THE CONCEPT OF JUS COGENS IN THE VIENNA CONVENTION ON THE LAW OF THE TREATIES

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I. *Introduction*

In the general theory of law, every legal system is said to contain general norms of imperative character which the subjects of law cannot modify or set aside in their contractual relations. They constitute the irreducible minimum principles in the legal system. These norms are called *jus cogens;* they are to be distinguished from *jus dispositivum* rules which can be derogated by private contracts.[1] In the interest of the community as a whole, *jus cogens* norms are set above the wills of the parties to a contract and are absolutely binding on them in restricting their freedom to determine the content of their agreement.[2] They serve as a medium through which the individuated legal relations are subordinated to what are considered as superior interests of the community.

But as thus formulated, the concept of *jus cogens* is identified with the notion of *ordre public* in municipal law, understood as an aggregate of fundamental norms on "public policy and good morals", which unify particular rules and principles in the legal order.

Whether there exist in international law general norms in the nature of *jus cogens* has been the subject of theoretical treatment for years.[3] It is implied in Grotius' hierarchy of norms in which

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[1] See Marek, *Contribution a l'etude du jus cogens en droit international,* in GENEVA UNIVERSITE FACULTE DE DROIT, RECUEIL D'ETUDES DE DROIT INTERNATIONAL HOMMAGE A PAUL GUGGENHEIM 429 (Geneva, 1968): "Ce principe apparait en effet comme necessaire. Il est d'abord d'une necessite d'ordre politique et social: il permet de proteger les interets essentiels et les bases fondamentales d'une societe donne. Il est ensuite d'une necessite d'ordre logique: un systeme juridique ne serait pa concevable si les sujets de cet ordre pouvaient le bouleverser a leur gre". Also at 426 and 447.

[2] *Id.,* at 427-429.

[3] For a review of international law literature on *jus cogens,* see Suy, *The Concept of Jus Cogens in Public International Law,* in CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE CONCEPT OF JUS COGENS IN INTERNATIONAL LAW (Papers and Proceedings of Conference on International Law, Lagonissi, Greece, April 3-8, 1966) 17, 26-49 (1967).

the immutability of natural law even applied to God.[4] As far back as Vattel, the concept of *jus cogens* has been given its natural-law rationale.[5] But while a broad agreement among reputable publicists supports the view that such norms exist on the international plane,[6] many of their *de lege ferenda* prescriptions on the nature of *jus cogens* norms are quite apart from the historical realities and practices of States and are not in keeping with the legal nature of the international community itself. Serious questions may precisely arise from an uncritical transference of *jus cogens* as a municipal-law concept into international law, which many theories seem to assume. The logic of the municipal-law analogy may lend support to "the existence of an international public order overriding state sovereignty",[7] implying that international *jus cogens* could acquire validity as legal norms independent of the consent of the individual members of the international community. From the municipal-law concept of *ordre public* it is a short step to transforming the "interest of the community" into a "common will" that stands above the wills of the individual States and creates norms binding upon them. This would then place the concept of *jus cogens* along the thinking which rejects the juridical equality of States, namely, that a group or a majority of States may dictate international-law rules binding upon the rest of the international community.[8]

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[4] "The law of nature, again, is unchangeable—even in the sense that it cannot be changed by God. Measureless as is the power of God, nevertheless it can be said that there are certain things over which that power does not extend; . . . DE JURE BELLI AC PACES, LIBRI TRES, 40 (Classics of Int'l Law, Kelsey trans., 1925).

[5] "Since, therefore, the necessary Law of Nations consists in applying the natural law to states, and since the natural law is not subject to change, being founded on the nature of man, it follows that the necessary Law of Nations is not subject to change.

"Since this law is not subject to change and the obligations which it imposes are necessary and indispensable, Nations can not alter it by agreement, nor individually or mutually release themselves from it.

"It is by the application of this principle that a distinction can be made between lawful and unlawful treaties or conventions and between customs which are innocent and reasonable and those which are unjust and deserving of condemnation". 3 THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 4 (Classics of Int'l Law, No. 4, Fenwick trans., 1915).

[6] See Suy, *op. cit., supra*, note 3.

[7] See, for example, the statement of Mr. Milan Bartos (Yugoslavia) at the 683rd meeting of the International Law Commission. 1963-I ILC YRBK 66.

[8] For example, see Quadri, *Le fondement du caractere obligatoire du droit international public*, 80 RECUEIL DES COURS 579, 624-625 (I, 1952): 'En effet, dans chaque societe les elements individuels qui la composent entrouvent etre subordonues a l'entite collective dont la volonte et l'action sont decisives pour eux. Devant et au-dessus de chaque entite individuelle il y a l'entite collective, le corps social, dont la force irresistible est appelee autorite. D'autre part il n'est pas necessaire que l'entite collective soit organisee dans le sens d'une distribution consciente des differentes fonctions juridiques entre un ensemble d'organes specialises. Il suffit la volonte, la decision et l'action commune d'une ensemble etant en mesure d'imposer le cas echeant son autorite".

A misplaced municipal-law analogy has also been made a basis for rejecting international *jus cogens*. Upon the assumption that the international legal community lacks the constituent elements which characterize the municipal legal system, it may be argued, as does Schwarzenberger, that *jus cogens* could not yet mature in the field of international law, because this concept "presupposes the existence of an effective *de jure* order" which is envisaged in the model of the municipal legal order.[9]

The emergence of the concept of *jus cogens* in positive international law is by no means merely a *lex lata* transformation of this concept as understood in such abstract, logical or natural-law sense, particularly in its strict municipal-law analogy. It is rather defined by the peculiar nature of international law, *i.e.*, by the condition that in the international legal order the subjects (States) of the law are themselves the creators of the law on the basis of sovereign equality. As is the case with the whole corpus of international law rules, *jus cogens* norms are strictly *inter*-national law and reject a supranational source.

