

ESSENTIALITY AND REALITY OF INTERNATIONAL *JUS COGENS*

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Contents: 1. The question of distinction: *jus dispositivum* and *jus cogens* in international law—2. Some preliminary points in identifying international *jus cogens*—3. Formulation in the Vienna Convention of the Law of Treaties—4. Essentiality of international *jus cogens*: general interest of the community of States—5. Principles of international morality—6. Concrete examples of *jus cogens* in international law—7. Its actual operation on the inter-governmental level—8. Some concluding remarks

1. On a previous occasion, I offered a tentative analysis of the concept of *jus cogens* in international law.¹ This newly emerged, but nebulous concept in our field still remains in a chronic state of things: an abundance of doctrine and a paucity of practice. The present essay intends to re-examine what is the essence of international *jus cogens* and how it actually operates on the inter-State level, referring to more recent writings and jurisprudence of the International Court.

To begin with, it would be well to take up the antecedent question concerning the possibility of distinguishing between *jus cogens* and *jus dispositivum* in the field of international law. Can we ever draw a distinctive line between the two categories of international legal norms? In what sense is the question of classification properly set up?

In municipal law, *jus cogens* is a counterpart of *jus dispositivum*. *Jus dispositivum*—yielding or supplementary—comprises the norms which shall be applied solely with the condition that any different regulation to be established by private persons is lacking. On the contrary, *jus cogens* excludes all possibility of deviation being introduced in the autonomous regulation by private persons. Consequently, a legal transaction between persons conflicting with a cogent norm, is void *ex jure*. Moreover, if such a transaction despite of its not incompatibility with a certain cogent norm, is contrary to the “*ordre public*,” it is also null and void.² Thus, as properly stated, while the essence of yielding law gives priority to “autoregulation” by private persons, cogent law absolutely denies it, foreclosing any derogation therefrom. A technical means for establishing such a private autonomous regulation is chiefly given by a legal transaction (*negozio giuridico*) between persons, *inter alia*, a contract in which they act for the satisfaction of their particular interests.

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¹ “*Jus Cogens* in Public International Law,” *Hitotsubashi Journal of Law and Politics*, Vol. 6 (1968), pp. 16 ff.

² “On ne peut déroger, par des conventions particulières, aux loi qui interessent l'ordre public et bonnes moeurs.”

Thus it is evident that the relevant distinction is founded on the institutional contra-distinction between law and act-in-law in the field of municipal law. In international law, however, so far as derogation from international legal norms—customary or conventional—is made by means of an agreement between State-persons which is a law-creating act, the concept of *jus dispositivum* will turn out to be extraneous in international law.³ By the same token, the concept of *jus cogens* is entirely foreign to international law. The common will expressed in the form of a treaty, as concerns its material sphere of validity, encounters with no limitation in international law. The principle of *pacta sunt servanda* is the basic law-creating norm in international law which simply contemplates a legal possibility of the relevant norm-creating act. Acting upon the principle of *pacta sunt servanda* in making an agreement, States realize the possibility of positing legal norms between them with no restrictions imposed by international law. This may be true for things that occur in most cases.

Notwithstanding, it is sensibly pointed out that the question of distinction may be posed also on the plane of international law.⁴ In cases where a certain norm—customary or conventional—contemplates itself the possibility of being derogated by means of unilateral or even bilateral juridical act of States, nothing prevents from saying that the norm is of “yielding” nature. In the same vein a certain norm containing in itself the criterion of prohibiting any derogation therefrom may be fairly said to be a “coherent or peremptory” norm of international law. Adherence to the formal schema in the context of identifying the relevant distinction may only help to obscure the substantially similar phenomena in international law, giving undue weight to elements of technical formality. The criterion is to be sought in substance rather than in form in the sense that what the norm itself provides is first in importance.⁵

2. We now proceed to some preliminary points in identifying yielding or coherent nature of legal norms in international law.

In the first place, it should be recalled that custom and agreement stand on a par as a source of international law. Whether the principle of *pacta sunt servanda* is a norm of customary law, or rather, a fundamental norm immanently moulded with the birth of the community of States, custom and agreement are given the equivalent force of law-production in international law.⁶ The view is also put forth that custom has a superior potentiality to agreement with respect to the sphere of addresses of the respective norms as well as their obligatory force, but it rarely asserts its rigid superiority to agreement.⁷ Thus customary

³ Perassi, “Teoria dommatica delle fonti di norme giuridiche in diritto internazionale,” *Scritti giuridici*, I (1958), pp. 288 ff. Cf. Anzilotti, *Corso di diritto internazionale*, Vol. 1 (1955), p. 91: “The truth is that not being preoccupied with the problem of a dispositive law in the internal legal orders, the question of coherent efficacy or otherwise of international norm should be posed in regard to creation of other norms.”

⁴ Morelli, *Norme dispositive di diritto internazionale*, *Rivista di diritto internazionale* (1932), pp. 388 ff.

⁵ According to Anzilotti, the States which have posited a certain norm can always agree not to observe it, but to replace by another. In this sense it could go to the length of saying that all the international norms are yielding (*dispositiva*.)” However, this unlimited faculty of abrogating or replacing the norms in force presuppose the consent of all the States which co-operated in framing them. Therefore, so far as the general norms are concerned, it becomes important to determine whether they exclude absolutely or admit within a certain limit derogatory particular agreement. This is the problem of coherent or yielding norms in international law. Anzilotti, *Corso*, pp. 91-92.

