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Jus Cogens: Guarding Interests Fundamental to International Society

GORDON A. CHRISTENSON*

The concept *jus cogens* beguiles us.¹ Often associated with a “public order of the international community,”² the basic concept seems

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1. The concept is embodied in part in the Vienna Convention on the Law of Treaties and restated in the Revised Restatement of Foreign Relations Law of the United States.

Article 53 of the Vienna Convention reads:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, U.N.T.S. Regis. No. 18,232, U.N. Doc. A/CONF.39/27 (1969), reprinted in 63 Am. J. Int'l L. 875 (1969) [hereinafter Vienna Convention]. Article 64 provides that a new peremptory norm will void an existing treaty in conflict with it. *Id.* at 895.

The concept has been extended to include rules of customary international law as well as agreements, as reflected in the Restatement. Restatement of Foreign Relations Law of the United States (Revised) § 331(2) (Tent. Draft No. 6, vol. 2, 1985) [hereinafter Revised Restatement]. Section 102, comment k, explains:

Some rules of international law are accepted and recognized by the international community of states as peremptory, permitting no derogation, and prevailing over and invalidating international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character.

Id. at § 102 comment k (Tent. Draft No. 6, vol. 1). A recent catalog of the extensive literature is found in Haimbaugh, *Jus Cogens: Root & Branch (An Inventory)*, 3 *Touro L. Rev.* 203 (1987) (descriptively reporting “the fecundity of *jus cogens* in legal literature and its near sterility in international jurisprudence and diplomacy”).

2. The phrase is attributed to Judge Mosler, who refers to a “public order of the international community” made up of principles and rules of “such vital importance to the international community as a whole that any unilateral action or any agreement which

simple enough in the literature: some principles of general international law are or ought to be so compelling that they might be recognized by the international community for the purpose of invalidating or forcing revision in ordinary norms of treaty or custom in conflict with them.³ For example, several States ought not be able to agree to enslave a minority people, to liquidate a race, to brutalize dissidents, or to use force against another State. A sovereign State acting unilaterally should also be legally disabled from taking actions that would have the same effect by modifying customary international law.

Despite its ambiguity, the concept has penetrated the consciousness of public international law discourse. Publicists and commentators love to speculate with its doctrine, rich in tautologies and contradictions.⁴ Propagandists find it flexible enough to use in support of their particular ideological points of view.⁵ Statesmen will occasionally

contravenes these principles can have no legal force", and without these foundational principles, community law cannot exist. H. Mosler, *The International Society as a Legal Community*, 140 *Recueil des cours* 2, 34 (1974). But the phrase also appears as a translation by Charles Rousseau of the term *contra bon mores*. See Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 *Am. J. Int'l L.* 55, 56 (1966) (Among the general principles of law is the principle forbidding contracts *contra bon mores*, because no judicial order can recognize the validity of contracts obviously in contradiction with the fundamental ethics of a society or community.).

3. M. Akehurst, *A Modern Introduction to International Law* 40-41 (5th ed. 1984); I. Brownlie, *Principles of Public International Law* 512-13 (3d ed. 1979); J. Dugard, *Recognition and the United Nations* 123-63 (1987); T. Elias, *The Modern Law of Treaties* 177 (1974); H. Kelsen, *Principles of International Law* 483 (R. Tucker rev. ed. 1966); M. McDougal, H. Lasswell & L. Chen, *Human Rights and World Public Order* 338-50 (1980); Lord McNair, *Law of Treaties* 213-15 (1961); T. Meron, *Human Rights Law-Making in the United Nations* 174, 184-200 (1986); C. Rozakis, *The Concept of Jus Cogens in the Law of Treaties* 19 (1976); I. Sinclair, *The Vienna Convention on the Law of Treaties* 203-41 (2d ed. 1984); J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal* (1974); Alexidze, *Legal Nature of Jus Cogens in Contemporary International Law*, 172 *Recueil des cours* 219, 227 (1982); Fitzmaurice, *The General Principles of International Law Considered From the Standpoint of the Rule of Law*, 92 *Recueil des cours* 1, 125-26 (1957); Gaja, *Jus Cogens Beyond the Vienna Convention*, 172 *Recueil des cours* 271, 279 (1982); Robledo, *Le Jus Cogens International: Sa Genese, Sa Nature, Ses Fonctions*, 172 *Recueil des cours* 9 (1982); Schachter, *International Law in Theory and Practice*, 178 *Recueil des cours* 9, 339 (1985); Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 *Am. J. Int'l L.* 946 (1967); Suy, *The Concept of Jus Cogens in Public International Law*, in 2 *The Concept of Jus Cogens in International Law*, 1967 Carnegie Endowment for International Peace 17; Tunkin, *International Law in the International System*, 147 *Recueil des cours* 1, 98 (1975); Tunkin, *Jus Cogens in Contemporary International Law*, 3 *U. Tol. L. Rev.* 107 (1971); Verdross, *supra* note 2, at 55; Whiteman, *Jus Cogens in International Law, With a Projected List*, 7 *Ga. J. Int'l & Comp. L.* 609 (1977).

4. See *infra* note 127.

5. See Sinclair, *supra* note 3, at 221-22 (discussing the use of *jus cogens* by Eastern European nations and the Soviet Union).

invoke it to express an especially intense outrage.⁶ Tribunals are very cautious in relying entirely upon it in particular cases. State practice cited in support of overriding norms of *jus cogens* seems suspect and fragmented.

Close to the heart of the concept lurks the embryonic notion of a world public order not exclusively controlled by nation-states, one that is foundational, guarding the most fundamental and highly-valued interests of international society.⁷ Without foundational ordering norms in a global, interdependent community, little hope would remain for even a rudimentary system of humane public order.⁸

6. See *infra* notes 79-81, 141 and accompanying text.

7. This legal concept of *jus cogens* as public order resembles the "fundamental law" debate in political and legal theory during the period of emergence of the centralized State in Europe, when the constitutional foundations separating the central institutions of power and public order were distinguished from the "ancient constitution" of custom and immemorial habit. Martyn P. Thompson has recently explored the loose and ambiguous nature of the term, "fundamental law," during that period and its paradoxical impact upon later constitutional theory. Thompson, *The History of Fundamental Law in Political Thought from the French Wars of Religion to the American Revolution*, 91 *Am. Hist. Rev.* 1103 (1986). Two metaphors infused the vocabulary of fundamental law thinking from Theodorus Beza to Hobbes, Grotius, and Pufendorf. The contract metaphor, that laws are pacts, gave legitimacy to popular or even absolute sovereignty. The building metaphor, that the State is an edifice built upon the foundation of fundamental ordering principles but for which the edifice would crumble, gave legitimacy to political and legal structures of centralized government. These metaphors gradually faded, as the central institutions of the nation-state became clearer and constitutional structures were consolidated, although they remained influential through the American Revolution. According to Thompson, the United States Constitution embodies fundamental law justifying judicial review of legislative action without need to resort to legitimacy from the twin metaphors or ancient constitutions. *Id.* at 1127-28. A paradox remains:

The originality of Montesquieu, Rousseau, and Hamilton consisted, in part, in their rejection of law-contract and foundation-edifice metaphors. Yet, it was precisely these two metaphors that were decisive in accounting for the first appearance of the term, its subsequent appeal, and the manner in which the language of fundamental law was theorized for more than a century and a half.

Id. at 1128.

The concept, "*jus cogens*," offers an equally paradoxical function in the period of change involving the nation-state system and some cosmopolitan or global system of public order. In place of "fundamental law" thinking, the attention shifts to a legal system of entirely distinctive norms guarding fundamental interests of international society, seeking also to escape the contract and edifice metaphors.

8. Eric Suy also uses a foundation metaphor to describe *jus cogens* norms, non-observance of which affects the "very essence of the legal system." Suy, *supra* note 3, at 18. This formal argument from necessity not only begs the question of what kind of public order we desire, but also conceals contradictions within principles from which conflicting logical conclusions might be drawn. As distinguished a scholar as Oscar Schachter, who does not deny the *jus cogens* concept, reveals four such antinomies in thinking about international human rights. Schachter, *supra* note 3, at 328-33; see Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *Yale L. J.* 203, 235-6 (1943) (citing Cardozo, *The Paradoxes of Legal Science* (1928)) (conflicts in doctrine can be understood as antinomies

Despite considerable theorizing otherwise, States almost exclusively constitute the present international order. This order maintains state independence and autonomy. The more fundamental and morally prior world common good differs from order among States.⁹ The present structure, to the extent it is thought of as an exclusive society of States, is under severe challenge, for such realism in many ways resists recognition of the cosmopolitan interests of a wider world society.¹⁰ While some of these interests might become overriding community policies thought fundamental,¹¹ they are still perceived as part of

with syntactic meaning only); see also Meron, *supra* note 3, at 199 (questioning the legal consequences of nullity, or no international responsibility, upon the internal effects of unilateral acts of states in derogation of peremptory norms of human rights, under Mosler's concept of public order as *jus cogens*).

9. Hedley Bull sees the beginning of the development of world order or order among mankind, which he characterizes as "something wider than order among states; something more fundamental and primordial than it; and also . . . something morally prior to it." H. Bull, *The Anarchical Society: A Study of Order in World Politics* 22 (1977). He remains skeptical about attempts to define what constitutes the world common good. While world order concerns the common ends or values of the universal society of all mankind, and not the common ends or values limited to the society of states, for Bull there exists no effective means for ascertaining the cosmopolitan *vox populi*. Only the uncoordinated pronouncements of States, or groups of States, or individuals in a private capacity or as representatives of non-governmental groups are ever heard. *Id.* at 84-86. But see McDougal and Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 *Am. J. Int'l L.* 1, 28 (1959) (A wider world public order is explicitly and systemically related to international law, yet includes diverse contexts and many participants other than States. The challenge to scholars is to "invent and recommend the authority structures and functions (principles and procedures) necessary to a world public order that harmonizes with the growing aspirations of the overwhelming numbers of the peoples of the globe and is in accord with the proclaimed values of human dignity enunciated by the moral leaders of mankind."). See also C. Murphy, *The Search for World Order* (1985) (containing a historical survey of the movement toward a political community inclusive of the moral and social bonds of all of its members, not just those of a nation-state system).

10. R. Falk, *The End of World Order* (1983). Responding to the realist criticisms of Bull, *inter alia*, Falk perceives the traditional study of international relations as being dominated by the realists and the neorealists. Realists, who include Hans Morgenthau, George Kennan, Raymond Aron, and Hedley Bull, are, Falk maintains, concerned with being scientifically objective. Their essential claim is "to give a faithful account of politics at the level of interstate relations that avoids wishful thinking", emphasizing "the absence of any shared sense of community or any regularly available and effective system of global governance." *Id.* at 3. Falk sees neorealists, such as Stanley Hoffmann, Robert Keohane, and Joseph Nye as somewhat more sophisticated than the realists, for they use interdependence as their central organizing concept, but only to supplement rather than displace the traditional realists' descriptive method. *Id.* at 6. Despite the genuine achievements of the realists and the neorealists, according to Falk their tradition is insufficient to deal with a changing world in which the challenges exceed the capabilities of the states system. *Id.* at 12-15.

11. In matters such as nuclear proliferation and ecological problems, "the realists turn away." *Id.* at 13. Falk calls for a postrealist orientation toward normative international relations. *Id.* at 15-23 and *passim*. He posits an approach to world order that combines analytic, empirical, ideological, and normative concerns to arrive at an arrangement of power

the basic legal order of the nation-state system.¹² At the same time, widespread demands and expectations of all peoples constantly press States to account to a wider society. Unilaterally or by collective cooperation and coercion, States ought not be free to make any rules they choose, however odious or arbitrary.

The emerging concept of *jus cogens* responds to this global "revolt of the masses." Conceptually, it invalidates ordinary state-made rules of international law in conflict with powerful norms expressing fundamental expectations vitally important to overriding community interests.¹³ These particular and powerful norms are "peremptory" when accepted as overriding by the international community as a whole. They then form part of the general category *jus cogens*: a symbol for unwritten constitutional guidance to the positive law-making power of sovereign nation-states reflecting those interests most basic to international society.

Paradoxically, this normative symbol is both hopeless chimera and hopeful myth. While it contains the possibility of intense demands from a global society, these demands may conflict with interests of governments. Of such conflict, Bull writes:

and authority that is "able to realize a set of human values that are affirmed as beneficial for all people and apply to the whole world" with some objectivity. *Id.* at 45-46. "The role of the state and other international actors is left open, as are the contours of a satisfactory future world order system." *Id.* at 46. The states system as it exists, however, is seen as not capable of dealing with the exigencies of current world conditions and in fact poses excessive risks of hastening collapse. *Id.* Falk's conception of world order is normative "to the extent that it advocates reliance on 'central guidance' mechanisms in response to the functional imperatives of interdependence and decentralization in response to ethical imperatives of humane patterns of governance." *Id.*

12. For similar but more optimistic concerns about human rights in a cosmopolitan order, see T. Honore, *Making Law Bind* 227-40 (1987) ("[W]hatever may have been the case in the past, today there is a human community and not merely an international society of sovereign states."); J. Stone, *Visions of World Order* 33-101 (1985) (preferring to limit human claims for justice to "justice constituencies" that differ from a world community).

In contrast, Bull distinguishes between a system of states, where states interact without any sense of common interests or values, and a society of states that "exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions." Bull, *supra* note 9, at 13. According to Bull, the present international order is comprised almost exclusively of states and works to sustain the elementary goals of the society of states. Primary among these goals is the preservation of the society of states itself and maintenance of the independence or external sovereignty of individual states. *Id.* at 16-18. He does not think it realistic to speculate about a truly global society.

13. McDougal describes the function of *jus cogens* as that "of *integrating*, in the sense of evaluating and policing even shared expectations for their compatibility with over-riding community policies. . . ." M. McDougal, *The Application of Constitutive Prescriptions: An Addendum to Justice Cardozo* 12 (1978) (emphasis in original).

[I]f it is chiefly through the views of states, and of states assembled in international organizations, that we have perforce to seek to discover the world common good, this is a distorting lens; universal ideologies that are espoused by states are notoriously subservient to their special interests, and agreements reached among states notoriously the product of bargaining and compromise rather than of any consideration of the interests of mankind as a whole.¹⁴

A number of doctrinal studies of *jus cogens* are available.¹⁵ Adopting a skeptical stance and a critical eye, this article looks behind the doctrine.¹⁶ While the concept *jus cogens* in international law surely conceals substantive emptiness, it also symbolizes a hope for a humane public order.¹⁷ Basically, *jus cogens* is a normative myth masking power arrangements that avoid substantive meaning until later decision, thereby both postponing and inviting political and ideological conflict. Concurrently, the idea carries a potential vision of integrating norms basic to a cosmopolitan world order where a modicum of humaneness and security might temper the prescriptions of States in response to convulsions of rapid change and violence.¹⁸

14. Bull, *supra* note 9, at 86.

15. Professor Meron has written: "The literature on *jus cogens* is rich." T. Meron, *Human Rights Law-Making in the United Nations* 190 (1986) (citing Sinclair, *supra* note 3, at 203-206); see especially Rozakis, *supra* note 3, Sinclair *supra* note 3, Sztucki, *supra* note 3, and the 1981 Hague lectures by Alexidze, Gaja, and Robledo, *supra* note 3; see also Haimbaugh, *supra* note 1 (cataloguing the literature).

16. Beneficial have been the three unpublished volumes of critical theory about international law written by Professor David Kennedy, part of which is critical of traditional "source" theory where he locates *jus cogens*. D. Kennedy, *International Legal Structures* (1984) (three unpublished volumes) (available in Harvard Law Library). Much of this work is now being published. See particularly, Kennedy, *The Sources of International Law*, 2 *Am. U.J. Int'l L. & Pol'y* 1 (1987); Kennedy, *Primitive Legal Scholarship*, 27 *Harv. Int'l L.J.* 1 (1986) (Recognition of opposition to modernity, disorder, and conflict helps explain the incongruity of the primitive scholarship's analysis of similar issues on international legal problems treated by later scholars). The present project does not purport to offer a coherent critical use of contradictions in doctrine and between doctrine and theory as proposed in Kennedy's critical stance. See generally Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 *New Eng. L. Rev.* 209 (1985-86); Boyle, *Ideals and Things: International Legal Scholarship and the Prison-house of Language*, 26 *Harv. Int'l L.J.* 327 (1985). The present inquiry is flexible enough to keep the problem of language and critical method open to future work in international law. Professor Franck's thoughtful review of Schachter's Hague lectures informs how to value a creative and constructive vision of international law even in the face of critical theory. Franck, *Book Review*, 81 *Am. J. Int'l L.* 763 (1987).

17. Onuf & Birney, *Peremptory Norms of International Law: Their Source, Function and Future*, 4 *Den. J. Int'l L. & Pol'y* 187 (1974) (Peremptory norms are simultaneously the decisive symbols of the international legal order and its constitutive propositions.).

18. Rozakis is more optimistic, posing the challenge of a world community "dynamically

The following sections attempt to analyze the concealed uses of the concept *jus cogens* and to offer an interpretation of its possibilities and dangers for a future world order. First, the inquiry is framed by introducing criteria for peremptory norms, the theme of dual formalism, and the problematic analogy to public order in municipal law. A review of the concept's contemporary development follows. The inquiry then explores ideological conflict and some questions of content, including two recent decisions against the United States. The final section revisits the myth of supernorms, including the problem of dissonance with ordinary norms, incommensurability of the dual normative systems, and a brief note on Cardinal Richelieu's reason of state and international public order.¹⁹

I. AN INQUIRY

After reviewing his earlier work on *jus cogens* in the law of treaties, Sir Ian Sinclair summed up the sentiments of many publicists: "The mystery of *jus cogens* remains a mystery."²⁰ The cogency of that mystery lies in Stanley Hoffmann's description of the Rousseauistic myth of the general will and the social contract for the French Revolution: "It gave a magic and mysterious recipe for how to create unity, uniformity, unanimity out of different fragments, how to assimilate ethics and politics."²¹ The danger of the myth involved the "involuntary intervention" of violence; the reign of terror followed upon an enlightened vision of the Rights of Man.²²

enlarged by the entrance into the scene of a quite important number of new States originating, by and large, from the decolonized areas of Africa and Asia." Rozakis, *supra* note 3, at ix (preface). To new states should be added the emergence of non-state participants including individuals and non-governmental organizations. These facts have profoundly changed the "sociopolitical roots of the community." *Id.* Rozakis believes that the concept *jus cogens* directly reflects the need new participants have to reformulate the rules of the old order to cope with the new realities. *Id.*

19. While doctrinal speculation abounds, theoretical and jurisprudential inquiry about *jus cogens* assumptions only begins.

20. Sinclair, *supra* note 3, at 224. He attributes to *jus cogens* the wondrous qualities of the "Cheshire Cat which had the disconcerting habit of vanishing and then reappearing to deliver further words of wisdom." *Id.*

21. Hoffmann, *A Note on the French Revolution and the Language of Violence*, 116 *Daedalus* 149, 154-55 (Spring 1987).

22. As Hoffmann explains, the lesson Lenin drew from this failure "is that terror has to be deliberate, has to be planned, and has to last as long as necessary." *Id.* at 155; see also Cover, *Violence and the Word*, 95 *Yale L.J.* 1601, 1629 (1986) (In the study of the intervention of violence in the legal system through words, "as long as legal interpretation is constitutive of violent behavior as well as meaning . . . there will always be a tragic limit to the common meaning that can be achieved.").

A. *Criteria for Peremptory Norms*

A norm is peremptory when it meets criteria designed to serve an overriding community purpose structurally differentiated from that served by ordinary rules of treaty and custom. Peremptory norms provide a modicum of normative order among the proliferating prescriptions of international law generated by the nation-state system. They also constitute a method guiding change in the norms affecting fundamental interests of international society.²³

The Federal Constitutional Tribunal of the Federal Republic of Germany in 1965 provided one of the first decisional expressions of criteria for peremptory norms:

The quality of such peremptory norms may be attributed only to such legal rules as are firmly rooted in the legal conviction of the community of nations and are indispensable to the existence of the law of nations as an international legal order, and the observance of which can be required by all members of the international community.²⁴

The three criteria, none substantive, demonstrate the difficulty in establishing a peremptory norm. In fact, following the analysis of Onuf and Birney, this process would have to be considered a new "source" of general international law.²⁵ These criteria also assume

23. The phrase, "essential for the protection of fundamental interests of the international community" is found throughout the literature, but in particular is used in Article 19 of the International Law Commission's draft articles on State Responsibility to establish a normative differentiation in rules of international law (ordinary norms and peremptory norms; delicts and crimes; acts illegal against specific states and acts illegal *erga omnes*). Report of the International Law Commission on the work of its thirty-second session (5 May—25 July 1980), U.N. Doc. A/35/10, reprinted in [1980] 2 Y.B. Int'l L. Comm'n 31, U.N. Doc. A/CN.4/SER.A/1980; State Responsibility, U.N. Doc. A/CN.4/291 and Add.1 and 2, reprinted in [1976] 2 Y.B. Int'l L. Comm'n 3-54, U.N. Doc. A/CN.4/SER.A/1976/ Add.1 (Part 1).

