

INTERNATIONAL PEREMPTORY NORMS (*JUS COGENS*) AND INTERNATIONAL HUMANITARIAN LAW

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1. INTRODUCTION

The notion of *jus cogens* in international law encompasses the notion of peremptory norms in international law.¹ In this regard, a view has been formed that certain overriding principles of international law exist which form “a body of *jus cogens*.”² These principles are those from which it is accepted that no State may derogate by way of treaty. As a result they are generally interpreted as restricting the freedom of States to contract while ‘voiding’ treaties whose object conflicts with norms which have been identified as peremptory.³ However, both the scope and in fact very existence of this concept has been debated within the international legal community for many years.⁴ Consensus was finally reached as to a definition during the Vienna Conference held in 1969 (“the Vienna Conference”) and this was codified in Article 53 of the Vienna Convention on the Law of Treaties 1969⁵ (“the Vienna Convention”).

This article considers first the development of the current overwhelming view that norms of *jus cogens* exist in international law. Within this analysis: I briefly consider the debate as to the validity of international law itself, summarizing what are generally accepted as the sources of international law from which concepts of *jus cogens* are drawn; I continue with consideration of the development of the concept of *jus cogens* both theoretically and legally up to and including an analysis of the debates during the Vienna Conference and the subsequent promulgation of the Vienna Convention. Second, I identify what are accepted as being the constituent elements of concepts of *jus cogens* in international law while also providing some brief examples. Third, I consider the existence and impact of emerging norms of *jus cogens* in international law. Fourth, I consider the invalidity of a treaty whose object is considered to be in violation of a principle of *jus cogens* (either because of a conflict with existing *jus cogens* or emerging *jus cogens*). And finally fifth, I consider the existence of principles of *jus cogens* in international humanitarian law (if any).

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¹ “Peremptory” is defined as: “Imperative; final; decisive; absolute; conclusive; positive; not admitting of question, delay, reconsideration or of any alternative. Self-determined; arbitrary; not requiring any cause to be shown.” *Black’s Law Dictionary* (Sixth Edition, 1990), p.1136.

² I. Brownlie, *Principles of Public International Law* (Fifth Edition, 1998), p. 515.

³ T. Meron, *On a Hierarchy of International Human Rights*, 80 *American Journal of International Law* (AJIL) (1986), p.1 at p. 14.

⁴ Certain authors found that there existed in the international community a binding law, violation of which rendered illegal the object of certain treaties. See J.C. Bluntschli, *Le Droit International Codifié* (1874), pp. 238-240; P. Fauchille, *Traité de Droit International Public*, Vol. I, 1ère partie (1922), p. 22; A. Verdross, *Forbidden Treaties in International Law*, 31 *AJIL* (1937) pp. 571 *et seq.* For a contrary view, see C. Rousseau, *Principes de Droit International Public* (1944), pp. 340-341 and Vol. I, *Droit International Public* (1970), pp. 130-131.

⁵ Vienna Convention on the Law of Treaties (1969), U.N. Doc. A/CONF.39/27.

2. DEVELOPMENT OF *JUS COGENS*

2.1. The validity of international law

Recognition of international law itself as a valid corpus of rules has been a gradual process.⁶ At a national level, the existence and therefore validity of the law is quite clear. Law is created and enforced by virtue of the power of the State exerted over its citizens (individuals). As has been stated, “[i]n systems of municipal law the concept of formal source [of law] refers to the constitutional machinery of law-making and the status of the rule is established by constitutional law.”⁷ For this reason it is considered to be ‘valid.’ However, such a formal structure is absent in the international arena. International law has been described as “one of the possible sets of laws for ordering the world” being based “on the wills of all or many nations.”⁸ Largely as a result of its very nature (that is, the fact that it is comprised of many sovereign States co-existing) the international community is characterized by the absence of any defined sovereign or formal structure comparable to that present within national jurisdictions.

It is however clear that States have become more and more dependant on each other, a phenomenon perhaps largely attributable to the growing ‘institutionalization’ of the international community.⁹ This so-called interdependence requires regulation. Although this is sometimes achieved by way of agreements reached between individual States the lacuna is also filled through the recognition by individual States of a so-called international ‘conscience’ which imposes legal regulation on the actions of States and in doing so ensures international respect for basic social values.¹⁰ Similarly this is reflected in the so-called international moral infrastructure¹¹ which itself is subject to normative disciplines.¹²

As a result of the regulation of States by international law, the concept of ‘national sovereignty’ has undergone an evolution and today States are regulated by both their own national rules together with the continually developing laws of the international community.¹³ These laws develop or are created not by an international legislator or sovereign, but very generally through the consensus of States which have recognized that certain ‘values’ amount to valid legal norms which must be respected as between States.¹⁴ In this regard, it is possible to talk of the ‘validity’ of international law.

⁶ See generally, L. Oppenheim, *Oppenheim’s International Law*, (Ninth Edition, edited by Sir R. Jennings and Sir A. Watts, 1992), Vol. 1, pp. 3 *et seq.*

⁷ I. Brownlie, *Principles of Public International Law* (Fifth Edition, 1998), p. 1.

⁸ A. Verdross, *Völkerrecht*, (Spanish Edition, 1957), p. 8. There are in modern analysis two opinions as to the validity of the law: (i) Kelsen was of the opinion that only norms and not facts could be valid, while (ii) other authors stated that there are principles which are valid *per se* and that thereafter it is possible through the will of States, to create positive law from them. See, H. Kelsen, *The Basis of Obligation in International Law*, in: *Libro Homenaje al Profesor Barcia Trelles* (1958) p. 196 and A. Flores Olea, *Ensayo sobre la Soberanía del Estado* (1969), p. 120 respectively.

⁹ J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties*, (1974), pp. 35, 165. This interdependence of States also means that so-called freedom of action of States (which in any event has never been absolute) is even more curtailed today.

¹⁰ Based on this ‘moral code’ international recognition and respect for certain basic social values can mean that particular agreements reached between a limited number of States become ‘valid’ for all. See C. de Visscher, *Théories et Réalités en Droit International Public* (Spanish Edition, 1962), pp.151 - 153.

¹¹ See generally, N. Politis, *La Morale Internationale* (1942).

¹² C. De Visscher, *Théories et Réalités en Droit International Public* (Spanish Edition, 1962), p.106. See also, Hauriou who stated that the best way an institution can express itself is not legal but moral and intellectual. F. Hauriou, *Aux Sources de Droit*, 23 Cahiers de la Nouvelle Journée, p. 117.

¹³ N. Politis, *Le Problème des Limitations de la Souveraineté et la Théorie de l’Abus des Droit dans les Rapports Internationaux*, I. Recueil des Cours (1925), pp. 5 *et seq.*

¹⁴ O. Lissitzyn, *El Derecho Internacional en un Mundo Dividido*, III Anuario Uruguayo de Derecho Internacional (1964), p.110. For a contrary view see, G.M. Danilenko, *International Jus Cogens: Issues of Law Making* (1991)

Having recognized the general validity of international law, before one can identify those norms which may be designated norms of overriding importance within this law, it is necessary to identify the sources from which they may be drawn. The sources of international law are generally regarded as having been exhaustively enumerated in Article 38(1) of the Statute of the International Court of Justice (“ICJ”):

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilised nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

It is immediately noteworthy that norms of *jus cogens* are not included specifically as being a ‘formal’ source of international law. Before these norms can be properly placed among the ‘formal’ sources one must identify both its evolution as a legal concept and the extent of international recognition of its existence.

2.2. Recognition of the concept of *Jus Cogens* in international law¹⁵

2.2.1. Theoretical acceptance of the concept of *Jus Cogens*

The notion of *jus cogens* as finally codified by the Vienna Convention is not recent. Although its origins may be traced primarily to the period in which the natural law doctrine was developed (see below), the notion was in fact first developed by the so-called ‘stoics.’ In IV AD they developed the theory that law should be applied on an international scale, by virtue of a so-called ‘universal reasoning’ which is not based on individual nationalities or race but is rather common to all. In doing so, they arrived at an idea of a ‘universal State’ in which all men should be equal.¹⁶

For the Spanish theologians of the XVI century (recognized as being the founders of modern international law), for Grotius and for other classical writers there existed certain ‘principles’¹⁷ which amounted to a *jus naturale necessarium* (necessary natural law).¹⁸ Wolff¹⁹ and Vattel²⁰ stated that there existed “necessary law” which was natural to all States and that all treaties and customs which contravened this ‘necessary law’ were illegal. Grotius stated that principles of natural law were so immutable that not even God could change them.²¹ “Natural law was the dictate of right reason involving moral necessity, independent of any institution – human or divine.”²² Natural law

European Journal of International Law (EJIL), p. 42. Although States may violate international law, generally it is not because they believe they are not subject to it. See, J. L. Brierly, *The Outlook for International Law* (1944), pp. 4-5.

¹⁵ On the origins of the expression *jus cogens*, see E. Suy, *The Concept of “Jus Cogens” in Public International Law* published in the compilation of works presented during the Lagonissi Conference, *Lagonissi Conference on International Law, Papers and Proceedings, Vol. II: The Concept of Jus Cogens in International Law*, (Geneva 1967) (“Lagonissi Conference”), pp. 17 - 77. These words were used for the first time by the International Law Commission in Fitzmaurice’s Third Report, Vol. II, ILC Yearbook (1958) pp. 26-28 and 40-41 (see below).

¹⁶ This was notwithstanding the fact that the ideal of absolute equality was blurred by a prevalent distinction between ‘absolute’ and ‘relative’ natural law. See W. Friedmann, *The Changing Structure of International Law* (Spanish Edition, 1967), p. 102 and in general, R. Nieto-Navia, *Estudios Sobre Derecho Internacional Público* (1992), pp. 61-83.

¹⁷ Such notions were said by the “Thomists,” to be present in the human mind.

¹⁸ *x v x v*, Aristotle, Ret. I, 13.

¹⁹ C. Wolff, *Jus Gentium* (1764), para. 5.

²⁰ E. de Vattel, *Le Droit des Gens ou Principes de la Loi Naturelle*, (1758), para. 9.

²¹ H. Grotius, *De Jure Belli Ac Pacis Libri Tres* (1625), 1, Ch. 1, X, 5.

²² L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, (Helsinki, 1988), p. 30.

was therefore interpreted as being a “necessary law which all states are obliged to observe.”²³ It included a theory that there existed universally binding principles of law “which could not be changed by anyone.”²⁴ In recognizing the existence of natural law principles, most philosophers were also in general agreement that there existed an international community²⁵ to which all sovereignties should submit in the interests of what could be described as the common good of humanity.²⁶ They distinguished between *jus naturale necessarium* and *jus voluntarium* or voluntary law, described as consent based law or law “created by the presumed, express or tacit will of States.” In particular, they considered that principles of *jus naturale necessarium* could not be amended by way of agreements reached in the exercise of voluntary law.²⁷ One can also recall in this context the views of Bodin. Bodin has long been considered the main supporter of a theory of absolute sovereignty, that is the theory that States have absolute power over their citizens.²⁸ However, contrary to this popular opinion Bodin did in fact also acknowledge that the concept of sovereign authority did not mean that this authority could be unlimited and arbitrary. On the contrary, he recognized that the sovereign was always subject to the overriding ‘laws of God,’ natural law and the law of nations..