⁶ Anzilotti, *op. cit.*, pp. 96 ff.

⁷ Sperduti, *Lezioni di diritto internazionale* (1958), p. 65.

norms may be abrogated by conventional norms and conventional norms, vice versa. The mutual relation between custom and agreement, as equal and fungible sources of law, are governed by the principles "*lex posterior derogat priori*," and in the relation between general and special laws, "*in toto jure genus per speciem derogatur*."

Second, the above-mentioned principles of co-ordination are applied ordinarily to the phenomena of law-creating process in international law, but the possibility of derogation or otherwise should be separately dealt with in the context of identifying a special category of *jus* in international law. If a legal norm is abrogated or modified subsequently by another norm in municipal law, we do not say that the precedent norm is yielding in nature. By the same reason, in cases where a legal norm—customary or conventional—is abrogated or modified by another international norm, it would not be justified in saying that the former is a yielding norm. The derogatory force of the latter norm is derived from the fact that both norms are of equal value from the view point of law-creating process. A cogent law cannot be abrogated or modified by the ordinary type of norm, but by the later norm having the same character. Despite the fact, it may occur that a norm of international law contemplates itself a derogation as permissible by an agreement between States. In that case, we are faced with the properly so-called *jus dispositivum* in international law, of which examples can be found also within the compass of positive international law.⁸ By hypothesis, in cases where a certain legal norm itself absolutely excludes a possibility of derogating therefrom in the sense that any agreement at variance with such a norm is unlawful and invalid even *inter partes*, then there exists a peremptory norm of international law (*jus cogens*). The relevant characterization is dependent upon *modus essendi* of international norms to be examined on a case-by-case basis.

Finally, assuming that a certain norm of international law has the character of *jus cogens*, any agreement between States conflicting with it, shall be deprived of norm-creating force. It means that the principle of *pacta sunt servanda* is to that extent derogated by a peremptory norm of international law. Accordingly, the existence of cogent law is made possible through the instrumentality of eventual derogation from the principle of *pacta sunt servanda*. It should be noted, however, that the principle is a fundamental norm of law-production based on the sovereign equality of States in international law. Such a derogation to be contemplated in identifying international *jus cogens* does not bring in its train the possibility of replacing the principle by *pacta sunt non-servanda*, which leads to a sheer absurdity. Though a yielding norm is obligatory as a legal norm unless otherwise provided by the parties, an agreement which derogates from it as provided for, is regarded as lawful and valid. But an agreement contravening a non-yielding type of norms which injures the right of the other States constitute an illegality in international law, and as such, not opposable to them. In cases where the norm is cogent or peremptory in the strict

⁸ For instance, Art. 39 of the Statute of the I.C.J. provides: "...In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers: the decision of the Court shall be given in French and English. In this case the Court shall at the same time determine which of the two texts shall be considered as authoritative." Art. 23 of Vienna Convention on Succession of States in Respect of Treaties runs: "Unless the treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession... shall be considered a party to the treaty from the date of the succession or from the date of entry into force of the treaty, which is the later date." *Per contra*, according to Art. 4 of International Covenant on Civil and Political Rights, "No derogation from Articles 6, 7, 8, (paragraphs 1 and 2), 11, 15, 16, and 18 may be made under this provision."

sense, an agreement at variance with it is not only unlawful, but also null and void even between the States parties.

3. Turning to the question of international *jus cogens* envisaged in its essential aspect, mention should be first of all made to the formulation given in the Vienna Convention of Treaties. Article 53 of the Convention, as is well-known, provides: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

It is not necessary here to enter into details, taking up the above Article as a matter of interpretation in the context of its drafting history. The formulation is simply an *idem per idem*—it is tantamount to saying that a peremptory norm is a norm which is peremptory in its efficacy. It does not contain any material point of reference in identifying international *jus cogens* in its essential aspect.⁹

According to the distinguished teachings, *jus cogens* in international law is composed of some norms from which derogation is prohibited, for the reason that they embody superior moral principles or vindicate collective interests so potent and fundamental as to make them appear as something analogous to internal norms of the "ordre public".¹⁰ Hence, whether or not international law contains a general norm corresponding to a norm of the "ordre public" in municipal law, international *jus cogens* at large should be a reflection of the consolidated or condensed value-judgment in the community of States basically founded on the existence of general interests and international morals.

Article 53 of the Vienna Convention provides that *jus cogens* shall be a norm of general international law. It is certain that customary international law falls by definition within this category. But a norm which is posited in general multilateral convention may be included within this purview (for example, the Charter of the United Nations, International Covenants of Human Rights, etc). Furthermore, it is asserted that for the purpose of treaty, the possibility cannot be *a priori* denied to establish *jus cogens* on a bilateral basis. This statement, however, seems to be problematical.¹¹

4. For the purpose of identifying *jus cogens* in international law, the postulated idea of "general interest" of the international community requires further examination and analysis.

In the case of *Barcelona Traction Company*, the International Court of justice said: "...In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of

⁹ It contains no mention of "l'ordre public et bonnes moeurs" of the international community.