24. In the matter of petition for review of the constitutionality of three decisions of the Federal Supreme Tax Court by . . . , a corporation at Zurich (Switzerland), 18 Decisions of the Federal Supreme Constitutional Court 441, 448 (April 7, 1965), quoted in Riesenfeld, *Jus Dispositivum and Jus Cogens in International Law: In the Light of a Recent Decision of the German Supreme Constitutional Court*, 60 Am. J. Int'l L. 511, 513 (1966) (citation omitted).

25. Onuf & Birney, *supra* note 17, at 194-95 ("[E]ither new peremptory norms are generated or existing norms are made peremptory. In either case, that process is conveniently described as a 'source' of international law."); see also Akehurst, *The Hierarchy of the Sources of International Law*, 1974-75 Br. Y.B. Int'l L. 273, 281-85 (1977) (Reports of the International Law Commission and pronouncements of states at the Vienna Convention provide support for the establishment of *jus cogens* by treaty or custom. The consensus was that to qualify as *jus cogens*, a rule must be accepted by all states in the world and an overwhelming majority must regard it as *jus cogens*.); Kennedy, *The Sources of International Law*, *supra* note 16, at 17-19 (suggesting that some hierarchy needs to be established "in order to develop an internally coherent and sufficiently independent scheme of authority").

exclusivity of a community of States in creating a restrictive normative system. First, a claim must show a subjective or psychological element: the existence of widespread rules entrenched in the legal conscience of the international community of States, difficult to measure empirically and easily confused with *opinio juris* in determining ordinary rules of customary international law. Second, a claim must demonstrate the norm's indispensability to the existence of the system of public international law, a question-begging proposition whose meaning lacks self-evidence. The claim rests upon political or social foundation theory in that much depends upon whether a norm symbolizes the legal order of a system of States exclusively or a wider cosmopolitan normative structure. How can a system-bound norm, meant to protect the state system of legal order, limit that legal order without some broader normative criteria? Finally, a claim must show an objective obligation running to all States allowing any or all of them to demand observance of the norm. As will be later demonstrated, this third criterion, although in the form of legal obligation shown by traditional sources of international law, rests upon the power of a State or international body to prevent a third State's defection from a peremptory norm even if the decision-maker lacks immediate interest.²⁶

The evidence would also need to demonstrate requisite *opinio juris* that the obligation is peremptory, by showing acceptance of the norm's overriding quality rather than mere subjective moral belief in its preeminence.²⁷ The Tribunal's first two criteria are not easily demonstrated until after an effective decision invokes a peremptory norm to override the ordinary norm. This decision must receive approval or acquiescence by the international community of States as a whole. Demonstrating the third criterion is very difficult.

Considerable doubt over the grounding of these criteria, whether from metaphor or traditional theory, prompts skepticism about *jus cogens*. It is precisely in the areas most vitally important to the power of States that the *jus cogens* concept should apply. If wider interests and demands clash with the state system, how can any limits beyond those of general international law effectively stem from the "community of States as a whole"? Without a more broadly-based constitu-

26. This principle of obligation *erga omnes* was developed in the *Barcelona Traction Case* and later incorporated into the draft articles on state responsibility by the International Law Commission. See *infra* notes 68, 104 and accompanying text.

27. Akehurst, *supra* note 25, at 284-85.

tion, peremptory norms lack meaning other than to confirm established structures of order.

B. *Dual Formalism*

Current doctrine classifies as peremptory any particular ordering norm that mandatorily disables a State's international law-making capacity. Each such norm joins the formal, general category, *jus cogens*.²⁸ All norms prohibiting derogation or defection by ordinary rules are peremptory. This definition is a classic tautology, for only if the norms are peremptory do they prohibit derogation or defection. By contrast the formal permissive category, *jus dispositivum*, denotes norms made or changed in ways compatible with peremptory norms.²⁹ The permissive category describes arrangements recognized as positive international law freely made or changed by sovereign nation-states through consensual acts.³⁰ Within that permissive category, independent and equal nations in a fictional setting of a natural society of sovereign States may create or change the law of nations by their own consensual acts.³¹

Jus cogens elicits concern in that it challenges this freedom and compels revision in the social contract metaphor among nations as the theoretical positive law basis for the international community.³² This opposition results in two structurally different systems of legal order³³

28. See Verdross, *supra* note 2, at 56-57; Schwelb, *supra* note 3, at 948.

29. See Verdross, *supra* note 2, at 58.

30. Meron explains the difference, in analyzing the problem of non-derogability in human rights conventions, as follows:

The significance of the *jus dispositivum* character of most rules of international law lies in the fact that a group of States, strictly in their mutual relations, may substitute a rule of conventional law for a rule of customary law. The difference between peremptory and other rules of international law is that, in the case of the former, the prohibition of derogations is absolute.

Meron, *supra* note 3, at 199.

31. Even this assumption, derived from Hobbes and Vattel, rests upon conditions thought scientific and predictable from nature. The foundation/edifice structure from Enlightenment thought provided conditions within which the contractarian positive law of states could function to prevent defections from the agreed system of order to reduce the natural state of hostility. See I. Shapiro, *The Evolution of Rights in Liberal Theory* 40-59 (1986).

32. Thompson, *supra* note 7, at 1110-16.

33. This dualism should not be confused with the controversy between Monists and Dualists that seeks to relate the international system of rules to municipal law and to characterize this relationship as either a single or a dual system. The dual formalism discussed here distinguishes functionally and formally the primary system of rules of international law (obligations governing conduct) from an international system of compelling norms (*jus cogens*) that force integration through revision or change in the primary rules. See H.L.A. Hart, *The Concept of Law* 208-31 (1961); see also Onuf & Birney, *supra* note 17, at 189-90. This distinction should not be confused, either, with what Reisman describes as the problem of

and may be described as dual formalism. Each system operates formally apart from the other, despite similarities of subject matter. Formal criteria define each by purporting objectivity yet serving different functions. One is a legal system governing the direct conduct of States in their mutual relations.³⁴ The other, *jus cogens*, is a normative system whose legal effect operates upon ordinary rules of international law, but not directly upon conduct comprising actions or omissions of States.³⁵ In the conceptual discourse that follows this difference, *jus cogens* would compel integration of overriding community norms with the uncoordinated, disparate rules of conduct derived from treaty and customary law. The doctrinal technique for integration is nullification or revision. Integration would follow from the mediation of conflict between norms from two formally different systems, resulting in the revision or invalidation of the positive rules. In terms of political theory, the mediation is between rules made legitimate from consensual acts among a society of sovereign States and those reflecting overriding demands and expectations of all people in a global community. The conflict is between ordinary norms derived from the mythical social contract among sovereign States presuming state autonomy and self-determination and compelling norms reflecting fundamental interests of a cosmopolitan community broader than a society of sovereign nation-states only.³⁶

The existence of two different normative systems prompts speculation about their formal relationship. The differences or boundaries between the two normative concepts are quite subjective, contingent

"secular dualism." Reisman, *International Lawmaking: A Process of Communication*, Proceedings of the 75th Anniversary Convocation, April 23-25, 1981, *Am. Soc. Int'l L.* 101, 109 (1983). He explains the need for peremptory norms as arising from the secular dualism of Vattel. The Vattelien reformulation of natural law permitted state elites to "make lawful agreements no matter how morally odious their content might have been." *Id.* But, Reisman notes that, in the latter part of this century, "elites have revived the notion of *jus cogens* or peremptory norm, from which derogation is not permitted." *Id.*

34. H.L.A. Hart thinks of international law as a set of customs, practices, and agreements governing relations among States, falling within his definition of primary rules of obligation. H.L.A. Hart, *supra* note 33, at 208-31.

35. These are parallel to Hart's secondary norms of recognition that determine the validity of primary rules and the process of recognizing them and changes in them. Hart does not believe that international law has yet developed secondary norms. *Id.* at 230-31.

36. See generally Thompson, *supra* note 7. The foundation/edifice concept is another metaphor to be distinguished from the social compact, both of which had origins in the Enlightenment and offer contrasting explanations of the theoretical basis of *jus cogens*. One is represented by Mosler's public order of the international community (fundamental law), see Mosler, *supra* note 2, at 33-36, the other by the International Law Commission's criteria of consensus of the international community of states (social compact), see *infra* notes 55-65 and accompanying text.

upon political circumstance and other conditioning factors.³⁷ A rough balance might be constructed between incoherent diversity among polities called States and unity in public order thought necessary for a wider international society. In formal relationship, two different types of conflict might occur. The first is a contradiction between a system of *jus cogens* from among a pure society of States and the absolute capacity of any State in such a society to create or participate in changing the positive rules of obligation. This difficulty emerges in the problem of defection by one State from the obligations it considers unjust, but derived from the states system of which it is a member. The second is the contradiction between international norms posited by the states system itself and a wider *jus cogens* conception reflected in the overriding community policies that limit the states system.

C. *Justification: Public Order and Ideology*

The usual justification of a completely separate system of imperative public order centers upon articulating fundamental interests of international society that ought to restrain from odious prescriptions the positive law-making freedom of States under either of the formal relationships just described. As in the second criterion of the German court decision,³⁸ without some minimum order and common policy, no organized life on a global scale under law would be possible, in this view, whether from among States themselves or from a broader cosmopolitan society.³⁹ This abstraction produces three ideological

37. American critical legal studies thinkers have adapted post-modern European intellectual traditions in their general criticism of formalism, objectivism, and hierarchy in law. R. Unger, *The Critical Legal Studies Movement* 3-14 (1986). Ironically, the formal categories of *jus cogens* and *jus dispositivum*, also adapted from a strong European tradition dating from late Roman law, have been transformed into new doctrines of public order through Third World and socialist political conceptions that criticize public/private boundaries. See *infra* notes 193-196 and accompanying text.

38. See *supra* note 24 and accompanying text.

39. The most influential definition, provided by Eric Suy at the important Lagnossi Conference, considers *jus cogens* as "the body of those general rules of law whose non-observance may affect the very essence of the legal system to which they belong to such an extent that the subjects of law may not, under pain of absolute nullity, depart from them in virtue of particular agreements." Suy, *supra* note 3, at 18. Mosler's view is similar. See Mosler, *supra* note 2, at 33-36. Applied to public international law, this definition often is demonstrated by asking whether it would be legally possible for two states to enter a treaty declaring that all past or future treaties between them are not binding, thus using *pacta sunt servanda* to contradict *pacta sunt servanda*, which would be a legal impossibility. Sinclair poses this conundrum and avoids attacking it critically, preferring to beg the question:

[A]cceptance of the view that there are certain norms of international law of so fundamental a character that it is legally impermissible to derogate from them by

visions of fundamental interests useful in influencing particular prescriptive decisions.

First, when Western nations refer concretely to peremptory norms serving these yet undefined fundamental interests, they tend to emphasize, in the liberal tradition, negative prohibitions against the official use of force, genocide, slavery, slave trade, state torture, or arbitrary state murder.⁴⁰ Second, Third World nations tend to view *jus cogens* norms as a category of legal order that prohibits ordinary, Euro-centric rules from undermining an affirmative and emerging new international justice and morality. Resenting the dominance by the West of the sources and biases of international law, these countries emphasize self-determination, non-aggression, and human rights as among the most fundamental interests of international society.⁴¹ Third, socialist nations tend to view the concept through prisms seeing peaceful coexistence, progressive development, prohibition against crimes against humanity, autonomy of States, non-intervention, and defense of peace and security.⁴²

The justification most effectively used, however, is the analogy drawn from the public order override of the State under municipal law.⁴³ That analogy reveals what is often unspoken, that peremptory

treaty involves acceptance in principle of the operation of *jus cogens* in international law. The question then poses itself: what is the content of *jus cogens*?

Sinclair, *supra* note 3, at 207.

40. See, e.g., Revised Restatement, *supra* note 1 (quoting the text of section 102, comment k); Brownlie, *supra* note 3, at 513; Sinclair, *supra* note 3, at 215-18.

41. Rozakis interprets the needs of the new nations more descriptively:

The transformations in the social and legal infrastructure of the world community are the dominant factors in both the concept's birth and survival. For, indeed, the concept of *jus cogens* came into life as a result of a need felt by the States (old and new) which realized that in such a vast, diversified, sometimes chaotic society as ours is, certain strict rules of law should exist to check individual interests and short-run ends; and to, thereby, build a coherent basis of peaceful relations and cooperation which alone can assure the furtherance of all other specific trends and goals. The concept of *jus cogens* has been conceived as a minimum legal standard of world order which may give an air of social consideration to the otherwise unstable and extremely individualistic family of Nations.

Rozakis, *supra* note 3, at ix (preface); see also T. Elias, *New Horizons in International Law* 49-51 (1979); Arechaga, *International Law in the Past Third of a Century*, 159 *Recueil des cours* 1, 64-65 (1978); Onuf & Birney, *supra* note 17, at 196-97.

42. See Tunkin, *International Law in the International System*, *supra* note 3, at 96-98; Alexidze, *supra* note 3, at 257, 262-63.

43. J. Starke, *An Introduction to International Law* 63-64 (8th ed. 1977); see D. Lloyd, *Public Policy: A Comparative Study in English and French Law* 147-57 (1953) (comparing the *ordre public* and morality of the French civil code with the public policy and morality of the English common law in the refusal by each system to recognize certain private arrangements in conflict with overriding community policy).

norms usually serve the function of maintaining control over the public order system. The struggle over the content of norms concerns the allocation of power to decide the outcomes of conflicts between ordinary and peremptory norms.

D. *The Municipal Law Analogy of Public Order*

The municipal law analogy ineffectively justifies the use of *jus cogens* in defining the fundamental interests of international society. At first glance, a peremptory norm in international law resembles the override of private arrangements contrary to the public order in municipal systems (especially those with a Roman law tradition), as in contracts that are void for countering public policy.⁴⁴ Indeed, this analogy informed the reasoning of Lauterpacht, McNair, and Mosler in their public order justification of *jus cogens* in international law.⁴⁵ A public order override in municipal systems obliges a public authority external to the private event or arrangement to invalidate or refuse to enforce private choices in conflict with the compelling community interest.⁴⁶

When some authority speaking for the international community applies a powerful norm to arrangements among sovereign States, adequate justification does not follow from the municipal law analogy. A norm of public policy preventing certain individual arrangements within a sovereign State differs in several important ways from a public order norm invoked to prevent consensual arrangements among sovereign States. Considering these differences reveals the flaws of the private law analogy.

First, a public order override in municipal law maintains the monopoly of control by application to individuals seeking to contract out of the control. The tradition of the public order override in municipal law permits state prohibition of private arrangements against public policy. Typically, a private agreement cannot oust courts or official decision-makers of their jurisdiction. This monopoly

44. Lloyd, *supra* note 43, at 6, 9-26.

45. Lauterpacht, 1953 Report on the Law of Treaties, [1953] 2 Y.B. Int'l L. Comm'n 90, 154-56 U.N. Doc A/CN/SER.A/1953; McNair, *supra* note 3, at 217; Mosler, *supra* note 2, at 33-36.

46. In the choice of foreign law in an international commercial contract when the contract is otherwise connected entirely with one country, the choice of law of another country shall not prejudice the application of the mandatory rules of the law of the first country. "Mandatory rules" having the same function as "peremptory rules" are defined as rules "which cannot be derogated from by contract." P. North, *Contract Conflicts* 9, 17-18, 97 (1982). In other words, parties cannot evade the application of mandatory rules of domestic law by choice of law or forum clauses contracting out of that public order system.

of coercive power by authorities is justified as the only way of maintaining the most essential policies supporting the common good. Operationally, this tradition requires a court or other authority with sufficient power to refuse to provide sanctions for private arrangements violating the norms of the basic public order.

When applied to international public policy, a tradition of override with the use of peremptory norms reveals a long-suspected aspect of municipal *ordre public*. Officials preventing private parties from defection from public order arrangements act in the interests of all powerful decision-makers public and private alike, because certain kinds of defection threaten existing political arrangements and interests.⁴⁷ In the international community, it is often the converse: *jus cogens* norms challenge a public monopoly of coercive power exercised by sovereign States retaining an international monopoly only by cooperation with other States.

Second, sovereign States differ from private parties who choose their own advantage in the context of a possibly overriding public interest determined by public authority. State officials can easily nullify or avoid private arrangements simply by refusing to sanction them by law, when public policy so requires. Officials can negatively sanction through refusal to enforce private arrangements incompatible with the overriding public policy. The control exercised negates the private arrangement, a peremptory override by officials exercising "public" power. International community assertion of a comparable enforcement of public order norms by refusal to enforce certain conflicting permissive norms of States would work only in a cosmopolitan order where the peremptory norms apply directly to all individuals and officials, penetrating the immunities of the sovereign State and preventing all such persons from enforcing public or private arrangements. Otherwise, the question is one of political power, namely, which political community—municipal or international—can collectively terminate, carry out, or revise ordinary rules in conflict with overriding public policy of *jus cogens* quality.

Third, the public order override in a municipal system operates within a centrally controlled, hierarchical framework. When several States seek mutual advantage by an arrangement prescribing new

47. David Hume thought it in the interest of all states to have rules of international law obeyed by all, but that it may be in the interest of a particular state to defect from compliance. See J. Harrison, *Hume's Theory of Justice* 233 (1981); see also R. Hardin, *Collective Action* 16-37 (1982) (analyzing the dilemmas of defection among sovereign states who want to cooperate, and extending the well-used "prisoner's dilemma" to dynamic collective action among states).

norms through a treaty or through unilateral acts modifying customary law, that conduct simultaneously involves a public concern affecting each State's relationships with its own citizens as well as those of the other States. Even if a negation of the arrangement by an international authority were possible, the collision more closely resembles one within a sophisticated political federation where the strong central authority overrides the political subdivision's power to legislate. A *jus cogens* norm, to be effective, would have to subordinate non-complying polities, not just private individuals, to the international public order. Only a strong community with powerful decision-makers could negate the will of a subordinate political entity; whereas by simply refusing to enforce, officials in control of the central apparatus within a State can frustrate the will of two private parties seeking contractual advantage contrary to the public order.

Private parties often require assistance of state judges and officials to enforce agreements. However, as the international community relies upon internal mechanisms and reciprocal sanctions rather than central enforcement of treaties or customary international law, the analogy fails. Use of peremptory norms to prevent private persons from contracting out of them by defecting from the public order system occurs within particular political communities. Use of peremptory norms against sovereign States wishing to derogate from them by sovereign acts alters the concept's meaning. Applying the municipal public order analogy to the states system prompts a notion of States as individuals, a corporate myth reinforced by Hegel, and attributes the legal personality of individuals in a hierarchical order to that of States in a horizontal order.⁴⁸

Fourth, *jus cogens* norms operate in a decentralized structure. A powerful decision-maker applying international community expectations of *jus cogens* quality operates in a horizontal, balance of power context. An authorized decision-maker acting on behalf of the international community to nullify an international agreement between several nations must appeal to all other public officials to recognize the intense demands forming the expectation that certain general principles widely accepted within the community of nations require

48. See A. Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* 74-81 (1986) (tracing the influence of German legal theory on the notion of treaty obligation); F. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* 53 (1988) (defining the Hegelian Myth as a notion of States holding a right of autonomy that demands respect and deference from other States).

strict adherence.⁴⁹ This normative expectation becomes peremptory when it is backed by effective power from within the international community. Measuring effectiveness introduces an empirical element in addition to a purely definitional or ethical criterion for the peremptory quality of the category of supernorms. Consequences follow when particular arrangements displace certain fundamental interests of international society.