Following this era, the notion of a superior and binding law on the international community (in general natural law theories) gradually began to disappear. Rather, what began to dominate thinking in the international arena were both new rules from State practice and what became known as the positive law doctrine, that is, the doctrine that law is actually and specifically enacted or adopted by proper authority for the government of an organized jural society.²⁹ Although the notion of *jus naturale necessarium* still maintained what could be described as a moral significance³⁰ during this period the Hegelian notion of the State and “voluntary international law,”³¹ known to have been supported by Liszt emerged.³² As a result, for some years both the expressions *jus cogens* and *jus dispositivum* disappeared. The overriding notion became rather the idea that international law was created solely through the will of States and was therefore subject to neither limitation nor restriction. Based on such interpretation in theory States could enter into treaties having any object and purpose.³³

²³ A. Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AJIL (1966), p. 56. Such notions are based on the metaphysical and consider that the validity and origin of all human actions are eternal truths. A. Flores Olea, *Ensayo sobre la Soberanía del Estado* (1969), p. 66.

²⁴ L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, (Helsinki, 1988), p. 30.

²⁵ Although the concept of an international community is of course very old it was much developed after the Second World War, and especially during the last part of the Twentieth Century. See the Declaration of the then President of the International Court of Justice (ICJ), M. Bedjaoui attached to the ICJ Advisory Opinion in *Legality of the Threat or Use of Nuclear Weapons*, Opinion of 8 July 1996, ICJ Reports, p. 226, para. 13, and R-J Dupuy, *Communauté Internationale et Disparités de Développement*, 165 Recueil des Cours, IV, pp. 9 *et seq.*

²⁶ However, although there was general concurrence as to the existence of this overall notion the philosophers often differed as to the contents of natural law: L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, (Helsinki, 1988), p. 31.

²⁷ A. Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AJIL (1966), p. 56.

²⁸ He stated that: sovereign authority is upon the citizens and subjects and power is independent of laws (*majestas est summa in cives et subditos legisbusque soluta potestas*). J. Bodin, *Les Six Livres de la République*, L. I, c.VIII.

²⁹ *Black's Law Dictionary* (Sixth Edition, 1990), p. 1162.

³⁰ L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, (Helsinki, 1988), p. 34.

³¹ This approach developed through two theories: the theory of auto-limitation of the State (Jellinek); and the theory according to which international law is created by the convergence of the will of States to produce an overall will of the community of States (the *vereinbarung*) (Triepel and Anzilloti). See: C. Rousseau, *Droit International Public* (1953), p. 9; G. Jellinek, *Teoría del Estado* (Spanish edition, 1914), pp. 474 *et seq.*; C.H. Triepel, *Les Rapports entre le Droit Interne et le Droit International*, 1 Recueil des Cours (1923), p. 83.

³² F. von Listz, *Derecho Internacional Público* (Twelfth Edition (Spanish), 1929). As seen above this approach was largely based on what amounted to ‘consent based’ international law.

³³ “Les règles de droit international n’ont pas un caractère impératif. Le droit international admet en conséquence qu’un traité peut avoir n’importe quel contenu...L’appréciation de la moralité d’un traité conduit aisément à la réintroduction du droit naturel dans le droit des traités.” P. Guggenheim, *Traité de Droit International Public* (1953), pp. 57-58. See

Nevertheless for some authors the very foundation of law remained what was contained in fundamental hypothetical norms (*grundnorm*)³⁴, natural law³⁵ or *la solidarité naturelle*.³⁶ The concept of norms of *jus cogens* developed partly from these concepts. However, they are not the sole source or origin. This is because although natural law theory is based on a belief that there exist concepts exterior to and above positive law and which are contained in overriding fundamental binding norms, *jus cogens* is not. On the contrary norms of *jus cogens* form an integral part of ‘positive’ law itself and are defined and recognized by international law. As will be seen, these norms are norms which are *accepted and recognized* by the international community as norms from which no derogation is permitted. Therefore although as with natural law theories, most of these norms derive from ethical or sociological considerations, their character derives from within international law and from the will of States.³⁷

2.2.2 Formal legal recognition of the concept of *Jus Cogens*

2.2.2.i Developments leading up to the Vienna Conference

The aforementioned theories of positivism continued to dominate the development of international law until the early part of the twentieth century. The concept of peremptory norms was not ‘formally’ accepted in international law until the latter half of that century, but as stated above the idea that these norms existed in international law did not disappear completely.³⁸

First as has been seen, academics continued to acknowledge the existence of peremptory norms on an informal basis.³⁹ Oppenheim stated in 1905 that in his view “a number of ‘universally recognised principles’ of international law existed which rendered any conflicting treaty void and that the peremptory effect of such principles was itself a ‘unanimously recognised customary rule of International Law.’”⁴⁰ Similarly, Hall stated that “[t]he requirement that contracts shall be in conformity with law invalidates, or at least renders voidable, all agreements which are at variance with the fundamental principles of international law and their undisputed applications, and with the arbitrary usages which have acquired decisive authority.”⁴¹

Second, moves towards a more ‘formal’ recognition of this concept within internationally binding instruments and jurisprudence began to appear after World War One, with for example the inclusion of relevant articles in both the Covenant of the League of Nations and the Statute of the Permanent Court of Justice (later, the Statute of the ICJ). Article 20.1 of the Covenant of the League of Nations

also, G. Morelli, *Nozioni di Diritto internazionale* (1951), p. 37 and “*Lotus*” Judgment No. 9, 1927, P.C.I.J. Series A, No. 10 at p. 18.

³⁴ H. Kelsen, *General Theory of Law and State* (1945), pp. 110 *et seq.*

³⁵ A. Verdross, *Völkerrecht* (Spanish translation, 1957), pp. 21 *et seq.*

³⁶ G. Scelle, *Précis de Droit des Gens* (1932), première partie, 3; *Cours de Droit international public* (1948), pp. 5 *et seq.*

³⁷ P. Weil, *Le Droit International en Quête de son Identité*, 237 *Recueil des Cours* (1992), Vol. 6, pp. 266 – 267: “*Alors que le droit naturel de naguère était conçu comme extérieur et supérieur au droit positif, le jus cogens d’aujourd’hui fait partie intégrante du système, puisque c’est le droit international lui-même qui définit certaines normes de rang supérieur auxquelles la volonté des Etats ne peut déroger.*”

³⁸ Lauterpacht states that in modern times more and more importance is being accorded to concepts of natural law. See, H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), as quoted by W. Jenks in *The Common Law of Mankind* (Spanish Edition undated), p. 29 (original 1958).

³⁹ See J. L. Kunz, *La Crise et les Transformations du Droit des Gens*, 88, II, *Recueil des Cours* (1955), pp. 1-104. Also, *The Changing Law of Nations*, 51 *AJIL*, pp. 77-83.

⁴⁰ M. Byers, *Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules*, 66 *Nordic Journal of International Law* (1997), p. 211 at p. 213 referring to L. Oppenheim, *International Law* (Longmans London, 1905) Vol. 1, p. 528.

⁴¹ W. Hall, *A Treatise of International Law* (Eighth Edition, 1924) at 382, referred to by M. Byers, *Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules*, 66 *Nordic Journal of International Law* (1997), p. 211 at p. 213.

of 1919 (interpreted by Judge Schücking, below), provided that members of the League should not enter into treaties which were incompatible with the terms of the Covenant.⁴² While later, Article 38(1)(c) of the Statute of the Permanent Court of Justice, adopted in 1920⁴³ included “the general principles of law recognized by civilised nations” within the sources of law applicable by the Court.⁴⁴

In 1934, Judge Schücking of the PCIJ interpreted Article 20 of the League of Nations as follows:

The Covenant of the League of Nations, as a whole, and more particularly its Article 20... would possess little value unless treaties concluded in violation of that undertaking were to be regarded as absolutely null and void, that is to say, as being automatically void. And I can hardly believe that the League of Nations would have already embarked on the codification of international law if it were not possible, even to-day, to create a *jus cogens*, the effect of which would be that, once States have agreed on certain rules of law, and have also given an undertaking that these rules may not be altered by some only of their number, any act adopted in contravention of that undertaking would be automatically void.”⁴⁵

Similarly, in 1939, resolution of the celebrated dispute over the contract agreement between the Sheikh of Abu Dhabi and a British petroleum development corporation led to consideration by Lord Asquith of Bishopstone of what should be the appropriate principles to apply. The agreement contained a declaration by the parties “that they [should] base their work in th[e] agreement on good will and sincerity of belief and on the interpretation of th[e] agreement in the fashion consistent with reason.” In resolving the dispute which arose between the parties, Lord Asquith of Bishopstone decided to apply “principles rooted in the good sense and common practice of the generality of civilised nations – a sort of ‘modern law of nature.’”⁴⁶

Finally, it is recalled that the ICJ discussed the existence in international law of what it considered to be a special category of international norms that should receive a particular degree of prominence. In commenting on the Genocide Convention⁴⁷ it stated that “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 interests 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.... The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of its provisions.”⁴⁸

⁴² Article 20.1 of the Covenant of the League of Nations provides: The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.

⁴³ Later reflected in Article 38(1) (c) of the Statute of the International Court of Justice, annexed to the Charter of the United Nations (see Article 92 of the Charter of the United Nations).

⁴⁴ As will be seen, these general principles have been interpreted as providing a source for peremptory norms of international law. See for example, M. Byers, *Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules*, 66 Nordic Journal of International Law (1997), p. 211 at 223.

⁴⁵ Judge Schücking’s individual opinion in *The Oscar Chinn Case*, (1934) PCIJ Rep. Ser. A/B, No. 63, p. 149.

⁴⁶ W. Friedman, *The Uses of “General Principles” in the Development of International Law*, 57 AJIL (1963), p. 279 at p. 284. See also 1 International and Comparative Law Quarterly (ICLQ), (1952), pp. 247 *et seq.*; Judicial Decisions, *Continental Shelf*, 47 AJIL (1953), p. 156; J. L. Kunz, *El Sistema del Derecho Internacional*, in *Libro Homenaje al Profesor Barcia Trelles* (1958), p. 101. The applicable law was decided by the arbiter.

⁴⁷ Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948 and entering into force on 12 January 1951.

⁴⁸ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports (1951), p. 15 at p. 23. See also below, with regard to the discussion on international humanitarian law.

Such was the approach generally taken by international law with the abandonment of strict positivist theories. The draft article on *jus cogens* brought to Vienna by the International Law Commission (“the ILC”) essentially reflected these developments and opinions.⁴⁹

2.2.2.ii *Jus Cogens* as discussed during the Vienna Conference

The ILC began preparations for a convention on the law of treaties at its first session held in 1949. Based on the prevailing view (discussed above) that there existed within the international community overriding binding laws or principles, violation of which could render illegal the object of a particular treaty, it decided to include as part of the discussions a proposal for a provision formally recognizing peremptory norms in the law of treaties. Four *Special Rapporteurs* were appointed overall to research the question. However, it is particularly noteworthy that two, Brierly⁵⁰ and Lauterpacht,⁵¹ had long before their appointment as *Special Rapporteurs* been supporters of acceptance of the notion of peremptory norms in international law.⁵² Lauterpacht had even gone so far as to endorse the creation of an international organ responsible for deciding on the morality of the object of treaties.⁵³ Accordingly in his report in 1953 he included a draft article which permitted the ICJ to declare a treaty void if its accomplishment could be considered illegal under international law.⁵⁴ The next draft was submitted by *Special Rapporteur* Fitzmaurice with the final draft being that of Waldock who was appointed in 1963 as the final *Special Rapporteur* on this question.⁵⁵ The issue of *jus cogens* was discussed by the ILC during its sessions held in 1963 and 1966 and it was on the basis of Waldock’s draft that the final draft article was adopted and included in the ILC report submitted to the Vienna Conference.⁵⁶ In this report, the ILC stated the following⁵⁷:

1. The view that in the last analysis there is no rule of international law from which States cannot at their own free will contract out has become increasingly difficult to sustain....
2. [I]n codifying the law of treaties it must start from the basis that to-day there are certain rules from which States are not competent to derogate at all by a treaty arrangement, and which may be changed only by another rule of the same character [recognition of the existence of *Jus Cogens*]....
3. [T]here is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*. Moreover, the majority of the general rules of international law do not have that character....
4. It is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*....
5. The emergence of rules having the character of *jus cogens* is comparatively recent, while international law is in process of rapid development. The Commission considered the right course to be to provide in general terms that a

⁴⁹ See generally, J. L. Kunz, *El Sistema del Derecho Internacional*, in *Libro Homenaje al Profesor Barcia Trelles* (1958), p. 88.