It is in the Vienna Convention on the Law of Treaties[10] that the concept of *jus cogens* is introduced into positive international law for the first time. As shown in the discussion below, the process of identifying a general norm of international law as *jus cogens* is definitively a consensual mechanism. Which norms in international law are characterized as *jus cogens* is not determined by the Convention in a ready-made fashion by an explicit listing of those norms. In terms of specific content, *jus cogens* norms are to be identified by the State themselves in their actual experience of struggle and cooperation. Thus, it is the intention of the International Law Commission (ILC) in drafting the Convention rule on *jus cogens* "to leave the full content of this rule to be worked out in State prac-

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[9] A MANUAL OF INTERNATIONAL LAW 29-30 (1967): "Unlike municipal law, international customary law lacks rules of *jus cogens* or international public policy, that is, rules which, by consent, individual subjects of international law may not modify. In fact, *jus cogens*, as distinct from *jus dispositivum*, presupposes the existence of an effective *de jure* order, which has at its disposal legislative and judicial machinery, able to formulate rules of public policy and, in the last resort, can rely on overwhelming physical force." See also his *International Jus Cogens*, 43 TEXAS L. REV. 455 (1965).

[10] By an overwhelming majority of 79 votes in favor, 1 against, with 19 abstentions, the Convention was adopted on May 22, 1969 by the United Nations Conference on the Law of Treaties which was convened in Vienna in two sessions, from March 26 to May 24, 1968 and from April 9 to May 22, 1969. The Philippines voted in favor of the Convention. It was opened for signature on May 23, 1969. By its Article 84, the Convention enters into force after the ratification or accession of 35 States. As of December 31, 1976, 27 States have deposited instruments of ratification or accession. A signatory, the Philippines ratified the Convention on November 15, 1972. [The Convention is hereinafter referred to as the Vienna Convention.]

tice and in the jurisprudence of international tribunals."[11] While made the basis of criticism against the inclusion of *jus cogens* provisions in the Convention on ground of basic ambiguity, the approach of the ILC emphasizes the more the fact that the identification of *jus cogens* norms is determined by the very real and concrete interests of States and therefore springs from necessity internal to the system of their inter-relationships, and not from some abstract considerations extraneous to international life.

Hence, the acceptance of *jus cogens* by the international community in its present stage of development reflects a recognition of necessity on the part of the member States,[12] born out of historical

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[11] Commentary of the Commission on its draft Article 50, U.N. CONFERENCE ON THE LAW OF TREATIES, OFF. REC., DOCUMENTS OF THE CONFERENCE, first and second sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969 (New York, 1971), A/CONF. 39/11/Add. 2, p. 67. [Hereinafter referred to as ILC COMMENTARIES].

Jus cogens norms are illustrated in the following examples cited by the Commission: "(a) a treaty contemplating an unlawful use of force contrary to the principles of the [U.N.] Charter, (b) a treaty contemplating the performance of any other act criminal under international law, and (c) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide." ILC COMMENTARIES, pp. 67-68.

[12] In the process of codification, a representative opinion was that expressed by the Hungarian delegate, E. Ustor, in the Sixth Committee (Legal) at the 18th session of the U.N. General Assembly: "..., although the members of the [International Law] Commission disagreed on the origin of the peremptory rules of international law, they had nevertheless agreed to recognize their existence, and their ideological differences had not prevented them from reaching a solution that met the needs of practice." U.N. GEN. ASS. OFF. REC., 18th Sess., Sixth Committee, p. 40. While the members of the Commission expressed differences on the nature of *jus cogens* norms, it is true that, as Suy summarized, "The most striking feature of the record of the Commission is the unanimity with which the members of the Commission accepted the idea of *jus cogens*." *Op. cit., supra,* note 3 at 50. Mr. Mustafa Kamil Yassein (Iraq), for example, stressed that 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. Mr. Manfred Lachs (Poland) in effect said that the limitation imposed by *jus cogens* on the treaty-making freedom of States was necessary to protect the interests not only of third parties, but of the international community as a whole. Mr. Antonio de Luna (Spain) commended the Special Rapporteur's definition of *jus cogens* because it satisfied moral, economic and social requirements, which were essential for the existence of an international society. See 1963 ILC YRBK. 62, 68, 72.

Although certain delegations doubted the efficacy of the draft article on *jus cogens,* "Without exception all the members of the [Sixth] Committee of the [U.N. General] Assembly welcomed the introduction of the *jus cogens* article into the [International Law] Commission's draft." Suy, *op. cit., supra,* note 3, at 54.

The text in Convention Article 53 was adopted by the Committee of the whole of the U.N. Conference on the Law of Treaties by 72 votes to 3, with 18 abstentions, and by the Plenary Meeting of the Conference, by 87 votes to 8, with 12 abstentions. The text in Convention Article 64 was adopted in that Committee without formal vote, which means that there was very substantial or overwhelming support for the text; it was adopted in the Plenary Meeting by 84 votes to 8, with 16 abstentions. In each voting, the Philippines voted in favor of Articles 53 and 64. U.N. CONFERENCE ON THE LAW OF TTEATIES, OFF. REC. DOCUMENTS OF THE CONFERENCE, A/CONF. 39/11/Add. 2 (1971), pp.

experience common to them. Historically, this has been given impetus by the moral principles that grew out of the struggle against fascism in the Second World War and those that have consolidated in international relations as a result of the influence of the socialist community of States and the newly independent States that emerged from colonialism. The prohibition against the use or threat of force, the Nuremberg principles,[13] human rights, sovereign equality of States, non-intervention, and right of self-determination are among the norms and principles which have formed part of contemporary international law founded on a new social base.