¹⁰ Cf. Fedozzi, *Trattato di diritto internazionale*, Vol. 1 (1933), p. 77.

¹¹ Morelli, objecting to the view of Verdross, argues that it should be admitted the possibility—at least theoretical—of a cogent norm to be posited by means of a bilateral agreement. A proposito di norme internazionali cogenti, *Rivista di diritto internazionale* (1968), p. 116. If a certain norm is posited as *jus cogens* in the bilateral treaty—apart from the case where a cogent norm of general international law is incorporated in it—, it is for the very reason that the two States parties accept the norm as such in their mutual relations. Such an acceptance represents the self-limitation *pro futuro* on each side which appears to be incompatible with the inherently heteronomous character of *jus cogens*. To remove such a limitation or not is left to both of them as a matter of their own concern.

all States. In view of the importance of the right involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.¹²

Norms of general international law are predicated upon the existence of general interests to be legally protected in the international community. In some cases such a norm, according to a binominal pattern, is directed to a collectivity of States, creating obligations and rights belonging to States in their individual capacity. This type of norms can be found in the field of diplomatic law.¹³ The obligation of diplomatic immunities is assumed by the receiving State only toward the sending State. Consequently, even in cases where some derogations from general law by agreement between these two States, the agreement is not only valid *inter partes*, but lawful toward a third State standing as an addressee of the same general law.

In the *United States Diplomatic and Consular Staff* case, the International Court seriously condemned the Iranian Government for its conduct: "...what has above all to be emphasized is the extent and seriousness of the conflict between the conduct of the Iranian State and its obligations under the whole corpus of the international rules of which diplomatic and consular law as comprised, rules the fundamental character of which the Court must have again strongly affirm."¹⁴ Albeit the fundamental importance attributed by the Court to the norms of diplomatic law, the statement of the Court does not purport to confirm the relevant norms as international *jus cogens*,¹⁵ setting aside the aspect of human right bearing upon depriving human beings of their freedom and act of taking-hostage.¹⁶ The Court decided that the violations of the international obligations engaged the responsibility of Iran toward the United States of America under international law.

The other type of international legal norms provides for the protection of general interests belonging to all States or the international community as a whole. The obligations contemplated by the international norm for that purpose are assumed toward all States for the satisfaction of general interests. So that, the norm correlatively creates rights belonging to States not in their individual capacity, but collectively.

In this connection, it should be recalled that the International Court held in the *South Africa* cases, referring to the nature of obligation undertaken by the Mandatory: "...the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members."¹⁷

In the second phase of the same cases, however, the International Court changed the position. The Court classified the relevant provisions of the Mandate into two types: "conduct of the mandate" provisions and "special interest" provisions. While the latter confer certain rights relative to the mandated territory, directly upon the Members of the League as individual States, or in favour of their nationals, the former do not give a legal

¹² *I.C.J. Reports 1970*, p. 32.

¹³ Morelli, *cit.*, A proposito.... p. 114.

¹⁴ *I.C.J. Reports 1980*, p. 42.

¹⁵ Cf. Bretton, L'affaire des «ostages» américains devant la Cour Internationale de Justice, *Journal du droit international* (1980), pp. 819-821; Morelli, Norme c.d. fondamentali e norme cogenti *Rivista di diritto internazionale* (1981), pp. 509-510.

¹⁶ Settlement of the Iranian hostage crisis was realized through the intermediary of Algeria in 1981. The validity of agreement thus reached was not contested by both Governments, nor by any third State.

¹⁷ *I.C.J. Reports 1962*, p. 343.

right or interest on an individual "State" basis. According to the altered view of the Court, "...the Applicants did not, in their capacity as States, possess any separate self-contained right which they could assert, independently of, or additionally to, the right of the League, in the pursuit of its collective, institutional activity, to require the due performance of the Mandate of the 'sacred trust.' This right was vested exclusively in the League and was exercised through its competent organs."¹⁸

Later, in the case of *Namibia*, the International Court upheld the resolution 276 (1970) of the Security Council, and indicated that "the Member States of the United Nations were...under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia." As to the position of the non-Member States, the Court was of opinion that "the termination of the Mandate and the declarations of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law: in particular, no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of such relationships, or of the consequences thereof."¹⁹

It is undeniable that the international obligations of the Mandatory for the performance of a sacred trust are of "*erga omnes*" type, whether the right to claim its obligations is vested in the international organization or in its Members as well. Consequently, any international act of the Mandatory violating the solemn obligations or the situation brought about as a result should be regarded as illegal *erga omnes*, that is, to all other State or the community of States as a whole. The act is not only illegal, but not opposable to any third State. This is particularly the case with such an illegality as to frustrate the fundamental object of the mandate and squarely contravenes the considerations of public policy which have a prominent role in the administration of the institution. Each State should abstain from any form of inter-governmental co-operation which may imply recognition or connivance of the wrong on its part. This being so, it would not hold water that international engagements disregarding this obligation of abstention may be non the less recognized or connived as *res inter alios acta*. It is no longer a question of principle, but that of will and power of all States jointly acting under the authority of the institution in a sense *super partes*.

5. In the international field, another special type of international norms is valid to govern the behavior of States. This type of norms is of universal applicability, inasmuch as it is accepted as a legal norm which is deeply rooted in the moral basis.

