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Jus Cogens: Root and Branch (an Inventory)

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JUS COGENS: ROOT & BRANCH (AN INVENTORY)

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I. INTRODUCTION

In 1953 the Sixth Committee of the General Assembly of the United Nations reported that:

> The recognition by the International Law Commission that there exist in the general positive international law of today certain fundamental rules of international public order contrary to which States may not validly contract (*jus cogens*) was considered by all representatives who referred to the matter as being a step of great significance and importance for the progressive development of international law . . . . The evolution of the international community in recent years, above all with impetus of the Charter, helped to turn the notion of *jus cogens* into a positive rule of international law.[1]

By 1966 the International Law Commission included its version of the concept of *jus cogens* in Articles 37 and 45 of the Draft Articles of the Law of Treaties which the Commission was preparing at the behest of the United Nations General Assembly. Articles 37 and 45, which the Commission adopted during its meeting in Monaco, January 3-28, 1966, read as follows:

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1. Report of the Sixth Committee to the General Assembly, Doc. A/5601, para. 18 (1963).

Article 37

A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 45

If a new peremptory norm of general international law of the kind referred to in article 37 is established, any existing treaty which is incompatible with that norm becomes void and terminates.[2]

Versions of these draft articles, as reformulated and renumbered by the Vienna Conference on the Law of Treaties, appear as follows in the Vienna Convention on the Law of Treaties[3] which was opened for signature at Vienna on May 23, 1969 and entered into force on January 27, 1980:

Article 53

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

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the 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.

Article 64

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

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.[4]

Article 66 of the Vienna Convention is the article relevant to disputes concerning the application or interpretation of Article 53 or

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2. A/CN.4/184, Annex, p. 3, 6 (1966).

3. U.N. Doc. A/Conf. 39/27, reprinted in 8 INT'L LEGAL MATERIALS 679 (1969).

4. With regard to the concept embodied in Article 64, Stuart Chessman has stated:

> Today this concept has little meaning or reality. First, no one knows what a rule of *jus cogens* is. Second, whether rules of *jus cogens* can be replaced or modified at all, or by new rules of *jus cogens* remains uncertain. Thus, the exact scope of *jus cogens* as a modifier of prior treaty obligations is subject to even more uncertainty than modification by subsequent rules of international law.

Chessman, *On Treaties and Custom: A Commentary on the Draft Restatement*, 18 INT'L LAW 421, 431 (1984). *See also* Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 383 (1985):

> The prevalence of slippery slope arguments in law may reflect a societal understanding that proceeding through law rather than in some other fashion involves being bound in some important way to the past and responsible in some equally important way to the future.

64. Such relevant procedure, however, is beyond the scope of this article.[5]

During the Vienna Conference on the Law of Treaties, Sir Humphrey Waldock explained that the International Law Commission

> has based its approach to the question of *jus cogens* on positive law much more than on natural law (it was) because it had been convinced that there existed at the present time a number of principles of international law which were of a peremptory character.[6]

Gaja pointed out that "the terms 'accepted' and 'recognized' [in Article 53] are taken from Article 38 of the Statute of the International Court of Justice" and imply "more than merely verbal attitude on the part of the States . . . ."[7] It is this requirement of Article 53 which distinguishes *jus cogens* from such somewhat analogous but less necessarily consensual concepts as natural law, public order or *contra bon mores*.[8]

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5. The text of the relevant Vienna Convention procedural article:

ARTICLE 66

Procedures for judicial settlement, arbitration and conciliation

If, under paragraph 3 of Article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(a) any one of the parties to a dispute concerning the application or the interpretation of Article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(b) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

6. UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES, Official Records, First Session (Vienna 26 March-24 May 1968), New York 1969, pp. 327-28.

7. Gaja, *Jus Cogens Beyond the Vienna Convention*, 172 RECUEIL DES COURS 275, 284 (1981) [hereinafter *Gaja*].

8. Alfred Verdross cites Christian Wolff and Emeric Vattel as distinguishing "this necessary law [i.e., natural law] from the voluntary law created by the presumed, express or tacit will of states." Verdross quotes Charles Rousseau as translating *contra bon mores* to mean the equivalent of "against the public order of the international community" and that "in international law the principle of public order is nearly non-existent in consequent of the individualistic structure of international law."—Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 A.J.I.L. 55, 56 (1966), reprinted in INTERNATIONAL LAW IN THE TWENTIETH CENTURY 217, 218 (L. Gross, ed.) (1969) [hereinafter *Verdross I*]. For a comprehensive analysis of the concept of *ordre public*, Egon Schwelb cites Bluntschli, *Das moderne Volkerrecht der civilisirten Staten als Rechtsbuch dargestellt* 234 *et. seq.* (1st ed., 1868), and he cites *Verdross I, supra*, at 56. Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 A.J.I.L. 946, 949 (1967) [hereinafter *Schwelb*]. Sir Ian Sinclair notes that the origin of *jus cogens* has been traced to the Roman law maxim *jus publicum privatorum pactis mutari non potest* citing [Roman law] *Digest* II, 14, 38. I. SIN-

Lest they be misunderstood as limiting examples of the rule of *jus cogens* to those that might have been specified, the members of the Commission decided "to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals." Although no illustrations of the concept of *jus cogens* were recommended for inclusion in the Vienna Convention on the Law of Treaties, the Commission's Report did list the following examples of *jus cogens* which had been suggested by some members of the Commission:

> (a) a treaty contemplating an unlawful use of force contrary to the principles of the Charter, (b) a treaty contemplating the performance of any other act criminal under international law, and (c) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate [and] treaties violating human rights, the equality of States or the principle of self-determination . . . .[9]

CLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 203 (1984) [hereinafter SINCLAIR]. Obvious analogies between international *jus cogens* and domestic law doctrines abound. For example, Justice Pitney stated for the United States Supreme Court in Atlantic Coast Line R. Co. v. Goldsboro, 232 U.S. 548, 558 (1914):

> [I]t is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the Community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.

This proposition was restated for the Supreme Court by Chief Justice Hughes in Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 434-35 (1934):

> Not only is the [contract clause] qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people . . . . [T]he reservation of essential attributes of sovereign power [is] read into contracts as a postulate of the legal order.

More recently Justice Powell, writing for the Court in Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) noted that:

> Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from "careful respect for the teachings of history [and] solid recognition of the basic values that underlie society."

This quotation is from the concurring opinion of Justice Harlan in Griswold v. Connecticut, 318 U.S. 479, 501 (1965).

9. *International Law Commission Report*, [1966] 2 Y.B. INT'L L. COMM'N 169, 247-49; 61 A.J.I.L. 263, 409 (1967). Although no examples were given to illustrate what the International Law Commission might have meant by the term, "any other act criminal under international law," Article 19 of the Commission's draft articles on State responsibility contains the following non-exhaustive list of international crimes:

> (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
>
> (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

The purpose of this article is to inventory examples of the rule of *jus cogens*—to "count the house" with regard to each of the many examples that have been suggested or nominated for inclusion in the concept of *jus cogens*. The plan is, first, to study the roots of *jus cogens* as evidenced by the recognition of the rule before 1953 when the United Nations General Assembly announced the recognition of *jus cogens* by the International Law Commission, and, next, to describe the way the rule has subsequently branched out to become what has been described as "not only a very important theoretical issue, but, [also] a very significant and complex political problem."[10]

II. ROOTS

One of the earliest discussions of *jus cogens* in the English language is the 1937 comment written by Alfred von Verdross[11] in response to his finding that there was no consideration "of treaties which are in conflict with general international law" in James Wilford Garner's Report on the Law of Treaties which had just then been published as a part of the *Harvard Research in International Law*.[12]

"Our starting point," Verdross wrote, "is the uncontested rule that, as a matter of principle, states are free to conclude treaties on any subject whatsoever." He next posed the question of "whether general international law contains rules which have the character of

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(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

Fifth Report on State Responsibility, Y.B. INT'L L. COMM'N (1967-II, I), p. 18. *See Gaja, supra* note 7, at 292-99.