Moreover, a claim of state agreement or action in conflict with a peremptory norm of international public policy provokes more than a mere conceptual override. The claim, whether of invalidity of treaty norms or of customary norms, introduces a collision of political wills. This kind of a demand would prevent a few States, or a single State, from making or changing rules in conflict with entrenched and sufficiently backed expectations that are found peremptory. The override, however, occurs after the fact, by virtue of the political decision backed by sufficient power to succeed in nullifying any legal consequences that normally would flow from the failure to keep an obligation. An agreement between two States, for example, to undertake collective humanitarian intervention against a third State engaged in gross human rights abuse of its own citizens could be considered invalid as in conflict with a *jus cogens* norm against forcible intervention in another State. It could also be considered, however, as an agreement in aid of a peremptory norm against the gross abuse of human rights, justifying an exception to the general norm against forcible intervention. The political outcome would determine to a large extent the legitimacy of the claim of invalidity of the original agreement. In this kind of circularity then, major powers can initiate the creation of peremptory norms through action followed by apparent acquiescence of all others. Similarly, many States could collectively create peremptory norms if their action is sufficiently compelling.

Less certain would be the outcome of the collective power of many individuals world-wide in expressing demands that result from

49. See McDougal, Lasswell, & Reisman, *The World Constitutive Process of Authoritative Decision*, in M. McDougal & W. Reisman, *International Law Essays* 191 (1981).

[C]ertain fundamental constitutive norms are held with expectations of greatest intensity and are less susceptible than others to unilateral modification and termination, since they are supported by a wide allocation of control. There are, of course, fundamental norms whose continued vitality depends upon the behavior of a few superpowers or even, in certain circumstances, upon the behavior of one participant. In terms of aggregate expectations, however, these norms are fundamental because of their impact on the constitutive process and the general expectation that they will continue to be applied.

Id. at 241-42 (citation omitted).

intensely held expectations, as in popular, cross-national protests against abuses by governments.⁵⁰ International implementation of these demands depends upon their prevailing in the collision of political wills over particular, often very strong national claims. Empirical observation would be necessary to support this type of conclusion. The demands measured and the expectations recognized, however, differ from those of a cohesive political community. Private individuals must adjust arrangements to accommodate the common public order or face official coercive orders nullifying private agreements contrary to that order. The conflict between States and the world community is between different kinds of political systems of control. In this situation then, the most powerful elites speaking for the international community may simply impose their version of a suitable ideology in the guise of preemptory norms.⁵¹ However, the interests of international society intervening between a government and its citizens will not easily transform the nation-state system of order.

II. CONTEMPORARY DEVELOPMENT

It is remarkable that the International Law Commission, the Institute of International Law, the American Law Institute, and most governments now accept the possibility of a different system for regulating change in norms affecting fundamental interests of international society.⁵² Not since the Grotian moment has the direction of desirable change in international law found such a structure expressed in a set of differently-functioning foundational norms of a decentralized public order.⁵³ The historical circumstance behind this

50. Assumptions about the interests of States might fail to consider adequately the reality of power emanating from within States through popular demands arising from human rights abuses. Democratic governments in recognizing and correcting such abuses often need major structural revision justifying some kind of support by the international community. For a study of a political realist's view of state interests and human rights, see Christenson, Kennan and Human Rights, 8 Hum. Rts. Q. 345 (1986).

51. Weil, Towards Relative Normativity in International Law?, 77 Am. J. Int'l L. 413, 441 (1983).

52. See Vienna Convention, *supra* note 1, art. 53 (containing text). The Revised Restatement states: "The conflict of the agreement at the time of its conclusion with a preemptory norm of general international law renders it void." Revised Restatement, *supra* note 1, § 331(2). See also Revised Restatement, *supra* note 1, § 102 comment k (containing text explaining preemptory norms).

53. During the developmental phase of international law, certain limits were imposed on States under all circumstances. "The index of Grotius in *De jure belli ac pacis* has 15 entries under *jus strictum*' (1758 ed.)." Frowein, *Jus Cogens* in 7 Encyclopedia of Public International Law 327, 328 (R. Bernhardt ed. 1984); see Falk, *supra* note 10, at 25-31; H. Lauterpacht, The Grotian Tradition in International Law, 23 Brit. Y.B. Int'l L. 1 (1946).

extraordinary position is a fascinating study of the development of public order norms through a purely conceptual and formal undertaking not involving state practice. Despite numerous studies, the full influence of this development is not widely appreciated.⁵⁴

A. *Early Development and the International Law Commission*

Verdross' pioneering work in 1937 drew upon the European idea of imperative norms by suggesting that treaties in conflict with such overriding principles of public order are illegal and void.⁵⁵ This idea stemmed from earlier work by Vattel and his European followers. They had recommended a structure for distinguishing ordinary international norms from those immutable, by analogy either to the naturalist tradition⁵⁶ or to the municipal civil law doctrine of *ordre public*

54. The concept is explained in most treatises, where it receives polite acquiescence, with varying degrees of skepticism. Haimbaugh's bibliographic review separates treatises mentioning *jus cogens* from those not. Haimbaugh, *supra* note 1, at 219-22. An integrated and serious development is found in the latest edition of L. Henkin, R. Pugh, O. Schachter, & H. Smit, *International Law, Cases and Materials* (2d ed. 1987), where the authors have infused conceptual and theoretical aspects of *jus cogens* within the basic doctrinal presentation: the persistent objector problem and apartheid, *id.* at 67; treaties in conflict with a peremptory norm, *id.* at 467-75; agreements specifying non-derogation, *id.* at 468; only prospective, not retroactive effect, *id.* at 469; safeguarding values of vital importance to the community as a whole, *id.* at 470 (quoting Arechaga, *supra* note 41, 9, 64-67); socialist view of *jus cogens*, *id.* at 472-73; consent no relief from state responsibility for violating *jus cogens* norm, *id.* at 537; equivalent counter-measures impermissible when encountering peremptory norms, *id.* at 547; obligation of one state not suspended by violation of peremptory norm by another, as in diplomatic immunity, *id.* at 548; non-use of force, U.N. Charter art. 2(4), as *jus cogens*, *id.* at 676-77; human rights derogations, *id.* at 1001-03; see also B. Weston, R. Falk & A. D'Amato, *International Law and World Order* 76-77, 629-32 (1980) (integrating *jus cogens* principles in the form of questions about sources and content).

55. Verdross, *Forbidden Treaties in International Law*, 31 *Am. J. Int'l L.* 571, 573 (1937).

56. Vattel, *The Law of Nations* lviii (Chitty ed. & trans.; additional notes by E. Ingraham, 1867). Vattel's structure of an immutable necessary law of nations distinguished lawful from unlawful voluntary positive law. The necessary law of nations, according to Vattel, is the application of the law of nature to nations in a natural state of independence and equality. This law of nature is based on the great secular end of human beings, happiness, to which this law is ordained. Even an atheist is bound to obey the laws of nature which are necessary to the general happiness of mankind. Whoever rejects them would by that conduct alone become an enemy to the human race and would deserve to be treated as such. Changes may not be made in the immutable law:

Whence, as this law is immutable, and the obligations that arise from it necessary and indispensable, nations can neither make any changes in it by their conventions, dispense with it in their own conduct, nor reciprocally release each other from the observance of it.

This is the principle by which we may distinguish *lawful* conventions or treaties from those that are not lawful, and innocent and rational customs from those that are unjust or censurable.

Id. (emphasis in original).

and its common law equivalent.⁵⁷ Several opinions of the Permanent Court of International Justice and other international tribunals suggest a similar structure.⁵⁸

Initial skepticism had faded by the time the International Law Commission, following the important proposals of Lauterpacht, McNair, Fitzmaurice, and Waldock, developed the concept and incorporated it into the Vienna Convention on the Law of Treaties.⁵⁹ The Commission, however, avoided specifying particular norms of *jus cogens*, for agreement seemed improbable.⁶⁰ With the possible exception of the prohibition against the use of force,⁶¹ it expressly withheld recommending content, deferring to later state practice and develop-

57. Lauterpacht's 1953 Report on the Law of Treaties equated the criteria for determining treaty validity with "principles of international public policy." Lauterpacht, *supra* note 45, at 155. Later, the International Law Commission tried, quite unsuccessfully, to separate international public policy from *jus cogens*, attempting to escape the analogy from municipal systems of public order. Sztucki, *supra* note 3, at 8-10. For analysis of this analogy, see *supra* notes 44-51 and accompanying text.

58. See Sztucki, *supra* note 3, at 12-16 (reviewing seventeen decisions arguably based on *jus cogens* and showing that all of the decisions could be explained without invoking peremptory norms). For example, in the case of S.S. "Wimbledon" (France, Italy, Japan, Poland, and the United Kingdom v. Germany), 1923 P.C.I.J. (ser. A) No. 1 (Judgment of Aug. 17), Judge Schucking in dissent invoked a similar idea of international public policy. *Id.* at 43-47. The same judge in the *Oscar Chinn* case again introduced the concept of international public policy:

I can hardly believe that the League of Nations would have already embarked on the codification of international law if it were not possible, even to-day, to create a *jus cogens*, the effect of which would be that, once States have agreed on certain rules of law, and have also given an undertaking that these rules may not be altered by some only of their number, any act adopted in contravention of that undertaking would be automatically void.

Oscar Chinn (U.K. v. Belg.), 1934 P.C.I.J. (ser. A/B) No. 63, at 149-50 (Judgment of Dec. 12) (separate opinion of Schucking, J.). Judge Schucking added that "[t]he Court would never, for instance, apply a convention the terms of which were contrary to public morality." *Id.* at 150.

59. The Vienna Convention requires the peremptory norm to be "accepted and recognized by the international community of states as a whole. . . ." Vienna Convention, *supra* note 1, art. 53. See also Revised Restatement § 331(2), *supra* notes 1, 52.

60. As Ian Brownlie comments: "more authority exists for the category of *jus cogens* than exists for its particular content." Brownlie, *supra* note 3, at 515 (citation omitted).

61. Commentary on the Commission's draft article 37 (treaties conflicting with peremptory norms) referred to the divided opinion over adoption, notably Schwarzenberger against and Lord McNair for, but accepted completely McNair's reasoning:

The law of the Charter concerning the prohibition of the use of force in reality presupposes the existence in international law of rules having the character of *jus cogens*. This being so, the Commission concluded that in codifying the law of treaties it must take the position that today there are certain rules and principles from which States are not competent to derogate by a treaty arrangement.

Report of the International Law Commission to the General Assembly, 19 U.N. GAOR Supp. (No.9) at 1, U.N.Doc. A/5509 (1963), reprinted in [1963] 2 Y.B. Int'l L. Comm'n 187, 198, U.N. Doc. A/CN.4/SER.A/1963/Add.1, at 11, 23.

ment by international tribunals.⁶² Inferring the necessity of the concept of peremptory norms from alleged positive law sources, logic, and municipal law analogies drew support from all nations including those not of the natural law or naturalist traditions.⁶³

The Commission suggested some examples of substantive norms, but avoided assertion of their peremptory quality.⁶⁴ In the final work of the Commission, the members treated *jus cogens* as a "sacred cow." The "uneasiness in raising voice against *jus cogens* was apparent, as if one who would criticize it were running the risk of being declared a grave offender of international legality."⁶⁵

B. *Influence of International Law Commission*

In separate opinions, judges of the International Court of Justice began referring to these suggestions of substance and developing the jurisprudence by dictum.⁶⁶ The Advisory Opinion in the *Genocide*

62. Difficulty in formulating a rule led to one in general terms, leaving the "full content . . . to be worked out in State practice and in the jurisprudence of international tribunals." Id.

63. Sztucki is critical of the intellectual foundations of a positive law approach to *jus cogens*, concluding that:

attempts to provide a theoretical basis for the concept of an international *jus cogens* by resorting to some kind of positivist constructions either proved inadequate or failed to assert themselves (as was the case of the theory of an "international public policy"). It is therefore no wonder that the *jus cogens* provisions in the Convention were met as a revival of natural law concepts, although natural law affiliations were being ardently denied by an overwhelming majority of supporters of the conventional concept of international *jus cogens*.

Sztucki, *supra* note 3, at 66 (citations omitted).

64. Relying upon considerable scholarly comment, the Commission suggested, but decided not to recommend, the following as possible examples of peremptory norms invalidating treaties in conflict with them: the UN Charter prohibitions on the use of force; norms against international crimes; rules for the suppression of slave trade, piracy, and genocide; and norms protecting human rights and self-determination. [1966] 2 Y.B. Int'l L. Comm'n 247-49, U.N. Doc. A/6309/Rev. 1. This suggestion followed that of Waldock's Second Report in 1963. See H. Waldock, Second Report on the Law of Treaties, [1963] 2 Y.B. Int'l L. Comm'n 36, 52-53, U.N. Doc. A/CN.4/SER.A/1963/ADD.1. For a review of the inconclusive history and results of the debate about content culminating in the Commission's work, see Sztucki, *supra* note 3, at 76-89; see also Kearney & Dalton, *The Treaty on Treaties* 64 Am. J. Int'l L. 495, 535 (1970).

65. Sztucki, *supra* note 3, at 157.

66. Gaja, *supra* note 3, at 286 (noting caution by the ICJ); Sztucki, *supra* note 3, at 15-16 (noting the separate opinions by judges of the Court). In *Nicaragua v. United States*, the International Court of Justice cited to the International Law Commission's suggestions, as if the examples of possible *jus cogens* norms were evidence of state practice and *opinio juris* leading to a general customary international law norm against the use of force and of non-intervention. The Court cited to the United States' Counter-Memorial for the same position. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 I.C.J. 14, 100-01 (Judgment of June 27). This inconclusive history about the content of norms of *jus cogens* quality was apparently useful in supporting the existence of an autonomous rule

Case,⁶⁷ doctrine about obligations *erga omnes* in the *Barcelona Traction Case*,⁶⁸ language in the *South West Africa Case*⁶⁹ and the Advisory Opinion in the *Namibia Case*⁷⁰ all nodded in the direction of certain indelible principles of public order imbedded in the international structure.⁷¹ The Commission continued to cite those principles it had mentioned tentatively in early work, but now as though their content were agreed.⁷² Agreement on the concept also legitimized use of *jus cogens* in expressing anti-Western sentiment about fundamental interests considered overriding.⁷³ Western powers used the concept to support their own view of interests fundamental to international society.⁷⁴ The French warned that use of the concept would be destabilizing.⁷⁵ Scholars recognized and cited these principles.⁷⁶ In its

of customary international law against the use of force, but without claiming that a peremptory norm determined the outcome.

67. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23-24 (Advisory Opinion of May 28).

68. *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, 1970 I.C.J. 3 (Judgment of Feb. 5). The Court stated that “[s]uch obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.” *Id.* at 32. The decision also referred to the U.N. Charter as containing principles of *jus cogens* in its preamble, *id.* at 304 (separate opinion of Ammoun, J.), and to principles of humane nature “translated into imperative legal norms (*jus cogens*),” *id.* at 325 (separate opinion by Ammoun, J.).

69. *South West Africa Cases, Second Phase (Ethiopia v. S. Afr.; Liberia v. S. Afr.)*, 1966 I.C.J. 6, 298 (Judgment of July 18) (Tanaka, J., dissenting).

70. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 72 (Judge Ammoun discussing the “imperative character of the right of peoples to self-determination” and of human rights violations by South African activities) (Advisory Opinion of June 21). Professor Gaja points out that the World Court shifted its view closer to that of the General Assembly in the Advisory Opinion. Gaja, *supra* note 3, at 286.

71. The consequence of this cautious public order role for the Court may be seen in the Court’s decision in *Nicaragua v. United States*, which continued the tacit development of international public order jurisprudence strikingly close to the category of *jus cogens* norms. For an explicit statement of a public order role for the Court, see the interview with Judge Elias, quoted *infra* note 216.

72. See e.g., *State Responsibility*, U.N. Doc. A/CN.4/291 and Add.1 and 2, reprinted in [1976] 2 Y.B. Int’l L. Comm’n 3, 18, U.N. Doc. A/CN.4/SER.A/1976/ Add.1 (Part 1); Report of the International Law Commission on the work of its twenty-eighth session (3 May-23 July 1976), U.N. Doc. A/31/10, [1976] 2 Y.B. Int’l L. Comm’n 1, 91-92, 119-22, U.N. Doc. A/CN.4/SER.4/1976/ Add. 1 (Part 2).

73. See Gaja, *supra* note 3, at 286; Mann, *The Doctrine of Jus Cogens in International Law*, in *Festschrift für Ulrich Scheuner* 399, 410-12 (1963).

74. See *supra* note 40 and accompanying text.

75. Rozakis, *supra* note 3, at 82 (noting French reservations concerning the unresolved aspects of *jus cogens* norms); Sinclair, *supra* note 3, at 220 (noting concerns by the French delegation over the coercive potential of *jus cogens*).

76. See Sztucki, *supra* note 3, at 54-96 (surveying the scholarly writings on *jus cogens*).

commentary on the final draft articles on the Law of Treaties, the Commission said that the Charter norm "concerning the prohibition of the use of force . . . constitutes a conspicuous example of a rule in international law having the character of *jus cogens*."⁷⁷ By 1980, the Commission was saying that the peremptory character of that obligation is beyond doubt in all events.⁷⁸

Inconclusive state practice also drew comment. In 1964 Cyprus invoked *jus cogens* norms in the Security Council to oppose Turkey's unilateral intervention in Cyprus under the Treaty of Guarantee whereby Greece, Turkey, and the United Kingdom undertook to ensure the Treaty's observance.⁷⁹ Professor Reisman thought Iran invoked *jus cogens* to justify termination of the 1921 Treaty of Friendship with the Soviet Union.⁸⁰ A number of Arab nations invoked *jus cogens* in the General Assembly to support the 1979 resolution declaring the Camp David accords invalid, arguing that Egypt's defection from the obligation of concerted defense against Israel undermined the Arab League security pact.⁸¹

The International Court of Justice in one sense has been much more cautious, for while it has invoked imperative norms of great importance in both the *Hostages Case*⁸² and *Nicaragua v. United States*,⁸³ it has not formally applied them as peremptory. In another sense, while formally non-committal, the Court has nonetheless insinuated in its underlying preferences, according to Professor Mann, a

77. Report of the International Law Commission on the Work of its Eighteenth Session, Geneva, 4 May - 19 July 1966, [1966] 2 Y.B. Int'l L. Comm'n 172, 247, U.N. Doc. A/CN.4/SER.A/1966/Add. 1.

78. Report of the International Law Commission on the work of its thirty-second session (5 May-25 July 1980), Doc. A/35/10, reprinted in [1980] 2 Y.B. Int'l L. Comm'n 30-33, U.N. Doc. A/CN.4/SER.A/1980/ Add.1 (Part 2).

79. 19 U.N. SCOR (1098th mtg.) at para. 95, U.N. Doc. S/PV.1098 (1964).

80. Reisman, Termination of the USSR's Treaty Right of Intervention in Iran, 74 Am. J. Int'l L. 144, 151-53 (1980) (The treaty provided a limited right of Soviet intervention in Iran in the event of a threat to the Soviet Union.).

81. Binder, The Dialectic of Duplicity: Treaty Conflict and Political Contradiction, 34 Buffalo L. Rev. 329, 342-62 (1985); Gaja, supra note 3, at 282.

82. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7, 19-20 (Provisional Measures Order of Dec. 15) (inviolability of diplomats and embassies as fundamental prerequisite for conduct of relations and imperative obligations); United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 41 (Judgment of May 24) (imperative character of legal obligations incumbent upon Iran). The Court did not hold that any of these obligations were peremptory. If they are peremptory, would they apply to prohibit counter-measures otherwise equivalent, as in France's detaining Iranian diplomats because the Iranians are holding French diplomats? This question is raised in Henkin, Pugh, Schachter, & Smit, supra note 54, at 547.

83. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14 (Judgment of June 27).

particularly ideological undertone of development in jurisprudential assumptions.⁸⁴ Gaja believes the caution is conscious; that in self-restraint, the Court wished to avoid the political consequences that would lead to discouraging ratification of the Vienna Convention on the Law of Treaties.⁸⁵ From a realist perspective, the net effect is probably the same.⁸⁶

The Inter-American Commission on Human Rights, in a decision against the United States,⁸⁷ invoked the strongest and most penetrating use of *jus cogens* yet by any adjudicative international body. In a case challenging juvenile capital punishment brought by individuals under sentence in Texas and South Carolina, the Commission specifically found that a peremptory norm of *jus cogens* prohibits state execution of children in the OAS system.⁸⁸

C. Effectiveness

The analysis that has been developed in this article begins to distinguish the power of the participants invoking the peremptory norm from the concept itself. One is thus led to examine the problem of effectiveness. An effective *jus cogens* decision must express a potent interest of the international community. The particular court, commission, or group of States must decide effectively from the community perspective that sovereign nation-states, no matter how powerful, may not agree to defect from a peremptory norm, nor may they defect from obligations *erga omnes*.⁸⁹ Effectiveness lies at the heart of any new unifying myth symbolizing a cosmopolitan public order.⁹⁰ Lacking central enforcement organs to bring claims on behalf of the entire

84. Mann, *supra* note 73, at 411-12.

85. Gaja, *supra* note 3, at 286.

86. Christenson, *The World Court and Jus Cogens*, 81 Am. J. Int'l L. 93, 100 (1987).

87. Resolution No. 3/87, Case No. 9647 (United States), Inter-Am. C.H.R., OEA/ser. L/V/II.69, doc. 17 (27 March 1987).

88. For analysis of this case, see *infra* notes 154-59 and accompanying text.

89. Professor Gaja invites international lawyers to create actions that would show the inventiveness, especially of the *erga omnes* aspect of peremptory norms to develop effectiveness. Gaja, *supra* note 3, at 280, 289. But in a critical review of this position, Professor Rubín is skeptical of the concept and its effectiveness. Rubín, Book Review, 81 Am. J. Int'l L. 254, 258 (1987).

90. The International Court of Justice, in its decision in the merits phase of *Nicaragua v. United States*, made a special but obscure point that its use of customary international law against the use of force survived the test of effectiveness. The Court measured the test against a common fundamental principle arguably of *jus cogens* quality:

The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations. The differences which may exist between the specific content of each are not, in the Court's view, such as to cause a judgment confined to the field

community, States and international organizations must look to alternatives. The *actio popularis* procedure would empower any State to challenge any other State's violation of obligations *erga omnes*, especially those based upon peremptory norms.⁹¹ Widely criticized,⁹² however, this empowerment would increase ideological conflict by making it possible for all States, including those newly formed, to claim exemption from unequal treaties or from Western-imposed international law. Moreover, according similar status to individuals to petition human rights commissions or organizations, as in the case involving execution of juvenile offenders, begins to develop an effective procedure for bringing *jus cogens* claims and arguments, especially when a commission takes a particularly active role in initiating a *jus cogens* determination.⁹³

D. *The Vienna Convention and the Revised Restatement of Foreign Relations Law of the United States*

Revision of the Restatement of Foreign Relations Law of the United States began about the time the Vienna Convention on the Law of Treaties had taken effect. The final revision recognizes the validity of peremptory norms in at least four places. The first, the reporters' note,⁹⁴ asserts that "[t]here is general agreement that the principles of the UN Charter prohibiting the use of force are *jus cogens*."⁹⁵ The second, a comment,⁹⁶ asserts that the rules of custom-

of customary international law to be ineffective or inappropriate, or a judgment not susceptible of compliance or execution.

Nicaragua v. United States, 1986 I.C.J. at 97.

91. See Schachter, *supra* note 3, at 195-201; Schwelb, *The Actio Popularis and International Law*, 2 *Isr. Y.B. Hum. Rts.* 46 (1972).

92. Mann, *supra* note 73, at 411; Rubin, *supra* note 89, at 258.

93. The Inter-American Commission on Human Rights initiated such a determination in the juvenile execution decision. See *infra* notes 154-59 and accompanying text. See generally, Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 *Am. U.L. Rev.* 1 (1982).

94. Revised Restatement, *supra* note 1, § 102 reporters' note 6.

95. *Id.* The reporters' note, as well as § 102 comment k, states that it is not the Charter but the principles of the Charter that are *jus cogens* under this view, thereby leaving open the interesting possibility that even the Charter might be open to revision to conform to a new peremptory norm. See Weil, *supra* note 51, at 425 (noting that the "Charter is not a 'kind of higher formal source of law'; it is only a treaty, and the norms it enshrines are, from the viewpoint of origin, nothing other than conventional rules") (citation omitted).

See also statement by Robert Rosenstock, U.S. Representative in the Sixth Committee of the United Nations, commenting on the Soviet proposal for a treaty on the nonuse of force, Nov. 22, 1976: "Today that clear and direct rule [article 2, paragraph 4 of the U.N. Charter] is universally recognized as a peremptory norm of international law binding on all and not subject to derogation by unilateral declarations or bilateral agreements." 1976 *Digest of United States Practice in International Law* 685 (E. McDowell ed.). He suggested the same

ary international law of human rights set out in the black letter “are peremptory norms (*jus cogens*), and an international agreement that would violate them would be void.”⁹⁷ The third, another comment,⁹⁸ applies norms of peremptory quality to “other rules of international law in conflict with them,” in addition to treaties.⁹⁹ A possible fourth area of incorporation is the Revised Restatement’s treatment of state responsibility, empowering any nation to claim violation of a norm of criminal responsibility from which no derogation is possible.¹⁰⁰ An additional peremptory norm of non-recognition of States may be emerging in the Revised Restatement’s rule against recognition of States in violation of international law.¹⁰¹

“pragmatic imperative” for article 2, paragraph 3, the obligation to “settle international disputes by peaceful means.” *Id.* See also Rosenstock, *Peremptory Norms—Maybe Even Less Metaphysical and Worrisome*, 5 *Den. J. Int’l L. & Pol’y* 167 (1975) (responding to Onuf & Birney, *supra* note 17, and urging a less theoretical and more pragmatic use of peremptory norms).

96. Revised Restatement, *supra* note 1, § 702 comment l.

97. *Id.* It is clear that a “rule need not be a peremptory norm (*jus cogens*), however, to be part of the customary international law of human rights.” Remarks by R. Lillich, Proceedings of the 79th Annual Meeting, April 25-27, 1985, *Am. Soc. Int’l L.* at 86 n.2 [hereinafter *Remarks*]. While seeming to accept certain customary human rights norms such as those against slavery and torture as peremptory, Lillich challenges the view that all such rules are of *jus cogens* quality. Lillich, *Civil Rights*, in 1 *Human Rights in International Law* 117-18 (Meron ed. 1984). But see Domb, *Jus cogens* and Human Rights, 6 *Isr. Y.B. Hum. Rts.* 104 (1976); M. McDougal, H. Lasswell & L. Chen, *Human Rights and World Public Order* 338-50 (1980). For a comprehensive review of the relationship between human rights and *jus cogens*, see the excellent critical summary in Meron, *supra* note 3, 174, 184-87, 189-200 (1986). A part of that book seeming to agree with Lillich’s point is also found in Meron, *On a Hierarchy of International Human Rights*, 80 *Am. J. Int’l L.* 1 (1986) (urging caution in accepting distinction between higher rights and ordinary rights to avoid unnecessary mystification of human rights, rather than to their clarification).

98. Revised Restatement, *supra* note 1, § 102 comment k.

99. *Id.* Prof. Meron thinks the non-treaty aspect of *jus cogens* “is far more important than the treaty aspect” for human rights violations. Meron, *On a Hierarchy of International Human Rights*, *supra* note 97, at 19. He credits Judge Mosler for first applying the concept, “public order of the international community,” both to unilateral acts and to agreements. *Id.*; see Mosler, *supra* note 2, at 34. While Mosler distinguishes international public policy or public order from the *jus cogens* which resides in the law of treaties, the earliest basis for the *jus cogens* as applied to treaties seems to have been likewise grounded in “international public policy (*ordre international public*).” Lauterpacht, *supra* note 45, at 155. Throughout the drafting history of the Vienna Convention on Treaties, *jus cogens*, by analogy to the *ordre public* or to public policy, was considered to be either the same as or a sub-set of the concept of international public policy, whether in the treaty on treaties or in draft codifications on state responsibility or international criminal conduct applying peremptory norms to unilateral acts. Rozakis, *supra* note 3, at 12-14; see also *supra* notes 57-59 and accompanying text.

100. See Revised Restatement, § 703(2) comment b; § 711 comment h; § 902(2).

101. See *id.* at § 202(2) comment e, reporters’ note 5; Dugard, *supra* note 3, at 163 (recommending limiting the basis for non-recognition only to the *jus cogens* norm identified with a serious breach of international public order through Security Council actions); Mann, *supra* note 73, at 413.

The Revised Restatement cites no authority extending the *jus cogens* concept beyond treaties to include other rules or unilateral actions in conflict with a peremptory norm.¹⁰² This significant extension merits a brief comment. The International Law Commission's recommendation, as incorporated into the Vienna Convention, would disable merely the sovereign capacity of States to enter treaties in conflict with an existing norm of *jus cogens* quality. Although the International Law Commission's developing recommendation on state responsibility involves a more general and controversial application of *jus cogens* to the customary international law of state responsibility,¹⁰³ much of its authority flows from the logic in the *obiter dictum* of the *Barcelona Traction Case*, as well as from a logical extension of the limits on treaty-making.¹⁰⁴ The Revised Restatement supports a broad concept, covering customary international law in conflict with a *jus cogens* norm as well as unilateral acts meant to change or interpret a development in customary international law.¹⁰⁵

This extension of *jus cogens* generates several issues. It is uncertain whether a new peremptory norm would invalidate a conflicting treaty, but it would presumably override a customary norm with which it conflicted. The more difficult question, as Meron points out, is whether a subsequent rule of *jus cogens*, established by custom and practice, can modify an earlier one, established by earlier custom and practice.¹⁰⁶ Additional issues involve the ability of a multilateral treaty to modify an earlier *jus cogens* norm and the effect of preexisting peremptory norms on emerging customary international law.

102. After reviewing the position of writers on this question (but not state practice) Rozakis thinks this doctrinal extension proposes "a radical modification of the traditional scheme of illegality of acts or actions in international law." Rozakis, *supra* note 3, at 18. Both in introducing a vertical hierarchy of norms and in implying an offense against the entire international community that any third party could raise against an objective standard, the extension from treaties to unilateral acts affecting customary international law would change the normative structure in ways not contemplated in the discussion of the matter in the development of the convention on treaties. *Id.* at 18-30; see also Dugard, *supra* note 3, at 142-46 (noting that the distinction between a crime and a delict in international law is only indirectly supported by *jus cogens*); Meron, *supra* note 3, at 197-200 (observing that *jus cogens* has now been extended well beyond treaties to unilateral acts).

103. This application of *jus cogens* would distinguish crimes from delicts. [1976] 2 *Y.B. Int'l L. Comm'n* (II) 98-116; [1980] 2 *Y.B. Int'l L. Comm'n* (II) 30; Gaja, *supra* note 3, at 300.

104. See *supra* notes 68, 102 and accompanying text.

105. Revised Restatement, *supra* note 1, § 703(2), reporters' note 3; see also Fitzmaurice, *supra* note 3, at 125-26; Suy, *supra* note 3, at 75-76 (both proposing extension of the concept beyond treaties to unilateral acts); Rozakis, *supra* note 3, at 17-22 (supporting the correctness of the conceptual expansion). But see Sztucki, *supra* note 3, at 66-69 (critically appraising the concept and questioning the correctness of such expansion).

106. Meron, *supra* note 3, at 184.

Subjective interests of States further confuse such conflicts. Fundamental interests of international society will nearly always appear so basic to the party invoking them that their "existence" assumes a metaphysical immutability.¹⁰⁷ The Revised Restatement in this sense strikingly resembles Vattel's language and structure.¹⁰⁸ Vattel's immutable necessary law invalidates both treaties and unilateral acts of States in conflict with it; the American Law Institute's Restatement does the same with state acts and treaties conflicting with *jus cogens* norms.¹⁰⁹ The analogy, however, fails to hold. In Vattel's system the overriding law necessary to achieve human happiness is incommensurate with contemporary understanding of the *jus cogens* structure.¹¹⁰ Though the structure and words are similar, the context and meaning differ. There would be no possibility to change such immutable law for Vattel, while contemporary *jus cogens* makes change in peremptory norms quite possible.¹¹¹ Moreover, in each structure the international community insists on some unidentified ordering presence.¹¹² This reintroduction of natural law or some other metaphysical presence raises suspicions of concealed subjective preferences in the superior principles necessary to international public order.

Professor Meron and Professor Sztucki both conclude that the extension of *jus cogens* norms to unilateral acts of sovereign States (completing a coherent doctrinal development) is probably more sig-

107. Onuf and Birney describe the claims as follows:

As in most metaphysical matters, it is impossible to prove that peremptory norms are not the substance of higher law. The inclination to view them in this manner is understandable in view of recent history and certainly helps to explain the fascination that the concept of peremptory norms holds for some scholars. Conversely, it is no easier to demonstrate that peremptory norms are superior because they are part of the natural order.

Onuf & Birney, *supra* note 17, at 188.

108. Vattel, *supra* note 56, at lviii.

109. Compare *id.* ("[N]ations can neither make changes in [immutable law] by their conventions, dispense with it in their own conduct, nor reciprocally release each other from the observance of it.") with Revised Restatement, *supra* note 1, § 102 comment k ("Some rules of international law are accepted and recognized . . . as peremptory, permitting no derogation, and prevailing over and invalidating international agreements and other rules of international law in conflict with them.").

110. See Vattel, *supra* note 56, at lviii.

111. Compare *id.* ("[N]ations can neither make changes in [immutable law] by their conventions, dispense with it in their own conduct, nor reciprocally release each other from the observance of it.") with the Vienna Convention, *supra* note 1, art. 53 (stating that "peremptory norms . . . can be modified only by a subsequent norm of general international law having the same character").

112. Compare Vattel, *supra* note 56, at lviii (basing international structure on the law of nature) with the Vienna Convention, *supra* note 1, art. 53 (basing peremptory norms on universal recognition).

nificant than its application to law-making through treaties.¹¹³ Unilateral claims change customary international law when accompanied by the appropriate reciprocal response and acquiescence. The extension of the continental shelf and economic zone seaward is a good example.¹¹⁴ Unilateral claims to exclusive control over the continental shelf and, seaward, over an economic zone or environmental zone encroached upon a prior condition of freedom of the high seas and led to new customary law eventually codified in the Law of the Seas treaty.¹¹⁵ The initial claims breached the prior balance by violating customary international law in the process of changing it through response and acquiescence. Attempts by weaker States to change customary international law in this manner, as in Libya's claim to the Gulf of Sidra, stand less chance of success than claims of more powerful States.¹¹⁶ A peremptory norm permitting no derogation would nullify such justification of change.¹¹⁷ Landlocked States, for example, might have claimed for the economic development of the continental shelf the same presumed peremptory quality of the common heritage of mankind as they did for deep-seabed resources.¹¹⁸ Circularity and reductionism then make trouble by inquiring how a peremptory norm of customary international law is changed, assuming it existed in the first place.

The possibility of modification by supervening peremptory norms led to an even more difficult problem of retroactive invalidity at the Vienna Conference. Third World nations wanting relief from forced treaties favored a broad flexibility, but a compromise proposed by Judge Elias led to Article 64 of the Vienna Convention,¹¹⁹ which provided that a new peremptory norm would not invalidate a prior treaty

113. Sztucki, *supra* note 3, at 66-69; Meron, *supra* note 3, at 184.

114. See generally L. Sohn & K. Gustafson, *The Law of the Sea* 115-22, 150-53 (1984) (covering the general movement from a common high seas regime to one marked and limited by exclusive economic zones).

115. *Id.*

116. Compare Libya's claim to the Gulf of Sidra with President Truman's proclamation extending the United States' continental shelf seaward. For a comment on the legality of the U.S. refusal to acquiesce, see Blum, *The Gulf of Sidra Incident*, 80 *Am. J. Int'l L.* 668 (1986).

117. Lobel, *The Limits of Constitutional Power: Conflicts between Foreign Policy and International Law*, 71 *Va. L. Rev.* 1071, 1142 (1985).

118. At the Law of the Sea Conference, the developed countries defeated a proposal making peremptory the principle of the common heritage of mankind. See Oxman, *The Third United Nations Conference on the Law of the Sea: the Eighth Session (1979)*, 74 *Am. J. Int'l L.* 1, 38-40 (1980).

119. Elias, *supra* note 41, at 49-51. Article 64 reads: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." Vienna Convention, *supra* note 1, art. 64.

in conflict with it, but maintenance of the treaty provision in the future must yield to the norm. The decision of the Inter-American Commission on Human Rights in the execution of juveniles,¹²⁰ and possibly the World Court case of *Nicaragua v. United States*,¹²¹ exemplify the process of changing prior treaty and customary international law.

This brief survey has outlined the *jus cogens* concept. Despite skepticism of its role in international law, this abstract concept continues to amaze scholars with its vitality, incoherence, and paradox. Traditional international law of the nation-state system is responding to accommodate emerging and intense demands to protect fundamental interests. Peremptory norms challenge or endorse the validity of changes of this magnitude and introduce the problems of continuity and discontinuity in international public order.

III. CONTENT AND IDEOLOGY

Jus cogens or public order concepts differ in another way from the legal order served by ordinary rules of international law.¹²² They provide hope for giving priority to ordinary rules or adding content to the most compelling interests of international society. The possibility of content of peremptory norms may be intrinsically more important in function than ordinary norms are in operation.¹²³ In light of this analysis, does the *jus cogens* concept conceal or promote unifying normative content? Is it an Austinian order of the concealed and naked power of a "political superior,"¹²⁴ however different and non-hierarchical its function? Is the *jus cogens* concept simply a description of diverse social facts operating in an institutional setting? Is it only def-

120. See *infra* notes 154-59 and accompanying text.

121. See *infra* notes 152-53 and accompanying text.

122. Onuf & Birney, *supra* note 17, at 189.

123. *Id.* at 189-90. Substantive norms have no hierarchical purpose, in this view. They simply perform different functions reciprocally and horizontally.

Although individual peremptory norms seem to have a *content* intrinsically more important than ordinary rules, it may actually be that they perform a *function* more vital to the workings of the legal order than do the overriding number of individual norms not designated as peremptory. If peremptory norms have nothing to do with ordinary rules in terms of their operation and yet seem to be superior because of their function, this is not to say that either kind is more *legal* in character than the other. Both kinds of norms are equally legal because they arise from a legally designated source of international law and are stated as law, no matter what function they perform in the legal order.

Id. at 189 (emphasis in original).

124. J. Austin, *The Providence of Jurisprudence Determined and the Uses of the Study of Jurisprudence* 13-14 (1954).

initial? Is the concept purely a moral and ethical imperative? What substantive content might it offer in the future? What does it mean? What difference does it make? Can the doctrine withstand a critique of the contradiction between concept and experience? What parts do power, authority, and normative content play in *jus cogens* decisions?

Awareness of the ideological purposes served by the general *jus cogens* principle helps to answer many of these questions. Explicit or concealed assumptions such as those identified earlier bias the definition and development of peremptory norms.¹²⁵ Even the assertion that the concept *jus cogens* lacks content hides substantive and ideological assumptions.

A. Questions of Content

Even as its symbolic use increases, the formal category of compelling supernorms not only remains enshrouded in mystery but also seems unworkable and ineffective.¹²⁶ Nevertheless, scholars cite it with surprising frequency to support various substantive propositions.¹²⁷ Practical discussion of indelible peremptory norms of general international law no longer seems foolish. The content of these compelling principles, defying codification, provides fair game for endless speculation.¹²⁸ The literature recommends content along lines

125. See *supra* notes 40-42 and accompanying text.

126. See, e.g., Rubin, *supra* note 89, at 258.

127. Inventive uses for the concept abound. Several scholars argue that *jus cogens* is or should be incorporated into the American Constitution as a limitation on the national powers of the President and Congress. Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 Harv. L. Rev. 853, 873 n.89, 879 (1987); Lobel, *supra* note 117, at 1141-42. Human rights advocates use *jus cogens* to distinguish human rights norms of greater or lesser importance. Meron, *supra* note 3, at 190-91; Schachter, *supra* note 3, at 339. A contemporary scholar argues that *jus cogens* might prevent any limitation on the inherent right of self-defense under Article 51 of the UN Charter, allowing a proper use of anticipatory self-defense. Rubin, *supra* note 89, at 255. It is used to support the inevitable march of socialist progress. Alexidze, *supra* note 3, at 262-63. The idea of a peremptory norm may be useful in solving the dilemma of the validity of conflicting treaties. Binder, *supra* note 81, at 380 n.159. The proliferation of nuclear weapons through transfers of nuclear technology might be prohibited by peremptory norms meeting postulated criteria for determining the content of *jus cogens* norms. Note, *The Jus Cogens Dimensions of Nuclear Technology*, 13 Cornell Int'l L.J. 63 (1980). The doctrine of *jus cogens* undergirding "self-determination" provides "a more satisfactory explanation for the phenomenon of the non-recognized State that fulfils the traditional requirements of statehood than does the construction of a new criterion of statehood." Dugard, *supra* note 3, at 132.

