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## Contractualism in the Law of Treaties

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# CONTRACTUALISM IN THE LAW OF TREATIES

Omar M. Dajani\*

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[O]nce upon a time—and not so long ago—the word “contract” cast a curious spell on legal thinking.<sup>1</sup>

## INTRODUCTION

When Henry Sumner Maine famously observed that “the movement of the progressive societies has hitherto been a movement from Status to Contract,”<sup>2</sup> he was invoking contract not as a device for binding parties to their commitments but, rather, as a metaphor for freedom. That metaphor lies at the heart of what legal scholars have come to call *contractualism*<sup>3</sup> (or, sometimes, contractarianism<sup>4</sup>)—the idea that people should be free to decide with whom, for what, and on which terms they enter agreements and that the law should minimize the constraints it places on these decisions. It is a proposition rooted in the values of liberty and efficiency—in the view that parties not only have a right to autonomy in structuring their relationships, but also are usually best situated to know what is good for them. And it has proved influential well beyond the law of contracts. Indeed, notwithstanding the highly anticipated, but ultimately unrealized, “death of contract,”<sup>5</sup> contractualism has been urged on a growing variety of fields, including the law of corporations,<sup>6</sup> bankruptcy,<sup>7</sup> trusts,<sup>8</sup> professional responsibility,<sup>9</sup> family law,<sup>10</sup> and environmental regulation.<sup>11</sup>

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1. *Beidler & Bookmyer, Inc. v. Universal Ins. Co.*, 134 F.2d 828, 829 (2d Cir. 1943).

2. HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 174 (Frederick Pollock ed., John Murray 1906) (1861).

3. Over the last decade, moral philosophers have assigned a different meaning to the term. See generally T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* (1998). In this Article, I use the term “contractualism” in the more generic sense employed by legal scholars. See, e.g., Robert C. Clark, *Contracts, Elites, and Traditions in the Making of Corporate Law*, 89 COLUM. L. REV. 1703, 1717–18 (1989) (noting ascendancy of contractualism in bankruptcy and reorganization law).

4. See, e.g., John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 637 (1995).

5. For competing accounts, compare GRANT GILMORE, *THE DEATH OF CONTRACT* (Ronald K.L. Collins ed., 2d ed. 1995) (arguing that individualist, laissez-faire ethic at center of classical contract theory was in decline), with Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49, 49–75 (1995) (challenging Gilmore’s caricature of classical contract theory and describing resurgence of laissez-faire thinking in U.S. politics and Supreme Court jurisprudence).

6. Clark, *supra* note 3, at 1717–18.

7. See Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807, 1807 (1998).

8. See Langbein, *supra* note 4, at 630.

9. See generally Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665 (2001) (urging contractarian approach to professional responsibility law).

10. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979).

11. See David A. Dana, *The New “Contractarian” Paradigm in Environmental Regulation*, 2000 U. ILL. L. REV. 35, 35 (2000).

As Max Weber stressed, however, “in no legal order is freedom of contract unlimited in the sense that the law would place its guaranty of coercion at the disposal of all and every agreement regardless of its terms.”<sup>12</sup> The existence of at least some mandatory rules—rules that may neither be varied nor waived by the parties to an agreement—has been justified by courts, legislatures, and legal scholars as necessary to address three problems inherent in the institution of contract: (1) the possibility that an agreement would have adverse effects on the protected rights of third parties, including those ostensibly represented by one of the parties to the agreement;<sup>13</sup> (2) differences in capacity, knowledge, and power between contracting parties that undermine the voluntariness and fairness of their agreements;<sup>14</sup> and (3) the need to protect the legitimacy and efficiency of the legal system when it is called on to enforce or invalidate an agreement between its subjects.<sup>15</sup>

What this Article examines is whether the freedom of contract of sovereign states is similarly constrained. At first glance, the question seems settled: the Vienna Convention on the Law of Treaties, the culmination of a twenty-year effort to codify customary rules of treaty law,<sup>16</sup> provides that “[a] treaty is void” if it has been “procured by the threat or use of force in violation of the principles embodied in the Charter of the United Nations”<sup>17</sup> or if it “conflicts with a peremptory norm of general international law”—that is, a norm considered *jus cogens*.<sup>18</sup> In these provisions, the parties to the Vienna Convention recognized that in international law, too, some rules are mandatory in character.<sup>19</sup> They were unable to reach a consensus regarding

12. MAX WEBER, ON LAW IN ECONOMY AND SOCIETY 100 (Edward Shils & Max Rheinstein trans., 1954).

13. See *infra* notes 100–114 and accompanying text.

14. See *infra* notes 116, 124–148 and accompanying text.

15. See *infra* note 115 and accompanying text.

16. IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 1–21 (1984). For a discussion of the preparatory work that gave rise to the Convention and its relation to customary and general principles of international law at the time of its drafting, see SHABTAI ROSENNE, THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION 29–63 (1970). The Convention’s *travaux préparatoires* may be found at U.N. Conference on the Law of Treaties, 1st Sess., Vienna, Austria, Mar. 26–May 24, 1968, U.N. Doc. A/CONF.39/11 (1969) [hereinafter Vienna Conference 1]; U.N. Conference on the Law of Treaties, 2d Sess., Vienna, Austria, Apr. 9–May 22, 1969, U.N. Doc. A/CONF.39/11/Add.1 (1970) [hereinafter Vienna Conference 2]. The documents from the Conference may be found at U.N. Conference on the Law of Treaties, 1st & 2d Sess., Vienna, Austria, Mar. 26–May 24, 1968, Apr. 9–May 22, 1969, U.N. Doc. A/CONF.39/11/Add.2 (1971) [hereinafter Vienna Conference Documents].

17. Vienna Convention on the Law of Treaties art. 52, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

18. *Id.* art. 53. The origins of the term *jus cogens* are discussed in Part II, Section 2. See *infra* notes 237–281 and accompanying text.

19. As will be seen, the concept of mandatory rules, as I am using it here, is broader in some respects, and narrower in others, than the concept of *jus cogens* as it has developed in international law. It is broader in that the concept of mandatory rules covers all norms that render a treaty in conflict with them void, including not only rules concerned with substantive

the source of these norms, with some representatives at the Vienna Conference citing custom in support of the *jus cogens* status of specific rules,<sup>20</sup> some characterizing the category as a whole as a general principle of law,<sup>21</sup> and some turning for justification back to natural law.<sup>22</sup> The effect of Articles 52 and 53, however, was clear: by establishing that a treaty is void if concluded through coercion or in contravention of *jus cogens*, rather than merely voidable at the election of one of the parties, the Vienna Convention recognized the existence of nonwaivable limits on the freedom of contract of states.

These provisions were heralded by representatives at the Vienna Conference as among the Vienna Convention's most important contributions to international law.<sup>23</sup> A few years after the Convention's adoption, moreover, the author of an influential monograph on *jus cogens* confidently predicted that the Convention's recognition of the concept would effect a dramatic transformation in the law of treaties:

Given . . . that the already great variety of fields presenting a common interest is constantly growing, the emergence of imperative norms to govern the basic, at least, aspects of the activity of States

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validity such as *jus cogens* norms addressing the legality of a treaty's object and execution, but also rules concerning the validity of the process through which the treaty was concluded, specifically the rule voiding treaties procured through coercion. It is narrower in that it concerns only the effect of such rules on the validity of treaties—not on the validity of other acts or the hierarchy of norms in general.

20. See, e.g., *Fifty-Fourth Meeting* (May 6, 1968), in Vienna Conference 1, *supra* note 16, at 306, ¶ 41 (statement of It. Rep. Mr. Maresca) (arguing that humanitarian law has come to be recognized as *jus cogens*).

21. See, e.g., *Fifty-Third Meeting* (May 6, 1968), in Vienna Conference 1, *supra* note 16, at 299, ¶ 26 (statement of Colom. Rep. Mr. Ruiz Varela) (“[T]he existence of certain general principles of international law was recognized by doctrine, positive law, and the practice of States, and . . . those principles, which had a firm moral basis in what been the *jus gentium* of the Romans, had become the rules of universal conscience of civilized countries.”).

22. See, e.g., *id.* ¶ 33 (statement of Pol. Rep. Mr. Nahlik) (“The notion of *jus cogens* was not so new as had sometimes been claimed. The existence of some superior rules had indeed been recognized in the past by the law of nations and they had only disappeared with nineteenth-century positivism.”).

23. *Fifty-Fifth Meeting* (May 7, 1968), in Vienna Conference 1, *supra* note 16, at 315, ¶ 24 (statement of Czech Rep. Mr. Smejkal) (“[Draft] article 50 contained one of the most important rules of international law.”); *Fifty-Third Meeting*, *supra* note 21, ¶ 21 (statement of Madag. Rep. Mr. Ratsimbazafy) (“He had no doubt that once the notion [of *jus cogens* and article 50] was established and recognized as such, it would become increasingly important in the law and life of the international community.”); *id.* ¶ 13 (statement of Ghana Rep. Mr. Dadzie) (“*Jus cogens* was an essential and inherently dynamic ingredient of international law.”); *Fiftieth Meeting* (May 3, 1968), in Vienna Conference 1, *supra* note 16, at 280, ¶ 54 (statement of Fr. Rep. Mr. de Bresson) (“[Draft] article 49 was undoubtedly one of the most important provisions in Part V.”); see, e.g., *Fifty-First Meeting* (May 3, 1968), in Vienna Conference 1, *supra* note 16, at 287, ¶ 45 (statement of U.S. Rep. Mr. Kearney) (“[Draft] article 49 was one of the key articles in the proposed convention and its final text could play a large part in determining the position of the United States delegation with regard to the convention as a whole.”).

in those fields seems assured. With the lapse of time, norms of *jus cogens* will increasingly cover specific areas of fields such as international commerce, international economics, international maritime law and many others, thus gradually preempting most of the spheres of activity which are presently left to the determination of the individual will of States.<sup>24</sup>

Although the implications of the recognition of *jus cogens* as a category of international law have since aroused heated debate, the context in which the concept has invited the least controversy is the one addressed directly in the Convention—treaty invalidity.<sup>25</sup> As Judge *ad hoc* Dugard confirmed in *Armed Activities on the Territory of the Congo*, “It is today accepted that a treaty will be void if at the time of its conclusion, it conflicts with ‘a peremptory norm of general international law.’”<sup>26</sup> The International Court of Justice (ICJ) has also declared that “[t]here can be little doubt, as is implied in the Charter of the United Nations and recognized in . . . the Vienna Convention . . . , that under contemporary international law an agreement concluded under the threat or use of force is void.”<sup>27</sup>

It consequently is striking that, in the more than three decades since the Vienna Convention entered into force, neither of these provisions has been successfully invoked even once to challenge the validity of a treaty. In this Article, I undertake to explain why that is so—and why it should concern us. I argue that constraints on contractual freedom serve functions as important to the law of treaties as they are to the law of contracts in domestic legal systems. But while such constraints won recognition in the mandatory rules set out in Articles 52 and 53 of the Vienna Convention, the enforcement procedures established by Articles 65 and 66 are radically contractualist: the ICJ lacks jurisdiction over treaty-invalidity claims unless the parties have consented to the Vienna Convention’s dispute resolution mechanism; moreover, third parties lack standing to challenge the validity of a treaty on the grounds defined in Articles 52 and 53, even though the rules

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24. CHRISTOS ROZAKIS, *THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES* 16 (1976).

25. See Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L. 291, 301 (2006) (endorsing view that *jus cogens* applies most plausibly in the law of treaties); Michael Byers, Book Review, 101 AM. J. INT’L L. 913, 914 (2007) (reviewing ALEXANDER ORAKHELASHVILI, *PEREMPTORY NORMS OF INTERNATIONAL LAW* (2006)) (describing the obligation not to recognize treaties in conflict with *jus cogens* as among “the least controversial implications” of the doctrine). For an early skeptical account, see JERZY SZTUCKI, *JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: A CRITICAL APPRAISAL* (1974); see also A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT’L L. 1, 24–40 (1995) (criticizing emptiness and conceptual confusion in *jus cogens* doctrine).

26. *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, 2006 I.C.J. 6, 88 (Feb. 3) (separate opinion of Judge *ad hoc* Dugard).

27. *Fisheries Jurisdiction (U.K. v. Ice.) (Fisheries Jurisdiction I)*, Judgment, 1973 I.C.J. 3, ¶ 24 (Feb. 2).

in both articles implicate interests shared by the international community as a whole. This procedural framework, I show, saps the rules in Articles 52 and 53 of much of their mandatory effect. Although a number of features of the international legal system make it unlikely in the foreseeable future that mandatory rules will serve all of the functions at the international level that they have come to serve in domestic law, I submit that some of their functions are of particular importance to international law. Accordingly, because post hoc judicial invalidation of agreements—the primary means employed by domestic jurisdictions for enforcing mandatory rules—is ill suited to the decentralized structure of the international legal system, the international community should promote adherence to them through individual and collective action by states *prior* to the conclusion of treaties and through *political*, as well as judicial, processes and institutions.

This Article is structured as follows: I begin, in Part I, by sketching the intellectual debates regarding the appropriate scope of contractualism in domestic law, with a view toward exploring how ideas developed in relation to domestic contracts law have been transposed to the international level. As I will show, codification efforts in the nineteenth and twentieth centuries increasingly obliged lawmakers and jurists to distinguish between rules with mandatory effect and those that could be varied or waived by the parties to an agreement.<sup>28</sup> The process brought to a head debates about the proper role of law in regulating agreements, as well as attendant controversies regarding the contours and validity of the public-private distinction, the relevance of individual will to contractual obligation, and the optimal means of promoting the efficiency of the legal system.<sup>29</sup>

What this intellectual history helps to illuminate is not only the arguments for and against contractualism, but also the functions served by legal constraints on contractual freedom. Part I concludes by examining these functions, including:

1. A *deterrent* function, whereby rules prohibiting the enforcement of agreements to engage in or encourage unlawful conduct offer an additional deterrent, beyond criminal and civil penalties, of the underlying conduct;
2. An *equitable* function, whereby rules give judges latitude to refuse enforcement of agreements to engage in or encourage conduct that is not itself unlawful but does adversely affect third parties or the public at large;
3. A *constitutional* function, whereby rules insulate laws concerning matters of public concern from alteration through agreement by private actors;

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28. See *infra* notes 46–69 and accompanying text.

29. See *infra* notes 61–85 and accompanying text.

4. A *systemic-integrity* function, whereby rules prohibit certain agreements in order to protect the logical integrity, dignity, or efficiency of the legal system;
5. A *paternalistic* function, whereby rules authorize the non-enforcement of agreements deemed injurious to parties who lack the capacity or information to protect themselves; and
6. A *distributive* function, whereby rules authorize the non-enforcement of agreements on terms deemed substantively unfair or as a means of shifting the allocation of power among social groups or classes.

To be sure, not all of these functions have elicited the same degree of support. More controversy has attended mandatory rules that serve paternalistic and distributive functions than those that serve to deter or prevent conduct that has adverse effects on the protected interests of third parties or the public at large.<sup>30</sup> Courts, moreover, have been reluctant to override the express preferences of parties to an agreement where the scale or negative character of the externalities created by it are seriously in dispute. Even so, the importance of the functions served by mandatory rules has made them a feature of every system of contracts law—even the most contractualist in approach.

In Part II of the Article, I show that debates regarding the merits of contractualism have been reprised at the international level in terms strikingly similar to those that unfolded in domestic jurisdictions. Focusing on the codification effort that culminated in the 1969 Vienna Convention on the Law of Treaties, I show that the Convention's recognition of constraints on the contractual freedom of states was premised to a great extent on analogues to the law of contracts in domestic jurisdictions. But while the concept of mandatory rules of international law ultimately won recognition in the Vienna Convention, the procedural mechanism the Convention established for enforcing such rules reflects a strictly contractualist vision of the law of treaties. I conclude Part II by explaining how features of this mechanism—the presumption of treaty validity, the lack of compulsory jurisdiction over invalidity claims, and the lack of third-party standing to bring them—operate to strip the rules recognized by the Convention of much of their mandatory effect.

Part III of the Article examines international practice in this area over the last half century. As I will show, what is most striking about this record is just how limited it is. Since the Vienna Convention entered into force in 1980, not a single party has pursued the invalidation of a treaty via the procedural mechanism defined in the Convention. Moreover, in the handful of cases in which the ICJ has addressed issues implicating the mandatory rules recognized in the Convention, it has adopted a restrictive view of the

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30. See *infra* notes 118–120, 142–146 and accompanying text.



functions appropriately served by such rules and of its own role in giving them effect.<sup>31</sup> Although regional human rights tribunals and U.N. political institutions have shown more willingness than the ICJ to entertain challenges to treaty validity arising from coercion and *jus cogens* claims,<sup>32</sup> they too have tended to be reluctant to unsettle the terms of treaties. These episodes nevertheless suggest that international institutions other than the ICJ may also have a role to play in promoting adherence to mandatory rules—both during the negotiation of international agreements and after they have been concluded.

In the fourth and final Part of the Article, I consider why the mandatory rules recognized in the Vienna Convention have failed to effect the expected transformation of treaty practice. I show that procedural barriers, norm indeterminacy, and concerns about paternalism pose virtually insurmountable obstacles to the judicial invalidation of treaties at the international level. I conclude by suggesting means, other than judicial intervention, through which the international community can ensure that some of the critical functions served by mandatory rules are performed. I focus in particular on steps that may be taken by international political institutions and the governments of third states—who are, after all, the primary enforcers of international law—to promote adherence to procedural and substantive norms while treaties are being negotiated, rather than after agreement has been reached.

This Article contributes to the rich literature on *jus cogens* in three primary ways. First, as a work of contracts scholarship, it offers a typology for describing the functions served by mandatory rules in legal systems. Although theorists have dedicated considerable attention to “default” rules, the roles played by mandatory rules in legal systems have largely been neglected in the existing literature. Second, as a work of legal history, the Article excavates the links between the development of mandatory rules of international law and the broader debates about contractualism in domestic legal orders, and it provides a legislative history of Articles 52 and 53 of the Vienna Convention, drawing on primary source materials from the International Law Commission and the Vienna Conference. Third, as a work of comparative and international law, it explains why the transposition of mandatory rules from the law of contracts to the law of treaties has proven so problematic and suggests how the process for promoting adherence to such rules may be better adapted to the decentralized character of the international legal system.

These questions are not merely matters of theoretical concern. Despite the paucity of international practice involving the actual invalidation of treaties pursuant to Articles 52 and 53 of the Vienna Convention, claims that international agreements were coerced or violate *jus cogens* have been neither infrequent nor inconsequential. It bears remembering that Hitler’s rise to power was fueled by the claim that the Versailles Treaty had been forced

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31. See *infra* Part III.A.

32. See *infra* Parts III.B–C.

on the German people and was manifestly unfair.<sup>33</sup> Over the last two decades, moreover, critics of a number of high-profile peace agreements, including the Dayton, Oslo, Accra, and Lomé Accords, have leveled charges that the agreements were coerced or conflicted with *jus cogens*;<sup>34</sup> and opponents of proposals for resolving the Cyprus and Arab-Israeli conflicts have used similar arguments as part of their efforts to defeat peace plans.<sup>35</sup> In addition, questions have been raised about whether amnesties extended to alleged human rights violators in the context of peace agreements are enforceable.<sup>36</sup> As the world has seen, the allegation that an existing or proposed treaty conflicts with the most fundamental norms of international law—such as the prohibitions of conquest, genocide, and torture; the right to self-determination; and the protections afforded by international humanitarian law—can have enduring political repercussions. Determining what can be done about it, and by whom, is consequently both important and urgent.

### I. CONTRACTUALISM IN PRIVATE LAW

Across private law, one encounters the distinction between rules of law that may be waived or modified by the party or parties to a legal instrument—such as a contract or will—and rules that parties are not permitted to vary. Among U.S. legal scholars, the former have come to be referred to as *default rules*, “by analogy to the default settings on a computer, since they are subject to contrary agreement [by the parties] but apply by default absent such agreement.”<sup>37</sup> The latter, on the other hand, commonly are labeled *mandatory rules*.<sup>38</sup> An agreement at odds with a

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33. See *infra* note 458.

34. See *infra* notes 444–448 and accompanying text.

35. See, e.g., ELIZABETH KOEK, AL-HAQ ORG., EXPLORING THE ILLEGALITY OF LAND SWAP AGREEMENTS UNDER OCCUPATION 6 (2011), available at [http://www.alhaq.org/publications/publications-index?task=callelement&format=raw&item\\_id=101&element=304e4493-dc32-44fa-8c5b-57c4d7b529c1&method=download](http://www.alhaq.org/publications/publications-index?task=callelement&format=raw&item_id=101&element=304e4493-dc32-44fa-8c5b-57c4d7b529c1&method=download) (arguing that international law bars Palestinian officials from concluding land swap agreement with Israel in the context of continuing military occupation); INT’L CRISIS GRP., THE CYPRUS STALEMATE: WHAT NEXT? 6 (Europe Report No. 171, 2006), available at [http://www.crisisgroup.org/~media/Files/europe/171\\_the\\_cyprus\\_stalemate\\_what\\_next](http://www.crisisgroup.org/~media/Files/europe/171_the_cyprus_stalemate_what_next) (describing Greek Cypriot opposition to the Annan peace plan on grounds of incompatibility with European human rights norms).

36. See *infra* notes 447–448 and accompanying text.

37. E. ALLAN FARNSWORTH, CONTRACTS, § 1.10, at 36 (1999). These rules are also known, variously, as “suppletory rules,” Melvin Aron Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1461 (1989), “suppletive rules,” Alejandro M. Garro, *Codification Technique and the Problem of Imperative and Suppletive Laws*, 41 LA. L. REV. 1007, 1007–08 (1980), “optional rules,” Arthur Lenhoff, *Optional Terms (Jus Dispositivum) and Required Terms (Jus Cogens) in the Law of Contracts*, 45 MICH. L. REV. 39, 41 (1945), and “yielding law,” *id.* at 41 n.6.

38. FARNSWORTH, *supra* note 37, § 1.10, at 36. A range of other terms have also been used to describe the same or similar concepts, including “immutable rules,” Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 88 (1989), “compulsory terms,” Duncan Kennedy, *Distributive and Paternalist*

mandatory rule is void—that is, unenforceable by any party.<sup>39</sup> What makes a rule mandatory is therefore not the legal system’s use of coercion, it is the absence of it—the state’s refusal to use its “coercive apparatus”<sup>40</sup> to enforce an instrument or term at odds with the rule. In addition to default and mandatory rules, a third category of rules is also recognized: rules the violation of which renders an agreement voidable by one of the parties, rather than void. Civil law systems refer to such rules as establishing “relative nullity.”<sup>41</sup> At the risk of adding more jargon to an already-littered field, I will refer to them here as *semimandatory rules*, since they are mandatory for the party who has violated the rule but may be waived by the victim of the violation.

Over the last several decades, legal scholars have debated the appropriate scope of contractual freedom in various fields of law.<sup>42</sup> In practical terms, their argument has been about the classification of rules—that is, the extent to which various rules of private law are and should be default or mandatory in structure and effect. Some of the terminology they have employed is new, but the distinction to which it points has ancient roots. In the following Sections, I briefly trace the intellectual origins of that distinction and the ideological debates that have attended the classification of rules pursuant to it. I then turn to examining the functions served by mandatory rules

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*Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 563 (1982), “required terms,” Lenhoff, *supra* note 37, at 41 n.6, “absolute terms,” *id.*, “imperative norms,” O. Kahn-Freund, *A Note on Status and Contract in British Labour Law*, 30 MOD. L. REV. 635, 641 (1967), and “coercive contract rules,” Stewart Schwab, *A Coasean Experiment on Contract Presumptions*, 17 J. LEGAL STUD. 237, 239 n.6 (1988). The term “mandatory rule,” moreover, has a separate, specialized meaning in the conflict-of-laws literature. There, a mandatory rule is “enforceable at the insistence of a party claiming its benefit or by a judge concerned with moving the docket, [but] may be waived or mitigated in exercising reasonable equitable discretion.” *Bowles v. Russell*, 551 U.S. 205, 216 (2007) (Souter, J., dissenting); *cf.* Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1, 9 (2008) (advocating different definition).

39. In practice, however, courts sometimes give such rules less than mandatory effect: “[a] court may hold instead that the agreement can be enforced by one of the parties though it cannot be enforced by the other” or “that part of the agreement is enforceable, though another part of it is not.” FARNSWORTH, *supra* note 37, § 5.1, at 322–23. For an economic analysis of how this variance contributes to efficient deterrence of wrongful conduct, see Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115, 120–21 (1988).

40. WEBER, *supra* note 12, at 98–99.

41. Garro, *supra* note 37, at 1011.

42. See generally Ayres & Gertner, *supra* note 38 (discussing various methods of evaluating effects of default rules); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (discussing mandatory rules of inalienability); Jeffrey Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549 (1989) (discussing different opinions of legal scholars and economists on contract-term regulation); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983) (discussing restraints on contractual freedom); John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105 (2004) (discussing rationales for mandatory rules in trust formation).

in private law. I offer this analysis with an eye toward exploring how and why the concept has been transposed into the law of treaties, a question to which I turn in Part II.

### A. When Agreement Conquers Law: Some Intellectual History

The central tenets of contractualism are expressed simply and poignantly in two maxims of ancient law: *conventio vincit legem* (“agreement conquers law”) and *invito beneficium non datur* (“A benefit is not forced on the unwilling”).<sup>43</sup> They convey a narrow view of law’s role in regulating private agreements, one in which rules of law are defaults that may be overridden by contracting parties and parties are free to define and pursue their own preferences, rather than have terms foisted on them. However, another maxim of Roman law, *jus publicum quod pactis privatorum mutari non potest* (“Public law cannot be altered by the agreements of private citizens”), has often been invoked in tandem with the first two, modifying—and moderating—their effect. Thus, writing in the sixteenth century, Sir Edward Coke observed that the rule that agreement conquers law “extend[s] not to anything that is against the commonwealth or the common right.”<sup>44</sup> Similarly, while the seventeenth-century French jurist Jean Domat acknowledged that “[p]ersons capable of enjoying their rights are free to renounce what the laws establish in their favour,” he added that “this freedom to renounce one’s right does not extend to a case where third parties have an interest, nor to those where renunciation . . . would be contrary to good morals or in defiance of some statute.”<sup>45</sup> The idea that emerges from the interaction of these maxims is that agreement should indeed conquer law—most contracting rules should be default, not mandatory—except to the extent that the law serves to protect the rights of third parties or, more generally, a public interest.

As Bernard Rudden points out, however, the word “public” in the third maxim “contains the germ of later difficulties.”<sup>46</sup> Roman law scholars debated whether what made a norm public was the norm’s source, form, or substance.<sup>47</sup> They also struggled to determine the extent to which the protection of certain private rights, such as those related to inheritance and tenancy, might implicate a public interest justifying constraints on contractual freedom.<sup>48</sup> Legislators in continental Europe encountered similar challenges when they undertook in the nineteenth century to codify the

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43. See Bernard Rudden, *Ius Cogens, Ius Dispositivum*, 11 *CAMBRIAN L. REV.* 87, 87–91 (1980). *Conventio vincit legem* is cited as a “general rule” in Glanvill, a twelfth-century treatise on the customary law of medieval England. *Id.* *Invito beneficium non datur* appears in the Roman law of obligations. *Id.* at 89.

44. *Id.* at 91 (quoting EDWARD COKE, COMMENTARY ON LITTLETON 166a (1628)).