Note the following statement by Rosenne:

[A]lthough it may be true that failure to fulfill an obligation established by a rule of *jus cogens* will often constitute an international crime, it cannot be denied that the category of international obligations admitting of no derogation is much broader than the category of obligations whose breach is necessarily an international crime. Too close an assimilation of the two notions may be an attractive simplification, but it does not appear to be conceptually acceptable.

S. ROSENNE, BREACH OF TREATY (1985) [hereinafter ROSENNE].

10. Alexidje, *Legal Nature of Jus Cogens in Contemporary International Law*, 172 RECUEIL DES COURS 223, 227 (1981).

11. Verdross, *Forbidden Treaties in International Law*, 31 A.J.I.L. 571-77 (1937) [hereinafter *Verdross II*]. Verdross footnote 3 lists relevant commentary in the German language going back as far as Hefter's *Das europaische Volkerrecht*, 4th ed. (1861).

12. 29 A.J.I.L., Supp., 655-1226 (1935).

jus cogens" and answered the question in the affirmative.[13] His investigation revealed the existence of such norms which fell into two groups. As examples from the first group he listed a "treaty between two or more states tending to exclude other states from the use of the high seas," a treaty binding the contracting parties to prevent third states from occupying or annexing *terra nullius* or preventing them "from the exercise of other rights of sovereignty acknowledged by general international law, such as passage throughout the territorial waters of other states."[14] The second group consisted of the "general principles prohibiting states from concluding treaties *contra bonos mores*" which Verdross divided into four sub-categories defined as treaties which would preclude a state from performing the following "moral tasks which they have to accomplish in the international community:"

> maintenance of law and order within the states,
> defense against external attacks,
> care for the bodily and spiritual welfare of citizens at home, and
> protection of citizens abroad.[15]

Without the use of the terms *jus cogens* or "peremptory norms," analogous theories were discussed in the nineteen twenties in the works of Hyde, Hall and McNair. In 1922 Charles Cheney Hyde wrote that "[i]f international law obtains among enlightened States, it is not unreasonable to assert that that law may denounce as internationally illegal, agreements which are concluded for the purpose of securing the performance of acts acknowledged to be lawless and contemptuous of fundamental principles of justice" as in the cases (1) of a secret alliance calling for aggression against and/or the partition of an unoffending State, (2) a treaty providing for the appropriation of a portion of the open sea, or (3) a treaty of cession which was not conditioned on the consent of the inhabitants.[16]

In 1924 the eighth edition of William Edward Hall's *A Treatise on International Law* (edited by A. Pearce Higgins) stated that "the requirement that contracts shall be in conformity with the law invalidates, or at least renders voidable, all agreements which are at variance with the fundamental principles of international law and

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13. *Verdross II*, *supra* note 11, at 571.

14. *Id.* at 572.

15. *Id.* at 572-77. Treaties which would interfere with the care for the welfare of citizens at home are described as those which would bind a state "to close its hospitals or schools, to extradite or sterilize its women, to kill its children, to close its factories, to leave its fields unploughed, or in other ways to expose its population to distress." *Id.* at 575.

16. C. HYDE, INTERNATIONAL LAW, vol. ii, § 490 (2d ed. 1945) [hereinafter HYDE].

with their undisputed applications . . . ." The two examples of such invalid treaties listed in Hall are (1) a treaty "which has for its object the subjugation or partition of a country, unless the existence of the latter is wholly incompatible with the general security," and (2) "an agreement for the assertion of proprietary rights over the open ocean [which] would be invalid, because the freedom of the open seas from appropriation, though an arbitrary principle, is one that is fully received into international law." Also listed is a "compact for the establishment of a slave trade [which] would be void, because the personal freedom of human beings has been admitted by modern civilized states as a right which they are bound to respect and which they ought to uphold internationally."[17]

In 1927, under the heading "Morality and Public Policy," McNair restated Hyde's 1922 formulation and examples.[18] Nearly two decades later in the second edition of his major work, Hyde repeated his contention that an international agreement "is dependent upon something more than the mere yielding of consent, and may not come into being if the international society regards the arrangement as gravely injurious to its interests and contemptuous of what the law of nations is deemed to require." In retrospect, however, he added:

> Opportunities for the invocation of this principle, as between contracting States are, however, rare. Such States are not disposed to admit that their mutual undertakings are contemptuous of international law . . . . Thus practice has not served to develop a body of law growing out of instances where contracting States have in fact tested the validity of treaties according to the relationship of the objectives sought to be achieved to the requirements of international law.[19]

This lack of the kind of state practice which would solidify the principle of *jus cogens* in international law is reflected in the lack of *jus cogens* listings in the indices of the following international law texts and treatises which were published before the *jus cogens* principle was endorsed by the United Nations International Law Commission in 1953: Hugo Grotius (1946), Henry Wheaton (1845), Archer Polson (1853), Henry Wheaton (1866), Theodore Woosey (1877), John Hosack (1882), Sir Travers Twiss (1884), Sir Henry Sumner Main (1885 and 1888), Thomas Alfred Walker (1893 and 1895), Theodore Dwight Woolsey (1894), David Jayne Hill (1911), George B. Davis (1916), Edwin DeWitt Dickinson (1920), William

17. W. HALL, A. HIGGINS, A TREATISE ON INTERNATIONAL LAW 383 (8th ed. 1924).
18. *Equality in International Law*, 26 MICH. L. REV. 131, 140-41 (1927).
19. HYDE, *supra* note 16, at § 490.

Edward Hall (1924), Sir Geoffrey Butler and Simon Maccoby (1928), Charles Pergler (1928), John G. Hervey (1928), Clyde Eagleton (1928), Louis L. Jaffe (1933), Amos S. Hershey (1935), George A. Finch (1937), James Brown Scott (1939), Gerhart Niemeyer (1941), John H. Wigmore (1943), Charles Cheney Hyde (1945), Hans Kelsen (1948), Charles G. Fenwick (1924, 1935 and 1948), Sir Hersch Lauterpacht (1927, 1947 and 1950), Herbert W. Briggs (1952), and Oppenheim Lauterpacht (1952).[20] Listings of *jus cogens* are also lacking in law dictionaries of the pre-1953 period.[21]

