The formal source of ius cogens in public international law

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The Formal Source of *Ius Cogens* in Public International Law

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I. The Views Expressed in Doctrine

In dealing with a subject matter such as this one, it is good and proper, *primo quaeritur*, to follow the Aristotelian method of setting out the views of others before putting forward one’s own. Alas, a thorough examination of these views, almost exclusively found in doctrinal writings, reveals most of them to be ill-considered, and more still to be controversial. They are ill-considered, insofar as the fundamental considerations of substance (or material content) of peremptory norms seems to have consigned the question of their formal source to a few rash, or even worse, shallow *obiter dicta*. Moreover, controversy stems from an impressive proliferation of articles dealing with *ius cogens*, yielding a wide array of opinions on the matter. Indeed, given the three primary sources listed in Art 38 para 1 of the Statute of the International Court of Justice (hereinafter, “the Statute”) and all the mathematical combinations thereof, arguments in support of seven out of the eight possible solutions can be traced.

A. Some authors contend that *ius cogens* requires a new, *sui generis* source. Monaco\(^1\) reaches this conclusion by applying hierarchical thinking: the universal character and strict conditions of derogation that serve to distinguish peremptory norms would presuppose the acquisition of this superior nature from their inception, and consequently through different means than other rules of international law. True for treaty and custom, this applies *a fortiori* to the general principles of paragraph 1 (c), seen as playing a subsidiary role in the general scheme of Art 38.

For Onuf/Birney\(^2\), *ius cogens* is the result of an original consensus to that effect. Hence, it can only be articulated in multilateral conferences bringing together the international community as a whole, since one would be hard pressed to find the necessary meeting of minds elsewhere. This approximates the concept of an international legislative function: the emphasis placed on the role of *opinio* (manifested here as an “instant law”) over *diurnitas* recalls that laid on recognition of the norm as having a peremptory character, stressed in Art 53 of the 1969 Vienna Convention on the Law of Treaties (hereinafter, “the Vienna Convention”).

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While Janis seems to ground *ius cogens* directly in natural law, Christenson, who also relies on the notions of hierarchy and originating consensus, calls upon an autonomous source without specifying how this new source might operate.

B. Others, like Asamoah, Cabier, Ronzitti, Thierry, or Thirlway, indirectly Ago, Diaconu, Fois, or Sztucki, and implicitly Conforti, would acknowledge custom as the sole available source of peremptory norms. Still others, such as Brownlie, Charles de Visscher, Paul or

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4 Christenson, *Ius Cogens: Guarding Interests Fundamental to International Society*, 28 Virginia Journal of International Law (1988) 592, 595. He speaks of “overriding community norms” as opposed to “uncoordinated, disparate rules of conduct derived from treaty and customary law”, in effect leading to “two different normative systems”. (On the whole, Christenson is very critical of the notion of *ius cogens*).
7 Ronzitti, La disciplina dello *Ius cogens* nella Convenzione di Vienna sul diritto dei trattati, 15 Comunicazioni e Studi (1978) 241 et seqs.
10 Yearbook of the International Law Commission (1965) 75 para 23.
11 Diaconu, Contribution à une étude sur les normes impératives en droit international (1971) 100.
15 Brownlie, *Principles of Public International Law* (1990) 513: “They are rules of customary law ...”.
16 Ch. de Visscher, Positivismus et *Ius Cogens*, 75 RGDIP (1971) 8 et seq. It seems uncertain that multilateral treaties are here excluded: “Constituent par excellence le droit international général les normes coutumières ...” (8).
Reuter\textsuperscript{18}, speak of a customary base without allowing us to determine if, in so doing, they intend to exclude all other possibilities. At the Vienna Conference on the Law of Treaties (hereinafter, “the Vienna Conference”), this stance found the support of Italy\textsuperscript{19} and, most probably, of France\textsuperscript{20} as well.

C. While a majority of authors ground \textit{ius cogens} in either convention or custom, it is often difficult to know whether the silence surrounding the “general principles of law” implies their rejection outright, or whether it simply means that no conclusion has been reached on that point. Among those who expressly cast them out are Akehurst\textsuperscript{21}, Puceiro Ripoll\textsuperscript{22}, Rozakis\textsuperscript{23}, Shaw\textsuperscript{24}, Virally\textsuperscript{25} and, in a murkier fashion, Ziccardi\textsuperscript{26}; the general views of Aleksidze\textsuperscript{27}, Tunkin\textsuperscript{28} or Verzijl\textsuperscript{29} on sources implicitly leave no

\textsuperscript{18} Reuter, Introduction au droit des traités, Armand Collin (1972) 139: “La Convention de Vienne a donné cependant une indication favorable à la naissance coutumière, en ayant introduit la précision suivante: il s’agit d’une norme ‘acceptée et reconnue par la communauté internationale des États dans son ensemble’ ... Il s’agirait donc d’une coutume dans laquelle l’\textit{opinio juris} présenterait un caractère particulier ...”.


\textsuperscript{21} Akehurst, A Modern Introduction to International Law\textsuperscript{4} (1982) 41; Akehurst, The Hierarchy of the Sources of International Law, 47 BYIL (1974) 283.

\textsuperscript{22} Puceiro Ripoll, Desarrollos actuales del ius cogens: el fantasma rompe su hechizo, 3 Rev Uruguaya de derecho internacional (1974) 65 et seq.

\textsuperscript{23} Rozakis, The Concept of Ius Cogens in the Law of Treaties (1976) 22, 58: “By definition, a general principle of law is not a norm. It is a general statement induced from or giving rise to a number of rules of law; but it is not itself a norm in the sense that it has no legally binding character as such”.

\textsuperscript{24} Shaw, International Law\textsuperscript{2} (1986) 95: “It is also clear that only rules based on custom or treaties may form the foundation of \textit{ius cogens} norms”.


\textsuperscript{26} Ziccardi, Il contributo della Convenzione di Vienna sul diritto dei trattati alla determinazione del diritto applicabile della Corte internazionale di Giustizia, 14 Comunicazioni e Studi (1975) 1064 et seq.


\textsuperscript{28} Tunkin, Theory of International Law (1974) 138; ILC Yearbook 1963, 69 para 26. On his conception of sources: Tunkin, Theory of International Law 91 et seqs, 199: “One must say very definitely that normative principles which would be common to the two opposed systems of law, socialist and bourgeois, do not exist”.

\textsuperscript{29} Verzijl, International Law in Historical Perspective, vol I (1968) 85: “Such peremptory character can attach to customary as well as to treaty law”, to be read jointly with pp 60–63, where he assimilates general principles to the conventional or customary source.
place for them; while Andrassy\textsuperscript{30}, Cassese\textsuperscript{31}, Elias\textsuperscript{32}, Geamanu\textsuperscript{33}, Haraszti\textsuperscript{34}, Jacqué\textsuperscript{35}, Jiménez de Aréchaga\textsuperscript{36}, McNair\textsuperscript{37}, Menzel\textsuperscript{38}, Meron\textsuperscript{39}, Morelli\textsuperscript{40}, Nguyen Quoc Dinh/Daillier/Pellet\textsuperscript{41}, Ruda\textsuperscript{42}, Sinclair\textsuperscript{43} or Yasseen\textsuperscript{44} do not mention them at all in this context. At the Vienna Conference, Trinidad & Tobago\textsuperscript{45}, voiced an opinion specifically excluding general principles from consideration.

D. Some eminent publicists would only accept custom and general principles of law as possible sources. They are Dahm\textsuperscript{46}, Mann\textsuperscript{47}, Mosler\textsuperscript{48} and Barberis\textsuperscript{49}, the latter two ruling out multilateral treaties expressis verbis. That was also the view taken by the Federal Republic of Germany\textsuperscript{50} at the Vienna Conference. Those who opt for this solution think that only

\textsuperscript{30} Quoted from Lagonissi (footnote 5) 46.
\textsuperscript{33} Geamanu, Jus Cogens en droit international contemporain, 11 Revue roumaine d'études internationales (1967) 62 et seq.
\textsuperscript{34} Haraszti, Some Fundamental Problems of the Law of Treaties (1973) 320.
\textsuperscript{35} Jacqué, Éléments pour une théorie de l'acte juridique en droit international public (1972) 157: "Le plus souvent, ces normes impératives trouveront leur origine dans les traités multilatéraux généraux ... la norme impérative peut également être d'origine exclusivement coutumière".
\textsuperscript{36} Jiménez de Aréchaga, Cours général de droit international public, 159 RCADI (1978) 66.
\textsuperscript{37} McNair, The Law of Treaties (1961) 215: "They are rules which have been accepted, either expressly by treaty or tacitly by custom, as being necessary ...".
\textsuperscript{38} Menzel, Völkerrecht (1962) 106.
\textsuperscript{39} Meron, On a Hierarchy of International Human Rights, 80 AJIL (1986) 17.
\textsuperscript{40} Morelli, A proposito di norme internazionale cogenti, 51 Rivista di diritto internazionale (1968) 110: "Non solo le norme consuetudinarie o comunque appartenenti ad una categoria sovraordinata rispetto a quella delle norme create da accordi, ma anche norme appartenenti a quest'ultima categoria possono essere di 'diritto internazionale generale' nel senso dell'articolo 50 [today Art 53] ed avere quindi il carattere di norme imperative".
\textsuperscript{41} Nguyen Quoc Dinh/Daillier/Pellet, Droit international public\textsuperscript{3} (1994) 202.
\textsuperscript{42} Ruda in Lagonissi (footnote 5) 87.
\textsuperscript{44} Yasseen in "L'élaboration du droit international public", Colloque de Toulouse, SFDI (1975) 207.
\textsuperscript{45} Conference (footnote 19) 355.
\textsuperscript{46} Dahm, Völkerrecht, vol I (1958) 17.
\textsuperscript{47} Mann, The Doctrine of Jus Cogens in International Law, Mélanges Scheuner (1973) 401: "This requires a custom ... or a general principle of law".
\textsuperscript{48} Mosler, Jus Cogens im Völkerrecht, 25 Swiss Yearbook of International Law (1968) 30, 38.
\textsuperscript{49} Barberis, La liberté de traiter des États et le jus cogens, 30 ZaöRV (1970) 44.
\textsuperscript{50} Conference (footnote 19) 319 para 33.
custom and general principles can embody rules of general international law, as opposed to treaty law, specifically created by, and designed for the members of the conventional community.

