

JUS COGENS IN PUBLIC INTERNATIONAL LAW*

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1. In the national legal order, legal rules, especially, rules of private law are divided into the category of *jus cogens* and that of *jus dispositivum*. It may be asked whether such a distinction can also be applied to rules of international law and in particular, to what extent international law recognizes the rules having the character of *jus cogens*. This is a controversial question. We have no aggregate of precedent, and opinions of international lawyers differ.

On the doctrinal plane, however, affirmative view is propounded by not a few of eminent writers. Thus it is contended that there exist a certain number of international rules from which States cannot derogate even by their agreement. Such a doctrinal position is now greatly reinforced by the attitude taken by the International Law Commission which has recently completed the work of drafting the law of treaties. In the codified law of treaties the articles on the *jus cogens* are formally inserted, which provide that a treaty is void if it conflicts with a peremptory norm of general international law (*jus cogens*).

In the deliberations of the Commission, that basic position was not disputed, and almost all the governments which received the draft articles endorsed the position of the Commission in this matter. What is the import of such a situation? Is it established *ex lege lata* that there already exist rules of *jus cogens* in international law? Can we attribute to the absence of objection any positive relevance to compensate for a paucity of international precedents?

It is asserted that a treaty may be rendered void if its object involves the infringement of *jus cogens* rules. However, as a matter of practice, issues of validity have not been hardly raised by reason of illegal objectives. Thus it is pointed out that "practice has not served to develop a body of law growing out of instances where contracting states have in fact tested the validity of treaties according to the relationship of the objectives sought to be achieved to the requirement of international law." (Hyde, *International Law as Chiefly Interpreted and Applied by the United States*, Vol. II (2nd ed., 1945), p. 1374.) In the conclusion of treaties, States usually act in accordance with good faith and sound judgment. The notable self-restraint must be in the fitness of things, because they fulfil the international function as law-creating agencies. A doctrine teaches that treaties *contra bonos mores* are null and void. Practically, however, States are not in the least disposed to make such treaties. That will be inconsistent with the "dignity" of a State to be claimed as an essential attribute of international personality. *Noblesse oblige*?

The International Court of Justice, having rejected in the *Reservations to Genocide Convention* the argument that there exists a rule of international law subjecting the effect of a

* For the more detailed discussion of this subject, see my article of the same title (in Japanese) in *Hōgaku-kenkyū* (Studies in Law), Vol. 7 (1968).

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reservation to the assent of all the contracting parties, held (*I. C. J. Reports*, 1951, pp. 24-25):

The considerable part which tacit assent has always played in estimating the effect which is to be given to reservations scarcely permits one to state that such a rule exists, determining with sufficient precision the effect of objections made to reservations. In short, the examples of objections made to reservations appear to be too rare in international practice to have given rise to such a rule.

With reference to the postulated existence of *jus cogens* in international law, it may be possible to argue in the same line. States usually act with good faith and prudence in the conclusion of treaties. They abstain from raising the issues of illegality or nullity referring to the treaty object. Precedents or decided cases in this respect are very rare. Examples such as the treaty permitting the act of piracy or re-establishing the slavery appear to concern merely "*une pure hypothèse d'école*." In such a state of things, it is doubtful how far the concept of *jus cogens* has penetrated into the juridical conscience of States. It may fairly be presumed that the concept of *jus cogens*, even though it may exist in the law of nations, is only germinal and inchoate.

2. According to one view, international law does not know the distinction between *jus cogens* and *jus dispositivum*. (Cf. Perassi, "Teoria dommatica delle fonti di norme giuridiche in diritto internazionale," *Scritti giuridici* I (1pp. 270-958), 290.) In international law, treaty is a law-creating act, and simultaneously, a technical means to regulate legally the relations between States. In a legal order of this kind, the rule which contemplates treaty as "*acte juridique*" is not to be presumed to coexist with the norm which contemplates treaty as a law-creating act. Therefore, the function of contracts as a means of transaction in the municipal sphere is accomplished in the international sphere by agreement *qua* law-creating act. In so far as the said distinction presupposes derogations being made by the instrumentality of "*acte juridique*", it is irrelevant and unknown in international law.