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20. H. GROTIUS, DE JURE BELLI AC PACIS (1946), Kelsey translation (1962); H. WHEATON, HISTORY OF THE LAW OF NATIONS IN EUROPE AND AMERICA FROM THE EARLIEST TIMES TO THE TREATY OF WASHINGTON 1842 (1845); A. POLSON, THE LAW OF NATIONS (1853); H. WHEATON, ELEMENTS OF INTERNATIONAL LAW (1866); T. WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW (1877); J. HOSACK, ON THE RISE AND GROWTH OF THE LAW OF NATIONS, AS ESTABLISHED BY GENERAL USAGE AND BY TREATIES, FROM THE EARLIEST TIME TO THE TREATY OF UTRECHT (1882) (republished by Rothman in 1982); T. TWISS, THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES, ON THE RIGHTS AND DUTIES OF NATIONS IN TIME OF PEACE (1884) (republished by Rothman in 1985); H. MAINE, POPULAR GOVERNMENT (1885, Liberty Classics edition, ed. by G.W. Carey, 1976); H. MAINE, INTERNATIONAL LAW: A SERIES OF LECTURES DELIVERED BEFORE THE UNIVERSITY OF CAMBRIDGE 1886 (1888); T. WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW (1894); D. HILL, WORLD ORGANIZATION AS AFFECTED BY THE NATURE OF THE MODERN STATE (1911); G. DAVIS, THE ELEMENTS OF INTERNATIONAL LAW WITH AN ACCOUNT OF ITS ORIGINS, SOURCES AND HISTORICAL DEVELOPMENT, 4th ed., revised by Sherman (1916); E. DICKINSON, THE EQUALITY OF STATES IN INTERNATIONAL LAW (1920) (republished by Kraus in 1972); W. HALL, A TREATISE ON INTERNATIONAL LAW, 8th ed., Ed. by Higgins (1924); B. BUTLER & S MACCOBY, THE DEVELOPMENT OF INTERNATIONAL LAW (1928); C. PERGLER, JUDICIAL INTERPRETATION OF INTERNATIONAL LAW IN THE UNITED STATES (1928); J. HERVEY, THE LEGAL EFFECTS OF RECOGNITION IN INTERNATIONAL LAW AS INTERPRETED BY THE COURTS OF THE UNITED STATES (1928); C. EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW (1928); L. JAFFE, JUDICIAL ASPECTS OF FOREIGN RELATIONS IN PARTICULAR THE RECOGNITION OF FOREIGN POWERS (1933); A. HERSEY, THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW & ORGANIZATION (1935); G. FINCH, THE SOURCES OF MODERN INTERNATIONAL LAW (1937); J. SCOTT, LAW, THE STATE, AND THE INTERNATIONAL COMMUNITY (1939); G. NEIMEYER, LAW WITHOUT FORCE: THE FUNCTION OF POLITICS IN INTERNATIONAL LAW (1941); J. WIGMORE, A GUIDE TO AMERICAN INTERNATIONAL LAW & PRACTICE AS FOUND IN THE UNITED STATES CONSTITUTION, TREATIES, STATUTES, DECISIONS, EXECUTIVE ORDERS, ADMINISTRATIVE REGULATIONS, DIPLOMATIC CORRESPONDENCE, AND ARMY AND NAVY INSTRUCTIONS, INCLUDING WAR-TIME LAW (1943); C. HYDE, *supra* note 16; H. KELSEN, LAW AND PEACE IN INTERNATIONAL RELATIONS: THE OLIVER WENDELL HOLMES LECTURES [AT HARVARD], 1940-41 (1948); C. FENWICK, INTERNATIONAL LAW (1924, 1935 and 1948); H. LAUTERPACHT, PRIVATE LAW SOURCES & ANALOGIES OF INTERNATIONAL LAW (1927), RECOGNITION IN INTERNATIONAL LAW (1947) and INTERNATIONAL LAW & HUMAN RIGHTS (1950); H. BRIGGS, THE LAW OF NATIONS: CASES, DOCUMENTS, AND NOTES (2d ed. 1952); L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE, 7th ed., Vol. 11-Disputes, War and Neutrality (H. Lauterpacht ed. 1952).

21. JACOB AND TOMLINS, THE LAW DICTIONARY EXPLAINING THE RISE, PROGRESS, AND PRESENT STATE OF THE ENGLISH LAW; DEFINING AND INTERPRETING THE TERMS OR WORDS OF ART; AND COMPRISING COPIOUS INFORMATION ON THE SUBJECTS OF LAW, TRADE, AND GOVERNMENT, 3 vols., (1811); TOMLINS, THE LAW DICTIONARY, EXPLAINING THE RISE, PRO-

Neither do court opinions of the period speak of *jus cogens* but there is a reference to it in the *separate* opinion of Judge Schucking in the *Oscar Chinn* case which was heard by the Permanent Court of International Justice in 1934.[22]

That the roots of *jus cogens* were not too deeply or firmly planted is suggested in Sinclair's[23] conclusion that, in the early sixties,

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GRESS, AND PRESENT STATE OF THE BRITISH LAW; DEFINING AND INTERPRETING THE TERMS OR WORDS OF ART; AND COMPRISING COPIOUS INFORMATION ON THE SUBJECTS OF TRADE AND GOVERNMENT (rev. ed. 1836); BOUVIER, A LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA AND OF THE SEVERAL STATES OF THE UNION, WITH REFERENCES TO THE CIVIL AND OTHER SYSTEMS OF FOREIGN LAW (1843); BOUVIER'S LAW DICTIONARY (rev. ed.'s 1848, 1854, 1883 and 1897); WHARTON, THE LAW LEXICON OR DICTIONARY OF JURISPRUDENCE: EXPLAINING ALL THE TECHNICAL WORDS AND PHRASES EMPLOYED IN THE SEVERAL DEPARTMENTS OF ENGLISH LAW, INCLUDING ALSO THE VARIOUS LEGAL TERMS USED IN COMMERCIAL TRANSLATION OF THE LATIN MAXIMS CONTINUED IN THE WRITINGS OF THE ANCIENT AND MODERN COMMENTATORS (1848); RAPALJE AND LAWRENCE, A DICTIONARY OF AMERICAN AND ENGLISH LAW, WITH DEFINITIONS OF THE TECHNICAL TERMS OF THE CANON AND CIVIL LAWS ALSO CONTAINING A FULL COLLECTION OF LATIN MAXIMS AND CITATIONS OF UPWARDS OF FORTY THOUSAND REPORTED CASES, IN WHICH WORDS AND PHRASES HAVE BEEN JUDICIALLY DEFINED OR CONSTRUED Vol. I (1883); STROUD, JUDICIAL DICTIONARY OF WORDS AND PHRASES JUDICIALLY INTERPRETED, TO WHICH HAS BEEN ADDED STATUTORY DEFINITIONS (1903); MACK, CYCLOPEDIA OF LAW AND PROCEDURE, Vol. XXIV (1907); BLACK, A LAW DICTIONARY CONTAINING DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN AND INCLUDING THE PRINCIPAL TERMS OF INTERNATIONAL, CONSTITUTIONAL, ECCLESIASTICAL AND COMMERCIAL LAW, AND MEDICAL JURISPRUDENCE WITH A COLLECTION OF LEGAL MAXIMS, NUMEROUS SELECT TITLES FROM THE ROMAN, MODERN CIVIL, SCOTCH, FRENCH, SPANISH, AND MEXICAN LAW, AND OTHER FOREIGN SYSTEMS, AND A TABLE OF ABBREVIATIONS (2d ed. 1910); STIMSON, A CONCISE LAW DICTIONARY OF WORDS, PHRASES, AND MAXIMS WITH AN EXPLANATORY LIST OF ABBREVIATIONS USED IN LAW BOOKS (rev. ed. 1911); BLACK'S LAW DICTIONARY (3d ed. 1933); SHUMAKER AND LOGSDORF, THE CYCLOPEDIA LAW DICTIONARY DEFINING TERMS AND PHRASES OF AMERICAN JURISPRUDENCE, OF ANCIENT AND MODERN COMMON LAW, INTERNATIONAL LAW, CIVIL LAW, THE FRENCH AND SPANISH LAW, AND OTHER JUDICIAL SYSTEMS WITH AN EXHAUSTIVE COLLECTION OF LEGAL MAXIMS (Moore 3d ed. 1940).

22. Referring to Article 20 of the Covenant of the League of Nations, Judge Schucking stated:

> 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 today 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 of their number, any act adopted in contravention of that undertaking would be automatically void.

PCIG, Ser. A/B, No. 63, pp. 149-50.

For discussions of opinions of international tribunals which do not mention but are regarded as having some bearing upon the question of an international *jus cogens*, see SINCLAIR, *supra* note 8, at 210, *Schwelb*, *supra* note 8, at 949-51 and J. SZTUCKI, JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: A CRITICAL APPRAISAL 12-14 (1974) [hereinafter SZTUCKI I].

23. I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 117 (1st ed. 1973) [hereinafter SINCLAIR II].

Brownlie "also appears to admit, although with some hesitation, the existence of *jus cogens*, conceding that there is more authority for the category of *jus cogens* than for its particular content."[24] Rosenne writes that, at the time of the drafting of the *jus cogens* articles of the Vienna Convention on the Law of Treaties, the concept of *jus cogens* "had not been adequately discussed or formulated."[25]

III. BRANCHES

From these shallow roots the concept of *jus cogens* has developed into two main branches each having many offshoots. The first branch outlaws treaties which would undermine the independence and security of the State. The second branch pertains to treaties intended to deprive individuals of life, liberty or property without due process of law.

A. *The Publicists*

This section of the article, first, will trace the extent to which each of the two branches of *jus cogens* is noted, advocated or ignored by writers on international law, and, second, will survey the use of *jus cogens* in international jurisprudence and state practice.

