1988

# The Nature of Jus Cogens

Mark Weston Janis
*University of Connecticut School of Law*

# THE NATURE OF *JUS COGENS**

*by Mark W. Janis***

*Jus cogens*, compelling law, is the modern concept of international law that posits norms so fundamental to the public order of the international community that they are potent enough to invalidate contrary rules which might otherwise be consensually established by states. The most notable appearance of *jus cogens* is, of course, in article 53 of the Vienna Convention on the Law of Treaties,[1] where the term is rendered in English as "peremptory norm":

> 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.[2]

The Vienna Convention further provides that: "If a new peremptory norm of general international law emerges, any existing treaty which is

---

* An earlier draft of this note was prepared as part of the work of the International Law Association (American Branch) Committee on the Formation of Customary Law on which the author serves.

** Professor of Law, University of Connecticut School of Law. A.B., Princeton University; B.A., M.A., Oxford University; J.D., Harvard University.

1. May 23, 1969, U.N. Doc. A/Conf. 39/27, U.N. Sales No. E.70.V.6 (1970), *reprinted in* 63 AM. J. INT'L L. 875 (1969).

2. *Id.* art. 53.

in conflict with that norm becomes void and terminates."[3]

Looking at the Vienna Convention, it is sometimes (but I think wrongly) presumed that *jus cogens* must be a form of customary international law, the law developed by state practice in international relations and by implicit state consent. For example, the Restatement of the Foreign Relations Law of the United States (Revised) opines that *jus cogens* "is now widely accepted . . . as a principle of customary law (albeit of higher status)."[4] To base this conclusion on the definition of "peremptory norm" in the Vienna Convention, one must make a number of assumptions: 1) that despite the limitation "[f]or the purposes of the present Convention," the provision can be generally applied to international law; 2) that there is an equivalence between the term "peremptory norm" and the term "*jus cogens*"; and 3) that there is a further equivalence between the term "general international law" and the term "customary international law." Putting aside the first two assumptions (I have no problem at all with the second) it strikes me that the third is insupportable.

The central problem with equating "general international law" and "customary international law" is, I think, that customary international law is by its very nature not an apt instrument for the development of non-derogable rules, norms with a potency superior even to treaty rules. As usually conceived customary international law is the weak sister of conventional international law. Both are based on state practice, but treaties show the practice explicitly in the form of written rules, while the rules of custom must be drawn awkwardly from the various evidences of state diplomacy or pronouncements. Both treaty and custom are grounded on the idea of agreement. Here again, treaties are stronger, since consent is shown by a ratification process, while the consensual foundations of custom must be demonstrated more uncertainly by expressions of the law-like character of the rules, the vague notion of *opinio juris*. That any form of customary international law can be said to be so firmly rooted that it can be employed to prospectively repudiate subsequent treaty rules is, I think, a proposition that makes nonsense of the usual theory of customary and conventional international law.[5]

---

3. *Id.* art. 64.

4. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised) § 102 reporter's note 6 (Tent. Draft No. 6, 1985).

5. I more fully explore the nature of customary international law in M.W. JANIS, INTERNATIONAL LAW 35-46 (1988).

It is more reasonable, I think, to understand the Vienna Convention's term "general international law" to signify not customary international law, but rather, and more precisely, those non-derogable rules described in the text of the Vienna Convention itself. We are thus saved the improbable task of elaborating two sorts of customary international law: the one making ordinary consensual rules, the other creating rules with a permanence which even treaties cannot supersede. The term "customary international law" could have been employed in article 53, but was not. The special definition of *jus cogens* as a peremptory norm in the Vienna Convention takes the concept out from the bounds of customary international law and gives it its own character and essence.

