of the agreement. Conversely, if a State agrees to surrender a part of its territory to another State under a treaty which becomes void and terminates under Article 64, though the act of voluntary surrender of territory is lawful by itself the obligation to perform that act becomes extinguished because of the invalidity of the treaty. However obvious this distinction may seem to be, its importance cannot be lost sight of.

It is submitted that the proviso in paragraph 2(b) of Article 71 appears to go far beyond the scope of Article 64 when it says the past acts, rights or situations may be maintained subsequent to the invalidity of the treaty "only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law." It would appear from this provision that the further maintenance of acts, rights etc. is made dependent upon the compatibility of their maintenance with the new peremptory norm irrespective of the validity or otherwise of the treaty provisions on which they are based.[81] This situation may give rise to two anomalies. Firstly, past acts, rights or situations, based upon even the separable provisions of a treaty affected by Article 64, may not be further maintained if their maintenance in itself is incompatible with the new peremptory norm. Secondly, past acts, rights or situations based upon even invalid provisions of such a treaty, may be maintained further if their maintenance is in itself not incompatible with the new peremptory norm. Thus, while Article 44, paragraph 3 applies the test of separability to the provisions of a treaty that becomes void under Article 64, the proviso in Article 71, paragraph 2(b) appears to extend the principle of separability even to acts,

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81. This conclusion is inevitable also from what Waldock stated in the ILC. He said: "If a rule of jus cogens became applicable to a treaty, whatever had occurred in the past the subsequent enjoyment of the rights and obligations resulting from the treaty must be subject to their not being in violation of that rule." (Emphasis added). YBILC, vol. 1 (1966), pt. II, p. 26, para 13.

rights or situations arising out of the provisions of a treaty. To look at the same situation from a different angle, Article 53 applies an existing rule of ius cogens to the whole of a treaty; Article 64 read with Article 44, paragraph 3 applies a new peremptory norm to the whole or part of a treaty; the proviso to paragraph 2(b) of Article 71 seems to apply the same new rule of ius cogens to the further maintenance of even past acts, rights or situations of the parties irrespective of whether those acts, rights etc. originated under what are now valid or invalid provisions of the treaty.

On the whole, it would appear that Article 71, one of the key provisions of the Convention is not happily worded, and is susceptible to interpretations at variance with what was perhaps actually intended by the draftsmen; the words like 'any provision' in paragraph 1(a) and ' bring their mutual relations' in paragraph 1(b) do not really mean what they say; and 'the treaty' in paragraph 2(a) and 'legal situation' and 'their maintenance is not in itself' in paragraph 2(b) do not say what they mean.

Chapter VII

CONCLUSION

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The Vienna Convention on the Law of Treaties is, indeed, a historic document. The Convention represents the first concerted international effort at codifying and consolidating the law of treaties, one of the most important branches of International Law. The law on the subject until recently was ridden with many uncertainties and ambiguities. The International Law Commission which was primarily responsible for the drafting of the Convention grappled with its work for more than a decade and succeeded in producing a draft which was an admixture of caution and boldness.

The International Law Commission took a courageous step in explicitly recognizing the existence of the concept of jus cogens and incorporating it in its draft articles even though there was no known instance of the application of peremptory norms in judicial decisions or state practice. Such a decision on the part of the ILC was, in retrospect, a very crucial one because if only the ILC had decided otherwise it would have virtually amounted to the death-knell of the concept of jus cogens in international law.

Three-pronged Approach to Jus Cogens

As is evident from the foregoing chapters, the convention adopted a three-pronged approach to jus cogens and dealt with it with reference to statement of the principle of invalidity of a treaty arising out of conflict with jus cogens; the procedure for

the establishment of the invalidity; and the legal consequences of such invalidity. Thus, the 'principle' was stated in Articles 53 and 64; the 'procedure' was laid down in Articles 65 and 66 and the 'consequences' were mentioned in Article 71. The Convention adopted a most comprehensive and integrated approach to the issues arising out of jus cogens and succeeded in meeting much of the criticism that was levelled against the relevant draft articles at the earlier stages of drafting and deliberation in the ILC.

