International *Jus Cogens:* Issues of Law-Making

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I. Introduction

The idea of international *jus cogens* as a body of 'higher law' of overriding importance for the international community is steadily gaining ground. First embodied in the 1969 Vienna Convention on the Law of Treaties,[1] it was recently confirmed by the 1986 Vienna Convention on the Law of Treaties.[2] In its judgment in the *Nicaragua Case* the International Court of Justice (ICJ) clearly affirmed *jus cogens* as an accepted doctrine in international law. The ICJ relied on the prohibition on the use of force as being 'a conspicuous example of a rule of international law having the character of *jus cogens*.'[3] The importance of the concept for the international legal order is further confirmed by the trend to apply it beyond the law of treaties, in particular in the law of state responsibility. By relying on ideas closely linked to *jus cogens* the International Law Commission (ILC) proposed the notion of international crimes resulting from the breach by a state of an international

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1 The Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331. Art. 53 of the Convention contains the following provision relating to *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 international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

2 The Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 1986, UN Doc. A/Conf. 129/15 (1986). Art. 53 of this Convention repeats *verbatim* the corresponding Article of the 1969 Convention (*supra* note 1).

3 ICJ Reports (1986) 100.

obligation 'essential for the protection of fundamental interests of the international community.'[4]

The growing acceptance of the *jus cogens* doctrine is also reflected in the increased reliance on specific peremptory rules in the official argumentation of governments. From a law-making perspective, of major importance is the fact that States developed a tendency to rely on the concept of *jus cogens* in their efforts to achieve profound changes in the existing law. States pressing for the rapid reforms in the existing international legal order regard the concept as a powerful tool of renovation. The proponents of reforms have discovered that by creating a few peremptory principles they may bring about radical changes in the entire system of the existing legal relationships.[5] In different departments of international law serious efforts have been undertaken to introduce new peremptory rules of general international law.[6]

As a result of these developments the international community is faced with a number of specific problems relating to *jus cogens*, many of which remain unresolved. Paradoxically, one of the still unresolved questions concerns the definition of normative procedures by which rules of fundamental importance for the community of states may be created. From a theoretical perspective, it remains unclear how the international community lacking any legislative power can accommodate the idea of overriding principles binding all of its members. While in internal legal orders the introduction of peremptory rules binding all subjects of law raises no difficulty, the absence of any international legislature capable of imposing legal rules on the members of the international community is a major obstacle highlighting the tenuous ground for the very existence of international *jus cogens*, at least in the usual meaning of the term. As a practical matter, there is a growing danger that in the absence of clearly defined procedures for the creation of peremptory norms their emergence and subsequent identification may become a matter of conflicting assertions reflecting political preferences of different groups of states. Lack of consensus as regards the basic parameters of the law-making process leading to the emergence of peremptory rules inevitably opens the door for the political misuse of the concept.

The purpose of this article is to analyse some of the fundamental questions relating to the notion of *jus cogens* from a law-making perspective. It shows that

4 See Draft Articles on State Responsibility, Art. 19. 2 *Yearbook of the ILC* (1976 II) 73. For a detailed discussion, see J.H.H. Weiler, A. Cassese, M. Spinedi (eds), *International Crimes of States: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (1989).

5 See in this connection Art. 64 of the Vienna Convention on the Law of Treaties (*supra* note 1) which states: 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.' See also Draft Articles on State Responsibility, Art. 18, para. 2: '... an act of the state which, at the time when it was performed, was not in conformity with what was required of it by an international obligation in force for that state, ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law.' 2 *Yearbook of the ILC* (1976 II) 87.

6 See, *infra* notes 78-102 and accompanying text.

although some of the relevant procedural issues have been clarified, the elaboration of a coherent theory of *jus cogens* remains a predominant challenge for the international community.

II. Natural Law vs. Positivism

It is well known that the doctrine of international *jus cogens* was developed under a strong influence of natural law concepts. In contrast to positivists proclaiming complete, or almost complete, freedom of contract, naturalists always taught that states cannot be absolutely free in establishing their contractual relations. They were obliged to respect certain fundamental principles deeply rooted in the international community. It is not surprising, therefore, that the negotiations on *jus cogens* were accompanied by assertions of the continued importance of natural law. At the 1969 Vienna Conference on the Law of Treaties a number of states stressed the fact that *jus cogens* derived its origin from concepts of natural law.[7] Many participants of the negotiations believed that rules of *jus cogens* are based on the legal conscience and moral beliefs of mankind.[8] The acceptance of the *jus cogens* doctrine was perceived as a major crisis of legal positivism. In this connection some delegates called for 'reconsideration of the positivist theory.'[9]

Post-Conference scholarly discussions of *jus cogens* were marked by a revival of natural law thinking. Ch. de Visscher, writing after the adoption of the Vienna Convention, questioned the premises of positivism and suggested that 'la norme impérative procède directement d'un jugement de valeur morale ou sociale.'[10] The view according to which the essence of *jus cogens* is such 'as to blend the concept into traditional notions of natural law'[11] also continues to enjoy support in modern legal theory.

A preoccupation with broad natural and moral foundations of *jus cogens* may explain the clear disregard of fundamental questions of legal form characteristic for the process of the elaboration of the new concept of general international law. After many years of discussions the ILC proposed a draft article on peremptory rules

7 See, e.g., the statements of the representatives of Mexico (United Nations Conference on the Law of Treaties, Official Records, First Session at 294 (1969)), Italy (*Id.* at 311), Ecuador (*Id.* at 320), Monaco (*Id.* at 324). (Hereinafter referred to as UNCLOT I).

8 See, e.g., the statements of the representatives of Mexico (*Id.* at 294), Lebanon (*Id.* at 297), Nigeria (*Id.* at 298), Uruguay (*Id.* at 303), Ceylon (*Id.* at 319), Ivory Coast (*Id.* at 320).

9 The statement of the representative of the Federal Republic of Germany (United Nations Conference on the Law of Treaties, Official Records, Second Session at 95 (1970)). (Hereinafter referred to as UNCLOT II).