1. Security and Independence of the State

Although Article 53 of the Vienna Convention on the Law of Treaties defines *jus cogens* without providing examples of the concept, examples were suggested by 26 of the 66 delegations which participated in the Conference which drafted the Treaty where 41 of the 66 delegations explicitly favored the inclusion of Article 53 in the Convention text. Of such peremptory norms the prohibition of the threat or use of force contrary to the United Nations Charter or of aggressive or otherwise unlawful war were the examples suggested by the greatest number (thirteen) of participating State delegations at Vienna. In his study of the records of the Vienna Conference on the Law of Treaties, Sztucki lists these and other examples of such norms which are aspects of a State's interest in security and independence—examples which are listed together with the number of delegations which nominated each norm:

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24. I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 409 (1961), I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 417-18 (1966) [hereinafter BROWNLIE].

25. ROSENNE, *supra* note 9, at 87.

1. Prohibition of the threat or use of force contrary to the U.N. Charter or of aggressive or otherwise unlawful war (13);

2. Sovereignty of States (respect for sovereignty, sovereign equality, independence) (7);

3. Prohibition of colonialism (struggle against colonial domination) (2);

4. Non-intervention in the domestic affairs of other States (5);

5. Principle of pacific settlement of disputes (Art. 33 of the U.N. Charter) (2);

6. Maintenance of peace among nations and of international security (2);

7. Prohibition of destruction of territorial sovereignty and political independence of a State (1);

8. Right of self-defense (Article 51 of the U.N. Charter) (1);

9. Humanitarian treatment of war victims (some rules of land warfare) (4);

10. Prohibition of unequal (unequitable) treaties (2);

11. Freedom of the high seas (1);

12. Rules on diplomatic relations contained in the Vienna Convention of 1961 (1);

13. Rules on consular relations contained in the Vienna Convention of 1963 (1).[26]

Since 1953 many writers have concluded or noted that others have concluded that peremptory norms (*jus cogens*) include prohibitions of certain uses of force. This they have done with or without reference to Articles 1 and 2 of the United Nations Charter which these articles list first, among the "Purposes of the United Nations," the maintenance of peace and security by means of (1) the taking of "effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace," (2) the development of "friendly relations among nations based on respect for the principles of equal rights and self-determination of people," and (3) U.N. members refraining "in their international relations from the threat or use of force against the territorial integrity or political independence of any state." Article 103 of the Charter says that the obligations of members under the Charter shall prevail over their obligations under any other international agreement.

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26. J. SZTUCKI, THE CONVENTIONAL CONCEPT OF PEREMPTORY NORMS (JUS COGENS) (1974) [hereinafter SZTUCKI II] Sztucki's list is reprinted in B. WESTON, R. FALK and A. D'AMATO, INTERNATIONAL LAW & WORLD ORDER 631-32 (1980). *See also* Kearney & Dalton, *The Negotiating History of Jus Cogens at Vienna*, 64 A.J.I.L. 495, 535 (1970).

A definition of "aggression" was deliberately omitted from the United Nations Charter but Article 51 of the Charter does provide that

> 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 . . . .[27]

President Truman felt that "[a]ny definition of aggression is a trap for the innocent and an invitation to the guilty."[28] By 1974 the United States acquiesced in the adoption by the United Nations General Assembly of a definition of aggression which contained, in Article 7, the proviso that

> Nothing in this Definition, and in particular article 3, could in any way prejudice the right of self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.[29]

The following writers assert or report that principles of *jus cogens* prohibit international agreements which would violate one or more of the above provisions of Articles 1 and 2 of the United Nations Charter: scholars at the conference held in Lagonissi, Greece (1966), Alfred Verdross (1966), Ian Brownlie (1966), Egon Schwelb (1967), Bernard Ramundo (1967), J.J. Lador-Lederer (1968), I.M. Schwarzenberg (1968), Kazimierz Grzybowski (1970), Oji Umozurike (1972), Ian Brownlie (1973), Nahlik (1973), J.H.W.

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27. Language similar to that in Article 51 of the Charter is found in Article 3 of the Inter-American Treaty of Reciprocal Assistance of 1947 which provides for individual or collective self-defense in case of armed attack, Inter-American Treaty of Reciprocal Assistance and Final Act of the Inter-American Conference for the Maintenance of Continental Peace and Security, U.N.T.S. (1948), v. XXI, No. 324, p. 77, and similar to language in Article 12 of the Draft Declaration on Rights and Duties of States adopted by the International Law Commission in 1949 which provided that every state has the right of individual or collective self-defense against armed attack.

28. 5 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 740 (1965).

29. U.N. GOAR, Supp. (no. 31) U.N. Doc. A/9631 (1974), at 142. *See* 70 DEP'T. ST. BULL. 498 (1974) for comments on the *Definition of Aggression.* Resolution by Robert Rosenstock who represented the United States on the United Nations Special Committee on the Question of Defining Aggression.

Verzijl (1973), I.M. Sinclair (1973), G.I. Tunkin (1974), Jerzy Sztucki (1974), Gerhard Von Glahn (1976), Georg Schwarzenberg (1976), Christos Rozakis (1976), Stuart Malawer (1977), Majorie Whiteman (1977), Werner Levi (1979), James Crawford (1979), T.O. Elias (1979), Myres McDougal, Harold Lasswell & Lung-chu Chen (1980), Louis Henkin, Richard Pugh, Oscar Schachter & Hans Smit (1980), Hermann Mosler (1980), Murray Forsyth (1981), American Law Institute, Louis Henkin (1981), Joseph Sweeney, Covey Oliver & Noyes Leech (1981), Gerhard Von Glahn (1981), Edward McWhinney (1981), Giorgio Gaja (1981), L. Alexidze (1981), Michla Pomerance (1982), Warwick McKean (1982), Theodore Meron (1984), West's Guide to American Law, vol. 6 (1984), Edward McWhinney (1984), Sir Ian Sinclair (1984), Shabtai Rosenne (1985), Thomas Buergenthal & Harold Maier (1985), Mark Villiger (1985).[30]

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30. CONFERENCE ON INTERNATIONAL LAW, PAPERS & PROCEEDINGS II, *The Concept of Jus Cogens in International Law* 13 (1967) (Conference held under auspices of Carnegie Endowment for International Peace); *Verdross* I, *supra* note 8, at 55; BROWNLIE, *supra* note 24; *Schwelb*, *supra* note 8, at 949; B. RAMUNDO, PEACEFUL COEXISTENCE: INTERNATIONAL LAW IN THE BUILDING OF COMMUNISM 51, 55, 166-68, 189, 191 (1967); J. J. LADOR-LEDERER, INTERNATIONAL GROUP PROTECTION: AIMS & METHODS IN HUMAN RIGHTS 113-16 (1968); K. GRZYBOWSKI, SOVIET PUBLIC INTERNATIONAL LAW: DOCTRINES & DIPLOMATIC PRACTICE 61 (1970) (with reliance on the Kellogg-Briand Pact of 1928 as well as on the U.N. Charter); O. UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW 187 (1972); BROWNLIE, *supra* note 24, at 500-01 (1973); O. UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW 187-88 (1972); J. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 76 (1973); G. TUNKIN, THEORY OF INTERNATIONAL LAW 157 (1974); SZTUCKI II, *supra* note 26, at 120; G. VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW (3d ed.) 444 (1976); G. SCHWARZENBERGER, THE DYNAMICS OF INTERNATIONAL LAW 8, 66-67 (1976) [hereinafter SCHWARZENBERGER] (Schwarzenberger stresses the consensual nature of the *jus cogens* of the United Nations Organization found in Article 2 of the Charter. For criticism of the consensual concept of peremptory norms (*jus cogens*) see SZTUCKI II, *supra* note 26, at 97-98); C. ROZAKIS, THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES 18 (1976); S. MALAWER, IMPOSED TREATIES & INTERNATIONAL LAW 77-78, 80, 85, 136-37 (1977); Whiteman, *Jus Cogens in International Law with a Projected List*, 7 GA. J. INT'L & COMP. L. 625-26 (1977) (Acts of force listed by Whiteman as being outlawed by *jus cogens* are: Political terrorism abroad, including terroristic activities; Hijacking air traffic; Recourse to war, except in self-defense, threat or use of force against the territorial integrity or political independence of another State (intervention); Armed aggression; Recognition of situations brought about by force; including fruits of aggression; Treaty provisions imposed by force; War crimes ("Superior orders" *prima facie* no answer to war crimes); Offenses against the peace and/or security of mankind; All methods of mass destruction (including nuclear weapons) used for other than peaceful purposes and the Appropriation of outer space and/or celestial bodies. Whiteman's 15 volume *Digest of International Law* issued between 1963 and 1973 contains no index reference to *jus cogens*); W. LEVI, CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION 36 (1979); J. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 106-08, 419-20 (1979); T. ELIAS, NEW HORIZONS IN INTERNATIONAL LAW 147-48 (1979); M. MCDOUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS & WORLD