E. Other jurists no less qualified, bearing in mind a small number of principles to be found at the top of the hierarchy, would grant status only to those general principles of law. This approach, made fashionable during the inter-War by Härle and von der Heydte, later became that of Jaenicke, Miaja de la Muela, Quadri and Reimann.

F. Some "deniers" of ius cogens would only and at the most allow for its existence in rules binding solely inter partes, i.e. on a strict conventional basis. The theoretical underpinnings here are not those of a general traié­loi, but that of particular law, strictly limited in its field of operation. The main proponent of this view is Schwarzenberger.

G. The following authors would regard all three primary sources, i.e. treaty, custom and general principles of law, as capable of generating peremptory norms: Alston/Simma, Amerasinghe, Paul de Visscher.

51 Härle, Les principes généraux de droit et le droit des gens, 16 RDILC (1935) 680: "... il existe aujourd'hui déjà dans le droit des gens un certain nombre de principes généraux de droit qui ont acquis une valeur tellement absolue et indiscutable que les États ne peuvent plus élaborer de normes qui leur soient opposées".

52 Von der Heydte, Glossen zu einer Theorie der allgemeinen Rechtsgrundsätze, Die Friedenswarte (1933) 297.

53 Jaenicke, Zur Frage des internationalen ordre public, Berichte der Deutschen Gesellschaft für Völkerrecht (1967) 91. This author admits also a ius cogens on the level of more concrete norms (Sachnormen); this particular ius cogens may emanate from custom, treaty or general principles (90).

54 Miaja de la Muela, Ius cogens y ius dispositivum, Mélanges Legaz y Lacambra II (1960) 1141.

55 Quadri, Diritto internazionale pubblico (1968) 109.

56 Reimann, Ius cogens im Völkerrecht (1971) 57: "Es gibt zwingendes Recht nur im Rahmen der allgemeinen Rechtsgrundsätze".

57 Schwarzenberger, International Law as Applied by International Courts and Tribunals, vol 1 (1957) 427; also Lagunissi (footnote 5) 88, 100, 103, where he admits the possibility of a customary ius cogens, but claims to have found no trace of it in an unstructured international society (103). The same argument is used against general principles (100). See also Schwarzenberger, International Ius Cogens? 43 Texas Law Review (1964) 455 et seqs. Even if admitting customary-based ius cogens, Schweitzer, Ius cogens im Völkerrecht, 15 ArchVR (1971) 222 et seq privileges their formation by treaty.


59 Amerasinghe in Lagunissi (footnote 5) 96 et seq.

60 P. de Visscher, Cours général de droit international public, 136 RCADI (1972) 107. He does not explain the reasons for this choice.
Gomez Robledo, Guggenheim/Marek, Hannikainen (if in a very restrictive way for general principles), Kadelbach, Nahlik, Saladin, Seidl-Hobenveldern, Suy, Teneides, Wolfke, Verdross/Simma, or Verdross himself (with due regard for the evolution in his views, and for the often imprecise quotes used to buttress his arguments). Allowing for a small reservation with which we shall deal more extensively later on, the present author also belongs to this category.

H. The only possible combination left, that of treaty and general principles of law, seems to have found no support in doctrine. Our research has so far yielded no advocate for this particular option. This should come as

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64 Kadelbach, Zwingendes Völkerrecht (1992) 182 et seqs, esp 189.
65 Nahlik in Lagonissi (footnote 5) 97.
68 Suy in Lagonissi (footnote 5) 74 et seq.
69 Teneides in Lagonissi (footnote 5) 112.
70 Wolfke, Jus Cogens in International Law, 6 Polish Yearbook of International Law (1974) 151 et seqs.
72 Verdross, Forbidden Treaties in International Law, 31 AJIL (1937) 572 et seq, where he admits a customary base as well as that of general principles; also Verdross, Jus Dispositivum and Jus Cogens in International Law, 60 AJIL (1966) 61: “A norm having the character of ius cogens can practically be created only by a norm of general customary law or by a general or multilateral convention”. However, one must not be misled by this sentence, like many authors have been. Verdross never departed from his acceptance of the concept of imperative general principles (such as the nullity of treaties contra bonos mores) binding in all cases. In the above quoted sentence, he speaks only of the voluntary creation of other peremptory norms, since in his view general principles are neither created nor voluntary. See also, to the effect that ius cogens norms may emanate from custom, treaties or general principles, Yasseen, L’élaboration du droit international public, Colloque de Toulouse (1975) 206 et seq; Mann, The Doctrine of Jus Cogens in International Law, Essays in Honour of Scheuner (1975) 401; Nicoloudis, La nullité de jus cogens et le développement contemporain du droit international public (1974) 150.
73 See infra III.B.
no surprise, since the two most controversial sources in our context are paired here, while the more generally accepted one is left out.

Faced with this vast array of opinions, we are tempted to reiterate as a starting point the query of Saint Thomas Aquinas: "Quaeritur utrum sit tantum una veritas...?"74 In so doing, we shall thereafter take the view that any exclusion of an existing formal source should find a satisfactory justification. Hence, we shall first examine in turn the various arguments brought against any and all possibilities.

II. The "Sophist's Refutations": a critique of the arguments raised against various formal sources potentially apt to carry ius cogens norms

A. The Question of a Source sui generis

1. From his finding that treaty and custom are hierarchically equal in international law,75 Monaco76 concludes that ius cogens, understood as norms of a higher value on the hierarchical scale, necessarily requires a specific source, dedicated to express formally this superiority of substance. Since a norm's rank or value in the hierarchy is here conferred through its source, the hierarchical concept must be seen as directly normative. It directly creates the source needed for the norms in question.

   It seems that this reasoning is rooted in erroneous premises. The postulate that hierarchy can only establish itself through the source and not through the norm proper, or in other words, that this hierarchy necessarily rests outside rather than within the norms, seems wrong. Indeed, it is possible to see in ius cogens, understood as a special category of norms, an exception to the principle of hierarchical equality between treaty and custom. Conventional or customary ius cogens rules would be superior to ordinary rules flowing from the same sources exclusively by their special character of peremptory norms rather than by their formal source. In other words, hierarchy is not necessarily linked to the question of the formal source. Normative hierarchy can often be found within the rules of one single source, this being the very essence of the generally known area of conflict of norms. Thus, for instance, Art 103 of the Charter

74 Saint Thomas Aquinas, De Veritate, q.1, a.4, beginning: "Quaeritur utrum sit tantum una veritas quia omnia sunt vera".
75 On this, see e.g. Akherst, The Hierarchy of the Sources of International Law, 47 BYIL (1974/5) 273 et seqs; also Brownlie (footnote 15) 3 et seq.
76 Monaco (footnote 1) 606 et seqs.
of the United Nations establishes its own superiority over other international agreements.

More generally, some form of hierarchy is necessary between the norms of international law but not, as an *a priori*, between its sources. If such was not the case, conflicts of norms would remain insoluble. Hierarchical value is then often to be found in the norm itself, rather than in the source of the norm. Since this is true of particular norms, taken individually, one cannot see why the same conclusion should not apply to a whole category of dedicated norms such as *ius cogens*. On this last point, one should keep in mind that a norm's peremptory character relates to its material "content", not to the formal "container" or support that carry it. The preceding reasoning is especially true in international law where the formal sources as such are largely devoid of a pre-established hierarchical order.

2. One must concede to Onuf/Birney that an original, widespread consensus, formulated in the context of an international conference, can, independently of any other formal process, give rise to *ius cogens*. Nevertheless, it is hard to see why any other means by which consensus can be expressed in the international community, such as treaty or, more limitatively, custom, should not be able to serve the same purpose.

3. The view that finds *ius cogens* rooted directly in natural law as a direct source of law stems from a regrettable misconception of the concept, and leads on a slippery slope. The role of the jurist is to apply norms, termed "juridical" because of their consecration as positive law through the sources of a legal system.

It is of course possible to contend that the material origin of *ius cogens* (or at least of the highly moral rules so often given as an example of it) is natural law. This is another matter entirely. Still, that is nothing particular to *ius cogens*.