Norms and Institutional Set-up

It has been said as an argument against international jus cogens that the development of a normative order should be matched by a parallel growth institutional set-up and that, in the present state of decentralized international legal order lacking in coercive machinery, the incorporation of jus cogens in the Convention is not only premature but also dangerous. As Schwarzenberger observes: "International Law on the level of unorganized international society does not know of any jus cogens. The explanation lies in the absence of any Centre of government with overwhelming physical force and Courts with compulsory jurisdiction to formulate rules akin to those of public policy on the national level."[1]

Schwarzenberger's argument regarding absence of compulsory jurisdiction is no longer valid because Article 66

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1. "Problems of International Public Policy", Current Legal Problems (London), vol. 18 (1965), p. 212.

of the Convention confers such competence on the ICJ for the interpretation and application of *jus cogens* provisions. But the other argument that *jus cogens* does not exist in international law because of the lack of "any center of government with overwhelming physical force" is in fact an argument against the validity of international law itself and smacks of Austinianism. While it should be admitted that the 'overwhelming physical force' is certainly one, and perhaps, the most important, of the factors that add strength and viability to legal norms, it must also be realised that, in the ultimate analysis, even that 'overwhelming physical force' is not self-supporting but rests on the foundations of superior norms. As these superior norms are, ex *hypothesi*, antecedent to the instruments of that physical force, the binding nature of those norms can be explained only in meta-legal terms. At one stage or the other, it becomes logically inevitable to concede that the obligatory character of the superior norms can be founded on intrinsic and not extrinsic social phenomena. Rules of *jus cogens* represent a very high degree of normative quality. To seek to find their binding character in a system of 'coercive order' that can at present be based only on the 'consent' of States, is a singular way of throwing the norms overboard.

Problems of Identification of Peremptory Norms

In spite of the incorporation of the so-called definition of a peremptory norm in Article 53 of the Convention, it must be admitted that identification of peremptory norms will not be an easy task. It may be difficult to clearly demarcate the border-

line between peremptory and non-peremptory norms. This difficulty is not peculiar only to the evaluation of peremptory character of norms. Thus, it may sometimes be very difficult to determine whether a rule is really a binding legal norm or merely a spurious impostor; whether a certain practice amounts to evidence of custom or is merely usage; whether a customary rule is of a regional or general character; whether a rule in a convention is lex lata or lex ferenda; whether a rule having its origin in a treaty has led to the subsequent establishment of customary practice so as to be binding on States which are not parties to the treaty; and the list of such problems is by no means short. The process by which the above and similar other problems can be solved cannot be very different from the process by which the peremptory character of norms can be evaluated and determined. In the case of identification of peremptory norms, as also with other similar problems, one may have to take into account the nature of the rule, the area and scope of its application, its standing in point of time, the States affected by it, and other relevant considerations. The grist that goes into this norm-mill may consist of many tangible and intangible factors. Thus, the difficulty in identification of peremptory norms cannot be an argument against the adoption of the concept of jus cogens.

However, what is stated above is not an argument in favour of a whole-sale adoption of a priori theories, doctrines and concepts into international law, even though there is no denying the fact that law has always been no less a product of innovation as of evolution. But what is sought to be

stressed is that the concept of *jus cogens* which finds reception and recognition in all the principal legal systems of the world and whose existence and necessity in international law cannot be denied, should not be jettisoned in the name of 'difficulties of identification', or, what is still worse, on the grounds of pseudo-legal contraptions like 'consent' and 'sovereignty' of states. While it is true that one cannot wish away the problems surrounding the concept of *jus cogens*, one should not, in view of its fundamental importance, do away with it.

The Role of the World Court

The ultimate victory of sanity and wisdom at the Vienna Conference contributed to the incorporation of procedural safeguards in Articles 65 and 66 and saved the delegates from the embarrassment of being accused of insincerity and hypocrisy of proclaiming the lofty principles of *jus cogens* without undertaking the necessary commitment to make their implementation possible. Article 66, in particular, has placed considerable burden on the International Court of Justice by conferring compulsory jurisdiction in matters of interpretation and application of Articles 53 and 66. Though there can be no two opinions about the fact that it is only the Court that is eminently suited for shouldering that responsibility, the role of the Court in this most sensitive area of the law of treaties is bound to be extremely delicate and crucial.

It seems likely that the International Court of Justice would adopt an approach of judicial caution and self restraint in pronouncing upon questions relating to *jus cogens*. As a

part of such an approach, the Court may be inclined to give a rather restrictive interpretation of Articles 53 and 64 as to avoid undue disturbance of treaty relations among States. The reasons for such a course of action are not far to seek. Firstly, the treaty is the principal instrument of law-making in international law and any extended application of peremptory norms may result in impeding the free growth of international conventional law. Secondly, jus cogens is a restriction on the treaty-making power of States. Thirdly, jus cogens restricts also the scope of the time honoured principle pacta sunt servanda. Fourthly, the presumption is always in favour of the validity of a treaty unless the contrary is proved. Fifthly, if a treaty is susceptible to more than one interpretation, the Court may have to choose that interpretation which does not lead to any conflict with jus cogens. Ut res magis valeat quam pereat. Lastly, the questions relating to the interpretation and application of jus cogens may involve highly sensitive political issues. Consequently, the Court has to strike a balance between, on the one hand, the necessity for giving the fullest possible scope to the treaty-making power of the States and, on the other, to the need for keeping the treaty-making power within bounds in the larger interests of the international community as a whole. Thus, the future course of judicial interpretation of Articles 53 and 64 would mainly involve the maintenance of a delicate balance between treaty-making power and social control of that power.