The accelerated pace in the internationalization of economic activities in the last four decades has increasingly interlinked the interests of States by a system of cooperative efforts, many aspects of which have been institutionalized in international organizations. The expansion and deepening of mutuality, brought about by rapid technological and scientific progress, has developed multilateralism as the most appropriate medium of achieving international cooperation, limiting the effectiveness of bilateral relations in meeting the requirements of a State's international relations.[14] The widening scope of multilateralism predisposes States to conduct their relations in the light of principles and norms already established in general multilateral treaties or conventions in which their interests are more substantially linked to a greater number of States. A State is thus less inclined to deal bilaterally with other States in terms that may be inimical to its multilateral commitments to which, in the first place, the latter may also subscribe as signatory to general multilateral treaties. It is in this context that States achieve agreement to structure their obligations into a hierarchy, thus up-

173-175; SUMMARY RECORDS OF THE PLENARY MEETINGS & MEETIINGS OF THE COMMITTEE OF THE WHOLE, A/CONF. 39/11/Add. 1 (1970), pp. 102-107; 122-125.

[13] The Nuremberg principles relate to crimes against peace, war crimes, and crimes against humanity, for which international law imposes criminal responsibility on individuals. The concept of crimes against humanity led to the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide. In Resolution 95(I), adopted on December 11, 1946, the U.N. General Assembly affirmed the principles of international law recognized by the Charter and the Judgment of the International Military Tribunal at Nuremberg.

[14] See Lachs, *Recognition and Modern Methods of Cooperation*, 35 BRIT. YRBK. INT'L. L. 252 (1959), for an appropriate description of international relations in the context of mutilateralism. Along the same context, Mr. Manfred Lachs (Poland) pointed out as member of the International Law Commission that in recent years two perhaps conflicting trends had become discernible: on the one hand an enormous increase in the number of treaties being concluded and on the other a growing number of general principles that were becoming part and parcel of *jus cogens* and thus constituting a limitation on the freedom of States in drafting treaty provisions if they were to comply with such binding rules and to respect the interests not only of third parties, but of the international community as a whole. 1963 ILC YRBK. (684th meeting), p. 68.

holding some norms or principles of law as superior to others. For example, under Article 103 of the United Nations Charter, it is the position of the Member States that their obligations in the Charter shall prevail in case these come into conflict with their obligations under any other international agreement.

In this sense, the rise of *jus cogens* in positive international law goes hand in hand with the concrete historical development of the international society, but not in the direction drawn by a teleological doctrine which makes the emergence of *jus cogens* dependent on the degree of development of the international society toward a world State in the model of a well-developed municipal legal order. Conditions for the reception of international *jus cogens* have matured in the relations of States not for reason of abstract rationality but out of concrete political interests and social or economic requirements involved in the struggle and cooperation of States, in the pursuit of solution to compelling problems of the moment. The maturation of such conditions is hastened by the deliberate and systematic work in the codification and progressive development of international law now carried on within the United Nations system.[15]

II. *Definition of* Jus Cogens *under the Vienna Convention*

The Vienna Convention transforms the concept of *jus cogens* into concrete norms of law by providing this as a ground for invalidating or terminating treaties. Article 53 of the Convention states that —

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

A companion provision is set forth in Article 64:

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

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[15] A specific function of the U.N. General Assembly relates to "encouraging the progressive development of international law and its codification." See U.N. CHARTER, Art. 13(1) (a). As a subsidiary organ of the General Assembly, the International Law Commission undertakes this work, which provides the basis for international conferences and the resulting general mutilateral conventions.

So broad a definition of a *jus cogens* norm amounts only to a statement of general concept: it is a peremptory norm of general international law accepted and recognized by the international community as a whole as a norm from which no derogation is permitted. It differentiates a *jus cogens* norm of general international law from a *jus dispositivum* norm of general international law. The latter category of norms is not qualified to nullify a treaty despite its general character. A *jus cogens* norm contains two elements: (1) it is a norm of general international law, and (2) it is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted. While a *jus cogens* norm is held to be superior to other norms, these two elements project the consensual nature of such norm. The first requires that this norm should express the will of at least a broad majority of States as a rule binding upon them. The second calls for the expression of their consent on the specific character of a general norm as *jus cogens* norm, *i.e.*, as a norm accepted by them as restricting their treaty-making competence and having the effect of invalidating their agreements contrary to its mandate. That it is the agreement of States which invests a norm with peremptory character is concretized as an objective basis for the identification of such norm within the framework of the Convention. The procedure prescribed by the Convention for the settlement of dispute, for example, as to the *jus cogens* character of a norm being invoked as a ground for invalidating or terminating a treaty in question, should serve to stress the consent of the parties to the dispute as a specific requirement in the operation of the concept of *jus cogens* in the law of treaties. This procedure actually becomes an objective method by which a norm with which a treaty is in conflict is determined to be *jus cogens* or not. As shown below, unless the parties to a treaty agree to its nullity, it cannot legally be considered void as conflicting with a *jus cogens* norm.

However, the consensual nature of a *jus cogens* norm should not lead to the formalism that the character of *jus cogens* finds explanation in the mere expression of the States' consent. In the preparation of its final draft articles on the law of treaties, the International Law Commission considered the possibility that parties to a treaty may stipulate with respect to any subject-matter and for any reason that no derogation from that stipulation is to be permitted, with the intended result that another treaty which conflicts with that provision would be void. The mere fact that the parties have so stipulated does not lend *jus cogens* character to that treaty provision.[16] As the Commission clarified: "It is not the form of a general rule of international law but the particular nature of the

[16] ILC COMMENTARIES, p. 67.

subject-matter with which it deals that may, . . . give it the character of *jus cogens*."[17] This clarification does not suggest a departure from the consensual nature of *jus cogens* norms. The "particular nature of the subject-matter" which determines the *jus cogens* character of general norms does not refer to some jusnaturalistic factors outside the consensual regime of States; instead, this is to be interpreted as indicating the level of importance or special relevance by which the States regard the function of a particular norm of general international law, *vis-a-vis* the maintenance of an international legal order as a system of "interconditionality of wills" of its members,[18] based on necessity.