Natural law doctrine seems the only acceptable theoretical basis founding legal obligation in its very core. Yet the supra-positive (*über-positiven*) norms *iure naturali* are, in general, factors that should inspire the decisions of a given legislator; they are less directly controlling in legal terms. They serve as the basis of the system, a system that by definition can only be grounded in an external element, both heteronomous and ontolog-

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77 See infra III.A.a.
78 Onuf/Birney (footnote 2) 193 et seqs.
79 See infra III.B.
80 See supra text and footnote 3.
ical, able to guarantee its minimal axiological unity. By virtue of their high level of abstraction, itself due to their overarching supremacy, these super-norms are often condemned to the role of a general delineating frame. As such, they can only rarely determine concrete solutions: to be complete, they call upon the action, and thus the freedom of Man. One is again reminded here of Saint Thomas Aquinas and his “analogia entis”\textsuperscript{81}, proceeding from the idea that the divine essence can be found in all the beings of Creation, albeit in varying levels of intensity. One can picture a large pyramid, where the abstract \textit{essentia}, even as it gets progressively weaker as one moves downwards on the structure’s degrees (i.e., towards higher levels of “concrete realisation”), provides the whole system with its unity and axiology. All references to God put aside, this is a fairly good representation of the juridical normative system. All its norms must tend towards the \textit{bonum commune} for it alone can provide a real basis of obligation and not only of constraint; metaphorically speaking, the mathematical sign of the norms must be positive. Evaluating the common good is a human endeavour: it is therefore incomplete, relative, and always in progress. The legal norm is essentially formal, for its content must be determined and validated by an act granting it positive value. Yet it has a “material” dimension that emanates from its participation in the supreme normative values and that densifies itself more it moves upward the described pyramid. This is so because law is at the same time a value and a positive fact. Thus, constitutional norms or general principles are more value-oriented than more specific, technical rules. It is at this highest points that natural law can seek normative incarnation. It then touches to the aspects that transcend human subjectivity to attain certain, absolute value. Where else for instance can we put categories like the prohibition of genocide? When a positive rule attempts to derogate from that exclusive purview, that \textit{domaine réservé} of objective justice, it is nullified by the norm of natural law. Interestingly enough, the modern doctrine of human rights seems to have adopted a similar conceptual frame, distinguishing a formal normative periphery from a material hard core being absolutely inderogable when limitations of individual freedoms occur (\textit{Wesensgehalt})\textsuperscript{82}. The norm that contravenes the lowest axiological denominator common to the whole legal order may still be applied for a time: that does not deter from the fact that it has in our view effectively cast itself out of that order, that it has become non-law. If human conscience can persist in

\textsuperscript{81} Saint Thomas Aquinas, \textit{Summa theologica} I, 13, 5.
\textsuperscript{82} E.g. von Hippel, Grenzen und Wesensgehalt der Grundrechte (1965); Haebel, Die Wesensgehaltsgarantie des Art. 19 Abs. 2 GG\textsuperscript{2} (1972); J. P. Müller, Elemente einer schweizerischen Grundrechtstheorie (1982) 141–155.
error for a while, a legal order cannot do so without sacrificing its coherence.\textsuperscript{83}

One can see how this perception of natural law, linking freedom, will and necessity, manages, contrary to the blame often put upon such doctrinal constructs, to respect all the polychromatic qualities of reality. Hence, natural law in its direct applicability is, in this author's view, a "state of necessity" law rather than a "daily management" law. Far from replacing the formal sources, it provides the farthest and absolute limits to the flexibility of the substance they shape. This explains why the opinion of those who, in rather muddy fashion, seem to base \textit{ius cogens} directly on natural law, as a formal source \textit{sui generis}, cannot be sustained.

4. In neither the International Law Commission nor the Vienna Conference was a similar line of reasoning including resort to a separate source for \textit{ius cogens} ever entertained. Most of the experts and delegates relied instead

\textsuperscript{83} On all these points, see chiefly the essential contributions of \textit{Radbruch, Rechtsphilosophie} (1973) 339 et seqs ("Der Konflikt zwischen der Gerechtigkeit und der Rechtssicherheit dürfte dahin zu lösen sein, dass das positive, durch Satzung und Macht gesicherte Recht auch dann den Vorrang hat, wenn es inhaltlich ungerecht und unzweckmässig ist, es sei denn, dass der Widerspruch des positiven Gesetzes zur Gerechtigkeit ein so unerträgliches Mass erreicht, dass das Gesetz als 'unrichtiges Recht' der Gerechtigkeit zu weichen hat", 345); and \textit{A. Kaufmann, Rechtsphilosophie im Wandel} (1984) esp 7 et seqs, but generally all the opus. In international law, \textit{Salvioli, Les règles générales de la paix}, 46 RCADI (1933) 15, writes: "si un traité existe et règle une matière donnée, il faut l'appliquer, même s'il eut été préférable que la matière soit réglée par des règles plus proches de la justice, à moins que le contraste avec les normes fondamentales de la justice ne soit accusé au point qu'il convienne de faire prévaloir le principe de justice violé par le traité, sur le principe du respect des pactes". This idea goes back to greco-roman philosophy, having been defended by \textit{Aristotle, the Stoics, Cicero and Seneca}. They fought the opinion of \textit{Carneades} and the Epicurians, according to whom justice was merely a human thing, based upon a convention between men trying to follow the lessons of practical experience. The naturalists upheld the existence of a higher concept of justice, that they claimed identical to natural law as dictated by right reason, the \textit{recta ratio}. This law was seen as eternal and immutable. If peoples and princes should enact positive laws contrary to the supreme norms that predate any political community, these laws, while not losing their formal legal quality, could not be construed as real law, or \textit{ius} ("Neque opinione sed natura esse ius", \textit{Aristotle, Nichomachean Ethics}, 1134 b, 1, 2. See also \textit{Sophocles' Antigone}; \textit{Cicero, De legibus}, 1, 10; 1, 14–16. \textit{De republica}, 3, 11; 3, 12; 3, 19; 3, 22; \textit{Seneca, Letters to Lucilius}, 4, 12; 22, 1). Those ideas will be integrated in Christian philosophy: see e.g. \textit{Saint Augustine, De libero arbitrio}, 1, 15 P.L. 32, 1229; 1, 5, 11 P.L. 32, 1227; \textit{Enarrationes in psalmos}, 145, 15, P.L. 37, 1894: "Nec ius dicendum est si iniustum est ..."; \textit{De civitate Dei}, IV, c 4; and \textit{Saint Thomas Aquinas, Summa theologica}, II, 1, 95, 2 \textit{(loca corrupta)}. This idea, even when reduced in scope, has always lied at the heart of natural law doctrines. This century has taught us how unavoidable it can be (even if it appears awkward), if only through the rise of Hitlerism.
on conventional or customary means. This should serve as a reminder that *ius cogens* is at heart a matter of substance, not of source.

**B. Custom**

_Sed contra_: Custom is the most commonly accepted source of *ius cogens*. The rare authors who reject it rely again on a hierarchic argument, hinging upon the supremacy of general principles of law. Reimann or von der Heydt for whom only general principles can produce *ius cogens*, start from the correct assumption that some general principles are absolute and superior to custom or treaty rules. Among those we find "*pacta vel consuetudo sunt servanda*", or, more generally, the essential conditions of validity of treaties and custom which must pre-exist them if one is to avoid falling into a circular argument. The essential conditions on acquisition of international legal personality are also superior to ordinary treaty and customary rules if one is to avoid once again circular reasoning. For this authors, similarly, neither treaty rules nor custom (because of the requirement of *opinio iuris*) can derogate from the principle prohibiting obligations _contra bonos mores_ or good faith. Such are the hierarchically supreme principles through which one can gauge what type of derogations are allowed by treaty or custom. Therefore, peremptory norms can only emerge out of this superlative source, since the submission of a body of norms labelled "imperative" or "peremptory" to a superior one, able to restrict it, would be unthinkable. One would be facing a contradiction in terms.

_Respomio_: Almost all of these and like claims predate the Vienna Conference, lessening their relevance to the further evolution of the question. From the outset, this line of argument may appear unimpeachable, for one who believes the premises to hold true; nevertheless, one must come to the conclusion that it partakes of the logical error of incorrectly transposing from one plane to another.

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84 See infra III.A.a and footnote 141.
85 See supra I.E.
86 See Quadri, *Cours général de droit international public*, 113 RGADI (1964) 350.
87 Such is not the case for Moser (footnote 48) 30, or for Schuenen, *Conflict of Treaty Provisions with a Peremptory Norm of General International Law and its Consequences*, 27 ZaöRV (1967) 525 et seq, who limit the the scope of general principles by distinguishing them completely from the structural rules necessarily presupposed in a legal order (*Funktionsnormen*), such as *pacta sunt servanda*, good faith, equity, etc. For them, these norms are logically and hence, pre-juridically binding, touching upon the famed point of Archimedes. This is all in the end a matter of terminology.
The alleged incapacity of an "inferior" source to carry *ius cogens* does not follow from the hierarchic argument, for the problem is not one of hierarchy nor of production of norms (hence a "sources problem"), but one of collision of norms. Hierarchy is a matter of precedence. It does not alter the intrinsic character or qualification of norms. The eventualty of a conflict of peremptory norms does not suffice to disqualify their normative nature. It should lead one to search for a casuistic solution, accommodating the conflicting norms by differentiating their sphere of application. An affirmation to the contrary would be akin to a statement that, in domestic law, peremptory rules cannot be enacted by laws, because the Constitution is hierarchically superior to laws. But supreme rank and peremptory character are not synonymous.

In fact, universal norms expressing *ius cogens* in international law very often convey moral contents, contents which would make a collision with general principles highly unlikely. Moreover, we have seen how the system's normative hierarchy is a matter of substance rather than of sources. General principles, limited in number as well as in scope, can accommodate a wide array of norms either compatible with them or operating in fields that they do not regulate. They are that much less predestined to exclude peremptory norms at other levels that they themselves tend to crystallise their essence in fields other than their own through conventional or customary means. To find against custom, especially on the strength of the superior value of general principles, does not strengthen the international public order. This is quite paradoxical, since authors who defend this position are of a school of thought that would, on the contrary, put this policy goal at a premium.

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88 Dahm (footnote 46) 17, and von der Heyde (footnote 52) 296 et seq, claim that a real conflict between custom and general principles is not possible. Custom requires *opinio iuris* to accompany the material action. Such *opinio iuris* cannot aim to depart from a rule deemed necessary to a legal order: law cannot contradict itself. Thus, a practice contrary to such a principle would be either impossible (e.g. abolition of the rule *pacta sunt servanda* through a convention, which would, by way of contradiction, represent a logical impossibility — not to be confused with a simple violation of the principle), or non-customary by lack of *opinio iuris* (Rechtsüberzeugung). Von der Heyde speaks in such a case of "gewohnheitsmässiges widerrechtliches Verhalten der Staaten" (297). This view brings a strong element of Sollen in the definition of custom, usually seen more in terms of sociology. The presupposed element inherent to this doctrine is that *opinio iuris* is characterized by an objective element of conformity with certain primary legal rules (emphasizing the "iuris"), not merely by the observation of convictions and effective practice (emphasizing the "opinio"). In this view, essence comes before existence, by opposition to the traditional approach which places existence before essence, and qualifies it *a posteriori*.