2. Individual Rights

In addition to the peremptory norms (*jus cogens*) intended to safeguard the security and independence of the *State*, Sztucki's study[31] of the records of the Vienna Conference on the Law of Treaties revealed that some delegations to the Conference identified, as examples of *jus cogens* norm intended to protect individual rights, the prohibition of

1. Genocide[32] (13 delegations),
2. Slavery[33] and/or the slave trade (12 delegations),[34] and
3. Piracy[35] (6 delegations).

It is interesting to note that among writers who recognize *jus cogens*, these three norms are each listed, respectively, in approxi-

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PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 346 (1980) [hereinafter MCDOUGAL, LASSWELL & CHEN]; L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW: CASES & MATERIALS 645-49 (1980); H. MOSLER, THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY 20 (1980); A.L. I. RESTATEMENT FRLUS § 338, Comment a., at 152; § 331, comment d. and e., at 117; Reporters note 4., at 121 (1985); D. WESTON, R. FALK AND A. D'AMATO, INTERNATIONAL LAW & WORLD ORDER 631-32 (1980); L. HENKIN, THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL & POLITICAL RIGHTS 111 (1981); J. SWEENEY, C. OLIVER & N. LEECH, CASES & MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 964 (2d ed. 1981); G. VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW (4th ed.) 502 (1981); E. MCWHINNEY, CONFLICT & COMPROMISE: INTERNATIONAL LAW & WORLD ORDER IN A REVOLUTIONARY AGE 151 (1981); *Gaja, supra* note 7, at 292-99 (1981); Alexidze, *International Jus Cogens—Lex Lata or Lex Ferenda?*, 172 RECUEIL DES COURS 229 (1981); M. POMERANCE, SELF-DETERMINATION IN LAW & PRACTICE: THE NEW DOCTRINE IN THE UNITED NATIONS 48-49, 71 (1982) [hereinafter POMERANCE]; J. MCKEAN, EQUALITY & DISCRIMINATION UNDER INTERNATIONAL LAW 280 (1983) [hereinafter MCKEAN]; WEST'S GUIDE TO AMERICAN LAW (Vol. 6) 420 (1984); E. MCWHINNEY, UNITED NATIONS LAW MAKING: CULTURAL & IDEOLOGICAL RELATIVISM & INTERNATIONAL LAW MAKING FOR AN ERA OF TRANSITION 74 (1984); SINCLAIR, *supra* note 8, at 213-14 (1984); ROSENNE, *supra* note 4, at 62-64; M. VILLIGER, CUSTOMARY INTERNATIONAL LAW & TREATIES 54 n.252 (1985).

31. SZTUCKI II, *supra* note 26, at 119-20. Sztucki noted that, "The 'official' list of examples seems to be much more 'state-oriented.' Emphasis on human rights and humanitarian rules in literature seems to be considerably greater." *Id.* at 121.

32. Note that the International Court of Justice answered in the affirmative, by a vote of seven to five, the question of whether the reserving State can be regarded as being a party to the Convention on the 1948 Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, "[w]hile still maintaining its reservation, if the reservation is objected to by one or more of the parties to the Convention but not by others."

33. Lauterpacht noted that "it has been suggested that in so far as instruments such as the Declaration of Paris of 1856 which abolished privateering or the Slavery Convention of 1926 obliging parties to prevent and suppress trade in slaves have become expressive of principles of customary international law, a treaty obiging the parties to violate these principles would be void on account of the illegality of its object." *International Law: Being the Collected Papers of Hersch Lauterpacht* 297 (1978) [hereinafter *Lauterpacht*].

34. One delegation listed "the condemnation of forced labor."

35. 78 U.N.T.S. 277.

mately the same proportion (26-26-17) that they were noted by delegations to the Vienna Conference (13-12-6). Those listing all three norms were : Suy (1966), Verdross (1966), Brownlie (1973), Naklik (1973), Whiteman (1977), de Arechaga (1978), McDougal, Lasswell & Chen (1980), Henkin, Pugh, Schechter & Smit (1980), Weston, Falk & D'Amato (1980), Pomerance (1982), McKean (1983), Sinclair (1984), McWhinney (1984), and Frowein (1984).[36]

Jus cogens norms prohibiting genocide and slavery but not piracy are listed in works by Scheuner (1967), Delupis (1974), the International Law Commission (1976), Domb (1976), Elias (1979), the American Law Institute (1980), and West's Guide to American Law (1984).[37] Piracy is listed by Sinclair (1973) along with genocide and by Alexidge (1981) without mention of either genocide or slavery.[38]

Additions to the three individual rights norms of *jus cogens* suggested by the delegations to Geneva include the prohibition of discrimination, the deprivation of life, liberty or property without due process of law[39] and the denial of human rights in general. Not unre-

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36. Suy, *Papers and Proceedings* vol. ii 24-28. (Conference on the Concept of *Jus Cogens* in International Law, Lagonissi, Greece, 3-4 April 1966, under the auspices of the Carnegie Endowment for International Peace); *Verdross* I, *supra* note 8, at 55, 57, 59 and 217, 219, 221 (1969); BROWNLIE, *supra* note 24, at 500-10; Naklik, "*Jus Cogens* and the Codified Law of Treaties," *Review "Temis"* 101-02 (1973) as cited in McWhinney at 76 *infra*, this note; Whiteman, *Jus Cogens in International Law with a Projected List*, 7 GA. J. INT'L & COMP. L. 609, 625 (1977); de Arechaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 3, 64-67 (1978); MCDOUGAL, LASSWELL & CHEN, *supra* note 30, at 349; L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 645 (1980); B. WESTON, R. FALK & A. D'AMATO, INTERNATIONAL LAW & WORLD ORDER 631-32 (1980); POMERANCE, *supra* note 30. SELF-DETERMINATION IN PRACTICE 71 (1982); MCKEAN, *supra* note 30, at 279; SINCLAIR I, *supra* note 8, at 215-18; E. MCWHINNEY, UNITED NATIONS LAW MAKING: CULTURAL & IDEOLOGICAL RELATIVISM & INTERNATIONAL LAW MAKING FOR AN ERA OF TRANSITION 76 (1984); FROWEIN, *Jus Cogens*, 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 327-30 (1984).

37. SCHEUNER, Conflict of Treaty Provisions with a Peremptory Norm of General International Law and its Consequences, "*Zeitschrift fur auslandisches offentliches Recht and Volkerrecht*," 81 (1967) as cited in SINCLAIR I, *supra* note 8, at 217; I. DELUPIS, INTERNATIONAL LAW & THE INDEPENDENT STATE 133 (1974) [hereinafter DELUPIS]; *Report of the International Law Commission on the Work of Its Twenty-eighth Session, 3 May-23 July 1976*, Y.B. INT'L L. COMM'N (1976-II, 2), p. 75 (listing slavery and genocide and *apartheid* as international crimes in draft Article 19 of State responsibility); Domb, *Jus Cogens and Human Rights*, in 6 ISRAEL Y.B. HUM. RTS. 104, 116-121 (1976); T. ELIAS, NEW HORIZONS IN INTERNATIONAL LAW 147-48 (1979); D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1133 (1982); RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised) § 49, Comment (a) at 164 (Tent. Draft No. 1, 1980); GUIDE TO AMERICAN LAW (West) vol. 6, p. 420 (1984).