⁵⁰ J. L. Brierly, *Règles Générales de Droit de la Paix*, 58 Recueil des Cours (1936), pp. 218-219.

⁵¹ H. Lauterpacht, *Règles Générales de Droit de la Paix*, 62 Recueil des Cours (1937), pp. 153 *et seq.*

⁵² Although Brierly did not include reference to *jus cogens* in his reports.

⁵³ H. Lauterpacht, *Règles Générales de Droit de la Paix*, 62 Recueil des Cours (1937), pp. 306 – 307.

⁵⁴ Article 15, Vol. II, ILC Yearbook (1953), p. 93: “A treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice.”

⁵⁵ It was Waldock’s draft that provided the basis for discussion during the conference held in Lagonissi under the auspices of the Carnegie Endowment. For arguments against the draft, see G. Schwarzenberger, *International Jus Cogens?*, 43 Texas Law Review (1965), pp. 45 *et seq.*, and *The Problem of International Public Policy*, Current Legal Problems (1965), pp. 191 – 214. A response to this is found in A. Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AJIL (1966), pp. 55 *et seq.* In general see also Lagonissi Conference: E. Suy, *The Concept of “Jus Cogens” in Public International Law*; G. Abbi-Saab, *Summary Record of the Discussion on the Concept of Jus Cogens in Public International Law*; B-S. Murty, *Jus Cogens in International Law*. See also J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties*, (1974), pp. 194-204. A summary of the views of States on the draft article were included by Waldock in the report found in Vol. II, ILC Yearbook (1966), pp. 20 *et seq.*

⁵⁶ Draft Article 37 in 1963 (which became draft Article 50 in the report to the Vienna Conference in 1966) read: “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.” This draft was finally adopted unanimously in 1963. See Vol. I, ILC Yearbook (1963), pp. 291 – 291 (the article was then numbered 13).

⁵⁷ The principles drawn from the report are quoted exactly, although the numbering has been added.

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....

6. [I]t would clearly be wrong to regard even rules of *jus cogens* as immutable and incapable of modification in the light of future developments...The article, therefore defines rules of *jus cogens* as peremptory norms 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....
7. [The] article is designed to exclude the arbitrary determination of the invalidity, termination or suspension of a treaty by an individual State such as has happened not infrequently in the past and to ensure that recourse shall be had to the means of peaceful settlement indicated in Article 33 of the Charter⁵⁸....
8. [T]here is no question of the present article having retroactive effects. 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*
9. [T]he 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 from the time of the establishment of the new rule of *jus cogens*.⁵⁹

As will be seen below, during the Vienna Conference it became clear that in reality although most States acknowledged in principle the existence in international law of peremptory norms they differed somewhat as to how they could be identified and defined. Nevertheless, based largely on the ILC report and draft article⁶⁰ and following the debates at the Vienna Conference, the article as it appears today (see below) was adopted by what has been described as a “rather impressive majority⁶¹” of 87 votes (8 votes against⁶² and 12 abstentions⁶³).

2.2.2.iii The Vienna Convention on the Law of Treaties

Article 53 of the Vienna Convention is recognized as setting out the current internationally accepted definition of *jus cogens*. It provides:

Treaties conflicting with a peremptory norm of general international law (*jus cogens*)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of 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.⁶⁴

2.2.2.iv Difficulties arising after the Vienna Conference

The ILC itself had already recognized the problems in attempting to codify the concept of *jus cogens* in international law. In its report to the Vienna Conference it acknowledged that “[t]he formulation of the article is not free from difficulty, since there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*. Moreover, the

⁵⁸Article 33 of the Charter of the United Nations provides: “1. The parties to any dispute, of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. 2. The Security Council shall, when it deems necessary, call upon the parties to settle their disputes by such means.”

⁵⁹ Vol. II, ILC Yearbook (1966) pp. 247 *et seq.*

⁶⁰ The draft article was adopted at the Vienna Conference largely as suggested, save for the addition of primarily the words “accepted and recognised by the international community of States as a whole.” A/CONF. 39/C. 1/L , p. 306.

⁶¹ J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties*, (1974), p.158.

⁶² Australia, Belgium, France, Liechtenstein, Luxembourg, Monaco, Switzerland and Turkey. A/CONF.39/11/Add.1, p. 107 (Records of Twentieth Plenary Meeting held 12 May 1969).

⁶³ New Zealand, Norway, Portugal, Senegal, South Africa, Tunisia, United Kingdom, Gabon, Ireland, Japan, Malaysia and Malta. A/CONF.39/11/Add.1, p. 107 (Records of Twentieth Plenary Meeting held 12 May 1969).

⁶⁴ This provision deals only with the impact on treaties of existing norms recognised as being peremptory under general international law at that time. The impact of what were referred to as emerging peremptory norms on existing treaties (see below) is regulated by Article 64 of the Vienna Convention.

majority of the general rules of international law do not have that character, and States may contract out of them by treaty.”⁶⁵

During the debates held at the Vienna Conference the French delegate, M. Hubert⁶⁶ was one of the delegates who pointed out the problems he anticipated would potentially arise through codification of the concept.⁶⁷ In particular, he pointed out the following:

- a. He expressed a general concern that the article was imprecise as to scope, formation and effect. He stated that “it declared void...an entire category of treaties but failed to specify what treaties they were, what were the norms whereby they would be voided, or how those norms would be determined.”⁶⁸
- b. He stated that imprecision in the article would mean that disputes would become a permanent feature in its interpretation and as a result both legal instruments and international relations would be undermined.
- c. He stated that if the article was interpreted to mean that a majority of States could create rules of *jus cogens* then the result would be the creation of a source of international law subject to no control and lacking all responsibility.

In sum, he stated that “his delegation was not prepared to take a leap in the dark, and to accept a provision which, because it failed to establish sufficiently precise criteria, opened the door to doubt and compulsion.”⁶⁹

These criticisms, directed primarily at the difficulties inherent in identification of peremptory norms of international law, were by no means new. The criticisms have also not gone away and in more recent times concerns are still being raised. One can cite by way of example, Virally, who wrote in 1983 that it is “*difficile d’affirmer aujourd’hui si une seule règle de droit international a pu satisfaire le critère défini à l’article 53 de la Convention de Vienne.*”⁷⁰ While in 1992 Weil wrote: “*Tous ces facteurs [71] se conjuguent pour interdire à l’heure actuelle encore – plus de vingt ans...après la Convention de Vienne – toute identification, même approximative, des règles de jus cogens.*”⁷²

Notwithstanding these criticisms, almost all States recognized *prima facie* the existence of *jus cogens* in international law and it was on this basis that Article 53 of the Vienna Convention was adopted.⁷³ Since 1969, it is clear that the international community as a whole has continued to accept the existence of these norms from which no derogation is permissible through agreement or unilaterally. As a result, it is possible to state that the definition agreed upon in the Vienna Convention is probably more than simply valid for the purposes of the Convention and is rather valid as a definition of the concept for the general purposes of international law.⁷⁴

⁶⁵ Vol. II, ILC Yearbook (1966), pp. 247- 248.

⁶⁶ France eventually voted against the inclusion of final Article 53.

⁶⁷ A/CONF.39/11/Add. 1, pp. 93 *et seq.*.

⁶⁸ A/CONF.39/11/Add. 1, p. 94, no. 8.

⁶⁹ A/CONF.39/11/Add. 1, p. 95, no. 18.

⁷⁰ M. Virally, *Panorama du Droit International Contemporain*, 183 Recueil des Cours (1983), p. 178. M. Virally was a member of the French delegation to the Vienna Conference. As seen above, France was strongly opposed to the inclusion in the Vienna Convention of an article regulating *jus cogens*.

⁷¹ Namely a concern regarding the risk of rendering the international system unbalanced.

⁷² P. Weil, *Le Droit International en Quête de son Identité*, 237 Recueil des Cours (1992), p. 271.

⁷³ Report of the Sixth Committee to the General Assembly during the eighteenth period of sessions (1963), UN Doc. A/5601.

⁷⁴ M. Akehurst, *A Modern Introduction to International Law* (Spanish Edition, 1972), p. 73.

3. *JUS COGENS* IDENTIFIED

Having considered the general definition of *jus cogens* in the Vienna Convention the following are identified as being the pre-requisites necessary for a norm in international law to be ‘elevated’ to the status of a norm of *jus cogens* in international law:

A. The norm must be a norm of *general* international law.

General international law is international law that is binding on most, if not all, States. It is the law which governs the international community in general “as is far the greater part of customary law.”⁷⁵ This is distinguished from both *regional* international law, which is only binding upon States from an identified geographical region and *particular* international law (usually contained within treaties) which is only binding upon a few States.

Schwarzenberger considered the possibility of the existence of *jus cogens inter partes*, that is, norms of *jus cogens* having a limited effect only between identified or signatory parties.⁷⁶ Such a notion envisaged the creation of norms of *jus cogens* by way of treaty, and thereafter observance of the requirement that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith” (*pacta sunt servanda*).⁷⁷ However, such a treaty is limited by the fact that there is no overriding rule prohibiting derogation (one of the identifying characteristics of *jus cogens*, as seen below) and the norm is only binding between the limited number of States parties.⁷⁸ Not all norms of general international law have the character of *jus cogens*.⁷⁹ However, “[t]he criterion for [the] rules [of *jus cogens*] consists in the fact that they do not exist to satisfy the need of the individual states but the higher interest of the whole international community”⁸⁰ as can be seen in certain of the rules of general international law created for a humanitarian purpose (see below).

B. The norm must be “accepted and recognized by the international community of States as a whole.”⁸¹

Acceptance and recognition by the international community can be either *express* or *implied*. Interpretation of how broad this acceptance must be however remains subject to debate. As pointed out by the Chairman of the Drafting Committee at the Vienna Conference Mr. Yasseen, the words “as a whole” were added to draft Article 50 by the ILC to try to avoid a situation whereby one State could effectively veto a decision to designate a norm as preemptory:

⁷⁵ L. Oppenheim, *Oppenheim’s International Law*, (Ninth Edition, edited by Sir R. Jennings and Sir A. Watts, 1992), Vol. 1, p.4. What is referred to as *general* international law in this article is referred to as *universal* international law in *Oppenheim’s International Law*, while the word “general” is employed to describe international laws that are “binding upon a great many states.”