As a norm of general international law, it is to be assumed that a *jus cogens* norm is either a customary or conventional rule. Also, it is either a universal one, in that it is accepted as binding by all members of the international community, or it is so recognized by a great majority of States. In defining a *jus cogens* norm, Article 53 of the Convention carries the requirement that it be recognized and accepted as such by the international community of States *as a whole*. The effect of the words "as a whole" is intended to preclude the possibility that an objection on the part of any one State may operate as a veto to the characterization of a norm as *jus cogens*, despite its recognition as a peremptory norm by a broad majority of States.[19] This should serve to emphasize the point that universal consent or unanimity is not intended as a basis for the determination of a *jus cogens* norm. A dissenting State cannot stop the bind-

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[17] *Ibid.*

[18] TUNKIN, THEORY OF INTERNATIONAL LAW 216 (1974): "The concordance of the wills of states includes the interconditionality of wills, reflected in the fact that the consent of a state to recognize a particular norm as norm of international law is given on condition of analogous consent by another or other states."

[19] The words "as a whole" were added by the Drafting Committee of the Committee of the Whole in the Vienna Conference on the Law of Treaties. The Chairman (Mr. Yassen) of the Drafting Committee explained this change at the 80th Meeting of the Committee of the Whole, as follows—

> It appeared to have been the view of the Committee of the Whole that no individual State should have the right to veto, and the Drafting Committee had therefore included the words "as a whole" in the text of Article 50.
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> . . . by inserting the words "as a whole" in Article 50 the Drafting Committee had wished to stress that there was no question of requiring a rule to be accepted and recognized as peremptory by all States. It would be enough if a very large majority did so; that would mean that, if one State in isolation refused to accepted the peremptory character of a rule, or if that State was supported by a very small number of States, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected. (U.N. CONFERENCE ON THE LAW OF TREATIES, OFFICIAL RECORDS, 1st Sess., 80th Meeting, Committee of the Whole, A/CONF. 39/11, pp. 471-472).

ing operation of a general norm as *jus cogens* with respect to the great majority of States which have so recognized it. This should not mean, however, that such norm binds the dissenting State. Norms of international law are created by agreement of States and *jus cogens* norms are not in any way distinct in this respect. It is not realistic, however, to think that a State would set itself apart from a *jus cogens* norm which corresponds with the interests of the great majority of States. Its relations with the rest of the members of the international community may precisely operate through the acceptance of that *jus cogens* norm.

III. *Function of Convention Rules on* Jus Cogens

The specifiic function of *jus cogens* norms under the Convention is to limit the freedom of the parties to a treaty in determining the content of their agreement. Any treaty provision that contravenes a *jus cogens* norm is either declared void or voidable, depending on whether the case falls within Article 53 or 64 of the Convention.

It is to be noted that both articles belong to Part V of the Convention, which is entitled "Invalidity, Termination and Suspension of the Operation of Treaties." But within this format, the two articles part ways: Article 53 is subsumed under Section 2, dealing with *invalidity* of treaties, and Article 64 forms part of Section 3, governing *termination and suspension* of the operation of treaties. Accordingly, while Article 53 declares that "a treaty is void" if it clashes with a *jus cogens* norm, Article 64 merely says that in such case "a treaty becomes void and terminates."

As a ground of invalidity of treaties, Article 53 renders a defective treaty a nullity.[20] As explained below, however, this article does not produce this effect automatically; its concrete operation is determined by other provisions of the Convention, which limit to a great extent its function in the law of treaties. However, if declared void through the procedure prescribed in the Convention, the illegal treaty under Article 53 is extinguished.

The consequences of invalidating a treaty on the basis of incompatibility with a *jus cogens* norm under Article 53 are set out in paragraph 1, Article 71 of the Convention, under which the parties to that treaty have the duty to —

> (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

[20] However, the Commission considered this "a special case of nullity." ILC COMMENTARIES, p. 86, See *infra*, at 530-531.

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

From the language of paragraph 1(a) above, it may be appropriate to raise the problem as to how far indeed should the parties go in eliminating the consequences of a void treaty. May the referent of the phrase "as far as possible" be circumscribed by an agreement that may result from negotiation between them as may be done under Article 65(3) of the Convention in relation to Article 33(1) of the United Nations Charter?[21] It is suggested that whatever discretion this phraseology may allow the parties is restricted by their related duty under paragraph 1(b), namely, that they have to adjust their mutual relations in conformity with the *jus cogens* norm. Clearly, the intention of paragraph 1(b) is to prevent the existence of treaty relations that is inconsistent with the peremptory norm of general international law, a situation that may result from too liberal an interpretation of paragraph 1(a) in favor of the individual interests of the parties.

Again, under paragraph 1(a) the words "any act performed in reliance on any provision which conflicts with the peremptory norm of general international law" are susceptible to the interpretation that the provisions of an invalid treaty are separable and that the duty of the parties to eliminate the consequences of any act arising from the treaty may not extend to those provisions which are not directly affected by illegality. Such interpretation would seem to come to an inevitable conflict with Article 44(5) which does not permit separation of the provisions of a treaty violative of a *jus cogens* norm.[22] In this case, together, paragraph 1(a) of Article 71 and Article 44(5) would create an absurd situation: separable consequences springing from non-separable provisions of an illegal treaty.

