AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 60 **CONTENTS** 1966

[No. 1, January, 1966, pp. 1–244; No. 2, April, 1966, pp. 245–474; No. 3, July, 1966, pp. 475–670; No. 4, October, 1966, pp. 671–928]

JUS DISPOSITIVUM AND JUS COGENS IN INTERNATIONAL LAW

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Nearly three decades ago I published in this Journal an article[1] in which I tried to prove that even in international law there exist rules having the character of *jus cogens; i.e.*, norms with which treaties must not conflict. Since my eminent colleague in the International Law Commission, Ambassador Tabibi, mentioned in a meeting of this Commission that the view expressed in my article "foreshadowed the solution" embodied in Article 37 of the Commission's draft Convention on the Law of Treaties concerning the problem of *jus cogens* in international law,[2] I feel obliged to defend this draft against the criticism directed against it by the eminent English lawyer, Professor Georg Schwarzenberger.[3]

For this purpose it seems to me necessary to point out that, according to the general opinion of writers and jurists of international law, the power of states to conclude international treaties is in *principle* unlimited. They are in principle competent to enter into international agreements on any subject whatever. The problem arises, however, if under general international law there are exceptions to this principle. Hence the question is whether all norms of general international law may be repealed by treaty provisions in relations among the contracting parties, or whether there are norms of general international law restricting the freedom of states to conclude treaties. In other words the question is whether all norms of international law have the character of *jus dispositivum* or if there exist some norms having the character of *jus cogens* too, from which no derogation is permitted by an agreement *inter partes*.

In the modern positivist doctrine of international law no settled opinion can be found on this question. Only a few writers deal with it. In the indexes of most systems, textbooks and digests of international law, the

[1] "Forbidden Treaties in International Law," 31 A.J.I.L. 571–577 (1937). See, further, on this topic before the second world war, von der Heydte, "Die Erscheinungsformen des zwischenstaatlichen Rechts: jus cogens und jus dispositivum im Völkerrecht," in 16 Zeitschrift für Völkerrecht 461 *et seq.* (1932); and Jurt, Zwingendes Völkerrecht (1933).

[2] See 1 I.L.C. Yearbook (1963) 63. As the Commission was informed by this communication of my point of view in this question, I abstained from speaking about the substance of Art. 37, inasmuch as I was in complete agreement with the draft proposed by the Special Reporter, Sir Humphrey Waldock.

[3] "International jus cogens?" in 43 Texas Law Review (1965), and "The Problem of International Public Policy," in Current Legal Problems (1965), pp. 191–214.

terms *jus dispositivum* and *jus cogens* are lacking. I found them only in the works of Kelsen,[4] Bin Cheng,[5] Schwarzenberger,[6] Dahm,[7] Quadri,[8] and Tunkin.[9]

The situation was quite different in the natural law school of international law. It starts from the idea of a necessary law which all states are obliged to observe. Christian Wolff and Emeric Vattel declare, for instance, that nations cannot alter the law by agreement.[10] They distinguish this necessary law from the voluntary law created by the presumed, express or tacit will of states.[11] A. W. Heffter says that all treaties are void whose object is physically or morally impossible. By moral impossibility he understands that the object of the treaty is contrary to the ethics of the world. As examples of such treaties he mentions agreements defending slavery or preventing the development of individual liberty or encroaching upon the rights of third states.[12]

In the present-day theory of international law some writers of recognized competence maintain that general international law consists exclusively of non-compulsory norms, because states are always free to conclude treaties which may deviate *inter partes* from general international law. So the eminent Professor Charles Rousseau says that in international law the principle of public order is nearly non-existent in consequence of the individualistic structure of international law. He adds that the hypothesis of an illegal object of an international treaty is in practice without any interest.[13] The eminent former professor, now Judge of the International Court, Gaetano Morelli, maintains that the norm regulating the creation of international law does not restrict the liberty of states in regard to the object of a treaty.[14] Similarly the leading Swiss professor of international law, Paul Guggenheim, asserts in his treatise on international law that treaties may have any object whatever. Particularly he rejects, just as Morelli does, the idea that all treaties *contra bonos mores, i.e.*, against the public order of the international community, are null and void.[15]

On the contrary, other modern writers of international law defend the thesis that in general international law some rules having the character of *jus cogens* exist, and that all treaties which are at variance with such rules are null and void. This principle was recognized after the second world

[4] Principles of International Law 89, 323, 344 (1952).