The International Court, in the *Corfu Channel* case, pointed out the obligations incumbent upon the Albanian authorities to notify the existence of a minefield in its territorial waters are based "on certain general and well-recognized principles, namely: "elementary considerations of humanity, even more exacting (*plus absolues encore*) in peace than in war...."²⁰

Furthermore, in the case of *Reservations to Genocide Convention*, the Court brought

¹⁸ *I.C.J. Reports 1966*, p. 29.

¹⁹ *I.C.J. Reports 1971*, pp. 54, 56.

²⁰ *I.C.J. Reports 1949*, pp. 22. Presumably, the Court applied it as a broad principle of universal validity underlying the various humanitarian provisions of the Hague Conventions. See, Fitzmaurice, *Judicial Innovation—Its Uses and its Perils, Essays in Honour of Lord McNair* (1965), pp. 28–29.

out the moral aspect of the Convention in full relief, which was given a crucial relevancy in answering the legal questions submitted to it: "The origins of the Convention show that it was the United Nations to condemn and punish genocide as 'a crime international law' involving a denial of the right of the 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.... The first consequence arising from the principles underlying the Convention are principles which are recognized by recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)." "The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interest of their own; they merely have, once and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions."²¹

International morals have a much wider domain of application than international legal norms in the sense that they are not only applied to relations between States, but also those with non-members of the international community such as private persons, peoples, minorities and so on.²² International morals are essentially inspired with the elementary respect of human beings. It shall be also noted that by their very nature, principles of moral law are of universal applicability and at the same time, the dictates derived from those principles are categorical, allowing of no exception or derogation. And finally, it is almost needless to say that the observance of moral principles is not a matter of "individual advantages or disadvantages" to States.

On the other hand, norms of moral law are *per se* devoid of legal force. However, they may be transformed into legal norms, thereby acquiring a great degree of practical efficacy. Such a process of transformation—it is asserted—is specifically contemplated by international law.²³ The process consists in receiving and incorporating the essential moral principles actually in force among the nations within the ambit of positive law at the instance of the international community as a whole. Then moral principles are transformed into norms of positive international law, whereas they are practically in force on the consolidated ethical consensus. The motive power bringing the process into operation is supplied by "the dictates of the public conscience." According to a sensible view, the normative process as indicated above, established a norm, prohibiting States from making an aggressive war, and erecting it into international crime which shall be punishable on an individual basis.

²¹ *I.C.J. Reports 1951*, p. 23.

²² Fedozzi, *op. cit.*, p. 20.

²³ Sperduti, *La consuetudine internazionale, Scritti in onore di Gaspare Ambrosini*, III, p. 193.

This ethico-legal principle is mentioned as a remarkable example of international *jus cogens*. It may be submitted that this special type of international norms incorporated into the corpus of positive international law by the relevant normative process does not lose its inherent weight *qua* norms of moral law and the essentiality thus retained, far from being dispelled via the route of transformation, will make up the force of international—if there exists—*jus cogens*.

6. International cogent law does not exist and apply in vacuum. Hence its practical operability must be examined on an empirical basis. For this purpose, it is first of all asked what are the concrete examples of *jus cogens* in international law.

According to Waldock (Special Rapporteur on the Law of Treaties), the followings are indicated as the conspicuous instances of treaties that are void by their inconsistency with a *jus cogens* rule: (a) the use or threat of force in contravention of the principles of the Charter of the United Nations; (b) any act or omission characterized by international law as an international crime; (c) any act or omission in the suppression or punishment of which every State is required by international law to co-operate.²⁴

Ago (ex-President of the Conference of the United Nations on the Convention of Treaties) mentions some “rare” examples of international *jus cogens* along the same lines:²⁵ the fundamental rules concerning the safeguarding of the peace, especially those prohibiting the threat or use of force; the fundamental rules of humanitarian nature (prohibition of genocide, slavery, racial discrimination, protection of essential rights of human persons in time of peace and war; the rules prohibiting the injuries to the independence and sovereign equality of States;²⁶ the rules ensuring all the members of the international community the enjoyment of certain common interests (the high seas, outer-space, etc.).

Reference may also be made to the statement of the International Court concerning the international obligations *erga omnes* in the case of *Barcelona Traction Company*: “such obligations derive, for example, in contemporary international law, from the outlawing (*la mise hors la loi*) of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human persons, inducing protection from slavery and racial discrimination.”²⁷

Furthermore, a projected list of wider scope is submitted covering the following items:²⁸ (1) genocide; (2) slavery and the slave trade; (3) piracy; (4) political terrorism abroad, including terroristic activities; (5) hijacking of air traffic; (6) recourse to war, except in self-defense, (7) threat or use of force against the territorial integrity or political independence (intervention); (8) armed aggression; (9) recognition of situations brought about by force, including fruits of aggression; (10) treaty provisions imposed by force; (11) war crimes (“superior orders” *prima facie* no answer to war crimes); (12) crimes against peace and humanity (“superior orders” *prima facie* no answer); (13) offenses against peace and/or

²⁴ *Yearbook of the International Commission*, Vol. II (1963), p. 52.

²⁵ Ago, *Droit des traités à la lumière de la Convention de Vienne*, *Recueil des cours*, Vol. III (1971), p. 324.