According to another view, the question of *jus cogens* is posed with regard to the creation of other international norms, without being too scrupulous about the distinction of municipal law. (Cf. Anzilotti, *Corso di diritto internazionale* (1955), pp. 91-92.) States which create a certain international norm, are free to agree to replace it with another norm. This faculty, however, is based on the assumption that the consent of all the parties can be obtained. Hence it exists virtually only in respect of bilateral or limited number treaties. As to general norms, it may be asked whether those norms exclude or permit special agreements derogating from them. This is the problem of *jus cogens* (and *jus dispositivum*) in international law.

When we say that the norm excludes or permits special agreement, it means whether the conclusion of it is legal or not in relation to the other States, subjects of the derogated norm. The possible illegality may engage international responsibility. But we can speak of *jus cogens* properly so called, only when the derogatory agreement is held to be null and void between the contracting States.

Therefore, international *jus cogens* is a body of rules which restrict law-creating aptitude of international agreements and deprive them of any possibility of infringement or derogation. Such rules constitute the objective limit of efficacy of international agreements (Cf. Morelli, *Nozioni di diritto internazionale* (7^a ed., 1963), p. 63). Hence the question of *jus cogens* must not be confused with that of the subjective limit of efficacy of international agreements.

The latter limit undoubtedly exists in international law. The subjects of international legal norms which are created by means of agreement coincide in scope with the States which participate in the conclusion of the agreement. *Pacta non obligant nisi gentes inter quas initia*. Consequently, agreement overstepping this limit and purporting to oblige the third State constitutes to that extent an act *ultra vires*, and therefore, invalid vis-à-vis that State.

The question of *jus cogens* setting limit *ratione materiae* on the international law-creating activities, needs to be considered with reference to the following points:

First, are rules of customary international law characterized as rules of *jus cogens* in its specific sense that agreements in contravention with them are *ipso jure* invalid?

Second, is there any limit of general application which deprives agreement of law-creating capacity in so far as it conflicts with the prior treaty?

Third, is international agreement required for its law-creating effect to conform with public morality (*bonnes moeurs*)?

3. Before proceeding to the said points for consideration, I would like to refer to the method of approach. Some writers start from almost immutable premise: "*ubi jus, ibi jus cogens*." It is contended that in no legal order is the freedom of will of its subjects unbounded. If it were, that would be the negation of legal order. Thus *jus cogens* is a positive international law, without which there would be no legal order. Other writers resort to the concept of "general principles of law." It is argued that among the general principles of law, we find the principle forbidding contracts *contra bonos mores*, which is recognized by all the civilized nations. It follows that its validity is also sanctioned in international law, since there is no contrary norm of international law.

The existence of international community—however weak as a legal community it may be—is not consistent with such ideas of absolute sovereignty or complete freedom of action of its subjects. However, it does not follow that international law must also contain rules of *jus cogens* on the municipal law level.

International law is the original and independent legal order which consists of various principles, rules, standards and procedures. It is not proper to treat it as if it were a private law writ large, and to introduce the private law concepts "lock, stock and barrel." Certainly, international law takes the attitude to respect the freedom of normative activities by States, relying upon their good faith and prudence. But, on the other hand, the position of other States is also considered and safeguarded. The first is the rule of *res inter alios acta*. A treaty creates law only between the parties. The third State is not bound by the treaty. The second is provided by the law of State responsibility. In the event when the conclusion or execution of a treaty brings about the injury of other State's rights, international law does not pass over this unlawful act, but confers a special claim in favor of that injured State. If the conclusion of a treaty should represent a flagrant violation of fundamental rules, it will cause a collective reaction of States to exact the revocation of the treaty. International law does not forbid such a process.

On the other hand, it is highly problematical to introduce *eo ipso* principles of municipal law into the international sphere. Agreements between sovereign entities should not be identified with contracts between private persons. Moreover, it requires great caution to taking in heterogeneous elements of limitation or prohibition through that channel, not for making

up the deficiencies in the existing regulation of interstate relations.

Instead, one might proceed from the premise that international law as it stands is of preeminently individualistic and liberal in character. Consequently, any treaty should be presumed to be *prima facie* valid in the absence of apparent irregularities. Assuming that there exist international rules of public order, these rules, occupying the exceptional status, should be subject to restrictive interpretation. Furthermore, it is for the government authorities themselves to frame, interpret and apply such a category of rules. And international tribunal should confine itself to ascertaining and applying the established rules of that category.