89 See supra II.A.a.
Having put to rest this objection, we can consider, *prima facie*, that custom is an acceptable formal source of *ius cogens*.

C. Multilateral Treaties

1. On the conventional side, one must distinguish two situations. First, the possibility of creating *ius cogens* norms by a universal multilateral treaty; this we will now examine. Second, the possibility of existence of a particular or regional *ius cogens* since it will often be embodied in a convention between a limited number of states (regional custom not being neglected); to this we shall revert later.90

2. *Sed contra:* The main stumbling block of the recognition of conventional *ius cogens* is the relativity of treaties *ratione personae*. By virtue of the principle *res inter alios acta*, treaties could only ever create law restricted to a defined community, and never general international law.91 Then, the terms "general international law", as they figure in Art 53 of the Vienna Convention, would arguably refer exclusively to customary law.92 This approach also suggests an apprehension towards imparting a "legislative function" to such multilateral instruments, especially if one sees them as able to generate binding treaty commitments for third-party states.

*Responsio:* The most obvious objection to this assertion is that one can envisage a truly universal treaty, literally bringing together all states.93 But no treaty, not even the Charter of the United Nations, has ever attained this perfect level of acceptance.94 Of course, the "constitutional" principles embodied in the Charter have been accepted by all, but that argument is not decisive, since such principles then belong to the province of customary law.

The main point is that this is again a *petitio principii*. One poses first that *ius cogens* must belong to general international law, then deduces

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90 See infra IV.


92 A view justly criticized by *Caliphoti*, L'extinction et la suspension des traités, 134 RCADI (1971) 522.

93 *Barberis* (footnote 49) 45 accepts the treaty as a valid bearer of peremptory norms solely in this theoretical case.
therefrom that treaties cannot serve as a source of such law, with the analysis of such "inherent" inability to produce general norms going no further than grammatical, or indeed tautological exegesis. This _parti pris_ will become even more questionable if one considers the depth of the doctrinal debates dealing with potential exceptions to the principle of relativity. This shows that the principle of relativity is far from being absolute or even logically necessary. An _a priori_ conception of the treaty as a means able to produce only "special law" is ill-adapted to the international order, where law-givers and subjects are the same entities. From this stems the problem of producing general law in the international society. Total exclusion of the treaty would be tantamount to rendering absolutely impossible the creation of voluntary general international law. Such a course would be of doubtful value, given the primary importance of the conventional process, and of codification in particular, in the management of contemporary world affairs. As long as the question is put in terms of relativity, a comprehensive answer remains out of reach.

What really counts is the effect the norm created has on states, rather than the effect of the source _per se_. It should not be forgotten that if universal custom is said to be binding upon all states, its normative elaboration will not require the participation of each and every one of them. It even knows a constraint which, if not akin to the rule _pacta tertiis nec nocent nec prosunt_, is not to be neglected nevertheless: the exception of the persistent objector. In that sense, it is not necessarily really universal either. One can even imagine a multilateral treaty to whom fewer states are not parties than there are persistent objectors to a customary rule.

In this case, the status of "third-party states" towards such heteronomous norms, and thus the distinction between "general" and "special" law, should be a matter of degree, not of category of sources. The crucial point is this: can respect for the "externally determined" rule of _ius cogens_ be forced upon the non-participating state? It is hard to see why this would be possible in the case of custom (probably even against a persistent objector), but never, _ex dogma pacta tertiis_, for states not party to an

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94 See Gomez Robledo (footnote 61) 96.
95 E.g. Nguyen Quoc Dinh/Datilier/Pellet (footnote 41) 239 et seq, esp 245 et seqs on "objective regimes", etc.
96 See infra III.C.b.
97 See the Anglo-Norwegian Fisheries case, ICJ Reports 1951, 131.
98 This view is shared by a majority of authors: Henkin, General Course of Public International Law, 216 RCADI (1989) 60; Brownlie (footnote 15) 11 footnote 56; Hannikainen (footnote 63) 231 et seq; Barberi, Formación del derecho internacional (1994) 111, Rozakis (footnote 26) 77; Thirlway (footnote 9) 110; Yasseen (footnote 44) 207; Ziccardi (footnote 70) 1065. Against this trend; Wolfe (footnote 70) 149; Charnley, The Persistent
otherwise very widespread multilateral agreement, states who oft-times are not even opposed to the rules spelled out therein, as persistent objectors are.

This approach is the only one that fits the notion of *ius cogens* as it was understood in the International Law Commission and at the Vienna Conference, where the ability of treaties to create peremptory norms was largely admitted. Moreover, one must keep in mind that no requirement of unanimous acceptance (that is, on the part of each state individually) of a given norm was retained for the rule to emerge as *ius cogens* and acquire imperative and universal character.

From thence one can affirm that a norm produced within a particular but large community can, by definition, establish itself on the general plane. The nature of a treaty as giving rise to such particular law would then pose no obstacle *a priori* to its capacity to enunciate peremptory norms.

Contrary to what Cahier claims, some "legislative effects" are thus inevitable in an international community that has attained our current level of integration. Those effects find themselves integrated in positive law. *Ius cogens* is, by its very essence, a legislative concept.

Objector Rule and Customary International Law, 56 BYIL (1985) 3 et seq footnote 9, 19 et seq footnote 81. For further references, see Ragazzi, The Concept of International Obligations Erga Omnes (1997) 59 et seqs.


See the explanation of Yasseen, President of the Drafting Committee, in Conference (footnote 19) para 12: "There was no question of requiring a rule to be accepted and recognized 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 ... would not be affected". See also infra text and footnote 148, where the excellent formula of Capotorti is reproduced. In Akbursi (footnote 75) 284 et seq, the examples given of States having allegedly opted for unanimous global acceptance of a rule before it can become peremptory (see his footnote 5) are not necessarily convincing, for those States speak simply of "universal" acceptance or recognition: it is not at all certain that, for them, "universal" is taken to mean "absolutely unanimous" rather than "gathering a vast majority". An interpretation favouring unanimity is, as always, unrealistic (what matters is to weigh, not to count), if only because if a dispute arises, it is highly probable that at least one State will contest the normative value of the rule.

See also supra text and footnote 148, where the excellent formula of Capotorti is reproduced. In Akbursi (footnote 75) 284 et seq, the examples given of States having allegedly opted for unanimous global acceptance of a rule before it can become peremptory (see his footnote 5) are not necessarily convincing, for those States speak simply of "universal" acceptance or recognition: it is not at all certain that, for them, "universal" is taken to mean "absolutely unanimous" rather than "gathering a vast majority". An interpretation favouring unanimity is, as always, unrealistic (what matters is to weigh, not to count), if only because if a dispute arises, it is highly probable that at least one State will contest the normative value of the rule.

Cahier, Cours général de droit international public, 195 RCADI (1985) 198 et seq, 203: "On ne saurait le répéter assez, la conception que l'on se fait encore aujourd'hui du principe de l'égalité des Etats, de la notion de souveraineté, et de la structure même de la société internationale empêchent une majorité d'Etats de légiférer à l'encontre d'une minorité" (198).
3. *Sed contra*: Ronzitti among others, argues that treaties codifying norms of peremptory character, or norms essential to the functioning of international society, are an expression of law that is either already customary or soon to be part of custom. Those customary rules would then be the ones binding all states, and not the treaty rules per se. Examples often given include the Charter of the United Nations and the Vienna Convention on the Law of Treaties.

*Responsio*: This view is mistaken, in that it confuses matters of fact and matters of principle. To say that codification treaties often express in fact customary rules is correct; to say that they necessarily have to do so is begging the question. The customary nature of a given rule is a question of state practice, a matter of cases in point. Forcing custom to cover *a priori* all cases where a treaty would carry peremptory norms would artificially stretch the concept to a purely fictional degree. In truth, there is today a tendency towards "making everything custom". Its illusory consequences show, for example, in these dual assertions from Conforti: on the one hand, he thinks custom is the only possible source of *ius cogens*; on the other, he identifies the very heart of *ius cogens* in Art 103 of the Charter. It is very hard indeed to believe a rule establishing the primacy of Charter obligations over any competing treaty commitments to be customary, i.e. binding also non-members of the United Nations!

4. *Sed contra*: The same Ronzitti contends that his assessment of custom as the sole source of *ius cogens* finds a confirmation in the views expressed by states at the Vienna Conference.

*Responsio*: Ronzitti has tracked down and refers to every one of the quite rare statements that support his theory. The vast majority of partici-

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102 *Ronzitti* (footnote 7) 293, refers to the Vienna Convention itself that "pressupone l'esistenza dello *ius cogens*".

103 *Fois* (footnote 12) 296 et seqs, tends towards this view, leading him to conclude that "accordi di codificazione non sono immediatamente fonte di norme cogenti, pur concorrendo alla loro formazione" (305).

104 Well calls this phenomenon the "customary nebula" ("nébuleuse coutumière"), in: *Le droit international en quête de son identité* (Cours général de droit international public), 237 RCADI (1992) 160 et seqs.

105 *Conforti* (footnote 14) 129 et seqs.

106 *Ronzitti* (footnote 7) 203.

107 Notably Italy (footnote 19) and France (footnote 20). He also bases his findings on the United States' declaration stating that "to give a norm of customary international law a peremptory character, State practice must be unambiguous" (see Conference [footnote 20] 102 para 22, emphasis added): he believes this sentence reveals an implicit recognition that the peremptory norm must be customary, since only custom is mentioned. But this reading is not necessarily the right one, and it is plausible that the reference to custom was made without prejudice to other eventual sources. Moreover State...
pants held opposing views, either acknowledging the treaty as a possible vehicle, or attributing no decisive value to the formal source at all. The International Law Commission has expressly admitted that conventional elaboration is possible. A global examination of the travaux préparatoires of the Vienna Convention yields no such conclusion as that formulated by Ronzitti.