45. *Id.* at 90 (quoting JEAN DOMAT, LES LOIS CIVILES DANS LEUR ORDRE NATUREL (1689)).

46. *Id.* at 88.

47. *Id.*

48. *Id.* at 89–90.

propositions underlying these ancient maxims,<sup>49</sup> which had become assimilated into customary law.<sup>50</sup> The process of codification obliged lawyers in civil law systems early on to develop tools for distinguishing between mandatory rules (termed *jus cogens* well before the term came to be associated with international law) from default rules (termed *jus dispositivum*).<sup>51</sup> As Roman lawyers had found, it was not a simple task.<sup>52</sup>

Like civil law, the common law has long declined to recognize the validity of agreements in conflict with law or public policy,<sup>53</sup> and it too has faced challenges in striking a balance “between community interests and sectional interests” in this context.<sup>54</sup> However, the distinction between mandatory rules and default rules remained largely unfamiliar to U.S. and English lawyers until the middle of the twentieth century.<sup>55</sup> One of the reasons for this lack of familiarity was the slow pace and haphazard character of codification in the common law system, particularly in the area of contracts law.<sup>56</sup> Statutes governing private economic relations were rare—“an exception imposed to remove mischiefs and evils which now and then the natural growth of the common law had failed to remedy.”<sup>57</sup> Accordingly, when such statutes were enacted, they “exhibited the most rigorous, unrelenting and unyielding character of rules.”<sup>58</sup> They tended not, in other words, to create rules that parties could waive as they saw fit. While the courts rec-

49. For examples of provisions codifying these principles in civil codes, see Garro, *supra* note 37, at 1007 n.2.

50. For example, the *Code Napoléon*, on which many subsequent civil codes were based, see J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 311–12 (1992), provides that “[o]ne may not, by private agreements, derogate from laws concerning *ordre public* and good morals;” Rudden, *supra* note 43, at 89 (quoting Article 6 of the *Code Napoléon*).

51. Lenhoff, *supra* note 37, at 39–40. According to Jerzy Sztucki, the term *jus cogens* itself originated in the works of nineteenth-century Roman law scholars. SZTUCKI, *supra* note 25, at 6.

52. For a discussion of the challenges facing this enterprise, see generally René David, *The Distinction Between Lois Impératives and Lois Supplétives in Comparative Law*, 22 REV. JUR. U.P.R. 154, 162–63 (1952) (describing use of textual analysis to differentiate between *lois impératives* and *lois supplétives* in civil law); Garro, *supra* note 37 (discussing difficulties of codifying mandatory and default rules in the Louisiana Code).

53. See *Lochner v. New York*, 198 U.S. 45, 53 (1905) (noting that, pursuant to police powers, states had enacted rules restricting contracts concerning “safety, health, morals and general welfare of the public”); see also P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 410–14 (1979) (noting that, even during the height of the classical period, English courts invalidated contracts in restraint of trade and those with significant adverse effects on third parties).

54. Percy H. Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76, 92–93 (1928).

55. See Kahn-Freund, *supra* note 38, at 642; Lenhoff, *supra* note 37, at 41.

56. See David, *supra* note 52, at 158–59.

57. Lenhoff, *supra* note 37, at 41; see also Kahn-Freund, *supra* note 38, at 641.

58. Lenhoff, *supra* note 37, at 41.

ognized a few default rules derived from custom,<sup>59</sup> these “were bound to hide their character behind the shape of ‘implied’ promises because the parties’ will and nothing else was deemed to control the bargain.”<sup>60</sup>

Indeed, as a result of the influence of will theory<sup>61</sup>—and of the laissez-faire economic philosophy that arose along with it—Anglo-American contracts law in the nineteenth and early twentieth centuries was purposefully spare in substance. Describing will theory’s influence on classical contracts law in England, P. S. Atiyah explains,

[T]he importance attached to free choice, and to the idea that a contract was a vehicle for giving effect to the will of the parties, had a profound effect on the very functions of contract law, as it was perceived by the Courts. The primary function of the law came to be seen as purely facultative, and the function of the Court was merely to resolve a dispute by working out the implications of what the parties had already chosen to do. The idea that the Court had an independent role to play as a forum for the adjustment of rights, or the settlement of disputes, was plainly inconsistent with this new approach.<sup>62</sup>

According to Lawrence Friedman, the “abstraction” of classical contracts law in the United States similarly represented “a deliberate renunciation of the particular, a deliberate relinquishment of the temptation to restrict untrammelled individual autonomy or the completely free market in the name of social policy.”<sup>63</sup>

Within this radically contractualist scheme, mandatory rules were disfavored. “As theories of individual freedom . . . seemed to require that no obligations or defences to obligations should be allowed unless willed by the parties,” Williston recounts, “so on the other hand the same theories led to opposition to restrictions being placed on the kind of contracts which they in fact did will.”<sup>64</sup> In the United States, this opposition led judges not only to

59. For example, the principle that “where work is to be done by one party and payment is to be made by the other, the performance of the work must precede payment, in the absence of a showing of contrary intention” was settled “[c]enturies ago.” See RESTATEMENT (SECOND) OF CONTRACTS § 234 cmt. e (1979).

60. Lenhoff, *supra* note 37, at 41; see also Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 366, 371 (1921).

61. For a concise explanation of will theory, see Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 272–74 (1986).

62. ATIYAH, *supra* note 53, at 407–08; accord Williston, *supra* note 60, at 366.

63. LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA* 20–21 (1965).

64. Williston, *supra* note 60, at 373. This view was not, of course, universally embraced. “Objective” theorists like Holmes and Williston urged a departure from will theory’s focus on subjective intent, reintroducing reliance principles into the law of contracts by focusing on the external manifestations of the parties’ will, and they expressed skepticism about its merits as a rationale for laissez-faire ideology. See Braucher, *supra* note 5, at 58–60. But, as Williston complained in 1921, “Conditions are not favorable . . . for dropping in the twentieth

conceive of their own role narrowly, but also to adopt a restrictive view of the legislature's role in constraining the substantive terms of contracts.<sup>65</sup> That view found expression, most notoriously, in the U.S. Supreme Court's decisions in *Lochner v. New York*<sup>66</sup> and its progeny. In these cases, the Court invalidated an array of statutes establishing mandatory rules—minimum-wage requirements,<sup>67</sup> maximum working hours,<sup>68</sup> etc.—on the grounds that they arbitrarily and unreasonably interfered with a constitutional right to freedom of contract. As Judge Jerome Frank memorably observed in a 1943 opinion, “[O]nce upon a time—and not so long ago—the word ‘contract’ cast a curious spell on legal thinking.”<sup>69</sup>

That spell has never entirely been lifted. To be sure, the notion that state legislatures' ability to enact mandatory rules is constitutionally constrained no longer holds sway in the United States.<sup>70</sup> The growing influence of sociological jurisprudence and legal realism during the middle of the twentieth century, in part as a consequence of the Great Depression, prompted both an expansion of the concept of the public interest<sup>71</sup> and a blurring (if not the outright collapse) of the public-private distinction.<sup>72</sup> Since then, “[s]ocial control of contractual association, which began as a counter-current in the early days of laissez-faire libertarianism, has . . . swelled into a main current of thought,” resulting in “the breakdown of the classical conception of contract law as a unitary body of legal doctrine and the emergence . . . of whole branches of specialized law . . . .”<sup>73</sup> But even as the scope of contracts law has diminished, the view that its primary function is—and ought to be—to give effect to the manifest intentions of the parties to transactions remains

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century views which were . . . adopted in the previous century, as easily and as quickly as they were taken up.” Williston, *supra* note 60, at 369.

65. Even though British courts could not invoke constitutional provisions to constrain legislative restrictions on freedom of contract, the substantive regulation of contracts by the legislature was also slow to develop in Britain. See Kahn-Freund, *supra* note 38, at 641.

66. *Lochner v. New York*, 198 U.S. 45, 56–58 (1905).

67. See *Adkins v. Children's Hosp. of D.C.*, 261 U.S. 525, 559 (1923) (striking down D.C. minimum-wage statute for women and children).

68. See *Lochner*, 198 U.S. at 61, 64 (striking down law regulating bakers' hours).

69. *Beidler & Bookmyer, Inc. v. Universal Ins. Co.*, 134 F.2d 828, 829 (2d Cir. 1943).

70. The Supreme Court began its shift away from *Lochner* in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). For a discussion of *Lochner* and the factors that prompted its reversal, see generally David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1 (2003).

71. As Morris Cohen observed in 1933, “To draw a sharp line, as Mill does, between those acts which affect one person and no one else and those acts which do affect others, is impracticable in modern society. What act of any individual does not affect others?” Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 562 (1933).

72. See generally Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1010–39 (1985); Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94, 115–26 (2000).

73. FRIEDRICH KESSLER ET AL., *CONTRACTS: CASES AND MATERIALS* 14 (3d ed. 1986).

prevalent. Accordingly, most of what we consider contract rules today are default rules.<sup>74</sup> Indeed, such is the predominance of default rules within contracts law that applying a “contractual” (or “contractarian”) model to other fields is understood to involve minimizing the incidence and scope of mandatory rules.<sup>75</sup>

As noted above, classical contracts theorists regarded the right of private actors to order their economic relations according to their own preferences as a critical dimension of individual autonomy and liberty<sup>76</sup>—a view echoed in *Lochner*-era judicial opinions in the United States.<sup>77</sup> Although rights-based rationales continue to inform arguments in favor of contractualism,<sup>78</sup> more recent scholarship tends to adopt a more explicitly utilitarian perspective, using economic analysis to assess the efficiency of legal constraints on contractual freedom.<sup>79</sup> Stripped down to its core elements, the economic argument for treating most contract rules as default rules unfolds as follows: The parties to an agreement are usually best able to assess their own interests.<sup>80</sup> Because no one is likely to care more about the parties’ welfare than the parties themselves, the parties also have “almost ideal incentives to seek out and adopt the rule that is in their own best interests.”<sup>81</sup> Conversely, if resource-allocation decisions are placed in third

74. For example, the Uniform Commercial Code states “affirmatively at the outset” that it is guided by freedom of contract, U.C.C. § 1-302 cmt. 1 (2005), providing that its effects “may be varied by agreement” “[e]xcept as otherwise provided in subsection (b) or elsewhere in [the code],” *id.* § 1-302(a); *see also* Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 825 (1992) (discussing predominance of default rules in contracts law).

75. *See* ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW* 79–124 (1997) (discussing contractarian challenges to mandatory rules of marriage and corporate law); *cf.* Lucian Arye Bebchuk, *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments*, 102 HARV. L. REV. 1820, 1822 (1989) (suggesting that constraints on charter amendments are consistent with “the contractual view of the corporation”).

76. *See* Cohen, *supra* note 71, at 558–59.

77. *See, e.g.*, *Adair v. United States*, 208 U.S. 161, 175 (1908) (upholding contracts forbidding workers from joining trade unions on ground that contrary legislation “is an arbitrary interference with the liberty of contract which no government can legally justify in a free land”).

78. *See, e.g.*, CHARLES FRIED, *CONTRACT AS PROMISE* 7 (1981) (“[W]hatever we accomplish and however that accomplishment is judged, morality requires that we respect the person and property of others.”); Thomas L. Hudson, Note, *Immutable Contract Rules, the Bargaining Process, and Inalienable Rights: Why Concerns Over the Bargaining Process Do Not Justify Substantive Contract Limitations*, 34 ARIZ. L. REV. 337, 343 (1992) (arguing against legal paternalism on ground that it constrains personal autonomy and denies “moral equality”).

79. *See* sources cited *supra* notes 6–11.

80. *See* Barnett, *supra* note 74, at 831–32 (discussing “the knowledge problem”).

81. Clark, *supra* note 3, at 1714. As Clark acknowledges, parties sometimes make mistakes about whether a particular rule will make them better off. “But in comparing different sources of rules, it is always important to focus carefully upon the incentives of the rule



parties' hands, it is difficult to ensure that they will be made impartially.<sup>82</sup> For these reasons, "[c]ontractually created rules will tend strongly to be pareto-superior rules: they will make one or both parties better off, and neither party worse off."<sup>83</sup> This is particularly true in a marketplace characterized by a diversity of interests and transactions because "[a] constantly expanding market system with 'infinite number[s] of atypical transactions' demands self-regulation by parties who know their interests better than public officials do."<sup>84</sup> Even where public interests are implicated, moreover, the use of default rules permits the kind of experimentation that leads to the development of better rules.<sup>85</sup>

Within this framework, mandatory rules are recognized to have a necessary, but narrow, role. Describing a "surprising consensus among academics," Ian Ayres and Robert Gertner submit that because mandatory rules "displace freedom of contract," they are "justified only if unregulated contracting would be socially deleterious because parties internal or external to the contract cannot adequately protect themselves."<sup>86</sup> In other words, because people usually know best what is good for them and will make agreements accordingly, their contracts should not be invalidated unless either (1) one of the parties is not actually in the best position to know or act on what is good for him or her, or (2) the parties' agreement adversely affects the protected interests of other people—or of the community at large. Again, therefore, "agreement conquers law"—except in a few circumstances. As in the past, however, it is identifying those circumstances that has aroused controversy: "the disagreement among academics is not over this abstract theory, but whether in particular contexts parentalistic concerns or externalities are sufficiently great to justify the use of [mandatory] rules."<sup>87</sup>

It is against the backdrop of these debates about the functions of contracts law that scholars, judges, and legislators have undertaken, in a variety of fields, to evaluate which rules should be mandatory, which should be default, and which should fall somewhere in between. It is not my intention in this Article to assess the relative merits of the approaches they have taken. As discussed in the next Section, however, the varying premises of these approaches inform our understanding of the functions served by mandatory rules. As I will show in Part II, they have contributed to the conceptual tension surrounding the introduction of mandatory rules into the law of treaties.

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makers and the information available to them when they make a rule. When this analysis is done, contractual rule making often seems clearly superior to its chief rivals." *Id.*

82. See Barnett, *supra* note 74, at 850–51 (discussing "the partiality problem").

83. Clark, *supra* note 3, at 1714.

84. HILLMAN, *supra* note 75, at 11–12 (footnotes omitted).

85. See Bernard Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 Nw. U. L. REV. 542, 576 (1990).

86. Ayres & Gertner, *supra* note 38, at 88–89.

87. *Id.*

### B. The Functions of Mandatory Rules

Mandatory rules appear in a great variety of contexts. In the United States, for instance, some have been enacted by legislatures, such as statutes rendering null and void agreements to engage in usury<sup>88</sup> or gambling<sup>89</sup> and agreements in restraint of trade.<sup>90</sup> Some have been derived by courts from legislation that prohibits conduct but does not explicitly void agreements to engage in it, such as statutes prohibiting criminal conspiracies<sup>91</sup> and commercial bribery<sup>92</sup> and those regulating labor, health, and safety.<sup>93</sup> Some, moreover, have been developed by the courts, such as rules voiding agreements or instruments restraining the alienation of property,<sup>94</sup> restraining unmarried persons from marrying or encouraging divorce or separation,<sup>95</sup> or encouraging breach of a fiduciary duty.<sup>96</sup> In addition, some mandatory rules focus not on an agreement's terms, but on the process through which it was concluded—such as the rule of contracts law rendering unenforceable agreements procured through physical compulsion.<sup>97</sup>

But what *functions* do mandatory rules serve? What is gained by rendering contracts or terms in conflict with a rule void, rather than merely voidable? Despite the attention lavished on default rules over the last few decades, the functions served by mandatory rules have received limited attention in recent scholarship.<sup>98</sup> While a comprehensive treatment of the subject is long overdue, it is beyond the scope of this Article. What this Section offers instead is an examination of the primary functions mandatory rules have been recognized to serve, distilling and elaborating on the

88. See, e.g., CAL. CIV. CODE § 1916-2 (West, Westlaw through Ch. 876 of 2012 Sess.).

89. See, e.g., 720 ILL. COMP. STAT. ANN. 5/28-1 (West, Westlaw through P.A. 97-1132 (excluding P.A. 97-1108 and P.A. 97-1109)).

90. See, e.g., 15 U.S.C. § 1 (2011); *id.* §§ 12–27. Although these rules were originally developed by the courts, “[f]ederal antitrust laws and related state statutes have so completely occupied this field that the common law rules are now of little consequence in most respects . . .” FARNSWORTH, *supra* note 37, § 5.3, at 331.

91. See, e.g., ALA. CODE § 13A-4-3 (West, Westlaw through 2012 Sess.).

92. See, e.g., CAL. PENAL CODE § 641.4 (West, Westlaw through Ch. 876 of 2012 Sess.); *Sirkin v. Fourteenth St. Store*, 108 N.Y.S. 830, 833–34 (N.Y. App. Div. 1908) (holding unenforceable a contract for sale of hosiery obtained through bribe of buyer’s purchasing agent in violation of antibribery statute).

93. See FARNSWORTH, *supra* note 37, § 5.3, at 334–36.

94. See, e.g., *Procter v. Foxmeyer Drug Co.*, 884 S.W.2d 853, 861 (Tex. App. 1994) (invalidating option provision on ground that it “operates indirectly as a restraint on alienation”).

95. See FARNSWORTH, *supra* note 37, § 5.4, at 340–41.

96. See, e.g., *Corti v. Fleisher*, 417 N.E.2d 764, 768 (Ill. App. Ct. 1981) (refusing to enforce contract between lawyer and firm giving lawyer the right to retain clients’ files on ground that it deprived lawyer’s clients of counsel of their choice).

97. See RESTATEMENT (SECOND) OF CONTRACTS § 174 (1979) (providing that manifestation of assent procured through physical compulsion is ineffective, rendering agreement based on it unenforceable).

98. Notable exceptions include Kronman, *supra* note 42, and Kennedy, *supra* note 72.

theoretical literature and judicial opinions.<sup>99</sup> I have grouped these functions into two broad categories: the protection of parties outside a transaction and the protection of parties to a transaction. Although, as discussed below, the lines separating these categories are not sharp, they provide a ready framework for analysis.

### 1. Protecting Parties Outside a Transaction

Almost every transaction affects third parties to some degree,<sup>100</sup> and legal systems have devised an array of means of discouraging those with adverse effects on the protected interests of parties outside the transaction.<sup>101</sup> For example, in the common law system, the doctrine of privity was conceived to constrain a party's ability to confer rights or impose obligations by contract on third parties.<sup>102</sup> In addition, criminal law and torts law—as well as specialized areas such as securities and antitrust law—attach penalties to transactions likely to have severe adverse effects on third parties or the public at large. Thus, as noted above, conspiracy to commit murder is subject to criminal penalties, as are agreements to fix prices and to violate important health and safety regulations.<sup>103</sup>

Mandatory rules may function to protect third parties from the adverse effects of transactions in several different ways: by deterring illegal conduct (a deterrent function), by allowing courts to deny enforcement of agreements that are harmful but not illegal (an equitable function), by insulating laws concerning matters of public concern from alteration by private actors (a constitutional function), and by safeguarding the logical and moral integrity of the legal system (a systemic-integrity function). Each of these functions is discussed further below.

*Deterrent Function.* Rules prohibiting the enforcement of agreements to engage in or encourage unlawful conduct offer an additional deterrent, beyond criminal and civil penalties, to the underlying conduct.<sup>104</sup> If the parties

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99. I rely in this Section on opinions of the U.S. Supreme Court that addressed, critically and at some length, the rationales for constraints on contractual freedom in early twentieth-century cases. I have not undertaken a thorough survey of the relevant jurisprudence of courts in other jurisdictions. That kind of survey would, however, be a welcome addition to the comparative contracts law literature.

100. See WEBER, *supra* note 12, at 126–27 (“The interests of every creditor of a person contracting a debt are affected by the latter’s increased liabilities, and the interests of the neighbors are affected by every sale of land, . . . through the changes in its use which the new owner may . . . introduce.”).

101. To put the same idea in economic terms, legal systems discourage transactions that create significant negative externalities, imposing greater costs on the community than on the parties to them. See Calabresi & Melamed, *supra* note 42, at 1111.

102. See ATIYAH, *supra* note 53, at 413.

103. See *supra* notes 91–93 and accompanying text.

104. The U.S. Supreme Court has even suggested that nonenforcement may serve as an additional penalty. See *Bartle v. Nutt*, 29 U.S. (4 Pet.) 184, 189 (1830) (“If either [party to an illegal contract] has sustained a loss by the bad faith of a particeps criminis, it is but a just in-

to a potential transaction know that no court will enforce its terms, they may be less inclined to enter into it. As the U.S. Supreme Court observed in *McMullen v. Hoffman*, “[t]o refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum.”<sup>105</sup>

The effectiveness of this deterrent turns in part on the certainty of non-enforcement. As the Court explained in *McMullen*, “[t]he more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, . . . the less inclined will they be to enter into them.”<sup>106</sup> Moreover, if a particularly strong deterrent is sought, the legal system may render void not just the problematic term, but the entire transaction.<sup>107</sup> Nonenforcement of the agreement in court is unlikely to be an effective deterrent, however, if the parties do not expect to bring the matter before a court or if they have alternative means of self-help. As a student note points out, “[f]ailing to pay the Pied Piper of Hamelin had negative repercussions, and one suspects the same would be true for anyone who reneged on a promise to pay an assassin for his services.”<sup>108</sup> Thus, the capacity of a mandatory rule to serve a deterrent function will turn both on the rule’s substantive determinacy and on the availability and likelihood of recourse to legal processes for the enforcement of transactions implicating the rule.

*Equitable Function.* Courts have also fashioned mandatory rules to permit nonenforcement of agreements to engage in or encourage conduct that is not itself unlawful but does adversely affect third parties (or the public at large). In an employment agreement, for example, a court may find a broadly drawn covenant not to compete unenforceable as a restraint on trade even though the conduct encouraged by the agreement—refraining from work in a particular field or geographic area—is lawful. As rules of this kind harden into precedent, they may develop a deterrent effect, discouraging future parties from entering into agreements at odds with an established public policy. When first articulated, however, such rules serve an equitable function, allowing courts to compensate for gaps in the law that, left unfilled, would oblige enforcement of agreements detrimental to third-party or public interests.<sup>109</sup> According to Percy Winfield, this equitable function “is a stone in the edifice of [public policy] doctrine, and not a missile to be flung at it,”

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fliction for premeditated and deeply practiced fraud; which, when detected, deprives him of anticipated profits, or subjects him to unexpected losses.”)

105. *McMullen v. Hoffman*, 174 U.S. 639, 669–70 (1899).

106. *Id.*

107. Conversely, as Juliet Kostritsky points out, if a court wishes to impose the deterrent on the party best able to bear the risk of nonenforcement, it may recognize enforcement rights to be one sided (that is, the rule may be treated as semimandatory). See Kostritsky, *supra* note 39, at 121–22.

108. Note, *A Law and Economics Look at Contracts Against Public Policy*, 119 HARV. L. REV. 1445, 1448 (2006).

109. See Winfield, *supra* note 54, at 89.

for “[t]he march of civilization and the difficulty of ascertaining public opinion at any given time make it essential.”<sup>110</sup>

*Constitutional Function.* Mandatory rules may serve to insulate laws concerning matters of public concern from alteration by private actors. This function is suggested by the literal terms of the maxim, *jus publicum quod pactis privatorum mutari non potest*, discussed above.<sup>111</sup> The concern is not just that private parties would alter public law as applied to their particular transaction, but also that the law could thereby be altered as applied to others as well. In the era before most law was codified, when norms of domestic law were derived primarily from custom,<sup>112</sup> the relevance of this function was easier to appreciate: because derogations from a rule could alter the rule over time, it was necessary to ensure that no derogations from rules implicating critical issues of public concern were permitted. In a system in which statutes trump custom and legislative functions are centralized, this function is less critical (though constitutional norms perform an analogous function vis-à-vis statutes).<sup>113</sup> In the international setting, however, this function of mandatory rules assumes signal importance. As Christos Rozakis explains,

In a decentralized system of law, legal rules are created or extinguished through the practice of States and the proof of legal conviction carried in such practice. Consistent violations of a legal rule which do not become subject to a protest on the part of the affected States may therefore change the texture of the violated prohibitive rule or even extinguish it, thus converting the illegality into a legality.<sup>114</sup>

In such a system, if agreements in conflict with a rule are merely made voidable, the choice of parties not to seek enforcement of the rule could change the “texture” of the rule over time. If made mandatory, in contrast, rules critical to the protection of third parties or of the community at large are insulated from transformation through the custom derived from successive individual transactions.

*Systemic-Integrity Function.* Mandatory rules may also operate to protect parties outside of a transaction by safeguarding the moral and logical integrity or efficiency of the legal system. They may help preserve *elegantia juris*—the logical integrity of the legal system—by ensuring that a court is not called on to enforce an agreement to commit acts deemed illegal under other parts of

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110. *Id.* at 95–96.

111. *See supra* text accompanying note 44.

112. *See KELLY, supra* note 50, at 139.

113. *See* Michael Byers, *Conceptualizing the Relationship Between Jus Cogens and Erga Omnes Rules*, 66 *NORDIC J. INT’L L.* 211, 219 (1997) (“[C]onstitutional rules frequently limit the ability of law-makers to create or change rules in ways which would be detrimental to those human rights or civil liberties which are considered to be essential, defining aspects of the legal system and the society it serves.”).

114. ROZAKIS, *supra* note 24, at 25.

the law. Similarly, they may help preserve the dignity of the courts. As famously expressed by Lord Chief Justice Wilmot in *Collins v. Blantern*,

You shall not stipulate for iniquity. All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again, you shall not have a right of action when you come into a Court of Justice in this unclean manner to recover it back. Procul O! procul este profani.<sup>115</sup>

Courts, in other words, will not permit the justice system to be “polluted” by actions to enforce wrongful transactions. The use of mandatory rules may also promote the efficiency of the legal system: particularly in circumstances where information asymmetry makes proving the involuntariness of an agreement difficult or where certain waivers of rights tend usually to be involuntary, mandatory rules may be used to reduce the incidence, length, and expense of litigation.<sup>116</sup>

Thus, mandatory rules are deployed in a variety of different ways to safeguard the interests of third parties and of the broader public from the adverse effects of transactions. Although these rules constrain the autonomy of the parties to them—a factor that accounts for classical jurists’ reluctance to embrace some of them<sup>117</sup>—they also safeguard the autonomy of third parties, helping to ensure that their liberty is not unduly circumscribed by the transactions of others. For that reason, they are among the most longstanding and least controversial of mandatory rules.<sup>118</sup> Again, however, what has been the point of controversy is not the theoretical question of whether significant negative externalities justify mandatory rules, but the practical question of whether the externalities created by a given type of transaction are substantial and adverse enough to justify constraints on the liberty of the parties to it.<sup>119</sup> It is sometimes difficult, after all, to place a value on a transaction’s harmful effects on third parties, particularly when the harm alleged is moral in character.<sup>120</sup>

For that reason, courts have tended to use balancing formulas to assess the relative weight of the interests of parties inside and outside the transaction,<sup>121</sup> also considering the clarity of the public policy implicated and the

115. *Collins v. Blantern*, (1767) 95 Eng. Rep. 847 (K.B.) 852.

116. See Kronman, *supra* note 42, at 770 (discussing nondisclaimable warranties in the context of litigation costs).

117. See ATIYAH, *supra* note 53, at 412–13.

118. Roman jurists, for instance, declined to accept the validity of a contract in which the parties agreed not to bring an action for theft on the ground that the contract would be “an invitation to crime.” Rudden, *supra* note 43, at 88.