4. Now the first point for consideration is whether customary rules of international law set the objective limit on the normative activities of States.

General international law contemplates the agreement between its subjects as a law-creating act. Concluding treaties, States act as subjects of law, and at the same time, law-creating agencies. Since the superior law-giver is absent in the international order, agreement between the subjects of law has always been a principal means of law-creation since the early appearance of international legal phenomena. Thus agreement along with international custom constitute the primary source of international law.

The predominant view places the custom and agreement in the same rank as a source of law. In other word, equal potentiality of law-creation is given to agreement and custom. Consequently, the rules of coordination between the legal rules which are derived from the same source may be applied to mutually inconsistent customary and conventional rules.

Another view asserts that international law gives a superior potentiality to custom. However, it does not imply that customary law is superior to conventional law in the formal or hierarchical sense. Further, customary rules taking a stiff line not to tolerate any derogation are very few. As a consequence of it, custom and treaty stand as "fungible" sources of international law. Hence, in case where special or contrary agreement exists, customary rules yield to it.

Nevertheless, it must be asked whether this is true with all the customary rules without exception. No doubt there are some fundamental principles which "the *ensemble* of subjects of international law appears unwilling to permit any serious inroad to be made." (Schwarzenberger, *International Law*, Vol. 1 (3rd ed., 1957), p. 426.) But can we properly assign to them the status of *jus cogens*?

a) The freedom of the seas is adduced as typical example. It is asserted that any agreement infringing the freedom of the seas is devoid of legal effect. Though the freedom of the seas has an incontestable value as a principle of international law, the two factors may be mentioned which obscure the categorical character of this principle. First, the high seas is all parts of the sea which are not included in the territorial sea, but the breadth of the territorial sea has not been fixed in a precise and uniform manner. Second, assuming that the correct limit of the territorial sea is 3 miles, it is generally conceded that there is nothing to prevent two States agreeing that, as between themselves, they apply a limit of 3+x miles. Such a possibility of framing bilateral relationships varying according to a pair of States would be difficult to be reconciled with the freedom of the seas as *jus cogens*.

b) International rule concerning the piracy is mentioned as another example. Under the traditional rule of international law, any State may seize and punish the pirate ship on the

high seas. It implies that the act of piracy is forbidden in the international community, but the traditional rule purports, in its principal effect, to create the *sui generis* jurisdiction of piracy. The modern formulation of this rule emphasizes the cooperative duty of States in the suppression of piracy. And it is pointed out that agreement contemplating the commission of piracy is null and void by reason of violating the rule of *jns cogens*. Positive rules of international law actually operate in so far as States, addresses of the rules, conceive as such and admit their binding force. But it is very doubtful whether States have been conscious of such imaginary agreements in the actual application of the traditional rule of piracy. The hypothetical character of the treaty is further made out by the fact that a treaty permitting a piracy is even contradictory to the very definition of piracy *jure gentium*, which envisages essentially private acts not authorized by State organs. The above proposition, no matter what academic interest may be attached to, is of slender value as a statement of positive law.

c) Some authors maintain the view that all States are obliged under international law to protect foreigners and to maintain public order in their territories, with the consequence that a treaty is invalid, if it places the contracting State in such a condition as not to be able to maintain the internal public order. (Cf. Verdross, "*Jus Dispositivum* and *Jus Cogens* in International Law," *A.J.I.L.* (1966), p. 59; Balladore Pallieri, *Diritto internazionale pubblico* (8^a ed., 1962), p. 282). General international law takes in principle the attitude not to interfere with the auto-organization of States. It merely precludes States to invoke the deficiencies of internal organization as a defence against the alleged non-performance of international obligation. Obviously, the responsibility of State may be engaged if the right of foreigners are injured as a result of such a treaty, and the State cannot plead the insufficiency of its organization as excuse to evade the responsibility. Still less it cannot invoke the treaty against a third State for which it is *res inter alios acta*. However, the view that it is automatically invalid on that ground seems not to be correct as interpretation of general international law.