At any rate, the sense of paragraph 1, Article 71, on the whole, carries the implication that some consequences arising from a treaty

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[21] Under Art. 65(3) of the Vienna Convention, if there is a dispute with respect the invalidity of a treaty, on ground, for example, of conflict with a *jus cogens* norm, "the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations," which enumerates modes of peaceful settlement of dispute, including negotiation.

[22] The pertinent provisions of Art. 44 on "separability of treaty provisions" read:

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> 2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty...
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> x x x x x x x x x
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> 5. In cases falling under Articles 51, 52 and 53, no separation of the provisions of the treaty is permitted.

which is illegal under Article 53 may be saved from the nullifying effect of a *jus cogens* norm. In this sense, it may have the effect of qualifying the concept of nullity as applied in Articles 53 and 69(1) of the Convention.[23]

The interpretation of paragraph 1, Article 71 that illegality based on conflict with a *jus cogens* norm does not totally wipe out the consequences of a void treaty is reinforced by paragraph 2(b), Article 69 in which it is made explicit that there are acts which are performed in good faith in reliance of the invalidated treaty and these acts "are not rendered unlawful by reason only of the invalidity of the treaty." This line of thought may provide us with an approach for resolving the conflict between paragraph 1 of Article 71 and paragraph 5 of Article 44, as pointed out above. Given the premise that there are indeed consequences of the invalidated treaty which are not affected by its illegality, such consequences, or "acts performed in good faith", should be deemed as valid and subsisting on the basis of a new agreement, expressly or tacitly made, which the parties may bring about as part of their effort to bring their mutual relations in line with the relevant *jus cogens* norm, as prescribed in paragraph 1(b), Article 71. Any attempt to maintain the validity of these acts cannot be anchored on any of the provisions of the invalidated treaty because invalidity based on violations of a *jus cogens* norm affects the entire treaty or each and every provision of it;[24] in fact, in this case, the ground of invalidity may be invoked only with respect to the whole treaty and no separation of its provisions is permitted, as prescribed in paragraphs 2 and 5 of Article 44.

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[23] That a treaty is *void* under Art. 53 meant to the Commission a "nullity" or "wholly void." See ILC COMMENTARIES, p. 68.

The pertinent part of Art. 69 on "consequences of the invalidity of a treaty" provides:

> 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.
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> 2. If acts have nevertheless been performed in reliance on such a treaty:
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> (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;
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> (b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.
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> x x x x x x x x x

Under the draft article on which Art. 69 was based, the Commission commented that nullity here "attaches to the treaty *ab initio*, and not merely from the date when the ground of nullity was invoked. See ILC COMMENTARIES, pp. 67-68, 84.

[24] See Art. 44, *supra*, note 22. The Commission rejected the separability of treaty provisions on the ground that violation of a *jus cogens* norm under Art. 53 is so fundamental that it affects the treaty in its entirety. See 1963-II ILC YRBK. 199.

Under Article 45 of the Convention, a State may lose the right to invoke a ground for invalidating, terminating, withdrawing, or suspending the operation of a treaty, through confirmation or acquiescence. This may result in the event that if, after becoming aware of the relevant 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 be 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.

Article 45, however, expressly limits its application to Articles 46 to 50, and Articles 60 and 62. The omission of Articles 53 and 64 from the coverage of Article 45 points to the conclusion that the invalidity of a treaty arising from violation of *jus cogens* norms cannot be cured by confirmation or acquiescence of the parties, or, in other words, by their consent. This serves to reinforce the objective character of *jus cogens* norms as criterion of illegality and to project their importance over the narrow individual interests of States.

Article 64 of the Convention is a ground for termination of a treaty and is a logical corollary of the *jus cogens* rule in Article 53. Its effect does not avoid the treaty from the time of its conclusion, "but only from the date when the new rule of *jus cogens* is established; in other words it does not annul the treaty, it forbids its further existence and performance."[25] Until the treaty is terminated on the basis of the emergence of a new *jus cogens* norm, all situations created by the treaty are of full validity. This feature of termination of a treaty, which distinguishes it from invalidity under Article 53, is spelled out in paragraph 2, Article 71 in which it is provided that when a treaty "becomes void and terminates," the termination —

> (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.

The other point of distinction is that unlike invalidity under Article 53, the case of termination under Article 64 admits of separability of treaty provisions, and those which are not tainted

[25] ILC COMMENTARIES, p. 81.

with illegality continue to be valid.[26] In this case, the terms of paragraph 3, Article 44 apply:

> If the ground relates to particular clauses, it may be invoked only with respect to the 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.

IV. *Operation of Convention Rules on* Jus Cogens

A treaty in conflict with a *jus cogens* norm is invalid in international law. But under the present state of the law, it can only be invalidated on that ground within the framework of the Vienna Convention. Article 2 of the Convention provides that the validity of a treaty may be impeached "only through the application of the present Convention." The basic limitation in the effective enforcement of *jus cogens* norms in the regime of the law of treaties is that this ground of invalidity may be invoked only by the parties to the Convention.

A *jus cogens* norm does not automatically invalidate a treaty conflicting with it. The Convention prescribes a particular procedure to be followed by a party to a treaty in establishing its invalidity. This is provided in paragraphs 1 and 2 of Article 65 in the following terms:

> 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 case of special urgency, 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.

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[26] The relevant comment of the Commission reads:

> Similarly, 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

As is clear from paragraph 1 above, this procedure is compulsory upon the parties to a treaty, not only with respect to invalidation based on *jus cogens* ground but to all cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty on all possible grounds under the Convention. Note that the procedure leaves no room for a party to unilaterally establish the invalidity of a treaty in conflict with a *jus cogens* norm. It cannot deviate from the requirement that it must send to the other parties a written notification of its claim as to the illegal character of the treaty based on *jus cogens* ground, stating the measure proposed to be taken by the contesting party and the reasons therefor.[27] With respect to invalidity under Article 53 and termination under Article 64, the claim of the contesting party is that the treaty is illegal because it violates a *jus cogens* norm, and the "measure to be taken" by him is the invalidation or termination of that treaty.