38. SINCLAIR II, *supra* note 23, at 123; Alexidze, *The Legal Nature of Jus Cogens*, 172 RECUEIL DES COURS 231 (1981).

39. The right to appear in court is listed in SINCLAIR II, *supra* note 38, at 500-01, and by DELUPIS, *supra* note 37, at 129-33 (1974). Verdross named a State's obligation to protect

lated to the banning of genocide and slavery are the numerous references to the norm prohibiting racial discrimination.[40] Other norms concern discrimination in general.[41] Verdross' anti-discrimination norm is broad enough to include not only racial but also sex, linguistic and religious discrimination.[42] With regard to the scope of *jus cogens* norms relating to individual rights, Verdross has stated that "all rules of general international law created for a humanitarian purpose" constitute *jus cogens*.[43] McDougal's view of the matter is even broader. He has written:

> When the Universal Declaration was adopted unanimously in December 1948 by the General Assembly, the stated expectation was that it mirrored merely "a common standard of achievement," devoid of legal authority and enforceability. In the nearly three decades subsequent to its adoption, however, the Universal Declaration has been affirmed and reaffirmed by numerous resolutions of United Nations entities and related agencies; invoked and reinvoked by a broad range of decision makers, national and transnational, judicial and other; and incorporated into many international agreements and national constitutions. The result is that the Universal Declaration is now widely acclaimed as a Magna Carta of human kind, to be complied with by all actors in the world arena. What began as mere common aspiration is now hailed both as an authoritative interpretation of the human rights provisions of the United Nations Charter and as established customary law, having the attributes of *jus cogens* and constituting the heart of a global bill of rights.[44]
>
> The evidences of general community expectation are thus overwhelming that particular states, whether or not members of the United Nations, will not today be protected by global constitutive process in the making and performance of agreements, any more than in

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foreigners, *Verdross* I, *supra* note 8. Freedom from torture or degradation while in custody is on the list of DELUPIS, *supra* note 37, at 129, of Henkin, *The International Bill of Rights* 122 (1981) [hereinafter *Henkin*], of Higgins, *Derogations Under Human Rights Treaties*, 48 BRIT. Y.B. INT'L L. 281, 282 (1976-1977), and of FROWEIN, *supra* note 36, at 328. In 1975 the United Nations Congress on Crime Prevention declared itself on record as against torture. However, "Arab delegates persuaded the Congress to drop political terrorism from a list of international terrorist activities requiring stricter control."—*New York Times*, September 14, 1975.

40. *Henkin* (1981), *supra* note 39, at 250, 269, and *Gaja*, *supra* note 30, at 292, 299.

41. MCKEAN, *supra* note 36, at 283, 6 *Guide to American Law* 420 (West 1984), and the *Encyclopedia of Public International Law*, *supra* note 36, at 329.

42. *Henkin* (1981), *supra* note 39, at 250, 268-69.

43. *Verdross* I, *supra* note 8, at 59.

44. MCDOUGAL, LASSWELL & CHEN, *supra* note 30, at 274. Delupis argues "that a number of rules contained in the Universal Declaration of Human Rights [along with a number of rules laid down in the conventions on genocide and slavery] are peremptory norms from which derogation either by legislation or by treaty, is not permitted." DELUPIS, *supra* note 37, at 133.

the performance of unilateral acts, which are in contravention of the basic policies of the contemporary human rights prescriptions.[45]

The above evidence of the increased acceptance or recognition of the concept of *jus cogens* since 1952 must be viewed along with the following long list of writers whose books on or relating to international law do not list *jus cogens* in their indices: Arthur Kuhn, *Pathways in International Law (1953),* Ann Thomas, *Communism versus International Law: Today's Clash of Ideals* (1953), H.B. Jacobini, *A Study of the Philosophy of International Law as seen in the Works of Latin American Writers* (1954), L. Oppenheim, *International Law: A Treatise, Vol. I—Peace,* (H. Lauterpacht, ed. 1955), Myres McDougal, *Studies in World Public Order* (1960), Morton Kaplan & Nicholas Katzenbach, *The Political Foundations of International Law* (1961), Lord McNair, *The Law of Treaties* (1961), William Bishop, *International Law: Cases & Materials* (1962), Hannah Arendt, *On Revolution* (1963), J.G. Starke, *An Introduction to International Law* (5th ed. 1963), Wolfgang Friedmann, *The Changing Structure of International Law* (1964), Roberto Regala, *Law & Diplomacy in a Changing World* (1965), D.P. O'Connell, *International Law* (1965), Clive Parry, *The Sources & Evidences of International Law* (1965), Oliver Lissitzyn, *International Law Today & Tomorrow* (1965), Myres McDougal, Harold Lasswell & James Miller, *The Interpretation of Agreements & World Public Order: Principles of Content & Procedure* (1967), Philip Jessup, *A Modern Law of Nations: An Introduction* (1968), H.B. Jacobini, *International Law: A Text* (1968), Charles de Visscher, *Theory & Reality in Public International Law* (Revised edition, 1968), Michael Barkun, *Law Without Sanctions: Order in Primitive Societies & the World Community* (1968), J.E.S. Fawcett, *The Law of Nations* (1968), *Encyclopedia of Social Sciences* (1968), Max Sorenson, *Manual of Public International Law* (1968), Henry J. Steiner and Detlev F. Vagts, *Transnational Legal Problems* (1968), Geza Herczegh, *General Principles of Law and the International Legal Order* (1969), D.W. Greig, *International Law* (1970), Richard Falk, *The Status of Law in International Society* (1970), Gerhard Von Glahn, *Law Among Nations: An Introduction to Public International Law* (2d ed. 1970), H. Lauterpacht, *International Law: Collected Papers of H. Lauterpacht* (E. Lauterpacht ed. 1970), Karl Deutsch & Hoffman, *The Relevance of International Law* (1971), Marjorie Whiteman, *Digest of Interna-*

45. MCDOUGAL, LASSWELL, & CHEN, *supra* note 44, at 350.

tional Law (15th & last volume of set published in 1973) (Index in Vol. 14), Ivan Bernier, *International Legal Aspects of Federalism* (1973), Henry Cattan, *Palestine & International Law: The Legal Aspects of the Arab-Israeli Conflict* (1973), Ronald Kirkemo, *An Introduction to International Law* (1974), Richard Deming, *Man & the World: International Law at Work* (1974), Ann Thomas & A.J. Thomas, *A World Rule of Law: Prospects & Problems* (1975), Arie David, *The Strategy of Treaty Termination: Lawful Breaches & Retaliations* (1975), William Tung, *International Law in an Organizing World* (1977), F. Parkinson, *The Philosophy of International Relations* (1977), Nathan Feinberg, *Studies in International Law with Special Reference to the Arab-Israel Conflict* (1979), Richard Bilder, *Managing the Risks of International Agreement* (1981), Eric A. Nordlinger, *On the Autonomy of the Democratic State* (1981), N.A. Maryan Green, *International Law: Law of Peace* (1982) (*jus cogens* mentioned but no examples given), Roger Fisher, *Improving Compliance with International Law* (1981), Terry Nardin, *Law, Morality & the Relations of States* (1983), Branimir Jankovic, *Public International Law* (1984), Francis A. Boyle, *World Politics & International Law* (1984).