119. Ayres & Gertner, *supra* note 38, at 88–89.

120. See, e.g., Calabresi & Melamed, *supra* note 42, at 1112.

121. See, e.g., *Fresh Cut, Inc. v. Fazli*, 650 N.E.2d 1126, 1130 (Ind. 1995).

extent to which nonenforcement of the transaction will serve to advance it.<sup>122</sup> Where forfeiture, deterrence, or other concerns militate against strict application of a mandatory rule, moreover, courts have employed a range of mitigating techniques, including severing the offending provision (rather than voiding the entire agreement), treating the rules as semimandatory, or permitting restitution.<sup>123</sup>

## 2. Protecting Parties to a Transaction

In addition to protecting third parties, mandatory rules have also been fashioned to protect the parties to a transaction. Such rules serve one or more of the following functions.

*Paternalistic Function.* Mandatory rules may serve to authorize the nonenforcement of agreements injurious to parties who lack the capacity or information to protect themselves. This function is sometimes premised on concerns about the judgment of people in certain groups—concerns arising from what Duncan Kennedy calls “the relative incapacity of groups” or “their characteristic mistakes.”<sup>124</sup> An example (though presumably not one Kennedy had in mind) appears in *Muller v. Oregon*, in which the U.S. Supreme Court made a rare departure from its ruling in *Lochner* to uphold unanimously a statute restricting the working hours of women.<sup>125</sup> Among the grounds for its decision, the Court expressed concern that “[t]hrough limitations upon [a woman’s] personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights.”<sup>126</sup> As the Court pointed out, similar logic had animated the traditional rule voiding contracts with infants.<sup>127</sup> In both cases, the mandatory character of the rules was considered necessary to protect parties who were believed to be unable to protect themselves as a result of weakness of judgment or constitution.

Paternalistic rules have also been rationalized as a means of compensating for information asymmetries. As Robert Clark suggests, “elite rule makers may in fact have much better information about what would really promote the welfare of the subjects of a rule than the subjects themselves do.”<sup>128</sup> He explains,

This is likely to be true when technical information is highly relevant to the choice of a welfare-enhancing rule, there are specialists or experts in the technical information, and the judgments made by the experts cannot be rationally second guessed by nonexperts un-

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122. See FARNSWORTH, *supra* note 37, § 5.5, at 346.

123. See *id.* § 5.5, at 343–61.

124. Kennedy, *supra* note 38, at 648–49.

125. *Muller v. Oregon*, 208 U.S. 412, 412 (1908).

126. *Id.* at 422.

127. See *id.* at 421.

128. Clark, *supra* note 3, at 1718.

less they take on enormous costs to become experts themselves. . . . Similarly, an important asymmetry may exist when the factual beliefs most relevant to choice of a rule are of a general and judgmental sort that depend on experience, and more and wider experience does tend to produce better judgments.<sup>129</sup>

Thus, particularly in the regulatory context, mandatory rules may function as means of protecting people from the consequences either of their lack of judgment or of their lack of information, especially where that information is difficult to obtain, evaluate, or convey.<sup>130</sup>

Paternalistic rules may also be fashioned to protect parties—especially those in a weak bargaining position—from being forced into agreements. This aim is sometimes cited as a basis for rules disallowing tenants from disclaiming the warranty of habitability<sup>131</sup> and for rendering void agreements in conflict with labor regulations.<sup>132</sup> Because a disadvantaged party may prefer a deal on poor terms to no deal at all,<sup>133</sup> this function is often better served by semimandatory rules than by mandatory rules, since the former allow a party who was or appears to have been coerced to affirm the deal. Accordingly, most contractual defenses that are premised on a failure of assent due to coercion or deception—for example, fraud, duress, undue influence—render contracts voidable by the victim, not void.<sup>134</sup> As Anthony Kronman notes, however, information asymmetry may make it difficult for parties to avail themselves of these defenses, rendering the use of a mandatory rule efficient as a means of ensuring the voluntariness of an agreement.<sup>135</sup> In addition, if it is concluded that the waiver of certain rights is *usually* (if not always) involuntary, then it may be more efficient at the societal level to prohibit all such waivers than to assess their voluntariness case by case.<sup>136</sup> This latter rationale, however, speaks less to the protection of the parties to a given transaction than to the protection of others like them, or of the system in general.

*Distributive Function.* Mandatory rules are also used to advance distributive aims, authorizing nonenforcement of agreements on terms deemed substantively unfair or as a means of shifting the allocation of power among

129. *Id.*

130. See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *YALE L.J.* 541, 609–10 (2003) (noting that mandatory rules also serve to “ameliorate a market failure that disclosure cannot cure”).

131. See Kronman, *supra* note 42, at 772.

132. See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392–94 (1937).

133. As the Court observed in *Lochner*, “The employé may desire to earn the extra money, which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employé to earn it.” 198 U.S. 45, 52–53 (1905).

134. See RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981) (misrepresentation); *id.* §§ 175 (duress), 177 (undue influence).

135. See Kronman, *supra* note 42, at 770.

136. *Id.* at 768.



social groups or classes. For example, Kronman argues that the mandatory character of the warranty of habitability is best understood as “an instrument of redistribution that seeks to shift control over housing from one group (landlords) to another (tenants) in a way that furthers the widely shared goal of insuring everyone shelter of at least a minimally decent sort.”<sup>137</sup> Rules voiding contracts contrary to labor laws, like minimum-wage statutes, may also be seen in this light.<sup>138</sup> Using mandatory rules to pursue these aims, Kronman adds, may be legitimate when the alternatives “are likely to be more costly or intrusive.”<sup>139</sup> Again, however, this function is concerned less with the protection of a party to a given transaction who may otherwise secure desirable benefits in exchange for the waiver of a right made inalienable by a mandatory rule than with the protection of a class to which that party belongs.

These functions—paternalistic and distributive—converge. The U.S. Supreme Court pointed to both in *West Coast Hotel v. Parrish*, the case that heralded the end of the *Lochner* era. Upholding a state minimum-wage statute, the Court framed its concerns in terms of both coercion and incapacity: observing that workers “are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength,” it determined that “[i]n such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.”<sup>140</sup> Linking these concerns to broader distributive goals, the Court added,

The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay.<sup>141</sup>

Thus, as the Court’s arguments suggest, the aims of protecting contracting parties from their own lack of information or judgment, protecting them from being overborne or deceived by parties with a bargaining advantage, and distributing wealth or power to a class of which they are part are very often interwoven, though the justifications for and critiques of each may differ.

A critique common to these functions, however, arises from their paternalistic character.<sup>142</sup> In moral terms, paternalism of this kind is

137. *Id.* at 772.

138. *See* *Adkins v. Children’s Hosp. of D.C.*, 261 U.S. 525, 563 (Taft, C.J., dissenting) (“[W]hile in individual cases, hardship may result, [the statute, which set a minimum wage for women,] will enure to the benefit of the general class of employees in whose interest the law is passed and so to that of the community at large.”).

139. Kronman, *supra* note 42, at 770.

140. *See* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 394 (1937).

141. *Id.* at 399.

142. Kronman, *supra* note 42, at 763 (“[A]ny legal rule that prohibits an action on the ground that it would be contrary to the actor’s own welfare is paternalistic.”).

criticized because it usurps a party's autonomy,<sup>143</sup> which accounts for the opposition of classical contracts theory to these uses of mandatory rules in most circumstances.<sup>144</sup> And in economic terms, it is criticized because it ignores the fact that the parties to a transaction are often better situated than the state to assess and act in their own interests.<sup>145</sup> For both reasons, courts have hesitated to treat paternalistic rules as mandatory in the absence of a clear legislative fiat<sup>146</sup>—or they have instead justified the rules as necessary to protect parties outside the transaction.<sup>147</sup>

In sum, the concept of mandatory rules developed in domestic law as a response to the adverse effects of private agreements—on the parties to a transaction, on third parties, and on the legal system. The exercise of these functions, however, serves not only to constrain contractual freedom, but also to enable it. As Duncan Kennedy observes,

We have freedom of contract if the decision maker enforces agreements, one might say. But this would be an inadequate specification of what must be going on if we are to “have” this institution. The decision maker must, indeed, enforce agreements, but he must also *refuse* to enforce agreements. If he enforces the wrong ones, those that shouldn't be enforced, then we are as far from freedom of contract as we would be were he to refuse to enforce agreements at all. The institution, in other words, is as much constituted by the exceptions to enforcement as by the practice of enforcement. It is there so long as the decision maker maintains his balance between the two extremes of non-intervention and over-intervention in the affairs of civil society.<sup>148</sup>

As lawmakers and scholars have debated the merits of contractualism, they have reached varying conclusions about the best way to maintain that balance, particularly where the public interest served by the invalidation of an agreement was seen to be attenuated or paternalistic. As discussed in Part II, similar concerns and similar tensions have attended the transposition of mandatory rules into international law.

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143. See Hudson, *supra* note 78, at 344.

144. It is for this reason, perhaps, that the Court in *Muller* took pains to emphasize that the mandatory rules it was approving benefited not only the individual employees whose transactions were at issue, but also the community at large. See *Muller v. Oregon*, 208 U.S. 412, 421 (1908) (“[A]s healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.”).

145. See Clark, *supra* note 3, at 1714–15.

146. See, e.g., Winfield, *supra* note 54, at 89–91.

147. See, e.g., *Muller*, 208 U.S. at 421 (justifying statute limiting working hours for women on ground that “as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race”).

148. Kennedy, *supra* note 38, at 569.

## II. MANDATORY RULES OF INTERNATIONAL LAW?

Historically and doctrinally, the law of treaties is linked closely to the law of contracts. The earliest recorded treaties, concluded between peoples of the ancient Near East, were notable for “their strongly contractual flavor,” taking the form of “an exchange of solemnized oaths and promises” between rulers of equal standing.<sup>149</sup> Medieval treaties between European monarchs also often took the form of personal contracts, binding only during the lifetimes of the potentates who signed them,<sup>150</sup> and rules governing their validity were frequently extrapolated from the Roman law of obligations.<sup>151</sup> In addition, early scholars of the law of nations routinely used the language of contract to describe treaty obligations.<sup>152</sup> Indeed, Hugo Grotius was among the first jurists even to recognize a distinction between the two fields.<sup>153</sup>

The longstanding identification of treaty with contract has led to persistent doctrinal overlap between the two bodies of law,<sup>154</sup> and some of the debates surrounding the merits of contractualism in domestic law have been reprised at the international level. In this Part, I begin by tracing the early recognition of the need for constraints on contractual freedom in international law. I then examine how the concept of mandatory rules made its way into the Vienna Convention on the Law of Treaties, exploring the controversies surrounding its transposition into international law and highlighting the changes made to it in the process. Drawing on the analysis set out in Part I, I will focus throughout this discussion on the functions envisaged for mandatory rules of international law.

### A. Early Recognition of Mandatory Rules in International Law

The links between the law of treaties and the law of contracts were not initially understood to imply unconstrained contractualism in international relations. Early on, natural law was seen to impose limits on the extent to which states could alter the law of nations by special agreement between

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149. DAVID J. BEDERMAN, *INTERNATIONAL LAW IN ANTIQUITY* 138 (2001) (distinguishing between full international agreements between coequal sovereigns and vassalage agreements in which a master dictates terms to a vassal).

150. WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 196 (2000); see ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 78 (1950).

151. Theodor Meron, *The Authority to Make Treaties in the Late Middle Ages*, 89 AM. J. INT'L L. 1, 2 (1995).

152. See *id.* at 14–15.

153. HERSCH LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* 12–13 (1927) (quoting HUGO GROTIUS, *DE JURE BELLI AC PACIS* (1625)). Even so, as one jurist subsequently remarked, “Grotius’ chapters on treaties read like a Roman private law treatise mixed with natural law ideas.” *Id.* at 13 (citing 3 FRANZ VON HOLTZENDORFF, *HANDBUCH DES VÖLKERRECHTS* (1885)).

154. See *id.* at 155–56.

them.<sup>155</sup> It was also seen to establish grounds for contesting the validity of treaties. In medieval France and England, for instance, the monarch's power was limited by an obligation not to "alienate the essential functions of his office to the prejudice of the state,"<sup>156</sup> and that obligation was understood to create a right of renunciation or annulment of treaties in which the monarch ceded sovereignty over territory in ways injurious to his subjects.<sup>157</sup> The sixteenth-century Italian Protestant jurist Alberico Gentili explained this rule as follows:

In general, it is for the interest of subjects not to change rulers, and hence their consent should be asked with regard to alienation. And as subjects may not make a contract to the prejudice of their superior, so a ruler may not form one to the prejudice of his subjects, since in this respect they are on an equality and are bound by mutual obligations.<sup>158</sup>

In Gentili's view, these obligations arose not only from the domestic law of the states concerned, but also from natural law—and, by extension, the law of nations: the alienation of sovereignty, he wrote, "seems to be forbidden by the general law of all kingdoms, which comes into being with the kingdoms themselves and as it were by the law of nations."<sup>159</sup> Gentili's Spanish contemporary, Balthazar Ayala, also regarded treaties that prejudiced the property of subjects without their consent as violations of natural law, but he was more concerned about the instability they produced, arguing that "the most effective treaties [i.e., treaties with the greatest prospects of 'longevity'] are those which are entered into on both sides by both king and people."<sup>160</sup>

This doctrine established rules that were semimandatory, not mandatory, since the representatives of a monarch's subjects could subsequently annul, renounce, or ratify the treaty in question. However, it points to an early recognition of the potential for agency problems during the treaty-making process—an issue that would subsequently inform debates about the purposes of mandatory rules in international law. It also reflects a recognition that factors other than the will of the sovereign were germane to the validity of treaties. Indeed, as J.M. Kelly points out with respect to medieval law in

155. See Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55, 56 (citing CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* (1764); EMERIC VATTTEL, *LE DROIT DES GENS* (1758)).

156. PETER N. RIESENBERG, *INALIENABILITY OF SOVEREIGNTY IN MEDIEVAL POLITICAL THOUGHT* 3 (1956).

157. See Meron, *supra* note 151, at 3–5.

158. *Id.* at 14 (quoting 2 ALBERICO GENTILI, *DE JURE BELLI LIBRI TRES* (John C. Rolfe trans., Carnegie ed. 1933) (1612)).

159. *Id.*

160. *Id.* at 13–14 (quoting 2 BALTHAZAR AYALA, *THREE BOOKS ON THE LAW OF WAR AND ON THE DUTIES CONNECTED WITH WAR AND ON MILITARY DISCIPLINE* 82 (John Pawley Bate trans., Carnegie ed. 1912) (1582)).

general, “the idea that a prince’s will makes law was not accepted and was rarely even entertained.”<sup>161</sup>

The subsequent turn toward positivism, combined with the emergence of absolutism in the early modern state,<sup>162</sup> presented a philosophical conundrum: if the source of international law is not some higher power, but the consent of states as expressed by their sovereigns, on what grounds could the right to give or withhold this consent be circumscribed? In some respects, this conundrum mirrored the one presented by will theory to the concept of mandatory rules at the domestic level. As Ian Sinclair explains, “the more extreme adherents of the positivist school . . . equated positivism with exaggerated notions of state sovereignty by insisting that the will of States constituted the only valid source of international law.”<sup>163</sup> Thus, just as will theorists saw the consent of private parties as the only source of contractual obligation, positivist scholars of international law regarded the consent of states—as expressed in treaty and practice—as the exclusive basis for international legal obligation. Both accordingly regarded most mandatory rules as an illegitimate infringement on party autonomy.

This perspective was not universally held. Mandatory rules appear in two nineteenth-century attempts to codify the law of treaties. The draft code prepared by the Swiss jurist Johann Kaspar Bluntschli, one of the founders of the *Institut de droit international*, provides, “[t]he obligation to respect treaties rests upon conscience and the sentiment of justice. . . . Consequently, treaties which infringe general human rights or the necessary principles of international law shall be null and void.”<sup>164</sup> According to Bluntschli, such treaties included those that “[i]ntroduce, extend or protect slavery”; that “[d]eny all rights to aliens”; that “[a]re inconsistent with the principle of the freedom of the seas”; and that “[p]rovide for persecution by reason of religious opinion.”<sup>165</sup> Bluntschli’s code also declares void treaties intended to “[e]stablish the domination of one Power over the whole world” or “[e]liminate by violence a viable State which does not threaten the maintenance of peace.”<sup>166</sup>

Similarly, the draft code prepared by Bluntschli’s Italian contemporary Pasquale Fiore provides that no state “may by a treaty engage to do anything contrary to positive international law or to the precepts of morals or univer-

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161. KELLY, *supra* note 50, at 140.

162. For a discussion of these transformations, see generally GREWE, *supra* note 150, at 163–77, 317–21.

163. SINCLAIR, *supra* note 16, at 205.

164. Special Rapporteur on the Law of Treaties, *Law of Treaties*, U.N. Doc. A/CN.4/23 (Apr. 14, 1950) (by J.L. Briery), reprinted in [1950] 2 Y.B. Int’l L. Comm’n 245, app. D, art. 410, U.N. Doc. A/CN.4/SER.A/1950/Add.1 (entitled “Bluntschli’s Draft Code,” and listing “[r]elevant articles” translated into English from JOHANN CASPAR BLUNTSCHLI, *LE DROIT INTERNATIONAL CODIFIÉ* (C. Lardy trans., Librairie de Guillaumin et Cie ed. 1870) (1868)).

165. *Id.* art. 411.

166. *Id.* art. 412.

sal justice” or “absolutely renounce its fundamental rights.”<sup>167</sup> His code also sets out a mandatory rule prohibiting coercion, though he defines it narrowly. On the one hand, Fiore’s code provides that “[t]reaties concluded between States must be freely assented to,” adding that assent is invalid if “extorted” by “true physical violence or when the person who signed the treaty was compelled to do so through external constraint which deprived him of all deliberation and freedom of judgment”;<sup>168</sup> on the other hand, the code acknowledges the then-prevailing rule that “consent cannot be considered as lacking freedom when the treaty is assented to under pressure of a hostile power which has occupied part of the state territory,” since, in those circumstances, the invaded state may be threatened “with greater disaster if the proposed conditions should not be accepted.”<sup>169</sup>

By their terms, the mandatory rules recognized by Bluntschli and Fiore appear intended to serve a range of functions: protecting the rights of third states (against the inhibition of freedom of the seas and violent aggression); protecting the rights of individuals against infringement by other governments (such as the violation of the rights of aliens) and their own (as in the case of religious persecution); and preserving the voluntariness of agreements (by forbidding certain forms of coercion). As described in the next Section, each of these functions would be taken up in subsequent codification efforts. Notably, however, neither draft code provides for a procedural mechanism for resolving competing claims about alleged violations of these rules, an omission probably reflecting the continuing lack of institutional machinery for the resolution of international disputes at that time.<sup>170</sup>

Recalling that early recognition of the distinction between mandatory rules and default rules was closely associated with the process of codification in civil law countries, it is unsurprising that the first modern international jurists to give the question prolonged attention did so in the process of attempting to devise codes of international law. Indeed, as discussed further below, it would be in the context of twentieth-century efforts to codify the law of treaties that the issue of mandatory rules of international law would take center stage. Nevertheless, although Bluntschli and Fiore both undertook to develop a code of international law, neither enterprise was motivated by positivist zeal. “While Bluntschli sought to show with his historical-philosophical method that the norms of international law were not ‘natural law’, he still considered it important to recall that human nature was

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167. Special Rapporteur on the Law of Treaties, *supra* note 164, reprinted in [1950] 2 Y.B. Int’l L. Comm’n 247, app. E, art. 760, U.N. Doc. A/CN.4/SER.A/1950/Add.1 (quoting PASQUALE FIORE, INTERNATIONAL LAW CODIFIED AND ITS LEGAL SANCTION (Edwin M. Borchard trans., Baker, Voorhis ed. 1918) (1890)) (entitled “Fiore’s Draft Code”).

168. *Id.* arts. 756, 758.

169. *Id.* art. 757.

170. See Cesare P.R. Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 N.Y.U. J. INT’L L. & POL. 791, 804 (2007) (describing lack of dispute settlement institutions in the nineteenth century).

'the actual foundation' of international law."<sup>171</sup> Similarly, Fiore's work was "neither naturalist nor positivist but sought a pragmatic reconciliation of history with reason."<sup>172</sup> Accordingly, both jurists' efforts to identify mandatory rules in the law of treaties were unconstrained by the need to justify those rules as expressions of the will of states.

Although Bluntschli and Fiore were not entirely alone in pointing to the existence of mandatory rules of international law,<sup>173</sup> their views by no means reflected prevailing opinion among the jurists of the era. For even as will theory was losing its luster as a framework for explaining private contractual relations, similar ideas continued to command considerable support as a vision of international society, even among jurists urging a departure from the theoretical confines of positivism.<sup>174</sup> In 1937, the year the U.S. Supreme Court finally reversed *Lochner*, Professor Alfred von Verdross of the University of Vienna raised the question in the *American Journal of International Law* whether there might also be mandatory rules of international law.<sup>175</sup> Although Verdross was not the first modern jurist to highlight

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171. Betsy Baker Röben, *The Method Behind Bluntschli's "Modern" International Law*, 4 J. HIST. INT'L L. 249, 264 (2002) (quoting JOHANN BLUNTSCHLI, DAS MODERN VÖLKERRECHT DER CIVILISIRTEN STATEN ALS RECHTSBUCH DARGESTELLT 55 (1st ed. 1868)). Röben elaborates,

Because *consensus gentium* was much more an expression of the common legal consciousness than it was a positive expression of the will of individual States, States could not claim to be released from their obvious duties of international law by simply denying that these existed. Bluntschli thus conceived not of a "positive" international law but of a *geltendes* or binding international law that consisted of more than mere recognition of individual States' declarations of their wills.

*Id.* at 266. This view led him to regard treaties as merely a secondary source of law and, accordingly, as subordinate to "real" law: "Treaties could violate international law precisely because they were not a primary source." *Id.* at 271.

172. MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960, at 57 (2001).

173. As Michael Byers points out, the existence of such rules was also recognized in a few leading treatises in the early twentieth century. See Byers, *supra* note 113, at 213. In addition, their existence formed the basis of Judge Schücking's famous dissents in the *Wimbledon* (1923) and *Oscar Chinn* (1934) cases before the Permanent Court of International Justice. See Egon Schwelb, *Some Aspects of International Jus Cogens As Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946, 950 (1967).

174. See LAUTERPACHT, *supra* note 153, at 156 ("The legal nature of private law contracts and international law treaties is essentially the same. The autonomous will of the parties is, both in contract and in treaty, the constitutive condition of a legal relation which, from the moment of its creation, becomes independent of the discretionary will of one of the parties."); WEBER, *supra* note 12, at 102–03 ("[I]n the sphere of public law, the domain of free contract is essentially found in international law.").

175. Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571 (1937).

the issue,<sup>176</sup> he was the first to address it at length. His article accordingly warrants close analysis.

Verdross acknowledged “the uncontested rule that, as a matter of principle, states are free to conclude treaties on any subject whatsoever”; but in comments on a Harvard study surveying the law of treaties, he urged consideration of “whether this rule does or does not admit certain exceptions.”<sup>177</sup> Taking direct aim at “that pseudo-positivistic doctrine which denies the prohibition of immoral treaties in international law and pretends that international treaties may contain any stipulations whatsoever,”<sup>178</sup> Verdross argued that will theory was logically inconsistent with the structure of the law of treaties. He wrote:

[T]hose authors who base the whole international law on the agreement of the *wills* of states . . . overlook the fact that each treaty presupposes a number of norms necessary for the very coming into existence of an international treaty. These are the norms determining which persons are endowed with the capacity to act in international law, what intrinsic and extrinsic conditions must be fulfilled that an international treaty may come into existence, [and] what juridical consequences are attached to the conclusion of an international treaty.<sup>179</sup>

The existence of these constitutional norms was itself proof that “norms determining the limits of the freedom of the parties to conclude treaties, [could] not be denied *a priori*.”<sup>180</sup>

Having established that mandatory rules of international law were not a logical impossibility, Verdross then undertook to make the case that such rules already existed, suggesting that they served two critical functions in the international system. First, observing that certain norms of customary international law give states rights—such as the right not to be disturbed on the high seas or to exclude other states from passage through their own territorial seas—Verdross argued that treaties in which other states conspired to

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176. See Oscar Chinn Case (U.K. v. Belg.), 1934 P.C.I.J. (ser. A/B) No. 63, at 149–50 (separate opinion of Judge Schücking) (arguing that the Permanent Court of International Justice should refuse to enforce an agreement contrary to international public policy); *Costa Rica v. Nicaragua*, LA GACETA (Costa Rica), Oct. 7, 1916 (Cent. Am. Ct. Justice 1916), translated in 11 AM. J. INT’L L. 181, 216–28 (1917) (holding that Nicaragua lacked capacity to conclude a treaty granting the United States a ninety-nine-year lease on a naval station in the Gulf of Fonseca because it derogated from the customary rights of third states to condominium in the gulf and because it conflicted with an earlier treaty between Nicaragua and Costa Rica); Quincy Wright, *Conflicts Between International Law and Treaties*, 11 AM. J. INT’L L. 566, 573–74, 578–79 (1917) (suggesting that “objective” rules of universal and permanent applicability may emerge in international law, but noting that the *Costa Rica v. Nicaragua* decision could be justified on the ground that it was affecting the rights of nonsignatories).

177. Verdross, *supra* note 175, at 571.

178. *Id.* at 576.

179. *Id.* at 572.

180. *Id.*



violate these rights contradicted “compulsory” principles of international law and, consequently, were themselves unlawful.<sup>181</sup> In other words, mandatory rules were necessary to protect third parties whose legal interests were adversely affected by treaties between other States.

What Verdross failed to explain, as Dinah Shelton has pointed out,<sup>182</sup> is why the long-recognized rule *pacta tertiis nec nocent nec prosunt* (“agreements neither harm nor benefit third persons”) would be insufficient to protect the rights of third parties. Another transplant from the Roman law of obligations, the *pacta tertiis* rule, as subsequently codified in the Vienna Convention on the Law of Treaties, holds that treaties do “not create either obligations or rights for a third State without its consent.”<sup>183</sup> As discussed below, the relationship between *pacta tertiis* and the concept of mandatory rules presented difficulties not only to Verdross, but also to the members of the International Law Commission when they attempted twenty years later to codify the concept of mandatory rules in the Vienna Convention.<sup>184</sup>

The second function that Verdross attributed to mandatory rules was based on a private law analogy: noting that “the general principles of law recognized by civilized nations are also binding between the states,” Verdross turned to domestic law for support for the proposition that, like contracts *contra bonos mores*, treaties contrary to the morals or ethics of the international community are invalid.<sup>185</sup> Although he conceded that the ethics of the international community are “much less developed” than those of national communities and that international society “embraces different juridical systems, built upon different moral conceptions,” he considered it possible to identify a common approach among the “decisions of the courts of civilized nations.”<sup>186</sup> Citing sources on the law of contracts in Germany, Sweden, and the United States, Verdross submitted that “everywhere such treaties are regarded as being *contra bonos mores* which *restrict the liberty of one contracting party in an excessive or unworthy manner or which endanger its most important rights.*”<sup>187</sup>

The examples Verdross offered of forbidden treaties point to the functions he understood mandatory rules to serve. Echoing the codes of Bluntschli and Fiore, Verdross argued that treaties were immoral—and consequently invalid—if they prevented states from exercising their key “moral

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181. *Id.*

182. Shelton, *supra* note 25, at 298.

183. Vienna Convention, *supra* note 17, art. 34. For a fuller discussion, see ERIK FRANCKX, U.N. FOOD & AGRIC. ORG., *PACTA TERTIIS AND THE AGREEMENT FOR THE IMPLEMENTATION OF THE PROVISIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA OF 10 DECEMBER 1982 RELATING TO THE CONSERVATION AND MANAGEMENT OF STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS 5* (FAO Legal Papers Online No. 8, 2000), available at [http://www.fao.org/fileadmin/user\\_upload/legal/docs/lpo8.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/lpo8.pdf).