10 De Visscher, 'Positivism et "*jus cogens*"', 75 *Revue générale de droit international public* (1971) 5, 9.

11 Janis, 'The Nature of *Jus Cogens*', 3 *Connecticut Journal of International Law* (1988) 359, 361.

which failed to indicate clear criteria by which such rules can be distinguished from other rules. The draft article simply stated that

> 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.[12]

In its commentary to this draft the ICL had to confess that 'there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens.*'[13] The ILC also expressed the view that 'it is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens.*'[14]

At the Vienna Conference on the Law of Treaties the Expert Consultant, Sir Humphrey Waldock emphasized that the ILC 'based its approach to the question of *jus cogens* on positive law much more than on natural law.'[15] Still many delegations believed that 'the form or source of such rules was not of essential importance in determining their peremptory character.'[16] Serious doubts were expressed whether it was really necessary 'to specify the manner in which such norms came into being.'[17] The principal criterion of peremptory rules was considered to be the fact that they 'served the interests of the whole international community, not the needs of individual states.'[18] Calls for more specific criteria were met by the argument that they were not really important. By relying on the domestic law analogy some delegations maintained that 'good customs, morals and public policy were not necessarily defined in municipal law, and yet no insoluble difficulties had ever arisen in applying them in specific cases.'[19]

At the same time there was also a disquieting feeling that this new powerful concept lacking clear definition could be misused for political purposes. Many felt that in a heterogeneous international society consisting of nation-states with differ-

12 2 *Yearbook of the ILC* (1966) 247.

13 *Id.* at 247-248.

14 *Id.* at 248. At a later stage the ILC once again confirmed this view by stating that the pre-eminence of fundamental obligations in international law over others 'is determined by their content, not by the process by which they were created.' 2 *Yearbook of the ILC* (1976 II) 85.

15 UNCLOT I, at 327.

16 The statement of the representative of Poland (*Id.* at 302). See also the statement of the representative of Cuba (UNCLOT II, at 97).

17 The statement of the representative of Israel (UNCLOT I, at 311).

18 The statement of the representative of Zambia (*Id.* at 322). For a similar view on the doctrinal level, see Verdross, '*Jus Dispositivum* and *Jus Cogens* in International Law', 60 *American Journal of International Law* (1966) 55, 58.

19 The statement of the representative of Philippines (UNCLOT II, at 95). See also the statement of the representative of Cyprus (*Id.* at 103). See also A.M. Fahmi, 'Peremptory Norms as General Rules of International Law', 22 *Österreichische Zeitschrift für öffentliches Recht* (1971) 383, 388.

ent interests and social systems it would be extremely difficult to obtain a genuine consensus of the content and ranking of community values and interests. There was a danger that the 'fundamental interests of the international community' would be interpreted subjectively. If no efforts were made to set up objective criteria for identification of norms reflecting these fundamental interests, then different groups of states would hardly be able to agree on what constitutes the *corpus* of norms of *jus cogens*. Indeed, the negotiations at the Vienna Conference on the Law of Treaties have shown that different states put forward the most diverging examples of the alleged rules of *jus cogens* each reflecting their own preferences. In commenting on the divergence of views on the various rules that had been referred to in the debate as having the character of *jus cogens*, the representative of the United Kingdom rightly drew attention to the fact that 'what might be *jus cogens* for one state would not necessarily be *jus cogens* for another.'[20]

From a broader perspective, it was also clear that community interests and moral values cannot be regarded as part of law, let alone part of 'higher law', without some form of approval within the recognized normative processes. As the representative of Brazil put it, 'international law was by definition formed by states, and no noble aspirations or sentiments, love of progress or anxiety for the well-being of the peoples of the world could be embodied in international instruments without the collective assent of the international community.'[21] This emphasis on the need for some validation of the proposed peremptory principles paralleled the often-quoted pronouncement of the ICJ which stated that as a matter of law the ICJ could 'take account of moral principles only in so far as these are given a sufficient expression in legal form.'[22]

The need to provide the novel concept of 'higher law' with more or less clear criteria has resulted in a gradual 'positivization' of *jus cogens*. The Vienna Conference introduced a new element into the ILC's draft article on *jus cogens* consisting in the requirement according to which peremptory norms should be 'accepted and recognized by the international community of states as a whole.' The call for positive validation of peremptory norms through the 'acceptance' and 'recognition' by the community of states clearly brought the concept of *jus cogens* into the realm of positive law. However, even after this development it remained

20 UNCLOT I, at 305.

21 *Id.* at 317.

22 ICJ Reports (1966) 34. Although the quoted statement was made by the ICJ in the otherwise controversial judgment in the *South West Africa Cases*, its authority as a confirmation of the continued importance of legal form in international law remains unaffected. The statement was a response to a suggestion on the part of the applicants (Ethiopia and Liberia) that humanitarian considerations are sufficient in themselves to generate international legal rights and obligations. Ethiopia and Liberia claimed that 'distinction between "legal" norms, on the one hand, and norms of a "political or technical" nature, on the other, misconceives the true nature of the judicial process' (ICJ Pleadings, *South West Africa Cases* 491 (Vol. 4)). In their view it would be appropriate for the ICJ to 'draw upon humane, moral and political standards in deriving the sources of law' (*Id.* at 487).

unclear what normative processes can bring about the emergence of peremptory rules.

In the realm of natural law there is no difficulty in postulating the existence of overriding principles binding on all subjects of law independently of their will. By contrast, the emergence of norms of *jus cogens* in positive legal orders involves legislative processes capable of imposing peremptory rules on all members of a particular community. While domestic legal systems based on legislation by a sovereign are well equipped in this regard, in international law there is a glaring gap between the requirements of the idea of *jus cogens* and the possibilities of the existing law-making processes. These processes provide for the creation of any rules only by the consent of the members of the international community. The consensual nature of the formation of international law is clearly reflected in the basic norm about the sources, Article 38(I) of the Statute of the ICJ It lists conventions, custom and general principles of law. In the case of conventions, Article 38(I) requires their express recognition by the contesting states. Article 38(I) holds that customary general practice should be 'accepted as law'. Finally, 'the general principles of law' should also be 'recognized' by civilized nations. This essentially consensual view of international law is confirmed and developed by abundant international practice and case-law. In its judgment in the *Lotus* case the Permanent Court of International Justice has stated: 'International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.'[23] The ICJ has expressed essentially the same attitude in the *Nicaragua Case*: 'In international law there are no rules, other than such rules as may be accepted by the states concerned.'[24] In the international legal order the basic principle of consensuality is reflected in a number of specific rules governing the treaty and customary law-making processes and providing that treaties do not bind third states without their consent, while customary rules do not bind persistent objectors. Actual practice also demonstrates that as a rule governments deny the possibility of becoming bound by rules of international law against their will.[25]

The apparent contradictions between the idea of *jus cogens* and the consensual nature of the formation of international law may in principle be resolved in two ways. The first would presuppose that the usual meaning of *jus cogens*, largely borrowed from domestic legal systems, cannot be transferred into international system. International rules of *jus cogens* would bind only those subjects of law who have accepted and recognized them. The second possibility involves the introduction into international system of a new law-making procedure which does not require the consent of individual states for the emergence of peremptory rules. Such a develop-

23 PCIJ, Series A, No. 10, at 19 (1927).

24 ICJ Reports (1986) 135.

25 See *infra* notes 112-114 and accompanying text.

ment would obviously amount to a fundamental change in the constitutional principles of the international legal order relating to law-making.