Unless the treaty under question provides otherwise, it is required under the Convention that the notification be transmitted directly by the contesting party to the other party, but if the treaty has appointed a depositary, transmission to the latter is instead the rule. Notification shall be considered as having been made only upon receipt by the party to which it was transmitted or by the depositary, as the case may be. If it was transmitted to a depositary, notification shall be considered as having been received by the party for which it was intended only when the latter has been so informed by the depositary.[28] Article 67 prescribes that the notification must be in an instrument normally signed by the Head of State, Head of Government or Minister for Foreign Affairs.

It is only after the expiration of at least three months from the receipt of notification, as understood in the procedure described above, that the contesting party may legally carry out the measure which it has proposed to any of the other parties, but this step can only be taken if the latter has not raised objection against the proposal within that period. In the absence of such objection, the contesting party can then proceed to effectuate the invalidation or termination of the treaty by a declaration to that effect embodied in an instrument communicated to the other parties. The instrument as thus communicated to the other parties establishes the invalidity or termination of the treaty in question.[29] The absence of objection within the minimum period prescribed should be taken as an im-

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from the rest of the treaty, the Commission thought that the rest of the treaty ought to be regarded as still valid. ILC COMMENTARIES, p. 81.

[27] Vienna Convention, Arts. 65(1) and 67.

[28] Vienna Convention, Arts. 77 and 78.

[29] Vienna Convention, Arts. 65(2) and 67(2).

plied consent on the part of the other parties to the measure proposed by the contesting party with respect to the invalidation or termination of the treaty.

If any of the other parties to the treaty has raised objection to the measure proposed in the notification, the matter becomes a dispute and the parties are obliged under paragraph 3, Article 65 of the Convention to seek solution "through the means indicated in Article 33 of the Charter of the United Nations." This requires them to settle their dispute by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional arrangements or other peaceful means of their own choice.[30] In case the parties have failed to reach a solution through these means within 12 months from the date the objection was raised, Article 66 of the Convention requires the parties to submit the dispute to (1) the International Court of Justice, with respect to the application or interpretation of Article 53 to 64 of the Convention, or to (2) the conciliation procedure annexed to the Convention concerning the application or interpretation of any of the other articles in the Convention relating to invalidity, termination and suspension of the operation of treaties.[31]

The import of the procedural requirements outlined above is that the right to establish the invalidity of a treaty or bring about its termination may be invoked only by the parties to the treaty under question, in addition to the restriction that they be parties to the Convention.[32] Outside of the Convention, the only possibility that

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[30] Article 33 of the U.N. Charter reads in full:

> 1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
>
> 2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

[31] Under Art. 66 of the Convention, any of the parties may set in motion the procedure specified in the Annex to the Convention by submitting a request to the U.N. Secretary General to that effect. The Secretary General shall then bring the dispute before a Conciliation Commission, which shall be composed of five conciliators, appointed as follows. The State constituting one of the parties shall appoint one conciliator of the nationality of that State, who may or may not be chosen from the list of conciliators and another conciliator not of the nationality of that State, who shall be chosen from that list. The State constituting the other party to the dispute shall also appoint two conciliators in the same way. The four conciliators chosen by the parties shall appoint a fifth conciliator who shall be chairman of the Commission. There shall be a list of conciliators which shall consist of names nominated by every State which is a member of the United Nations or a party to the Convention. (For complete procedure, see text of Annex given in U.N. CONFERENCE ON THE LAW OF TREATIES, OFFICIAL RECORD, DOCUMENTS OF THE CONFERENCE, A/CONF. 39/11/Add. 2, p. 301.)

[32] See Vienna Convention, Art. 65(1), *supra*, pp. 14-15. This provision makes available the procedure for invalidation of a treaty only to a party to that treaty.

may broaden the effectivity of *jus cogens* norms is for the States not parties to the Convention to adopt the system of invalidation or termination each time that they conclude a treaty. While it may be possible to regard the rules on *jus cogens* as applicable just the same to non-parties to the Convention in the character of customary law, their enforceability outside of the Convention's framework is problematical, lacking the procedure for invalidation or termination established by the Convention.

The other basic limitation to invalidation or termination on *jus cogens* ground is the fact that the Convention in effect requires that this be established by the consent of the parties to the treaty in question. In fact, the serious implication of this consensual requirement is that in the event that no agreement is reached by the parties to invalidate or terminate the treaty by authority of Article 53 or 64 of the Convention, it would seem that nothing can be done about the treaty in question on the part of the international community. Consequently, the treaty in conflict with the peremptory norm of international law would continue to subsist. It should be borne in mind that, considering the nature and function of *jus cogens* norms in the international community, the invalidation or termination of a treaty in conflict with these norms objectively subserves the interests of the community and not only the interests of the parties to that treaty. The latter interests should be deemed as merely incidental to the larger issue of protecting the regime of *jus cogens* from the encroachment of treaties or agreements incompatible with its norms. As an objective ground of invalidity, conflict with a *jus cogens* norm may thus theoretically be invoked by any State. Despite these considerations, however, the law under the Convention stands, namely, it is not possible for a third State (not party to the treaty under question) to invoke the *jus cogens* ground in the attempt to establish its invalidity or bring about its termination.