128. Ulrich Scheuner proposed three distinct groups of norms: First, rules protecting "the foundations of law, peace and humanity," as in prohibitions of genocide, slavery, or the use of force; second, rules of peaceful cooperation, as in protections for fundamental common interests such as the freedom of the seas; and third, rules protecting "human dignity, personal

generally reflecting the political or moral orientation of Western, Third World, or socialist positions. Specific questions about particular uses of *jus cogens* norms fall uneasily into four groups, each susceptible to any one of the above interpretive postures.

1. *Peace and Security*

The first group includes questions about public order arrangements affecting the foundations of law, peace, and humanity.¹²⁹ The norm against the use of force in international relations is not the only area of speculation. Do the limits to self-defense in Article 51 of the UN Charter conflict with a contemporary *jus cogens* norm of autonomy and self-determination of States?¹³⁰ Can several States agree to maintain constitutional order in the territory of a third?¹³¹ Do peremptory norms prohibit international trade in nuclear weapons or technology?¹³² Does a *jus cogens* norm of self-determination affect an act of recognition or non-recognition of a new State or government?¹³³

2. *State Abuse of Human Rights*

A second group of normative public order questions explores the limits that *jus cogens* norms place on a State's authorization for violation of human rights.¹³⁴ Does the execution of juveniles for capital crimes or the imposition of cruel and inhumane punishment violate a rule of international law of *jus cogens* quality? What burdens do *jus cogens* norms place upon the State to justify capital punishment

and racial equality, life and personal freedom." Mann, *supra* note 73, at 401-02; see also Whiteman, *supra* note 3, at 625-26 (proposing 20 categories); Sztucki, *supra* note 3, at 76-89 (cataloging various groupings at length).

129. This is part of the first of Scheuner's categories. Mann, *supra* note 128, at 401-02. Haimbaugh classifies *jus cogens* content into two broad categories, (1) peace and security and (2) human rights. Haimbaugh, *supra* note 1, at 212-22 (including his bibliography for the first category).

130. This was raised in *Nicaragua v. United States*. See *infra* note 214 and accompanying text.

131. This issue was raised in the Cyprus agreement between the United Kingdom, Greece, and Turkey, see *supra* note 79; the ICJ decision regarding Namibia, see *supra* note 70; and the condominium for Palestinians on the West Bank, between Israel and Jordan, proposed in the Camp David Accords, see *supra* note 81.

132. See generally Note, *supra* note 127.

133. Dugard, *supra* note 3, at 158-62.

134. Citing McDougal, Reisman, and Chen, among others, to the effect that norms of the Universal Declaration of Human Rights are of *jus cogens* quality, the Revised Restatement takes the position that the rules of section 702 defining the customary international law of human rights "are peremptory norms (*ius cogens*), and an international agreement that would violate them would be void." Revised Restatement, *supra* note 1, § 702 comment 1. Section 702 reads:

involving racial bias? Can States validly prescribe or agree to the use of techniques of coercion against alleged "terrorists" to extract information crucial to protect a local population?¹³⁵ What justification is required for collective coercion by the State against unauthorized private violence by individuals, including punishment for crimes, or against private arrangements, a clawback provision of public order.¹³⁶ Can States validly agree to extradite certain "freedom-fighters" accused of "political crimes"?¹³⁷ Can States place reservations on

A state violates international law if, as a matter of state policy, it practices, encourages or condones

- (a) genocide,
- (b) slavery or slave trade,
- (c) the murder or causing the disappearance of individuals,
- (d) torture or other cruel, inhuman or degrading treatment or punishment,
- (e) prolonged arbitrary detention,
- (f) systematic racial discrimination, or
- (g) consistent patterns of gross violations of internationally recognized human rights.

Id. at § 702. But see Lillich, *Civil Rights*, supra note 97, at 117-18; Lillich, *Remarks*, supra note 97, at 86 n.2; Meron, *Human Rights Law Making in the United Nations*, supra note 97, at 193-94; Meron, *On a Hierarchy of Human Rights*, supra note 97, at 16-17 (all challenging that all the norms in the Restatement are necessarily of *jus cogens* quality); Schachter, supra note 3, at 340 (stating that no authoritative official body has raised human rights to the level of *jus cogens*).

135. See G. Wardlaw, *Political Terrorism: Theory, Tactics, and Counter-measures* 26 (1982) (posing "the possibility that a terrorist group may gain access to nuclear, biological, or biochemical materials" and hold a population hostage).

136. Professor Rosalind Higgins distinguishes the clawback (or suspension of obligations for reasons of public order in normal circumstances) of human rights by the state from the non-derogability of certain human rights deemed peremptory in time of emergency. R. Higgins, *Derogations Under Human Rights Treaties, 1976-77* Brit. Y.B. Int'l L. 281, 281-82 (1978). An example of a domestic clawback provision is the British law requiring a plaintiff subject to British law to pay back punitive damages awarded against a British defendant by a foreign court for activities extraterritorial to the forum. *British Airways Board v. Laker Airways Ltd., H. of L. (Engl.)* [1985] L. Repts., 58, 89-94. No one yet has suggested that a treble-damage civil action for extraterritorial antitrust violations of United States law encounters a peremptory norm of *jus cogens* for upsetting a fundamental interest of international society.

137. This question was raised in hearings on Supplementary Treaty Concerning the Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, Signed at London on 8 June 1972. See S. Exec. Rept. 99-17, *Supplementary Extradition Treaty with the United Kingdom*, Senate Committee on Foreign Relations, 99th Cong., 2d Sess., July 8, 1986. Extradition treaties, while not directly depriving human beings of basic rights, may have consequences in implementation that could violate human rights of *jus cogens* quality when the accused will be a victim of abuse by the requesting state. Thus, the attempt to eliminate the political offense exception to extradition might be subject to an overriding *jus cogens* norm. The prestigious Institut de droit international in fact adopted a resolution on extradition in 1983 permitting refusal of extradition in such cases, notwithstanding a treaty requirement. See 60 Y.B. Inst. Int'l L. 214 (1984); see also Meron, supra note 3, at 194-95; Schachter, supra note 3, at 340.

human rights conventions eliminating the non-derogability clauses for certain enumerated human rights?¹³⁸ Do peremptory norms impose affirmative duties upon States to prevent starvation or conditions conducive to private human servitude or gross exploitation?

3. *State Responsibility to Entire International Community*

A third group of questions seeks to distinguish ordinary international delicts from international criminal responsibility from which no derogation is possible.¹³⁹ In other words, the concept would distinguish between legitimate and illegitimate variances from customary international law. In this distinction lies the possible beginning of international criminal law through non-derogable peremptory norms of international public order. Can one State or a group of States hold another State responsible for wrongs to the international community as a whole (as in apartheid, for example) even if their interests are not immediately affected?¹⁴⁰ As shall be seen, the one question (defection from ordinary norms of state responsibility by accepting the legal consequences of obligation to repair the delict) quickly can become the other (preventing any defection from peremptory norms).

4. *Peaceful Cooperation*

The fourth group questions defections from norms of peaceful

138. Sinclair, *supra* note 3, at 211-12. The Inter-American Court of Human Rights, in its Advisory Opinion on Restrictions to the Death Penalty (American Convention on Human Rights arts. 4(2), 4(4)) OC-3/83 of 8 Sept. 1983. Ser. A No. 3, said that such a reservation was incompatible with the purpose of the Convention and not permitted by it. Judge Buergenthal finds a nexus between nonderogability and incompatibility adding "force to the conceptual interrelationship which exists between certain fundamental human rights and emerging *jus cogens* norms." Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 *Am. J. Int'l L.* 1, 25 (1985) (citation omitted); see also Meron, *supra* note 3, at 192-94.

139. Thus, the International Law Commission uses the concept of *jus cogens* in Article 19 of its draft on the law of state responsibility to distinguish between international delicts where sovereign states may breach an obligation and accept the legal consequences of state responsibility and international criminal conduct where no derogation from the norm is permissible. See Report of the International Law Commission on the work of its twenty-eighth session (3 May-23 July 1976), U.N. Doc. A/31/10, [1976] 2 *Y.B. Int'l L. Comm'n* 1, 120, U.N. Doc. A/CN.4/SER.4/1976/ Add. 1 (Part 2). Absent strong central organs, however, who speaks for the fundamental interests of international society when the interests of the affected parties to a treaty or in relation to a wrongdoers are remote? The notion of international criminal responsibility of states is far too abstract to allow an adequate sanctioning process, although in theory the international community authorizes decentralized sanctions against states breaching obligations *erga omnes*. See Gaja, *supra* note 3, at 299-301.

140. United Nations Codification of State Responsibility (M. Spinedi & B. Simma eds. 1987) 17 (obligations *erga omnes*), 87, 185 (limiting counter-measures), 109-14 (supervening peremptory norms), 134-35 (*jus cogens* broader than international crimes).

cooperation. Does UN Charter Article 2(3) (requiring peaceful settlement of disputes) have the same *jus cogens* quality as the prohibition against the use of force in Article 2(4)?¹⁴¹ Does Article 94 of the Charter compel deference to decisions of the International Court of Justice thus preventing a State from invoking customary norms of the doctrine of *excès de pouvoir*?¹⁴² Or might States claim *excès de pouvoir* as a peremptory norm conditioning the treaty obligation, thereby preventing defections from public order norms by an international tribunal?¹⁴³ What party or body has sufficient standing to insist on an effective override by peremptory norms fundamental to the interest of international society?¹⁴⁴

The hypotheticals in the four groupings above (in contrast to the usual abstract questions about the use of force, slavery, or genocide, or the separation between public order and human rights) are not just odd philosophical puzzles. With imagination, international lawyers might use the logic of the concept to serve any number of interests. For some years now, dicta in the opinions of the International Court of Justice have shaped what some consider a particular ideological vision of *jus cogens*.¹⁴⁵ In *Barcelona Traction*,¹⁴⁶ for example, Judge Ammoun associates self-determination with imperative norms of *jus cogens* he thinks were sanctioned by representatives of most States at the Vienna Conference on the Law of Treaties.¹⁴⁷ He connects self-determination to *jus cogens* principles or "imperative juridical norms" underlying the UN Charter.¹⁴⁸ New international law references in

141. See Rosenstock, *supra* note 95, at 685 (U.S. Representative Rosenstock suggesting, in his comment on Soviet proposals on the non-use of force, that this was the case).

142. If so, this conclusion would limit the application of the customary norm of international law of *excès de pouvoir* (adapted from French law and translated to mean "excess of jurisdiction") as applied to international tribunals. See also W.M. Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards 60-67* (1971) (reviewing the efforts of the International Law Commission to create an acceptable standard of *excès de pouvoir*.)

143. *Id.* at 546-47.

144. See Schachter, *supra* note 3, at 341-42.

145. Mann, *supra* note 73, at 411-12.

146. *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, 1970 I.C.J. 3 (Judgment of Feb. 5).

147. Judge Ammoun writes of the new international law:

Against the defenders of the last bastions of traditional law, there thus stand arrayed, once again, with the support of a Western minority, the serried ranks of the jurists, thinkers and men of action of the Latin American and Afro-Asian countries, as well as of the socialist countries. For all of them self-determination is now definitely part of positive international law.

Barcelona Traction, 1970 I.C.J. at 312 (separate opinion, Ammoun, J.).

148. *Id.*

other dicta, promoting a "New Higher Law of Anti-Colonialism,"¹⁴⁹ have supported, with explicit and inventive references to *jus cogens* norms, an emerging, particularly ideological, international law formed by all peoples. Nor is it surprising that the Court, not wishing to challenge directly Western skepticism about an overgenerous *jus cogens*, avoids specific holdings that advance Third World or socialist concepts more favorable to their political interests. This result keeps *jus cogens* doctrine alive through separate opinions while the majority reaches the same conclusion by reasoning based upon premises of international public policy, if not pure *jus cogens*.

B. *Content of Jus Cogens Norms in Two Recent Decisions*

The recent decisions by the World Court and the Inter-American Commission on Human Rights illuminate this ideological conflict. Each holds the United States in violation of norms of international law arguably of *jus cogens* quality. The *Nicaragua* case develops the customary and basic norm against the use of force (a group one norm).¹⁵⁰ The other applies a peremptory norm of international human rights (a group two norm)¹⁵¹ in the relationship between the Federal government, the States, and individuals in the United States.

1. *Nicaragua v. United States*

In the case brought by Nicaragua against the United States, the International Court of Justice decided that the United States violated both a general customary norm prohibiting the use of force against another State and a customary norm of non-intervention. Several opinions support the decision by showing that the norms are of *jus*

149. Emerson, *The New Higher Law of Anti-Colonialism*, in *The Relevance of International Law, Essays in Honor of Leo Gross* 153 (1968); Emerson, *Self-Determination*, 65 *Am J. Int'l L.* 459 (1971); Kiss, *The Peoples' Right to Self-Determination*, 7 *Hum. Rts. L. J.* 165 (1986); Cassese, *Self-Determination of Peoples*, in *International Bill of Rights* 111 (L. Henkin ed. 1979) (*jus cogens* character of self-determination is "conclusively demonstrated" and probably reflected in the Declaration on Friendly Relations, limited to colonial peoples); Espiel, *Self-Determination and Jus Cogens*, in *UN Law/Fundamental Rights: Two Topics in International Law* 167-73 (Cassese ed. 1979).

150. See *supra* notes 129-33 and accompanying text. Henkin considers the U.N. Charter norm against the use of force to be the most fundamental for international society, calling it the "principal norm of contemporary international law." L. Henkin, *How Nations Behave* 129 (1968). In the second edition, Henkin changed this language to read: "The principal development in international law in our time is the law of the United Nations Charter outlawing the use of force in international relations." *Id.* at 135 (2d ed. 1979) (citation omitted). He added, "ideological struggle and the emergence of the Third World have exerted pressures on, and changed the contents and influence of, that law." *Id.*

151. See *supra* notes 139-40 and accompanying text.

cogens quality, although the judgment does not specifically hold that a preemptory norm requires the result.¹⁵² The decision presents questions about important norms of public order against the use of force developing outside the United Nations Charter framework. A legal action by Nicaragua on the judgment might invoke norms of *jus cogens* quality to hold the United States responsible to comply with the judgment. A defense by the United States could then assert a *jus cogens* challenge to the validity of the Court's active assertion of jurisdiction.¹⁵³ If the Charter ineffectively maintains the peace, when, if at all, may state practice in effect modify the Charter norms by providing an alternative customary law of public order? When, if at all, may customary international law of *jus cogens* quality modify an obligation to comply with decision? Might a different preemptory norm for inherent self-defense force revision in the meaning of Article 51? Might non-intervention norms of customary international law be guided by new *jus cogens* norms?

2. *Decision of Inter-American Commission on Human Rights*

In late March 1987, the Inter-American Commission on Human Rights decided that the United States had violated the right-to-life provision of the American Declaration of the Rights and Duties of Man in allowing the execution sentences of James Terry Roach and

152. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, 1986 I.C.J. 14 (Judgment of June 27). Paragraph 190 refers to claims that the prohibition against the use of force in international relations is *jus cogens* in support of showing the existence of an independent norm of customary international law. *Id.* at 100-01. In a separate opinion, President Singh states that the Court's decision not to apply treaty law to the case, but rather to apply customary international law which outlaws the use of force in international relations, "represents the contribution of the Court in emphasizing that the principle of non-use of force belongs to the realm of *jus cogens*, and is the very cornerstone of the human effort to promote peace in a world torn by strife." *Id.* at 153 (Singh, J., separate opinion). Judge Sette-Camara also refers to the norm's *jus cogens* quality: "[T]he non-use of force as well as non-intervention — the latter as a corollary of equality of States and self-determination — are not only cardinal principles of customary international law but could in addition be recognized as preemptory rules of customary international law which impose obligations on all States." *Id.* at 199 (Sette-Camara, J., separate opinion). See generally Christenson, *supra* note 86.

153. Consider an action in the United States to enforce a judgment against the United States by the International Court of Justice at the reparations phase. Any such case, in the unlikely event Nicaragua would bring it, most likely would be dismissed under the political question doctrine. Were the merits to be reached, however, the United States courts would have the opportunity to consider some broad concepts of public order to reach a reasoned result one way or the other. Inevitably, fundamental interests of international society would need appraisal, even if the result were deference to the Executive's act that considered the World Court's assumption of jurisdiction to be beyond the fundamental interests of a community of sovereign states.

Jay Pinkerton. These petitioners were juveniles at the time they committed the capital crimes for which they were convicted by South Carolina and Texas courts, respectively. They were both later executed. The Commission specifically found that a norm of *jus cogens* quality prohibits state execution of children in the OAS system.¹⁵⁴ It asserted that the right-to-life provision of the American Declaration contains an emerging prohibition against laws permitting execution of juveniles.¹⁵⁵ The United States could not defect from the emergence of such a customary norm by objection or protest, as a "persistent objector", because the peremptory norm prevents such defection.¹⁵⁶ The single dissent asserted that a *jus cogens* norm prohibiting execution of juveniles convicted of capital crimes had not emerged.¹⁵⁷

Two aspects of the decision illustrate a supervening *jus cogens* norm's effect on prior treaty and customary international law. First, the Commission used the supervening peremptory norm it "found," in part from the International Law Commission's work on treaties, to interpret the Declaration on the Rights and Duties of Man. The

154. Resolution No. 3/87, Case No. 9647 (United States), Inter-Am. C.H.R., OEA/ser. L/V/II.69, doc. 17 para. 56 (27 March 1987).

155. "The Commission finds that in the member States of the OAS there is recognized a norm of *jus cogens* which prohibits the State execution of children. This norm is accepted by all the States of the inter-American system, including the United States." Id.

156. See Revised Restatement, supra note 1, § 102 comment d (recognizing for the persistent objector an exemption from an emerging customary norm); see also Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 Harv. Int'l L.J. 457, 459-60 (1985). It is unlikely that the persistent objector rule would apply to an emerging customary norm of human rights under section 702 of the Restatement when the objection is to a norm of *jus cogens* quality. The United States has persistently objected to mandatory standards of customary law or treaty prohibiting execution of juveniles, since states presently have discretion to render such sentences under the United States Constitution. The Inter-American Commission decision found that the *jus cogens* norm against executing children disabled the persistent objection of the United States to an emerging customary norm used in interpreting a treaty: "Since the United States has protested the norm, it would not be applicable to the United States should it be held to exist. For a norm of customary international law to be binding on a State which has protested the norm, it must have acquired the status of *jus cogens*." Resolution No. 3/87, Case No. 9647 (United States), Inter-Am. C.H.R., OEA/ser. L/V/II.69, doc. 17 para. 54 (27 March 1987) (citation omitted). Thus, the objection, encountering a peremptory norm, dissipates and is not available to disclaim the binding effect of customary international law; see also Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 Br. Y.B. Int. L. 1, 3-4 (n.11), 20 (1985).

157. The dissenting member, Dr. Cabra, disagreed with the Commission's view that a *jus cogens* norm could be regional. Without approval of the international community as a whole, which it did not have, the emerging customary international law norm or the treaty norm within the Inter-American system could not have *jus cogens* quality. Resolution No. 3/87, Case No. 9647 (United States), Inter-Am. C.H.R., OEA/ser. L/V/II.69, doc. 17, Dissenting Opinion of Dr. Marco Gerardo Monroy Cabra 13-14 (27 March 1987).

interpretation sought consistency between the emerging new customary norm against executing juveniles and the *jus cogens* norm of the same content. Finding them the same, it used the customary norm, reinforced by the peremptory norm, to find the United States in violation of the Declaration's right-to-life provision. Second, the Commission used the supervening peremptory norm to prevent the United States from claiming the persistent objector exception to the development of an ordinary customary norm against the execution of juveniles.

The Commission acted on behalf of the Inter-American system, but on the application of two individuals, not governments. Challenging the United States' claim of defection from a *jus cogens* norm, the Commission asserted that the countries of the Americas region, including the United States, had accepted the norm.¹⁵⁸ This decision revises prior customary and treaty law by finding a supervening peremptory norm to guide interpretation, another irony for the United States with its own moral penchant for holding other American States to fundamental human rights standards in the treatment of their nationals.