III. Law-Making Process: The Controversy Unresolved

From a legal political perspective, the view according to which *jus cogens* implies the emergence of non-consensual or not completely consensual law-creating procedures is reflected in two different types of claim. The first is that the acceptance of the *jus cogens* concept means the recognition of a wholly new source of law capable of producing generally binding rules. The second claim is based on the theory that the existing sources have been modified to allow majority rule-making in the context of 'higher law'.

The possibility of the emergence of a new source of law was first envisaged at the Vienna Conference on the Law of Treaties by the representative of France who stated that if the draft article on *jus cogens* 'was interpreted to mean that a majority could bring into existence peremptory norms that would be valid *erga omnes*, then the result would be to create an international source of law...'[26] France rejected such a possibility because the new source of law would be subject to no 'control and lacking all responsibility.'[27] After the Conference the particular formulation of Article 53 of the Vienna Conference on the Law of Treaties[28] was used to support the contention that a new source of 'general international law' was emerging. Commentators regarded Article 53, according to which a peremptory norm of general international law is a norm 'accepted and recognized' as such by 'the international community of states as a whole', as evidence of 'a *new* source, one that manifestly involves an intent of the community, as expressed in a community-wide forum, to create general norms directly.'[29] The proponents of this view argue that the traditional sources of international law listed in Article 38(I) of the Statute of the ICJ do not represent the international community as a whole. They claim that this community may assemble only in the UN General Assembly or at a universal inter-

26 UNCLOT I, at 94.

27 *Id.*

28 See, *supra* note 1.

29 Onuf, Birney, 'Peremptory Norms of International Law: Their Source, Function and Future', 4 *Denver Journal of International Law and Policy* (1974) 187, 195 (citation omitted, emphasis in the original). See also Caicedo Perdomo, 'La teoria del jus cogens en derecho internacional a la luz de la convencion de Viena sobre el derecho de los tratados', *Revista de la Academia Colombiana de Jurisprudencia* Nos. 206-207 (1975) 259, 263 ('El procedimiento normativo especial del jus cogens parece confirmar la existencia de *una nueva fuente del Derecho Internacional*, constituída por las normas imperativas, fuente que no aparece en las disposiciones del artículo 38 del Estatuto de la Corte Internacional de Justicia que enumera las fuentes "tradicionales" del derecho internacional') (Emphasis added). Cf. Christenson, '*Jus Cogens*: Guarding Interests Fundamental to International Society', 28 *Virginia Journal of International Law* (1988) 585, 592.

national conference.[30] They also draw attention to the fact that Article 53 contains no reference to any element of practice. Consequently, the conclusion is made that the formation of general peremptory rules can hardly be conceived as a strengthened form of custom. It is more likely that an autonomous, original mode of formation of 'general rules' not based on practice is involved.[31]

However, a careful examination of the negotiating record relating to the notion of *jus cogens* does not support the view that the acceptance of Article 53 of the Vienna Convention on the Law of Treaties implied the recognition of a new source of general international law. Obviously, in the international community no new method of law-making can casually be assumed. Yet, the evidence shows that in elaborating the notions of *jus cogens* the ILC nowhere mentioned the possibility of introducing a higher source of law for determining 'higher law'. In fact, the ILC did not pay much attention to the question of sources of peremptory norms.[32] In its commentary to a draft article on *jus cogens* the ILC singled out only treaties as the most probable vehicle for 'a modification of a rule of *jus cogens* '[33] At the Vienna Conference on the Law of Treaties there was a clear tendency to regard *jus cogens* as the product of the existing sources. The established sources of law, primarily treaty and custom interacting with each other, were expressly mentioned by the majority of delegates participating in the debate.[34] Subsequent developments confirm the absence of any special source for *jus cogens* rules. The ILC stated in 1976 that 'in reality there is, in the international legal order, no special source for creating "constitutional" or "fundamental principles".'[35] In the *Nicaragua Case* the ICJ clearly proceeded on the assumption that the peremptory rule prohibiting the use of force was based not on some exotic source, but on the two most commonly used and established sources of law, namely treaty and custom.[36]

The view affirming the emergence of majority rule-making in the framework of the established sources tends to put a special emphasis on the fact that under Article 53 of the Vienna Convention on the Law of Treaties the peremptory norms of general international law should be accepted and recognized as such not by individual states but by 'the international community of states as a whole.' The argument is that the community as a whole may create rules which will bind all its members notwithstanding their possible individual dissent.

30 See Caicedo Perdomo, (*supra* note 29) 265. Cf. Onuf, Birney (*supra* note 29) 193.

31 See Sur, 'Intervention', in A. Cassese, J.H.H. Weiler (eds) *Change and Stability in International Law-Making* (1988) at 128.

32 See, *supra* note 14 and accompanying text.

33 2 *Yearbook of the ILC* (1966) 248.

34 See, e.g., the statements of the representatives of Greece (UNCLOT I, at 295), Cuba (*Id.* at 297), Poland (*Id.* at 302), Italy (*Id.* at 311), Ivory Coast (*Id.* at 321), Cyprus (*Id.* at 387), USA (UNCLOT II, at 102), and Bulgaria (*Id.*).

35 2 *Yearbook of the ILC* (1976 II) 86.