In taking this position, the Convention resolves the issue in favor of the claim that a more liberal system of protecting the regime of *jus cogens* norms, at the present stage in the development of international society, may jeopardize the stability of treaties. Procedural safeguards, particularly those in Article 65 of the Convention, as quoted above, are intended to ward off arbitrariness in unilateral assertion of invalidity, termination or suspension of the operation of treaties. In formulating the final draft of what is now Article 65, the International Law Commission expressed the apprehension of its members that "some of the grounds upon which treaties may be considered invalid or terminated or suspended under those sections, if allowed to be arbitrarily asserted in face of ob-

jection from the other party, would involve real dangers for the security of treaties." Thus, the Commission reached the conclusion that the relevant articles of the Convention "should contain procedural safeguards against the possibility that the nullity, termination or suspension of the operation of a treaty may be arbitrarily asserted as a mere pretext for getting rid of an inconvenient obligation."[33]

V. *Non-Retroactivity of Convention Rules on* Jus Cogens

Article 28 of the Convention lays down the general rule that—

> 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 party.

While this rule establishes the non-retroactive operation of treaties in general, it provides for flexibility in that the parties themselves may expressly stipulate the retroactive effects of treaty provisions. Article 4 of the Convention makes it doubly clear that in the application of the Convention itself, such general rule is followed, *i.e.*, its provisions do not apply retroactively to *treaties concluded by States before it has entered into force* as to them.[34] In this light, the provisions of Article 53 and 64 may be understood as applicable only to treaties that may be concluded after the entry into force of the Convention.

There is no question that treaties concluded *after the entry into force of the Convention* which are in conflict with a *jus cogens* norm are void under Article 53, or become void and terminate under Article 64 if in conflict with a new *jus cogens* norm which has emerged. In this case, note that both the conclusion of the treaty in question and the time of conflict between that treaty and the relevant *jus cogens* norm necessarily occur after the Convention's entry into force. A problem may be raised, however, whether Articles 53 and 64 may still apply in a situation where the treaty in question has been concluded *before* the Convention's entry into force but the time of conflict between that treaty and a *jus cogens* norm comes *after* its entry into force. A plain application of the non-retroactivity

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[33] ILC COMMENTARIES, p. 81.

[34] Article 4 on "non-retroactivity of the present Convention" reads in full:

> 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.

rule in the Convention would seem to exclude such situation from the coverage of the Convention's rules on *jus cogens*, for the reason that under Article 4, the Convention "applies only to treaties which are concluded by States after the entry into force of the present Convention." However, this same situation could perfectly come within the normal operation of Article 64 at least: an existing treaty, validly concluded before the Convention's entry into force becomes void and terminates for the reason that it comes into conflict with a new *jus cogens* norm which emerges after the Convention comes into force.

The non-retroactivity rule contemplated in Article 4 may be concretized in the application of Article 53. Since it is to be understood that a treaty under the latter article is one which is concluded after the Convention enters into force, a *jus cogens* norm cannot possibly reach a treaty concluded *before* the Convention comes into force because the point of conflict defined by this article is "the time of its [the treaty's] conclusion." Treaties concluded before the Convention's entry into force are perforce saved from the operation of Article 53, even if they conflict with a *jus cogens* norm. Here, the date of Convention's entry into force draws the dividing line between treaties which are affected by the non-retroactivity rule and those which are not.

But Article 4 bears a different level of relevance with respect to Article 64. Commenting on the issue of retroactivity in regard to its draft Article 61, which is now Article 64, of the Convention, the Commission explained:

> Manifestly, if a new rule of that character—a new rule of *jus cogens* —emerges, its effect must be to render void not only future but *existing* treaties. This follows from the fact that a rule of *jus cogens* is an overriding rule depriving any act or situation which is in conflict with it of legality. An example would be former treaties regulating the slave trade, the performance of which later ceased to be compatible with international law owing to the general recognition of the total illegality of all forms of slavery.[35]

It is suggested that by "existing treaties" the Commission necessarily had in mind treaties already concluded at the time it submitted its report to the United Nations General Assembly in 1966, together with its final articles on the law of treaties. In other words, it was referring to treaties already concluded before the Convention enters into force. It would be reasonable to interpret the Commission's view as meaning that existing treaties, *although concluded before the Convention's entry into force,* are affected by

[35] ILC COMMENTARIES, p. 81. Italics in word "existing" supplied.

the invalidating force of a *jus cogens* norm when it is given binding force as such by the entry into force of the Convention. In this case, the non-retroactivity rule in Article 4 does not relate so much to the fact that a treaty in question was concluded before the Convention's entry into force—which is the literal requirement of that article—as to the non-retroactive effect of a particular *jus cogens* norm on a treaty concluded before the Convention's entry into force. To determine the correct application of the non-retroactive rule under Article 4 in relation to Article 64, the relevant issue is *not* whether the treaty in question was concluded before or after the Convention's entry into force, but from what point of time after the Convention's entry into force should a *jus cogens* norm invalidate that treaty. On the basis of the nature of the *jus cogens* rule in Article 64, the more precise non-retroactivity rule applicable is not Article 4, but paragraph 2(b), Article 71, which provides, *inter alia*, that the termination of a treaty under Article 64 "does not affect any right, obligation or legal situation of the parties created by the execution of the treaty prior to its termination."

Hence, while under Article 53 the point of reference for the operation of the non-retroactivity rule is the *date the Convention enters into force*, under Article 64 it is the *time of emergence of the jus cogens norm.*

One more point relating to Article 64 deserves comment. The peremptory norm which this Article speaks of is described as "new". This word introduces an issue which may affect the range of effectivity of the *jus cogens* rules in the Convention. It gives rise to the suggestion that the Convention contemplates two categories of *jus cogens* norms: (1) those general norms of international law existing on the date of the Convention's entry into force, the acceptance and recognition of which as *jus cogens* norms by the international community, at that time, takes on binding force upon the entry into force of the Convention; and (2) those general norms which become *jus cogens* norms only sometime later after the Convention has entered into force.