184. See generally *infra* notes 249–255 and accompanying text.

185. Verdross, *supra* note 175, at 572–73.

186. *Id.* at 573–74.

187. *Id.* at 574.

tasks,” namely, “maintenance of law and order within the states, defense against external attacks, care for the bodily and spiritual welfare of citizens at home, [and] protection of citizens abroad.”<sup>188</sup> For “if a state were burdened with obligations making it impossible to fulfill the universally recognized tasks of a state, no community would exist which would be able to care for these human beings in an adequate way.”<sup>189</sup> Thus, Verdross’s overriding concern, while framed as a means of protecting the liberty and rights of the *state*, was actually ensuring that the individual and collective rights of a state’s *citizens* could not be bargained away by their government. Like the earlier natural law rules, recognized by Gentili and Ayala four centuries earlier,<sup>190</sup> Verdross’s concept of immoral treaties contemplated a situation in which the agents of a state, willingly or under duress, were violating the trust of those whom they presumed to represent. But, unlike earlier jurists, Verdross argued that only by treating states’ key duties as mandatory—as nonwaivable—could international law prevent agency problems and coercion.

Two features of the procedure urged by Verdross for challenging the validity of immoral treaties bear highlighting. As will be seen, they present a marked contrast to the approach the law of treaties ultimately would take. First, Verdross regarded it as a duty of any court or arbitral tribunal to which a dispute involving an immoral treaty was submitted to “take judicial notice that such treaties are void, even if there be no demand by a party to this effect.”<sup>191</sup> Thus, emphasizing the nonwaivable character of the norms at issue, and perhaps also recognizing the potential complicity of the burdened state’s representatives in the immoral aims of the treaty, Verdross did not see it as necessary that a party raise the issue of immorality in order for the treaty to be declared invalid. Second, Verdross suggested that states burdened by such treaties have the right “simply to refuse the fulfillment of such an obligation” even without a judicial pronouncement to that effect.<sup>192</sup> Although he urged submission of such conflicts to arbitral or judicial tribunals, he did not make the renunciation of immoral treaties contingent on judicial authorization.

Although Verdross’s arguments elicited skeptical responses among positivists like Georg Schwarzenberger<sup>193</sup> and Hans Kelsen,<sup>194</sup> the horrors of the Second World War and the invocation of universal norms by the war crimes

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188. *Id.* (emphasis removed).

189. *Id.* at 576.

190. *See supra* notes 156–160 and accompanying text.

191. Verdross, *supra* note 175, at 577 (footnote omitted).

192. *Id.*

193. *See* Georg Schwarzenberger, *International Jus Cogens?*, 43 *TEX. L. REV.* 455, 455–56 (1965).

194. *See* HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 344 (1952) (“No clear answer [to the question whether *jus cogens* norms exist] can be found in the traditional theory of international law.”).

tribunals convened in its wake prompted a reexamination. As discussed in the next Section, the primary forums in which that reexamination took place were the newly established International Law Commission and the Vienna Conference on the Law of Treaties.

### B. Vienna Convention on the Law of Treaties

In 1949, concluding that the codification of the law of treaties was among its highest priorities, the International Law Commission (ILC) commenced work on a draft convention on the subject.<sup>195</sup> The task of codification presented the members of the ILC and, later, the delegates to the Vienna Conference on the Law of Treaties with the challenge of determining whether and how to adapt the concept of mandatory rules to treaty relations. The question arose in relation to two distinct issues: the validity of treaties procured through the threat or use of force and of those substantively in conflict with certain norms of international law. Although the rationales for using mandatory rules in each of these contexts ultimately converged, discussions about the rules proceeded separately, and they are discussed separately below. The ultimate outcome of the deliberations with respect to both issues was also influenced, however, by questions of process—specifically, the procedures through which each ground could be raised, tested, and implemented to invalidate a treaty. As will be seen, the decisions made with respect to process cast doubt on whether the rules recognized by the Convention are plausibly mandatory at all.

#### 1. Coercion

Entitled “Coercion of a State by the threat or use of force,” Article 52 of the Vienna Convention provides that “[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.”<sup>196</sup> The language of Article 52 makes clear its drafters’ intention to invest the rule with mandatory effect. As Humphrey Waldock explains, “the words ‘a treaty is void’ meant that if the nullity was established the effect of that nullity related to the treaty itself, not merely to the consent of the States concerned.”<sup>197</sup> In other words, the treaty could not subsequently be affirmed by the coerced state; it was void *ab initio*.<sup>198</sup> As described below, Article 52

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195. See INT’L LAW COMM’N, ANALYTICAL GUIDE TO THE WORK OF THE INTERNATIONAL LAW COMMISSION, 1949–1997, topic I.I.A, U.N. Sales No. E.98.V.10 (1998), available at <http://untreaty.un.org/ilc/guide/gfra.htm>.

196. Vienna Convention, *supra* note 17, art. 52.

197. ROZAKIS, *supra* note 24, at 103 (quoting *Fortieth Meeting* (Apr. 26, 1968), in Vienna Conference 1, *supra* note 16, at 221, ¶ 66 (statement of Special Rapporteur Sir Humphrey Waldock)).

198. In contrast, the other grounds for invalidity recognized by the Vienna Convention provide that a state “*may* invoke” an error, fraudulent conduct, or the corruption of a representative as “invalidating its consent to be bound by the treaty.” Vienna Convention, *supra*

represented an innovation in international law and a self-conscious attempt to bring treaty law into conformity with a premise of contracts law—the centrality of consent to contractual obligation. What guided this change, as will be seen, was the desire to promote the logical integrity and legitimacy of international law and to deter illegal conduct. As in domestic contracts law, however, the rule’s capacity to serve a broader distributive function became a point of contention.

Prior to the First World War, treaties obtained by threat or use of force against a state were considered “morally questionable” but not illegal.<sup>199</sup> Because war was a permissible means of settling international disputes, “it followed that the law was bound to recognize the results of [a] successful use of force thus used.”<sup>200</sup> It was feared, moreover, that voiding agreements procured by force would jeopardize the perceived validity of peace treaties<sup>201</sup> and might even prolong hostilities, precluding a state from “ensur[ing] its survival by consenting to an agreement to prevent that state and its people from further destruction.”<sup>202</sup> Accordingly, as late as the 1940s, the prevailing view among international law scholars was that the private law defense of duress could not simply be transposed into the law of treaties.<sup>203</sup>

In 1953, Sir Hersch Lauterpacht, the ILC’s second Special Rapporteur on the law of treaties, urged a reassessment. In his view, the time had come to bring the law of treaties into conformity with “the general principle of law which postulates freedom of consent as an essential condition of the validity of consensual undertakings.”<sup>204</sup> Lauterpacht argued that “[t]he reasons which in the past rendered that principle inoperative in the international sphere have now disappeared,” noting that under the U.N. Charter the use of force had ceased to be a legitimate means of settling disputes.<sup>205</sup> Accordingly, he offered for the ILC’s consideration a draft article that declared void “[t]reaties imposed by or as a result of the use of force or threats of force

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note 17, arts. 48–50 (emphasis added). Thus, while a state could waive its right to invoke these other grounds of invalidity, which establish only voidability or “relative nullity,” Article 52, by its terms, offers no similar flexibility. See SINCLAIR, *supra* note 16, at 161; see also Vienna Convention, *supra* note 17, art. 52.

199. SINCLAIR, *supra* note 16, at 177; see also Int’l Law Comm’n, *Draft Articles on the Law of Treaties with Commentaries*, in Vienna Conference Documents, *supra* note 16, at 7, art. 49, cmt. 2 [hereinafter 1969 Vienna Conference Draft Articles].

200. Special Rapporteur on the Law of Treaties, *Law of Treaties*, U.N. Doc. A/CN.4/63 (Mar. 24, 1953) (by H. Lauterpacht), reprinted in [1953] 2 Y.B. Int’l L. Comm’n 90, art. 12, cmt. A.1, U.N. Doc. A/CN.4/8ER.A/1953/Add.1 [hereinafter *Lauterpacht Report*].

201. SINCLAIR, *supra* note 16, at 177; see also 1969 Vienna Conference Draft Articles, *supra* note 199, art. 49, cmt. 2.

202. STUART S. MALAWER, *IMPOSED TREATIES AND INTERNATIONAL LAW* 19 (1978).

203. NUSSBAUM, *supra* note 150, at 95–96. Sir Ian Sinclair agrees with this assessment, noting that the rule embodied in Article 52 “is of very recent origin.” SINCLAIR, *supra* note 16, at 177.

204. *Lauterpacht Report*, *supra* note 200, art. 12, cmt. A.3.

205. *Id.*

against a State in violation of the principles of the Charter of the United Nations.”<sup>206</sup>

The starting point of Lauterpacht’s analysis was the centrality of consent to treaty validity—a point he underscored by addressing the issue of coercion in a section of his draft articles entitled “Reality of Consent.”<sup>207</sup> Indeed, in one passage of his report, he seemed almost to embrace will theory, declaring that “[t]he defect of the treaty concluded in such circumstance is fundamental and nothing short of the conclusion of a freely negotiated treaty can cure it.”<sup>208</sup> Because the coerced state’s will had been overborne, in other words, no treaty had ever come into being. What Lauterpacht did not explain, however, is why the lack of effective consent at treaty formation would be a “fundamental defect” in the context of coercion, but not in the context of fraud or error, which rendered an agreement voidable rather than void in his draft articles.<sup>209</sup>

The answer, he hinted, was the presence of an additional factor—the incompatibility of “the conclusion and continuation” of a coerced treaty with “international public policy.”<sup>210</sup> Invoking another general principle of law, he noted that

in so far as war or force or threats of force constitute an internationally illegal act, the results of that illegality—namely, a treaty imposed in connexion with or in consequence thereof—are governed by the principle that an illegal act cannot produce legal rights for the benefit of the law-breaker.<sup>211</sup>

Voiding the treaty therefore would serve not only to penalize the lawbreaker, but also to promote the logical consistency of the law. Lauterpacht acknowledged that judicial invalidation of treaties on grounds of coercion had theretofore been little more than a theoretical possibility, noting that such challenges had tended to proceed from transformations in power relations, rather than litigation in court.<sup>212</sup> But he was unwilling to “remov[e] from the province of judicial determination what is essentially a question of law.”<sup>213</sup> In his view, “the systematic exposition of an important branch of law cannot properly be determined by the actual or probable frequency of occurrences giving rise to the application of the rules of law in question.”<sup>214</sup> What was at stake was “the authority and the completeness of the law.”<sup>215</sup> Thus, a key

206. *Id.* art. 12.

207. *Id.* § 2, at 147.

208. *Id.* art. 12, n.2.

209. *Id.* arts. 13, 14.

210. *Id.* art. 12, n.2.

211. *Id.* art. 12, cmt. A.3.

212. *Id.* art. 12, n.1.

213. *Id.*

214. *Id.*

215. *Id.*

function served by making the rule against coercion mandatory was to preserve the systemic integrity of international law.

Lauterpacht's analysis also suggests, however, that voiding such treaties would also serve a deterrent function:

[T]he prospect that the advantages gained by an imposed treaty may prove illusory . . . because of the invalidity of the settlement thus imposed—an invalidity to be formally affirmed by international tribunals, by third States and, when conditions permit, by the victim of violence himself—may in itself act as a brake upon designs of unlawful use of force.<sup>216</sup>

Because the “probable absence of equality in the position of the parties”<sup>217</sup> to the coerced agreement precluded relying on the victim of the coercion to challenge a coerced agreement, only voidness would safeguard the broader community interest in deterring illegal uses of force.

Lauterpacht's successor as Special Rapporteur, Sir Gerald Fitzmaurice, took a wholly different view. His draft code on the law of treaties did provide that “duress” against the *persons* negotiating a treaty would render the agreement voidable, in accordance with longstanding doctrine.<sup>218</sup> Citing practical considerations, however, Fitzmaurice argued against recognizing coercion against a *state* as a basis for invalidity.<sup>219</sup> In his view, such recognition would open “a dangerously wide door to the invalidation of treaties.”<sup>220</sup> In addition, “by the time, if ever, that circumstances permit . . . repudiation [of a coerced treaty], it will have been carried out, and many steps taken under it will be irreversible or reversible, if at all, only by further acts of violence.”<sup>221</sup> Thus, in Fitzmaurice's view the community interest in deterring the use of force militated against the rule, not in favor of it: “if peace is a paramount consideration,” he submitted, “it must follow logically that peace may, in certain circumstances, have to take precedence for the time being over abstract justice.”<sup>222</sup>

The other members of the ILC did not immediately take a position on the validity of coerced treaties. Indeed, as a result of its preoccupation with

216. *Id.* art. 12, cmt. A.6.

217. *Id.* art. 13, cmt. 3.

218. See Special Rapporteur on the Law of Treaties, *Law of Treaties: Third Report*, U.N. Doc. A/CN.4/115 (Mar. 18, 1958) (by G. G. Fitzmaurice), reprinted in [1958] 2 Y.B. Int'l L. Comm'n 20, art. 14, U.N. Doc. A/CN.4/SER.A/1958/Add.1 [hereinafter *Fitzmaurice Report*].

219. *Id.*

220. *Id.* pt. II, § A, ¶ 62. On this issue, Fitzmaurice's views were undoubtedly influenced by the arguments he had advanced, as counsel for the United Kingdom, in proceedings before the International Court of Justice (ICJ) in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, 1950 I.C.J. 65, 77 (Mar. 30), in which he rejected the invalidity of treaties on grounds of nonreciprocity or inequality of obligations. See MALAWER, *supra* note 202, at 148–49.

221. *Fitzmaurice Report*, *supra* note 218, pt. II, § A, ¶ 62.

222. *Id.*

work on the law of the sea and diplomatic and consular relations, “the Commission was not able to do much more than give occasional glances at these reports” until 1963.<sup>223</sup> By the time the ILC did take up the question of coercion, Lauterpacht was dead, and Fitzmaurice had been elected to the ICJ. But it was Lauterpacht’s view with respect to the invalidity of coerced treaties that prevailed, commanding the unanimous support of the members of the Commission.<sup>224</sup> Sir Humphrey Waldock, the ILC’s fourth and final Special Rapporteur on the law of treaties, prepared a draft article providing that treaties “procured by the threat or use of force in violation of the principles of the Charter of the United Nations” were void,<sup>225</sup> and the governments that commented on it voiced no objection to the mandatory character of the rule, in many cases expressing enthusiastic support for it.<sup>226</sup>

In its commentary on the final draft article on coercion submitted to the Vienna Conference, the ILC largely followed the rationales Lauterpacht had cited for recognizing the mandatory character of the rule against coercion. Like Lauterpacht, the ILC stressed the importance of consent to treaty validity, arguing that in order to restore the “legal equality” of the parties to a coerced treaty, it was necessary to regard the treaty as void—not merely voidable:

Even if it were conceivable that after being liberated from the influence of a threat or of a use of force a State might wish to allow a treaty procured from it by such means, the Commission considered it essential that the treaty should be regarded in law as void *ab initio*. This would enable the State concerned to take its decision in regard to the maintenance of the treaty in a position of full legal equality with the other State.<sup>227</sup>

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223. Special Rapporteur on the Law of Treaties, *Law of Treaties: First Report*, U.N. Doc. A/CN.4/144 (Mar. 26, 1962) (by Humphrey Waldock), reprinted in [1962] 2 Y.B. Int’l L. Comm’n 27, U.N. Doc. A/CN.4/SER.A/1962/Add.11.

224. See *Summary Records of the 827th Meeting*, [1966] 1 Y.B. Int’l L. Comm’n 30, ¶¶ 6–63, U.N. Doc. A/CN.4/SER.A/1966; *Summary Records of the 826th Meeting*, [1966] 1 Y.B. Int’l L. Comm’n 24, art. 36, U.N. Doc. A/CN.4/SER.A/1966; *Summary Records of the 682nd Meeting*, [1963] 1 Y.B. Int’l L. Comm’n 53, ¶¶ 2–82, U.N. Doc. A/CN.4/SER.A/1963; *Summary Records of the 681st Meeting*, [1963] 1 Y.B. Int’l L. Comm’n 46, ¶¶ 27–52, U.N. Doc. A/CN.4/SER.A/1963.

225. See *Summary Records of the 826th Meeting*, *supra* note 224, art. 36.

226. See Special Rapporteur on the Law of Treaties, *Law of Treaties: Fifth Report*, U.N. Doc. A/CN.4/183 (Nov. 1, 1965) (by Humphrey Waldock), reprinted in [1966] 2 Y.B. Int’l L. Comm’n 1, art. 36, cmts., U.N. Doc. A/CN.4/SER.A/1966/Add.1 [hereinafter *1966 Waldock Report*]. The U.S. delegation, for example, characterized the article as “an important advance in the rule of law among nations,” *id.* art. 36, U.S. cmt., the Bulgarian delegation “unreservedly support[ed] the notion embodied in [it],” *id.* art. 36, Bulg. cmt., and the Colombian delegation called it a “step forward in the preservation of freedom of contract,” *id.* art. 36, Colom. cmt.

227. Vienna Conference Documents, *supra* note 16, art. 49, cmt. 6. The ILC’s logic on this point is difficult to follow: if a coerced treaty were voidable, rather than void, the victim of the coercion might feel some *political* pressure not to exercise its option to invalidate the

In addition, the ILC recognized—albeit obliquely—that the interests of third states were implicated by the rule, pointing out that “[t]he prohibitions on the threat or use of force contained in the Charter are rules of international law the observance of which is legally a matter of concern to every State.”<sup>228</sup>

But while ILC members were able to agree that a rule voiding coerced agreements would serve to prevent recourse to force and to promote the legal equality of states, they found it difficult to establish a consensus about whether the rule should also be employed to promote political or economic equality—to make consent a reality in this broader sense. With respect to this distributive function, a fissure developed between some of the members from Eastern-bloc and developing countries, on the one hand, and those from Western countries on the other. The former, arguing that economic and political coercion were no less wrongful—and probably more pervasive—than military coercion, urged an explicit acknowledgment that the nullity of treaties “procured by the threat or use of force” did not apply solely to those procured through military force.<sup>229</sup> The latter argued that such a reading would deal a blow to the stability of treaties, adding that states had radically different views about when economic and political pressure amounted to improper coercion.<sup>230</sup>

When the Commission’s draft articles were presented for discussion at the Vienna Conference, similar battle lines were drawn.<sup>231</sup> Indeed, while all

treaty; but it is hard to see how the victim’s *legal* position would be weakened. Indeed, making a coerced treaty void, instead of voidable, serves primarily as a constraint on the victim of the coercion, which is denied the option of affirming the treaty.

228. See Vienna Conference Documents, *supra* note 16, art. 49, cmt. 2.

229. See *Summary Records of the 682nd Meeting*, *supra* note 224, ¶¶ 5–13 (statement of Yugoslavia Rep. Mr. Bartoš); ¶¶ 32–37 (statement of Iraq Rep. Mr. Yasseen); ¶¶ 43–44 (statement of India Rep. Mr. Pal); ¶¶ 48–60 (statement of Soviet Union Rep. Mr. Tunkin); ¶¶ 61–63 (statement of Braz. Rep. Mr. Amado); ¶¶ 64–69 (statement of Afg. Rep. Mr. Tabibi). The Eastern-bloc and developing countries represented on the ILC included Brazil, Yugoslavia, the United Arab Republic, Nigeria, Uruguay, Cameroon, Poland, China, Mexico, India, Ecuador, Dahomey, Afghanistan, the Soviet Union, and Iraq. *Members of the Commission*, [1963] 1 Y.B. Int’l L. Comm’n, at viii, U.N. Doc. A/CN.4/SER.A/1963.

230. Waldock crystallized this position as follows:

[I]f “coercion” were to be regarded as extending to other forms of pressure upon a State, to political or economic pressure, the door to the evasion of treaty obligations might be opened very wide; for these forms of “coercion” are much less capable of definition and much more liable to subjective appreciations. Moreover, the operation of political and economic pressures is part of the normal working of the relations between States, and international law does not yet seem to contain the criteria necessary for formulating distinctions between the legitimate and illegitimate uses of such forms of pressure as a means of securing consent to treaties.

Special Rapporteur on the Law of Treaties, *Law of Treaties: Second Report*, U.N. Doc. A/CN.4/156 & Add.1–3 (June 5, 1963) (by Humphrey Waldock), *reprinted in* [1963] 2 Y.B. Int’l L. Comm’n 36, art. 12, cmt. 6, U.N. Doc. A/CN.4/SER.A/1963/Add.1 [hereinafter *1963 Waldock Report*].

231. For a description of the debate and the various proposals introduced in an effort to resolve it, see SINCLAIR, *supra* note 16, at 177–80.



of the governments represented at the Conference expressed willingness to accept a mandatory rule invalidating treaties procured through coercion, the definition of coercion elicited prolonged debate.<sup>232</sup> Eventually, this debate was resolved through a political compromise. The conferees in Vienna issued a declaration condemning “the threat or use of pressure in any form, military, political, or economic, by any State, in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of sovereign equality of States and freedom of consent.”<sup>233</sup> The text ultimately adopted as Article 52 of the Vienna Convention, however, does not speak explicitly to the question.<sup>234</sup>

The argument, however, did not end with Article 52. As the Australian representative was quick to point out, “[t]he word ‘void’ . . . might be misleading as tending to obscure the fact that the ground of invalidity stated [in Article 49, which later became Article 52], as well as other grounds of invalidity . . . were subject to the procedures to be laid down” in other parts of the Vienna Convention.<sup>235</sup> This point was echoed by the representatives of a number of other Western countries, who emphasized that their agreement to the article was contingent upon a satisfactory resolution of disputes about procedure.<sup>236</sup> These concerns undoubtedly were animated by the debate about the definition of coercion—and the fear that it would be reprised after the adoption of the Vienna Convention in ways that would endanger the stability of treaties. As discussed further below, however, the procedural mechanism eventually devised to address these worries turned out to be fatally strong medicine. For, notwithstanding the absolute nullity established by Article 52, the procedures through which the invalidity of coerced treaties may be raised and challenged not only undermine the rule’s capacity to serve some of its intended functions, but also raise doubts about whether it is mandatory at all.

## 2. *Jus Cogens*

Early in its deliberations, the ILC recognized that the rules invalidating treaties *procured* through improper means, such as coercion, were closely linked to the broader category of rules concerned with the validity of a treaty’s *object* or *execution*.<sup>237</sup> Like the rule against coercion, this broader

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232. See *id.* at 177–78; Richard Kearney & Robert Dalton, *The Treaty on Treaties*, 64 AM. J. INT’L L. 495, 533–35 (1970).

233. *Twentieth Plenary Meeting* (May 12, 1969), in Vienna Conference 2, *supra* note 16, at 100, ¶ 1.

234. Vienna Convention, *supra* note 17, art. 52.

235. *Forty-Eighth Meeting* (May 2, 1968), in Vienna Conference 1, *supra* note 16, at 268, ¶ 43 (statement of Austl. Rep. Mr. Harry).

236. See, e.g., *Fiftieth Meeting*, *supra* note 23, ¶ 5 (statement of Can. Rep. Mr. Wershof); *Forty-Ninth Meeting* (May 2, 1968), in Vienna Conference 1, *supra* note 16, at 274, ¶ 19 (statement of Neth. Rep. Mr. Riphagen).

237. *Summary Records of the 681st Meeting*, *supra* note 224, ¶ 64.

category was self-consciously transposed from domestic law. And, as had been the case for Article 52, the appropriate scope and function of what became Article 53 of the Vienna Convention emerged as major points of contention both within the ILC and among the conferees in Vienna. In its final form, Article 53 provides that “a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of international law.” As described below, what was at issue during its negotiation was whether mandatory rules of international law would serve a narrow deterrent function or would become vehicles for challenging the substantive fairness of treaties.

Echoing Verdross, Lauterpacht argued in his first report to the Commission that

[t]he voidance of contractual agreements whose object is illegal is a general principle of law. As such it must find a place in a codification of the law of treaties. This is so although there are no instances, in international judicial and arbitral practice, of a treaty being declared void on account of the illegality of its object.<sup>238</sup>

Similarly, borrowing concepts and terms from domestic law, Fitzmaurice suggested that the rules of international law could be divided “into two classes—those which are mandatory and imperative in any circumstances (*jus cogens*) and those (*jus dispositivum*) . . . the variation or modification of which under an agreed régime is permissible, provided the position and rights of their States are not affected.”<sup>239</sup> Waldock also used the term *jus cogens* to describe the category of mandatory substantive norms, observing that “the concept was probably known in most legal systems, though it had no exact equivalent in common law countries.”<sup>240</sup>

Lauterpacht’s successors also shared his belief that the international community had already—if just barely—recognized the existence of *jus cogens* in international law. Citing the U.N. Charter’s framework governing the use of force and “the development—however tentative—of international

238. Lauterpacht Report, *supra* note 200, art. 15, cmt. 5.

239. Fitzmaurice Report, *supra* note 218, pt. II, § A, ¶ 76.

240. Summary Records of the 683rd Meeting, [1963] 1 Y.B. Int’l L. Comm’n 60, ¶ 25, U.N. Doc. A/CN.4/SER.A/1963. Waldock’s use of the term was not roundly supported. Commission member Radhabinod Pal of India complained that “*jus cogens*” should be dropped from the text, as it “was not to be found in most books on international law, it was unfamiliar to lawyers trained in common law systems, and he himself had only become acquainted with it as a result of the Commission’s discussions at the previous session.” Summary Records of the 684th Meeting, [1963] 1 Y.B. Int’l L. Comm’n 67, ¶ 31, U.N. Doc. A/CN.4/SER.A/1963. Similarly, Herbert Briggs of the United States worried that the term “would give rise to difficulties,” proposing instead that the draft articles refer to “conflict with a peremptory norm of general international law from which no derogation is permitted except by a subsequently accepted norm of general international law.” Summary Records of the 683rd Meeting, *supra*, ¶ 30. Briggs’s proposed language, in modified form, made its way into the ILC’s final draft articles and, ultimately, Article 53 of the Vienna Convention. See Vienna Convention, *supra* note 17, art. 53.

criminal law,” Waldock argued that “[i]mperfect though the international legal order may be, the view that in the last analysis there is no international public order—no rule from which States cannot at their own free will contract out—has become increasingly difficult to sustain.”<sup>241</sup>

For many of the governments represented at the Vienna Conference, this transposition from domestic to international law was a natural and welcome development. Because “general principles of law recognized by civilized nations” were already an accepted source of international law,<sup>242</sup> it was not a major leap, as one representative suggested, to consider certain of these principles “rules of the universal conscience of civilized countries.”<sup>243</sup> The U.S. representative even suggested revising the draft convention to make this link explicit by defining *jus cogens* norms as those “recognized in common by the national and regional systems of the world.”<sup>244</sup>

A number of representatives at the Vienna Conference also agreed that, like the norm against coercion, *jus cogens* was already recognized in international law. The representative of Ghana, for example, argued that “[a]lthough the notion of *jus cogens* had appeared only recently in the writings of the publicists, *jus cogens* itself had existed in international law since the time of the most primitive societies.”<sup>245</sup> While the “international law of past eras may not have prohibited aggressive wars, genocide, and slavery,” he observed, “neither had it sanctioned every act of international banditry.”<sup>246</sup> Similarly, the representative of Poland pointed out that “[t]he existence of some superior rules had indeed been recognized in the past by the law of nations and . . . had only disappeared with nineteenth-century positivism,” adding that *jus cogens* “had reappeared in the twentieth century but on an entirely different basis, less controversial than before.”<sup>247</sup> Such views, moreover, were not expressed solely by the representatives of Eastern-bloc and developing countries, who were the most vocal proponents of *jus cogens* at the Vienna Conference. Among the governments that offered comments on Waldock’s draft article on *jus cogens*, only one—Luxembourg—actually “questioned the existence of rules of *jus cogens* in the international law of to-day.”<sup>248</sup>

241. 1963 Waldock Report, *supra* note 230, art. 13, cmt. 1.