* International law protects the territorial sovereignty of each State. But it does not exclude the possibility that the territorial sovereignty of State is restricted to a more or less extent by agreement with other State. The Permanent Court of International Justice rejected in the *Wimbledon* case the argument that the general grant of a right of passage to vessels of all nationalities through the Kiel Canal could not deprive Germany of the exercise of her rights as a neutral power in time of war, which was qualified by Germany as "a personal and imprescriptible right, which forms an essential part of her sovereignty" (*P.C.I.J. Series A, No. 1, p. 25*).

Moreover, as pointed out by Judge Anzilotti in the *Austro-German Customs Union* case, a State is free to abandon the independence, even its existence under international law. Every State ought to respect the independence of other States, but is not forbidden to accept the abandonment of independence by other State (*Series A/B, No. 41, p. 59*).

5. The second point for consideration is whether there exists any limit of general application which deprives agreement of law-creating capacity in so far as it conflicts with the prior treaty. This problem is raised in the case where the parties to the later agreement do not include all the States which are parties to the prior treaty. It may occur, as stated by an eminent writer, that "in the process of supplanting a multi-partite treaty by another, a predominant group of States may produce the consummation of a fresh amendatory convention without consulting or obtaining the definite approval of some parties to the original agreement, and in various ways encourage them to withhold disapproval what has taken place." (Hyde,

op. cit., p. 1523.) In such an event, it may be questioned, as a matter of principle in international law, whether the later treaty is valid or not.

In this connection, we can refer to the cases decided by the International Court. In the *Oscar Chinn* (1934), the General Act of Berlin of 1885 and the Act of Brussels of 1890 provided that any modification or improvement of the Congo régime should be introduced by "common accord" of the signatory States. In spite of this provision, certain of the parties to the Berlin Act concluded the Convention of St. Germain in 1919. This later convention abrogated a number of the provisions as between the parties, among which the parties in this case were included. The question of the legality of the Convention of St. Germain, which was not raised by either party in this case, was *proprio motu* taken up and vigorously discussed by Judges Van Eysinga and Schücking. According to them, this is a legal situation "*d'ordre public*"; the convention concluded contrary to the express provision should be regarded as automatically null and void. The Permanent Court, however, having rejected the doctrine of absolute nullity, held (*P.C.I.J. Series A/A*, No. 63, p. 80):

No matter what interest may in other respects attach to the 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 not so far, to the knowledge of the Court, been challenged by any Government.

In the *European Commission of the Danube* (1927), the question was raised as to whether the Conference which framed the Definitive Statute of the Danube had authority to make any provisions modifying the provisions of the Treaty of Versailles. The Permanent Court pronounced (*P.C.I.J. Series B*, No. 14, p. 23):

...as all the Governments concerned in the present dispute have signed and ratified both the Treaty of Versailles and the Definitive Statute, they cannot, as between themselves, contend that some of its provisions are void as being outside the mandate given to the Danube Conference under Article 349 of the Treaty of Versailles.

The judicial experiences of the Permanent Court are summarized by Sir H. Waldock as follows (*Yearbook of I.L.C.*, Vol. II (1963), p. 60):

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 régime. Where the States before the Court were all parties to the later Treaty, the Court applied the later treaty. This does not, of course, mean that the Permanent Court would not, in an appropriate case, have considered a later treaty which derogated from an earlier multilateral treaty to be a violation of the rights of the States parties to the earlier treaty who were not also parties to the second treaty. But it does seem to mean that the Permanent Court acted on the principle that conflicts between treaties are to be resolved on the basis of the relative priority of conflicting legal norms, not on the basis of the nullity of the later treaty; and acted on that principle even when the priority treaty was an international "statute" creating an international régime.

This seems to be accurate as a description of positive law. Thus it may be concluded that there exists no objective limit of general operability, for general international law does not provide that any agreement is automatically invalidated to the extent that it conflicts with the prior treaty. Conflicts between treaties are normally adjusted by the "relative priority" of conflicting legal norms. This adjustment is, in appropriate case, supplemented by the principle of State responsibility which entitles a State to demand reparation for non-performance.

Priority does not amount to nullification. Though prevalence is normally given to earlier treaty or obligations, the later treaty may also be fully applied in so far as its validity has not been impugned by the States concerned. Hence priority may be juridically qualified by acquiescence or estoppel. In such a state of things, situational adjustment may be factually qualified by the relative power relation of the contracting States, and the will of a predominant group of States may not infrequently produce the consummation of a fresh not-invalidated agreement.