Even more biting is the second holding that the United States had denied equal treatment of the minimum international standard of *jus cogens* by allowing the fifty states the discretion to sentence juveniles to death for capital crimes.¹⁵⁹ Latin American countries have long resented the U.S. and European position on minimum standards for protecting aliens as well as nationals.¹⁶⁰ Here, the *jus cogens* concept plays an indispensable doctrinal role in differentiating a mandatory from discretionary regional standard. Taken seriously, the *jus cogens* norm would force revision in (or negate) the legal effect of the U.S. unilateral objection to the emergence of a rule of customary international law against executing juveniles.

C. *Current Development and Appraisal*

It remains to be seen whether the Inter-American Commission's

158. Paragraph 57 of the decision explains that the case arises not because the United States denies the existence of the international norm prohibiting execution of children but because no consensus exists about the age at which the states may try juveniles as adults before criminal courts. Resolution No. 3/87, Case No. 9647 (United States), Inter-Am. C.H.R., OEA/ser. L/V/II.69, doc. 17 para. 57 (27 March 1987).

159. *Id.* para. 65.

160. F. Dawson & I. Head, *International Law, National Tribunals and the Rights of Aliens* 5-26 (1971); Dawson, *International Law, National Tribunals and the Rights of Aliens: The Latin American Experience*, 21 *Vand. L. Rev.* 712, 720-21 (1968).

decision will aid development of a supernorm accepted as fundamental. Will the decision deter the United States' continuing defection from an emerging norm of customary international law or influence a revision of Constitutional restraint on the states? Or will the United States join nations such as South Africa and the Soviet Union which reject the implications of external *jus cogens* decisions as a legal basis for internal revision of norms in conflict with peremptory norms?¹⁶¹ Either way, the symbolic demands and heightened community expectations flowing from the International Law Commission's initial work suggest contradiction in the content of peremptory norms protecting interests fundamental to international public order. Using *jus cogens* to require minimum humane treatment while using it to maintain the states system will inevitably promote conflicts when these norms are invoked to force revision in ordinary international law. States prescribing derogations from overriding human rights norms of *jus cogens* quality bear a far greater burden for revising those prescriptions than they will for revising breaches of other less fundamental human rights norms.¹⁶² If revision threatens to undermine the foundations of the states system by forcing a reallocation of control within the existing public order system that maintains the monopoly of coercion, then the *jus cogens* concept will amount to little more than the traditional uses of peremptory norms to preserve the existing states system of order, just as the traditional concept of municipal public order maintains the monopoly of power from within.

Consider capital punishment cases in the United States involving juveniles or interracial capital crimes. Although the United States Supreme Court denied a petition for a writ of certiorari in the Roach¹⁶³ and Pinkerton¹⁶⁴ cases, it may yet decide the Constitutionality of juvenile executions. The Court is now reviewing a case involving the death sentence of a juvenile.¹⁶⁵ This case gives the Court an

161. See Teson, *International Human Rights and Cultural Relativism*, 25 Va. J. Int'l L. 869, 879-84 (1985) (critiquing the cultural relativism underlying the defense of exclusive domestic jurisdiction).

162. The question of apartheid in South Africa presents the most poignant aspect of the contradiction between possible *jus cogens* norms against racial discrimination and non-intervention. See Revised Restatement, *supra* note 1, at § 702 comments i, 1 (discussing apartheid and human rights violations as contrary to *jus cogens*).

163. *Roach v. Martin*, 757 F.2d 1463 (4th Cir. 1985), cert. denied 474 U.S. 865 (1985).

164. *Pinkerton v. State*, 660 S.W.2d 58 (Tex. Crim. App. 1983), cert. denied 474 U.S. 865 (1985).

165. *Thompson v. State*, 724 P.2d 780 (Okla. Crim. App. 1986), cert. granted 107 S.Ct. 1284 (1987). On June 29, 1988, after this article went to press, the Supreme Court reversed the sentence in *Thompson v. Oklahoma* as cruel and unusual punishment where the capital defendant was less than sixteen years of age at the time of the offense and the state did not

opportunity to consider the Commission decision in its deliberations, especially since the United States has petitioned the Commission for reconsideration. Should the Supreme Court give any weight to arguments that derogations from *jus cogens* norms ought to bear the most searching justification? In deciding the validity of death sentences of convicted juveniles, the Court can help shape peremptory norms and also reflect them in expressing contemporary standards for determining cruel and unusual punishment. Whether explicit or not, the Court's decision would most likely recognize the Commission's reasoned opinion, even if the Court does not face the particular issue of the authority of peremptory norms or international law under the Federal system. Nonetheless, these norms might show a stronger and more powerful principle of public order than ordinary norms of treaty and customary international law, which seem to have had little effect so far on these Constitutional questions.

In the meantime, another petition from a United States citizen under death sentence, a black adult in Louisiana who subsequently has been executed, is pending with the Inter-American Human Rights Commission.¹⁶⁶ This petition challenges racial bias in certain death sentences. It invokes specific standards potentially of *jus cogens* quality against racial discrimination and cruel and unusual punishment contained in the Charter of the Organization of American States, a treaty to which the United States is a party.¹⁶⁷ The recent *McCleskey*

establish a minimum age for death sentences. See *Thompson v. Oklahoma*, 56 U.S.L.W. 4892 (June 29, 1988). The next day the court granted review of two other juvenile death sentence cases. See *High v. Zart*, No. 87-5666 and *Wilkins v. Missouri*, No. 87-6026, N.Y. Times, July 1, 1988, at 7, col. 1.

166. Case 10.031 (United States), Inter-Am. C.H.R., filed July 17, 1987.

167. The OAS Charter contains the following: "The American States proclaim the fundamental rights of the individual without distinction as to race. . . ." Charter of the Organization of American States, Apr. 30, 1948, art. 3(j), 2 U.S.T. 2394, 2418, T.I.A.S. No. 2361 (as amended by the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, 660, T.I.A.S. No. 6847). The Senate advised and consented

to ratification of the Charter with the reservation that none of its provisions shall be considered as enlarging the powers of the Federal Government of the United States or limiting the powers of the several states of the Federal Union with respect to any matters recognized under the Constitution as being within the reserved powers of the several states.

Id. at 2484.

The Declaration of the Rights and Duties of Man, approved by the Ninth International Conference of American States (Bogota, 1948), reprinted in Secretariat for Legal Affairs, Gen. Secretariat of the Org. of Am. States, 1 *The Inter-American System: Treaties, Conventions & Other Documents* (Part II) 4 (1983), contains the following provisions: Article I: "Every human being has the right to life, liberty and the security of his person." *Id.* at 6. Article II: "All persons are equal before the law and have the rights and duties established in this declaration, without distinction as to race. . . ." *Id.* Article XXVI: "Every person accused of an

decision by the United States Supreme Court declined use of statistics showing racial bias in death sentences to invalidate such a death sentence under the Equal Protection Clause of the Fourteenth Amendment.¹⁶⁸ The claim of violation of a peremptory norm of human rights against racially biased cruel and unusual punishment has not yet been made, although it might be arguable in light of the juvenile execution cases. The United States Government answered, arguing that the petition in this case does not state facts that constitute a violation of the rights referred to in the American Declaration of the Rights and Duties of Man.¹⁶⁹

Under the Supremacy Clause, the Supreme Court ought to consider and weigh the *jus cogens* quality of the OAS Charter norms if they are at variance with state law. If of *jus cogens* quality, these treaty norms should have a stronger influence on interpretation of Federal limitations against state action than does ordinary customary or treaty law. First, the treaty norms, as interpreted by the Inter-American Human Rights Commission, are law-making prescriptions done under the authority of the United States as provided in the Constitution and are entitled to deference, especially if they contain norms so compelling

offense has the right to be given an impartial and public hearing . . . and not to receive cruel, infamous or unusual punishment." *Id.* at 12.

The petition argues that the provisions of the American Declaration acquire binding force under the OAS Charter and that violations of Declaration provisions are therefore violations of treaty obligations. Relying upon T. Buergenthal, R. Norris & D. Shelton, *Protecting Human Rights in the Americas: Selected Problems* (1982), the petition states:

Article 3(j) of the OAS Charter . . . provided the constitutional basis for the establishment in 1959 of the Inter-American Commission of Human Rights and for the application in the inter-American system of the American Declaration of the Rights and Duties of Man. The latter instrument was proclaimed in 1948 by the same OAS conference that adopted the OAS Charter. The American Declaration has over the years come to be accepted as an authoritative legal source for determining what categories of human rights are 'fundamental rights of the individual' within the meaning of Article 3(j). This proposition finds expression in the Statute (constitution) of the Inter-American Commission on Human Rights, which declares that 'for purposes of this Statute, human rights are understood to be those set forth in the American Declaration of the Rights and Duties of Man.' [Art. 2] The revised OAS Charter provides, in turn, that the Commission's 'principle function shall be to promote the observance and protection of human rights.' [Art. 112] The promotion of the human rights proclaimed in the American Declaration is thus a basic principle and goal of the Inter-American system that the OAS Member States accepted by ratifying the OAS Charter. A state consequently violates its treaty obligations when it pursues governmental policies that cannot be reconciled with the American Declaration.

Id. at 27-28.

168. *McCleskey v. Kemp*, 107 S.Ct. 1756 (1987).

169. Memorandum of the United States to the Inter-American Commission on Human Rights in Case 10.031 (Willie Celestine) (on file at the Urban Morgan Institute for Human Rights, College of Law, University of Cincinnati).

within the Inter-American community to amount to an intensely held expectation of the community as a whole. Their effect ought to increase the burden of justification in applying ordinary norms that permit deprivations of fundamental human rights. Just as some state constitutions provide similar stringent burdens of justification beyond that available in the Bill of Rights, so should specific peremptory norms of international law increase the burden of justification of state executions involving juveniles and interracial capital crimes.

Second, these norms, fundamental to the interests of a humane international society and overwhelmingly accepted as such, should constrain judicial interpretation of open-ended treaty standards. A responsive decision by the Supreme Court should account for any recommendations and reasoning on the international law aspects in these racial discrimination petitions, especially if the norms are of *jus cogens* quality and thus express overriding community policy. Nevertheless, because a peremptory norm is not easily demonstrated, there is danger that the Court could convert a *jus cogens* argument into a nearly impossible test of when to give domestic effect to international human rights standards. Because a poorly reasoned decision by the Inter-American Human Rights Commission would be ineffective if not disastrous in its persuasive function, inviting rejection out-of-hand, the Commission must employ greater care and judicial craft than it did in the juvenile execution decision.¹⁷⁰ Instead of needlessly discussing whether the national government should preempt states from exercising their discretion to sentence juveniles to death, the Commission should have limited the question to the substantive one: whether the United States violates international law by state execution of juveniles. Because acts of political subdivisions are attributable to the

170. Professor Covey Oliver has criticized zealous human rights advocates for overstating their claims before domestic appellate courts in the United States, failing to shape their arguments with sufficient skill to guard against a major set-back if the appellate court rejects their position. See Oliver, *The Treaty Power in National Foreign Policy as Vehicles for the Enforcement of Human Rights in the United States*, 9 Hofstra L. Rev. 411, 431 (1981). For responses to this tactical point, see Christenson, *The Uses of Human Rights Norms to Inform Constitutional Interpretation*, 4 Hous. J. Int'l L. 39, 54-55 (1981) (arguing that the indirect incorporation approach of heightened scrutiny is less vulnerable to attack than a direct incorporation position); Schneebaum, *International Law as Guarantor of Judicially-Enforceable Rights: A Reply to Professor Oliver*, 4 Hous. J. Int'l L. 65 (1981). For theories of direct and indirect use of norms of international human rights law in constitutional interpretation, see Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. Cin. L. Rev. 3 (1983); Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. Cin. L. Rev. 367, 408-12 (1985); Comment, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. Rev. 1195 (1987).

State once domestic remedies are exhausted,¹⁷¹ an international commission need not pass judgment on the domestic Constitutional allocation of discretionary power between the national and state governments. *Jus cogens* principles are important here because they might prevent a legal objection to emerging customary law, not because they impose a duty upon a national government to preempt the discretion of its political subdivisions.

The decision of the Inter-American Commission on Human Rights recognizes a peremptory norm simultaneously with its recognition of an emerging customary norm. This circularity of "finding" a peremptory and customary norm of international law at precisely the same time defies easy explanation. The Commission made this "find" after the fact in order to recognize the emergence of a customary norm from which defection by protest is prohibited by the *jus cogens* norm. Why else is the *jus cogens* norm in that circumstance more easily recognized than the ordinary norm? As Onuf and Birney point out, such a result might emerge because the two structures of legal order simply differ and lack necessary logical relationship.¹⁷² Whether the two structures are incommensurable is beside the point for the moment, for the question of ordering normative experience is central to the idea of an international public order. The works of thoughtful scholars such as H.L.A. Hart,¹⁷³ Hans Kelsen,¹⁷⁴ Ronald Dworkin,¹⁷⁵ and many publicists in international law have reflected upon the relationship of ordinary norms to principles of public order, morality, and policy. New normative experience appears to be increasing in the international scene. While presently incoherent, the experience should not be discounted by a sweep of the positivist broom.

Except (especially?) in specific cases such as the two briefly mentioned above, the content of peremptory norms eludes description despite rough attempts at classification (such as the four groupings above) and other various speculations. Rather than emerging from within the structure of the concept itself, the content of *jus cogens* norms is shaped by outside interests and forces. States and decision-

171. Christenson, *The Doctrine of Attribution in State Responsibility*, in *International Law of State Responsibility for Injuries to Aliens* 321, 333-35 (Lillich ed. 1983).

172. Onuf & Birney, *supra* note 17, at 188-90.

173. See Hart, *supra* note 33, at 18-25, 208-31 (relating primary norms to public order secondary norms).

174. For Kelsen's attempt at contributing to world public order, see H. Kelsen, *Peace Through Law* 3-67 (1944) (see especially preface vii-ix).

175. See R. Dworkin, *A Matter of Principle* 9-32 (1955) (relating individual right to the public good); Dworkin, "Natural" Law Revisited, 34 *U. Fla. L. Rev.* 165, 183-88 (1982) (relating law to political order).

makers differentiate the formal category of supernorm into groupings to place their own interests and advantage before that of the international community. This differentiation in advantage-seeking by States, however, contradicts the purpose of *jus cogens* in guarding interests fundamental to international society. Defections from rules of international law are not in the interest of all, but may be in the interest of each. Is advantage-seeking any different when a different set of *jus cogens* norms purports to guard fundamental interests?¹⁷⁶ There is no satisfactory theory of civic virtue for the international society as a whole. The *jus cogens* concept has the virtue at least of concentrating on important interests of the global legal order for several reasons beyond narrow advantage-seeking.

First, the proliferation of treaties and other international agreements are challenging the traditional sources (and sources doctrine) controlling the stability of international norms.¹⁷⁷ Guido Calabresi has discussed the problem of proliferation of obsolete statutes uncoordinated with the fabric of the common law forced into legislative revision by judicial decision.¹⁷⁸ *Jus cogens* may likewise prove useful as a comparable doctrine providing order within proliferation of conflicting international law-making activities.¹⁷⁹

176. David Hume thought it in the interest of all States to have a law of nations that all nations obey, but that it is to the advantage and self-interest of each State not to obey it. See Harrison, *supra* note 45, at 229-33. However, a broader advantage to all may make it in the interest of a state not to defect from a *jus cogens* norm when it is perceived as necessary to survival, as in controlling serious environmental harm.

177. A. D'Amato, *The Concept of Custom in International Law* 73-102 (1971) (formulating a process of determining customary international law from state practice); A. D'Amato, *International Law: Process and Prospect* 123-47 (1987) (asserting that conventions themselves without subsequent acquiescence by States can create customary rules of law); Akehurst, *Custom as a Source of International Law*, 47 *Brit. Y.B. Int'l L.* 1, 42-53 (1974-75) (noting that treaties are evidence of customary law, but only if other objective evidence exists showing they declare custom); Baxter, *Treaties and Custom*, 129 *Recueil des cours* 25 (1970); Schachter, *supra* note 3, at 98-106 (noting that the relationship between treaties and custom depend upon complex political, economic, and ideological factors).

178. G. Calabresi, *A Common Law for the Age of Statutes* 1-7 (1982).

179. The role of the courts in revising anachronistic statutes to serve a traditional common law function of keeping the law up to date has a looser counterpart in international law in the role customary international law plays in revising out-of-date treaties. Not only international tribunals but also States have a function in practice of modifying treaties through interpreting them in light of customary international law. Schachter, *supra* note 3, at 103-10; Schachter, *The Nature and Process of Legal Development in International Society*, in *The Structure and Process of International Law* 745, 761-66, 773-81, 784-87 (R. St. J. McDonald & D. M. Johnston eds. 1986) (both suggesting customary international law as well as progressive codification as tools to aid revision of proliferating treaties and agreements). In the common law tradition, statutes in derogation of the common law were strictly construed. A similar rule of interpretation was articulated by Oppenheim: that treaties in derogation of customary international law could not change the latter or affect non-parties. 1 L. Oppenheim,

Second, the development of general peremptory norms interposes fundamental interest analysis to increase the burden of justification on States defecting from *jus cogens* norms and induces revision of prescriptions to avoid conflict with them. The attempt to clarify and give content to norms basic to international society through the use of *jus cogens* justifies a critical look beyond the system-bound assumptions that constitute our political and legal reality.¹⁸⁰ It would be foolish not to give critical scrutiny to the contending interests within *jus cogens* norms.

IV. THE PROBLEM WITH SUPERNORMS

A. *Mistrust of Unifying Myths*

A *jus cogens* supernorm is not a personal presence like Zarathustra. A faceless, immanent emptiness, an abstraction through which some human power might act to create a new order, it drags the dead past of modernism from the marketplace into light. As explained in part I, supernorms in this category are labeled peremptory because they prohibit or invalidate other norms.¹⁸¹ Confusion enters at once, for norms do not themselves prohibit or invalidate other norms; people with authority and power making decisions do.¹⁸² Through doctrine and symbol, peremptory norms communicate both expectations and likely outcomes of law-making decisions.¹⁸³ In a world of extraordi-

International Law 27-28 (H. Lauterpacht 8th ed. 1955). Rather than recognizing in customary law the function of up-dating or validating all international law including treaties, see D'Amato, *International Law: Prospect and Process*, supra note 177, at 132, I would argue that the concept *jus cogens* better serves this secondary rule function analogous to that articulated by H.L.A. Hart, although Schachter thinks sources doctrine serves the function better. Compare Hart, supra note 33, at 203-31 with Schachter, *The Nature and Process of Legal Development in International Society*, supra, at 763.

180. See Meron, supra note 3, at 201-02 (suggesting removal of "the underbrush that clutters the landscape of concepts and nomenclature . . .").

181. The Inter-American Human Rights Commission, for example, takes a natural or fundamental law view of this principle: "The concept of *jus cogens* is derived from ancient law concepts of a 'superior order' of legal norms, which the laws of man or nations may not contravene." Resolution No. 3/87, Case No. 9647 (United States), Inter-Am. C.H.R., OEA/ser. L/V/II.69, doc. 17 para. 55 (27 March 1987); see Thompson, supra note 7, at 1109-14 (illustrating the relationship between fundamental law and ancient constitutions).

182. One reason the International Court of Justice has applied norms thought by many to be of *jus cogens* quality, but has never said they were peremptory, is caution in claiming effective power to issue commands. Gaja, supra note 3, at 286. While the Inter-American Commission on Human Rights applied a peremptory norm against the United States, effective public order decisions applying or approving *jus cogens* norms are more likely to flow from nation-state power groups, although this power may begin to shift to individuals and groups beyond officials.

183. Reisman, supra note 33, at 105-13.

nary change and transition, patterns of decisions protecting interests fundamental to international society communicate normative demands. Caught on the tightwire between a primitive past and a cosmopolitan future, the international community needs guidance from a unifying symbol of humane public order. Guidance from public order decisions could bring treaties and customary international law into line with such fundamental interests, yet the exercise of power such decisions entail is distrusted.¹⁸⁴ The word *jus cogens* could symbolize those few principles of humane public order necessary for a decentralized world community. It could act as a mediating symbol of authority and language of public order without central institutions.¹⁸⁵ But words have lost meaning. The world community distrusts embracing this kind of myth as a means to legitimate action. Nietzsche, Santayana, or even Thurman Arnold might have applauded using the myth as symbol for the untethered creative spirit free to experiment. However, if both unintended violence, flowing from abstractions invoked in a reign of terror, and intentional violence, used to back a social revolution, are suspect when justified by such a myth, most surely suspect would be a creative "World Spirit" synthesized in power at the hierarchical apex or foundation of a mystical order called *jus cogens*.¹⁸⁶

B. *No Defections from Established Order*

In liberal thought, certain individualistic rights may "trump" other rights or limit the powers of the State. A major difficulty with the *jus cogens* concept and its new vision of public order is that the tradition from which it is drawn stands this liberal idea on its head. The "ancient law" referred to reverently by the recent decision of the Inter-American Commission on Human Rights exemplifies this con-

184. Professor Reisman recommends a very special significance for *jus cogens* in communicating policy content of a prescription of a super-ordinate norm that forces the revision of the content of a prescription of custom or treaty. In addition to policy content, the international law-making process requires communication of an authority signal and a control intention. *Id.* at 109; see also Carty, *supra* note 48, at 128-31 (offering a critical theory of introspective reflection rather than of empirical research into effective power and state practice).