242. Statute of the International Court of Justice art. 38, June 26, 1945, U.N. Charter, Annex.

243. Fifty-Third Meeting, *supra* note 21, ¶ 26 (statement of Colom. Rep. Mr. Ruiz Varela).

244. See ROZAKIS, *supra* note 24, at 50. The U.S. proposal was rejected because the majority of governments at the Vienna Conference were “unprepared to accept an interference of municipal law considerations with the determinations of the *jus cogens* norms.” *Id.*

245. Fifty-Third Meeting, *supra* note 21, ¶ 13 (statement of Ghana Rep. Mr. Dadzie).

246. *Id.*

247. *Id.* ¶ 33 (statement of Pol. Rep. Mr. Nahlik).

248. 1969 Vienna Conference Draft Articles, *supra* note 199, art. 50, cmt. 1; 1966 Waldock Report, *supra* note 226, art. 37, Lux. cmt.

There was, however, a diversity of opinion about which functions would be served by recognizing certain norms to be mandatory—and, by extension, about which norms fit the bill. Among the three Special Rapporteurs who addressed the question of treaty invalidity,<sup>249</sup> all recognized that one of the functions of *jus cogens* was to protect third parties from certain adverse effects of agreements between states, but they struggled to formulate the concept in a way that distinguished it from other rules. From the start, Lauterpacht was careful to acknowledge that “a treaty is not void on account of illegality on the mere ground that it purports to affect, without its consent, the right of a third State.”<sup>250</sup> Under the rule *pacta tertiis nec prosunt nec nocent*, he noted, a treaty that presumed to create rights or obligations for third states without their consent was already unenforceable against them.<sup>251</sup> In his view, what would render such a treaty *void*, as well, is if, as stated by Arnold Duncan McNair, the treaty “contemplates the infliction upon a third State of *what customary international law regards as a wrong . . .*”<sup>252</sup> Building on this point, Fitzmaurice and Waldock added that, in order for such a “wrong” to render a treaty invalid, it had to be a violation of a higher-order rule—not merely of any rule of customary law.<sup>253</sup> By way of illustration, Waldock explained, “The general law of diplomatic immunities makes it illegal to do certain acts with regard to diplomats; but this does not preclude individual States from agreeing between themselves to curtail the immunities of their own diplomats.”<sup>254</sup> These kinds of rules, in other words, were *jus dispositivum*, not *jus cogens*—default, not mandatory. It was “only as regards rules of international law having a kind of absolute and non-rejectable character (which admit of no ‘option’) that the question of the illegality and invalidity of a treaty inconsistent with them can arise.”<sup>255</sup>

But which rules met this standard? In Waldock’s 1963 report to the Commission, he noted that many national legal systems had “well-established categories of unlawful contracts” but wondered whether the time was ripe for a codification of the possible categories of “unlawful treaties.”<sup>256</sup> In his second set of draft articles, however, he did identify three examples of rules that he believed met the standard.<sup>257</sup> Responding to concerns that enumerating examples might prejudice recognition of other norms

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249. The first Special Rapporteur, James Brierly, did not report on the question of treaty invalidity.

250. *Lauterpacht Report*, *supra* note 200, art. 15, cmt. 2.

251. *Id.*

252. *Id.* (emphasis added) (quoting ARNOLD DUNCAN MCNAIR, *THE LAW OF TREATIES: BRITISH PRACTICE AND OPINIONS* 113 (1938)).

253. *Fitzmaurice Report*, *supra* note 218, pt. II, § A, ¶ 76.

254. *1963 Waldock Report*, *supra* note 230, art. 13, cmt. 2.

255. *Fitzmaurice Report*, *supra* note 218, pt. II, § A, ¶ 76.

256. *1963 Waldock Report*, *supra* note 230, art. 13, cmt. 3.

257. *Id.* art. 13, cmt. 2.

as *jus cogens*,<sup>258</sup> the Commission ultimately removed them from the draft article before submitting it to the Vienna Conference. In its accompanying commentary, however, it reproduced (with slight revisions) Waldock's examples of treaties violating *jus cogens*:

- (a) [A] treaty contemplating an unlawful use of force contrary to the principles of the Charter,
- (b) a treaty contemplating the performance of any other act criminal under international law, and
- (c) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate.<sup>259</sup>

Because none of these examples was challenged on substantive grounds, they offer some indication of the functions *jus cogens* norms were expected to serve.

What all three examples have in common, as Waldock explained, is that they all "involve[] some element of international criminality."<sup>260</sup> The Commission appears to have hoped that by rendering void treaties providing for the commission of criminal conduct, the conduct itself might be deterred. Eduardo Jiménez de Aréchaga, the Commission's Chairman during its deliberations on the law of treaties, made this point explicitly during the Vienna Conference, where he represented Uruguay. Arguing that "[i]t was not enough to condemn the violation" of principles implicating the "essential interests and . . . fundamental moral ideas" of the international community, he said "it was necessary to lay down the *preventive sanction* of absolute nullity in respect of the preparatory act, namely the treaty whereby two States came to an agreement to carry out together acts constituting a violation of one of those principles."<sup>261</sup>

From the third example in the Commentary, moreover, it seems clear that the Commission was concerned with deterring wrongful conduct not only against third states, but also against individuals. Lauterpacht had emphasized this point in his report to the Commission. Noting that the norms

258. See *Summary Records of the 705th Meeting*, [1963] 1 Y.B. Int'l L. Comm'n 209, ¶¶ 54–55, U.N. Doc. A/CN.4/SER.A/1963; *Summary Records of the 684th Meeting*, *supra* note 240, ¶¶ 17, 53, 65.

259. 1969 Vienna Conference Draft Articles, *supra* note 199, art. 50, cmt. 3.

260. *Summary Records of the 683rd Meeting*, *supra* note 240, ¶ 26.

261. *Fifty-Third Meeting*, *supra* note 21, ¶ 48 (emphasis added). The point was seconded by Alexandru Bolintineanu of Romania. See *Fifty-Fourth Meeting*, *supra* note 20, ¶ 60 ("A provision that a treaty conflicting with *jus cogens* was void seemed to have above all a preventive function."). Not all representatives, however, were equally convinced by this rationale. See, e.g., *Fifty-Fifth Meeting*, *supra* note 23, ¶¶ 38–39 (statement of Ceylon Rep. Mr. Pinto) (representative of Ceylon expressing doubts that the article would "prevent States from conspiring by treaty to achieve evil ends," though it might "encourage a successor government of a State party to an illicit agreement to refuse performance by such other legal means as were open to it and restore the *status quo*").

banning slavery and privateering “have become expressive of a principle of customary international law,” he argued that “a treaty obliging the parties to violate these principles would be void on account of the illegality of its object [even if it does not directly affect third States].”<sup>262</sup> Fitzmaurice, moreover, took this idea one step further, explaining that mandatory rules might also serve to safeguard the legal rights of citizens of one or both of the parties to the treaty:

Thus if two countries were to agree that, in any future hostilities between them, neither side would be bound to take any prisoners of war, and all captured personnel would be liable to execution, it is clear that even though this was intended only for application as between the parties, and not vis-à-vis any other country that might be involved in hostilities with either of them, such an arrangement would be illegal and void. Most of the cases in this class are cases where the position of the individual is involved, and where the rules contravened are rules instituted for the protection of the individual.<sup>263</sup>

Thus, the protection offered by *jus cogens* to parties outside the transaction in question was seen to extend not just to states, but also to individuals—even those ostensibly represented by their government during the negotiation of a treaty.

In this respect, the ILC Special Rapporteurs hinted that mandatory rules might function not only as a deterrent against international crimes in a general sense, but also as a means of preventing (and correcting) agency problems—serving, like the early rules recognized by natural law scholars, to invalidate agreements in which a government had contracted away the inalienable rights of its citizens or conspired with another government to violate them. To be sure, the nature of the international community’s interest in preventing the alienation of these rights is a question that troubled theorists well before the ILC took up the question—and that continues to be a point of contention.<sup>264</sup> But while that question is beyond the scope of this Article, it does seem clear from the ILC’s deliberations that the international rules barring crimes against individuals, as well as states, were recognized to be mandatory—and that one of the functions of mandatory rules was deterring conduct of that kind. That limited function, moreover, aroused no controversy at the Vienna Conference.

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262. *Lauterpacht Report*, *supra* note 200, art. 15, cmt. 3. Lauterpacht’s reference to privateering in this passage is confusing—because privateers tended to target the commercial vessels of certain states, it is hard to see how agreements to engage in privateering would fail to affect third states. His reference to slavery, however, makes clear that one of the functions of the mandatory rules he was advocating was to protect individuals.

263. *Fitzmaurice Report*, *supra* note 218, pt. II, § A, ¶ 76 (footnotes omitted).

264. For a novel and thoughtful approach to the question, see Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 *YALE J. INT’L L.* 331 (2009).

Differences arose in both settings, however, when discussions proceeded beyond the invalidity of treaties providing for the commission of international crimes and other acts clearly recognized to be wrongful to those in conflict with other norms, particularly those derived from more loosely defined conceptions of morality or concerned with substantive fairness. Among the reasons the ILC chose not to place the examples of *jus cogens* offered by Waldock in the text of its draft article was the concern that doing so “might suggest that the article was concerned only with acts already recognized as criminal.”<sup>265</sup> But Commission members found it difficult to find a formula for addressing the validity of treaties that contravened moral norms that fell short of recognized crimes. Lauterpacht argued that such norms could be a basis for treaty invalidity, even if they had not “crystallized in a clearly accepted rule of law,” so long as they were “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 Article 38(3) of its Statute.”<sup>266</sup> He recommended against codifying “consistency with international morality as a condition of validity of treaties,” however, expressing concern that “[t]o do so may result in conferring upon international tribunals a measure of discretion, in a matter admitting of highly subjective appreciation, which Governments may not be willing to confer upon them and which they could exercise only with difficulty.”<sup>267</sup> Fitzmaurice concurred with this approach,<sup>268</sup> and the Commission’s final draft article on *jus cogens* made no reference to morality at all.

Even so, a number of representatives at the Vienna Conference expressed concern that the Commission’s draft article would blur the distinction between moral and legal grounds of invalidity, particularly in view of the ILC’s failure to agree to a list of examples of *jus cogens*.<sup>269</sup> As Jean-Jacques de Bresson of France noted, “[t]he problem, which was on the ill-defined border between morality and law, was that of knowing which principles it was proposed to recognize as having such serious effects as to render international agreements void, irrespective of the will of the States which had concluded them.”<sup>270</sup> Thus, while most governments were prepared to accept that mandatory rules would operate to invalidate treaties in conflict with recognized international crimes, some were considerably less comfortable with the broader equitable function, recognized in domestic law, of allowing judicial tribunals to use them to fill gaps in existing law.

Similar concerns were raised in discussions about whether *jus cogens* should function to address distributive concerns. ILC member Grigory Tun-

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265. *Summary Records of the 705th Meeting*, *supra* note 258, ¶ 54.

266. *Lauterpacht Report*, *supra* note 200, art. 15, cmt. 4.

267. *Id.* art. 15, n.2.

268. *Fitzmaurice Report*, *supra* note 218, art. 17.

269. *Vienna Conference Documents*, *supra* note 16, art. 50, cmt. 3.

270. *Fifty-Fourth Meeting*, *supra* note 20, ¶ 28.

kin of the Soviet Union argued that Waldock's examples of void treaties "undoubtedly" should include a reference to "treaties establishing gross inequality between the obligations of the parties,"<sup>271</sup> a point seconded by ILC member Manfred Lachs of Poland<sup>272</sup> and reprised at the Vienna Conference by delegates from both Eastern-bloc and developing countries.<sup>273</sup>

Interestingly, these arguments elicited the most pointed opposition from two ILC members from developing countries. Radhabinod Pal of India said "he could not agree that such inequality would suffice to make a treaty void," adding that "[s]ome other element, such as undue influence, coercion, or the fact that one party had taken an unfair advantage of the other, must also be present."<sup>274</sup> And Eduardo Jiménez de Aréchaga of Uruguay expressed concern that Tunkin sought to introduce into international law the equivalent of the doctrine of *lésion* in French law—a doctrine (similar to unconscionability in U.S. law) that "had subsequently been discredited because its abuse had led to contractual instability."<sup>275</sup> In the international setting, he said, that doctrine would prove particularly dangerous in regions like Latin America, where "many States would be able to claim . . . that their various frontier treaties had resulted in a manifest inequality of obligations," thereby "opening a Pandora's box of difficulties in relations between States."<sup>276</sup> He argued, moreover, that the paternalism underlying the doctrine had no place in an international system premised on sovereign equality.<sup>277</sup>

These differences arose in part from the transposition of the concept of mandatory rules from domestic legal systems, which approached it in varying ways themselves. As ILC member Milan Bartoš of Yugoslavia pointed out, "[i]t was difficult to use the term *jus cogens* . . . because it was subject to different interpretations according to the tradition of private law followed."<sup>278</sup> As in the domestic setting, these differences also arose in part from differing philosophies about the proper function of law in regulating contractual relations, about which Western and Eastern-bloc states clearly disagreed. As reflected in the views described above, however, the controversy about whether *jus cogens* should serve as a vehicle for correcting the substantive unfairness of treaties was not easily categorized as a civil versus common law, East versus West, or North versus South dispute, though each of those divisions may have had some influence on the debate.

The final text of the article on *jus cogens* adopted at the Vienna Conference did little to resolve these questions. Entitled "Treaties conflicting with

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271. *Summary Records of the 684th Meeting*, *supra* note 240, ¶ 28.

272. *Id.* ¶ 10.

273. *See, e.g., Fifty-Third Meeting*, *supra* note 21, ¶ 69 (statement of Cyprus Rep. Mr. Jacovides).

274. *Summary Records of the 684th Meeting*, *supra* note 240, ¶ 33.

275. *Id.* ¶ 45.

276. *Id.* ¶ 47.

277. *Id.* ¶ 45.

278. *Summary Records of the 683rd Meeting*, *supra* note 240, ¶ 82.



a peremptory norm of general international law ('*jus cogens*')," it provides, "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."<sup>279</sup> Without listing any examples, the article defines a peremptory norm of general international law as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."<sup>280</sup> But, while the decision to leave open which norms were *jus cogens* did not prevent the article's adoption—eighty-seven states voted for it, eight against, with twelve abstentions<sup>281</sup>—the controversy surrounding that question set the stage for the ensuing debate about procedure.

### 3. Procedure

The procedures through which the grounds of invalidity defined in the Vienna Convention could be raised and challenged were among the major points of contention within both the ILC and the Vienna Conference. As described below, disputes arose from divergent conceptions about a range of issues: the importance of preserving the stability of treaties, the impartiality of international tribunals, and the necessity of strengthening procedural machinery for the resolution of treaty disputes in tandem with the substantive development of international law. The disputes also reveal different perspectives regarding the appropriate functions of mandatory rules in the international system.

Two of the procedural questions that arose over the course of the deliberations have particular bearing on this issue: which parties would have standing to bring a claim of invalidity and whether compulsory jurisdiction—or something resembling it—would be established for the resolution of disputes about treaty invalidity. I address each in turn below.

#### a. Third-Party Standing

As discussed in the Sections above, Lauterpacht argued as Special Rapporteur that the mandatory character of the rule invalidating coerced treaties functioned not only as an additional means of ensuring that treaties were the product of the freely given consent of the parties, but also as a vehicle for promoting the logical consistency of international law and for deterring the use of force.<sup>282</sup> These latter functions spoke to the very purpose of rendering the rule mandatory, rather than semimandatory or default, in that they inured to the benefit not only of the coerced party, but also of third states and the

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279. Vienna Convention, *supra* note 17, art. 53.

280. *Id.*

281. *Twentieth Plenary Meeting*, *supra* note 233, ¶ 65. The states that voted against the draft article were Switzerland, Turkey, Australia, Belgium, France, Liechtenstein, Luxembourg, and Monaco. *Id.*

282. See *supra* notes 210–217 and accompanying text.

international community as a whole. Accordingly, Lauterpacht's draft article authorized "any State"—not just the parties to the coerced treaty and not just the parties to the envisaged "Code of the Law of Treaties"—to seek a declaration that the coerced treaty is void.<sup>283</sup>

Lauterpacht did not explicitly address the question of standing in relation to claims of invalidity relating to the object or execution of a treaty, providing simply that "[a] treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice."<sup>284</sup> His draft, however, did not foreclose the possibility that such a declaration could arise from proceedings brought by a third state. In his commentary, moreover, he made clear that a declaration of invalidity should not be made contingent upon a claim by one of the parties:

As the offending treaty—or the offending provision—is contrary to overriding principles of international law it cannot be enforced by an international tribunal even if the State which stands to benefit from the judicial nullification of the treaty fails to raise the issue. No action will lie on a treaty of that description. On the other hand, the defendant State, although it has taken part in bringing about the illegal treaty, can plead the illegality as a defence.<sup>285</sup>

In this respect, Lauterpacht's analysis proceeded on the basis of direct analogy to the functions of mandatory rules in domestic law. Because community interests were implicated, an international tribunal could not overlook a conflict with "overriding principles of international law" (*jus cogens*) merely because it had not been raised by the parties to the treaty in question. On this point, moreover, Fitzmaurice took the same approach, providing in his draft articles that treaties with an illegal object were unenforceable.<sup>286</sup>

Although the ILC recognized in the commentary accompanying the draft articles it submitted to the Vienna Conference that third states had an interest in deterring the use of force, the Commission seems to have abandoned Lauterpacht's proposal to confer standing on any state to raise a claim of coercion. The proposal had received the support of a few ILC members: Antonio de Luna of Spain argued, for instance, that the rule against coercion "should apply *erga omnes* rather than *inter partes*" because "the vital interests of the international community required that any obligations imposed by unlawful coercion should be invalid";<sup>287</sup> and Grigory Tunkin of the Soviet Union contrasted the articles on coercion and *jus cogens* with other grounds for invalidity, noting that "in the situations envisaged in articles 11

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283. See *Lauterpacht Report*, *supra* note 200, art. 12, nn.2–3.

284. *Id.* art. 15.

285. *Id.* art. 15, cmt. 6.

286. *Fitzmaurice Report*, *supra* note 218, art. 22(1)(f), (g).

287. *Summary Records of the 682nd Meeting*, *supra* note 224, ¶ 81.

and 12, any State, whether a party to the treaty or not, should be able to raise the issue.<sup>288</sup> But even though the summary records of the ILC's meetings reveal no opposition to these arguments, the idea of granting all states standing to raise coercion or *jus cogens* claims does not appear to have been pursued further in the ILC, and it appears nowhere in the Commission's draft articles.

Although a few representatives at the Vienna Conference argued that third-party standing to bring claims of invalidity premised on coercion or *jus cogens* followed logically from the functions envisaged for the rules<sup>289</sup>—one representative suggesting that *jus cogens* claims might even be brought by private persons<sup>290</sup>—none of the procedural proposals considered by the Conference provided for third-party standing of any kind. It was suggested, moreover, that third-party claims were best addressed politically through the broad dispute resolution framework defined in Article 33 of the U.N. Charter<sup>291</sup> rather than through a prescribed mechanism for judicial settlement.<sup>292</sup> Preoccupied with overcoming disputes about the efficacy of compulsory jurisdiction in this context, the Conference appears to have simply let the idea of recognizing third-party standing fall.

As elaborated further in the next Section, the procedural mechanism ultimately codified in Articles 65 and 66 of the Vienna Convention provides for the resolution of disputes regarding the validity of treaties through the means specified in Article 33 of the Charter<sup>293</sup> and, failing that, through recourse to conciliation between the parties to the treaty at issue<sup>294</sup> or, for *jus cogens* claims, through arbitration or judicial settlement—again, between the parties.<sup>295</sup> Article 42 of the Convention provides, moreover, that “[t]he validity of a treaty . . . may be impeached only through the application of the present Convention,”<sup>296</sup> adding, for good measure, that “[t]he termination of a treaty, its denunciation or the withdrawal of a party, may take place

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288. *Summary Records of the 681st Meeting*, *supra* note 224, ¶ 29.

289. *See* SZTUCKI, *supra* note 25, at 129; *see also Fifty-Fourth Meeting*, *supra* note 20, ¶ 38 (statement of Isr. Rep. Mr. Rosenne) (“The invalidity was . . . objective and . . . it could be asserted by any State or any international organization aware of the invalid treaty.”).

290. *Fifty-Sixth Meeting* (May 7, 1968), in *Vienna Conference I*, *supra* note 16, at 321, ¶ 40 (statement of Nor. Rep. Mr. Dons).

291. Article 33 obliges the parties to a dispute likely to threaten international peace and security to undertake to resolve their differences through an array of procedures, including “negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means.” U.N. Charter art. 33., para. 1.

292. *Fifty-Fourth Meeting*, *supra* note 20, ¶¶ 76–77 (statement of Eth. Rep. Mr. Kebreth).

293. Vienna Convention, *supra* note 17, art. 65(3).

294. *Id.* art. 66(b).

295. *Id.* art. 66(a).

296. *Id.* art. 42(1).

only as a result of the application of the provisions of the treaty or of the present Convention.”<sup>297</sup>

Commentators have reached varying conclusions about the implications of these provisions with respect to third-party standing.<sup>298</sup> Pointing to the Vienna Convention’s text and *travaux préparatoires*—particularly the adamant insistence of a number of governments on the need to preserve treaty stability—Christos Rozakis submits that Articles 65 and 66 cannot be read to provide for “*erga omnes* invalidity,”<sup>299</sup> adding that Article 42 forecloses legal challenges to the validity of treaties through any means other than those provided in Articles 65 and 66.<sup>300</sup> Citing the opinions of a number of other scholars, Antonio Cassese similarly concludes that “in the case of bilateral treaties falling foul of *jus cogens* . . . , no third State can ask that the treaty be declared null and void. This power is still in the hands of the two contracting parties . . . .”<sup>301</sup>

Advocates of the contrary view have made their case largely on the basis of logical reasoning. Alexander Orakhelashvili argues that “[t]he view that invalidity cannot be invoked except by parties to a treaty is incompatible with the notion of peremptory norms,” which “follows from the idea of international public order,” adding that such a view would leave nonstate actors without protection.<sup>302</sup> Orakhelashvili also suggests that the Vienna Convention text may be read in a manner consistent with this interpretation.<sup>303</sup> However, he offers no analysis of the text that would bear out that assertion, and it is difficult to reconcile with the Vienna Convention’s plain terms.<sup>304</sup> Jerzy Sztucki also points out the logical problem with limiting standing to bring *jus cogens* claims but suggests that it is inherent in the effort to codify the concept of *jus cogens* via a treaty between states:

297. *Id.* art. 42(2).

298. Although these commentators have focused on third-party claims of *jus cogens* violations, their arguments are largely applicable to claims of coercion as well.

299. ROZAKIS, *supra* note 24, at 115.

300. *Id.* at 118.

301. ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES 172 & n.21 (1995); *accord* Weisburd, *supra* note 25, at 16–17.

302. ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS OF INTERNATIONAL LAW 142–43 (2006); *accord* Byers, *supra* note 113, at 236–37 (“[*Jus cogens* rules necessarily apply *erga omnes*. Illegal treaties and illegal rules of special customary international law would never be struck down as being inconsistent with *jus cogens* rules unless those rules also gave standing to other States. States which enter into illegal treaties or otherwise attempt to create illegal exceptions to general rules are normally not interested in challenging the validity of those exceptions.”).

303. ORAKHELASHVILI, *supra* note 302, at 142.

304. The mechanism in Articles 65 and 66 may be invoked only by “a party,” a term defined in the Vienna Convention as “a State which has consented to be bound by the treaty.” Vienna Convention, *supra* note 17, art. 2(1)(g). The Vienna Convention, moreover, distinguishes between a “party” and a “third State,” *id.* art. 2(1)(g), (h), making it implausible that the former term could be read generically to include the latter. For further analysis, see ROZAKIS, *supra* note 24, at 118–19.

The main problem at stake is not that of the character of a procedure as such, but that of a gap between whatever conventional procedure and the category of *jus cogens*. Any conventional procedure for settlement of disputes concerning *jus cogens* may be anyway binding only upon the parties to the Convention, and only after its entry into force. On the other hand, the category of *jus cogens*, once accepted, is *ex definitione* valid for all States, and, consequently, may be invoked against a treaty by any State—even a nonparty to the Convention and regardless of the Convention; thus, without any obligation as to any procedure which otherwise may be perfectly devised in the Convention. This is true unless we assume that the very category of *jus cogens* may be invoked only by the parties to the Convention. But then the whole concept of *jus cogens* as one of “peremptory norms of general international law . . . accepted and recognized by the international community of States as a whole” is turned down and rendered meaningless.<sup>305</sup>

Sztucki raises a genuine conundrum: while the view that the Vienna Convention itself establishes standing *erga omnes* to bring *jus cogens* or coercion claims is difficult to square with its text and *travaux préparatoires*, it is no easier to accept the notion that the parties to a treaty purporting to recognize as *lex lata* superior norms of universal applicability could, by the same treaty, impose procedural barriers restricting which parties are entitled to invoke those norms.

In addition to highlighting the tension between positivism and natural law inherent in the codification of mandatory rules of international law, the question of standing also raises questions about the functions these rules serve. Those questions are explored in Part III.

### b. Compulsory Jurisdiction

From the start, the ILC’s consideration of the question of treaty invalidity was attended by concerns about the stability of treaties, and these concerns grew increasingly pronounced as differences of opinion about the circumstances in which invalidity could be claimed were revealed. Acknowledging that, left unchecked, the recognition of the voidness of coerced treaties could lead to opportunistic assertions of invalidity, Lauterpacht’s 1953 report and draft articles provided that claims of coercion be brought before the ICJ.<sup>306</sup> Although Lauterpacht acknowledged that this requirement would “amount to a conferment of obligatory jurisdiction upon international tribunals in a matter of this description”<sup>307</sup> and was, in that respect, *de lege ferenda*,<sup>308</sup> he argued that judicial involvement was a necessary means of

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305. Sztucki, *supra* note 25, at 137–38.

306. *Lauterpacht Report*, *supra* note 200, art. 12 & cmts. 1–11.

307. *Id.* art. 12, cmt. 11.