6. The third point for consideration is whether the law-creating aptitude of international agreement is subject to the requirement of conformity with public morality. According to some distinguished writers (e.g., Oppenheim, Verdross, Dahm, Quadri, Yepes) it is customarily established that immoral obligations cannot be the object of international agreement. Immoral treaty is absolutely null and void. *Per contra*, other writers (e.g., Morelli, Tachi, Sereni) take the view that the existence of such a custom may be postulated, but not actually proved. Judge Schücking states in the *Oscar Chinn* case: "The Court would never... apply a convention the terms of which were contrary to public morality" (*P.C.I.J. Series A/B*, No. 63, p.150). He considers that such a treaty is absolutely invalid. Sir G. Fitzmaurice is of opinion that it is difficult to predicate *a priori* the nullity of a treaty that has immoral or unethical (but not illegal) object, though it is open to international tribunal to refuse to apply it (*Yearbook of I.L.C.*, Vol. II (1958), p. 45).

We cannot neglect or ignore the practical influence of moral or humanitarian considerations in the conduct of international relations. If a treaty envisages a truly immoral object, it will not fail to incur a condemnation of public opinion. It must also be destined to a short life as a treaty. However, what is moral or immoral is frequently put forth as a controversial question which is liable to subjective interpretation. Moreover, States are able to invoke the so-called superior principle of morality as a pretext for evading the treaty obligation, without contesting the text of the instrument. Therefore, the vague proposition that immoral treaty is void, may seriously jeopardize the stability of treaty relations.

For the purpose of argument, the problem may be posed in a somewhat academic manner, that is, the validity of treaties having immoral objectives, though not actually contrary to rules of international law. Presumably, international tribunal will not declare the treaty as null and void merely on the ground of immoral elements. In the event of profound divergence between the treaty and morality, however, it is for the tribunal itself to decide whether to apply it in the actual case.

Moral considerations which are pertinent as a criterion in this respect, must have crystallized into the recognized standard of international behaviour.

a) Occasionally, the standard may have been established as a principle of general law. The prohibition of slavery is the case in point. The infamous "*asiento de negros*" is now obsolete and has no legitimate place in the present-day international law.

b) The standard may be also recorded in the resolutions of international assembly, which are *per se* devoid of legally binding force. The policy of apartheid (separate development) may be taken as an example. A supposable treaty purporting to promote separate development policy should be morally reproached. But is the treaty impressed as null and void *ab initio*? It will depend in the last resort to the attitude of international community.

c) Finally, the standard may be embodied in the multilateral treaties of humanitarian character. These treaties have the dual aspects: first, elementary principles of morality are confirmed in the interest of humanity, such as prevention and suppression of traffic in women, forced labour, trade of narcotics, etc., and second, various modes of international cooperation are framed in order to realize the treaty object. The latter obligations of cooperation are directed only to the contracting parties, while the former principles may be relevant to the non-parties in the sense that they have been "recognized by civilized nations as binding on States, even without any conventional obligation." The question will remain, however, whether States, non-parties to the treaty, are legally or morally bound.

The elementary principles of morality can be transmuted into legal principles in one or another form by the dictate of public conscience. It may be submitted that these principles constitute a hard core of "*ordre public international*." In the first place, these principles are characterized by their own intrinsic value, namely, they are in essence rules of morality. Further, they are also characterized by its formative process. It is pertinently pointed out that contemporary international law has the law-creating process which consists in the sanctioning of international social principles of ethics (Cf. Sperduti, *Lezioni di diritto internazionale*, 1958, pp. 68-74). The process originates in the historical consolidation of the community consciousness on the imperative necessity of transforming certain ethical principles into legal norms. In such a process, the principles are endowed with both juridical and practical value.

It is questionable whether the *bellum justum* doctrine was part of positive international law, but it is now widely admitted that aggressive war is prohibited, not only as State-activities, but also individual-activities. And it is urged that a treaty of offensive alliance should be regarded as null and void. Similarly, it is arguable that traditional law admits outside States to intervene in the atrocities affecting human beings in another country, but at present, States confirm that genocide, whether committed in time of peace or in time of war, is "a crime under international law." Consequently it is affirmed that the policy of genocide can not be made a valid object of treaty.