⁷⁶ G. Schwarzenberger, *The Problems of International Public Policy*, Current Legal Problems (1965), p. 191 at p. 194. See also, by the same author *The Inductive Approach to International Law* (1965), p. 100 and *International Law*, (1957), Vol. I, pp. 213 *et seq.*

⁷⁷ See Article 26 of the Vienna Convention.

⁷⁸ The ILC expressly excludes “regional international law” when referring to the *chapeau* of draft article 50. Vol. 1, ILC Yearbook (1963), p. 214.

⁷⁹ This means that not all *general* international law treaties even those ratified by a very large number of States can be classed as *jus cogens*. This problem will be discussed further *infra*.

⁸⁰ A. Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AJIL (1966), p. 58.

⁸¹ The words “recognized by the community of States” were included by an amendment proposed by Spain, Finland and Greece (A/CONF.39/C. 1/L and Add. 1 and 2). The Drafting Committee introduced the words “as a whole”. “[L]a pratique de ces dernières années nous montre que le recours à la notion de communauté internationale n’est plus l’apanage des pays en voie de développement dans la mesure où les Etats occidentaux, hier les plus réticents, n’hésitent plus, aujourd’hui, à invoquer la défense de la dite communauté au nom de droit.” J-A. Carrillo-Salcedo, *Cours Général de Droit International Public*, 257 Recueil des Cours (1996), p. 132.

...there was no question of requiring a rule to be accepted and recognized as peremptory by all States. It would be enough if a very large majority did so; that would mean that, if one State in isolation refused to accept the peremptory character of a rule, or if that State was supported by a very small number of States, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected.⁸²

Therefore it is the case that before a norm can be considered as *jus cogens* it must be accepted and recognized by the international community of States as a whole (in some respects similar to the way in which norms of general customary international law are formed). However, this does not mean that the norm must be accepted by all States (unanimously). What is most important is that “only some subjects of international law, acting alone or in conjunction with others” cannot create *jus cogens*⁸³ and thereafter impose their interpretation on the majority of States. Similarly, only some subjects acting alone or in conjunction with others cannot in theory veto a decision taken by a majority of States.⁸⁴

One can state generally that norms of *jus cogens* can be drawn from the following identified sources of international law:

(i) General treaties.

It is well accepted in international law that treaties do not bind non-parties without their consent.⁸⁵ However, one exception to this principle are those conventions or treaties whose objects and purposes render them more important. This will be considered further below when discussing international humanitarian law. However it can be noted that if a treaty or convention simply codifies existing norms which are already binding on States as customary international law, States not party to the convention or treaty in question may nevertheless find that they remain bound by the terms of the relevant customary law principle.⁸⁶ Similarly, if provisions of such treaties or conventions satisfy the other criteria to be recognised as *jus cogens*, States not party to them will also be bound by their terms;

(ii) International custom.

International custom is defined as being “evidence of a general practice accepted as law.”⁸⁷ Notwithstanding the process of codification of international law undertaken by the ILC over

⁸² A/CONF. 39/11, p. 472.

⁸³ C. Tomuschat, *Obligations Arising for States Without or Against their Will*, 241 Recueil des Cours (1993), p. 307.

⁸⁴ This interpretation is valid in the context of an international conference attempting to identify *jus cogens* as in this context a *veto* would not be accepted. However it has no significance in the case of customary law. “Il ne s’agit pas d’une question de majorité ni d’acceptation universelle: on demande plutôt qu’une règle donnée soit acceptée et reconnue comme imperative par de nombreux Etats qui soient assez représentatives des différents groupes politiques et géographiques qui forment la communauté internationale.” F. Capotorti, *Cours Général de Droit International Public*, 248 Recueil des Cours (1994), p. 141.

⁸⁵ The maxim *pacta tertiis nec nocent nec prosunt* means that a treaty applies only between the parties to it. See for example, Article 34 of the Vienna Convention: “A treaty does not create either obligations or rights for a third State without its consent.” Article 35 of the Vienna Convention: “An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.” Also, I. Brownlie, *Principles of Public International Law* (Fifth Edition, 1998), p. 628. See, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports (1951), p. 15 at p. 21.

⁸⁶ See Article 38 of the Vienna Convention: Rules in a treaty becoming binding on third States through international custom: “Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.” Kelsen stated that “general multilateral treaties to which the overwhelming majority of the states are contracting parties, and which aim at an international order of the world” are exceptions to the *pacta tertiis* rule. See H. Kelsen, *General Theory of Law and State* (1945), p. 486.

⁸⁷ Article 38 (1)(b) Statute of the ICJ.

the years a large portion of international law remains customary in nature. Indeed even the many so-called ‘general’ treaties (see below) are often in fact simply codification of existing customary law rules. For certain authors norms of *jus cogens* are to be found primarily in international custom⁸⁸;

- (iii) General principles of law recognized by civilized nations.⁸⁹

C. The norm must be one from which no derogation is permitted and which can be modified only by a subsequent norm of general international law of the same character.⁹⁰

It could be stated that this is in fact the main identifying feature and ‘essence’ of a norm of *jus cogens*. Although the next section of this article will attempt to illustrate, by way of selected examples, norms which one can state have been accepted by most as being norms of *jus cogens*, with regard to this criteria in particular it is “easier to illustrate these rules than to define them.”⁹¹

Accordingly, it is possible to draw a preliminary classification of norms⁹² that do not permit derogation by inter-parties treaties or otherwise:

- (i) Norms which have a fundamental bearing on the behaviour of the international community of States as a whole and from which *no derogation is permitted* at all.⁹³ One example is the principle of good faith⁹⁴;
- (ii) Norms which are necessary for the stability of the international juridical order, for example *pacta sunt servanda*⁹⁵ and general principles of law⁹⁶ including *res inter alios acta*⁹⁷;

⁸⁸ A. McNair, *The Law of Treaties* (1961), pp. 214-215; Katz, Lagonissi Conference, p. 100; Tunkin, Lagonissi Conference, p. 102. Some authors think that *only* international custom can create *jus cogens*. See for example, J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties*, (1974), p. 74, where he mentions Monaco and Wengler.

⁸⁹ Article 38(1)(c) Statute of the ICJ. The role of general principles of law as a source of international law is often considered to be ‘supplementary.’ See generally A. Verdross, *Völkerrecht*, (Spanish translation, 1957), p. 126 and *Jus Dispositivum and Jus Cogens in International Law*, 60 AJIL (1966), pp 55 *et seq.* However it could also be stated that most of these principles are binding *per se*. “The fact that *all* States consider that immoral agreements (*contra bonos mores*) are not binding” (*id. ibid.* 143), is a general principle of law, as affirmed by Judge Schücking in his individual opinion in *The Oscar Chinn Case*, (1934) PCIJ Rep. Ser. A/B, No. 63, pp. 149-150.

⁹⁰ For example, notwithstanding Article 103 of the Charter of the United Nations (“In the event of a conflict between the obligations of the Members of the United Nations under the...Charter and their obligations under any international agreement, their obligations under the present Charter shall prevail), although a conflict in an obligation under the UN Charter and a norm of *jus cogens* is highly improbable, the relevant norm of *jus cogens* would have to be found to prevail over any corresponding norm or obligation under the UN Charter. See M. Virally, *Reflexions sur le Jus Cogens*, *Annuaire Français de Droit International* (1966), p. 26. Similarly, the Security Council (as with all organs created by States for common action) is bound by norms of *jus cogens*. K. Zemanek, *Legal Foundations of the International System*, 266 *Recueil des Cours* (1997), p. 231.

⁹¹ A. McNair, *The Law of Treaties*, (1961), p. 215. Although this statement is made in general with regard to “rules of customary international law which stand in a higher category and which cannot be set aside or modified by contracting States” it is particularly relevant in illustrating this ‘ingredient’ of norms of *jus cogens*.

⁹² “[L]a notion d’ordre juridique désigne toujours un système coordonné de principes et de règles.” J-A Carrillo-Salcedo, *Cours Général de Droit International Public*, 257 *Recueil des Cours* (1996), p. 135.

⁹³ These are not *strictu sensu* norms as defined in Article 53 of the Vienna Convention.

⁹⁴ See Pechota, *Carnegie Endowment Conference on the Process of Change in International Law* (“Menton Conference”) Report, p. 15.

⁹⁵ See Article 26 of the Vienna Convention: Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

⁹⁶ From which derogation is logically impossible.

- (iii) Norms referred to as having humanitarian objects and purposes including certain principles of human rights and international humanitarian law⁹⁸;
- (iv) Norms of general interest to the international community as a whole or to international public order. Examples are: the goals and aspirations set out in the preamble to the Charter of the United Nations:

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought, untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom

and; the “Purposes and Principles” of the United Nations, as set out in *inter alia*, Articles 1.2⁹⁹ and 2.1 – 2.4¹⁰⁰ respectively of the Charter of the United Nations. These include: respect for equal rights and self-determination of peoples¹⁰¹; sovereign equality of States; fulfilment in good faith of international obligations; settlement of international disputes by peaceful means¹⁰²; prohibition of the threat or use of force against other States in any manner inconsistent with the purposes of the UN¹⁰³;

⁹⁷ This rule forbids the introduction of collateral facts which by their nature are incapable of affording any reasonable presumption or inference as to the principal matter in dispute, and thus evidence as to acts, transactions or occurrences to which accused is not a party or is not connected is inadmissible. *Black's Law Dictionary* (Sixth Edition, 1990), p. 1310. See also J. Sztucki, *Jus Cogens and the Vienna Conventions on the Law of Treaties*, (1974), p. 72.

⁹⁸ A. Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AJIL (1966), pp. 59 - 60. This is in fact a general conclusion as not all norms of human rights can be included. In general terms one can state that under *jus cogens* States are obliged to respect human rights. Specific human rights which can be considered as part of *jus cogens* are for example, those prohibiting the trade of human beings (not only ‘slavery’ as defined, but also the traffic of women and children extended and tolerated in Europe today). With regard to international humanitarian law, see below.

⁹⁹ Article 1.2, setting out one of the purposes of the United Nations, provides in full: To develop friendly relations among nations based on respect for the *principles of equal rights and self-determination of peoples*, and to take other appropriate measures to strengthen universal peace” (Emphasis added).

¹⁰⁰ Articles 2.1 – 2.4 provide as follows: The Organisation and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. 1. The Organisation is based on the principle of the *sovereign equality of all its Members*. 2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall *fulfil in good faith the obligations* assumed by them in accordance with the present Charter. 3. All Members shall *settle their international disputes by peaceful means* in such a manner that international peace and security, and justice, are not endangered. 4. All Members shall *refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state*, or in any other manner inconsistent with the Purposes of the United Nations (Emphasis added).

¹⁰¹ M. Bedjaoui, *Commentary to Article 73 of the Charter*, in: J-P. Cot and A. Pellet, *La Charte des Nations Unies* (1985), p. 1074.

¹⁰² According to J. Charpentier this principle is a rule of customary law binding on all States but is not *jus cogens*. He reaches this conclusion based on the fact that during the discussion on the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of United Nations (UN. Rep, suppl. No. 4, Vol. 1, p. 363) a proposed amendment to consider this principle as expressing a universal juridical conviction by the international community was rejected (Commentary to Article 2, paragraph 3 of the Charter, in: J-P. Cot and A. Pellet, *La Charte des Nations Unies* (1985), p 105).