Volumes published since 1952 which focus on or relate to international human rights and contain no index reference to *jus cogens* include: Karl A. Wittfogel, *Oriental Despotism* (1957), Edwin S. Newman, *The Freedom Reader* (1963), A.H. Robertson, *Human Rights: In National & International Law* (Proceedings of the Second International Conference on the European Convention on Human Rights held in Vienna under the auspices of the Council of Europe & the University of Vienna, 18-20 October 1965 (1965)), Sidney Hook, *The Paradoxes of Freedom* (1967), James Fitzjames Stephen, *Liberty, Equality, Fraternity* (1967), Moses Moskowitz, *The Politics & Dynamics of Human Rights* (1968), H. Lauterpacht, *International Law & Human Rights* (1968), John Carey, *U.N. Protection of Civil & Political Rights* (1970), John Rawls, *A Theory of Justice* (1971), Robert Andelson, *Imputed Rights: An Essay in Christian Social Theory* (1971), Ian Brownlie, *Basic Documents on Human Rights* (1971), Ervin Pollack, *Human Rights* (1971), John Rawls, *A Theory of Justice* (1971), Ivo Duchacek, *Rights & Liberties in the World Today: Constitutional Promise & Reality* (1973), F. A. Hayek, *Law, Legislation and Liberty*, 3 vols. (1973, 1976 and 1979), Frede Castberg, *The European Convention on Human Rights* (ed. by Opsahl & Ouchterlony (1974)), Moses Moskowitz, *International Concern with Human Rights* (1974), E. Lauterpacht & John

Collier, *Individual Rights & the State in Foreign Affairs: An International Compendium* (1977), Thomas Buergenthal & Judith Hall, *Human Rights, International Law & the Helsinki Accord* (1977), Zaim Nedjari, *Human Rights under the European Convention* (1978), Louis Henkin, *The Rights of Man Today* (1978), B.G. Ramcharan, *Human Rights Thirty Years After the Universal Declaration* (1978), F.A. Hayek, *Law, Legislation & Liberty, Vol. I, Rules & Order* (1979), Zaim M. Nedjati, *Human Rights Under the European Convention* (1978), Kurt Glaser & Stefan Possony, *Victims of Politics: The State of Human Rights* (1979), Donald Kommers & Gilbert Loescher, *Human Rights & American Foreign Policy* (1979), Peter G. Brown & Douglas MacLean, *Human Rights & U.S. Foreign Policy* (1979), Richard Lillich and Frank Newman, *International Human Rights: Problems of Law & Policy* (1979), David G. Ritchie, *Natural Rights: A Criticism of Some Political & Ethical Conceptions* (1979), William A. Galston, *Justice & the Human Good* (1980), Ronald H. Nash, *Freedom, Justice and the State* (1980), William N. Nelson, *On Justifying Democracy* (1980), Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (1980), Alan S. Rosenbaum, *The Philosophy of Human Rights: International Perspectives* (1980), Natan Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination* (1980), Ian Brownlie, *Basic Documents of Human Rights* (2d ed. 1981), Stanley Hoffman, *Duties Beyond Borders: On the Limits & Possibilities of Ethical International Politics*, Roland Pennock and John W. Chapman, *Human Rights* (1981), A.H. Robertson, *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights* (2d ed. 1982), Israel W. Charney, *How Can We Commit the Unthinkable? Genocide: The Human Cancer* (1982), Alan Gewith, *Human Rights: Essays on Justification & Application* (1982), Patrick Riley, *Will & Political Legitimacy: A Critical Exposition of Social Contract Theory in Hobbes, Locke, Rousseau, Kant, & Hegel* (1982), Michael Sandel, *Liberalism & the Limits of Justice* (1982), Ton J.M. Zuijdwijk, *Petitioning the United Nations: A Study in Human Rights* (1982), David P. Forsythe, *Human Rights & World Politics* (1983), Douglas MacLean & Claudia Mills, *Liberalism Reconsidered* (1983), J. Roland Pennock & John W. Chapman, *Liberty Democracy* (1983), Michael Walzer, *Spheres of Justice: A Defense of Pluralism & Equality* (1983), Antony Black, *Guilds & Civil Society in European Political Thought From the Twelfth Century to the Present* (1984), John Stuart Mill, *Essays on Equality, Law and Education*, Ed. by

J.M. Robson (1984—essays originally published between 1825 and 1871), Max L. Stackhouse, *Creeds, Society & Human Rights* (1984), Julius Stone, *Visions of World Order: Between State Power & Human Justice* (1984), Jeremy Waldron, *Theories of Rights* (1984), L.J. MacFarlane, *The Theory & Practice of Human Rights* (1985), Rex Martin, *Rawls & Rights* (1985), Diana T. Meyers, *Inalienable Rights: A Defense* (1985), Kai Nielsen, *Equality & Liberty: A Defense of Radical Egalitarianism* (1985), Siegart, *The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights* (1985), Vernon Van Dyke, *Human Rights, Ethnicity, and Discrimination* (1985), Ernst Bloch, *Natural Law & Human Dignity* (1986), and the annual editions of the *United Nations Yearbook on Human Rights* (1946 to date). Even Arie David's *The Strategy of Treaty Termination* (1975) carries no *jus cogens* index listing.

And neither do the recent law dictionaries: namely, the fourth (1968) and fifth (1979) editions of Black's *Law Dictionary,* Burton, *Legal Thesaurus* (Macmillan, 1980), Rothenberg, *The Plain-Language Law Dictionary* (Penguin, 1981), Oran's *Dictionary of the Law* (West, 1983), West's *Law and Commercial Dictionary in Five Languages: Definitions of the Legal and Commercial Terms and Phrases of American, English and Civil Law Jurisdictions* (1985), Statsky, *Legal Thesaurus/Dictionary* (West, 1985) and Gilmer, Wesley, *The Law Dictionary . . .* of legal words and phrases with Latin and French maxims of the law translated and explained, 6th ed. (1986).

B. *Authoritative Decision Makers*

During the Vienna Conference on the Law of Treaties, Special Rapporteur Waldock explained that, during the fiftieth session, the International Law Commission: "considered its correct course to be to leave the full extent of the rules—the identification of the norms which have become norms of *jus cogens*—to be worked out in State practice and in the jurisprudence of international tribunals."[46]

46. 2 Y.B. INT'L L. COMM'N 25 (1966). Waldock added the Commission "felt, *inter alia*, that if it were to attempt to draw up, even selectively, a list of norms of *jus cogens*, this might involve a prolonged study of matters which belong to other branches of international law. *Id.*

1. International Jurisprudence

Since 1953 the following putative *jus cogens* norms have been considered in opinions by various judges of the International Court of Justice:

(a) the right of access to enclaved property including passage of armed forces accepted in a dissenting opinion by Judge Fernandes (*ad hoc* Judge from Portugal) in the *Case Concerning Rights of Passage Over Indian Territory* (1960);[47]

(b) "the legal interest in general humanitarian causes" accepted in a separate opinion by Judge Jessup in the *South West Africa Cases* (1962);[48]

(c) "the law concerning the protection of human rights" accepted by Judge Tanaka in his dissenting opinion in the *South West Africa Cases* (Second Phase—1966) as surely belonging to *jus cogens*;[49]

(d) equidistance, "an essential principle of the continental shelf institution which must be recognized as *jus cogens*" according to Judge Tanaka in his dissenting opinion in the *North Sea Continental Shelf Cases* (1969);[50]

(e) "the principles appearing in the preamble of the [United Nations] Charter, the "respect due to principles of an international or humane nature and the right of self-determination were seen by Judge Ammoun in his separate opinion in the *Barcelona Traction Case* (1970-1971) as being imperative legal norms or *jus cogens*.[51] In that case the judgment of the Court asserted that "[o]bligations the performance of which is the subject of diplomatic protection are not of the same category" as a State's "obligations erga omnes" which Sinclair interpreted as meaning norms of *jus cogens*.[52]

In an official comment on the draft article which was the precursor to Article 53 of the Vienna Convention on the Law of Treaties, International Law Commission rapporteur Hersch Lauterpacht stated in 1953 that:

> The voidance of contractual agreements whose object is illegal is a general principle of law. As such it must find a place in a codification

47. 1960, ICJ, 135.
48. 1962, ICJ, 425.
49. 1966, ICJ, 298.
50. 1969, ICJ, 182.
51. 1970, ICJ, 304, 325. 1971, ICJ, 72-75.
52. 1970, ICJ, 32. SINCLAIR II, *supra* note 8, at 212-13. SINCLAIR noted that the Court in the case of the *United States Diplomatic and Consular Staff in Tehran*, 1980, ICJ, 41, "skirted delicately round the question of whether the inviolability of the premises of a diplomatic mission is or is not a norm of *jus cogens*." SINCLAIR, *supra* note 8, at 212.