185. See J. Vining, *The Authoritative and the Authoritarian* (1986) (suggesting domestic law without a Supreme Court and international law without central institutions); J. White, *When Words Lose Their Meaning* 3-23, 278-84 (1984) (reconstituting language and community).

186. Hegelian influence on German idealism, for instance, has been used to justify the obligation to keep treaties in a balance of power context. See Carty, *supra* note 48, at 74-81 (critiquing such an influence).

fusion.¹⁸⁷ Norms from the tradition of "ancient law" resemble fundamental law imperatives that flow from a long-established custom to prohibit individual human arrangements inimical to community or public order.¹⁸⁸ In late Roman law, the *jus strictum*¹⁸⁹ or the *jus publicum*¹⁹⁰ operated in this way to prohibit private arrangements that would disturb the class structure of public order.¹⁹¹ Defections could not be countenanced. Just or unjust, private law arrangements that threatened the ruling order were not permitted to change the status of persons (such as freedmen, slaves, and women) or legal obligations.

The new vision of a *jus cogens* of human rights, as articulated by the Inter-American Commission on Human Rights, would upset the existing public order system of nation-states by preventing a sovereign State from objecting persistently to the emergence of customary law. Moreover, *jus cogens* might prove especially upsetting when it intrudes into the relationship between a State and its nationals.¹⁹² This limitation on the law-creating function, traditionally the province of sovereign States, entails a completely different vision of public order, one in which nation-states and public officials are themselves subject to some fundamental limits on their power over all individuals within their jurisdiction. In the tradition of *ordre public*, good order overrides private and individual action inimical to it, subjecting individuals to the public good. If international human rights law disrupts this relation of a State to its citizens, what role does *jus cogens* play, arising as it does from the tradition of *ordre public*? Does it reinforce

187. Resolution No. 3/87, Case No. 9647 (United States), Inter-Am. C.H.R., OEA/ser. L/V/II.69, doc. 17 para. 55 (27 March 1987).

188. Arguments from the primacy of ancient customary law over positive law based on historical "foundations" or compact have encountered historical criticism. See J. G. A. Pocock, *The Ancient Constitution and the Feudal Law*, 30-55 (1957). As Hobbes pointed out as well, the state uses ancient law arguments to maintain sovereign power in the institutions already exercising them. See Thompson, *supra* note 7, at 1111-13.

189. *Jus strictum* formed the essence of early Roman law, "the rigid law of an age when commerce moved but slowly." R. Sohm, *The Institutes: A Text-book of the History and System of Roman Private Law* 47 (Ledlie trans. 1901). Later, it came to mean that law refuses to consider particular circumstances of a particular case, in contrast to *jus aequum* (equity) which does. *Id.* at 29, 83.

190. *Jus publicum* came to be used in the technical sense of absolute law whose operation cannot be changed by the private will of the individual. *Id.* at 28-29. Public law proper, in contrast to private law, was concerned with a person's power to exercise control in the common interests of all over other persons of equal legal status. *Id.* at 27.

191. Frowein, *supra* note 53, at 328; Robledo, *supra* note 3, at 17-18; see Sohm, *supra* note 189, at 23-29, 171-86.

192. Oscar Schachter recognizes this disruptive aspect of human rights theory and practice as part of the four antinomies he identified in analyzing international human rights. Schachter, *supra* note 3, at 328-33.

interests fundamental to a cosmopolitan society against the power of States, or will it restrain the disruptive force of human rights law in the domestic jurisdiction when a State needs to derogate for public order reasons?

Agreement supporting such an intrusive concept of *jus cogens* as international public policy was easier than perceived, given presumed awareness of this competing tradition that prevents defections from power arrangements. The perception that the structure of order prevents defections was firmly entrenched through municipal systems that regulated private ordering systems through boundaries set to the concept of *jus dispositivum*. The European literature grounded in the Roman law tradition is quite comfortable with the notion that acts changing the positive law may not conflict with imperatives of public order taking the form of peremptory norms. Roman rules of law were either peremptory (*jus strictum*, *jus publicum*, or of a public character now called *jus cogens*) or permissive (*jus dispositivum* or private arrangements permissible so long as they did not derogate from the *jus publicum*). The political and economic demands of slave-owners, for example, thus became non-derogable through legal norms having public and peremptory character. Other slave-owners could not defect from this system of order even if they wanted to arrange otherwise with their slaves or dominium. In preventing certain private law arrangements, the peremptory norms served an important purpose: the control of the legal relationship of private persons in the interests of the entire elite and powerful class of slave-owners.¹⁹³ No single slave-owner could make private arrangements to threaten that structure of order, even if particular manumission were possible. The public law prevented private defections when the arrangements of power would be undermined.¹⁹⁴

According to socialist theory, the European middle-class similarly adapted the division of public and private law from Roman law to serve the economic and political needs of the ruling class. Without recognizing the public/private distinction, contemporary socialist law adapts both the peremptory compulsion of public order and the permissive arrangements in service of social progress, but under a single category of order.¹⁹⁵ Under this theory, local and regional regimes

193. Alexidze, *supra* note 3, at 233-34.

194. The problem of defections from public order by private choices is the same as dilemmas of defection among sovereign states who want to cooperate. Hardin, *supra* note 47, at 173-87.

195. Alexidze, *supra* note 3, at 235; see K. Grzybowski, *Soviet Public International Law* 410-11 (1970) (referring to *jus cogens* not as a function of relationships of States but "derived

may experiment with their own modes of socialist development that negate the old international legal order and transform it progressively as though *jus cogens* were the inevitable historical movement.¹⁹⁶ These public order norms, as well as the more sophisticated devices of the civil and common law, reflected in middle-class Europe (as they do today) the powerful political and economic interests imbedded in structure.¹⁹⁷ They do not necessarily mean that a superior order will never protect fundamental human rights or limit the use of public force. Incorporating equity, right reason or the *jus gentium* frequently serves the interest of those maintaining public order. The public order concept means that peremptory norms can reinforce any political ordering system with any content determined by those powerful enough to make and implement effective decisions, even paternalistic ones. The concept "peremptory norm" thus has no content except as may be concealed in the structure of political or moral order it reinforces. For that reason, among others, the struggle over content cannot avoid political and ideological conflict.

Even before its content is created by decision, the concept's ordering function must be consulted to glean present meaning. The content inexorably follows the function of prohibiting or invalidating defections from politically superior public order systems. Confusion results from a contradiction in meaning when the concept is applied to ordinary law-making acts of sovereign States through international law involving two different systems of public order.

exclusively from its overall relationship to the structure of the new international community, stressing such principles as self-determination of peoples and the national sovereignty of states").

196. See Osakwe, *Socialist International Law Revisited*, 66 *Am. J. Int'l L.* 596, 597-600 (1972) (attempting to reconcile Tunkin's dialectic that local and regional international norms of socialist progress cannot be barred by *jus cogens*, with Tunkin's view that *jus cogens* norms are supreme); G. Tunkin, *Theory of International Law* 157-58 (W. Butler trans. 1974).

197. It is easy to see how imbedded in language the concept of peremptory action became, by consulting *The Oxford Universal Dictionary on Historical Principles* (1955). There one finds that the word, "peremptory," usually means a command admitting no refusal, and that in Roman Law and early English law, the term was used to mean an act "that puts an end to, or precludes all debate, question, or delay." A person's peremptory action is positive in operation, intolerant of debate, refusal or contradiction, and imperious or dictatorial. In Anglo-American law, the concept denotes similar action through terms such as "peremptory mandamus" (command is absolute), "peremptory writ" (no option to enforce appearance), "peremptory orders" (commands from a legislative or parliamentary body), and "peremptory challenge" (absolute elimination of someone from a venire in jury selection). See Ballentine's *Law Dictionary* (3rd ed. 1969) for the meanings of these words in their contexts.

C. *Dissonance, Avoidance, and Revision*

A decision by the persons or bodies with sufficient power to countermand prescriptive acts of sovereign States in the name of fundamental interests of international society is a difficult proposition. For example, who would have effective power actually to decide when general or particular official abuses of human rights in the Philippines, South Korea, the United States, the Soviet Union, Iran, South Africa, or Latin America will amount to a violation of interests fundamental to international society? Despite this difficulty, no derogation from the *jus cogens* is permissible. Sometimes moral dissonance arises between a country's positive norm of order and a human rights norm of *jus cogens* quality disruptive of that order.¹⁹⁸ Each has moral justification. Often the result is deference and avoidance, as seen in the behavioral aspects of cognitive dissonance.¹⁹⁹

1. *Jus Cogens and Dissonance*

Professor D'Amato uses cognitive dissonance theory to support his argument that the international legal system operates to preserve "entitlement equilibrium."²⁰⁰ D'Amato's entitlement equilibrium sys-

198. The problem of moral dissonance is examined in L. Anderson, *Moral Dilemmas, Deliberation, and Choice*, 82 *J. Phil.* 139 (1985); Sinnott-Armstrong, *Moral Realisms and Moral Dilemmas*, 84 *J. Phil.* 263 (1987); Sinnott-Armstrong, *Moral Dilemmas and Incomparability*, 22 *Am. Phil. Q.* 321 (1985) (defining moral dilemmas as "situations where there is a moral requirement for an agent to adopt each of two alternatives, and the agent cannot adopt both, but neither moral requirement is overridden in a morally relevant way.")

199. The concept of cognitive dissonance was first articulated in L. Festinger, *A Theory of Cognitive Dissonance* (1957). Festinger's thesis is that dissonance causes psychological discomfort that brings about a motivational state wherein a person will try to reduce the dissonance and achieve consonance. *Id.* at 3. The terms "dissonance" and "consonance" refer to relations that exist between pairs of cognitive elements; i.e., "the things a person knows about himself, about his behavior, and about his surroundings." *Id.* at 9. Two elements may be either irrelevant or relevant. Elements that are relevant may be either dissonant or consonant. If dissonance exists, the general tendency is to seek to reduce it by selectively exposing oneself to sources of information that would add consonant elements and by avoiding sources that would increase dissonance. *Id.* at 9-31. The concept of resistance to change is the hallmark of the theory. R. Wicklund & J. Brehm, *Perspectives on Cognitive Dissonance* 10 (1976). The publication of this latter book, "the most important work of synthesis ever achieved in the field," marked the beginning of a decade-long decline of interest in dissonance theory. Joule, *Twenty Five On*, 16 *Eur. J. Soc. Psychology* 65 (1986).

200. Other nations will react to remove this dissonance by taking legal action against the violator (which . . . involves retaliatory entitlement-violation). Additionally, the violating nation itself, having introduced dissonance into the system, will expect retaliation, but will not know what kind of entitlement will be involved in the retaliation. Its inability to predict the retaliation serves to dissuade it from committing the initial entitlement violation (the delict); thus the system as a whole tends toward self-preservation of its set of entitlements.

D'Amato, *International Law: Prospect and Process*, *supra* note 177, at 97.

tem differs from the one made possible by *jus cogens* in that the latter would require revision in the ordinary rules of custom and would regulate changing them without the circularity and reductionism inherent in the problem of changing customary law from within its own assumptions. Dissonance theory, from D'Amato's perspective, acts as an ultra conservative force,²⁰¹ preserving the underlying power balances that keep the status quo. Without the *jus cogens* gloss on dissonance theory, there would be greater difficulty reflecting adequately the intense community claims that governments and States have every incentive to ignore through traditional statist entitlements.

The collision between a lawful execution of a juvenile convicted of serious crime in the United States and an asserted *jus cogens* norm of the Inter-American system prohibiting the legal discretion to execute juveniles is a precise example of dissonance. Two separate and different normative systems of public order each claim supremacy. Whether they integrate even in myth or symbol compels discussion about interests fundamental to international society. Otherwise, the disruptive norm of *jus cogens* will lead to avoidance of resolution and deference to existing arrangements of power.

2. *Jus Cogens and Incommensurability*

In addition to the problem of dissonance, the absence of coherence or communication of meaning between two different textual or language systems, in two separate systems of public order, presents for *jus cogens* the related problem of incommensurability.²⁰² "Incommensurability" is the absence of a common basis for comparison in qualities such as value, size, or excellence. Joseph Raz defines it simply: "A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value."²⁰³ Critics of the thesis contend that it necessarily means that incommensurables cannot be compared, and that inasmuch as proponents of incommensurability theories cannot communicate, any choice of theories must be made arbitrarily, on an irrational, subjective basis.²⁰⁴ The progeni-

201. See generally Wicklund & Brehm, *supra* note 199 (finding the ultra-conservative force in cognitive dissonance theory).

202. See T. Kuhn, *The Structure of Scientific Revolutions* (1962); Feyerabend, *Explanations, Reduction, and Empiricism*, in 3 *Minnesota Studies in the Philosophy of Science* 28-97 (H. Fiegl & Maxwell eds. 1962) (advancing the thesis of incommensurability). See generally *Paradigms and Revolutions* (G. Guttig ed. 1980).

203. Raz, *Value Incommensurability: Some Preliminaries*, 86 *Proceedings of the Aristotelian Society* 117, 117 (1986).

204. See, e.g., C. Kordig, *The Justification of Scientific Change* 22, 52 (1971); L. Laudan, *Progress and its Problems* 139-42 (1977); I. Scheffler, *Science and Subjectivity* 81-86 (1967);

tors of the concept, in defending their thesis, disagree with this interpretation.²⁰⁵ To say that the *jus cogens* normative system is incommensurable with the traditional states system of international law means merely that the one makes no sense in terms of the other, or in other words they speak to different communities of language. The virtue, or evil, of this dual formalism is that the one more powerful has as its purpose the forced revision in the norms of the other. Their difference and their dissonance in specific cases make up the dialectic of revision.

3. *Jus Cogens and Revision: The Two Recent Cases*

The International Court of Justice and the Inter-American Commission on Human Rights decisions against the United States challenge the entire international community with a complex choice. In effect, the decisions appeal to the international community as a whole to approve of dissonance introduced by a *jus cogens* norm thereby forcing revision in the structure of the nation-state law-making system. This fundamental-interest myth seeks to shift the perspectives and loyalties from a nation-state vision of community and public interest to a common one of survival of international society. This shift would in effect escape the problem of incommensurability by creating a new standard of comparison beyond ordinary international law.

The shift in allegiance toward a few interests fundamental to international society begins with one or several States' insistence on justification for changes in conflict with the powerful interests of international society. The unifying, fundamental-interest myth of *jus cogens* defers particular substance to the time of decision when a superior norm is worked into the psychological framework of the decision-makers.

Shapere, Meaning and Scientific Change, in *Mind and Cosmos* 41, 54-60, 65-67 (Colodny ed. 1966).

205. Thomas Kuhn, for example, has tried to clarify his popularization of the term when applying it to different paradigms: "In applying the term 'incommensurability' to theories, I had intended only to insist that there was no common language within which both could be fully expressed and which could therefore be used in a point-by-point comparison between them." Kuhn, *Theory Change as Structure Change: Comments on the Sneed Formalism*, in *Historical and Philosophical Dimensions of Logic, Methodology and Philosophy of Science* 289, 300-01 (Butts & Hintikka eds. 1977). Cf. T. Kuhn, *The Structure of Scientific Revolutions* 198-207 (2d ed. 1970). Feyerabend stresses that the concept is necessarily vague, his purpose being "to find terminology for describing certain complex historical-anthropological phenomena which are only imperfectly understood rather than defining properties of logical systems that are specified in detail." P. Feyerabend, *Against Method* 269 (1975).

The Inter-American Human Rights Commission invoked a peremptory norm to prevent the United States from defecting from the interpretation of treaty informed by an emerging customary rule against executing juveniles.²⁰⁶ Ironically, peremptory norms in the past have worked to the advantage of established power. The Commission's decision, if accepted, would reverse that tendency. The peremptory norm used by the Commission on behalf of individuals in the Inter-American system would place limitations against a powerful nation to prevent its dominance in resisting revision of a human rights norm, even when no harm is inflicted upon another State.²⁰⁷ As the Commission phrased the test,²⁰⁸ a rule of customary international law such as one prohibiting genocide "achieves the status of *jus cogens* precisely because it is the kind of rule that it would shock the conscience of mankind and the standards of public morality for a State to protest."²⁰⁹ On the other hand, if past tradition reasserts itself in the future, the entrenched nation-states system might coalesce to prevent the Commission from departing from arrangements of public order, thus preserving traditional ways of interpreting treaties and limiting the emergence of new customary international law concerning a nation's treatment of its own citizens.²¹⁰

206. See *supra* notes 154-59 and accompanying text.

207. The Commission, not the petitioners, first raised the claim that the rule prohibiting the execution of juvenile offenders has acquired the authority of *jus cogens*. This technique is one of effectiveness, an unusual and important initiative by a non-judicial body to assert a claim on behalf of the entire international society against a state whose national was allegedly denied fundamental human rights amounting to obligations *erga omnes*. Resolution No. 3/87, Case No. 9647 (United States), Inter-Am. C.H.R., OEA/ser. L/V/II.69, doc. 17 para. 54 (27 March 1987).

208. The Commission's test is probably incorrectly stated in light of the German Tribunal's decision. See *supra* notes 24-27 and accompanying text.

209. Resolution No. 3/87, Case No. 9647 (United States), Inter-Am. C.H.R., OEA/ser. L/V/II.69, doc. 17 para. 55 (27 March 1987).

210. The United States has begun this process of reasserting traditional order by its petition to the Commission to rehear the case. Also, the dissent, published well after the initial decision by the Commission was entered, preserves and reasserts the traditional means for determining the pedigree of a *jus cogens* norm, namely that "the prohibition of the death penalty with respect to minors under 18 years of age is not a norm of *jus cogens* since it has not been accepted by the international community as a whole." Resolution No. 3/87, Case No. 9647 (United States), Inter-Am. C.H.R., OEA/ser. L/V/II.69, doc. 17, Dissenting Opinion of Dr. Marco Gerardo Monroy Cabra 12-14 (27 March 1987). The dissent also denies that there is violation of a treaty or customary international law norm against executing juveniles. *Id.* The two interpretations of *jus cogens* fundamentally contradict each other about the kind of public order system the emergent international society will have. Doctrinally, the dissent exposes vulnerable points in the Commission's reasoning, yet there is very little difference in the moral outcome between the United States' position about abuses of human rights in Latin American countries in relation to their own citizens and the Commission's stance for potential abuses in the United States.

Similarly, the question arises whether the United States in effect invoked *jus cogens* in the *Nicaragua* case to justify refusal to comply with Article 94 of the U.N. Charter (the obligation of parties to comply with Court decisions).²¹¹ The justification for this position has two arguments. First, the doctrine of *excès de pouvoir*²¹² arguably stands as a norm of *jus cogens* quality because it may be fundamental to a nation-state system that any derogation from sovereignty by consent to jurisdiction be narrowly construed in order not to undermine good faith compliance with international agreements providing for international adjudication.²¹³ Second, the inherent right of self-defense is a *jus cogens* norm justifying a broad interpretation of Article 51²¹⁴ of the Charter. In the absence of effective Security Council action to enforce breaches of the peace, the autonomy of a State or region may be placed in jeopardy by external threats not amounting to an armed attack.²¹⁵ These justifications show how States may construct *jus cogens* arguments of public order to avoid disrupting

211. Article 94 reads in full:

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

U.N. Charter art. 94.

212. See supra note 142 and accompanying text.

213. The argument is generally the other way, that Article 94, see supra note 211, is the norm of *jus cogens* quality. The point here is not to assert that either interpretation is a valid *jus cogens* claim, but to caution that such claims in whatever name they are made invite struggle over the interests thought fundamental to public order, among the most powerful of which is the survival of the nation-state system of making and changing international law, influenced as it is by major powers. See Reisman, *Has the World Court Exceeded its Jurisdiction?*, 80 Am. J. Int'l L. 128, 134 (1986).