¹⁰³ *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*, Judgement of 27 June 1986, ICJ Reports (1986) (the “*Nicaragua case*”), pp. 100-101. M. Bennouna believed that Article 2.7 of the Charter of the United Nations (which prohibits UN intervention “in matters which are essentially within the domestic jurisdiction of any State”) “a un caractère péremptoire” and “[l]a non-intervention par la force dans les luttes intestines est une norme imperative de Droit international” (*Le Consentement à la Ingérence Militaire dans les Conflits Internes* (1974), pp. 120 and 79). In the *Case Concerning United States Diplomatic and Consular Staff in Tehran*, Judgment of 24 May 1980, ICJ Reports (1980), pp. 42-43, the ICJ stated: “Such events [setting at naught the inviolability of a foreign embassy] cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance

- (v) Norms which are binding on all new States even without their consent as being established rules of the international community. Examples are the principles of the freedom of the high seas or the common heritage of mankind, the protection of the environment and respect for the independence of States.¹⁰⁴

One final observation should be made. Rules of *jus cogens* can be defined in general terms as being non-derogable rules of international ‘public policy.’¹⁰⁵ Given their overriding importance and indeed because often they involve matters of international public order it can be stated that each and every State has a legal interest therein.¹⁰⁶ As a result, one can state that peremptory obligations are owed by all States (and other subjects of international law) to the international community of States as a whole. One can recall the well-known dictum of the ICJ in the *Barcelona Traction* case:

[A]n 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....By their nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*....Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide^[107] as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.¹⁰⁸

These *erga omnes* obligations have been defined as obligations of a State towards the international community as a whole, in the vindication of which all States have a legal interest. They are rules which accord a right to all States to make claims. As stated by Brownlie such rules are “[o]pposable to, valid against, ‘all the world’, i.e. all other legal persons, irrespective of consent on the part of those thus affected.”¹⁰⁹ It should be noted however that although all norms of *jus cogens* are enforceable *erga omnes* not all *erga omnes* obligations are *jus cogens*.¹¹⁰

of which is vital for the security and well-being of the complex international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.” Although this is recognition of the importance of these rules of behavior within the international community it does not mean that the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations are peremptory.

¹⁰⁴ “Les règles qui assurent à tous les membres de la communauté internationale la jouissance de certaines biens communs.” R. Ago, *Droit des Traités à la Lumière de la Convention de Vienne. Introduction*, 134 *Recueil des Cours* (1971), III, p. 324. The Tribunal of Arbitration in the case *Aminoil* expressly rejected the idea of considering the permanent sovereignty on the natural resources as a norm of *jus cogens*. *Journal du Droit International* (1982), p. 893.

¹⁰⁵ M. Byers, *Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules*, Vol. 66 *Nordic Journal of International Law* (1997), p. 211.

¹⁰⁶ Except the States parties in the treaty by application of the principle *venire contra factum proprium non valet*. See the opinion of Luxembourg on the 1963 draft (Vol. II, ILC Yearbook (1966), p. 312). Common Article 1 of the Geneva Conventions provides that “[t] High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” This has been interpreted by the ICRC as meaning that “[i]n the event of a Power failing to fulfil its obligations, each of the other Contracting Parties (neutral, allied or enemy) may and, should endeavour to bring it back to an attitude of respect for the Convention.” See, for example the commentary to Article 1 of Geneva Convention IV, in J. Pictet, (ed.), *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, (1958). This means, that all Contracting Parties, even those not concerned with the case in particular, have *locus standi* to react.

¹⁰⁷ In its decision of 11 July 1996 in the *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Judgement on Preliminary Objections, ICJ Reports (1996), para. 52, the ICJ also considered that the rights and obligations in that convention were *erga omnes*.

¹⁰⁸ *Case concerning the Barcelona Traction, Light and Power Company, Limited*, Second Phase, Judgment of 5 February 1970, ICJ Reports (1970), p. 3, at p. 32.

¹⁰⁹ I. Brownlie, *Principles of Public International Law* (Fifth Edition, 1999), Glossary.

¹¹⁰ For example in 1949 the ICJ considered that the international subjectivity of the United Nations Organization was opposable *erga omnes*, that is as between all States and not only the Members of the Organization. By this statement the Court recognized the separate international existence of international organizations as being subjects of international law, but in doing so, did not intend to create or recognize an existing peremptory norm. See, *Reparation for Injuries*

4. EXAMPLES OF *JUS COGENS*¹¹¹

Although Article 53 of the Vienna Convention provides some guidance to the identification of *jus cogens* nevertheless ‘elevation’ of norms of international law to the status of *jus cogens* is not an easy task. There are obvious risks in over use of the notion and consequently often attempts to do so attract criticism.¹¹² This is particularly so when for example attempts are made to exhaustively list entire treaties as being *jus cogens*.¹¹³ In fact, as has been stated “more authority exists for the category of *jus cogens* than exists for its particular content...”¹¹⁴ Nevertheless it is possible to give some examples of norms which have been considered as peremptory in nature.

We begin with the examples put forward by the ILC in its final report to the Vienna Conference. As noted above, the ILC decided against the inclusion of specific examples of *jus cogens* in the draft article forwarded to the Vienna Conference. Its reasons were the following:

First, the mention of some cases of treaties void for conflict with a rule of *jus cogens* might...lead to misunderstanding as to the position concerning other cases not mentioned in the article. Secondly, if the Commission were to attempt to draw up, even on a selective basis, a list of rules of international law which are to be regarded as having the character of *jus cogens*, it might find itself engaged in a prolonged study of matters which fall outside the scope of the present articles.¹¹⁵

It did however include in its report examples put forward by certain of its members, “by way of illustration [as being], some of the most obvious and best settled rules of *jus cogens* in order to indicate by these examples the general nature and scope of the rule contained in the article.”¹¹⁶ In this way, it is suggested that it managed to illustrate, without recommending that specific examples should be included in the final article, how it hoped the concept would be interpreted. Specific examples¹¹⁷ included were: (1) Principles of the Charter of the United Nations prohibiting the unlawful use of force¹¹⁸; (2) International laws that prohibit the performance of any other act

suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949, ICJ Reports (1949), p. 185. See also the *Nuclear Tests Cases*, where in 1974 the ICJ considered that unilateral statements made by the French authorities that France would not carry out new nuclear atmospheric tests in the South Pacific Ocean were *erga omnes*, that is, directed towards the international community: *Nuclear Test Case (Australia v. France)*, Judgement of 20 December 1974, ICJ Reports (1974), p. 253, para. 50 and *Nuclear Test Case (New Zealand v. France)*, Judgement of 20 December 1974, ICJ Reports (1974), p. 457, para. 52.

¹¹¹ Apart from these brief examples, we will consider primarily the impact and presence of *jus cogens* in the field of international humanitarian law.

¹¹² See for example, A. D’Amato, *It’s a Bird, It’s a Plane, It’s Jus Cogens*, 6 Connecticut Journal of International Law, 1990, 1. D’Amato stated that such over use of the concept has resulted in the promotion “to the status of supernorm” of seemingly limitless numbers of rules of international law and human rights law. He stated that “[T]he sheer ephemerality of *jus cogens* is an asset, enabling any writer to christen any ordinary norm of his or her choice as a new *jus cogens* norm, thereby in one stroke investing it with magical power.” D’Amato also criticized the identification of what he referred to as a “gaggle of substantive norms” and the claim “that the entire body of human rights norms are norms of *jus cogens*” by K. Parker and L. B. Neylon, in *Jus Cogens: Compelling the Law of Human Rights*, 12 Hastings International and Comparative Law Review, 1989, p. 411.

¹¹³ See K. Parker and L. B. Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 Hastings International and Comparative Law Review (1989), 411, referred to in A. D’Amato, *It’s a Bird, It’s a Plane, It’s Jus Cogens*, 6 Connecticut Journal of International Law, 1990, 1. See also, J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties*, (1974), p. 82, wherein he refers to thirty-nine treaties which are stated by various authors (including Berber, Von der Heydte and Quadri) to be treaties contrary to *jus cogens* and in doing so criticises such analyses.

¹¹⁴ I. Brownlie, *Principles of Public International Law* (Fifth Edition, 1999), pp.516 – 517.

¹¹⁵ Vol. II, ILC Yearbook (1966), p.248.

¹¹⁶ Vol. II, ILC Yearbook (1966), p.248.

¹¹⁷ As seen above, these examples largely reflect the principles and purposes of the United Nations, as set out in Articles 1 and 2 of the Charter of the United Nations.

¹¹⁸ Article 2.4 of the Charter of the United Nations. As for States not members of the United Nations, Article 2.6 provides that “[t]he Organization shall ensure that States which are not Members of the United Nations act in accordance with [the] principles [set out in Article 2] so far as may be necessary for the maintenance of peace and security.” However, this has been referred to as “a task of the Organization and does not create legal obligations for

criminal under international law; and (3) International laws that oblige States to co-operate in the suppression of certain acts such as trade in slaves, piracy or genocide.¹¹⁹

It is noteworthy that both Lauterpacht and Fitzmaurice in their respective reports had also attempted to define or provide examples of peremptory norms of international law. Lauterpacht in his first report provided as examples the prohibitions against privateering and slavery in the Declaration of Paris of 1856 and the Slavery Convention of 1926 respectively.¹²⁰ Quoting McNair he explained his interpretation of the impact of *jus cogens* on treaties: “It is believed that a treaty between two States the execution of which contemplates the infliction upon a third State of what customary international law regards as a wrong is illegal and invalid *ab initio*.”¹²¹ Fitzmaurice in his report in 1958 referred generally to norms concerning the international protection of individuals, the prohibition of wars of aggression and the ‘hypothetical’ convention containing the agreement of a State of “not interf[er]ing] in case [other State] should command its vessels to commit piratical acts in the high seas.”¹²² He concluded by stating that it was “not possible...to state exhaustively what are the rules of international law that have the character of *jus cogens*, but a feature common to them, or to a great many of them, evidently is that they involve not only legal rules but considerations of morals and of international good order.”¹²³

Other examples can be drawn from remarks made by delegates during the Vienna Conference. For example, the Italian delegate, Mr. Maresca, referred to rules of an absolute character being those which “protected the human person” and “ensured the maintenance of peace and the existence and equality of States.” He stated that this was an example of *jus naturalis* which has its original source in what he referred to as “mankind’s awareness of the law” and “the conscience of mankind.”¹²⁴ Examples of acts or treaties permitting such acts considered by delegates at the Vienna Conference as being contrary to norms of *jus cogens* were: acts violating certain human rights norms, such as acts contrary to certain laws of war, colonialism and racial discrimination.¹²⁵ Finally, acts contrary to fundamental norms of the international community such as the principle of the freedom of the high seas were considered by the Polish delegation as being in violation of a norm of *jus cogens*.¹²⁶

5. EMERGING NORMS OF *JUS COGENS*¹²⁷

Although the previous section has attempted to illustrate briefly certain examples of norms of international law which have been considered peremptory it is important to recall that international

non-member States.” K. Zemanek, *The Legal Foundations of the International System*, 22 Recueil des Cours (1997), p.231 (footnote omitted).