²⁶ Quadri points out that “agreement which lays in jeopardy the security of other States in general or pretends to put a State under the perpetual yoke” infringes the international public order. *Diritto internazionale pubblico* (1968), p. 110.

²⁷ *I.C.J. Reports 1970*, p. 32.

²⁸ Whiteman, *Jus Cogens in International Law, with Projected List*, *Georgia Journal of International and Comparative Law*, Vol. 7 (1977), pp. 625–626.

security of mankind; (14) dispersion of germs with a view to harming or extinguishing human life; (15) all methods of mass destruction (including nuclear weapons) used for other than peaceful purposes; (16) contamination of the air, sea, or land with a view to making its harmful or useless to mankind; (17) hostile modification of weather; (18) appropriation of outer space and/or celestial bodies; (19) disruption of international communications with a view to disturbing the peace; (20) economic warfare with the purposes of upsetting: (a) the world's banking; (b) the world's currencies; (c) the world's supply of energy or (d) the world's food supply.

Without going deep into these categories one by one in order to verify their requisite elements as cogent law, each of them, except some categories mentioned in the last list which are evidently projected *de lege ferenda*, may be presumably and *prima facie* entered into an eligible list, but the question still remains to be examined how these norms operate in practice on the inter-State level.²⁹

7. In the international field, each State figures as the overall apparatus of governance for the general good of people. A State is essentially a bearer of public functions, and an agreement between them concluded on the basis of sovereign equality constitutes a law-creating act in international law. Accordingly, to pose a question concerning international *jus cogens* in the similar context of a private contract *contra bonos mores* in municipal law is misleading as well as devoid of reality.

As already stated, in identifying international *jus cogens*, it shall be the first consideration that what is the origin, object and subject-matter of a legal norm.³⁰ The formal indication ("no derogation may be made...") is also one of the relevant considerations. But, in the last analysis, the criterion consists in the "considerations of morals and international good order" (Fitzmaurice) infiltrating into the material content of the norm.

In most cases, international ethico-legal principles in which the public conscience is

²⁹ In the *Nuclear Tests* case, Judge Petrén pointed out concerning the legality of nuclear test: "Since the Second World War, certain States have conducted atmospheric nuclear tests for the purpose of enabling them to pass from the atomic to the thermo-nuclear stage in the field of armaments. The conduct of these States proves that their Governments have not been of the opinion that customary international law forbade atmospheric nuclear tests. What is more, the Treaty of 1963 whereby the first three States to have acquired nuclear weapons mutually banned themselves from carrying out further atmospheric tests can be denounced. By the provision in that sense the signatories of the Treaty showed that they were still of the opinion that customary international law did not prohibit atmospheric nuclear tests." *I.C.J. Reports 1973*, p. 305.

³⁰ According to Fitzmaurice, the relevant classification of conventional obligations not of a "mutually reciprocating type" is set up between an obligation of an "interdependent" type and that of an "integral" type. In the former case, a fundamental breach of an obligation by one party will justify a corresponding non-performance generally by the other parties and not merely in their relations with the defaulting parties, whereas in the latter case, the force of the obligation is self-existent, absolute and inherent for each party and not dependent on a corresponding performance by the others. Waldock comments: "...it seems to the present Special Rapporteur that it is the *jus cogens* nature of the subject-matter of these Conventions, rather than the 'integral' character of the obligations created by the Conventions upon which the nullity of an inconsistent later treaty has to rest. It may be added that a large number of these so-called 'integral' type treaties have withdrawal or denunciation clauses. Even the Genocide Convention (Article 14) provides the possibility of unilateral denunciation at regular intervals every five years; but here again denunciation of the Convention would not absolve a State from observing its fundamental principles." *Yearbook of the International Law Commission*, Vol. II (1963), pp. 58-59. The writer, for one, is of opinion that the "obligation" side is complimentary and not antithetical to the "subject-matter" (the interest involved) in identifying the nature of *jus* in international law, just as both side of a coin. The analytical observations by Fitzmaurice in this connection seem to be of valuable relevancy.

manifested, will be sanctioned by the inner compulsion of moral conviction shared among the civilized States. They are justly expected to abide by these principles spontaneously without regard to their individual advantages or disadvantages. Can we imagine and agreement contemplating a policy of genocide to be implemented between Governments?³¹ Such an agreement is farfetched, and of fictitious value for the practice of States. Similarly, it is almost inconceivable that the two or more States agree to violate the inherent right to life or the other essential human rights.³²

Notwithstanding the spontaneity in the observance of international *jus cogens* such as mentioned above, if, for instance, States venture to conclude an agreement contemplating an offensive use of force against a third State, it should be asked whether the agreement is valid or not between the States parties themselves. By hypothesis, it would be warrantable to say that the agreement is void because it contravenes the international public order. As showed by experience, arbitrary use of force adheres to sovereign power. The legal control by means of international *jus cogens* has a realistic significance in this context, that is, the activities involving, willy or nilly, the grave consequences which only States *qua* sovereigns have the capacity to carry out.