36 See ICJ Reports (1986) 97, 100.

The theory according to which norms of *jus cogens* reflecting the fundamental interests of the international community bind dissenters has a strong intellectual appeal. This is most clearly illustrated by the arguments of the applicants, Ethiopia and Liberia, in the *South West Africa Case* which strongly resemble the concept of *jus cogens*. The applicants contended that South Africa 'may not claim exemption from a legal norm which has been created by the overwhelming consensus of the international community, a consensus verging on unanimity.'[37] Ethiopia and Liberia argued that

> the norm of non-discrimination and non-separation involves the promotion of common interests and collective interests of states, and of the organized international community as a whole. There are, moreover, common interests which rest upon a widely shared and deeply felt and often eloquently expressed humanitarian conviction. In this respect apartheid corresponds to genocide, and the nature of the law-creating process in response to both has been remarkably similar: one in which the collective will of the international community has been shocked into virtual unanimity, and in which the moral basis of law is most visible. It is precisely because there is an offender that there has been a drive to create a norm. If the offender is allowed to avoid the legal condemnation of his action by stating a protest, then international law is rendered impotent in the face of a grave challenge to the values underlying the international social order.[38]

At the Vienna Conference on the Law of Treaties, however, only some states expressly supported the view that peremptory norms bind dissenters. Thus, the representative of Venezuela stated that 'except where a rule of *jus cogens* was concerned, Venezuela would not assume obligations it had not formally accepted, still less obligations it had expressly rejected.'[39] It appears that the same attitude was also implied in an emphasis on the generally binding character of *jus cogens* rules. Proposals were made, for example, to substitute the words 'accepted and recognized by the international community of states as a whole' used in the draft Article 53 by the words 'binding the international community.'[40]

Since the adoption of the Vienna Convention on the Law of Treaties this line of thought has found wide support among commentators. Ch.L. Rozakis writes, for example, that once adopted, the peremptory norms bind the entire international community and '[in] consequence a state can no longer be dissociated from the binding peremptory character of that rule even if it proves that no evidence exists of its acceptance and recognition of the specific function of that rule, or moreover, that it has expressly denied it.'[41] The Soviet author L.A. Alexidze holds that norms of *jus cogens* are based on the common will of the international community and as abso-

37 ICJ Pleadings, *South West Africa Cases* 305 (Vol. 9) (statement by E.A. Gross, agent for the Governments of Ethiopia and Liberia).

38 *Id.* at 351.

39 UNCLOT I, at 444.

40 See the statement of the representative of Cyprus (*Id.* at 473).

41 Ch.L. Rozakis, *The Concept of* Jus Cogens *in the Law of Treaties* (1976) 78.

lute norms these norms bind even dissenters.[42] H. Neuhold contends that in the case of *jus cogens* norms, the will of the majority 'binds the minority even when it expressly rejects the *jus cogens* qualification.'[43] G. Gaja believes that 'a peremptory norm necessarily operates with regard to all states.'[44] According to him 'there is general agreement among interpreters that lack of acceptance or even opposition on the part of one or a few states is no obstacle to a norm becoming peremptory.'[45] R.St.J. Macdonald asserts that 'the consent of a "very large majority" will suffice to create a rule of *jus cogens*.'[46] He also thinks that such norms should be binding on all states, including those which expressly refused to acknowledge them.[47] In his view 'it is the essence of the concept that a peremptory norm is applicable against states that have not accepted the rule.'[48]

These and other commentators usually use two arguments in support of their conclusions. The first is based on the 'essence of the concept' which must 'necessarily' operate as regards all states without exception. The basic flaw of this line of argument is an assumption that the 'essence' of the concept is the same in the domestic and in the international legal orders. The argument takes as proven precisely that which requires proof: namely the fact that by accepting *jus cogens* states indeed reached an agreement on a constitutional principle that peremptory norms bind all members of the international community notwithstanding their possible dissent.

The second, more substantive, argument relies on a particular interpretation of the words 'accepted and recognized by the international community of states as a

42 L.A. Alexidze, *Some Theoretical Problems of International Law. Peremptory Norms* Jus Cogens (1982) 178. (In Russian with English summary). See also Alexidze, 'Legal Nature of *Jus Cogens* in Contemporary International Law', 172 *Recueil des cours* (1981 III) 219, 246-247, 258. For an earlier expression of a similar view in Soviet doctrine see, e.g., A.P. Movchan, *Codification and Progressive Development of International Law* (1982) 38-43. (In Russian). For a contrary view, see L.N. Shestakov, *Peremptory Norms in the System of Contemporary International Law* (1982) 38-43. (In Russian). G.I. Tunkin, while stressing that peremptory norms, like other norms of general international law, are created by agreement between states (G.I. Tunkin, *Theory of International Law* (1970) 181 (in Russian)), now supports the view that at least new states are automatically bound by the existing rules of *jus cogens* (R.A. Mullerson, G.I. Tunkin (eds), 1 *Course of International Law* (1989) 198 (in Russian)). See also Mullerson, 'Sources of International Law: New Tendencies in Soviet Thinking', 83 *American Journal of International Law* (1989) 494, 504.

43 Neuhold, 'Völkerrechtlicher Vertrag und "Drittstaaten"', 28 *Berichte der Deutschen Gesellschaft für Völkerrecht* (1988) 51, 63 (translation from German by the author).

44 Gaja, '*Jus Cogens* Beyond the Vienna Convention', 172 *Recueil des cours* (1981 III) 271, 283.

45 *Id.*

46 Macdonald, 'The Character of the United Nations and the Development of Fundamental Principles of International Law, in B. Cheng, E.D. Brown (eds), *Contemporary Problems of International Law: Essays in Honour of George Schwarzenberger* (1988) 196, 199.

47 *Id.*

48 Macdonald, 'Fundamental Norms in Contemporary International Law', 25 *Canadian Yearbook of International Law* (1987) 115, 131. See also M. Bos, *A Methodology of International Law* (1984) 246.

whole' proposed during the Vienna Conference on the Law of Treaties by the Chairman of the Drafting Committee M.K. Yasseen. The Chairman of the Drafting Committee pointed out that the phrase 'as a whole' did not imply that universal acceptance and recognition of a rule of *jus cogens* was necessary:

> There was no question of requiring a rule to be accepted and recognized as peremptory by all states. It would be enough if a very large majority did so; that would mean that, if one state in isolation refused to accept the peremptory character of a rule, or if that state was supported by a very small number of states, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected.[49]

M.K. Yasseen also stressed that 'no individual state should have the right of veto, and the Drafting Committee had therefore included the words "as a whole" in the text of Article 50'[50] (in the Draft Treaty of 1968, corresponding to Article 53 of the Vienna Convention – G.D.).

Notwithstanding the apparent authoritativeness of this statement, it is far from established, however, that the concept of *jus cogens*, as codified by Article 53 of the Vienna Convention, allows the imposition of legal obligations upon members of the international community without their consent. A careful analysis of the wording of Article 53 and an examination of the relevant preparatory work relating to the notion of *jus cogens* provides a number of arguments supporting rather than rejecting the view that principles of *jus cogens* have an essentially consensual foundation. It should be noted, first, that according to Article 53 of the Vienna Convention, principles of *jus cogens* belong to the *corpus* of 'general international law.' Because international law does not have a special source designed to generate rules of 'general international law' which are going to be accepted as norms of *jus cogens*,[51] such norms have to be created in the framework of the established law-making procedures. This would require the application of traditional criteria of validity for establishing a rule of general international law which are essentially consensual in their nature.[52] The judgment of the ICJ in the *Nicaragua Case* appears to suggest that evidence supporting the peremptory character of a rule may have relevance in the process of ascertainment of the validity of the alleged general or customary rule.[53] This does

49 UNCLOT I, at 472.

50 *Id.* at 971. Cf. Yasseen, 'Reflections sur la détermination du *jus cogens*', in *L'élaboration du droit international public* (1975) 204-210.