5. There still remains the problem of withdrawal clauses in a multilateral agreement. Can one sustain the peremptory nature of a treaty's contents when unilateral denunciation of it is allowed? This is again a matter of fact rather than principle, for one can very well conceive of treaties that contain no denunciation clauses, perhaps by very reason of the importance of the rules they set up. Conversely, the presence of such a clause can indicate that peremptory character is not to be devolved upon that treaty, although it will be necessary to make sure that the norms carried thereby do not otherwise belong to the realm of custom. Yet it is true that denunciation clauses most often have another end entirely than that of weakening the normative value of the agreement, or to implicitly qualify a norm as jus dispositivum. For instance, certain subordinate rules, such as judicial protection by the International Court of Justice, might prove unsuitable - or risk becoming so - to certain states. Denunciation then becomes the transactional compensation by which subordinate rules that make the codification effort better overall can find acceptance and be included in the final instrument.

practice is material only in the context of customary law, thus excluding direct references to other sources.

108 Conference (footnote 19) 293 et seqs, and infra III.A.a.


110 When the treaty is silent on this point, unilateral denunciation of it may be implicitly permitted: this can result from the intention of the parties, or be deduced from the nature of the instrument, as in the case of Alliance Pacts (Art 56 of the Vienna Convention). A contrario one could then argue that a treaty containing peremptory norms (especially if it contains only norms of this character, for instance in the form of a solemn declaration) and thus articulating no possibility of unilateral withdrawal could not be denounced, since this would neither conform to the intention of the parties, nor be compatible with its nature. Such treaties not susceptible of denunciation are quite frequent, especially in matters of peace agreements and frontier settlements. The category is thus not esoteric. On all this, see Nguyen Quoc Dinh/Daillier/Pellet (footnote 41) 298 et seq.

111 See the Military and Paramilitary Activities in Nicaragua case, ICJ Reports 1986, 114, on the link between conventional law (in this instance, the Charter of the United Nations) and customary law, in the light of the United States' Vandenbergh Reservation.

112 For instance, the Convention for the Prevention and Repression of the Crime of Genocide of 9 December 1948, and Waldeck's statement on the scope of a withdrawal
It is therefore also appropriate to retain, *prima facie*, the multilateral treaty as a possible formal source of *ius cogens*.

**D. General Principles of Law**

1. The doctrinal views on general principles as potential carriers of *ius cogens* depend heavily upon how one conceives of their role in a more general sense. These views have diverged literarily from the moment of the inclusion of paragraph 1 (c) in Art 38 (then Art 38 para 3) of the Statute of the Permanent Court of International Justice. A short overview of the main axis of dissent is thus warranted here. Opinions on the subject usually pertain to one of two categories:

a) There are those who would dispute the character of autonomous source conferred upon general principles by Art 38. This is explained either through a strict inter-state voluntarist approach to international law, where no place for common principles can be found at all; by holding that those principles are embodied in treaty or custom; by labelling them mere “auxiliary means”, used to discover the applicable law; by assimilating general principles to equity, perceived as an extra-legal phenomenon; or, lastly, because Art 38 para 1 (c) would constitute an authorisation granted to the Court, and only to the Court, to constructively fill out gaps in the law *modo legislatoris*. These views must be held incorrect.

clause: “It would be manifestly absurd to suggest that the denunciation of the Genocide Convention by a party could affect the prohibition of the crime of genocide by international law. The fact of the matter was that the Genocide Convention contained, in addition to the substantive clauses relating to the prevention and suppression of genocide, certain procedural clauses in respect of which a right of denunciation was appropriate” (ILC Yearbook 1963/1, 131).


114 On the creation of the Court see e.g. Hudson, *The Permanent Court of International Justice, 1920–1942* (1972) 142 et seqs.


116 E.g. Verzijl (footnote 29) 60 et seqs.


118 Kopelmanas, *Quelques réflexions au sujet de l’article 38, 3° du Statut de la Cour permanente de justice internationale*, 43 RGDIP (1936) 304 et seq, reflections which bring him to the unusual conclusion that, in the matter of sources, "le troisième paragraphe de l’article 38 ne signifie au fond rien du tout" (307).

b) On the other hand, there are those who recognise general principles as an autonomous source, either on the basis of natural law and the idea of objective justice inherent in the essence of law, or by analogy with principles universally found in foro domestico\(^{121}\) (the view shared by the Commission of Jurists responsible for drafting the Statute\(^{122}\)), or because such principles are common to any and all legal orders, be they national or international\(^{123}\).

Obviously, jurists like Rozakis\(^{124}\) and Verzijl\(^{125}\) who contend that general principles are not an autonomous formal source also cannot see in them a valid support for *ius cogens: ex nihilo ens non oritur*!

2. Authors of the second group voice the following objections to the acceptance of general principles in the capacity of bearers of peremptory norms:

a) *Sed contra:* The main thrust of the opposition stems from dissent as to the very nature of those "general principles". Such dissent is found in doctrine, of course, but also in state practice. To wit, countries of the late Socialist Bloc refused to acknowledge formal sources other than treaty or custom. This dissonance arguably "presents an almost insuperable obstacle"\(^{126}\) to the rise of a norm of peremptory character, opposable to all, outside of those two processes: it would not then be "accepted and recognized by the international community of states as a whole ..."\(^{127}\).

*Responsio:* As a point of principle, one must restate that it is the norm, not the source, that has to be "accepted and recognized by the international community of states as a whole". Furthermore, the ideological tinge of the

\(^{120}\) E.g. Fitzmaurice (footnote 91) 162 et seqs, or Cheng, General Principles of Law as Applied by International Courts and Tribunals (1953) 23.


\(^{122}\) See e.g. Vitanyi (footnote 113) 50 et seq.


\(^{124}\) Rozakis (footnote 23) 58.

\(^{125}\) Verzijl (footnote 29) 60 et seqs.

\(^{126}\) Akehurst (footnote 75) 284; see also Shaw (footnote 24) 95.

\(^{127}\) Akehurst (footnote 75) 284.
position defended by the former socialist countries led to a rather outrageously dogmatism: did Tunkin not write that there could be no common normative principles between "socialist" law and the "bourgeois" order?128 Yet proof to the contrary is easily found, if only from a logical standpoint: for if Tunkin was right, there would and could be no such thing as a universal body of international law. Without the basis of common "material" principles guaranteeing a modicum of systematic and axiological identity, no unity is conceivable. In truth, no one has contested the universality of principles such as *pacta sunt servanda*, for instance. What is more, some of these principles are logically non-derogable (like *pacta sunt servanda*) or peremptory by nature (such as the prohibition of agreements contra bonos mores). If for other principles, the level or relative ideological consonance in the international society will play a greater role, no *a priori* incompatibility can be inferred thus even leaving aside the usual incantations about interdependence. Insofar as there are at least a few common general principles, the possibility of adding to their number also exists, and a positive result then hinges on a mere question of level of agreement. Far from the voicing of articles of faith, the question is one of comparative analysis. Here as always, it is vital to steer clear from begging the question.

b) *Sed contra:* Some authors, like Akehurst129, Balladore Pallieri130, or Ronzitti131, affirm that within the structure of Art 38, general principles are only to be applied as a subsidiary tool, used by the Court to avoid a *non liquet*, or the rejection of a claim not grounded in the conventional or customary plane. Hence, they could not prove peremptory, for that would run contrary to their subsidiary nature.

*Responsio:* Against yet another *petitio principii*, one simply needs to point out that general principles seen as peremptory would, as a consequence, simply not be subsidiary: they would find immediate application as a primary source.132 No dogmatic definition of general principles should dictate opposite consequences. This opposite may at most be true for

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128 See footnote 28. It is interesting to note that an eminent Chinese author, Li Hanpd, acknowledges the existence of general principles and envisions a universalist concept of *ius cogens* embodied precisely in a general principle of law recognized by civilized nations" (quoted in Cassese [footnote 31] 202 et seq).

129 *Akehurst* (footnote 75) 283.

130 *Balladore Pallieri*, Diritto internazionale pubblico (1937) 143.

131 *Ronzitti* (footnote 7) 260.

132 As Verdou pointedly wrote in: Forbidden Treaties in International Law, 31 AJIL (1937) 573: "The principle of merely subsidiary validity of the general principles of law cannot be true without exception. It is only reasonable as far as it applies to noncompulsory norms".
authors who limit general principles to municipal law analogies drawn upon in case of lacunae in international law. But the category of general principles of law is certainly larger, independently of the construction of Art 38 para 1 (c) of the Statute which on this point is controversial. Given their support of the evolution of international law, the Committee of Jurists responsible for the elaboration of the Statute surely had no such wish in mind. Even if recognition of the peremptory character of general principles should not occur as often today, as most of them have also found a customary expression in international law,133 there is no valid reason to exclude this possibility a priori.

c) Sed contra: For Ronzitti134, general principles are directly extracted and incorporated from domestic law into international law. Thus their existence on the level of international law does not depend upon their recognition “by the international community of states as a whole”, making that process incompatible with the conditions set forth in Art 53 of the Vienna Convention.

Responsio: Ronzitti seems to have forgotten that an essential part of the definition of “general principles” in Art 38 para 1 (c) is precisely their recognition as such within all the great legal systems. Their insertion in international law, alleged here “automatic”, presupposes such universality. Speaking of general principles not uniformly recognized by the international community of states as a whole would indeed be a contradiction in terms. When one alludes to “the great legal systems” in describing general principles, one lays the grounds from whence the general character of a given principle will be induced. There is no difference, in species or otherwise, to be found between “the international community of States as a whole” and “all the great legal systems”.

d) Sed contra: For Akehurst135, the rejection of an amendment of the United States of America defining ius cogens as a rule “which is recognized in common by the national and regional legal systems of the world and from which no derogation is permitted” serves as proof that such an option was considered and deemed unsatisfactory in Vienna. For it is precisely that amendment that “might have been interpreted as defining ius cogens by reference to general principles of law”. Discarded by those who wrote the treaty, this option should thus be discarded as well by those called upon to analyze or interpret it.