[5] General Principles of Law 5, 393–394 (1953).

[6] 1 International Law 352–353, 425–427 (1957).

[7] 1 Völkerrecht 16, 443; 3 *ibid.* 60, 140 (1957).

[8] Diritto Internazionale Pubblico 94–95 (3rd ed., 1960).

[9] Das Völkerrecht der Gegenwart 95–96 (1963).

[10] Wolff, Jus Gentium, par. 5 (1764); Vattel, Le Droit des Gens, Introduction, par. 9 (1758).

[11] Wolff, *op. cit.*, par. 25; Vattel, *op. cit.*, par. 27.

[12] Das Europäische Völkerrecht der Gegenwart 156 (4th ed., 1861).

[13] 1 Principes du Droit International Public 340–341 (1944).

[14] Nozioni di Diritto Internazionale 37 (3rd ed., 1951).

[15] 1 Traité de Droit International Public 57 (1953). He later changed his opinion, however, as we will see in the text of this article.

war, especially by the eminent authors, Lord McNair,[16] Balladore Pallieri,[17] Kelsen and G. Tunkin.[18] It is now also accepted by P. Guggenheim.[19]

The International Law Commission tried to codify this principle in Article 37 of its draft Convention on the Law of Treaties. It reads as follows:

> *Treaties conflicting with a peremptory norm of general international law (jus cogens)*
>
> A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[20]

This article was unanimously accepted by the Commission.[21] It found it, however, difficult to indicate any criterion by which rules of *jus cogens* may be distinguished from other rules of general international law. Some members of the Commission suggested that mention be made, as examples of treaties in violation of a rule of *jus cogens*, of treaties contemplating an unlawful use of force contrary to the principles of the Charter, or the performance of any other act criminal under international law, or treaties contemplating or conniving at the commission of acts, such as slave trade, piracy or genocide, in the suppression of which every state is called upon to co-operate. The Commission decided, however, against including any examples of *jus cogens* for two reasons: first, because it may lead to misunderstanding as to the position of other possible cases; secondly, because a complete list of such cases was impossible without a prolonged study of this matter.[22]

In the discussion in the Commission some members made an effort to find the criterion by which the rules of *jus cogens* may be recognized. Mr. Ago, Mr. Amado, Mr. Castrén and Mr. Tsuruoka, it is true, were of the opinion that no definition is necessary, because the idea of *jus cogens* is clear in itself.[23] But Mr. Bartoš, Mr. Lachs, Mr. de Luna, Mr. Pal, Mr. Rosenne and Mr. Tunkin expressed the idea that rules of *jus cogens* are such as exist in the interest of the whole international community. Mr. Yasseen said that to have the character of *jus cogens* a rule must be "found necessary to international life and deeply rooted in the international conscience."[24] According to Mr. Pal, the rules of *jus cogens* are those which constitute the "international public order."[25] Mr. Lachs underlined the idea that such rules exist in the "interest of the interna-

[16] Law of Treaties 213–214 (1961).
[17] Diritto Internazionale Pubblico 282 (8th ed., 1962).
[18] *Op. cit.*
[19] 3 Strupp-Schlochauer, Wörterbuch des Völkerrechts 531 (1962).
[20] 1963 I.L.C. Yearbook 291. It is also published in 58 A.J.I.L. 264 (1964).
[21] In the meeting of July 9, 1963, 1963 I.L.C. Yearbook 292.
[22] I.L.C. Report on the Work of Its Fifteenth Session, U.N. General Assembly, 18th Sess., Official Records, Supp. No. 9 (A/5509), pp. 11–12; also in 58 A.J.I.L. 245, 264 (1964).
[23] 1 I.L.C. Yearbook (1963) 66, 67.
[24] *Ibid.* 63.
[25] *Ibid.* 65.

tional community as a whole."[26] Mr. Tunkin stressed that certain international relations "had become an interest to all."[27] Mr. Bartoš and Mr. de Luna said that the rules of *jus cogens* constitute "the minimum of rules of conduct necessary to make orderly international relations possible."[28] Mr. Rosenne maintained that "the concept of *jus cogens* expressed some higher social needs."[29] The Special Reporter, Sir Humphrey Waldock, opposed, however, the idea of identifying the rules of *jus cogens* with the Principles of the Charter, "because they were not all imperative in character."[30]