In this point, however, we are to encounter with the great difficulties due to indeterminacy of enforced application. General international law has not yet organized the institution *super partes* with a view to controlling the validity of agreement between States. Consequently, in cases where the States continue by their collusion to endorse an invalid

³¹ In the case of *Trial of Pakistani Prisoners of War*, the main point resided in another matter. It was claimed by Pakistan that such individuals, as were under the custody of India and were charged with alleged acts of genocide, should not be transferred to Bangla Desh for trial. It was contended that Pakistan had exclusive jurisdiction over its nationals in respect of any acts of genocide allegedly committed in Pakistan territory. *I. C.J. Reports* 1973, pp. 328–331.

³² It is pointed out by Suy that an international agreement by which the States are bound to violate the essential human rights are unlikely to be actually concluded. Therefore, it would not be realistic to speak of cogent norms concerning the restricted category of civil and political right—apart from the right of self-determination of peoples—in the context of eventual derogation by means of an agreement. Such a derogation can be hardly conceivable in the practice of States except by means of a national measure which is the problem usually located in the context of the law of responsibility but not the law of treaties. The doctrine and the practice has not yet clarified the effect of a legislative or administrative measure contrary to the “*ordre public*” of the international community. It is not sufficient to affirm that the measure entails the international responsibility of the State, because such could be the consequence of a violation of an international obligation, whatever it may be. The consequence of a measure derogating from the “*ordre public*” of the international community should be the heaviest, and involve the obligation of all the States, besides its absolute nullity, not to recognize the measure. *Droit des traités et droit de l’homme, Festschrift für H. Moser* (1983), pp. 937–938. Truly, under certain circumstances, a measure of a State is held to be “unlawful and invalid” in international law. (For instance, a proclamation of occupation of a territory which is not *terra nullius*. *P.C.I.J., Series A/B, No. 53*, p. 75). When it is said that a legislative act or administrative measure of a State is invalid in international law, it usually means that the act or measure is not opposable to other States which are not bound to recognize it. In the above context, reference is made to the obligations of all the States not to recognize the measure, which is considered to mean that the act of recognition has no effect to heal it of its vital flaws. If it means furthermore that the measure is invalid even on the plane of municipal law, then there may be no more “international” but “*supranational*” public order. See, with reference to the principle of self-determination, Münch, *Bemerkungen zum ius cogens*, *Festschrift, cit.*, pp. 625 ff. It is suggested that the principle—as *jus cogens* in a broad sense—serves as the instrument of “peaceful change” searching for the good international order. On the other hand, it may be arguable whether the so-called Calvo clause, going beyond the limit of partial validity attributed by certain arbitral awards, and being pushed to the outright rejection under any circumstances of the protection against the denial of justice—which evidently implies the “negation of human personality” (Huber)—can be consistent with the requirement of the international public order.

treaty, it will in fact remain efficacious as between them, unless one of the parties on its side, but with impunity, destroys the common will.³³ In a similar vein, with regard to the nullity a treaty coerced unlawfully by the threat or use of force, the victim State, even if it is interested in its nullification, would not be in a position to lay a claim, so long as it is forced to admit the factual supermacy of the coercing State.³⁴

Such being the case, it may be contended that international law should confine itself to characterize the act as an illegality *erga omnes*, and bring the orthodox law of international responsibility into full operation. The responsible State is considered to have violated the obligations toward all other States, and engage on that score the obligations of reparation including the restitution of the situation *qua ante*.

Hence, so far as a serious divergence of views concerning the questions is not forensically controlled and settled, how to deal with the question will be placed in the hands of the States parties. Undoubtedly any other State is legitimized to intervene as a third party. It is highly desirable that the right to invigilate of a third State will be actively exercised for the common cause of the international community. But what is desirable, will not be necessarily realized. The action of State is dominantly motivated by the self-interested concerns. If the question is raised as one element in a wider political dispute, the opaque concept in scope is apt to be utilized as a weapon to undermine the stabilized relations in the tangle of political warfare.

Nevertheless, as indicated by Waldock, "imperfect though international legal order may be, the view that in the last analysis there is no international public order—no rule from which States cannot at their own free will contract out—has become increasingly difficult to sustain."³⁵ At the present stage, any possible doubt thereof has been officially dispelled by the insertion of Article 53 concerning a peremptory norm of international law in the Law of Treaties. Hence, as a matter of law, if a treaty is concluded between States, and its object or execution conflicts with international *jus cogens*, we are inevitably led to the conclusion that the treaty is not only unlawful *vis-à-vis* toward all other States, but invalid *ex tunc* between the States parties themselves. In consequence, the parties shall eliminate *as far as possible* the consequences of any act performed in reliance on any provision which conflicts with international *jus cogens*, and bring their mutual relations into conformity with *jus cogens* (Art. 71 of the Law of Treaties). A third State should recognize the nullity of such a treaty, and any action on its part cannot operate so as to cure it of its vital defects.

³³ It is indicated that the "efficacy" of a conventional norm is a value independent of the "validity" of a treaty. Indeed, a value of efficacy solely derives from the sociological fact of the persistence of common will of the parties to enforce continuously the said norm. Therefore the "validity" may be discussed with reference to the type-fact of agreement, but not to the norm derived from it. The norm remains efficacious so long as the common will of the parties continues to exist. Hence, despite the existence of a treaty which should be impugned as "void," it may happen that the parties *mala fide* continue to maintain the norm established by the treaty. Barile, *Lezioni di diritto internazionale* (1977), p. 76.