133 See Nguyen Quoc Dinh/Daillier/Pellet (footnote 41) 345; Verdross, Die Quellen des universellen Völkerrechts (1973) 128 et seq; Verdross, Les principes généraux de droit dans le système des sources du droit international, Mélanges Guggenheim (1968) 550.
134 Ronzitti (footnote 7) 260.
135 Akehurst (footnote 75) 283.
The only link established by Akehurst between the amendment and the general principles as described in Art 38 para 1 (c) rests on a vague resemblance in the words chosen. In fact, this link does not exist. The US proposal sought to impose the criterion of necessary municipal recognition on the process of elaboration of *ius cogens*. Admitting that certain rules common to various domestic legal orders could eventually acquire a peremptory status in international law is another thing entirely. The reasons invoked by those who opposed it show that they were not fooled. The Cuban delegate, also followed by other members, expressed very well the underlying motive for the proposal’s rejection at the Conference: “[It] would subordinate the rules of *ius cogens* of international law to national and regional legal systems. That approach would enable a State to thwart any rule of *ius cogens* by invoking its domestic legislation”137. Such a position would make municipal law prevail over international law. Obviously, submitting *ius cogens* to the acid test of domestic law has nothing to do with general principles: on the contrary, the function of these norms is to extend, not to restrain, the scope of international normativity.

e) *Sed contra*: Virally138 argues that a positive demonstration as to the status of a general principle is hard to make, since it is most probable that a truly and absolutely peremptory principle would have acquired either conventional or customary value.

*Responsio*: Much depends here on the definition of general principles which is to be followed: Do principles by their intrinsic nature and characteristics not keep distinguishing themselves from custom even if regularly applied as law? Leaving aside this point, there is no need to rehash what has already been said to come to the conclusion that Virally is right. But he is right only in a practical sense, not as a matter of logic. To say that something is difficult does not entail that it is impossible. To postulate an impossibility, in the face of the evolution and growth of peremptory norms and given the uncertainty as to its future embodiments, is to presuppose yet again what one is seeking to prove.

Thus, in the light of what has been said in the preceding paragraphs, it is reasonable to think that, *prima facie*, general principles can also constitute a formal source of *ius cogens*.

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136 For instance, Poland (whose delegate speaks overtly of the danger of placing domestic legal orders in a position of superiority over the international one), Conference (footnote 19) 302 para 41; Bielorussia (ibid) 307 para 8; and Spain (ibid) 315 para 4 et seq.

137 Ibid 297 para 38.

III. *Philosophia Positiva*: Some considerations favouring a flexible and global approach to the formal sources of *ius cogens*

**A. The travaux préparatoires of the International Law Commission and the Vienna Conference**

1. The leitmotiv of the debates, both in the International Law Commission and at the Vienna Conference, seems to have been that "it is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals"\(^{139}\) that confer upon it a peremptory character, or in other words that the crucial distinction between *ius cogens* norms and other rules of international law pertained not to their origin, but to their substance.\(^{140}\) Formal considerations have been brushed aside. Although custom and treaty were the most oft-quoted possibilities,\(^{141}\) this should not be taken as excluding general principles.\(^{142}\) It is only natural for the two main sources of international law to be primarily referred to. The vital idea is that the formal source is not determinant. Hence, it follows that there is no reason to dismiss one *a priori*.

2. The tendency to move away from formalism appears from the beginning of the International Law Commission’s works on *ius cogens*. The second Rapporteur, Sir Hersch Lauterpacht, wrote in 1953: “These principles need not necessarily have crystallized in a clearly accepted rule of law ... They may be expressive of rules of international morality so cogent that an international tribunal would consider them as forming part of those principles of law generally recognized by civilized nations which the International Court of Justice is bound to apply by virtue of Art 38 para 1 (c) of its Statute”\(^{143}\). Far from disavowing this opinion, his successors took it in stride. Fitzmaurice, third Rapporteur, even extended

\(^{139}\) ILC Yearbook 1966/II, 248 para 2.

\(^{140}\) E.g. ILC Yearbook 1963/I, 63 para 39 (Yaarim); ILC Yearbook 1966/II, 21 (Brazil), 22 (Iraq); Conference (footnote 19) 297 (Cuba), 302 (Poland), 307 et seq (India), 310 et seq (Israel); Conference (footnote 20) 97 (Cuba) etc. In doctrine, e.g. Rao, *Ius cogens* and the Vienna Convention on the Law of Treaties, 14 Indian Journal of International Law (1974) 368; Lagonisi (footnote 5) 101 (Ruda), 90 (Bystricky) etc.

\(^{141}\) E.g. Conference (footnote 19) 302 (Poland), 327 (Trinidad & Tobago), 387 (Cyprus); see also Tunkin, ILC Yearbook 1963/I, 69 para 26 among many others.

\(^{142}\) As argues Akehurst (footnote 75) 283. Only Trinidad & Tobago clearly excluded general principles, while other delegations such as that of the Federal Republic of Germany expressly included them. See Conference (footnote 19) 327 (Trinidad & Tobago) and 319 para 33 (FRG).

\(^{143}\) ILC Yearbook 1953/II, 154 et seq.
it in order to cover immoral agreements. While the solution adopted in the end, inspired by Sir Humphrey Waldock, leans towards the effects of a peremptory norm, it nevertheless shows no intent to depart from the notion put forward by his predecessors.

3. The crucial criterion by which *ius cogens* is to be identified is a qualifying act on the part of the international community. Yasser

the president of the drafting Committee, pointed out that such an act need not be unanimous, if it is clear that the recognition is shared by a vast majority. Capotorti expresses very well this line of thinking: "L'accord d'un grand nombre d'Etats appartenant à des systèmes juridiques, politiques et sociaux différents est nécessaire ... ce qu'on demande ... c'est que la règle déterminée soit acceptée et reconnue comme impérative par de nombreux Etats, suffisamment représentatifs des différents groupes politiques et géographiques formant la communauté internationale". Indeed, all of the formal sources are apt to achieve this goal.

**B. Consensus as a Primary Source of International Law**

On the other hand, one needs to widen the perspective. *ius cogens* is not necessarily based upon one of the formal sources listed on Art 38 para 1, since this list is not exhaustive. Verdross/Simma have rightly noted that consensus is the main source of positive international law. Consensus can informally modify existing international law, its incarnation in a formal source not being required for these sources are themselves grounded in it.

Thus instruments intrinsically not binding in form like resolutions of international organisations can become so, and can even carry *ius cogens*
norms if and only to the extent that such a consensus of States is manifest therein. It is rightly said in this context that voting behaviour within the decision process cannot solely give rise to a legal obligation, since the vote can find its motivations elsewhere than in opinio iuris, and usually depends largely upon political or diplomatic opportunity considerations.\textsuperscript{153} It is in that sense that one should agree with Onuf/Birney, when they speak of an original consensus of the international community.\textsuperscript{154} All of this serves to remind us of how unimportant form is to the determination of the rule iuris cogens.

C. Custom, Treaties and General Principles

1. No long explanations are needed to justify considering custom as a formal source of ius cogens. Most of the examples given of alleged peremptory norms belong to its realm: the prohibition of the use of force, of genocide, of the slave trade, etc.\textsuperscript{155} Custom is the corpus of norms in international law which has the highest potential in terms of generality, prompting Gomez Robledo to conclude that it is the best approximation of what legislation represents in the domestic order.\textsuperscript{156}

2. Many arguments plead for the granting of the quality of formal source of ius cogens to treaties as well. Firstly, the International Law Commission itself recognised that multilateral agreements could carry peremptory norms "as a modification of a rule of jus cogens would to-day most probably be effected through a general multilateral treaty"\textsuperscript{157}. Further-

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\textsuperscript{153} Especially clear on the subject is Simma, Methodik und Bedeutung der Arbeit der Vereinten Nationen für die Fortentwicklung des Völkerrechts, in Institut für Internationales Recht der Universität Kiel (Hrsg), Die Vereinten Nationen im Wandel (1976) (Veröffentlichung Nr 73) 101 et seq.

\textsuperscript{154} See footnote 2. Contra, Perris, La nécessité et les dangers du jus cogens, Mélanges Pictet (1984) 758 et seq.

\textsuperscript{155} See ILC Yearbook 1966/II, 248 para 3.

\textsuperscript{156} Gomez Robledo (footnote 61) 95.

\textsuperscript{157} ILC Yearbook 1966/II, 248 para 4; see also Tunkin's comments (ILC Yearbook 1969/1, 69 para 26): "The Special Rapporteur had been right to include the provision contained in paragraph 4 of article 13 [1963 Draft], because a general multilateral treaty to which all or nearly all States of the international community were parties would abrogate or modify a rule of jus cogens. The contention of some authorities, including Sir Hersch Lauterpacht, that general rules could only derive from customary law might have been true fifty years ago, but with the great increase in the number of general multilateral treaties which were virtually universal in character, it was true no longer". Capotorti
more, the first draft of the provision on *ius cogens* (in the 1963 Draft Convention, Art 13 and its comments) stated that the rule therein contained “does not apply to a general multilateral treaty which expressly abrogates or modifies a rule having the character of *jus cogens*”158. The drafters wanted to take into account the evolving character of *ius cogens*, not seen here as an immutable given.159 It does not follow from its absence from the final, abridged version of 1969 that the idea itself fell out of favour, since a vast majority of states granted that modifying *ius cogens* in this manner was allowed.160 If it is possible to modify or abrogate existing peremptory norms, or to introduce new ones by way of a treaty, it must mean that the treaty can support such peremptory norms.160a This is an example of what jurists call the parallelism of forms.