There was clearly a consensus in the Commission that the majority of the norms of general international law do not have the character of *jus cogens*. The general law of diplomatic intercourse, for example, does not, according to the Commentary to Article 37, "preclude individual States from agreeing between themselves to modify the treatment to be accorded reciprocally to each other's representatives."[31] It is so because normally the rules of general international law have the character of *jus dispositivum*. This means that they are not imperative but of a yielding nature. They must be applied only if the individual states have not agreed otherwise *inter se*. Therefore individual states may, *e.g.*, contract out *inter se* some diplomatic rights created by general international law.

However, in the field of general international law there are rules having the character of *jus cogens*. The criterion for these rules consists in the fact that they do not exist to satisfy the needs of the individual states but the higher interest of the whole international community. Hence these rules are absolute. The others are relative, because the rights and obligations created by them concern only individual states *inter se*.[32]

These two categories of general international law were also recognized by the International Court of Justice in its Advisory Opinion concerning Reservations to the Genocide Convention.[33] There the Court says:

> The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. . . . In such a convention the contracting States *do not have any interest of their own;* they merely have, one and all, a *common interest*, namely, the accomplishment of those high purposes which are the raison d'être of the Convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages of States, or of the maintenance of a perfect contractual balance between rights and duties.[34]

The rules of general international law having the character of *jus cogens* may be divided into the following groups:

1. At first glance all treaties encroaching upon the rights of third states seem to be contrary to *jus cogens*. In fact such treaties are illegal if the third states do not give their consent, but not all of them are prohibited

[26] *Ibid.* 68.
[27] *Ibid.* 69.
[28] *Ibid.* 72, 76–77.
[29] *Ibid.* 73.
[30] *Ibid.* 62.
[31] Report 11.
[32] See the writer's Völkerrecht 126 (5th ed., 1964).
[33] [1951] I.C.J. Rep. 23.
[34] Italics added.

by a rule of *jus cogens*. Such a treaty is, however, void if the means envisaged by it are forbidden by a rule of *jus cogens* (see under 3). Further, a treaty is void if the restriction of liberty imposed on a state goes so far that it is impossible for it to accomplish its international duties. All states, it is true, can in principle renounce their rights. But there is one exception, for a state cannot waive the rights necessary for it to fulfill its international obligations. So, for instance, all states are obliged under general international law to protect foreigners and to maintain, therefore, public order in their territories. Hence they cannot obligate themselves to reduce their police or their tribunals in such a way as to prevent them from maintaining public order.[35] As this rule exists in the interest of the whole international community, it has the character of *jus cogens*.

2. A very important group of norms having the character of *jus cogens* are all rules of general international law created for a humanitarian purpose. As it was stated in the above-mentioned advisory opinion of the International Court, such conventions are not created in the interest of individual states, but in the higher interest of humanity as a whole.[36] Hence all treaties concluded in violation of the conventions concerning slavery, traffic in women and children, or the rights of prisoners of war are void. Never would the International Court or an arbitral tribunal apply such a treaty, concluded "in contradiction to *bonos mores*," as it was stated by the former international Judge, Professor Walter Schücking, in his dissenting opinion in the *Chinn* case.[37] Such treaties are void even if the parties to them did not ratify the humanitarian conventions, because the humanitarian principles underlying these conventions are basic principles of general international law with the character of *jus cogens*. In its judgment in the *Corfu Channel* case, the International Court says that "elementary considerations of humanity" are "even more exacting in peace than in war." In the original French text they are said to be "*absolues*."[38]

International humanitarian principles already existing before the second world war were augmented by the Charter of the United Nations by reaffirming "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women,"[39] and by its purpose to promote and encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[40] Not all human rights, proclaimed in the Declaration of Human Rights and accepted by the General Assembly, are recognized by general international law. It cannot be denied, however, that an open and permanent violation of fundamental human rights is a violation of the Charter, because the Member States are obliged under its Article 56 to co-operate with the United Nations Organization for the achievement

[35] *Cf.* Strisower, Der Krieg und die Völkerrechtsordnung 114 (1919).
[36] See note 31.
[37] P.C.I.J., Series A/B, No. 63, p. 149.
[38] [1949] I.C.J. Rep. 22.
[39] U.N. Charter, preamble, second paragraph.
[40] *Ibid.*, Art. 1, par. 3.