51 See, *supra* notes 26-36 and accompanying text.

52 See, *supra* notes 23-25 and accompanying text.

53 In ascertaining the existing customary law, the ICJ stated: 'A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, para. 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by state representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law.' The Court referred then to the opinion of the ILC which regarded the principle under discussion as having 'the character of *jus cogens*.' ICJ Reports (1986) 100.

not necessarily mean, however, that the traditional tests for the existence of a rule of 'general international law' may be relaxed.

Secondly, it should be borne in mind that in defining norms of *jus cogens*, Article 53 closely follows the consensual requirements established by Article 38(I) of the Statute of the ICJ Far from abolishing the requirement of consent, Article 53 calls for 'acceptance' and 'recognition' of emerging peremptory norms by states constituting the international community. It is significant to note that both words were used by the Drafting Committee at the Vienna Conference on the Law of Treaties in order to bring the definition of norms of *jus cogens* into line with Article 38(I) of the Statute of the ICJ[54]

While the statement of the Chairman of the Drafting Committee suggests that a peremptory norm may emerge as a result of recognition by 'a very large majority',[55] a closer examination of preparatory work reveals that in view of many participants of negotiations the formation of peremptory norms was not a matter of simple majority rule-making. A number of states stressed the need for 'universal' acceptance of norms of *jus cogens*.[56] Still others tended to place a strong emphasis on the qualitative requirement, apparently rejecting the idea that simple 'very large majority' would be enough. Thus, the representative of Australia stressed that rules could only be regarded as having the status of *jus cogens* if there was 'the substantial concurrence of states belonging to all principal legal systems.'[57] He also emphasised that 'as in the case of the development of ordinary rules of customary international law the development of peremptory rules was not a matter of majority voting.'[58] The representative of the United States, for his part, pointed out that the recognition of the peremptory character of a norm 'would require, as a minimum, the absence of dissent by any important element of the international community.'[59] Later on, this general line of thought was taken up by commentators. In an apparently first authoritative interpretation along these lines R. Ago stated:

> ... il faut que la conviction du caractère impératif de la règle soit partagée par toutes les composantes essentielles de la communauté internationale et non seulement, par exemple, par les Etats de l'Ouest ou de l'Est, par les pays développés ou en voie de développement, par ceux d'un continent ou d'un autre.[60]

54 See the statement of the Chairman of the Drafting Committee, UNCLOT I, at 471.

55 See, *supra* note 49 and accompanying text.

56 See, e.g., the statements of the representatives of Finland (UNCLOT I, at 294), Greece (*Id.* at 295), UK (*Id.* at 304), Israel (*Id.* at 311), and the Philippines (*Id.* at 387).

57 *Id.* at 388.

58 *Id.*

59 UNCLOT II, at 102. Note that the Expert Consultant, Sir Humphrey Waldock placed an emphasis on a slightly different requirement. According to him 'a principle of general international law could become *jus cogens* only upon general acceptance as such throughout all the regions of the world' (UNCLOT II, at 330).

60 Ago, 'Droit des traités à la lumière de la convention de Vienne', 134 *Recueil des cours* (1971 III) 237, 323. See also Ago, 'Intervention' in *International Crimes of State*, *supra* note 4, at 253.

This interpretation of the expression 'accepted and recognized by the international community of states as a whole' is also confirmed by subsequent developments, in particular by the ILC's commentary to Article 19 of the Draft Articles on State Responsibility[61] which also requires that an international crime should be recognized as such by the international community 'as a whole'. The ILC pointed to the close link between notions of *jus cogens* and international crimes.[62] The ILC also stressed that in dealing with the notion of international crimes it decided to follow the system adopted by the Conference on the Law of Treaties for determining the 'peremptory' norms of international law.[63] This approach makes 'the international community as a whole' responsible for judging whether a breach of specific obligation is an international crime. The ILC pointed out that this

> certainly does not mean the requirement of unanimous recognition by all the members of that community, which would give each state an inconceivable right of veto. What it is intended to ensure is that a given international wrongful act shall be recognized as an 'international crime', not only by some particular group of states, even if it constitutes a majority, but by all the essential components of the international community.[64]

These considerations appear to imply that in matters relating to the creation of peremptory rules 'a very large majority' will not necessarily be able to impose its will on 'a very small number of states.' If the latter would represent a significant element of the international community the emergence of a new rule of *jus cogens* would have to be deferred.

Be that as it may, the emergence of a peremptory norm recognized by 'a very large majority' or by 'all the essential components of the international community' does not necessarily mean that 'individual states' or 'a very small number of states' refusing to accept the peremptory character of a new norm will be bound by it. According to the key statement of the Chairman of the Drafting Committee cited earlier[65] an opposition of an 'individual state' or of 'a very small number of states' does not 'affect' the emergence of a peremptory norm as such. In other words, the dissenting states cannot succeed in preventing the formation of a rule of *jus cogens*. However, this does not necessarily imply the view that such rules will be opposable to them in cases when they persistently objected to the rules. Indeed, an examination of preparatory work indicates that only a limited number of states expressly supported the idea that peremptory norms could be imposed on states which objected to them.[66] Others have clearly rejected it. Thus, the representative of France stated that if the proposed article 'was interpreted to mean that a majority could bring into exis-

61 2 *Yearbook of the ILC* (1976 II) 73.
62 *Id.* at 201, 119-120.
63 *Id.* at 119.
64 *Id.*
65 See, *supra* note 49 and accompanying text.
66 See, *supra* note 39-40 and accompanying text.

tence peremptory norms that would be valid *erga omnes*, then the result would be to create an international source of law subject to no control and lacking all responsibility.'[67] He strongly opposed such an idea stating that to compel states 'to accept norms established without their consent and against their will infringed their sovereign equality.'[68] Similarly, in addressing the question as to whether a treaty peremptory norm accepted by a majority of states would be 'valid only for the parties to a treaty or for all states' the representative of Switzerland stressed that 'the Swiss delegation believed that the former presumption was correct.'[69]

The foregoing appears to suggests that the acceptance of *jus cogens* by the international legal order does not automatically imply the introduction of a new international law-making technique based on majority rule. It is generally recognized that in order to acquire the quality of *jus cogens* a norm must first pass the normative tests for rules of 'general international law.' It is also established that, secondly, such a norm must be 'accepted and recognized' as a peremptory norm by 'the international community of states as a whole.' These requirements appear to provide the dissenting minority with ample opportunities to dissociate itself from both the binding quality and the peremptory character of a rule. If the requirement of the acceptance and recognition by the international community of states 'as a whole' is interpreted to mean the recognition by all the essential components of the international community, then the concept of *jus cogens* establishes a very strict threshold for this particular type of law-making. Under this interpretation, the requirement of acceptance and recognition comes very close to a call for unanimity among all the important elements of the modern international community. It follows that if there is an opposition to the proposed peremptory rule on the part of states comprising an important element of the international community, such a dissent would prevent the emergence of a rule of *jus cogens*.