Secondly the treaty offers the added advantage of coherence over the customary rules sometimes labelled “*coutume sage*”.161 Problems inherent to the progressive modification of the rule are especially delicate as far as peremptory norms are concerned. Such problems are greatly lessened by the absolute predominance of *opino necessitatis* on concrete action and the immediate embodiment *unum actum* of a normative régime which characterise conventional instruments. In custom we find the inevitable uncertainty towards the behaviour of states initiating the practice. It is often difficult to say if it is or not in violation of current international law.162 The resolution of this uncertainty depends upon the reaction of other states. The initial confusion between the “old custom” not yet outdated and the (footnote 148) 522, justly points out that “indiquer l’appartenance des normes impératives au droit international général ne signifie pas même inscrire ces normes dans le cadre du droit coutumier international...”.

158 ILC Yearbook 1963/II, 52 et seq, Art 13 (4), and Comments, para 6, at the end.
159 Ibid 53 para 6.
160 Only Tanzania was opposed to it: Conference (footnot 19) 321: “His delegation took the view that a rule of *jus cogens* could not be modified. New norms of *jus cogens* would, of course, emerge in the future, but they would only be added to the earlier norms and would not derogate from those already in existence. It was hard to see how ‘future developments’ could modify the condemnation of the crime of genocide, the slave trade or the use of force”. 161 On the meaning of this expression see Dupuy, Coutume sage et coutume sauvage, Mélanges Rousseau (1974) 75 et seqs.
162 Verdross/Simma (footnote 71) 362 et seqs; see also Bleckmann, Völkerrecht trotz widersprüchlicher Praxis? 36 ZAA RV (1976) 374 et seqs. Including abstract declarations into the analysis of the material basis of an eventual custom (in *status nascendi*) can ease considerably the formative process: Akehurst, Custom as a Source of International Law, 47 BYIL (1974/5) 8, 21 et seqs.
“new custom” not yet firmly entrenched would be especially deleterious to peremptory norms. This would prove a serious setback for rules that often bear moral values and belong to the category of \textit{ordre public}. Moreover, a multilateral agreement’s elaboration is faster attained, and its modification is easier to achieve.

Thirdly, let us not forget the crucial role that treaties play in the pattern of contemporary world affairs.\textsuperscript{163} Without unduly insisting on this point, or exaggerating its consequences, one must note the structural shift from a society ruled by a law achieved through successive acts to one with a “codifying” bent.\textsuperscript{164} \textit{Abi-Saab} has pointed out how custom itself, in its traditional incarnation exogenous, spontaneous, inductive and unconsciously achieved, tends now to become a consciously driven process of normative production, institutionalised through the United Nations framework; the customary rules becomes \textit{ius positum}, abstract and general, obtained through deduction, a normative machinery that is leaning more and more towards a “quasi-legislative” function.\textsuperscript{165} One moves from nominalism to realism. If classical custom is a process where in adduction of facts yields a growth in the juridical conscience, where existence precedes the essence qualified \textit{ex post} by law, the new breed seems to proceed from a projection of the will into the realm of the concrete, so that it can imprint itself upon facts.\textsuperscript{166} This process, conventional in a wider sense and more suited than any other to the expression of conscience, be it juridical or political, is undoubtedly the best possible support for the values, often moral, of universal \textit{ius cogens}.

The \textit{Koch} case,\textsuperscript{167} where, in a post-war trial of crimes against humanity, a Polish court in Warsaw held a conventional norm to be peremptory, is often quoted as confirming this view in practice. Still, since the treaty in question (the fourth Hague Convention of 1907, on the Laws and Cus-

\begin{footnotes}
\footnote{\textsuperscript{163} Among many examples are \textit{Verdrass/Simma} (footnote 71) 335 (“die praktisch wichtigste Rechtsquelle”); \textit{Ch. de Visscher}, Coutume et traité en droit international public, 38 RGDP (1935) 354; \textit{Brierly}, The Law of Nations\textsuperscript{15} (1965) 62; \textit{Diasuna} (footnote 11) 95; ILC Yearbook 1963/1, 63 para 43 (Yasseen).}
\footnote{\textsuperscript{164} On the codification of general international law \textit{Nguyen Quoc Dinh/ Daillier/Pellet} (footnote 41) 328 et seqs, and \textit{Truyol y Serra}, Cours général de droit international public, 173 RCADI (1981) 242 et seqs. Already in a historical perspective, see also \textit{Ch. de Visscher}, La codification du droit international, 6 RCADI (1925) 329 et seqs.}
\footnote{\textsuperscript{165} \textit{Abi-Saab}, La coutume dans tous ses états ou le dilemme du développement du droit international général dans un monde éclaté, \textit{Mélanges Aho}, vol 1 (1987) 53 et seqs.}
\footnote{\textsuperscript{166} Wording inspired by \textit{Dupuy}, Cours général de droit international public (Communauté internationale et disparités de développement), 165 RCADI (1979) 171.}
\end{footnotes}
The Formal Source of *Ius Cogens* in Public International Law

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toms of War on Land) also purports to express customary law on the subject, the value of this example is to be taken *cum grano salis*.

3. General principles especially if drawn from domestic law analogies play today a lesser part in international law, the substance of which has grown considerably denser. The need to resort by analogy to principles found in *foro domestico* has dimmed. Yet, in a world where ideological rifts tend to narrow and interdependence to develop, one can well imagine such principles reasserting their progressive and dynamic role. In this author's view on formal sources, general principles of law (be they international or domestic) have a real importance. They irradiate their strong normative content through all areas of international law, giving rise to more specific principles and rules, or bending the application of the latter towards better compliance with their substance. This is especially true for principles of international law. General principles also serve as a systematic base from which legal lacunae can be filled and the body of norms peacefully and progressively adapted to the world it regulates.

Of course, invoking the imperative value of a principle in all domestic systems as far as municipal analogies are concerned will not suffice to make it so in the international order. The analogy between different structures must always be critical. Yet there is no reason to exclude it *a priori*. It is not inconceivable that some principles, pertaining for instance to procedure, to the modern rule of law or to state organisation, might, if sufficiently common, integrate international law in this way.

The possible integration of *ius cogens* through general principles has even been evoked at the International Court of Justice, albeit in dissenting opinions only: those of judge *ad hoc* Fernandez in the *Right of Passage Over*

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168 See footnote 133.
169 *Alkahrous* (footnote 73) 284.
170 See *Cb. de Visscher*, Contribution à l'étude des sources du droit international, 14 RDILC (1933) 4:10 et seqs.
171 The ILC project still talked of "general rules or general principles" of international law (Art 13 [1], ILC Yearbook 1963/II, 52), but it is unclear and quite improbable that this was intended to mean "general principles" in the sense of Art 38 (1) c of the ICJ Statute. The words "general principles" were deleted because the drafters feared problems of interpretation and clashes with the term "rules": see ILC Yearbook 1963/II, 68 para 16 (Amado), 71 para 51 (Ago), and the comments of rapporteur Waldock, ibid, 77 para 44.
171a See e.g. *Morin*, L'Etat de droit: Emergence d'un principe du droit international, 254 RDADI (1995) 9-462. The role of principles or of "custom without practice" in the context of *ius cogens* has been stressed by *Simma*, From Bilateralism to Community Interest in International Law, 250 RDADI (1994) 290-292.
Indian Territory case (1960), and of judge Tanaka in the South West Africa cases (second phase) (1966).

In the arbitration between Guinea-Bissau and Senegal, on a point of limitation of the *ius tractatus* of a colonising state, the tribunal states that *ius cogens* can emerge either through custom, or via the formation of a general principle of law. This is probably inspired by the already mentioned doctrinal opinion of Barberis, who presided the tribunal. In any case general principles of law are here expressly acknowledged as a possible formal source of *ius cogens*.

IV. A "Special" or "Regional" *Ius Cogens*?

A. The Confusion in Doctrine

It is surprising to behold the confusion that still rages over such a benign question. It is even more surprising to witness doctrinal authorities engaging in what amounts to trench warfare over it.

On one side, there are those who admit that special *ius cogens* is possible, if only through negative arguments: "No convincing reason has ever been given for ruling out the possibility of the existence of non-
universal, or 'regional’ peremptory norms”\textsuperscript{176} says Gaja. Sztucki adds: “One may wonder why the idea of regional or otherwise particular ius

cogens should be rejected”.\textsuperscript{177}

On the other are the deniers,\textsuperscript{178} who maintain that universality is inher­

ten to the absolute notion of ius cogens.\textsuperscript{179} In the words of the delegate of

Mali at The Vienna Conference: “The moral and spiritual values inherent

in ius cogens could only assert themselves with the desired peremptory force

if no geographical limits were placed on their applicability. Hence there

could be no question of a regional ius cogens”.\textsuperscript{180} Diaconu argues further that

if one were to admit regional ius cogens, this particular ius cogens norm could

not be imposed on third states. Why then should states ruled by such a

peremptory norm not be able to derogate to it inter se since the rule would

in such a case not have any intrinsically compelling nature.\textsuperscript{181} At a closer

look this appears to be a variation of the universality theme. The same

author adds that such a body of regional peremptory norms would be sub­

jected to general international law that could derogate to it under the prin­

ciple superior derogat inferiori; it then cannot be properly termed peremptory

without falling into a contradiction in terms.\textsuperscript{182} We shall soon come back

on these arguments.

B. The Field of Application of Art 53

One must first study this provision of the Vienna Convention, since it has

been argued that the words “general international law” found therein

implicitly condemn the notion of a regional ius cogens.\textsuperscript{183} On the contrary,

\textsuperscript{176} Gaja (footnote 175) 284.

\textsuperscript{177} Sztucki (footnote 13) 107.