7. What is a reliable criterion in order to test the character of *jus cogens* of international legal norms? This is a very fine question. Sir H. Lauterpacht speaks of "overriding principles of international law which may be regarded as constituting principles of international policy" (*Yearbook of I.L.C.*, Vol. II (1953), p. 155). The concept is more clearly defined by Sir G. Fitzmaurice. According to his view, a feature common to the rules having the character of *jus cogens* is that "they involve not only legal rules, but considerations of morals and of international good order" (*Yearbook of I.L.C.*, Vol. II (1958), p. 41). Sir H. Waldock considers that in international law, the time does not seem to ripe for trying to codify the possible categories of "unlawful" treaties; the prudent course, therefore, is to state in general terms the rule that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals. At the same time, he regards it advantageous to indicate, by way of example, some of the more conspicuous instances. These are: treaties envisaging (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; and (c) any

act or omission in the suppression or punishment of which every State is required by international law to co-operate.

The *prima facie* criteria for sorting out the rules having the character of *jus cogens* should be sought in the mode of existence of international legal rules. First, it is a rule of positive law, not a rule of natural law, whatever may it be called—fundamental rule, peremptory norm, etc. Second, it is a rule of general international law. There is nothing to prevent that a multilateral treaty declares or codifies the existing general rule of *jus cogens*. Besides, it is not excluded that certain conventional rules may acquire the character of *jus cogens* within the framework of legal institution (For instance, certain rules of the Statute of the International Court of Justice). Third, the material aspect of rules has direct relevancy, which demands the attentive consideration.

In lieu of the term of *jus cogens*, “fundamental principles of international law” was suggested as more intelligible. But it is all the more uncertain what the fundamental principles of international law are. This term reminds us of the so-called “fundamental rights” of States. Indeed, it is emphatically stated that the original or primordial rights of States can never be repealed by agreement (Sibert, *Traité de Droit international*, Vol. II (1951), pp. 214-215). The scope extends from the inherent right of self-defence to the right of preparing the effective armaments. Unequal treaties are also attacked as null and void.

In laying down the criteria, attention should be focused not on the individual interest of States, but the general interest of the world community. At the same time, weight should be properly placed on the aspect of correlative obligations which are imposed for the protection of the general interest. In international law there exists a form of legal interest which may be separate from the strictly individual interest of States. This is confirmed by the International Court in the *Reservation to Genocide Convention (I.C.J. Reports 1951, p. 23)*. In addition, it is pointed out by Sir G. Fitzmaurice, there are types of obligations which are “self-existent, absolute, and inherent” in character. It may be submitted, therefore, that the special characteristics of international *jus cogens* consists in the synthetics of the general interest of the community and non-optional type of obligations for the protection of the interest. If the interest is of moral or universal humanitarian character, correlative obligation may be more exacting in nature. The concept of “illegality *in se*” is thus derived, which involves a wrong directly to the international community as a whole rather than to the particular members.

In view of the deliberations of the Commission, the types of international *jus cogens* may be tentatively classified into the following three. The first class is composed of rules which are preeminently ethical norms. (slave traffic, genocide, etc.) These rules will be voluntarily observed and almost unilaterally controlled by the civilized States in conformity with the maxim: “*noblesse oblige*.” The second class cover the rules of international social law. Protection of human rights and the principles of international labour law may be mentioned as notable examples of this class. The viability of international *jus cogens* can be expected especially in this field, provided that the wider use of international adjudication is promoted *pari passu*. The third class represents a political public order which may cover the regulation of force, the principle of self-determination, and unequal treaties. In this field, the most important thing is to organize an effective order which prevents war and other uses of force. The ill-defined concept of *jus cogens* may serve as a means of diplomatic tactics in this field which may produce a series of political litigations in the international assembly. Advisory procedure of the International Court can be resorted to, but in most cases, settlement

on the basis of political expediency will be first of all tried and explored.

8. The establishment of international rules of *jus cogens* will ultimately depend on the attitude of the community itself. Any agreement which derogates from the rule of *jus cogens* should be rendered null and void. Now it must be asked whether and how far traditional international law has established and put into actual operation such a system of nullity.