308. *Id.*

preserving treaty stability.<sup>309</sup> On similar grounds, he argued that a state alleging the invalidity of an “illegal treaty” should be able to “suspend performance and leave it to the other contracting party to resort to the International Court of Justice for the vindication of the validity of the treaty.”<sup>310</sup> In this case too, he suggested, the Court’s jurisdiction would be “obligatory.”<sup>311</sup>

When the ILC took up the question in 1963, Lauterpacht’s arguments in favor of compulsory jurisdiction were found unpersuasive—or at least unrealistic in the prevailing political climate. On this issue, the passage of time between Lauterpacht’s report and the Commission’s deliberations proved consequential: supervening events—including the difficulties encountered by proposals for compulsory jurisdiction at the 1958 Geneva Conference on the Law of the Sea<sup>312</sup> and the growing concerns of Eastern-bloc and newly independent states regarding the composition and impartiality of the ICJ<sup>313</sup>—had dampened optimism about the prospects of securing states’ support for compulsory jurisdiction as a vehicle for the resolution of treaty disputes. Although in Waldock’s view such jurisdiction “would certainly be the ideal solution,” it did “not seem possible for the Commission to adopt this solution.”<sup>314</sup> Conversely, Waldock was also unwilling to support making annulment, denunciation, or withdrawal from a treaty conditional upon the consent of the other parties to it, as urged by some governments. This approach, he argued, “subordinates the legal principles governing invalidity and termination of treaties entirely to the rule *pacta sunt servanda* and goes near to depriving them of legal significance.”<sup>315</sup>

The procedure ultimately recommended by the Commission for resolving differences regarding treaty invalidity accorded with Waldock’s views on the matter. Pursuant to the Commission’s draft articles, a party claiming that a treaty was invalid would be obliged to notify the other parties of its claim; if objections were raised, the parties would “seek a solution through the means indicated in Article 33 of the Charter of the United Nations.”<sup>316</sup> According to Waldock, however, the injured state was “free to choose the procedure it proposed for the settlement of the dispute.”<sup>317</sup> If the other state

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309. *Id.* (“It is only if these conditions are fulfilled that reliance on the vitiating effect of duress . . . instead of constituting a disintegrating force in the treaty relations of States may become a factor in maintaining the authority of international engagements.”).

310. *Id.* art. 15, cmt. 6.

311. *Id.*

312. *See* 1963 Waldock Report, *supra* note 230, art. 25, cmt. 6.

313. *See* SINCLAIR, *supra* note 16, at 228. The ICJ’s controversial decision in *South West Africa* (Eth. v. S. Afr.), 1966 I.C.J. 6 (July 18), further prejudiced developing countries against the Court. *See* Schwelb, *supra* note 173, at 974.

314. 1963 Waldock Report, *supra* note 230, art. 25, cmt. 6.

315. *Id.*

316. 1969 Vienna Conference Draft Articles, *supra* note 199, art. 62.

317. *Summary Records of the 699th Meeting*, [1963] 1 Y.B. Int’l L. Comm’n 170, ¶ 14, U.N. Doc. A/CN.4/SER.A/1963.

failed to consent to participate, moreover, the injured party could proceed to treat the treaty in question as void.

This formula was supported by all but one of the other members of the Commission.<sup>318</sup> Herbert Briggs of the United States expressed worry about the dangers of leaving it to the “subjective judgment of states” to determine, in relation to coercion, what constituted “a threat or use of force in violation of the principles of the Charter.” Briggs concluded that “there was perhaps even less agreement today [in 1966] on the scope and precise meaning of that expression than there had been in 1963,” when the Commission had first discussed the issue.<sup>319</sup> Grigory Tunkin of the Soviet Union countered this view by cautioning against approaching international law “with ideas drawn from municipal law,” asserting that it “was highly dangerous to decry a rule of international law merely because it authorized a State sometimes to act unilaterally” and pointing out that Article 51 of the U.N. Charter permitted states to do just that in dire circumstances.<sup>320</sup> Tunkin argued, moreover, that while “[m]eans of peaceful settlement of disputes should be further developed, . . . the progress of other branches of international law should not be made dependent on the development of that particular branch.”<sup>321</sup>

When the Commission’s draft articles were considered at the Vienna Conference, Briggs’s view was taken up with renewed vigor by the representatives of a substantial number of governments.<sup>322</sup> The Turkish representative raised questions about the wisdom of “introducing into international law a rule borrowed from civil law without adapting it to the particular conditions of the international setting,” arguing that “by cutting out the safeguards it had in internal law, the International Law Commission had submitted a text that opened the door to all kinds of abuse.”<sup>323</sup> Invoking both the specter of Hitler and the ghost of Lauterpacht, the Chilean representative captured the fears of a number of states regarding the fate of existing treaties if no judicial safeguards were established:

Thirty years previously, the world had suffered from what had begun as an invocation of *jus cogens* and had subsequently turned out to be a use of force in the interests of a personalist policy. Sir Hersch Lauterpacht had issued a warning that the possibility of in-

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318. See *Summary Records of the 714th Meeting*, [1963] 1 Y.B. Int’l L. Comm’n 277, ¶¶ 17–56, U.N. Doc. A/CN.4/SER.A/1963.

319. *Summary Records of the 826th Meeting*, *supra* note 224, ¶ 73.

320. *Summary Records of the 682nd Meeting*, *supra* note 224, ¶ 58.

321. *Summary Records of the 700th Meeting*, [1963] 1 Y.B. Int’l L. Comm’n 176, ¶ 46, U.N. Doc. A/CN.4/SER.A/1963.

322. See, e.g., *Sixty-Ninth Meeting* (May 14, 1968), in Vienna Conference 1, *supra* note 16, at 407, ¶¶ 22–24 (statement of F.R.G. Rep. Mr. Truckenbrodt); *Fifty-Fifth Meeting*, *supra* note 23, ¶ 29 (statement of Japan Rep. Mr. Fujisaki); *Fifty-Fourth Meeting*, *supra* note 20, ¶ 29 (statement of Fr. Rep. Mr. de Bresson); *Fifty-Third Meeting*, *supra* note 21, ¶ 54 (statement of U.K. Rep. Mr. Sinclair).

323. *Fifty-Third Meeting*, *supra* note 21, ¶ 8 (statement of Turk. Rep. Mr. Miras).

voking the invalidity of immoral treaties was a constant invitation to unilateral evasion of an irksome obligation. It was true that Lauterpacht seemed to have changed his view of *jus cogens* after the horrors of the Second World War, but it was certain that he had continued to hold that the problems deriving from the incompatibility of the terms of a treaty with the principles of international law should be brought before an international tribunal.<sup>324</sup>

Thus, while few representatives expressed opposition to the mandatory rules defined in what became Articles 52 and 53 of the Vienna Convention, they did seek to constrain their invocation through judicial safeguards. Proponents of the approach defined in the ILC's draft articles, in contrast, argued that insistence on judicial involvement would sap international law of its dynamism<sup>325</sup> and obstruct the pursuit of justice. As the representative from Cuba declared, "[i]t had been objected that voidness *ab initio* undermined legal security. But the contrary position, which would establish a presumption of *ab initio* validity of a treaty that was radically void, would represent the bankruptcy of justice."<sup>326</sup>

The mechanism on which the conferees in Vienna agreed, after consideration of a range of proposals in the waning hours of the conference, built on the ILC's approach but added features that shifted the presumption against invalidity. As in the ILC's proposal, disputes about claims of invalidity would be resolved, in the first instance, "through the means indicated in Article 33 of the Charter."<sup>327</sup> Pursuant to Article 66, however, a failure to resolve those claims within 12 months entitles any of the parties to the treaty to activate one of two prescribed mechanisms: for *jus cogens* claims, the dispute may be "submit[ted] . . . to the International Court of Justice for a decision unless the parties agree to submit the dispute to arbitration";<sup>328</sup> for other claims, including coercion, the dispute may be submitted to the U.N. Secretary-General for conciliation, pursuant to a procedure defined in the Annex to the Vienna Convention.<sup>329</sup> Pursuant to Article 69 of the Vienna Convention, moreover, a treaty is void only if its invalidity "is established

324. *Fifty-Second Meeting* (May 4, 1968), in Vienna Conference 1, *supra* note 16, at 293, ¶ 55 (statement of Chile Rep. Mr. Barros).

325. For example, echoing Tunkin, Shabtai Rosenne (who represented Israel at the Vienna Conference, after serving on the ILC) argued "that the development of normative rules of modern international law was not contingent upon the simultaneous development of its procedural rules." *Fifty-Fourth Meeting*, *supra* note 20, ¶ 35 (statement by Isr. Rep. Mr. Rosenne).

326. *Sixty-Eighth Meeting* (May 15, 1968), in Vienna Conference 1, *supra* note 16, at 402, ¶ 43 (statement of Cuba Rep. Mr. Alvarez Tabio).

327. Vienna Convention, *supra* note 17, art. 65(3).

328. *Id.* art. 66(a).

329. *Id.* art. 66(b).



under the present Convention,”<sup>330</sup> suggesting that it remains valid until it is determined not to be through the procedures in Articles 65 and 66.<sup>331</sup>

As Rozakis aptly puts it, these procedures establish a regime of “consensual invalidation.”<sup>332</sup> A treaty alleged to be the product of coercion may be invalidated only if the parties to it accept its invalidity, either at the outset or upon the recommendation of a conciliation commission established pursuant to Article 66 and the Annex to the Convention.<sup>333</sup> Thus, notwithstanding the language of absolute nullity set out in Article 52, a literal reading of Article 66 and the Annex suggests that the consent of all of the parties to the treaty—including the state alleged to have engaged in coercion—is required to establish the treaty’s invalidity. Such a reading, however, turns Article 52 into something with even less force than a default rule, since the treaty remains binding unless the parties agree instead to abide by the rule. According to Ian Sinclair, this result may be avoided through a more pragmatic interpretation of the Vienna Convention:

Of course, there is one obvious gap in the Convention regime—what happens in the event of failure of conciliation? To this the Convention as such provides no answer, but it is not unreasonable to assume, despite the nominally recommendatory character of the conciliation commission’s report, that a report favourable to the state having asserted a ground of invalidity or termination would *prima facie* justify that State in going ahead with the measure proposed, and that an unfavourable report would justify the objecting State in claiming continued performance of the treaty.<sup>334</sup>

Sinclair’s reading, however, goes only so far. Because nothing stops the party alleging coercion from agreeing to halt the conciliation and proceeding with performance of its obligations under the treaty, without affording a judicial tribunal an opportunity to assess the validity of the treaty, it is difficult to regard Article 52 of the Vienna Convention as more than a semimandatory rule, rendering coerced treaties voidable, but not void.

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330. *Id.* art. 69(1).

331. The ILC’s draft of this article, in contrast, provided only, “[t]he provisions of a void treaty have no legal force.” It made no mention of the need to “establish” voidness. *See* ROSENNE, *supra* note 16, at 356 (providing draft and final texts of Article 69).

332. ROZAKIS, *supra* note 24, at 110.

333. *See* Vienna Convention, *supra* note 17, art. 66 (“Any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.”). The Annex also provides that the report of the Conciliation Commission established by the Secretary-General “shall not be binding upon the parties” and “shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.” *Id.* Annex.

334. SINCLAIR, *supra* note 16, at 233.

The same largely holds true for the Vienna Convention's procedures for challenging treaties in conflict with *jus cogens*. Pursuant to Article 65, the parties to such a treaty are charged with undertaking to resolve their dispute themselves, through one of the means listed in Article 33 of the U.N. Charter.<sup>335</sup> At any time during this process, the parties may presumably agree to the waiver of rights or obligations alleged to be *jus cogens* and to proceed with performance of the agreement. It is only if this process fails to yield a resolution of the dispute that the jurisdiction of the ICJ arises pursuant to Article 66.<sup>336</sup> To be sure, by providing for the Court's jurisdiction—at least among parties to the treaty in dispute—the Vienna Convention takes a step away from the purely consensual procedure applicable to other claims of invalidity. But the extent to which the Vienna Convention thereby establishes mandatory rules, as that concept is understood in the domestic context, is constrained by two factors: first, the parties' ability by agreement to opt out of judicial settlement under Article 65 and proceed with performance of an agreement even if it conflicts with *jus cogens*; and second, the narrow participation of states in the regime established by the Vienna Convention. Among the 194 recognized states in the world, only 112 were parties to the Convention as of May 2012.<sup>337</sup> Among these parties, moreover, almost a dozen entered reservations to Article 66 conveying their unwillingness to be drawn into ICJ proceedings unless all parties to the treaty in dispute have consented to the ICJ's jurisdiction in the case in question.<sup>338</sup> These reservations, in turn, elicited objections from a number of other governments, which declared that they did not consider themselves bound, in relations with the states that had entered such reservations, by the Vienna Convention's substantive articles on treaty invalidity.<sup>339</sup> Accordingly, the opportunities for the ICJ or an arbitral tribunal to assess a treaty's compatibility with *jus cogens* without first securing consent to its jurisdiction from the parties to the treaty are limited. As I will discuss in Part III of this Article, these limitations further narrow the potential functions served by the rules articulated in Articles 52 and 53 of the Vienna Convention.

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335. See *supra* note 291.

336. The procedure defined in Article 66(a) is triggered, “[i]f, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised.” Vienna Convention, *supra* note 17, art. 66.

337. *Status of the Vienna Convention on the Law of Treaties*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en](http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en) (last visited Oct. 28, 2012) [hereinafter *Status of the Vienna Convention*].

338. Such reservations have been entered by Algeria, Armenia, Belarus, China, Cuba, the Soviet Union/Russian Federation, Saudi Arabia, Tunisia, Ukraine, Tanzania, and Viet Nam. *Id.*

339. Objections of this kind were raised by Belgium, Denmark, Finland, Portugal, Egypt, Japan, the Netherlands, Sweden, and the United Kingdom. *Id.*

### C. Convergence, Controversy, and Codification

The legislative history of Articles 52 and 53 of the Vienna Convention points to a striking convergence between the debates about contractual freedom in private domestic law, as described in Part I, and those that have unfolded with respect to the law of treaties. In both settings, mandatory rules have proven least controversial when they were seen as a means of preventing or deterring violations of the established rights of third parties. Thus, at even the height of the classical period of contracts law in England and the United States, courts had little difficulty rationalizing the invalidation of contracts to commit crimes. Similarly, the members of the International Law Commission and, later, the delegates to the Vienna Conference were able to agree that if *jus cogens* had any content as a category it included the prohibition of agreements to commit recognized international crimes.<sup>340</sup> Like the rule of contracts law voiding agreements procured through physical compulsion, moreover, the rule voiding coerced treaties in Article 52 is best explained as a means of deterring the unlawful use of violence.

In both settings, mandatory rules have also been urged as a means of correcting agency problems—protecting principals from breaches of trust by the agents contracting on their behalf. Although the scope of that function in U.S. private law has narrowed with the contraction of *ultra vires* doctrine, concerns about governments reaching agreements that breach the trust of those they claim to represent were what impelled Verdross to raise the question of forbidden treaties back in 1937, and they continue to underlie a good part of international *jus cogens* doctrine.<sup>341</sup> In addition, both international and domestic jurists have regarded mandatory rules as necessary to safeguard the consistency and dignity of the legal system. Lauterpacht's invocation of the "general principle of law" that "an illegal act cannot produce legal rights for the benefit of the law-breaker"<sup>342</sup> is cut from the same equitable cloth as Lord Chief Justice Wilmot's outraged banishment of criminal conspirators from his court in *Collins v. Blantern*.<sup>343</sup>

Mandatory rules have also elicited similar controversies at the domestic and international levels. In both, questions have been raised about the propriety of judges filling in gaps in statutory or conventional law with their own judgments about what is fair or what is moral, particularly if in doing so they are overriding the express preferences of not only one, but both, of the parties to a transaction. Thus, the tirades of mid-nineteenth-century English judges against judicial interference with contracts through the vehicle of public policy<sup>344</sup> would be reprised a century later by the French representa-

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340. See generally Criddle & Fox-Decent, *supra* note 264.

341. See *id.* at 335–36.

342. Lauterpacht Report, *supra* note 200, art. 12, cmt. A.3.

343. JOHN DEVOE BELTON, A LITERARY MANUAL OF FOREIGN QUOTATIONS: ANCIENT AND MODERN 160 (New York, G.P. Putnam's Sons 1891) ("Hence, far hence, ye profane.").

344. Winfield, *supra* note 54, at 90–91.

tive at the Vienna Conference.<sup>345</sup> Similarly, just as attempts by U.S. progressives to use mandatory rules to promote distributive aims raised the ire of the *Lochner* court, the attempts of Eastern-bloc and developing countries' representatives to do the same, through recognition of an expansive definition of coercion and through a *jus cogens* norm voiding "treaties establishing gross inequality between the obligations of the parties,"<sup>346</sup> met with opposition from their Western counterparts on the ILC and at the Vienna Conference.

This alignment between the functions envisaged for domestic and international mandatory rules, and the controversies surrounding them, is not merely a consequence of the concept's origins in domestic law. It is also a response to problems inherent in the institution of contract: the possibility that agreements will adversely affect rights and interests of third parties, the possibility that differences in capacity or power between parties will undermine the voluntariness of their agreements, and the need to protect the legitimacy of the legal system called on to enforce such agreements. Presented with these common problems, it is unsurprising that domestic and international jurists have turned to the same solution.

To a certain extent, they also have turned to the same process for implementing that solution: judicial invalidation of agreements in conflict with mandatory rules. As described above, however, the procedures for challenging the validity of treaties under Articles 52 and 53 of the Vienna Convention make gaining access to a judicial tribunal difficult for the parties to an agreement—and virtually impossible for third parties. As I will show in Part III, these procedural barriers, combined with structural features of the international legal system, have made judicial invalidation of a treaty an exceptionally remote possibility, limiting the capacity of mandatory rules to perform important functions in international life.

Before turning to an examination of recent international practice, it bears emphasizing that it is neither incidental nor inconsequential that debates about mandatory rules of international law came to a head in the context of a codification process. The codification enterprise of the last two centuries sprang largely from the Enlightenment's search for order—from the desire to organize and rationalize the law so as to cure it of "its haphazard and uncertain character."<sup>347</sup> But it was also rooted in positivist philosophy<sup>348</sup> and "scepticism towards traditional systems of authority."<sup>349</sup> The imprint of these related but, at times, conflicting origins is plain to see in the Vienna Convention. Just as it had been the process of codification that brought the distinction between *jus cogens* and *jus dispositivum* to the attention of nineteenth-century civil lawyers in Europe, it was the attempt to

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345. See *supra* text accompanying note 270.

346. See *supra* notes 271–273 and accompanying text.

347. KELLY, *supra* note 50, at 265.

348. *Id.* at 324–25.

349. *Id.* at 249.

undertake a “systematic exposition” of the law of treaties that brought Lauterpacht and succeeding ILC Rapporteurs to the question of mandatory rules of international law. For Lauterpacht, the thoroughness and coherence of international law were critical to its legitimacy. Accordingly, his draft code of the law of treaties, which did much to shape the Vienna Convention, drew freely on analogues from domestic law, without overmuch concern for “the actual or probable frequency of occurrences giving rise to the application of the rules of law in question.”<sup>350</sup> Comprehensiveness and systemic integrity took precedence over a solid grounding in international custom.

But while the substantive norms announced in Articles 52 and 53 of the Vienna Convention are rooted in general principles of law from domestic legal systems (and perhaps, by extension, natural law), the procedural mechanism for enforcing them points in a different direction—toward the positivist origins of the modern codification enterprise. It bears remembering, after all, that the Enlightenment-driven search for constant, rationalizing principles that undergirded early codification efforts in continental Europe also inspired the abstraction of classical contracts law in England and the United States<sup>351</sup> and the positivist view that the only legitimate source of contractual obligation is the consent of the parties to an agreement.<sup>352</sup> The philosophical links between positivism and codification have vexed efforts to legislate constraints on contractual freedom, particularly at the international level, where codes generally take the form of multilateral treaties, often with less than universal participation, rendering the line separating code from contract indistinct. Indeed, notwithstanding the invocation of a higher order of norms independent of the consent of states in Articles 52 and 53 of the Vienna Convention, the Convention derives its force *as a treaty* from the consent of the parties to it, even if parts of it are widely considered a codification of customary law. In that respect, the delegations assembled in Vienna in 1968 and 1969 were trapped literally and figuratively by the conventions of positivism. That conundrum is reflected in the emphatic contractualism of the Convention’s procedures for enforcing mandatory rules and, as discussed below, in ensuing international practice.

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350. See *Lauterpacht Report*, *supra* note 200, art. 12, n.1.

351. Martin J. Doris, *Did We Lose the Baby with the Bath Water? The Late Scholastic Contribution to the Common Law of Contracts*, 11 *TEX. WESLEYAN L. REV.* 361, 369–71 (2005).

352. Indeed, the ties connecting these strands of thought are made manifest in the work of a single person: Jeremy Bentham, who is credited with coining both the word “international” and the word “codification” and was an early champion of codification, positivism, and freedom of contract. See ATIYAH, *supra* note 53, at 324–26 (describing Bentham’s advocacy of freedom of contract); KELLY, *supra* note 50, at 265 (noting that Bentham coined the term “codification”); H.B. Jacobini, *Some Observations Concerning Jeremy Bentham’s Concepts of International Law*, 42 *AM. J. INT’L L.* 415, 416 (1948) (describing Bentham’s positivism and coining of the term “international”).

### III. CONTRACTUALISM ASCENDANT: RECENT INTERNATIONAL PRACTICE

The most striking feature of the development of mandatory rules of international law since the adoption of the Vienna Convention is the paucity of state practice in this area. Notwithstanding the torrent of scholarly commentary regarding the theoretical coherence, content, and implications of *jus cogens* over the last fifty years,<sup>353</sup> and judicial recognition of both *jus cogens* and coercion as grounds for the invalidity of treaties, no international tribunal has voided a treaty on the basis of either ground, and few have been called on to do so. Indeed, no party has pursued the invalidation of a treaty via the procedural mechanism defined in Articles 65 and 66 of the Vienna Convention even once since the Convention entered into force in 1980.<sup>354</sup> In this Part, I review the limited record of international practice in this area over the last century, examining decisions of the ICJ and of regional human rights tribunals, as well as proceedings of the U.N. General Assembly and Security Council. These episodes reveal a profound—but not entirely unshakeable—reluctance on the part of the international community to unsettle the terms of a treaty once it has been concluded.

#### A. International Court of Justice Jurisprudence

The one case in which an international tribunal has considered the effect of the mandatory rules recognized by the Vienna Convention on the validity of a treaty was decided after the Convention's adoption, but prior to its entry into force. In the *Fisheries Jurisdiction* case, the United Kingdom and the Federal Republic of Germany contested Iceland's unilateral extension of its exclusive fisheries jurisdiction, asserting that the ICJ's jurisdiction over the dispute was established by a 1961 Exchange of Notes between the countries.<sup>355</sup> Iceland, however, refused to recognize the Court's jurisdiction or to participate in the proceedings.<sup>356</sup> In a letter to the Court's Registrar, Iceland's Minister of Foreign Affairs alleged that "[t]he 1961 Exchange of

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353. For references to many of the numerous articles on *jus cogens*, see Gordon Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585, 586 n.3, 615 n.27 (1988).

354. See ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 315–22 (2d ed. 2007) (noting the lack of formal invalidity claims under Vienna Convention provisions on error, fraud, corruption, coercion, and *jus cogens*); Władysław Czapliński, *Jus Cogens and the Law of Treaties*, in *THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: JUS COGENS AND OBLIGATIONS ERGA OMNES* 83, 93 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006) (“Art. 53 of the Vienna Convention has never been invoked in practice.”). As discussed below, the Democratic Republic of Congo invoked Articles 53 and 66 in an attempt to establish the ICJ's jurisdiction over its suit against Rwanda, but it did not claim the invalidity of any treaty. It sought instead to bring an end to alleged human rights violations by Rwandan armed forces in Congolese territory. See *infra* notes 379–386 and accompanying text.

355. *Fisheries Jurisdiction I*, 1973 I.C.J. ¶ 1; *Fisheries Jurisdiction (F.R.G. v. Ice.) (Fisheries Jurisdiction II)*, Judgment, 1973 I.C.J. 49, ¶ 1 (Feb. 2).

356. *Fisheries Jurisdiction I*, 1973 I.C.J. ¶ 3.

Notes took place under extremely difficult circumstances, when the British Royal Navy had been using force to oppose the 12-mile fishery limit established by the Icelandic Government in 1958.<sup>357</sup> Observing that “[t]his statement could be interpreted as a veiled charge of duress purportedly rendering the Exchange of Notes void *ab initio*,” the Court briefly considered whether the agreement was invalid on the ground of coercion.<sup>358</sup>

Citing the U.N. Charter and Article 52 of the Vienna Convention, the Court confirmed that “under contemporary international law an agreement concluded under the threat or use of force is void.”<sup>359</sup> But it was quick to add that “a court cannot consider an accusation of this serious [sic] nature on the basis of a vague general charge unfortified by evidence in its support,”<sup>360</sup> and it found the evidence against the United Kingdom wanting: “The history of the negotiations which led up to the 1961 Exchange of Notes,” it stated summarily, “reveals that these instruments were freely negotiated by the interested parties on the basis of perfect equality and freedom of decision on both sides.”<sup>361</sup> Thus, while the Court accepted as a rule that proof of coercion would render the treaty void, it was unwilling to define coercion in broad terms, and it expressed unwillingness to override a treaty between states in the absence of the clearest evidence of the threat or use of force. In the sole dissenting opinion, Judge Padilla Nervo took issue with both elements of the Court’s application of the rule to the facts of the case, arguing that, in view of the relative military power of the respective states, the “mere presence” of the Royal Navy inside Iceland’s claimed fishery limits “may have the same purpose and the same effect as the use or threat of force” and that the difficulty of establishing such pressure using “so-called documentary evidence” made it no less real.<sup>362</sup>

Particularly when read in light of Judge Padilla Nervo’s dissent, the Court’s judgment in the *Fisheries Jurisdiction* case points to a restrictive view of the functions of the mandatory rule against coercion. The Court declined to embrace the broad conception of coercion that had been urged by Eastern-bloc and developing countries at the Vienna Conference—and, along with it, the idea that the rule could serve a distributive function, to correct disparities in political or economic power. As the Court made clear, the treaty’s validity rested on the legal equality of the parties—and the absence of the plainest military compulsion—not on the fairness of the exchange for which it provided.<sup>363</sup> The Court’s decision also reflects recog-

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357. *Id.* ¶ 24.

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.* at 47 (dissenting opinion of Judge Nervo).

363. However, Judge Fitzmaurice did undertake in his separate opinion to make the case that the agreement also represented a fair quid pro quo. *Id.* at 34 (separate opinion of Judge Fitzmaurice).

dition of the limitations of its own fact-finding capacity: although it affirmed the mandatory character of the rule against coercion, addressing the issue even in the absence of a clear claim by Iceland, it declined to look beyond the limited evidence presented to it by the parties.<sup>364</sup>

Although the ICJ has not squarely addressed treaty invalidity pursuant to coercion or *jus cogens* in any other decision, two more recent judgments reflect a similar reluctance to push the boundaries of either the rules or the Court's role in giving them effect. In the *East Timor* case, Portugal brought proceedings against Australia alleging that Australia had incurred international responsibility by wrongfully concluding a treaty with Indonesia—the Timor Gap Treaty<sup>365</sup>—that established a zone of cooperation in the Timor Sea pursuant to which petroleum reserves there could be explored and exploited.<sup>366</sup> Claiming that the treaty infringed both “the right of the people of East Timor to self-determination, to territorial integrity and unity and its permanent sovereignty over its natural wealth and resources” and “the powers of Portugal as the administering Power of the Territory of East Timor,”<sup>367</sup> Portugal sought a declaration “that Australia [was] bound . . . to cease from all breaches of [these] rights and international norms” and “to refrain [both] from . . . negotiation, signature or ratification” of the treaty and from implementing the acts authorized by it.<sup>368</sup> The Court acknowledged that the right of peoples to self-determination “has an *erga omnes* character.”<sup>369</sup> It decided, however, that it lacked jurisdiction to entertain Portugal's claims, concluding that their resolution would require it to determine “whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf”—a determination it could not make “in the absence of the consent of Indonesia,”<sup>370</sup> which had not accepted the Court's jurisdiction.