\textsuperscript{178} For instance, Cahier (footnote 6) 198 ("l'idée d'une norme impérative régionale est

ccontraire à sa notion même"); Diaconu (footnote 11) 80 et seqs; Grandino Rodas, Jus Cogens


on Main Features of Jus Cogens as Notion of Public International Law, Mélanges Abendroth (1982) 52 et seq ("expression of a lawyer's imagination"); Martonen, Jus Cogens in

Völkerrecht (1971) 80a, 90; Pueireiro Ripoll (footnote 22) 65 (according to whom ius cogens

can only be at an embryonic state on the regional level, achieving true peremptory

ccharacter only through its universal recognition); Yassou in: L'élaboration du droit

international public, Colloque de Toulouse (1975) 207. See also Ushakov in Lagonissi

(footnote 5) 108.

\textsuperscript{179} E.g. Cahier (footnote 6) 198; Diaconu (footnote 11) 80 et seqs.

\textsuperscript{180} Conference (footnote 19) 327 para 73.

\textsuperscript{181} Diaconu (footnote 11) 81.

\textsuperscript{182} Ibid.

\textsuperscript{183} Virally, Cours général de droit international public, 183 RCADI (1983) 177, who

contradicts his earlier writings where he affirmed – in 1966, see Virally (footnote 25) 14
in the fifteenth session of the International Law Commission in 1963, the Drafting Committee explained: "The article was concerned with universal international law; that was why the title referred to general international law, to the exclusion of regional international law". Art 53 thus defines *ius cogens* merely "for the purposes of the present Convention", as it so specifies itself. Notwithstanding the qualms of Stzucki, and as Virally had already noted in 1963, this can only mean that the matter falls outside the scope of the proposed Article. Far from being excluded, regional *ius cogens* was simply not examined. If its dismissal had been sought, a debate would certainly have arisen then, given the controversy surrounding the question; but no such discussion ensued. This matter, not of global import, simply did not fall within the purview of this international organ, which already had enough on its plate in dealing satisfactorily with universal *ius cogens*. Consequently no negative assertion follows from the wording of Art 53. In a similar vein, the reference to general custom in Art 38 para 1 (b) of the Statute did not prevent the Court and authors alike from acknowledging the existence of regional, or even of bilateral custom.

### C. Circular Reasoning in the Deniers' Views

The "deniers" can even be said to use a circular argument, since the Vienna Convention including its Art 53 defining universal *ius cogens* is merely "special" law to which, at the time of its entry into force, only a quarter of the states in the world had adhered. But this reasoning can be countered by asserting that the concept of *ius cogens* was either already part of general custom at the time, or quickly became so afterward. The *vinculum iuris* would then be established on that standpoint.

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185 Stzucki (footnote 13) 106.
186 Virally (footnote 23) 14.
187 E.g. in the Colombian-Peruvian Asylum case, ICJ Reports 1950, 276 et seq.
188 Right of Passage Over Indian Territory case, ICJ Reports 1960, 39.
189 See Stzucki (footnote 13) 106 et seq.
190 See supra II.C.b, c. This argument is often invoked against treaty law.
D. In Praise of Regional *Ius Cogens*

Yet the "deniers" thesis must be rejected. It proceeds both from a logical *diallélé*, so often chastised above under its other name of *petitio principii*, and from a misunderstanding of the phenomenon of peremptoriness in international law.

Assimilating universality and peremptoriness *a priori*, and deducing therefrom that a regional *ius cogens* norm cannot exist, is indeed begging the question. The *fallacia* probably runs as follows. One inventories existing examples of alleged universal *ius cogens* norms (such as the prohibitions of genocide, slavery, aggression, ...) that are quoted time and again; one then notices how highly moral, and in that sense "absolute", they all are, how they truly constitute a *ius necessarium pro omnium*. Is it any wonder such rules, fundamental in a moral and legal sense, are the first to emerge in this previously uncharted land? From this, one usually deduces erroneously that every one of the peremptory norms must bear such a high degree of "ethical" or "moral" density, and that each must then be considered binding upon all as a matter of course.

In its all or nothing form, admitting nothing between the two poles, this view is already highly disputable on its own terms. If universality was to prove unreachable, would it not be worthwhile to admit at least some norms on a regional level? Would that not constitute a progress of international law, given the alternative option of denying, in the absence of universal rule of law, even a regional variation of it?

The view becomes even more questionable when one realises that its premise is wrong. For norms which have not the same degree of "morality" or "necessity" can still be peremptory between states recognising them as part of their public order. This last concept is relative. Those few states bind themselves, and wish to find only themselves so bound through their public order. The rules thereof, of value to none but themselves, do not bear any derogation between members of that community, while, of course, derogating to them vis-à-vis third parties is of no concern in this case. It is indeed essential to avoid any excessive sacralization of peremptory norms. Then loses all pertinence the argument according to which it is hard to see why States of the given region should be imperatively bound by regional *ius cogens*, while third-party states would not.

Furthermore, there is no contradiction in terms in saying that this regional *ius cogens* could find itself supervened by "global" international law, since the normative hierarchy has no incidence on the possible peremptory quality of a norm at a given level. If it was so, as stated before, the law (*loi; Gesetz*) could never carry imperative prescriptions in the domestic order, because the Constitution, on a higher step, does so. The
regional norm will only be peremptory in relative terms, that is, rationae personae.

Finally, even on the universal plane, a peremptory norm can be derogated by a norm of the same normative level, i.e. notably via multilateral treaty or custom. This "relativity" of the peremptory norm not only fits its definition, it is indeed a part of it. Imperative is not immutable. In addition, we have shown that ius cogens does not presuppose the adhesion of every one of the states in the international community, and that it is suited by definition to bear special status. Must we underline that between this lack of unanimity on the global plane and a regional ius cogens there exists but a difference in degree, not in essence?

In truth, only this conception is compatible with practice as it stands. As Tenekides\textsuperscript{191} or Verdrass/Simma\textsuperscript{192} demonstrate, there is today in Europe, insofar as the democratic principle, human rights or other like matters a wider vision of public order and thus of imperative law than on the larger scale. This illustrates how unacceptable it would be to negate the value of such regional orders on the basis of dogmatic analyses, and how this would weaken the notion of public order at any level, be it regional or universal. Historically as well as practically, the regional domain of crystallised solidarity offers the best possibilities, as well as a testing ground for developing principles that may eventually, through dialectic interaction with the universal, attain this ultimate level. Is this not reminiscent of the post-Westphalian ius publicum europaeum?\textsuperscript{193} Permanent tension between regional and universal is undoubtedly one of the most important factors, one of the most unrelentingly dynamic engines of enrichment in international law.

E. Ius Cogens and Bilateral Treaties

Can a bilateral treaty give rise to ius cogens?\textsuperscript{194} Diaconu thinks this is impossible since by definition such an agreement can be modified by an

\textsuperscript{191} Tenekides in: L'élaboration du droit international public, Colloque de Toulouse (1975) 212: "Je crois qu'il faut commencer par un droit international régional. J'ai cru apercevoir et reconnaître des règles de jus cogens dans le cadre européen" (e.g. democratic legitimacy, human rights).

\textsuperscript{192} Verdrass/Simma (footnote 71) 334.

\textsuperscript{193} Verdrass/Simma (footnote 71) 21 et seqs; Truyol y Serra, L'expansion de la société internationale au XIXe et XXe siècles, 116 RCADI (1965) 95 et seqs; Grewe, Vom europäischen zum universellen Völkerrecht, 42 ZÄRV (1982) 449 et seqs.

\textsuperscript{194} Morelli (footnote 40) 116 and Schwarzenberger (footnote 57) seem to think so. See also ILC Yearbook 1983/II, 1st part, 21 para 115–124, in the context of objective régimes. (Riphagen, Report on International Responsibility).
instrument with a similar scope. But this is true also for universal ius cogens since, as has been said, peremptory law is not immutable law. Less drastically, Kadelbach states that the case with which actus contrarius is achieved renders bilateral ius cogens useless. This latter statement carries great weight. But there is no need to go that far. Asserting that a given treaty embodies ius cogens inter partes can certainly give it strong political or symbolic value, and can even entail legal effects. For instance, a simple desuetudo might not suffice to make the instrument inoperative; eventually, parties that have not clearly expressed their intention of casting away the peremptory weight with which their future contracting freedom will be burdened might see agreements deemed inconsistent with the agreed imperative provisions be annulled or declared void. The burden of proof in such cases would then run contrary to the usual principle posterior derogat priori. This is part of the problematique of incompatible successive treaties.

V. Concluding Remarks

The conclusions will be twofold, the first material, the second formal.

A. Pro materia, it appears that any and all expressions lato sensu of interstate consensus can serve as a formal source of ius cogens: among those are custom, treaties and general principles of law.

B. Pro forma, one must not be misled by the alleged "absolute" content of ius cogens into a dogmatic frame of mind towards all that concerns it, proceeding thus through a series of petitiones principiorum tearing away from peremptory norms any forms of expression that do not fall into preconceived categories deemed exclusively suitable to this purpose. Deductive analysis is certainly as valuable as inductive thinking. But to let it reign unchecked, to separate it from the discursive aporetique with which axioms are built, to erect it into a dogma without the benefit of submitting it to the acid test of reality and to the necessities of a given legal order, is to embark upon the sterile and deceptive path flayed in the preceding pages with the strength of Jupiter fulgurating the Giants: the path that leads us to beg the questions.

195 Diazaur (footnote 11) 79.
196 Kadelbach (footnote 64) 204.
197 Contra, Schweitzer (footnote 175) 220.
198 See the illuminating words of Treyol y Serra (footnote 164) 204.
Zusammenfassung

In der Frage nach der Rechtsquelle des völkerrechtlichen *ius cogens* wird von der Lehre eine außerordentliche Vielfalt von Meinungen vertreten.


Allgemeine Rechtsgrundsätze werden als Rechtsquelle von zwingendem Recht mit verschiedenen Argumenten bekämpft. Dazu gehören die Opposition gewisser Staaten (der ex-sozialistische Block) gegen diese


Das führt zu folgendem Schluß: Jede der anerkannten primären Völkerrechtsquellen kann ius cogens-Normen hervorbringen.

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