67 UNCLOT II, at 94.

68 *Id.* at 95. It was reported that France planned to submit to the Vienna Conference an amendment to the draft Art. 50 on *jus cogens* which would have provided that a peremptory norm of general international law '... n'est pas opposable à un Etat qui peut faire la preuve qu'il ne l'a pas acceptée expressément en tant que telle' (See Deleau, 'Les positions françaises à la Conférence de Vienne sur le droit des traités', 15 *Annuaire français de droit international* (1969) 7, 19). The envisaged amendment was never officially proposed because it did not find enough support during unofficial consultations with certain delegations. However, it would be wrong to draw far-reaching conclusions from this episode. There may be different motives behind the reported lack of support for the envisaged amendment. O. Deleau explains the lack of support by the fear of states that new amendments would only destabilize the already achieved compromise on Art. 50 (*Id.*). It is also possible, however, that the amendment went too far by demanding *an express acceptance* of peremptory norms by individual states. The reaction might have been different if the issue of opposibility would have been resolved in a different way, for instance by proposing that a peremptory norm of general international law is not opposable to states who have expressly and persistently objected to the norm while it was in the process of development. For a contrary interpretation, see Ch.L. Rozakis (*supra* note 41), at 78-79. L. Hannikainen, *Peremptory Norms* (Jus Cogens) *in International Law* (1988) 212-213.

69 *Id.* at 123.

It appears that, generally, an individual state, even a most powerful one, cannot qualify as an 'essential' or 'important' element of the international community, and, therefore, be able to block the formation of peremptory rules. Yet, even here the situation is not without some doubt. Thus, it is well recognized that the creation of general rules of international law requires the participation of states whose interests, as the ICJ put it, are 'specifically affected.'[70] It may well be argued that by analogy these states would also have a major influence in matters relating to the elevation of the relevant general rules to the rank of peremptory norms. In certain areas of law, where a limited number of 'specifically affected' states play a predominant role, their opposition to a proposed norm may be a decisive factor. To take an obvious example, it is difficult to envisage the establishment of peremptory rules regarding outer space in the face of the opposition of the major space powers. Whatever the position will be on these matters, it appears that in any case individual states may always raise the issue of opposability. There is much to be said for the view that by expressing their dissent, they may be able to exclude themselves from the application of the peremptory rules.

Apart from these issues, obviously calling for further clarification, there is also one basic question which still remains unresolved. The question is whether the concept of *jus cogens* as such, whatever its specific interpretation, applies to states that opposed it from the very beginning. At the 1969 Vienna Conference on the Law of Treaties, for example, a number of states, in particular France, clearly rejected the concept. France continued to express opposition to the concept on other occasions, in particular during the 1977 Vienna Conference on Succession of States in Respect of Treaties[71] and at the 1986 Vienna Conference on the Law of Treaties which confirmed the 1969 definition of *jus cogens*.[72] It could be argued, of course, that the objecting states are bound by the concept in so far as Article 53 of the Vienna Convention is declaratory of an already existing international law concerning *jus cogens*. Indeed, at the 1969 Vienna Conference a number of states maintained that *jus cogens* was clearly a part of positive law.[73] However, the persuasiveness of this argument is put into question by the display of extremely divergent positions of different states as regards the nature of *jus cogens* during the negotiations at the Vienna Conference. The ILC apparently believed that the proposed concept was largely an innovation as it stated in its commentary that 'the emergence of *jus cogens* is comparatively recent, while international law is in process of rapid development.'[74] In

70 ICJ Reports (1969) 43, 44.

71 See the statement of the representative of France, United Nations Conference on Succession of States in Respect of Treaties. Official Records. First Session at 39 (1978).

72 See the statement of the representative of France, UN Doc. A/Conf. 129/C. 1/SR 28 at 7 (1986).

73 See, e.g., the statements of the representatives of Poland (UNCLOT II, at 99), Bulgaria (*Id.* at 102), Iraq (*Id.* at 103), Italy (*Id.* at 104).

74 2 *Yearbook of the ILC* (1966) 248. At a later stage the ILC stressed that '... the widespread recognition of the existence in international law of rules of *jus cogens* is too recent...'. 2 *Yearbook of the ILC* (1979 II) 114.

view of the fact that the final wording of Article 53 was the result of a compromise at the Conference, one can hardly deny that at least the treaty definition of the concept is an innovation.[75] Consequently, the dissenters can claim that they are not bound by this particular notion of *jus cogens*, as embodied in the Vienna Conventions,[76] including the possible legislative implication for the global law-making.

IV. Peremptory Law-Making: Existing Experience

In a situation where many law-making implications of the concept of *jus cogens* remain unclear, the subsequent practice of states gains a special significance. One may always hope that differences in approaches to the concept which were not resolved *in abstracto* still can be reconciled in the context of specific situations. Regrettably the actual practice relating to the creation of new rules of *jus cogens* is very scarce. Therefore one cannot rely on it as an indication of established trends. Nevertheless, the existing practice clearly demonstrates that many states are eager to put the law-making potential of the novel concept to the test.

In view of the political realities in the international community it comes as no surprise that the principal proponents of the concept are found within a group of states constituting majority in the present international community, namely among the developing countries. As a result of an unprecedented expansion of membership of the international society of nation-states, the newly independent and essentially developing states are able to mobilize on automatic majority at any international law-making forum. The numerical majority favouring far-reaching and rapid changes in the existing international legal order gradually realized the power of numbers. Once the proponents of change acquired the preponderant majority, the temptation emerged to control the law-making process by way of majority decisions. In such a situation it was only natural to develop a strong interest in *jus cogens* as a possible normative vehicle for introducing sweeping reforms dictated by the majority. While writers from the developing countries display a growing interest in the non-consensual foundations of *jus cogens*,[77] an analysis of recent practice indicates that the

75 The ILC appears to support this view by stating that 'the notion of peremptory norms of general international law, embodied in Article 53 of the Vienna Convention, had been recognized in public international law before the Convention existed, but that instrument gave it both a precision and a substance which made the notion one of its essential provisions', 2 *Yearbook of the ILC* (1982 II) 62.