Under the traditional international legal system, as pointed out by the learned author, a breach of international law is considered to be a matter which concerns only the state whose rights are directly infringed; and no other state, nor the community of states, is entitled to remonstrate or object or to take action (Jessup, *A Modern Law of Nations*, 1948, p. 10). The community of States is not itself an independent *persona*, but the aggregate of sovereign entities. The interest of the international community may be reduced to the sum of interests common to individual States. Therefore, a community interest in the observance of international law is rather a principle of abstract or ideological value.

Such a characteristics of traditional law can be seen in the law of State responsibility. The legal relationship of international responsibility is exclusively established between the subject which commits a wrongful act and the subject whose right is thereby injured. The peculiar feature of responsibility is that its effects are exhausted in the relation between these States, active and passive subjects of responsibility. Since there is no organized entity superior to States, the concept of criminal responsibility is alien to the traditional law.

Secondly, the system of nullity or the procedure of annulment which is fully developed in the municipal law, is as yet embryonic in international law. Instead of it, responsibility plays an important role, when the illegal act is "*acte juridique*." And even the disappearance of the act may be demanded in title of reparation (Cf. Reuter, *Droit international public*, 1958, p. 133).

Thirdly, under the normal type of adjudication clause, it is necessary for a dispute to be covered by the clause that the party should assert a right or legal interest of its own derived from the provisions of the treaty. It is not sufficient for the party to assert that the opponent party has the obligation which is not fulfilled. In the *South West African* case, the Court pointed out that "international law as it stands at present does not know the equivalent of an *actio popularis*, or right resident in any member of a community to take legal action in vindication of a public interest" (*I. C. J. Reports* 1966, p. 47).

In such an individualistic legal order, rules of public international order may be theoretically postulated, but they have at most "twilight existence." However, a new trend has emerged so far in the evolution of international law and society.

a) The fact of primary importance is that the international community has been organized in the form of the United Nations. The United Nations is given a legal personality, distinctive from that of each Member State. In order to develop a body of *jus cogens*, there must be the central organization which administers the more integrated interests of the world community. Now, this rôle can be assigned to the United Nations. However, the United Nations itself has not *locus standi* in the procedure of the International Court. This remains an aim of future development.

b) Since the end of the second World War, it has been generally recognized that a certain violation of international legal rules should be treated not merely as a wrongful act,

but as a criminal act to be punished. Thus the concept of criminal responsibility has been brought over into the realm of international law, though international criminal tribunal has not as yet been established.

c) And finally, it must be mentioned that the concept of *jus cogens* has been formally included in the codified law of treaties. How do rules of *jus cogens* operate in the relations between States? The three typical cases can be conceived, as indicated by Mr. Tsuruoka in the Commission (*Yearbook of I.L.C.*, Vol. 1 (1963), pp. 67-68). The first case is that in which the parties have deliberately concluded by a treaty contrary to *jus cogens*. That would be, by the nature of things, a secret treaty, and no country would have an opportunity of challenging its validity, so long as it is kept secret. The second case is where the parties have concluded a treaty which they believe *bona fide* to be legal, but concerning which a third State holds a different opinion. And the third case is where the parties have sincerely believed, when concluding the treaty, that it does not contravene any *jus cogens* rule, but one of them has later come to consider that it does. In such a case, a problem of interpretation will arise, and it is generally advocated that the defendant State can plead the illegality and nullity as a defence (*In pari delicto potior est conditio defendentis*). According to the opinion of Mr. Tsuruoka, in the second case, the treaty will at least be presumed to be valid, and it is debatable whether it is wise to grant the third State the right to dispute the treaty's validity, for that raises a delicate question of interpretation. Is it not open for the third State to plead the invalidity of the treaty invoking the rule of *jus cogens*? For instance, it may be conceded that the third State, which is the potential object of offensive alliance between the other States can plead the invalidity of the treaty. Yepes goes further. According to his view, it not infrequently occurs that a weak State is compelled to sign the illegal treaty under the pressure of strong State. Therefore, it becomes necessary to establish a sort of "*action populaire internationale*" to authorize every State, even if it has no direct interest, to demand the annulment of a treaty having an illegal object between the other States. Mr. Yepes proposes: "*En cas de controverse sur la licéité d'un traité, la Cour internationale de Justice se prononcera sur la demande de toute État directement ou indirectement intéressée, ou des Nations Unies*" (*Yearbook of I.L.C.*, Vol. II (1953), pp. 165, 166). This is a proposal *de lege ferenda*, but the decisive step. In my submission, the technical means which is at present available in such an eventuality, is to request the advisory opinion of the International Court on the relevant legal aspects of the question.