Attitude of 'New' States

Finally, it may be necessary to examine the views expressed in some quarters about the attitude of the 'new' States towards the concept of *jus cogens*. Some sceptics assume that the newly emergent Afro-Asian states are unwilling to be bound by rules of international law and that the concept of *jus cogens* would be the most effective instrument of binding those states to at least the peremptory norm content of International Law. The whole assumption is, however, unfounded. No doubt, the 'new' States have stoutly resisted the attempts of the erstwhile colonial Powers to perpetuate their hegemony under the cover of antediluvian rules which were originally made to serve their colonial interests. But, a just and effective international legal order is, in fact, the only guarantee for the security and progress of new States which, having been released from centuries of domination and exploitation, find themselves suddenly thrust into an international society ridden with military blocs and power politics. It would be absurd to suggest that the 'new' States, militarily weak and economically unsteady, would choose to spurn even the meagre protection that is offered by the present day international law.[2] Indeed, it is no surprise that these States have been the most ardent champions of the concept of *jus cogens* because it is their wish and hope that the concept would make international relations more just and humane.

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2. See generally R.P. Anand, "Attitude of Asian-African States towards Certain Problems of International Law", ICLQ, Vol. 15 (1966).

APPENDIX

APPENDIX

Some Relevant Provisions of the Vienna Convention on the Law of Treaties, 1969

Part I

Introduction

Article 1

Scope of the Present Convention

The present Convention applies to treaties between parties.

Article 2

Use of Terms

1. For the purposes of the present Convention:

(a) "treaty means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

* * * *

(g) "party" means a state which has consented to be bound by the treaty, and for which the treaty is in force;

(h) "third state" means a state not a party to the treaty;

Article 4

Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by states after the entry into force of the present Convention with regard to such states.

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Part III

Observance, Application and Interpretation of Treaties

Section 1: Observance of Treaties

Article 26

Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

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Section 2: Application of Treaties

Article 28

Non-retroactivity of Treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party.

Part V

Invalidity, Termination and Suspension of the Operation of Treaties

Section 1: General Provisions

Article 42

Validity and Continuance in force of Treaties

1. The validity of a treaty or of the consent of a state to be bound by a treaty may be impeached only through the application of the present Convention.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present

Convention. The same rule applies to suspension of the operation of a treaty.

Article 43

Obligations Imposed by International Law Independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any state to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

Article 44

Separability of Treaty Provisions

1. A right of a party, provided for in a treaty or arising under Article 56, to denounce, withdraw from or suspend the operation of the treaty may be exercized only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognised in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in Article 60.

3. If the ground relates solely to particular clauses, it may be invoked only with respect to those clauses where:

(a) the said clauses are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

4. In cases falling under Articles 49 and 50 the state entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or, subject to paragraph 3, to the particular clauses alone.

5. In cases falling under Articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

Article 45

Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

A state may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under Articles 46 to 50 or Articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation as the case may be.

Section 2: Invalidity of Treaties

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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 purposes of this 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.

Section 3: Termination and Suspension of the Operation of Treaties

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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.

Section 4 : Procedure

Article 65

Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound

by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special emergency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in Article 67, the measure which it has proposed.

3. If, however, the objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights and obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to Article 45, the fact that a state has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Article 66

Procedures for judicial settlement, arbitration and conciliation

If, under paragraph 3 of Article 65, 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 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;

(b) any one of the parties to a dispute concerning the application or interpretation of any of the other articles in Part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary General of the United Nations.

Article 67

Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. The notification provided for under Article 65 paragraph 1 must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of Article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the state communicating it may be called upon to produce full powers.

Article 68

Revocation of Notification and instruments provided for in Articles 65 and 67

A notification or instrument provided for in Articles 65 or 67 may be revoked at any time before it takes effect.

Section 5: Consequences of the Invalidity, Termination or Suspension of the Operation of a Treaty

Article 69

Consequences of the invalidity of a treaty

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.

3. In cases falling under Articles 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which fraud, the act of corruption or coercion is imputable.

4. In the case of the invalidity of a particular state's consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that state and the parties to the treaty.

Article 70

Consequences of the Termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a state denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relation between that state and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 71

Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

1. In the case of a treaty which is void under Article 53 the parties shall:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under Article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

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