76 This was the position of some of the dissenters. See, e.g., the statement of the representative of Turkey (UNCLOT II at 99).

77 A lucid illustration of this trend is the statement by an Indian commentator that 'the extreme consent-oriented approach is inconsistent with the espousal of "community norms" of law like *jus cogens* and an international law of crimes which obviously seek to bind the dissenting states.' Rama Rao, 'International Custom', 19 *Indian Journal of International Law* (1979) 515, 520. Cf., however, Magallona, 'The Concept of *Jus Cogens* in the Vienna Convention on the law of Treaties', 51 *Philippine Law Journal* (1976) 521, 522-523, 529.

Third World decision-makers do not hesitate to use the *jus cogens* concept for legislative purposes.

The negotiating process at the Third United Nations Conference on the Law of the Sea (UNCLOS) is the most lucid illustration of these trends and tendencies. The developing states believed that 'because they were in the majority, the Conference gave the third-world countries the opportunity of imposing bold solutions in order to create a new law of the sea.'[78] Conscious of its numerical preponderance, the majority developed a tendency to present its views, usually expressed by the Group of 77, as the views of the international community as a whole. In a characteristic statement the representative of Tanzania states, for example, that the working papers on the regime of the sea-bed submitted by the Group of 77 'spoke in terms of the interests of all mankind, whereas those produced by other groups referred to individual states which in fact represented less than one-third of the members of the international community.'[79] The coincidence of the views of the majority of 120 developing states at UNCLOS was considered as a sufficient indication of the community 'consensus'.[80]

In a situation where 'a very small number of states' of the West opposed the proposals of the majority, in particular those regarding the legal regime of the sea-bed, the developing countries turned to the notion *jus cogens* by claiming that the principle of the common heritage of mankind, as proclaimed by the 1970 United General Assembly resolution on the sea-bed,[81] was a principle of *jus cogens*. While many developing countries supported this view in their official statements,[82] the representative of Chile introduced a draft article which would have declared the provisions of the Law of the Sea Convention[83] relating to the common heritage of mankind a peremptory norm of general international law.[84] The debates on this

78 Statement by the representative of Colombia, II Third United Nations Conference on the Law of the Sea, Official Records at 19. (Hereinafter referred to as UNCLOS).

79 VI UNCLOS at 62-63. See also Pinto, 'The New Law of the Sea: The Lawyer as International Legislator', in P. van Dijk *et al.* (eds) *Restructuring the International Economic Order: The Role of Law and Lawyers* (1983) 230 ('At the Conference, the developing countries as a group tended to emphasize their perception of "community interests" as fundamental to their position while among the free market economy industrialized countries individual economic and security concerns appeared to dominate').

80 See, again, the statement of the representative of Tanzania, VI UNCLOS, at 71.

81 Declaration of Principles Governing the Sea-Bed and the Ocean Floor and the Subsoil thereof Beyond the Limits of National Jurisdiction, UN Doc. A/Res. 2749 (1970).

82 See, e.g., the statements of the representatives of India (XIV UNCLOS, at 16), Trinidad and Tobago (*Id.*), Argentina (*Id.* at 37), Iran (*Id.* at 42), Niger (*Id.* at 75), Jamaica (*Id.* at 77).

83 United Nations Convention on the Law of the Sea, UN Doc. A/Conf. 62/122 (1982) (Hereinafter referred to as Law of the Sea Convention).

84 The text of the Chilean proposal (UN Doc. A/Conf. 62/GP/9 (1980)) read as follows: 'The states parties to the present Convention accept and recognize on behalf of the international community as a whole that the provision relating to the common heritage of mankind set out in Art. 136 is a peremptory norm of general international law from which no derogation is permitted and which, consequently, can be modified only by a subsequent norm of general international law having the same character.' The document containing this proposal is

proposal have made it clear that while 'the majority strongly supported the proposal', it 'was not entirely acceptable to some.'[85] Because UNCLOS was working on the basis of consensus this opposition prevented the inclusion of the original Chilean proposal into the text of the Convention. The Convention contains only a loose provision according to which 'state parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in Article 136 and that they shall not be party to any agreement in derogation thereof.'[86] It is clear that Article 311 imposes an important limitation on the subsequent conduct of the parties to the Law of the Sea Convention. However, the existence of this limitation does not necessarily mean that by virtue of Article 311 the principle of the common heritage of mankind automatically acquired the character of a norm of *jus cogens*. It is well recognized that a mere stipulation in a treaty providing that derogation from the terms of specific rules embodied in the treaty is not permitted does not transform the relevant rules into peremptory norms of general international law.[87] In assessing the impact of Article 311, one has to take into account the fact that it binds only 'state parties' to the Convention. It should also be kept in mind that in contrast to the original Chilean proposal, Article 311 does not claim to be the recognition of the *jus cogens* character of the common heritage of mankind principle on behalf of the international community as a whole.

Notwithstanding all this, the developing states continued to claim that the Convention reflected the recognition of the common heritage of mankind as a peremptory rule.[88] The Chilean representative, while conceding that he 'would have preferred more categorical language', stressed that the negotiated text of the Convention 'in no way affected the status of *jus cogens* provisions in customary law and that that text took note of their existence.'[89] Although 'a very small number' of Western states clearly rejected the *jus cogens* character of the common heritage of mankind principle,[90] the majority continued to rely on it with an aim of

reprinted in R. Platzöder (ed), 12 United Nations Conference on the Law of the Sea: *Documents* (1987) 302.

85 See Report of the President on the Work of the Informal Plenary Meeting of the Conference on General Provisions, UN Doc. A/Conf. 62/L. 58, XIV UNCLOS, at 129.

86 Law of the Sea Convention (*supra* note 83) Art. 311, para. 6

87 See commentary of the ILC to the draft article on *jus cogens*, 2 *Yearbook of the ILC* (1966) 248.

88 See, e.g., the statement of the representative of Costa Rica (XIV UNCLOS, at 66) and Uruguay (*Id.* at 80). For a similar assessment of Art. 311 of the Law of the Sea Convention on the doctrinal level, see, e.g., Gómez Robledo, 'Le *jus cogens* international: sa genèse, sa nature, ses fonctions', 172 *Recueil des cours* (1981 III) 9, 176. L. Hannikainen (*supra* note 68), at 87-188, 570.