At any rate, it must be born in mind that "if there be a *jus cogens* in international law this constitutes more than the mere emergence of a new rule or rules; it is an entry upon a new and more advanced stage of development of the law as a whole." (Jennings, "Nullity and Effectiveness in International Law," *Cambridge Essays in International Law*, 1965, p. 74.)

9. Now I would like to make a few remarks about the drafting of articles. Article 50 of the Law of Treaties (1966) is formulated as follows:

A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

It may be contented that "from which no derogation is permitted" is pleonastic, but the term "peremptory" norm seems to be somewhat novel, and the additional wording may be

justified for the benefit of clarity. However, the qualifying phrase, "and which can be modified only by a subsequent norm of general international law having the same character" seems to me very problematical. Peremptory rules *ex hypothesi* operate not to permit any derogation by agreement, bilateral or multilateral. The functional aspect of *jus cogens*—which is the proper object of the present article—should be distinguished from the law-creating process of peremptory rules. Rules of *jus cogens* are historical norms which may be extinguished or changed with the progress of time. For instance, modifications of peremptory rules may originate in the law-creating process of multilateral treaty which will be eventually integrated with the appropriate elements of recognition by other States. However, it is also possible that peremptory rules may sink into desuetude or may be transformed into the non-peremptory rules. Further, strictly speaking, peremptory rules may be modified by the law-creating process, not "by a subsequent norm." These aspects which are attendant upon the law-creating process of rules need not to be provided in the present article.

Article 61 runs as follows:

If a new peremptory norm of general international law of the kind referred to in Article 50 is established, any existing treaty which is in conflict with that norm becomes void and terminates.

The first point for consideration concerns the retroactive effect of *jus cogens*. According to the view of the Commission, there is no question of article 50 having retroactive character. It concerns cases where a treaty is void at the time of its conclusion by reason of the fact that its provisions are in conflict with an already existing rule of *jus cogens*. The treaty is wholly void. Article 61, on the other hand, concerns cases where a treaty, valid when concluded, becomes void and terminates by reason of the subsequent establishment of a new rule of *jus cogens* with which its provisions are in conflict. The emergence of a new rule of *jus cogens* is not to have retroactive effects on the validity of a treaty. The invalidity is to attach only as from the time of the establishment of the new rule of *jus cogens* (nullity *ex nunc*).

It is argued that Article 50 is a piece of retroactive legislation to the extent that it purports to apply to treaties concluded before the entry into force of the article which, at the time of conclusion, conflicted with a peremptory norm (Schwelb, "Some Aspects of International *Jus Cogens*," *A. J. I. L.* (1967), pp. 969-971).

It is a matter of interpretation whether the individual rule of law has been established as having the jural quality of *jus cogens*. Apart from this individual aspect of interpretation, the more general problem is raised: to what extent has been the *opinio juris communis* of States on this subject consolidated in the past practice? If our conclusion is short of any finality in this matter, then it may allow us to infer that article 50, which implies to that extent the formal establishment of law, will apply only prospectively, unless the contrary is clearly proved.

The second point for consideration concerns the principle of separability to be applied. It is the opinion of the Commission that this principle is not appropriate when a treaty is void *ab initio* under Article 50, whereas the 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 these provisions can be properly regarded as severable from the rest of the treaty, the rest of the treaty ought to be regarded as still valid (*Report of I. L. C.* (1966), p. 89; Cf. the text of Draft Articles in 1963, *Yearbook*, Vol. II (1963), p. 155).

The severability of treaty provisions—"Utile per inutile non vitiatur"—is a problem of

interpretation and application of each treaty. There is no compelling reason to treat the problem of severability differently with Article 50 and Article 61, in so far as that concept is recognized. It is more preferable to leave room for concrete readjustment in each case than to adopt a straightjacket formula, which provides explicit exclusion of severability in respect of the case under Article 50 (See, e.g., the possible case envisaged by Lord McNair, *The Law of Treaties* (1961), p. 484).

ERRATA

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Pagina	Linea	Erratum	Correctum
16	31	personality- <i>Noblesse oblige?</i>	personality. <i>Noblesse oblige!</i>