214. Article 51 reads:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. Charter art. 51.

215. Here again the struggle is about the nature of the public order system for peacekeeping, one of the fundamental interests of international society. The general security might be maintained by either a cooperative United Nations system or by a decentralized traditional balance of power setting of self-help and reciprocity. Professor Rubin suggests, for example, that the *jus cogens* quality of the principle of self-defense follows from the negotiating history of the Kellogg-Briand pact. Rubin, supra note 89, at 255.

existing power arrangements often incommensurable with widespread and intense demands of an international society.

When the United States withdrew from the *Nicaragua* case, citing, among other things, abuse of jurisdiction, part of the action directly challenged the system for making effective international public order decisions. The United States defected. The challenge asks whether the locus of decision should move toward functional international organizations no longer dominated by the West or should remain in nation-states still powerfully influenced by Western policy. Although the United States did not formally invoke *jus cogens* in challenging the Court's decision, it asserted in effect that the International Court of Justice exceeded its jurisdiction in the case by assuming a public order or political role²¹⁶ contrary to state practice and the narrow function given the Court when the United States accepted compulsory jurisdiction under the Optional Clause.²¹⁷ Thus, the United States ironically invoked a public order norm to prevent defection by the Court from

216. In an extra-judicial interview quoted by Judge Schwebel in his dissent in the case of *Nicaragua v. United States*, Judge Elias (while President of the Court) expressed his views of the international public order role for the Court in holding a major power accountable to the international community: "If a State withdraws its acceptance of our jurisdiction without notice, that leads to anarchy and disorder. . . . A State that defies the Court will not get away with it. Although some States try to show that they do not care, they do in reality. . . . [The Court] can help develop a world public order and make that a real force [through its rulings]." *Nicaragua v. United States*, 1986 I.C.J. at 315 (Schwebel, J., dissenting) (quoting Elias, J.).

Regarding the United States' intervention in Grenada, Judge Elias was quoted in the same interview as saying: "Smaller nations wonder what happened to the rule of law when the United States can behave like this. . . . Modern international law will not tolerate the gunboat diplomacy of the past centuries." *Id.* But cf. *id.* at 179-80 (Elias, J., separate opinion) (responding to Judge Schwebel's use of his earlier remarks).

217. The "Optional Protocol," Statute of the International Court of Justice art. 36, para. 2, allows a state to accept as compulsory the jurisdiction of the International Court of Justice. The Optional Protocol reads:

The state parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* all without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.

Id.

The U.S. declaration of acceptance contained a multilateral treaty reservation, the so-called Vandenberg Reservation. At the initial jurisdictional phase, the United States (before withdrawing) had argued, among other things, that this Reservation barred jurisdiction because U.N. Charter provisions were at issue and not all relevant parties to the Charter were before the Court as required by the Reservation. Counter-Memorial of the United States (*Nicar. v.*

the traditional and entrenched public order system where derogations from state sovereignty are strictly construed. A collision of ideologies is implicit.

On the substantive merits, the United States was unable to successfully justify its intervention on grounds of self-defense.²¹⁸ Based on the U.S. appeal to existing public order systems of the international community, as expressed in the doctrine of *excés de pouvoir*, a plausible argument emerges that the Court may have asserted an unjustified public order role by stretching to the limits its jurisdiction.²¹⁹ However fashionable the rhetoric, the appeal must be seen through the three ideological visions that represent the various fundamental interests of international society.²²⁰

Whether the self-judging clause²²¹ authorizing the Court to determine its own jurisdiction is limited or expanded by the broadest meaning of the *jus cogens* concept, the issue compels inquiry into the interests fundamental to international society. With the extent of its jurisdiction in controversy, should the Court be allowed to make this determination, or should it exercise judicial restraint? Should self-defense be broadened to include responses to threats and counter-measures? Or does a proper understanding of *jus cogens* analysis of fundamental interests suggest the very opposite, that state restraint in responding to threats and in taking counter-measures is of vital interest to international society justifying an activist public order role for the Court? In each direction, conflicts arise in the constitution of the public order system. The *jus cogens* symbol conceals avoidance of such conflicts to suggest unity of fundamental interests where there may be none. It also suggests deference for resolving substantive conflict to an emerging cosmopolitan power, whose mantle the Court seeks to wear.

Did Judge Elias correctly describe *jus cogens* as a means of pushing into international law the changing international public morality?²²²

U.S.), 1984 I.C.J. Pleadings (Military and Paramilitary Activities in and against Nicaragua) 105-29 (Aug. 17, 1984).

218. See *Nicaragua v. United States*, 1986 I.C.J. at 118-23 (concluding that the United States' plea of self-defense to justify its conduct toward Nicaragua could not be upheld).

219. See Appraisals of the ICJ's Decision: *Nicaragua v. United States (Merits)*, 81 Am. J. Int'l L. 77 (1987) (comments by sixteen scholars discussing jurisdiction and other issues in the *Nicaragua* case).

220. See *supra* notes 40-42 and accompanying text.

221. Article 36, paragraph 6 of the Statute of the International Court of Justice provides: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

222. Elias, *supra* note 41, at 49-51.

Without claiming that it is yet overriding law, Meron believes Judge Elias was correct and recommends, at least for human rights, that "the ethically important concepts of *jus cogens* and public order of the international community should be allowed to develop gradually through international practice and growing consensus."²²³

It does not follow, however, that international public morality is a fundamental interest of *jus cogens* quality. If no derogation from a peremptory norm of public order is possible, the consensus of States and other powerful actors still determines when no defection is allowed, despite the ethical or moral claims. Except to prevent chaos, itself a moral prescription, public order decisions may or may not also have moral content.²²⁴ As Meron rightly concludes, the symbolic incorporation of ethics into *jus cogens* as a superior norm must develop from experience and reflection.²²⁵ In that process, effective decisions in specific settings, backed by the most powerful interests, can begin to reflect ethical standards fundamental to international society, but only if differentiated from the traditional legal order. The substance follows effective decisions of *jus cogens* quality.

If the World Court, the General Assembly or the Security Council, or human rights courts or commissions gain effective control to prevent defections from important public order norms, a different public order would follow. The directions of those decisions would provide the after-the-fact substance of those peremptory norms.²²⁶

The ideas for a new international public order, then, amount to political struggle among powerful States, coalitions of States, international institutions, and the elites that decide their actions. This struggle will pour content into the emptiness of *jus cogens*. Preserving the possibility of a functionally different order, the dissonance between the emerging supernorm not yet present backed by new power and the entrenched statist system might force revision of ordinary norms to accommodate the new order.

223. Meron, *supra* note 3, at 202.

224. H.L.A. Hart, *supra* note 33, at 221-26.

225. See Meron, *supra* note 3, at 202.

226. Bentham stigmatized the after-the-fact qualities of the common law as dog law: "When your dog does anything you want to break him of, you wait until he does it, and then beat him. This is the way you make laws for your dog, and this is the way judges make laws for you and me." Graveson, *The Restless Spirit of English Law*, in Jeremy Bentham and the Law (G. Keeton & G. Schwarzenberger eds. 1948) (quoting Bentham, *Truth v. Ashhurst*, in 5 Works 231 (1792)).

D. *Interests Fundamental to International Society and Public Order*

Domestic limitations on the private capacity to enter contracts against public policy or to enter private arrangements contrary to the *ordre public* differ from international public order limitations on sovereign arrangements.²²⁷ The public order analogy has been offered to support a central juridical idea limiting the capacity of sovereign States to enter treaties or undertake unilateral actions contrary to peremptory norms. Even accepting the desirability of a separate system for an international public order override, however, this analogy remains incomplete. A better analogy might be found in the worldly idea of *raison d'état* and its place in a "reason of system" or balance of power.

Contrary to the modern view that *raison d'état* entails statism or arbitrarily enshrines government and the State above all private interests, Cardinal Richelieu developed the doctrine of reason of state to subordinate the king to the public interest. Thereby, he connected the purpose of the State with the security, welfare, and civil order of the entire community and separated it from personal identity with the absolute monarch, as in "l'état est moi."²²⁸ *Raison d'état* was not self-

227. See *supra* notes 43-51 and accompanying text.

228. Richelieu, *The Political Testament of Cardinal Richelieu* (1961).

Common sense leads each one of us to understand that man, having been endowed with reason, should do nothing except that which is reasonable. . . . It further teaches us that the more a man is great and conspicuous, the more he ought to be conscious of this principle and the less he ought to abuse the rational process which constitutes his being. . . . From these two principles it clearly follows that if man is sovereignly reasonable he ought to make reason sovereign. . . .

Id. at 71.

The public interest ought to be the sole objective of the prince and his councillors, or, at the least, both are obliged to have it foremost in mind, and preferred to all private gain. It is impossible to overestimate the good which a prince and those serving him in government can do if they religiously follow this principle, and one can hardly imagine the evils which befall a state if private interest is preferred to the public good and actually gains the ascendancy.

Id. at 76.

Sir Herbert Butterfield developed this understanding through his interpretation of Cardinal Richelieu's moral contributions to international relations. See generally, Butterfield, *Raison D'Etat* (1975), arguing for the ubiquity of the concept of "reason of state" in early modern Europe as a limiting device on monarchial absolutism. "In the contemporary literature on this subject one repeatedly finds that reason of state is equated with the public welfare, the common good, or the public safety. . . ." *Id.* at 17. For a recent appraisal, see A. Coll, *The Wisdom of Statecraft: Sir Herbert Butterfield and the Philosophy of International Politics* 92-96 (1985).

Thompson considers "fundamental law" as a comparable limiting device during this period. "By the early seventeenth century, it had become the standard term for any laws, rights, privileges, or customs that writers thought of special importance for the well-being of a commu-

contained in an absolute State. It functioned within the context of a balance of power. This broader, external context gave meaning to *raison d'etat* beyond state absolutism in what Richelieu called a "reason of system" in international relations. The reason of system orders the reason of state.²²⁹ Butterfield makes clear that at least by the beginning of the eighteenth century the influential concept in physics of a Newtonian balance of power (as in gravitational balances among celestial bodies) among the European states-system was coming to be regarded as an "over-ruling law."²³⁰ "The safety of the European States was so urgent a matter that it ought to have priority over the internal legislation of a country, even over the law of succession, if this were calculated to produce an excessive accumulation of power."²³¹

This relationship, while limiting the power of the monarch internally, also operated within the wider European system which required the maintenance of a balance of power for practical purposes, such as the careful observance of treaties. Reputation and prestige, the great instruments of sovereigns, easily are lost if a sovereign fails to keep an agreement and the balance of power is undermined.²³² Major political treaties have been kept traditionally to maintain the public order among nations. With literally tens of thousands of international agreements in force, as well as rules of customary international law, the need for another kind of public order arises — the kind associated at the beginning of this article with the underlying purpose of the *jus cogens* concept.²³³ It has two practical sides: (1) that of avoiding too much confusion from conflict among the ordinary norms prescribed by convention or custom, and (2) that of seeking and integrating those common, intensely held expectations emanating from a more inclusive world community than of nation-states only.

The concept of *jus cogens* as guardian for fundamental interests of international society communicates the expectation that a public

nity." Thompson, *supra* note 7, at 1110. By the last half of the eighteenth century the concept had developed into one of constitutional principles. *Id.* at 1125-28.

229. Richelieu, *supra* note 228, at 94-102. "In matters of state it is necessary to profit from everything possible; whatever is useful is never to be despised. Leagues are in this category. The fruits are often very uncertain, but they must not be ignored." *Id.* at 100; see also Butterfield, *The Balance of Power*, in *Diplomatic Investigations* 132, 142-43 (H. Butterfield & Wright eds. 1968); Butterfield, *Diplomacy*, in *Studies in Diplomatic History* 357, 367 (Hatton & Anderson eds. 1970).

230. Butterfield, *Diplomacy*, *supra* note 228, at 368.

231. *Id.* at 369.

232. *Id.*; Coll, *supra* note 228, at 92-93; Richelieu, *supra* note 228, at 101-02.

233. See *supra* notes 23-27 and accompanying text.

authority might be empowered to invalidate or force revision in certain conventional and customary prescriptions to maintain the minimum coherence and content demanded of an international public order system. It aids decision-makers by instructing them when to guard against deviation from entrenched substantive norms fundamental to international society. These interests could be calculated from within a balance of power or from some more complex cosmopolitan balance. The concept might also create auto-limitations on a sovereign capacity for unilateral action meant to change customary international law in ways derogating from an existing superior norm. The concept might justify invalidating ordinary customary international law in conflict with a newly emerging peremptory norm, as in the execution of juveniles decision of the Inter-American Commission on Human Rights.²³⁴ As in the relationship between reason of state and reason of system, the practical driving force behind fundamental interest needing protection is self-interest in the best political sense over the long-term.

The content of a peremptory norm, having no prior meaning apart from decision, must flow from some authority or political leader informed by the deepest expectations of international society. Whoever has power to negate the claim to prescribe or change an ordinary norm on that basis has control of the supernorm's content. The empirical analysis then becomes an inquiry into political power and the demands and expectations from within the entire international community, beyond the system of States. We are enlightened by the policy-oriented realism of Lasswell, McDougal, and Reisman in this empirical and normative endeavor, but this inquiry makes no claim to apply that method comprehensively. It is enough to assert that *jus cogens* analysis reveals and challenges odious conduct from the nation-state system by introducing a possible secondary system of norms of validation and change.²³⁵

If a coalition of weak States and other organizations might gain sufficient equilibrium of power to curtail a unilateral claim by a superpower to change or defect from customary international law, then the presence or creation of a peremptory norm of *jus cogens* would be invoked by the decision-makers in that group in justification of its claim to supremacy in ordering the rate and direction of changes in ordinary international law. Several powerful nations in control of

234. See supra notes 154-59 and accompanying text.

235. See Hart, supra note 33, at 226-31 (suggesting such an introduction of a secondary system of norms).

weapons and space technology placed in strategic balance, in contrast might well decide the validity of claims in conflict with principles of order they find peremptory. In each of these settings, the *jus cogens* symbol becomes the prod of legal conscience compelling justification from the perspective of the global community. It is the gadfly that attaches to the nation-state system and guards the interests even more fundamental to international society.

This dual structure of power and interests fundamental to international society finds less support in the metaphor of Vattelian naturalism with its hierarchical system of ordering norms than in horizontal balances of power, representing *realpolitik*, tempered by an irksome *jus cogens* myth effectively communicated. This symbol of an embryonic new constitutional order demands limits to the exercise of the positive law-making power of sovereign States intruding upon common interests fundamental to an international society of human beings. Reciprocal equilibrium from power balances maintains the traditional legal order within constraints of state-interest. The *jus cogens* principle reflects the other system of order. It would begin to guide and limit the traditional international legal order by infusing in law-creating decisions a powerful tension representing the important interests most fundamental to life and cooperation in a global society. The international community of persons demands no derogation by sovereign States from these norms now called peremptory.

V. CONCLUSION

Without much experience and state practice in the emerging content of *jus cogens* norms, commentators must speculate. In one sense the speculation is refreshing, for it forces thinking in new ways about those interests of a global society fundamental to any human organized life together on a single planet. This inquiry has chosen to organize speculation around four tentative groupings of substantive questions, posing hypotheticals and examples from all available sources. It has speculated further about two entirely different normative systems of order, a dual formalism, with the dynamic of dissonance that dual formalism provides for inducing revision in norms. Three ideological visions of *jus cogens* provide the raw biases for controversy over the fundamental needs of a global society. A future project will have to relate the content of groupings more adequately to the dual formalism within which the various political ideologies of *jus cogens* are fought. Scholars must further inquire into using peremptory norms to heighten justification when collective coercion is thought necessary. From the standpoint of the fundamental interests

of international society, more thought is required concerning the substantive importance of questions raising issues of *jus cogens* quality and their conceptual groupings. While this article has examined the process of changing *jus cogens* norms and has attempted to place it within a broader context of international public order and change, more attention must be given the three ideological visions that are related to political context. In all, *jus cogens* speculation remains as if in a trance, in the remaining grin of the Cheshire cat now vanished, as Sinclair put it, but now less of a mystery.

This inquiry concludes, as it began, with a skeptical eye. More clearly now, however, stand the important questions *jus cogens* compels us to confront. They are always substantive. Always they ask what normative conditions are required for an international society, given the present states system. The four groups of specific questions framed are overly generalized, but the sense of fundamental importance to international society ought to underpin each.

First, peace and security are world order and political concepts of balance of power, yet they also inform the normative universe and provide assumptions. Seen through various ideological prisms, peace and security interests force concrete questions about *jus cogens* and allow normative solutions in a decentralized system of order.

Second, the use of collective coercion against the human person under assumptions of state sovereignty poses cosmopolitan questions. What justification must officials and elites provide without the immunity of official orders? *Jus cogens* norms increase the need for justification for otherwise legitimate, collective coercion to be made directly to the larger international society whose demands and expectations may not be reflected adequately by governments.

The third group of questions governs the relationship between delicts and criminal responsibility of States and officials, and the use of peremptory norms in creating the boundaries to permit and prohibit defections.

The final category asks about affirmative cooperation in providing human well-being and the obligation for officials and individuals, as well as States, to seek peaceful solution of disputes that might endanger the interests fundamental to international society, including effectiveness and standing, as well as accountability.

Jus cogens norms that may emerge from questions in groupings such as these might form a normative public order to guide change in ordinary rules of international law. This different structure of order, with the various ideological underpinnings, boasts a long tradition in other guises such as *ordre public*, *jus strictum*, or *jus publicum*. While

available mainly in concept, *jus cogens* arguments have insinuated themselves very quietly into much literature. Frequently, *jus cogens* is invoked as pure aspiration, as if to be hopeful of a better system of restraint on the positive international law-making power of sovereign States, but knowing full well the human condition.

Students of international law and relations should have no illusions.²³⁶ Even so, they should act as if they seek to hold the nation-state system of international law itself accountable to a global society whose fundamental interests are not the survival of the states system but the security and well-being of all people.²³⁷ *Jus cogens* symbolizes that paradox.²³⁸

236. Hedley Bull, for example, characterizes outside intervention between a government and its citizens as being "potentially subversive of international society itself." Bull, *supra* note 9, at 83. He asserts that the society of states in securing their *sine qua non* — recognition of sovereign jurisdictions — create a conspiracy of silence between governments regarding the rights and duties of their respective citizens. *Id.* States are therefore loath to countenance the concept of a higher authority than themselves: "for if men have rights, which other states or international authorities may champion, there are limits to their own authority; and if men have duties, to causes or movements beyond the state of which they are citizens, the state cannot count on their loyalty." *Id.* at 84.

237. Bull rejects the notion that the states system is in decline. *Id.* at 257-81. Nor is it obsolete. He does, however, recognize "that there is now a wider world political system of which the states system is only a part . . . the world-wide network of interaction that embraces not only states but also other political actors, both 'above' the state and 'below' it." *Id.* at 276.

Characterizing the radical intellectuals as at once naive and presumptuous, superficially optimistic yet fundamentally pessimistic, Bull contends that "it seems hardly likely that a centralised global structure can be created and imbued with the values of the Western radicals by resort to the salvationist exhortation favoured by Falk and his colleagues." *Id.* at 305. But see Falk, *supra* note 10, at 41-46 (offering a response to and appraisal of the realist criticisms of, *inter alia*, Bull).

238. Stanley Hoffmann offers an assessment of Hedley Bull's scholarly career and a vindication of realism in international relations. Hoffmann, Hedley Bull and His Contribution to International Relations, 62 *Int'l Aff.* 179 (1986). Hoffmann readily declares his affinity with Bull's intellectual world-view, identifying Bull as occupying "a position close to realism, the school of thought that looks at international relations as the politics of states in their external aspects. . . ." *Id.* Hoffmann writes: "[r]ealism starts by rejecting all forms of utopianism" and then praises Bull's *The Anarchical Society* as "magisterial" in its criticism of "utopianism". *Id.* While Hoffmann does not define what he means by "utopian," one is given the sense that it is any concept that challenges the paradigm of the primacy of the states system. He lauds Bull for his anti-cosmopolitanism, *id.* at 186, and points out the tension present in Bull's later work where he explains the need to develop the cosmopolitan elements in the present world culture but within the statist paradigm. *Id.* at 190. This study of *jus cogens* enters at precisely this point.