³⁴ Thus, referring to the coerced treaty, it is also pointed out: "...insofar as the article could not be self-implementing, the burden would continue to rest on the allegedly coerced State to determine whether to confront its alleged oppressor with a defiant claim of nullity. Its decision on this matter would necessarily be determined, in any foreseeable condition of international relations, by prudent considerations of the power relations in which it found itself with the coercing State. It is not believed that these considerations or their outcome could be basically different from those operative under customary law, where the imposed treaty is valid until there is sufficient change in the relevant power relations to bring about a denunciation or renegotiation." Stone, *Of Law and Nations* (1974), pp. 249-250.

³⁵ *Yearbook of the International Law Commission*, Vol. II (1963), pp. 53.

The International Court, in the Fisheries Jurisdiction case, observed: "There can be little doubt, as is implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void."³⁶ It is not conceivable that the International Court will take the different position with reference to Article 53.

As to the role of the International Court, the Vienna Convention on the Law of Treaties provides that any one of the parties to a dispute concerning the application or the interpretation of Article 53 may, by a written application, submit it to the International Court of Justice for a decision (Art.66). But the rule laid down therein is conventional in nature, and as such, it does not oblige States which are not parties to the Vienna Convention.

It is a stark fact that States generally shun any concrete commitment to submit their dispute for decision by the International Court. It is also an observable tendency that the International Court shows a reluctance usually to make a pronouncement on the nullity of a treaty to be impugned as unlawful in cases where the parties together maintain it and ask the Court to apply.³⁷

In the *Oscar Chinn* case, the Permanent Court of International Justice was requested by the parties to apply the Convention of Saint-Germain of 1919. Whereas the General Act of Berlin of 1885 stipulated that the Act of Berlin might only be revised with the consent of all contracting Parties, the Convention of Saint-Germain abrogated a number of the provision of the Act as between the parties, among which the parties in this case were included. The parties did not raise a point of unlawfulness of the origin of the Convention. The Permanent Court held: "No matter what interest may in other respects attach to these Acts.. ..in the present case the Convention of Saint-Germain of 1919, which both Parties have relied on as the immediate source of their respective contractual rights and obligations, must be regarded by the Court as the Act which it is asked to apply; the validity of this Act has so far, to the knowledge of the Court, been unchallenged by any government."³⁸ On the other hand, Judge van Eysinga vigorously dissented from this finding: "The General Act of Berlin does not create a number of contractual relations between a number of States, relations which may be replaced as regards some of these States by other contractual relations; it does not constitute a *ius dispositivum*, but it provides the Congo Basin with a régime, a statute, a constitution. This régime, which forms an indivisible whole, may be modified, but for this the agreement of all contracting Power is required."³⁹ Judge Schücking also stated: "It is beyond doubt that the signatory States of the Congo Act desired to make it absolutely impossible, in the future, for some of their number only to amend the Congo Act, seeing that any modifications thus introduced would have been a danger to their vested rights in that vast region. Accordingly, in my view, the nullity contemplated by the Congo Act is an absolute nullity, that is to say, a nullity *ex tunc*, which the signatory States may invoke at any moment, and the convention concluded in violation of the prohibition is automatically null and void."⁴⁰ The question here involved may be debatable from another point

³⁶ *I.C.J. Reports 1973*, p. 14.

³⁷ Waldock points to : "The Jurisprudence of the Permanent Court.... so far as it goes, seems to be opposed to the idea that a treaty is automatically void if it conflicts with an earlier multilateral treaty establishing an international regime." *Yearbook, cit.*, p. 60.

³⁸ *P.C.I.J., Series A/B, No. 63*, p. 80.

³⁹ *Ibid.* pp. 133-134.

⁴⁰ *Ibid.* pp. 148-149, 150.

of view.⁴¹

The Permanent Court, however, did not hesitate to affirm the mandatory character of certain norms belonging to the ambit of procedural law. In the case of *Free Zones of Upper Savoy and District of Gex*, the Court refused to give effect to the terms of the Special Agreement between the parties on the ground of its incompatibility with the norms of the Court's Statute. With reference to Article 1 of the Agreement, the Court said: "...the spirit and letter of its Statute, in particular Articles 54, paragraph 3, and 58, do not allow the Court 'unofficially' to communicate to the representatives of two Parties to a case 'the result of the deliberation' upon a question submitted to it for decision; as, in contradistinction to that which is permitted by the Rules (Article 32), the Court cannot, on the proposal of the Parties, depart from the terms of the Statute."⁴² Regarding to Article 2 also by which the two Parties subordinate to their joint concurrence a part of the Court's judgment, the Court declared: "After mature deliberation, the Court maintains its opinion that it would be incompatible with the Statute, and with its position as a Court of Law, to give a judgment which would be dependent for its validity on the subsequent approval of the Parties."⁴³ In the case of *Certain Norwegian Loans*, the International Court took the restrained position on the validity of a so-called "self-judging reservation of domestic jurisdiction," which was not questioned by the parties in the proceedings. Not having entered into an examination of the reservation but "without prejudging" the question, the Court decided to give effect to the reservation as it stood as the Parties recognized it.⁴⁴ The view of the Court was sharply contested by the individual Judges.⁴⁵