Although Portugal did not claim that the rights and norms it invoked were *jus cogens* or seek invalidation of the treaty *per se*, the *East Timor* case highlights several constraints on the operation of mandatory rules at the international level. First, Portugal's decision not to seek a declaration of the Timor Gap Treaty's invalidity on grounds of conflict with *jus cogens* supports the narrow interpretation of the Vienna Convention's standing requirements advanced by Rozakis and Cassese: if the Portuguese government believed that Article 53 of the Vienna Convention conferred standing

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364. *Id.* ¶ 24 (majority opinion).

365. Treaty Between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia, Austl.-Indon., Dec. 11, 1989, [1991] A.T.S. 9 (Austl.).

366. *East Timor* (Port. v. Austl.), Judgment, 1995 I.C.J. 90, ¶¶ 1, 10 (June 30).

367. *Id.* ¶ 10.

368. *Id.*

369. *Id.* ¶ 29.

370. *Id.* ¶ 28.



on third parties to bring claims of invalidity premised on *jus cogens* and permitted claims against states not party to the Convention,<sup>371</sup> it presumably would have made such a case directly. Similarly, if the Court read Article 53 to confer such standing, notwithstanding Articles 65 and 66, it presumably would have addressed that issue even in the absence of a claim by Portugal.<sup>372</sup> The silence of both Portugal and the Court on this front suggest that, whatever the logical merits of the arguments advanced by Orakhelashvili, Sztucki, and, earlier, Lauterpacht, they have not so far been embraced in practice.

Second, in view of the Court's recognition that the right of self-determination imposes obligations *erga omnes*, its deference to Indonesia's refusal to consent to jurisdiction points to an unwillingness to step outside the narrow confines of a consent-based jurisdictional framework even when confronted with alleged violations of norms of universal interest. "In the main," as one commentator observes, "the ICJ has remained unreceptive to third-party claims, upholding and ruling upon the parties' presentation of their own dispute."<sup>373</sup> The *East Timor* judgment suggests, moreover, that "[s]ubstantive law developments towards acceptance of the related concepts of obligations owed *erga omnes* and non-derogable norms of *jus cogens* have not been matched by procedural flexibility."<sup>374</sup>

Third, the Court's reluctance to unsettle Australia's agreement with Indonesia appears to have been animated not only by concerns about its ability to rule on Indonesia's rights absent its consent to jurisdiction, but also by questions about which party was legitimately situated to represent the interests of the people of East Timor in proceedings before it. The U.N. Security Council had called, shortly after Indonesia's invasion of East Timor, for respect for "the territorial integrity of East Timor as well as the inalienable right of its people to self-determination"; and, at the time the Court's judgment was issued, the U.N. General Assembly continued to regard East Timor as a non-self-governing territory, both organs initially referring to Portugal as the "administering Power."<sup>375</sup> The Court nevertheless was unwilling to infer from these facts "an obligation on third States to treat exclusively with Portugal as regards the continental shelf of East Timor," noting that neither the Council nor the Assembly had endorsed such an in-

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371. Indonesia has never been a party to the Vienna Convention on the Law of Treaties. See *Status of the Vienna Convention*, *supra* note 337.

372. In the *Armed Activities* case, Judge *ad hoc* Dugard identified *East Timor* as another case "in which norms of *jus cogens* might possibly have been invoked." *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, 2006 I.C.J. 6, 90 (Feb. 3) (separate opinion of Judge *ad hoc* Dugard).

373. Christine Chinkin, *The East Timor Case (Portugal v. Australia)*, 45 INT'L & COMP. L.Q. 712, 712 (1996).

374. *Id.* at 721.

375. See *East Timor*, 1995 I.C.J. ¶ 31 (quoting S.C. Res 384, ¶ 1, U.N. Doc. S/RES/389 (Apr. 24, 1976)).

ference themselves.<sup>376</sup> As Judge Vereshchetin pointed out in his opinion concurring with the judgment, Portugal had not secured support for its Application to the Court from the third party whose rights “lie[] at the core of the whole case,” the people of East Timor.<sup>377</sup> Noting Australia’s claim that its treaty with Indonesia would inure to the benefit of the East Timorese, Vereshchetin suggested that the Court was poorly situated to decide how best to protect their interests.<sup>378</sup>

The Court’s judgment in *East Timor* points to some of the interrelated factors that impede the efficacy of mandatory rules of international law as means of protecting third-party interests. The judgment suggests that even where a third-party stake in a dispute is legally recognized, third-party access to judicial forums continues to be constrained by the necessity of establishing both consent to jurisdiction and standing, particularly where the rights of nonstate actors are at issue. And while the Court’s judgment on jurisdiction precluded a decision on the merits, it hints at the problems presented by indeterminacy in this context: although the Court recognized the *erga omnes* character of the principle of self-determination, it showed reluctance to unsettle a treaty between states without the clearest guidance from political actors like the Security Council and General Assembly about the implications of self-determination with respect to the lawfulness of Indonesia’s presence in East Timor and Portugal’s claim to represent the East Timorese.

Seventeen years later, in *Armed Activities on the Territory of the Congo*, the Court extended its holding in *East Timor* to cover claims based explicitly on *jus cogens*.<sup>379</sup> In that case, the Democratic Republic of the Congo (D.R.C.) initiated proceedings against Rwanda, alleging that Rwanda’s armed forces had committed acts violating a host of international obligations while present in the D.R.C.’s territory and seeking a declaration that Rwanda was required to withdraw its forces and to pay compensation for the wrongful acts imputable to it.<sup>380</sup> Although the D.R.C. did not call on the Court to declare any treaty void, it claimed that some of Rwanda’s acts violated norms recognized to be *jus cogens*, including the prohibition of genocide, and it argued that Article 66 of the Vienna Convention “establishes the jurisdiction of the Court to settle disputes arising from the violation of peremptory norms (*jus cogens*) in the area of human rights.”<sup>381</sup> The D.R.C. also claimed that the Court’s jurisdiction was established by Article IX of the Genocide Convention, contending, inter alia, that Rwanda’s reservation to that article of the Convention was void because it would “‘prevent the . . .

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376. *Id.* ¶ 32.

377. *Id.* at 135 (separate opinion of Judge Vereshchetin).

378. *Id.* at 136.

379. *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, 2006 I.C.J. 6, ¶ 64 (Feb. 3).

380. *Id.* ¶ 11.

381. *Id.* ¶ 15.

Court from fulfilling its noble mission of safeguarding peremptory norms.’”<sup>382</sup>

These arguments, however, failed to persuade the Court. For the first time in a majority opinion,<sup>383</sup> it recognized the concept of *jus cogens*, and it confirmed that the prohibition of genocide “assuredly” is “a norm having such a character.”<sup>384</sup> Referring back to its holding in *East Timor*, however, the Court reasoned that

the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute.

The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court’s jurisdiction: . . . [u]nder the Court’s Statute that jurisdiction is always based on the consent of the parties.<sup>385</sup>

The Court also confirmed the effectiveness of Rwanda’s reservation to Article IX of the Genocide Convention, concluding that the “reservation is not incompatible with the object and purpose of the Convention” because it “does not affect substantive obligations relating to acts of genocide themselves.”<sup>386</sup> Thus, drawing a clear separation between substance and procedure, the Court held that the character of a norm as *erga omnes* or *jus cogens* would suffice neither to establish jurisdiction nor to invalidate a reservation to a treaty provision establishing jurisdiction.

The Court’s jurisdictional holdings in *East Timor* and *Armed Activities* are made all the more striking by the fact that, during its history, the Court has seldom concluded that it lacks jurisdiction over matters brought before it.<sup>387</sup> The Court’s faithful adherence to the “consensual paradigm”<sup>388</sup> in these cases, combined with the narrowness of its inquiry in the *Fisheries Jurisdiction* case, suggest that recourse to it for the resolution of disputes regarding mandatory rules of international law will continue to be exceptionally rare.

382. *Id.* ¶ 56 (quoting *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Rwanda)*, Verbatim Record, ¶ 38 (July 5, 2005, 10 a.m.), <http://www.icj-cij.org/docket/files/126/4157.pdf> (testimony of Mr. Ntumba Luaba Lumu)).

383. *See id.* at 87 (separate opinion of Judge *ad hoc* Dugard) (“This is the first occasion on which the International Court of Justice has given its support to the notion of *jus cogens*.”).

384. *Id.* ¶ 64 (majority opinion).

385. *Id.*

386. *Id.* ¶¶ 66–67.

387. Cesare P.R. Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 N.Y.U. J. INT’L L. & POL. 791, 818 & n.98 (2007) (observing that among the thirty-eight cases submitted to the ICJ unilaterally, it has dismissed nine on jurisdictional grounds, three of which arose from one set of factual circumstances).

388. *Id.* at 817.

### B. Jurisprudence of Regional Human Rights Tribunals

In a trio of cases, regional human rights tribunals have expressed greater willingness than the ICJ to address the compatibility of international agreements with mandatory rules of international law. Although none has dealt with precisely the kind of frontal challenge to treaty validity contemplated in Articles 65 and 66 of the Vienna Convention, their decisions suggest that regional tribunals may be less rigid in construing the procedural framework defined in the Convention—and less reluctant to unsettle the terms of a treaty—than the ICJ has proved to be.

In the *Aloeboetoe Case*,<sup>389</sup> the Inter-American Court of Human Rights considered the implications of a 1762 agreement between the Netherlands and the Saramaka tribe of Suriname.<sup>390</sup> The agreement, which recognized a degree of Saramaka autonomy within the tribe's territory, was cited in support of a claim that Saramaka custom should govern the disposition of succession issues.<sup>391</sup> The Court, however, declined to give legal effect to the agreement, observing that some of its other provisions required capture of runaway slaves and permitted the sale into slavery of prisoners taken by the tribe, thereby "contradict[ing] the norms of *jus cogens superveniens*."<sup>392</sup> Because there is no indication that slavery continued to be practiced at the time the suit was brought, the Court's decision to declare the agreement null and void cannot have been intended to halt or deter violations of the norm against slavery. The Court seemed instead to be invoking the systemic-integrity function of mandatory rules, declaring (with a hint of indignation reminiscent of Lord Chief Justice Wilmot's opinion in *Collins v. Blantem*)<sup>393</sup> that "[n]o treaty of that nature may be invoked before an international human rights tribunal."<sup>394</sup> The Court, moreover, appears not to have felt constrained to apply the procedures for treaty invalidation defined in Articles 65 and 66 of the Vienna Convention,<sup>395</sup> declaring the agreement void without offering the parties to it an opportunity to weigh in on the matter. Of course, since the treaty appears not to have implicated any continuing interests of the Netherlands or Suriname (the Netherlands' apparent successor in interest), the Court may not have regarded such a step as necessary.

In the *Kallon & Kamara* case, the Special Court for Sierra Leone also briefly considered the validity, under Articles 53 and 64 of the Vienna Convention, of an international agreement—in this case, the Statute of the

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389. *Aloeboetoe et al. Case, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 15* (Sept. 10, 1993).

390. *Id.* ¶¶ 55–56.

391. *Id.* ¶ 56.

392. *Id.* ¶ 57.

393. *See supra* note 115 and accompanying text.

394. *Aloeboetoe*, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 57.

395. *See supra* notes 327–336 and accompanying text.

Special Court for Sierra Leone.<sup>396</sup> Article 10 of the Statute provides that amnesties previously granted to criminal defendants would not operate as a bar to the Court's jurisdiction to prosecute certain crimes.<sup>397</sup> Responding to claims that Article 10 was unlawful in various respects,<sup>398</sup> the Court asserted that a treaty could only be invalidated as unlawful if it conflicted with a peremptory norm of international law, and it found no evidence of such a conflict.<sup>399</sup> The Court did not, however, rule out the possibility that such a claim could be raised before it to challenge a treaty provision. In that respect, the Special Court's decision (like the Inter-American Court's decision in the *Aloeboetoe Case*) potentially signals a willingness by human rights tribunals to move beyond the strictly contractualist paradigm for treaty invalidation set out in Articles 65 and 66 of the Vienna Convention.

The European Court of Human Rights' decision in *Sejdić v. Bosnia & Herzegovina*<sup>400</sup> points in a similar direction. In that case, the Court's Grand Chamber assessed the compatibility of several provisions of the Constitution of Bosnia and Herzegovina with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The petitioners in the case, who identified themselves as of Roma and Jewish origin, respectively, sought to run in elections for the Presidency and House of Peoples (Bosnia's second legislative chamber).<sup>401</sup> They challenged the constitutional requirement that candidates for both offices be affiliated with one of Bosnia's "constituent peoples"—Bosniacs, Serbs, and Croats<sup>402</sup>—arguing that the requirement was racially discriminatory in violation of several articles of the European Convention and its protocols.<sup>403</sup> The Court, which assessed whether the disputed constitutional provisions violated the European Convention's prohibition of discrimination,<sup>404</sup> did not mention Article 53 of the Vienna Convention or undertake to assess whether the norm against discrimination is *jus cogens*.<sup>405</sup> Because Bosnia's Constitution had been negotiated

396. Prosecutor v. Kallon & Kamara, SCSL-2004-15AR72(E), SCSL-2004-16AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶¶ 61–65 (Mar. 13, 2004), <http://www.transcrib.org/07%20SCSL%20-%202004%20-%20Kallon%20Kamara>.

397. Statute of the Special Court for Sierra Leone art. 10, Jan. 16, 2002, 2178 U.N.T.S. 145.

398. *Kallon*, SCSL-2004-15AR72(E), SCSL-2004-16AR72(E), ¶¶ 55–60.

399. *Id.* ¶ 62.

400. *Sejdić v. Bosnia & Herzegovina*, App. Nos. 27996/06, 34836/06 (Eur. Ct. H.R. 2009), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96491>.

401. *Id.* ¶ 9.

402. *See id.* ¶¶ 11–12, 26.

403. *Id.* ¶ 26 (alleging violations of Article 14 of the Convention, Article 3 of Protocol No. 1 to the Convention, and Article 1 of Protocol No. 12).

404. *See id.* ¶¶ 38–51 (discussion of provisions pertaining to the House of Peoples), ¶¶ 52–56 (discussion of provisions pertaining to the Presidency).

405. *See generally id.* Whether the norm against discrimination has *jus cogens* status is a point of some contention. The Inter-American Court of Human Rights concluded in its advisory opinion on the Juridical Condition and Rights of Undocumented Migrants "that the

in tandem with and annexed to a treaty (the Dayton Peace Agreement),<sup>406</sup> the court was obliged, however, to grapple with the role of judicial institutions in enforcing mandatory rules of international law.

With respect to that role, the Court charted a middle course for itself. On the one hand, it did not back away from identifying what it determined to be violations of fundamental human rights norms, declaring that the constitutional provisions at issue violated the European Convention's prohibition of discrimination.<sup>407</sup> On the other hand, the Court acknowledged that its decision required the parties to revisit elements of what had been a delicately balanced political compromise,<sup>408</sup> hinting that it might have been more reluctant to intervene were it not for the political progress that, in its view, had been made in Bosnia since the Dayton Peace Agreement.<sup>409</sup> The decision nevertheless elicited a withering dissent from Judge Bonello, who questioned the propriety of "undoing an international treaty . . . engineered by States and international bodies, some of which are neither signatories of the Convention nor defendants before the Court in this case."<sup>410</sup> In his view, "a judicial institution so remote from the focus of dissention" was ill suited to decide when it was safe to unsettle the political compromises that had produced the fragile peace in Bosnia.<sup>411</sup> As discussed in Part IV of this Article, concerns of this kind—about state consent to jurisdiction and judicial competence—are significant barriers to the judicial invalidation of treaties. *Sejdić* indicates, however, that human rights tribunals will not always treat such concerns as controlling.

Indeed, all three cases described above suggest that the development of mandatory rules of international law may progress more rapidly within the jurisprudence of regional human rights tribunals than it has at the ICJ. Reference to regional instruments, like the Inter-American and European Conventions, and to region-specific norms may help to assuage concerns about whether states have consented to the content of *jus cogens*. Human rights cases, moreover, implicate in fundamental ways problems that mandatory rules have been fashioned to address—the need to ensure that agreements do not infringe on the protected rights of third parties (as was

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principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*." Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 101 (Sept. 17, 2003). However, the sweeping character of the Court's holding has been controversial. See Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101, 118–22 (2008).

406. See General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Dec. 14, 1995, 35 I.L.M. 75.

407. *Sejdić*, App. Nos. 27996/06, 34836/06, ¶¶ 50, 56.

408. See *id.* ¶ 45.

409. See *id.* ¶ 47.

410. *Id.* at 54 (dissenting opinion of Judge Bonello) (emphasis removed).

411. *Id.* at 55.

the concern in *Sejdić*) and the need to preserve the sanctity and integrity of the legal system (as was the concern in the *Aloeboetoe Case*).

### C. Practice of International Political Institutions

As an alternative to judicial resolution, claims of treaty invalidity have been pursued on a few occasions in political institutions. Prior to the Vienna Convention's adoption, Cyprus challenged the validity of the Treaty of Guarantee<sup>412</sup> it had concluded in 1960 with Greece, Turkey, and the United Kingdom.<sup>413</sup> During meetings of the U.N. Security Council in 1963 and the General Assembly in 1965, which were seized of the situation in Cyprus on account of the outbreak of intercommunal violence on the island, Cyprus alleged both that the treaty had been coerced and that it conflicted with *jus cogens*.<sup>414</sup> In particular, its representatives argued, first, that the treaty contained "onerous provisions" that were "imposed on the majority of the people of Cyprus making the doctrine of unequal, inequitable and unjust treaties relevant,"<sup>415</sup> and, second, that if the treaty's authorization of intervention by the three "guarantor Powers"—Greece, Turkey, and the United Kingdom—was understood to permit armed intervention, that the treaty conflicted with the *jus cogens* norm prohibiting the threat or use of force.<sup>416</sup>

The U.N. response to these claims was underwhelming. The Security Council took no position on the validity of the treaty, though it did "[c]onsider[] the positions taken by the parties" in relation to the treaty and stated that it "ha[d] in mind the relevant provisions of the Charter of the United Nations and, in particular, its Article 2, paragraph 4," which it proceeded (with questionable effect) to restate in the preamble of its resolution.<sup>417</sup> The General Assembly went slightly further, affirming Cyprus's right to "enjoy full sovereignty and complete independence without any foreign intervention or interference" and calling on all states "to refrain from any intervention directed against it."<sup>418</sup> The Assembly also abstained, however, from pronouncing on the validity of the treaty.

The Security Council and General Assembly's responses to Cyprus's claims foreshadowed the challenges that would face the operation of manda-

412. Treaty of Guarantee, U.K.-Greece-Turk.-Cyprus, Aug. 16, 1960, 382 U.N.T.S. 3 (1960).

413. For a description of the circumstances that gave rise to the treaty and the subsequent challenge to its validity, see David Wippman, *International Law and Ethnic Conflict on Cyprus*, 31 TEX. J. INT'L L. 141, 144-48 (1996).

414. See Schwelb, *supra* note 173, at 952-53; Wippman, *supra* note 413, at 149-50.

415. U.N. SCOR, 19th Sess., 1098th mtg., ¶ 109, U.N. Doc. S/PV.1098 (Feb. 27, 1964) (statement of Cyprus Rep. Mr. Kyprianou).

416. Schwelb, *supra* note 173, at 952.

417. S.C. Res. 186, pmb., U.N. Doc. S/5575 (Mar. 4, 1964). The Council also recommended the establishment of a peacekeeping force in Cyprus and the appointment of a mediator to facilitate the peaceful resolution of the conflict. *Id.*

418. G.A. Res. 2077 (XX), ¶¶ 1-2, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014, at 9 (Dec. 18, 1965).

tory rules of international law following the Vienna Convention's adoption. Like Iceland's claims in the *Fisheries Jurisdiction* case, Cyprus's arguments about the unfairness of the treaty "fell largely on deaf ears" during U.N. debates.<sup>419</sup> As one commentator observes, the Treaty of Guarantee and related instruments "were unequal, both in their terms and in the bargaining power of the signatories, but that inequality was considered legally and politically unimportant."<sup>420</sup> Cyprus could not point to a threat or use of physical force that had compelled its signature to the treaty, and no consensus had emerged then—or has emerged since—in favor of using the rule against coercion to address broader distributive concerns. The United Nations' response also reflects the difficulties presented by the indeterminacy of the norms at issue: during Security Council deliberations, governments disagreed about the extent to which the Treaty of Guarantee violated the U.N. Charter's prohibition of the use of force,<sup>421</sup> and they proved to be unwilling—and perhaps also unable—to unsettle the treaty in the face of such differences.

A claim of treaty invalidity also came before the U.N. General Assembly in relation to the 1978 Egypt-Israel Camp David Accords, which set out, inter alia, a framework for limited self-government arrangements for the Palestinians in the West Bank and Gaza Strip and a process for negotiating the "final status" of those territories.<sup>422</sup> In 1979, the General Assembly adopted a resolution expressing concern that the Accords had been "concluded . . . without the participation of the Palestine Liberation Organization, the representative of the Palestinian people," and rejecting provisions of the Accords that "ignore, infringe, violate, or deny the inalienable rights of the Palestinian people, including the right of return, the right of self-determination, and the right to national independence and sovereignty in Palestine, in accordance with the Charter."<sup>423</sup> The resolution concluded by declaring that "the Camp David accords and other agreements have no validity in so far as they purport to determine the future of the Palestinian

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419. Wippman, *supra* note 413, at 150.

420. *Id.*

421. For example, whereas the Representative of Greece firmly answered "no" to the question whether "the independence, territorial integrity, security, sovereignty and unity of a State [can] be subject to a treaty which may be interpreted as granting a right of unilateral military intervention without any other condition," U.N. SCOR, 19th Sess., 1097th mtg., ¶¶ 168–169, U.N. Doc. S/PV.1097 (Feb. 26, 1964), the Representative of the United Kingdom argued that "[t]he legal effect of the provisions . . . of the Treaty of Guarantee . . . will depend on the facts and circumstances of the situation in which they are invoked, and there is nothing in Article IV to suggest that action taken under it would necessarily be contrary to the United Nations Charter," U.N. SCOR, 19th Sess., 1098th mtg., ¶ 68, U.N. Doc. S/PV.1098 (Feb. 27, 1964).

422. See A Framework for Peace in the Middle East Agreed at Camp David, Egypt-Isr., Sept. 17, 1978, 17 I.L.M. 1466, reprinted in 1 DOCUMENTS ON THE ARAB-ISRAELI CONFLICT: THE PALESTINIANS AND THE ISRAELI-PALESTINIAN PEACE PROCESS 865–69 (M. Cherif Bassiouni ed., 2005).

423. G.A. Res. 34/65B, ¶¶ 1–2, U.N. Doc. A/Res/34/65B (Dec. 12, 1979).



people and of the Palestinian territories occupied by Israel since 1967.”<sup>424</sup> Thus, while the Assembly did not explicitly invoke *jus cogens*, it did link the validity of the Accords to their compatibility with the Palestinians’ “inalienable rights.” It also suggested that these rights could not be bargained away by a government lacking the authority to represent the Palestinians.

The effect of the General Assembly’s resolution on the validity of the Accords is difficult, however, to ascertain. Although the resolution was strongly worded, it won the support of fewer than half of the Assembly’s members.<sup>425</sup> And while ultimately the Accords’ provisions on Palestinian self-government were never implemented, it is unclear to what extent the Assembly’s declaration was decisive: in view of the fact that the Accords were rejected by all of the other Arab states, as well as the Palestinians,<sup>426</sup> the implementation of their provisions pertaining to the West Bank and Gaza Strip would have faced significant obstacles even if the General Assembly had not addressed the question. To be sure, the resolution may well have bolstered the perceived legitimacy of the Palestinian and Arab rejection of the Accords. It is difficult, however, to cite the episode as evidence of the mandatory force of the substantive norms that the Assembly invoked. Indeed, notwithstanding the many similarities between the arrangements proposed in the Accords and those subsequently provided for in the Oslo Accords in 1993, the latter received the General Assembly’s enthusiastic endorsement.<sup>427</sup> Accordingly, it seems likely that what animated General Assembly action in 1979 was the exclusion of the Palestinians from the negotiations that produced the Camp David Accords, rather than a substantive conflict between the Accords and *jus cogens* norms.

#### IV. TOWARD A MODERATED CONTRACTUALISM IN INTERNATIONAL LIFE

The foregoing analysis suggests that notwithstanding the strong language employed in Articles 52 and 53 of the Vienna Convention—the unequivocal assertion that treaties procured through coercion or in conflict with *jus cogens* are void—little seems mandatory about the rules announced there. Although the rules are premised on the recognition that in some circumstances parties should not have the last word regarding the validity of their agreements, the possibility that a judicial tribunal would override the express preferences of parties to a treaty seems—and has proved so far to be—very remote. In this final Part of the Article, I examine the factors that

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424. *Id.* ¶ 4.

425. The voting records of the resolution may be found at *United Nations Bibliographic Information System*, UNITED NATIONS, <http://unbisnet.un.org> (follow the Voting Records “New Browse List Search,” then search by UN Resolution Symbol “A/Res/34/65B”) (last visited Oct. 28, 2012).

426. KENNETH W. STEIN, *HEROIC DIPLOMACY: SADAT, KISSINGER, CARTER, BEGIN, AND THE QUEST FOR ARAB-ISRAELI PEACE* 258–259 (1999).

427. See G.A. Res. 48/158D, U.N. Doc. A/Res/48/158D (Dec. 20, 1993).

have constrained the operation of mandatory rules at the international level and consider what may be done to enhance their capacity to serve the functions envisaged for them.

### A. *The Structural Contractualism of the International System*

Why have legal challenges to the validity of treaties under Articles 52 and 53 of the Vienna Convention proved so rare? As described below, procedural barriers, norm indeterminacy, and paternalism concerns pose virtually insurmountable obstacles to judicial invalidation of treaties.

#### I. Barriers to Enforcement

At the domestic level, the enforcement of mandatory rules is far from automatic. Courts, after all, “cannot void contracts that do not come before them,”<sup>428</sup> and a range of factors may keep parties away from the judicial system, including litigation costs, procedural hurdles (such as heightened pleading requirements), and the availability of alternative means of recourse. Indeed, with respect to the latter, the fact that mandatory rules often implicate criminal or moral norms, and involve some complicity on the part of both parties to an agreement, means that the chances that the parties will avoid the legal system altogether are substantial.<sup>429</sup> What the parties cannot do, however, is “oust courts or official decision-makers of their jurisdiction” by private agreement.<sup>430</sup>

At the international level, the barriers listed above are even more formidable. Among the factors that prompted many developing countries at the Vienna Conference to oppose the establishment of the ICJ’s compulsory jurisdiction over treaty-invalidity claims were the costliness and slow pace of litigation in that forum.<sup>431</sup> These barriers to access are exacerbated by the procedural mechanism defined in the Vienna Convention, which both establishes a presumption against treaty invalidity and, as confirmed by the ICJ in the *Armed Activities* case, depends for its operation on the consent of the states involved.<sup>432</sup> As Gordon Christenson points out, moreover, “the international community relies upon internal mechanisms and reciprocal sanctions rather than central enforcement of treaties or customary international law,”<sup>433</sup> rendering recourse to judicial settlement unlikely even in the absence of the procedural hurdles described above<sup>434</sup> and particularly in

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428. See Note, *supra* note 108, at 1447–48.