of the purposes set forth in Article 55. Among the purposes indicated there we find "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[41]

3. Another group of rules having the character of *jus cogens* was introduced by the Charter. It deals with the use of force, and is composed of three inter-connected rules. The first obliges the Member States to refrain in their international relations from the threat or use of force other than in individual or collective self-defense (Article 2, par. 4, and Article 51). The second rule obliges the Member States to settle their international disputes by peaceful means (Article 2, par. 3). The third rule obliges the Member States to give the United Nations every assistance in any action taken in accordance with the Charter and to refrain from giving assistance to any state against which a preventive or enforcement action has been taken (Article 2, par. 5).

It is clear that these rules exist in the common interest of all humanity. Therefore bilateral or multilateral treaties concluded in violation of these norms are void. The contracting parties are not bound *inter se* by such treaties. Never could the International Court or an arbitral tribunal consider them as valid.

It seems, however, unnecessary to mention separately treaties contemplating the performance of a criminal act. Such treaties are either treaties concluded in violation of humanitarian principles or treaties against peace. The third group of criminal acts under international law, namely, war crimes, are only then violations of a rule having the character of *jus cogens* when they are simultaneously violations of humanitarian principles which are also recognized in war. Only such violations shock all humanity. Hence the rules forbidding these acts are norms with the character of *jus cogens.*

The criticism of Professor G. Schwarzenberger, mentioned in the beginning of this article, may be summarized in the following words:

Professor Schwarzenberger recognizes and has always recognized that through bilateral or multilateral consensus a rule having the character of *jus cogens* can be created *inter partes.* Its legal effect is therefore "limited to the contracting parties."[42] He denies, however, the existence of such rules on the level of unorganized international society as it existed before the United Nations Organization. Expressly he says that "international law on the level of unorganized international society does not know of any rules of public policy."[43] He admits only "*de facto* and common-sense limits for the freedom of action of the subject of international law."[44] On the other hand, he says the "question whether an international tribunal or court could be expected to apply an agreement

[41] *Cf.* General Assembly Resolution 616 B (VII).

[42] Current Legal Problems 194 (1965); The Inductive Approach to International Law 100 (1965); 1 International Law 213–214 (1957).

[43] Current Legal Problems 212 (1965).

[44] The Inductive Approach to International Law 100 (1965).

contra bonos mores . . . can be answered with a firm negative." But he adds: This is only possible "on the consensual level on which international judicial institutions operate."[45]

In considering this first part of the criticism of Professor Schwarzenberger, I cannot understand how, by "bilateral" agreement, a rule having the character of *jus cogens* can be created. Even if we admit the very improbable consensus of two states to the creation of such a norm, there is no doubt that its abrogation by the same parties is always possible. Consequently there is no room for its application at all. Therefore a norm having the character of *jus cogens* can practically be created only by a norm of general customary law or by a general or multilateral convention. Indeed, the customary law of the former unorganized international society had already accepted certain limits on the liberty of states to conclude treaties by its recognition of the "general principles of law recognized by civilized nations" as a subsidiary source of general international law. Article 38, paragraph 3, of the Statute of the Permanent Court only codified an old practice of international arbitration in this field.[46] Among these "general principles of law" we find the principle forbidding contracts *contra bonos mores*, because no juridical order can recognize the validity of contracts obviously in contradiction to the fundamental ethics of a certain society or community. It may be said that no other general principle of law is so universally accepted as this one. It follows that its validity in international law is also recognized, since no contrary norms of customary or conventional international law exist.[47] It does not matter that the ethics of the international community are not identical with those of the individual states, since their ethics have also many differences.

If Professor Schwarzenberger asserts that this principle can only be applied by an international tribunal on a consensual basis, it may be objected that arbitration agreements normally do not indicate the rules to be applied by the tribunal. Also Article 38 of the Statute of the International Court of Justice does not say what norms have the character of *jus cogens*. Nevertheless the Court has to apply them, if it is competent to decide a conflict concerning a treaty *contra bonos mores, i.e.*, against the international public order.

Professor Schwarzenberger admits that in organized world society the principles of the United Nations "present attempts at the creation of consensual rules of international public policy."[48] Yet he adds, "this 'peremptory' law is not opposable to third parties, unless, like the Federal Republic of Germany, they have undertaken special obligations in this

[45] Current Legal Problems 208 (1965).