As in the case of the *Free Zones*, the International Court should stand up to any issue pertaining to substantive law, especially taking note of the contemporary development of international law. As a matter of law, approaches to be adopted may be varied. The issue may be posed concerning the treaty as an international wrong which entails an obligation of reparation toward the others (a wrong *erga omnes*) and also must be remedied by its dissolution. The issue may be also presented just as the question of *jus cogens* in the sense that a treaty is impugned by one of the parties or a third State as having no legal force. Going a step further, it may be asked whether the Court *proprio motu* take up the point, even if it is not raised by the parties or the others. We should recall that half a century ago it was clearly stated: "It is an essential principle of any court, whether national or international, that the judges may only recognize rules which they hold to be valid"; "The Court would never, for instance, apply a convention the terms of which were contrary to public morality (*bonnes moeurs*)."⁴⁶ Inasmuch as the International Court is a Court of Justice and as such, the custodian of the law, it stands to reason that it should declare the nullity of or at least not give effect to any convention which is established as conflicting

⁴¹ In this connection Anzilotti comments: "...Article 13 of the Convention of Saint-Germain is *ultra vires*, and therefore void or unlawful. But because *utile per inutile non vitiatur*, the Convention remains efficacious to replace for the norms of the Act of Berlin concerning the liberty of commerce and navigation leaving the Act in force in every other respect." Corso, *cit.* p. 92.

⁴² *P.C.I.J.*, Series A, No. 22, p. 12.

⁴³ *P.C.I.J.*, Series A/B, No. 46, p. 161.

⁴⁴ *I.C.J. Reports 1957*, p. 27.

⁴⁵ Separate Opinion of Judge Lauterpacht and Dissenting Opinion of Judge Guerrero. *Ibid.*, pp. 34 ff; pp 67 ff.

⁴⁶ Separate Opinion of Judge Schücking in the *Oscar Chinn* case. *P.C.I.J. Series A/B No. 63*, p. 149.

with international *jus cogens*. The custodian of the law must protect the very core of the law against any deviation or derogation therefrom.

8. In conclusion, the foregoing observations are summarized as follows:

(a) The question of *jus cogens* (which is distinguished from *jus dispositivum*) may be posited in international law, not on a *a priori* basis, but for practical purposes of legal control in the international community. If a norm itself contemplates the possibility of derogating from it by means of agreement between States, a norm is yielding in nature. On the contrary, if a norm itself absolutely forbids any deviation from it, a norm is cogent or mandatory in nature.

(b) When derogation is made by an agreement to yielding norm (*jus dispositivum*), it is a matter of course that the derogatory agreement is lawful and valid. However, if the derogated norm is non-yielding in the sense of affecting the right of the other States, an agreement which carries the violation of the norm injurious to those States, constitutes an international wrong and as such, is not opposable to them (even if the agreement is valid as between the parties). And moreover, if the norm is a *jus cogens* in the technical sense, then an agreement dislodging it is not only unlawful and invalid vis-à-vis any third State, but also it is void *ex tunc* even as between the parties.

(c) The relevant criteria in identifying international *jus cogens*, should be sought in the material content of a legal norm, having regard to its origin, object and subject-matter. It is said that the idea of *jus cogens* is concomitant to the perceived existence of a general interest in the international community. International norms laid down for the sake of a general interest are divided into two categories. The first category purports to safeguard a general interest by creating an obligation States on the basis of bilateralism, and the second by imposing an obligation of States *erga omnes*. In the former case, derogatory agreement enlarging or contracting the scope of obligations is lawful and valid between the parties concerned. In the latter case, however, any agreement violating the imposed obligation constitutes a wrong *erga omnes* which entails the legal consequences to be attached by international law toward all other States.

(d) The circumstances that a legal norm creates an obligation *erga omnes* of which violation constitutes a wrong *erga omnes* is certainly necessary, but not sufficient for the existence of international *jus cogens*. Granting that its essence consists in "l'idée absolue de l'impossibilité de toute dérogation de la part des sujets destinataires" (Monaco),⁴⁷ that will be an emanation from a high level of normative consciousness alchemized, so to speak, by overriding considerations of public morality, good order and common welfare in the international community, which in turn substantiate the framework concept of *jus cogens* in international law.

(e) Considered *in concreto*, examples of international cogent norms are mentioned in doctrine. The restricted group of these norms seem to meet the requisite conditions, but should be tested on an empirical basis, that is, not only in possibility, but in reality. A certain kind of norms are observed by States spontaneously under the inner compulsion of their shared conscience. Nevertheless, lacking the controlling institution *super partes*, it may occur that so long as the States having concluded an agreement deviating from inter-

⁴⁷ Observations sur la hiérarchie des sources du droit international, Festschrift, *cit*, p. 614.

national *jus cogens* maintain persistently their attitude, it would be very difficult to undo its conclusion or its effects. The International Court is by no means a decisive safeguard. But in the actual state of things a new hope should be built for the International Court in the broader context of its law-declaring function. Perhaps the International Court would neither negativate the existence of international *jus cogens* in favour of the idea of absolute sovereignty or autonomy of States, nor would enlarge easily the scope of *jus cogens* to the detriment of the stability of treaty relations.⁴⁸

⁴⁸ It is appositely remarked by Fitzmaurice that "In fact a court situated as the International Court, must steer a middle course between being over-conservative and ultra-progressive." *Judicial Innovation...*, *cit.* p. 26.