429. Cf. *id.* (suggesting an analogue that externalities will deter parties from contracting).

430. Christenson, *supra* note 353, at 598.

431. See SINCLAIR, *supra* note 16, at 228.

432. See *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, 2006 I.C.J. 6, ¶ 64 (Feb. 3).

433. Christenson, *supra* note 353, at 600.

434. See Weisburd, *supra* note 25, at 25–26.

view of the limited participation of states in the Vienna Convention's judicial-settlement regime.<sup>435</sup>

The transposition of the concept of mandatory rules from a system in which the judiciary plays a central role in the enforcement of contracts to one in which its role remains largely peripheral affects the rules' capacity to serve the functions envisaged for them. As Thomas Main observes,

Because substantive law is calibrated to achieve some outcome, fidelity to that law may require that it remain hinged to the corresponding procedural law that was presumed its adjunct. . . . If this substantive law were enforced without these presumed procedures, there could be a mismatch between the desired and achieved levels of deterrence.<sup>436</sup>

In this instance, the mismatch is marked. As described in Part I, Lauterpacht and his successors as Special Rapporteur urged recognition of mandatory rules of international law in an effort, in part, to deter the illegal use of force and other international crimes, including crimes by governments against their own citizens. To achieve this end, Lauterpacht argued for compulsory jurisdiction and third-party standing where coercion or conflict with *jus cogens* was alleged. In contrast, the framework of "consensual invalidation"<sup>437</sup> ultimately adopted at the Vienna Conference, along with the ICJ's reluctance to permit third-party standing, significantly diminishes the chances of bringing a successful invalidity claim, at the same time diminishing the deterrent capacity of the substantive rules at issue.

This procedural framework places particularly heavy constraints on the capacity of mandatory rules to deter or correct situations in which governments bargain away the ostensibly inalienable rights of those they claim to represent—the kind of agency problem highlighted by Verdross and subsequent commentators.<sup>438</sup> As Michael Byers suggests,

Illegal treaties . . . would never be struck down as being inconsistent with *jus cogens* rules unless those rules also gave standing to other States. States which enter into illegal treaties or otherwise attempt to create illegal exceptions to general rules are normally not interested in challenging the validity of those exceptions.<sup>439</sup>

Of course, it is conceivable that a new government would be inclined to correct the sins of its predecessor by seeking a declaration of the invalidity of a treaty to which it is party, but that eventuality seems too remote to operate as much of a deterrent at the time a treaty is made. While third-party stand-

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435. See *supra* notes 337–339 and accompanying text.

436. Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 802 (2010).

437. ROZAKIS, *supra* note 24, at 110.

438. See *supra* text accompanying notes 189–190.

439. Byers, *supra* note 113, at 236–37.

ing to challenge the validity of contracts is limited in the domestic context, too, contractual invalidity operates as a complement to the deterrent force of penal and regulatory regimes in that setting. The relative weakness of those regimes at the international level means that there are few alternative avenues for addressing the kinds of agency problems in the treaty process that the doctrine of *jus cogens* was conceived, in part, to correct.

The Vienna Convention's procedural framework also limits the capacity of mandatory rules to serve a constitutional function. Because treaties play a role in the formation of international custom, they can contribute to altering the content of international law, even as applied to actors who are not parties to the treaty.<sup>440</sup> Accordingly, if a treaty that conflicts with a *jus cogens* norm is not pronounced invalid, the content or status of the norm in question may be affected over time. For example, if successive treaties provide for the cession of territory conquered during war to the victorious state, and those treaties are never invalidated, the rule against conquest could be altered or could cease to be regarded as having *jus cogens* status. While judicial invalidation of treaties conflicting with *jus cogens* could stem this kind of normative erosion, the obstacles to ICJ jurisdiction over disputes regarding treaty validity under Articles 52 and 53, combined with the fact that international law tends to be enforced by states, not a centralized authority, make it very unlikely that a court would even have the opportunity to weigh in on the validity of a treaty absent the consent of the parties to it, much less that it could strike down "unconstitutional" treaties.

But what are the implications of this analysis? Does the solution lie in a move away from the strictly consensual jurisdictional framework defined in the Vienna Convention and the ICJ Statute, assuming such a move could win the support of states? Would the implementation of Lauterpacht's original vision—the transposition not only of mandatory rules, but also of compulsory jurisdiction—enable mandatory rules of international law to serve the functions envisaged for them? Were the procedural barriers to enforcement of mandatory rules the only obstacles to their effective operation at the international level, a procedural solution might suffice. As discussed below, however, their operation is also constrained by the problem of indeterminacy—a problem that, on the one hand, is exacerbated by the unavailability of enforcement mechanisms and, on the other, makes international judicial institutions more reluctant to unsettle the express preferences of the parties to an agreement.

## 2. Indeterminacy

A rule's "determinacy"—the extent to which it "convey[s] a clear message" such that "one can see through the language of a law to its essential

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440. See Timothy Meyer, *Codifying Custom*, 160 U. PA. L. REV. 995, 1022–23 (2012) (describing how treaty making influences development of customary law).

meaning<sup>441</sup>—enables “states or persons to whose conduct the rule is directed [to] know more precisely what is expected of them, which is a necessary first step toward compliance.”<sup>442</sup> Conversely, a rule’s indeterminacy makes it difficult for parties to predict how a court would decide a legal dispute and, accordingly, to weigh the costs and benefits of a particular negotiated outcome against alternatives.<sup>443</sup> For that reason, indeterminacy also weakens a rule’s value as a deterrent: the more difficult it is to assess in advance whether an agreement will be found invalid, the less effective the potential sanction of invalidity is likely to be as a means of deterring agreements to perform the conduct at issue.

With respect to mandatory rules, indeterminacy may operate at several levels. First, the *status* of a norm as mandatory, semimandatory, or default may be indeterminate. A variety of factors may cloud that question, including the nature and importance of the interests, values, and rights the norm implicates; how longstanding (or how dated) recognition of the norm as mandatory is; on whose authority the norm was recognized to be mandatory; and the means through which that recognition occurred. In the domestic context, as noted in Part I, courts and jurists seized on a range of distinctions—public versus private, source versus substance, judge-made rules versus legislation—in an effort to find a constant, rational formula for distinguishing between mandatory and default rules. And those distinctions, with some variations, have also guided (and confounded) thinking at the international level. Difficult questions abound: Which rules implicate the interests of the community of nations “as a whole” and which only the parties to an agreement? How much weight should be assigned to resolutions of the U.N. Security Council and General Assembly or judgments of the ICJ in determining the mandatory character of a rule? How much weight should be assigned to norms expressed in treaty regimes that have commanded less than the universal participation of states? May a norm be considered mandatory even if its recognition as such is of recent vintage?

Second, indeterminacy may infect the *content* of a norm. The breadth and elasticity of concepts like the restraint of trade or the protection of marriage at the domestic level, and self-determination and even genocide (as we have seen in Darfur and Cambodia) at the international level, point to the difficulty in distinguishing between conduct that falls within the scope of *jus cogens* and that falling outside it. The degree of indeterminacy grows as one moves away from the criminal prohibitions at the core of coercion and *jus cogens* and toward norms implicating more elastic conceptions of fairness and morality. Indeterminacy about norm content may present itself, however, even with respect to rules dealing with recognized crimes: should only

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441. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 30 (1995).

442. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 52 (1990).

443. See Mnookin & Kornhauser, *supra* note 10, at 969.

agreements to commit crimes be considered void, or should we also void agreements that facilitate the commission of crimes?

Third, indeterminacy may complicate the *application* of the norm to a particular set of facts. Just as it has proved difficult at the domestic level to assess whether the invalidation of a given contract would inhibit or further a recognized public policy (whether, for instance, an interest rate is usurious if the risk of lending is commensurately high), it may be challenging to determine, on the facts, whether a given international agreement was coerced or runs afoul of *jus cogens* in view of the existence of other factors. Commentators have raised questions, for instance, about the validity of agreements concluded during armed interventions (like the October 1998 agreements between the Federal Republic of Yugoslavia and the Organization for Security and Co-operation in Europe)<sup>444</sup> and during military occupation (like the Oslo Accords),<sup>445</sup> agreements ratifying the acquisition of territory by force (like the Dayton Accords),<sup>446</sup> agreements establishing amnesties for war criminals (like the Lomé Accords),<sup>447</sup> and agreements waiving individual rights to bring claims for violations of peremptory norms (like the 1951 U.S.-Japanese peace treaty).<sup>448</sup>

Of course, indeterminacy is neither unique to international law nor necessarily problematic. Dealing with it, after all, is the stock and trade of lawyers. It also allows courts to consider equitable factors that militate for or against application of a particular substantive rule or remedy. As Thomas Franck submits, “the legitimacy costs of introducing less determinate elements of distributive justice into the text of a rule . . . are more than balanced by the gains achieved when that law’s standard opens a more generous fairness discourse.”<sup>449</sup> Indeed, that broader equitable inquiry has long been the “stone in the edifice” of public policy doctrine.<sup>450</sup>

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444. See Tarcisio Gazzini, *NATO Coercive Military Activities in the Yugoslav Crisis (1992–1999)*, 12 EUR. J. INT’L L. 391, 430 (2001).

445. See John Quigley, *The Israel PLO Agreements Versus the Geneva Civilians Convention*, 7 PALESTINE Y.B. INT’L L. 45, 58 (1994).

446. Francis A. Boyle, *Negating Human Rights in Peace Negotiations*, 18 HUM. RTS. Q. 515, 515–16 (1996) (pointing out that the Dayton Peace Accords sanctioned forcible acquisition of territory by Serbia and Montenegro); Weisburd, *supra* note 25, at 42–43.

447. See Colm Campbell, *Peace and the Laws of War: The Role of International Humanitarian Law in the Post-Conflict Environment*, 82 INT’L REV. RED CROSS 627, 632 (2000) (suggesting that a peace agreement granting formal amnesty to perpetrators of grave breaches of humanitarian law would be unlawful); Jeremy I. Levitt, *Illegal Peace?: An Inquiry into the Legality of Power-Sharing with Warlords and Rebels in Africa*, 27 MICH. J. INT’L L. 495, 562 (2006) (arguing that the Accra and Lomé agreements are in conflict with “non-derogable” rights including self-determination).

448. See Carolyn A. Eilers, *Article 14(b) of the 1951 Treaty of Peace with Japan: Interpretation and Effect on POWs’ Claims Against Japanese Corporations*, 11 TRANSNAT’L L. & CONTEMP. PROBS. 469, 484 (2001).

449. FRANCK, *supra* note 441, at 33.

450. Winfield, *supra* note 54, at 95.

In the international setting, however, two additional factors—the decentralization of lawmaking and enforcement and limitations on the judicial role in both—make indeterminacy an especially formidable challenge to the deterrent and constitutional functions of mandatory rules. At the domestic level, as noted above, indeterminacy may attend the designation of a rule as mandatory, but it is greatly multiplied at the international level, where there exists no authoritative institution or process for the designation of such norms.<sup>451</sup> Indeed, the difficulties of using multilateral treaties to achieve those aims are exemplified by the controversy surrounding the enumeration of examples of *jus cogens* norms within the ILC and at the Vienna Conference.<sup>452</sup> In the domestic context, moreover, “enforcement serves not only as a deterrent, but also as a means to clarify the law.”<sup>453</sup> As Ehud Kamar explains,

Enforcement is the engine for generating case law. As decided cases accumulate, . . . standards become clearer. Every court decision applies the standards to a specific factual scenario and sheds additional light on their meaning. This does not mean that indeterminacy ever disappears. . . . [But] [w]hile it is futile to hope for the elimination of legal uncertainty in a standard-based regime, a steady flow of lawsuits is rather necessary to keep certainty from decreasing.<sup>454</sup>

In contrast, because courts play such a limited role in the resolution of international disputes, the case law critical “to keep certainty from decreasing”—and, thereby, to maintain the deterrent capacity of mandatory rules—is lacking. This analysis is not meant to imply that mandatory rules are so indeterminate that they lack content entirely. While it is difficult to imagine the circumstances that would prompt a state to defend before an international tribunal the validity of an agreement to, for instance, carry out the slaughter of an ethnic group or launch an unprovoked attack against a third state, it seems safe to assume that a tribunal with jurisdiction to decide the question would find the agreement void. The heavily contingent—even fantastical—quality of that scenario, however, merely highlights the barriers to the operation of mandatory rules at the international level: governments are unlikely to commit such agreements to writing or to expose them to public scrutiny, and they are unlikely to afford an international tribunal the opportunity to pronounce on their validity. Indeed, the kinds of claims that are least susceptible to indeterminacy, and most likely to succeed, are probably also the ones that are least likely to be brought before a tribunal. As discussed in the next Section, moreover, the “hard cases”—where a court is

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451. Weisburd, *supra* note 25, at 25–26.

452. See *supra* text accompanying notes 256–268.

453. Ehud Kamar, *Shareholder Litigation Under Indeterminate Corporate Law*, 66 U. CHI. L. REV. 887, 897 (1999).

454. *Id.*

called on to assess the implications of indeterminate norms or to apply them to complex facts—are the kinds that international courts and tribunals are likely to feel least competent to resolve.

### 3. Paternalism Concerns

As discussed in Part I, mandatory rules of domestic law often exercise paternalistic and distributive functions—protecting parties from their own incapacity or from being overborne as a result of severe bargaining disparities, and prohibiting enforcement of agreements on terms deemed unfair. In the debates leading up to and during the Vienna Conference, the governments of many developing countries and Eastern-bloc states urged that international law be adapted to serve similar functions. But despite the heated controversies about whether economic and political pressure constituted coercion and whether self-determination and permanent sovereignty over natural resources were *jus cogens* norms that would operate to invalidate “unequal” treaties,<sup>455</sup> that view failed to win sufficiently broad support to effect at the international level the kinds of transformations that had been wrought in the domestic law of many jurisdictions a few decades earlier. Not only did the Vienna Conference fail to incorporate that broader vision of voluntariness and fairness into the terms of Articles 52 and 53, the procedural mechanisms defined in Articles 65 and 66 limited the possibility that the norms would develop in that direction through practice.

The result of these debates points to more than the ideological balance of power at the Vienna Conference. It also highlights structural factors that make it difficult for the law of treaties, over time, to assume distributive or paternalistic functions in even the modest ways that the U.S. law of contracts has during the last century. The transformation of international law through either treaty or custom requires more than the support of a majority of states, as developing countries found when the New International Economic Order they urged in the 1970s failed to effect a transformation in the customary law of investment.<sup>456</sup> The capacity of the ICJ to act as an agent of legal change, moreover, is constrained not only by the consensual nature of its jurisdiction and the limited role governments have allowed it in the resolution of their disputes, but also by the sovereign and plural character of the litigants before it.

Indeed, while the moral and practical perils of paternalism are not insubstantial in the domestic context, they assume even greater proportions at the international level. The plural character of states makes it particularly difficult for an international tribunal to assess whether an expression of consent was genuine or whether an exchange provided for in a treaty, on balance, was fair; and the complexity and duration of most international

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455. *Summary Records of the 684th Meeting*, *supra* note 240, ¶ 28.

456. See José E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT’L L. & POL. 17, 39–40 (2009) (arguing that the New International Economic Order failed to alter the customary law of investment).



agreements would likely make many judges hesitate to override the judgment of governments about which agreements are good for them or their constituents, particularly if the norms at issue are indeterminate. As Martti Koskenniemi and Päivi Leino observe,

The universalist voices of humanitarianism, human rights, trade or the environment should undoubtedly be heard. But they may also echo imperial concerns, and never more so than when they are spoken from high positions in institutions that administer flexible standards that leave the final decision always to those speakers themselves. At that point, the protective veil of sovereign equality, and the consensual formalism of the ICJ will appear in a new light: as a politics of tolerance and pluralism, not only compatible with institutional fragmentation, but its best justification.<sup>457</sup>

Although Koskenniemi and Leino are not arguing for unrestrained contractualism, their observation does cast in a more favorable light the structural limitations of a centralized judicial role in regulating the substantive fairness of international agreements. While unfair agreements can have important implications for public order—the world is still suffering the consequences of Versailles<sup>458</sup>—distributive concerns are better addressed through blunt and vigorous discourse in political forums than through litigation in court.

### B. *Whither Mandatory Rules of International Law?*

Thus, the capacity of mandatory rules to function at the international level through the framework defined in the Vienna Convention is limited. Their deterrent and constitutional functions are constrained both by the substantial procedural hurdles that must be overcome before a treaty may be invalidated and by the indeterminacy of *jus cogens* norms—questions about which norms have that status, the content of those norms, and their implications when applied to complex factual situations. Their equitable function is constrained by states' infrequent recourse to judicial tribunals for the resolution of treaty disputes and by the tribunals' own reluctance to override the preferences of states expressed in treaties, particularly in politically sensitive circumstances. Their capacity to address agency problems is limited by the lack of third-party standing to bring coercion and *jus cogens* claims. And their capacity to serve paternalistic or distributive functions is diminished by the lack of international consensus about what constitutes substantive fair-

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457. Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 578–79 (2002).

458. The punitive and one-sided terms imposed in the Versailles Treaty are often characterized as a root cause of World War II and the convulsions that proceeded from it. See Catherine Lu, *Justice and Moral Regeneration: Lessons from the Treaty of Versailles*, 4 INT'L STUD. REV. 3, 4–5 (2002) (describing varying perspectives on the legacy of the Versailles Treaty).

ness in agreements between states and by both the plural character of states and the complexity of their agreements.

But does international law need mandatory rules? Or is their presence in the law of treaties a matter of form rather than substance—a question simply of *elegantia juris*?

In this final Section, I offer preliminary answers to these questions, though empirical research—and the passage of time—will be needed to test them. I acknowledge that contractualism has an important place in international life, but I argue that it is useful for international law to recognize constraints on contractual freedom even though they are unlikely to be enforced through judicial invalidation of treaties. The formal recognition that such constraints exist—along with discourse about their content—may perform at least a basic constitutional function, slowing if not wholly preventing the erosion of fundamental norms. Mandatory rules also have an important role to play in deterring wrongful acts in circumstances where governments are likely to seek legitimization of their conduct by the international community. I submit, however, that this deterrent function is better served through action by international political institutions and the governments of third states to promote adherence with mandatory rules while a treaty is being negotiated than through the threat of judicial invalidation after its conclusion. Indeed, ensuring the consistency of the proposed terms of a treaty with fundamental norms of international law is a matter in which third states have not only an interest, but also a responsibility.

### 1. A Rudimentary Constitutionalism

At this juncture, the development of a richly elaborated body of rules to guide and constrain the treaty practice of states—a robust international constitution of the kind champions of the Vienna Convention once anticipated—remains a distant prospect. Certain areas of international law, like human rights, international criminal law, and international trade and investment law, have developed considerably over the last few decades, to a great extent through the work of treaty bodies and international and domestic judicial tribunals. But even as these bodies of law have grown fuller and more nuanced, what has not developed is a body of case law that addresses the extent to which the finer points of treaties and other international agreements are substantively consistent with *jus cogens*. For the reasons described in Part II, the application of mandatory rules to complex political questions addressed in treaties is not something that international courts have often been called on to do or tend to feel comfortable doing. However, regional human rights tribunals may yet prove to be an exception on both fronts, particularly insofar as they are assessing the compatibility of treaties with highly developed regional norms.

It seems plausible, moreover, that the Vienna Convention's recognition that mandatory rules of international law exist—and the lively discourse that has since ensued about the content of those rules—help to prevent the

erosion of fundamental norms through state practice, even if they do not always succeed in deterring violations of those norms. To be sure, governments and other actors continue to violate even norms widely recognized to be *jus cogens*: the last two decades have seen the conquest of territory during war, genocidal attacks on a horrific scale, and the use of torture against detainees. Such conduct, however, is rarely if ever cited as evidence of a change in the law. Indeed, while debates have ensued about the contours of these rules, attempts to alter their basic content have elicited fierce and vocal opposition.<sup>459</sup> Although it is difficult to establish a causal link between the recognition of the peremptory status of these rules and the forcefulness of opposition to altering them, such recognition does at least provide a tool that can be used by those advocating fealty to the rules by their own governments and others.<sup>460</sup>

## 2. Enhancing Deterrence

Can mandatory rules be an effective means of deterring wrongful conduct? As discussed in Part I, the effectiveness of the “deterrent sanction” of mandatory rules turns in part on the likelihood that the parties to an agreement anticipate needing to turn to the legal system for enforcement. In most cases, one suspects, the parties to an international agreement in conflict with *jus cogens* will be unlikely to seek enforcement of their agreement in court—or even to make it public. A decision to adhere to an agreement to collaborate in the destruction of a particular ethnic group or to transfer a detainee to a secret location for torture, for example, would not be based on the expectation that the legal system would ensure enforcement of the agreement. To the extent that the decision is rational, it will be taken instead on the basis of strategic calculations—the likely costs and benefits of the act, the likelihood that it will be discovered, and the power and interests of the parties to the agreement. Accordingly, it is difficult to imagine the parties being deterred from their intended course of conduct by the prospect that such an agreement might later be deemed legally invalid. The presumed invalidity of such an agreement may enhance the moral and logical integrity of international law, rendering the law of treaties consistent with the substantive law prohibiting the underlying conduct, but it seems unlikely itself to affect the conduct of parties.

In circumstances where international actors are likely to seek external validation of the lawfulness of their agreements, however, mandatory rules

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459. For example, the infamous “torture memos” drafted by officials in the administration of President George W. Bush elicited a flood of opprobrium in academic and political circles after their release. For a general discussion of the legal controversy surrounding the issue and a reference to other pertinent scholarship, see generally Michael P. Scharf & Rory T. Hood, *The Elephant in the Room: Foreword: Torture and the War on Terror*, 37 CASE W. RES. J. INT’L L. 145 (2006).

460. See, e.g., Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EUR. J. INT’L L. 491, 498 (2008).

have a greater capacity to perform a deterrent function. For example, a government may undertake to consolidate territorial gains achieved through aggression by obtaining international endorsement of a treaty in which the territory is formally conceded. Such endorsement would allow the conquering state to transform possession of the territory into title to it, making the eventual reversal of its territorial gains more difficult and opening the doors to international agreements facilitating trade and investment in the area. In such circumstances, the expectation that the international community will refuse to recognize the validity of the treaty on the grounds that it violates mandatory rules of international law—in this case, aggression and coercion—could influence the cost-benefit analysis of the state contemplating war. Because external recognition of the validity of the treaty is necessary to realize the full benefits of conquest, the prospect that such recognition will be withheld may help to deter an aggressive war before it is undertaken.

Even in such circumstances, however, the deterrent force of mandatory rules of international law is unlikely to be very strong if such rules are enforced only through post hoc judicial invalidation of treaties. The barriers to access described in Part II of this Article make judicial invalidation too remote a possibility to serve as an effective deterrent. Moreover, a government is more apt to turn to third states and international political institutions like the U.N. General Assembly and Security Council for validation of a treaty “laundering” wrongful conduct than it is to international judicial institutions.

For that reason, the capacity of mandatory rules of international law to deter wrongful conduct will be strengthened if states send clear signals to one another, individually and collectively, that they will not accept the validity of agreements that they deem to have been coerced or in conflict with *jus cogens*. Such signals may be communicated in a variety of ways beyond ratification of the Vienna Convention itself, including condemnation of conduct violating *jus cogens* in terms that make clear that such conduct is considered illegal (rather than merely using diplomatic terms—like “unhelpful” or “regrettable”—that obscure the legal status of the conduct); international cooperation to bring such violations to an end; nonrecognition of the lawfulness of situations created by violations; and the articulation by the international community of parameters for peace treaties that spell out the lawful limits of the agreement. If clearly, consistently, and credibly communicated—an admittedly tall order—such signals would enhance the capacity of the mandatory rules recognized in the Vienna Convention to perform the deterrent function for which they were conceived.

It is in this context that the law of treaties intersects with the law of state responsibility, which obliges nonrecognition of situations resulting from serious breaches of *jus cogens*.<sup>461</sup> But whereas the former addresses the

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461. See Draft Articles on the Responsibility of States for Intentionally Wrongful Acts, in *Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. No. 10, at 1, 43, U.N. Doc. A/56/10, reprinted in [2001] 2 Y.B. Int'l L. Comm'n 26,

invalidity of a treaty that was coerced or whose terms conflict with *jus cogens*, the latter permits—and even requires—states to take action to address the underlying breaches of peremptory norms well before such a treaty is concluded.<sup>462</sup> Indeed, while the doctrine of nonrecognition has been applied primarily to situations other than the conclusion of a treaty, it offers an important alternative to the dead-end procedural mechanism, described in Part I, for challenging the validity of treaties under the Vienna Convention. The doctrine, after all, has its origins in U.S. Secretary of State Henry Stimson's declaration, during the Manchurian crisis of 1931–32, that the United States would not “admit the legality of any situation de facto nor . . . recognize any treaty or agreement entered into between those Governments, . . . which may impair the . . . sovereignty, the independence or the territorial . . . integrity of the Republic of China.”<sup>463</sup> Accordingly, applying the doctrine to the nonrecognition of treaties in conflict with *jus cogens* would by no means be unprecedented. Such nonrecognition, moreover, would have particular credibility—and legal force, notwithstanding Article 69 of the Vienna Convention—if it were effected pursuant to a decision of the U.N. Security Council, in accordance with its responsibility for the maintenance of international peace and security.<sup>464</sup>

Linking the law of treaties and the law of state responsibility in this fashion would engage a broader array of actors and institutions in the process of promoting adherence to mandatory rules of international law, potentially enhancing the rules' capacity to deter wrongful conduct. It would also drive home that adherence to the rules is a matter of “international community interest,”<sup>465</sup> rather than merely the concern of the parties to a treaty. That link between interest and responsibility is an important rejoinder to those advocating an unrestrained contractualism in treaty relations. Powerful political actors, like the members of the Security Council, may sometimes conclude that the international public order more urgently requires the termination of hostilities between warring parties than fidelity to the prohibition of acquisition of territory by force or the right of self-determination, but they should be reminded of the costs of such decisions. The deterrence of wrongful acts, after all, is not only in the interest of all members of the international community; it is also a goal that can only be achieved through consistent—and concerted—effort by them.

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¶ 76, art. 41(2), U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter 2001 Draft Articles].

462. See *id.* ¶ 76, art. 41.

463. See *id.* ¶ 77, art. 41, cmt. 6 (quoting Secretary of State Harry Stimson's note to the Chinese and Japanese Governments, reprinted in 1 HACKWORTH, DIGEST OF INTERNATIONAL LAW 334 (1940)) (emphasis added).

464. U.N. Charter art. 24.

465. 2001 Draft Articles, *supra* note 461, art. 41, cmt. 9.

## CONCLUSION

The regime established by the Vienna Convention on the Law of Treaties for the invalidation of agreements procured through coercion or in conflict with *jus cogens* represents a self-conscious transposition from domestic law—and a response to problems common to the domestic and international settings. However, the myriad obstacles to the invalidation of treaties, and the exceptionally limited state practice in this area since the Vienna Convention's adoption, suggest that mandatory rules of international law are unlikely to develop into a nuanced body of constitutional norms to guide treaty practice—or to deter wrongful conduct—if their enforcement is undertaken only through post hoc judicial invalidation of treaties. The rules' effectiveness will turn instead on the extent to which third states exercise their responsibility, collectively and individually, to respond to breaches of peremptory norms and attempts at coercion before and during the negotiation of treaties, rather than following their conclusion.