> of the law of treaties. This is so although there are no instances, in international judicial and arbitral practice, of a treaty being declared void on account of the illegality of its object.[53]

Two decades later in a conclusion that would seem to have validity today, Sztucki wrote that "[i]t appears highly debatable whether the relevant jurisprudence of the ICJ may be regarded as indicative of the recognition of the category of *jus cogens* in international law."[54]

2. State Practice

> It is of course only right that there should be a thorough and sustained examination by scholars of the implications of *jus cogens* in the law of treaties and also in other branches of international law. What is, however, significant is that, during the past fourteen years, there have been few, if any, instances in State practice where the validity of a treaty has been seriously challenged on the ground that it conflicted with a rule of *jus cogens*. The mystery of *jus cogens* remains a mystery.—Sir Ian Sinclair[55]

State practice concerning claims based on *jus cogens*, which as Sinclair noted as recently as 1984, is "perhaps fortunately, very limited indeed."[56] A lonesome example is the argument made in 1964 before the Security Council and General Assembly of the United Nations to the effect that the 1960 Treaty of Guarantee between Cyprus on the one hand and Greece, Turkey and the United Kingdom on the other, was invalid insofar as it might allow the unilateral intervention of a guaranteeing Power. A Security Council resolution left open the question of whether the Cyprus treaty arrangement violated the peremptory rule contained in Article 2, paragraph 4 of the United Nations Charter which provides that "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state

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53. *Lauterpacht*, *supra* note 33, at 298.

54. SZTUCKI I, *supra* note 22, at 15.

55. SINCLAIR II, *supra* note 8, at 224. Sinclair added:

> To borrow another analogy from the field of English literature, it has some of the attributes of the Cheshire Cat which had the disconcerting habit of vanishing and then reappearing to deliver further words of wisdom. *Jus Cogens* will undoubtedly continue to exercise its influence on the development of international law in the foreseeable future. How far that influence will extend to the actual practice of States remains to be seen, although there must now be a consciousness among the legal advisors to Foreign Ministries that international law *does* impose certain limitations upon the freedom of States to enter into treaties regardless of their object or content.

Id.

56. SINCLAIR II, *supra* note 8, at 215.

. . . ."[57] When the General Assembly became seized of the Cyprus question it called upon all states, in conformity with their obligations under Charter Article 2 (1 and 4), "to respect the sovereignty, unity, independence and territorial integrity of the Republic of Cyprus and to refrain from any intervention directed against it,"[58] but with only 47 Member Nations voting in favor and with 54 abstaining. At the summer 1980 session of the Third United Nations Conference on the Law of the Sea, Chile informally proposed, without success, that the common heritage of mankind concept be accepted as constituting a peremptory norm.[59]

As of 1986, legal literature, international jurisprudence and state practice generally continue to support conclusions that Egon Schwelb arrived at in 1967:

> While the proposal to include the concept in an official codification is hardly more than a dozen years old, in the literature of international law the concept of an international *ordre public* has been advocated for a very long time. A survey of both the older and the more recent literature shows however that the writings on the subject have been theoretical statements by learned authors not substantiated by references to rulings of international courts or tribunals, to less authoritative state practice, or to diplomatic proceedings or correspondence.[60]

IV. CONCLUSION

This article has presented an inventory of the aspects of essential sovereignty and of human rights which are perceived by many or by some as making up the content of *jus cogens*—a concept which has flourished in theory but not in practice. This contrast calls for, at least, a brief look at how leading writers on international law explain the contradiction between the fecundity of *jus cogens* in legal literature and its near sterility in international jurisprudence and diplomacy.

Giorgio Gaja has written that:

> The provisions in the Vienna Convention on the Law of Treaties concerning peremptory norms are, no doubt, one of the principal reasons

57. 19 SCOR Supp. (Jan.-Mar. 1964), at 102, U.N. Doc. S/5575 (1964).

58. G.A. Res. 2077, 20 GAOR Supp. (No. 14), U.N. Doc. A/6014 (1965).

59. Informal Proposal GP/9 dated 5 August 1980. See Report of the President of the Third United Nations Conference on the Law of the Sea on the Work of the Informal Plenary on General Provisions at 2-3 (paragraph 3), U.N. Doc. A/CONF. 62/L.58 (mimeo, 22 August 1980). *See also* Goldie, *A Selection of Books Reflecting Perspectives in the Seabed Mining Debate: Part I*, 15 INT'L LAW. 293, 318-19 (1981).

60. *Schwelb, supra* note 8, at 949.

> why many States have so far refrained from ratifying the Convention.[61]

Because, in part, of "the inevitable incidentality of giving examples, Jerzy Sztucki predicted:

> a rather ominous tendency to use the category of *jus cogens* more or less freely, depending on current tactical needs, and without being bound even by [their own] earlier advanced ideas about the content of *jus cogens* . . . . [O]n the international level . . . any *ad hoc* judgment as to the validity of an international treaty is liable to reflect a sheer balance of power rather than a rule of law. From the legal point of view, categories of international law without a specific content involve a serious risk of being either inoperative or subject to misuse.[62]

Just as one man's meat is another man's poison, Georg Schwarzenberger has pointed out that what may deter one State may attract another:

> What makes the terminology of *jus cogens* politically attractive are the opportunities it offers for purposes of ideological abuse . . . .
>
> *Jus cogens* also offers a welcome device to escape from burdensome treaty obligations on the assertion of their incompatibility with an alleged rule of a peremptory character.[63]
>
> [Article 53] perfectly adapted to the idiosyncracies of a hypocritical age, has emerged. It has all the trappings of fashionably "progressive," if unrealistic, thinking. Yet, in a weak world confederation, in which international judicial organs are likely to continue to be condemned to a subordinate position, it is more likely that the function of this [then] draft article, like the *clausula rebus sic stantibus* before it, will be to serve as a means of undermining the sanctity of the pledged word.[64]

Referring to *jus cogens*, Michla Pomerance warns of:

> the palpable practical dangers, inherent in all absolutist theories, of ignoring the relativity of rights and their inevitable clash with other equally valid rights.[65]

Shabtai Rosenne gives a clue to the lack of *jus cogens* litigation even among States party to the Vienna Convention:

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61. 172 RECUEIL DES COURS III 279 (1981).

62. SZTUCKI I, *supra* note 22, at 121, 123.

63. SCHWARZENBERGER, *supra* note 30, at 124-25. The reference to "ideological abuse" suggests the controversy over "substantive" due process in the literature of constitutional law in the United States. See, for example, Ely, *On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978). *See also* the Frankfurter-Black debate in their opinions in Adamson v. California, 332 U.S. 46 (1947).

64. Schwarzenberger, *International Jus Cogens?*, 43 TEX. L. REV. 456-57 (1965). *See* Lissitzyn, *Treaties and Changed Circumstances (Rebus Sic Stantibus)*, 61 A.J.I.L. 895 (1967).

65. POMERANCE, *supra* note 30, at 71.

> In the Vienna Convention, the concept of *jus cogens* appears only in a negative form, as a ground for impeaching the validity of a treaty (and it is unlikely that States would knowingly make public a treaty violative of a rule of *jus cogens*, if only for the oppobrium and political convulsions it would cause).[66]

Hopes for and fears of *jus cogens* have been succinctly expressed by Sir Ian Sinclair:

> To sum up, there is a place for the concept of *jus cogens* in international law. Its growth and development will parallel the growth and development of an international legal order expressive of the consensus of the international community as a whole. Such an international legal order is, at present, inchoate, unformed and only just discernible . . . . If [*jus cogens*] is invoked indiscriminately and to serve short-term political purposes, it could rapidly be destructive of confidence in the security of treaties; if it is developed with wisdom and restraint in the overall interest of the international community, it could constitute a useful check upon the unbridled will of individual states.[67]

66. ROSENNE, *supra* note 9, at 64-65.

67. SINCLAIR II, *supra* note 8, at 223. Sinclair added that "this conclusion was published in the first edition of this book, published more than ten years ago [1973]. It is a conclusion which the author considers is still valid." *Id.*