¹¹⁹ These examples largely reflect those initially in the second report by Waldock in 1963. This report progressed from giving particular examples of *jus cogens* to being more general. See Vol. II, ILC Yearbook (1963) pp. 52 *et seq.* More general examples which expanded the proposed interpretation beyond consideration of acts that constitute crimes under international law were treaties violating human rights, the equality of States or the principle of self determination. See, A. Cassese, *Commentary to Article 1, Paragraph 2 of the Charter*, in J-P Cot, and A. Pellet, *La Charte des Nations Unies* (1985), p. 54: “Il ne faut pas oublier un autre grand mérite des Nations Unies: celui d’avoir progressivement transformé un postulat politique et une norme programmatrice qui l’incorporait – l’article 1, paragraph 2 – en un des principes juridiques fondamentaux de la Communauté internationale, dotés de la force juridique spéciale propre au *jus cogens*.”

¹²⁰ Vol. II, ILC Yearbook (1953), pp. 154 – 155.

¹²¹ Vol. II, ILC Yearbook (1953), p. 154.

¹²² Vol. II, ILC Yearbook (1958), p. 40.

¹²³ Vol. II, ILC Yearbook (1958), pp. 40 – 41.

¹²⁴ A/CONF. 39/11 (1968) p. 311.

¹²⁵ Lebanon and Poland, Ukraine and Uruguay respectively. See A/CONF. 39/11 (1968), pp 297, 302, 322, 303 respectively.

¹²⁶ A/CONF. 39/11 (1968), p. 302.

¹²⁷ In considering this issue the ILC simply referred to it as “the logical corollary” of its more detailed analysis and proposal regarding existing *jus cogens*. In fact, only four paragraphs were included in the final Report. Vol. II, ILC Yearbook (1966), p. 261.

law is in a constant state of evolution. This must also mean that new norms of *jus cogens* may in theory develop.¹²⁸ The evolution of *jus cogens* is referred to in the Vienna Convention in terms of the emergence of new peremptory norms of general international law and is specifically regulated by Article 64:

Emergence of a new peremptory norm of general international law (*jus cogens*)

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

It is not intended in this article to analyse in the context of emerging norms, either the differences between termination and invalidity of legal norms or to determine how and when what was validly born can become void.¹²⁹ Nor do we intend to examine if it would be sufficient to consider emerging *jus cogens* as plainly as one of the cases of termination of treaties. However, we will briefly consider the following question: whether or not it is possible for a new peremptory norm to constitute a totally new concept having no link with pre-existing peremptory norms or whether, on the contrary, such a norm is better described as a derogation from an existing peremptory norm.

As discussed there is no legislature in the international community. How then can new concepts of *jus cogens* be ‘created’? The ILC pointed out that “a modification of a rule of *jus cogens* would today must probably be effected through a general multilateral treaty.”¹³⁰ By analogy, this could also be applied with regard to the emergence of *new* norms of *jus cogens*. Similarly, such norms could emerge through the recognition of a new rule of customary international law which is considered as being peremptory. As a result, in theory it appears that it would be possible for a new peremptory norm to constitute a totally new concept having no link with a pre-existing peremptory norm as long as it was accepted and recognised by the international community as a whole as such.

With regard to derogation from an existing peremptory norm it is not so clear. Application of the principle *ex injuria non oritur jus* means that the continuous violation of an existing rule of *jus cogens* cannot lead, through such violation, to its modification.¹³¹ However, as has been discussed principles of *jus cogens* can be drawn from both customary international law and treaties. In theory it is always possible for both a new treaty to derogate from an existing treaty and a new rule of customary international law to derogate from an existing rule, if the will of States so dictates. In these circumstances, by derogation from an existing rule of *jus cogens* contained within custom or treaty, in theory the new rule, treaty (or provision within the treaty) could amount to *jus cogens*. Again this would only arise if either the new treaty or customary rule is accepted and recognised by the international community as a whole as being a rule of *jus cogens*.

In practice however it is most unlikely if not impossible that this would ever arise. This is primarily because of the very nature of these principles of *jus cogens*. In particular we refer to: the fact that norms of *jus cogens* are recognised as being fundamental and general in nature; and the fact that

¹²⁸ J. Paust, *The Reality of Jus Cogens*, 7 Connecticut Journal of International Law (1991), 81, at p. 83: “[I]t is subject to birth, growth, other change, and death, depending upon patterns of expectation and behaviour that are recognizably generally conjoined in the ongoing social process.”

¹²⁹ Vol. II, ILC Yearbook (1966), p. 261: “Although the rule operates to deprive the treaty of validity, its effect is not to render it void *ab initio*, but only from the date when the new rule of *jus cogens* is established; in other words it does not annul the treaty, it forbids its further existence and performance.”

¹³⁰ Vol. II, ILC Yearbook (1966), p. 248. It is recalled that general treaties (indeed all treaties), are subject to the rule *pacta tertiis* and are not binding *erga omnes* simply because there is a majority (even a large majority) of States that are parties. However as has been stated the principles contained in some are nevertheless binding on third parties as a result of customary law (for example, rules of the UN Convention on the Law of the Sea related to the maritime areas) but even in those cases they are not necessarily rules of *jus cogens*.

¹³¹ The principle that no benefit can be received from an illegal act. See, O. Lissitzyn, Menton Conference, p. 11 and E. Suy, Lagonissi Conference, p. 112.

they only reached this status having first been recognised as a whole as being norms from which no derogation is permitted and which can only be modified by a subsequent norm of general international law of the same character. In these circumstances it is very unlikely in practice that derogation would ever occur.

Consequently, it is the case that an emerging norm of *jus cogens* will probably only ever be recognised if it takes the form of a totally new concept, which is accepted and recognised by the international community as a whole.

6. THE INVALIDITY OF TREATIES VIOLATING *JUS COGENS*

A final issue to consider in this general analysis is the impact of *jus cogens* on a treaty which is considered to be in violation thereof. As norms of *jus cogens* have been identified as being norms "...accepted and recognized by the international community of states as a whole as...norm[s] from which no derogation is permitted" it must follow that there will be a specific impact on a treaty which is found to be in violation of an identified norm. After considerable debate and discussion at the ILC it was finally concluded that a treaty which conflicts with a peremptory norm of international law is void if and because *its object* is identified as being illegal.¹³² A treaty which is void because of such illegality terminates independently of the will of the parties to the treaty - it is considered invalid *ipso jure ab initio*.¹³³ Articles 53 and 64 of the Vienna Convention (above) therefore provide as a general principle that a treaty is or becomes void if it conflicts with either an existing peremptory norm or an emerging peremptory norm, respectively.

However, a finding that a treaty is void perhaps many years after it has been entered into will obviously have an impact on any acts/agreements etc., performed in reliance on its terms.¹³⁴ For the following reasons, although the Vienna Convention contains a general provision regulating the consequences of *the termination* of a treaty both under its own provisions or in accordance with the Convention itself (Article 70) it was decided that invalidity through conflict with a peremptory norm merited its own specific provision. The ILC in particular considered that in relation to nullity of a pre-existing norm, this was

a special case of nullity. The question which arises in consequence of the invalidity is not so much one of the adjustment of the position of the parties in relation to each other as of the obligation of each of them to bring its position into conformity with the rule of *jus cogens*.¹³⁵

Similarly, it stated that termination "by reason of...conflict with a new rule of *jus cogens*...is a special case of termination."¹³⁶ It stated that "the rules laid down in Article 66, paragraph 1 [of the draft, Article 70. 1 of the Vienna Convention] are applicable *in principle*."¹³⁷ However, it felt that

¹³² Lauterpacht spoke in 1953 about the "*performance*" of the treaty (Vol. II, ILC Yearbook (1953), p. 154); Fitzmaurice stated that it was essential to the validity of a treaty that it should be in conformity with or not contravene, or that "*its execution*" should not involve an infraction of principles of *jus cogens*. (Vol. II, ILC Yearbook (1958), p. 26); Waldock referred to a treaty's "*object or its execution*" (Vol. II, ILC Yearbook (1963), p. 52). In the ILC Report to the Vienna Conference it was stated that "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*." See, Vol. II, ILC Yearbook (1966), p. 248.

¹³³ Vol. II, ILC Yearbook (1966), p. 266. Fitzmaurice believed that a treaty contrary to *jus cogens* could be applied *inter partes*, provided that no prejudice was caused to third States. The effect would be the *unenforceability* of the treaty. Vol. II, ILC Yearbook (1958), p. 28.

¹³⁴ Article 69(1) of the Vienna Convention provides, as a general principle with regard to the consequences of the invalidity of a treaty, that "[a] treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force."

¹³⁵ Vol. II, ILC Yearbook (1966), p. 266.

¹³⁶ Vol. II, ILC Yearbook (1966), p. 266. It also stated that this was a special case of invalidity since the invalidity does not operate *ab initio*.

¹³⁷ See Vol. II, ILC Yearbook (1966), p. 266 (Emphasis added).

because the current Articles 53 and 64 were “special cases arising out of the application of a rule of *jus cogens*” they should be grouped in their own article. It also felt that such a specific article gave

added emphasis to the distinction between the original nullity of a treaty under article 50 [of the draft, article 53 of the Vienna Convention] and the subsequent annulment of a treaty under article 61 [of the draft, article 64 of the Vienna Convention] ...Having regard to the misconceptions apparent in the comments of certain Governments regarding the possibility of the retroactive operation of these articles, this additional emphasis on the distinction between *the nullifying effect of article 50 and the terminating effect of article 61* seemed to the Commission to be desirable.¹³⁸

This distinction is very important given the different legal consequences of a finding that a treaty is void by reason of conflict with either an existing or new peremptory norm. The ILC in particular stressed the need to emphasise the fact that a treaty validly born must be found to have produced valid consequences. It is suggested that although such a treaty *may terminate* as a result of emerging *jus cogens* it does not, in our view, *become void*, such that it is found to have been without legal effect. However, it is clear that certain of the legal consequences and the rights and obligations flowing from the treaty which come into conflict with the new norm cannot be maintained.

The consequences of the invalidity of a treaty conflicting with a peremptory norm are regulated by Article 71 of the Vienna Convention:

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

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

As can be seen, the article is two pronged. It regulates first, nullity of a treaty *ab initio* as being contrary to pre-existing peremptory norms (a treaty which is void under Article 53 of the Vienna Convention) and second, nullity of a treaty *ex nunc* as conflicting with emerging peremptory norms (a treaty which becomes void under Article 64 of the Vienna Convention). In the case of the latter, it is provided that recognition of the new peremptory norm does not render the treaty invalid *ab initio*. That is, it is not the case that the emerging *jus cogens* will have retroactive effect – the treaty in question is still considered to have been valid and to have produced valid consequences.¹³⁹ However, any “right[s] obligation[s] or legal situation[s]” may only be maintained “to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.”

¹³⁸ Vol. II, ILC Yearbook (1966), p. 266 (Emphasis added).

¹³⁹ “[A] right, obligation or legal situation valid when it arose is not to be made retroactively invalid; but its *further* maintenance after the establishment of a new rule of *jus cogens* is admissible only to the extent that such further maintenance is not in itself in conflict with that rule” (Vol. II, ILC Yearbook (1966), p. 267). “[N]ous pouvons dire qu’il n’existe, à notre connaissance, pas un seul cas où, sur la base des prescriptions d’une quelconque règle générale coutumière survenue par la suite, on ait conclu à la responsabilité d’un Etat pour un fait qui n’était pas internationalement illicite au moment où il a été commis.” R. Ago, *Rapport sur la Responsabilité Internationale de l’Etat*, in: *Scritti sulla Responsabilità internazionale degli Stati*, II, 1 (1986), p. 804.