[46] See my lectures, "Les principes généraux du droit dans la jurisprudence internationale," in 52 Hague Academy Recueil des Cours 195–249 (1935, II); and my article, "Les principes généraux du droit applicables aux rapports internationaux," 45 Revue générale de droit international public 33 *et seq.* (1938).

[47] *Cf.* 1 Guggenheim, Traité de droit international public 150–151 (1953); Sir H. Lauterpacht, The Development of International Law by the International Court 165 (1957).

[48] Current Legal Problems 213 (1965).

respect.''[49] It seems to me, however, that the fundamental principles of the Charter, indicated in this article, are valid for the entire international community for the following reasons: Article 39 of the Charter authorizes the Security Council to ''determine the existence of *any*[50] threat to the peace, breach of the peace or act of aggression'' and to take all necessary measures to maintain or restore peace. Such measures are also possible against non-members of the United Nations. As no state outside the organization opposed this rule, we may conclude that all states acquiesced in the principles of the Charter governing the use of force. They were also approved by the Encyclical, ''Pacem in Terris,'' of April 11, 1963. It seems to me, therefore, that these principles became a universal customary rule of international law.

Professor Schwarzenberger asserts further that the *jus cogens* created by the Charter ''remains too precarious to amount to more than an international quasi-order.''[51] It is true that the United Nations Organization is still imperfect. Nevertheless the fundamental principles of the Charter are the most important part of the constitutional law of the present international community. Everybody who emphasizes its importance strengthens its force. Everybody who decreases its value weakens it.

Finally Professor Schwarzenberger thinks that Article 37 of the draft Convention on the Law of Treaties opens the door to misuse. ''It leaves everybody absolutely free to argue for or against the *jus cogens* character of any particular rule of international law.''[52] Any unilateral invocation of *jus cogens* seems to him especially dangerous, because many states refused to accept the compulsory jurisdiction of the International Court of Justice or any arbitral tribunal.

I agree with Professor Schwarzenberger that a misuse of Article 37 is possible. But this is true for every norm and every institution. The great number of dissenting and individual opinions annexed to the judgments of the International Court prove still more clearly that even in good faith different interpretations of a legal text very often are possible.

I agree with him that the acceptance of compulsory jurisdiction would be of great advantage to respect for international law. I proposed, therefore, to include in the Report on the Law of Treaties, prepared before the second world war by the Harvard Research in International Law, a rule stating that all disputes concerning the interpretation and application of a norm having the character of *jus cogens* must be submitted to arbitration.[53] I proposed this to exclude any political misuse of unilateral invocation of *jus cogens*.[54]

But the lack of compulsory jurisdiction in the international community could not prevent the International Law Commission from dealing with

[49] The Inductive Approach to International Law 112–113 (1965). There he refers to Art. 3(1) of the Convention on Relations between the Three Powers and the Federal Republic of Germany, May 26, 1952. [50] Italics added.

[51] The Inductive Approach to International Law 113 (1965).

[52] Current Legal Problems 213 (1965).

[53] See 29 A.J.I.L. Supp. 655–1226 (1935). [54] In 31 A.J.I.L. 577 (1937).

the problem of *jus cogens*. I cannot see how it would have been possible for the Commission, charged with the codification of the law of treaties, to omit this very important problem or to settle it in a different manner than it did.

Like all other organs competent to prepare the codification of law, the International Law Commission can only hope that its drafts, if they are accepted by the states, will be interpreted and executed in good faith.[55] For this principle governs all international agreements. So long as the international community is composed of sovereign states the classical words of Cornelius van Bynkershoek will always remain true:

> *Pacta privatorum tuetur jus civile, pacta principum bona fides. Hanc si tollas, tollis mutua inter principes commercia . . . quin et tollis ipsum jus gentium.*[56]

[55] I would like to emphasize that I am alone responsible for this article. It was written without any contact with the other members of the International Law Commission.

[56] Quaestiones juris publici libri duo (1737) II, Cap. 10. [The passage may be translated roughly as: "The civil law protects the contracts of individuals; good faith the contracts of princes. If you destroy good faith, you destroy the mutual intercourse of princes . . . and you destroy even international law itself."—Ed.]