If the term "new peremptory norm of general international law" in Article 64 refers only to the second category, treaties existing at the time the Convention enters into force are not affected by the operation of that "new" *jus cogens* norm. Neither are these treaties affected by the application of Article 53, because they were concluded before the Convention comes into force. The result is that they continue to subsist despite their incompatibility with *jus cogens* norms which come into effect as such upon the entry into force of the Convention. The lacunae may be so seriously broad as

to nullify the whole rationale of introducing the concept of *jus cogens* into positive international law through the Convention. In effect, the former legal regime, in conflict with the *jus cogens* norms at the time the Convention takes effect, cannot be brought into conformity with the peremptory norms of the new international legal order. It is submitted that a norm of general international law which is deemed accepted and recognized as *jus cogens* norms upon the entry into force of the Convention constitutes "a new peremptory norm of general international law" under Article 64 as of that time, in relation to the treaties existing then, such that the invalidating effect of a *jus cogens* norm upon such treaties would operate as a mechanism of adjusting the old regime of treaties along the imperatives of the new international legal order. In this respect, the correlation between Article 53 and 64 is that treaties concluded prior to the Convention's entry into force, which thus escape the coverage of the former Article, are caught by the invalidating effect of the latter Article. This would seem to be the understanding of the Commission when it stated that the effect of a new rule of *jus cogens* under its draft Article 61 (which is the present Article 64 of the Convention) "must be to render void not only future but existing treaties."

VI. *Modification of* Jus Cogens *Norms*

A *jus cogens* norm is not immutable.[36] It is subject to change in keeping with societal developments of global scale. This is clearly implied in Article 53 of the Convention. However, it is required that a *jus cogens* norm "can be modified only by subsequent norm of general international law having the same character." Only a *jus cogens* norm can totally supersede or partially change an existing peremptory norm.

Generally, the process of modification of a *jus cogens* norm follows the same mechanism as its formation, which is on the same consensual basis as any other norm of general international law. This may occur both in terms of customary or conventional norm-formation. The modification process may present the least difficulties when it operates through a general multilateral treaty or convention. In that case, the terms of change can be precise and the moment of modification exactly determined. While, as the International Law Commission anticipated, "a modification of a rule of *jus cogens* would today most probably be effected through a general multilateral treaty", in the field of customary rules the requirement of Article 53 may pose a problem. Much that can be said on this point may pertain

[36] For comment of the Commission on the modification of *jus cogens* norms, see ILC COMMENTARIES, p. 6.

to abstract possibilities, but at any rate certain State practices may develop contrary to an existing *jus cogens* norm and, in the absence of significant protest, broaden into a customary rule adhered to by the majority of States, thus gaining the status of a norm of general international law. However, at that stage, it may lack peremptory character in the sense that it is not yet "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted". Under Article 53, it cannot therefore yet modify the existing *jus cogens* norm on the matter, even if it is established as a norm of general international law (*jus dispositivum*). The result would be that a norm retains its *jus cogens* character formally, despite the fact that its content as a norm of general international law is contradicted by a new customary norm among the majority of States. However, the real world does not develop along the sequence of theoretical analysis; the two elements of *jus cogens* norm, pointed out above,[37] would most likely occur as one process in reality.

VII. *Concluding Remarks*

In providing *jus cogens* as a ground of invalidity or termination of treaties, the Vienna Convention on the Law of Treaties puts an end to the regime of *laissez-faire* in treaty-making. That the competence of States in this field has ceased to be unlimited is in itself one of the most significant features of progressive development in contemporary international law. It is a landmark that may shift the whole perspective of the theory of international law, and determine its future course on the basis of the same social forces that ushered in the concept of *jus cogens* into the modern law of treaties. However, as shown by the terms of the Convention, recognition of *jus cogens* by the international community of States does not mean at all the existence of superior norms independent of the wills of States, contrary to the hypothesis of publicists represented by Verdross.[38] That certain rules are normatively superior to others is brought about only by the concordance of wills of States themselves.

The introduction of *jus cogens* in the Vienna Convention can serve as a transformative mechanism for discarding out-moded rules in the old international law and for replacing them with progressive

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[37] See *supra*, at

[38] *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571, 572 (1937): "These principles concerning the conditions of the validity of treaties cannot be regarded as having been agreed upon by treaty; they must be regarded as valid independently of the will of the contracting parties. That is the reason why the *possibility* of norms of general international law, norms determining the limits of the freedom of the parties to conclude treaties, cannot be denied *a priori*."

principles that contribute to the making of a qualitatively new legal order. It may be recalled that the major capitalist powers whose exploitative interests are subserved by those obsolete rules indicated their opposition to a provision on *jus cogens* in the Convention or opted for the restriction of its application; on the other hand, the Third World States and the socialist community firmly supported the principle of *jus cogens* in all the stages toward the conclusion of the Convention.[39]

Despite the fact that the overwhelming majority of States have recognized the existence of international *jus cogens,* the operation of *jus cogens* rules under the Convention is seriously restricted, largely on account of the stand taken by the Western powers. But what remains as an achievement is that the Convention has succeeded in laying down the framework within which the international community can develop the fuller content of *jus cogens* norms, through the auspices of the new forces which have a stake in strengthening the conditions for detente, national independence and self-determination of peoples.

[39] For a discussion of this confrontation, see Sinclair, *Vienna Convention on the Law of Treaties*, 19 INT'L & COMP. L.Q. 47, 66-68 (1970); Tunkin, *Jus Cogens in Contemporary International Law*, 1971 TOLEDO L. REV. 107, 112-114; Abi-Saab, *The Third World and the Future of International Law*, 29 REV. BELGE DROIT INT'L 27, 51-53 (1973).