7. *JUS COGENS* AND INTERNATIONAL HUMANITARIAN LAW

7.1 Introduction

The recognition of norms of *jus cogens*, norms from which any derogation is forbidden, is particularly important in the area of international humanitarian law. As has been pointed out:

In the *law of war* there was a great need for absolute norms for the safeguarding of the minimum fairness, orderliness, civilization and humanity of warfare and to prevent superfluous devastation.¹⁴⁰

These “absolute norms” have been gradually identified over the years and it is now the case that the prohibition of genocide together with certain rules of international humanitarian law are considered almost unanimously to be peremptory norms of international law. It is this classification which will now be considered.

7.2 International Humanitarian Law in general

It serves to briefly consider the development of international humanitarian law, to properly place identification, if possible, of peremptory norms therein. The term ‘humanitarian law’ is in fact “a relatively recent one”¹⁴¹ despite the fact that the concepts (formerly referred to as part of the laws of war (*jus in bello*)) have been recognised for a very long time.¹⁴² International humanitarian law as it exists today broadly includes what is now commonly referred to as Hague and Geneva law.¹⁴³ At the end of the XIX century a concerted effort was made on the international plane to codify the laws of war. The Hague International Peace Conferences held in 1899 and 1907 had the most important impact and resulted in, *inter alia*, the promulgation of The Hague Conventions II (1899) and IV (1907)¹⁴⁴ together with those related to the prohibition of certain weapons. These became known as the laws of The Hague.¹⁴⁵ The laws of Geneva encompass the four Geneva Conventions of 12 August 1949¹⁴⁶ together with the protocols adopted on 10 June 1977.¹⁴⁷ Finally, there is the

¹⁴⁰ L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, (Helsinki, 1988), p. 211.

¹⁴¹ G. Abi-Saab in *The Specificities of Humanitarian Law*, in C. Swinarski, (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Martinus Nijhoff Publishers, 1984), p. 265.

¹⁴² The concepts are very old. Predecessors to ‘modern’ humanitarian law are for example, the Spanish scholastics and the Catholic Church Councils. During the middle ages, the former developed theories of the *bellum justum* and the latter those prohibiting the slavery of prisoners of war (III Lateran Council, 1179) or the use of weapons considered as too “lethal and hateful for God” (II Lateran Council, 1139). See H. Nussbaum, *A Concise History of the Law of Nations* (Spanish Edition, undated), p. 22 (original 1954).

¹⁴³ For a discussion on this question, see the Judgement by the Appeals Chamber of the ICTY: Prosecutor v. Zejnir Delali_ et al., *Judgement*, Case No. IT-96-21-A, 20 February 2001, paras. 131 *et seq.*

¹⁴⁴ The Hague Convention (II) with respect to the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land. The Hague, 29 July 1899 and The Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land. The Hague 18 October 1907.

¹⁴⁵ It is noted that other regulations and conventions are also included in the laws of The Hague.

¹⁴⁶ (I) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; (II) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; (III) Geneva Convention relative to the Treatment of Prisoners of War; (IV) Geneva Convention relative to the Protection of Civilian Persons in Time of War. In the view of the ICJ “the Geneva Conventions are in some respects a development, and in other respects no more than the expression” of the fundamental general principles of humanitarian law. The *Nicaragua* case, para 218. The ICRC Commentary to Geneva Convention IV states: “[t]he Geneva Conventions form part of what are generally called the laws and customs of war, violations of which are commonly called war crimes”. See, J. Pictet, (ed.), *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, (1958). As of January 2001, 189 States are parties to the Geneva Conventions. Only two United Nations members, Marshall and Nauru are not parties.

¹⁴⁷ Protocol I: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts. Protocol II: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts. These Protocols have received a

Convention on the Prevention and Punishment of the Crime of Genocide (1948). Although it is arguable that this convention cannot be considered *strictu sensu* to be part of the ‘laws of armed conflicts’ it is without doubt applicable.¹⁴⁸ This is not least because Article one provides that genocide “whether committed in time of peace *or in time of war*” is a crime under international law for which individuals shall be tried and punished.¹⁴⁹

In 1996, the ICJ specifically re-affirmed the importance of the place held in international law by rules of international humanitarian law. As a general principle, it initially stated:

It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’ as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (*I.C.J. Reports 1949*, p. 22), that The Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.¹⁵⁰

Considering the history of these rules and the road to recognition as being fundamental to the respect of the human person and ‘elementary considerations of humanity,’ it mentioned in particular the so-called “de Martens Clause” contained in the preambles to The Hague Conventions of 1899 (II) and 1907 (IV).¹⁵¹ It referred to the fact that a “modern version...is to be found in Article 1, paragraph 2, of Additional Protocol I of 1977, which reads as follows: ‘In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.’”¹⁵² It stated that at a very early stage humanitarian law “prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives”. It referred to the fact that the Nuremberg International Military Tribunal had already found in 1945 that the humanitarian rules included in the Resolutions annexed to the Hague Convention IV of 1907 “were recognized by all civilized nations and were regarded as being declaratory of the laws

more limited number of ratifications by comparison to the Geneva Conventions. As of January 2001, 157 States are parties to Additional Protocol I and 150 States are parties to Additional Protocol II.

¹⁴⁸ In his report to the Security Council with regard to the establishment of the ICTY, the Secretary General included in his list the Genocide Convention as comprising “part of conventional international humanitarian law which has beyond doubt become part of international customary law...applicable in armed conflict.” *Report of the Secretary General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704, 2 May 1993 (“Secretary General’s Report”), para. 35.

¹⁴⁹ Emphasis added.

¹⁵⁰ *Legality of the Threat or Use of Nuclear Weapons: Advisory Opinion*, ICJ Reports (1996) (the “*Nuclear Weapons* case”), para. 79. In a decision by the Appeals Chamber of the ICTY, the Appeals Chamber stated that “[s]tate practice shows that general principles of customary international law have evolved with regard to internal armed conflict also in areas relating to methods of warfare...Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.” *The Prosecutor v. Du_ko Tadi_*, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, 2 October 1995, paras. 125-126. For a different opinion see, T. Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AJIL (1996), pp. 238-249.

¹⁵¹ This provides as follows: “Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience”. This clause was included in the Preamble of the 1899 Hague Convention II respecting the Laws and Customs of War on Land and in the 1907 Hague Convention IV on the same matter. See, in general, A. Cassese, *The Martens Clause: Half a Loaf or simply Pie in the Sky?* Vol. 11, No. I, EJIL (2000), pp. 187-216.

¹⁵² *The Nuclear Weapons* case, para. 78.

and customs of war.”¹⁵³ Finally, it referred to the most recent confirmation on the international level of the status which the international community has accepted should be accorded to certain rules of international humanitarian law, by referring to the Secretary General’s Report and his remarks concerning the subject-matter jurisdiction of the ICTY:

In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law...The part of conventional humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied by: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1949; and the Charter of the International Military Tribunal of 8 August 1945.¹⁵⁴

One can note the following findings of the ICJ in respect of the Genocide Convention:

The Convention was manifestly adopted for a purely humanitarian and civilizing purpose...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 interests 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.¹⁵⁵

There can be little doubt that as a general rule the provisions contained in the conventions and regulations referred to above have attained the status of customary international law, while certain provisions are generally considered to reflect elementary and fundamental considerations of humanity. The Statutes of the ICTY and ICTR provide for prosecution for violation of the following customary rules of international humanitarian law: grave breaches of the Geneva Conventions, violations of the laws and customs of war, genocide and crimes against humanity.¹⁵⁶

In the context of this article, it remains to be seen whether or not one may also automatically elevate these conventions or provisions as a whole to the status of peremptory norms.

7.3 Rules of International Humanitarian Law which can be classified as *Jus Cogens*

Article 2 of The Hague Convention IV of 1907 provides:

The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention.

This clause, known as the *si omnes* or general participation clause was based on the principle of reciprocity and was designed to avoid disadvantages in the military balance. It provided that the convention and annexed regulations were not applicable unless *all* the parties to the conflict were equally bound by their terms. This meant that they would not even apply between those who were parties to the convention if there were other belligerents involved who were not.

¹⁵³ *Trial of the Major War Criminals, 14 November 1945-1 October 1946*, Nuremberg, 1947, Vol. I, p. 254, referred to in the *Nuclear Weapons* case, para.80.

¹⁵⁴ The *Nuclear Weapons* case, para. 81, citing the Secretary General’s Report, paras. 34 – 35. As cited below, jurisprudence of both Trial Chambers and the Appeals Chamber of the ICTY has re-affirmed these findings.

¹⁵⁵ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide: Advisory Opinion*, 28 May 1951, in ICJ Reports (1951), p. 23. This case also confirms that the Genocide Convention is considered to be part of customary international law. See also the Secretary General’s Report, paras. 35 and 45.

¹⁵⁶ See generally, *The Prosecutor v. Du_ko Tadi_*, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, 2 October 1995.

The Geneva Conventions on the other hand have been described as reflecting “a constant endeavour to extend their application to the widest possible circle of States and conflictual situations, and to reduce to a minimum the legal grounds for avoiding such an application.”¹⁵⁷ Paragraph 3 of common Article 2 to the four Geneva Conventions “expressly refute[s]” the *si omnes* clause¹⁵⁸ and provides as follows:

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

This provision which came over forty years later was a clear and welcome departure from the more limited terms of Article 2 of the aforementioned Hague Convention. The important difference is the fact that it provides that the provisions of the four Geneva Conventions will remain applicable as between the parties even if one of the belligerents in a conflict is not a party to them.¹⁵⁹ However, the provision remains limited largely because the principle of reciprocity is preserved. As a result, hypothetically and based on the express terms of the provisions, if a power involved in a particular conflict who is not a party to the Geneva Conventions neither formally accepts to be bound by their provisions (for example, by way of a formal or explicit declaration), nor even to apply its provisions (for example, by in practice accepting their terms), the Geneva Conventions will not on the face of it apply to govern actions committed by them.¹⁶⁰

Despite this very hypothetical scenario we must recall what has been described as the overall humanitarian aim of the Geneva Conventions. Indeed the Appeals Chamber for the ICTY recently described the object and purpose of the Geneva Conventions as being “to guarantee the protection of certain fundamental values common to mankind in times of armed conflict” while describing the conventions as “fundamental humanitarian conventions.”¹⁶¹ This humanitarian object and purpose is particularly reflected within certain provisions. Examples are the prohibition against the taking of reprisals¹⁶² and the prohibition on each party preventing them absolving themselves of any liability incurred in respect of the “grave breaches” provisions.¹⁶³ A further example is the specific protection offered to the category of persons defined by the conventions as “protected persons.” The conventions provide that these persons “may in no circumstances renounce in part or in entirety the rights secured to them” by the conventions or by special agreements.¹⁶⁴ In addition, the conventions expressly prohibit agreements *inter partes* which could “adversely affect the situation of [protected persons]... , nor restrict the rights which [they] confer[] upon them.”¹⁶⁵

Further protection is guaranteed by Article 60(5) of the Vienna Convention which reads as follows:

¹⁵⁷ G. Abi-Saab in *The Specificities of Humanitarian Law*, in C. Swinarski, (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Martinus Nijhoff Publishers, 1984), p. 267 (footnote omitted).