The distinctive character essence of *jus cogens* is such, I submit, as to blend the concept into traditional notions of natural law. Such a blending makes sense both historically and functionally. Historically, it is significant that the proponents of the idea of peremptory norms invalidating treaty rules were, in no small measure, reacting to the abuses of Nazism during the Second World War.[6] They rejected the positivist proposition that state acts, even the making of treaties, should be always thought capable of making binding law. Verdross, one of *jus cogens*' earliest advocates,[7] explained that the concept of *jus cogens* was quite alien to legal positivists, but "[t]he situation was quite different in the natural law school of international law."[8] Natural lawyers were ready to accept "the idea of a necessary law which all states are obliged to observe . . . , [that is, an] ethics of the world."[9]

When the first drafts of what were to become the Vienna Convention's peremptory norm provisions were introduced in the International Law Commission by Lauterpacht in 1953, he made a clear distinction between the new notion, as yet untermed, and customary international law: "the test was not inconsistency with customary international law pure and simple but inconsistency with such overriding principles of international law which may be regarded as constituting principles of international public policy."[10] And as Schwelb noted, though the term *jus cogens* may be new, "the concept of an international *ordre public*

6. *See* E. JIMÉNEZ DE ARECHAGA, EL DERECHO INTERNACIONAL CONTEMPORANEO 79 (1980).

7. *See* Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571 (1937).

8. Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55, 56 (1966).

9. *Id.*

10. Schwelb, *Some Aspects of International* Jus Cogens *As Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946, 949 (1967).

has been advocated for a very long time."[11] *Jus Cogens* is a legal emanation which grew out of the naturalist schooi, from those who were uncomfortable with the positivists' elevation of the state as the sole source of international law.

Functionally, a rule of *jus cogens* is, by its nature and utility, a rule so fundamental to the international community of states as a whole that the rule constitutes a basis for the community's legal system. Perforce and per article 53, a rule of *jus cogens* is ordinarily nonderogable and invalidates subsequent norms generated by treaty or by custom, that is, by the ordinary consensual forms of international legislation. Thus it is a sort of international law that, once ensconced, cannot be displaced by states, either in their treaties or in their practice. *Jus cogens* therefore functions like a natural law that is so fundamental that states, at least for the time being, cannot avoid its force.

Partly because of its perceived potency, a peremptory norm is even more difficult to prove and establish than a usually controversial rule of customary international law. In the *North Sea Continental Shelf* cases, the International Court of Justice explicitly put itself on record as not "attempting to enter into, still less pronounce upon any question of *jus cogens*."[12] There seems to be no example in modern international practice of a treaty being voided by a peremptory norm.[13]

Nonetheless, there have been frequent assertions by states and others that certain principles of law are so fundamental as to be considered *jus cogens*. For example, there are the principles of articles 1 and 2 of the Charter of the United Nations, which guarantee the sovereignty of states. Some human rights, too, are claimed to be protected by rules of *jus cogens*.[14]

Probably no rule better fits the definition of a norm of *jus cogens* than *pacta sunt servanda*, for it is essential to the theory of both conventional and customary international law that contracts between states be legally binding. However, it is difficult to understand how the obligatory force of agreements can be attributed to either treaty or custom without making a circular argument. If either a treaty or a customary rule be said to impose the rule *pacta sunt servanda*, why should that

---

11. *Id.*

12. North Sea Continental Shelf Cases (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 4, 42 (Judgment of Feb. 20).

13. *See* Gaja, Jus Cogens *Beyond the Vienna Convention*, 172 HAGUE RECUEIL 271, 286-89 (1981).

14. *See* Robledo, *Le* jus cogens *international: sa génese, sa nature, ses fonctions*, 172 HAGUE RECUEIL 9, 167-87 (1981).

treaty or customary rule be valid unless it relied upon that very rule of legal obligation that is itself at issue?

It makes much better sense to argue that the *pacta sunt servanda* rule is neither a rule of conventional or customary international law, but rather a norm fundamental to the legal system from which both treaty and customary rules derive. Indeed, it might do to conceive of the *pacta sunt servanda* norm as just the kind of non-derogable rule described as a peremptory norm in the Vienna Convention. In effect, this compelling law, *jus cogens*, is not a form of customary international law, but a form of international constitutional law, a norm which sets the very foundations of the international legal system.

In a sense, *pacta sunt servanda* rules may be seen to be a form of natural law if we take an organic view of the term "natural." A rule such as *pacta sunt servanda* is natural to the international community of states because there would be no such community without such a rule. The norm is intrinsic to the very existence of the given community. This does not mean that the rule is one prescribed by nature to every community or every legal system or to any given community's legal system at any given time. Rather, the word "natural" has to do with the organic or constitutional aspect of the rule: that it concerns the fundamental order of the community and its legal system.