¹⁵⁸ G. Abi-Saab in *The Specificities of Humanitarian Law*, in C. Swinarski, (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Martinus Nijhoff Publishers, 1984), p. 267.

¹⁵⁹ Article 1 of the four Geneva Conventions provides: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” That is they undertake to ensure respect regardless of considerations of reciprocity.

¹⁶⁰ We state “hypothetically” as this analysis is of course purely theoretical. This is because as has been seen almost all members of the United Nations are parties to the conventions. It is also because many of the terms of the conventions in any event are considered to constitute customary international law. See Judgement by the Appeals Chamber of the ICTY in *The Prosecutor v. Zejnir Delali_ et al.*, *Judgement*, Case No. IT-96-21-A, 20 February 2001, paras. 112 – 113.

¹⁶¹ *The Prosecutor v. Zejnir Delali_ et al.*, *Judgement*, Case No. IT-96-21-A, 20 February 2001, para. 113.

¹⁶² For example, Article 46 (Convention I) provides: “Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited.” See also, Articles 47 (Convention II), 13 (Convention III) and 33 (Convention IV) and 20 and 51 to 56 of Additional Protocol I.

¹⁶³ Common Articles 51 (Convention I), 52 (Convention II), 131 (Convention III) and 148 (Convention IV).

¹⁶⁴ Common Articles 7 (Conventions I, II, III) and 8 (Convention IV).

¹⁶⁵ Common Articles 6 (Conventions I, II, III) and 7 (Convention IV).

Paragraphs 1 to 3 [on the conditions of termination or suspension of treaties as a consequence of their breach] do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties”.

This general clause applies to all treaties.

Nevertheless, it is suggested that the protection offered by the conventions and the above provisions is technically not absolute. This is because, within the terms of each convention there is provision for States to avoid application of their terms through denunciation. Although it is also provided that such denunciation “shall not take effect until peace has been concluded, and until after operations connected with the release and repatriation of the persons protected by the present Convention have been terminated” and that denunciation “shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity and the dictates of the public conscience,”¹⁶⁶ nevertheless, the fact remains that denunciation of the conventions is possible. Similarly both the Geneva Conventions and the Genocide Convention can be subject to reservations, provided that these reservations do not go against “the object and purpose” of the treaties.¹⁶⁷ The question arises as to how treaties, which can in theory be denounced¹⁶⁸ and may in theory be subject to reservations can be considered as a whole as *jus cogens*?

One author has stated the following:

A number of factors in the 1949 Geneva Conventions make them appear *particularly to satisfy criteria drawn from the perspective of jus cogens*:

- Many provisions stipulate the protection of persons in absolute terms. Each Convention contains a provision prohibiting reprisals against the persons protected by the Convention. (The provision in Convention IV does this only in a limited scale.
- The Conventions prohibit the conclusion of special agreements which would adversely affect the situation of protected persons or would restrict their rights as defined by the Conventions. Thus, derogations by treaties *inter se* which would have adverse effects are prohibited.
- The Conventions deny the validity of any renunciations of their rights by protected the persons.
- The Conventions single out the grossest violations as ‘grave breaches’, and prohibit the parties from absolving any other party of any liability incurred in respect of the ‘grave breaches. There is a strong presumption that at least the prohibitions of the ‘grave breaches’ of the Conventions are peremptory.
- The Conventions have received a nearly universal degree of ratification.¹⁶⁹

Although it has been suggested that there is a strong presumption that at least the ‘grave breaches’ provisions of the four Geneva Conventions have gained peremptory status it has also been acknowledged that many of the norms contained within the conventions do not fulfil the criteria

¹⁶⁶ Common Articles 63(Convention I), 62 (Convention II), 142 (Convention III), 158 (Convention IV) and 99.1 of Protocol 1. The purpose of these dispositions is to maintain the protected persons within the same parameters until the conclusion of military operations and in the case of civilians, until their “release, repatriation and re-establishment.” Article 158, Geneva Convention IV.

¹⁶⁷ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide: Advisory Opinion*, 28 May 1951, in ICJ Reports (1951), pp. 15 *et seq.* Also Article 19 (c) of the Vienna Convention. It is the case that they have already been subject to several.

¹⁶⁸ In the *Nuclear Weapons* case, para. 82, the ICJ noted in general that the denunciation clauses in codification instruments of the conventions codifying international humanitarian law had (to that date) never been used.

¹⁶⁹ L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, (Helsinki, 1988), pp. 605-6 (footnote omitted).

which are necessary for such a norm to be considered as *jus cogens*.¹⁷⁰ But as seen above, norms of *jus cogens* are essentially general in nature. They are defined as norms, which are “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.”¹⁷¹ It is as a result rather difficult to identify specific norms within treaties which are peremptory in nature unless they are very general. This applies equally in the identification of norms of *jus cogens* in the area of international humanitarian law and in particular, with regard to this analysis, to the four Geneva Conventions of 1949 and the Genocide Convention of 1948.

With regard to the four Geneva Conventions of 1949 it is suggested that it can only be said that the principles and prohibitions underlying paragraphs (1) and (2) of common Article 3 are *truly* peremptory in nature. Those other provisions in, for example the Geneva Conventions and the Additional Protocols (together with other instruments in international humanitarian law) which reflect the principles contained within common Article 3 can also be considered peremptory in nature. Common Article 3 is general in nature, it lays down the “elementary considerations of humanity” described by the ICJ which derive “from established custom, from the principles of humanity and from the dictates of public conscience.” Common Article 3 reads as follows:

[E]ach party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;¹⁷²
 - (b) taking of hostages;
 - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for.

Although common Article 3 refers to “[c]onflicts not of an international character” it is now generally accepted that its terms are applicable in situations of both internal and international armed conflicts. The ICRC Commentary to common Article 3 of Geneva Conventions IV stated *inter alia*, that “...the object of the Convention is a purely humanitarian one...and that it merely ensures respect for the few essential rules of humanity which all civilised nations consider as valid everywhere and under all circumstances and as being above and outside war itself.”¹⁷³ In the commentary to each Geneva Convention, it stated that it “[r]epresent[s]...the minimum which must be applied in the least determinate of conflicts, its terms must *a fortiori* be respected in the case of

¹⁷⁰ The same author also recognises that “the number of norms fulfilling all the criteria is not necessarily very small, even if limited.” L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, (Helsinki, 1988), p. 606.

¹⁷¹ Article 53 of the Vienna Convention.

¹⁷² It is recalled that for example with regard to (1)(a), a recent decision by a Trial Chamber of the ICTY confirmed that the prohibition against torture in both times of peace and during an armed conflict constitutes a norm of *jus cogens* which is therefore non-derogable. See *The Prosecutor v. Dragoljub Kunarac et al., Judgement*, Case No. IT-96-23-T & IT-96-23/1-T, 22 February 2001, para. 466. Also, *The Prosecutor v. Zejnil Delali_ et al., Judgement*, Case No. IT-96-21-T, 16 November 1998, para. 454 and references therein. Also, T. Meron, *International Criminalization of Internal Atrocities*, 89 AJIL (1995), p. 554, at p. 571.

¹⁷³ ICRC commentary to common Article 3, in Jean Pictet, (ed.), *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, (1958), p. 44.

international conflicts proper, when all the provisions of the Convention are applicable. For ‘the greater obligation includes the lesser’, as one might say.”¹⁷⁴

The ICJ later interpreted it as follows:

Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called “elementary considerations of humanity”¹⁷⁵

Finally, the Appeals Chamber for the ICTY, most recently in a decision rendered on 20 February 2001 relied on this interpretation by the ICJ and confirmed that common Article 3 is applicable in international armed conflicts. It stated:

It is both legally and morally untenable that the rules contained in common Article 3, which constitute mandatory minimum rules applicable to internal conflicts, in which rules are less developed than in respect of international conflicts, would not be applicable to conflicts of an international character. The rules of common Article 3 are encompassed and further developed in the body of rules applicable to international conflicts. It is logical that this minimum be applicable to international conflicts as the substance of these core rules is identical.¹⁷⁶

It is therefore suggested that the principles underlying common Article 3 of the four Geneva Conventions satisfy the criteria set out above for it to be designated a norm of *jus cogens*. It lays down fundamental standards which are applicable at all times, in all circumstances and to all States and from which no derogation at any time is permitted. As was stated, it “sets forth a minimum core of mandatory rules [and], reflects the fundamental humanitarian principles which underlie international humanitarian law as a whole, and upon which the Geneva Conventions in their entirety are based. These principles, the object of which is the respect for the dignity of the human person, developed as a result of centuries of warfare and had already become customary law at the time of the adoption of the Geneva Conventions because they reflect the most universally recognised humanitarian principles.”¹⁷⁷

Finally, with regard to the Genocide Convention, the ICJ stated in its Advisory Opinion in 1951 that there could be little dispute over a finding that the crime of genocide was universally prohibited. It stated that:

[t]he origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses for humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the

¹⁷⁴ ICRC commentary to common Article 3, in for example, Jean Pictet, (ed.), *Commentary: II Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, International Committee of the Red Cross, Geneva, (1960), p. 35. This comment also appears in the commentary to the three other Geneva Conventions.

¹⁷⁵ The *Nicaragua* case, para. 218, citing the *Corfu Channel case*, I.C.J. Reports (1949), p. 22.

¹⁷⁶ The Prosecutor v. Zejnir Delali_ et al., *Judgement*, Case No. IT-96-21-A, 20 February 2001, para. 150. This Judgement confirmed the decision in: The Prosecutor v. Du_ko Tadi_, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, 2 October 1995, where the interpretation of common Article 3 in the *Nicaragua* case was accepted. The Appeals Chamber found that “at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant.” (para. 102).

¹⁷⁷ The Prosecutor v. Zejnir Delali_ et al., *Judgement*, Case No. IT-96-21-A, 20 February 2001, para. 143.

condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge’ (Preamble to the Convention).¹⁷⁸

However all *relevant* articles to the Genocide Convention save Articles 1 and 2 have reservations.¹⁷⁹ It is accordingly suggested that one can only find as being truly peremptory in nature, the principles “underlying the Convention [and] recognized by civilized nations as binding on States, even without any conventional obligation” because their denial “shocks the conscience of mankind.” Consequently, it is suggested that in terms of the Genocide Convention its provisions constitute *jus cogens* only with regard to the principles enunciated in Articles 1 and 2 of the same. Articles 1 and 2 read as follows:

Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group

8. CONCLUSION

As can be seen it is in fact difficult to identify norms of international law which can be defined truly as peremptory. Based on a strict application of the definition discussed in this article often a principle which could be *prima facie* considered as peremptory, in fact fails to satisfy all criteria. In the context of international humanitarian law, it is suggested that this task of identification is no less difficult. Although the Geneva Conventions as a whole have been described as setting forth fundamental principles of humanitarian law, nevertheless it is suggested that many of the provisions cannot *truly* be described as *jus cogens*. Based on a *strict* interpretation of the concept, it is suggested that only those principles underlying common Article 3 and as outlined above can be identified as having reached the relevant standard. Similarly, with regard to the Genocide Convention, it is suggested that only the principles underlying the convention can be truly considered peremptory in nature.

The Hague, March 2001.

¹⁷⁸ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports (1951), p. 23. See T. Meron, *International Criminalization of Internal Atrocities*, 89 AJIL (1995), p. 554, at p. 556.

¹⁷⁹ The United States has however filed an “understanding” with regard to Article 2 of the Genocide Convention.