89 XIV UNCLOS, at 46. At the closing session of the Conference the Chilean representative claimed that the legal concept of the common heritage of mankind 'is characterized as *jus cogens* by the present Convention', XVII UNCLOS, at 67.

90 See, e.g., the statement of the US delegation: 'The concept of the common heritage of mankind in the Convention adopted by the Conference is not *jus cogens*. The Convention text and the negotiating record of the Conference demonstrate that a proposal by some delegations to include a provision on *jus cogens* was rejected.' XVII UNCLOS, at 243.

imposing specific normative solutions regarding sea-bed on dissenters. In protesting against the relevant unilateral legislation and limited agreements among Western states, claiming the right of unilateral exploitation of the sea-bed, the Group of 77 states:

> Given that the principle of the common heritage of mankind is a customary rule which has the force of peremptory norm, the unilateral legislation and limited agreements are illegal, and are violations of this principle.[91]

It appears that the same attitude lies behind the 1985 Declaration of the Preparatory Commission for the Sea-Bed Authority which declared exploitation of the sea-bed beyond the framework of the conventional regime 'wholly illegal'.[92]

Another recent example of a concerted effort aimed at elevating a particular norm to the rank of *jus cogens* is provided by the negotiations at the Vienna Conference on Succession of States in Respect of State Property, Archives and Debts. One of the most controversial issues at the Conference was the legal nature of the principle of the permanent sovereignty over natural resources proclaimed in a number of the UN General Assembly resolutions.[93] The Draft Convention on Succession of States contained a rule according to which agreements concluded between the predecessor state and the newly independent state to determine succession to state property of the predecessor state should not 'infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.' In its commentary to a draft article containing this rule, the ILC noted that some of the members of the Commission expressed the view that agreements violating the principle of the permanent sovereignty 'should be void *ab initio*.'[94] By relying on this commentary the developing states claimed that according to the Draft Convention the principle of the permanent sovereignty over wealth and natural resources is a principle of *jus cogens*.[95] The Conference was also used to impart the *jus cogens* character to other

91 UN Doc. A/Conf. 62/106 (1980), XIV UNCLOS, at 112. (Letter from the Chairman of the Group of 77 to the President of the Third UNCLOS).

92 UN Doc. LOS/PCN/72, at 2 (1985).

93 See Permanent Sovereignty over Natural Resources, UN Doc. A/Res. 1803 (1962), Charter of Economic Rights and Duties of States, UN Doc. A/Res. 3281 (1974).

94 2 *Yearbook of the ILC* (1981 II) 43. The Expert Consultant at the Vienna Conference, M. Bedjaoui stated that the infringement of the principle of permanent sovereignty in an agreement between the predecessor state and the newly independent state 'would invalidate such an agreement' (UN Doc. A/Conf. 117/C. 1/SR 15, at 3 (1983)).

95 See, e.g., the statements of the representatives of India (UN Doc. A/Conf. 117/C. 1/SR 13, at 5 (1983)), Algeria (*Id.* at 6), Thailand (SR 14, at 6), Syria (*Id.*), Brazil (*Id.* at 12), Egypt (SR 16, at 5).
The Soviet Union expressed its support for the peremptory character of the principle of the permanent sovereignty over wealth and natural resources at an earlier stage, during the United Nations Conference on Succession of States in Respect of Treaties. See the statement of the Soviet representative, United Nations Conference on Succession of States in Respect of Treaties. Official Records. Resumed Session at 23 (1979).

broad principles, such as the right of the peoples to development, to information about their history and to their cultural heritage.[96]

The developed Western states described these efforts as 'an attempt to give legal force to mere notions to be found in various recommendatory material emanating from the General Assembly.'[97] They clearly rejected the view that these principles were of the nature of *jus cogens*.[98] However, the conference majority, obviously oblivious of the effective power relationships in the outside world, regarded the influential dissenters as a small and easily overridable minority. As a result, the Convention containing controversial formulations[99] was adopted on the basis of majority vote.[100]

There are indications that efforts aimed at elevating certain principles of law to the rank of *jus cogens* via multilateral treaties will continue in the future. The possibility of relying on *jus cogens* was already mentioned, for example, during the discussions on the Draft Code of Offences Against the Peace and Security of Mankind[101] in the ILC. The *jus cogens* concept was regarded as the best means for reconciling the requirement for the universality of the offences and of the rule of law with the consensual nature of future international instrument whose adoption would require the consent of states. One member of the ILC, M. Bennouna, favouring the use of *jus cogens* in this connection mentioned during the debates the experience of UNCLOS in establishing the peremptory character of the common heritage of mankind 'in the text of the Convention itself' and asked whether there should not be

96 See the amendment submitted by Nigeria (UN Doc. A/Conf. 117/C. 1/L. 40 (1983)). See also the statements of the representatives of India (UN Doc. A/Conf. 117/C. 1/SR 27, at 11 (1983)), Syria (SR 28, at 2), Kenya (*Id.* at 8).

97 The statement of the representative of the US, UN Doc. A/Conf. 117/C. 1/SR 15, at 4 (1983).

98 See, e.g., the statements of the representatives of the Federal Republic of Germany (speaking on behalf of the ten Member States of the EEC) (UN Doc. A/Conf. 117/SR 10, at 6 (1983)), Canada (*Id.* at 7), Australia (*Id.* at 15), Switzerland (*Id.* at 17), Japan (*Id.* at 18), UK (*Id.* at 19). It is interesting to note that there were also expressions of continued resistance towards the concept of *jus cogens* as such. Thus, the representative of Switzerland, by referring to the relevant provision of the Vienna Convention on the Law of Treaties (*supra* note 1) stated that 'this provision was very far from being accepted by all members of the modern international community and indeed constituted for many states an obstacle to their accession to the 1969 Convention...' (UN Doc. A/Conf. 117/C. 1/SR 14, at 4 (1983)).

99 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, UN Doc. A/Conf. 117/14 (1983), Arts. 14, para. 4, 26, para. 7, 28, para. 3, 29, para. 4 and 36, para. 2.

100 The Convention was adopted by 54 votes to 11, with 11 abstentions (UN Doc. A/Conf. 117/SR 10, at 13 (1983)). A number of Western states expressed their disappointment regarding the manner in which the Conference had carried out its work. The representative of the Federal Republic of Germany stated that 'if the way in which the Conference had proceeded were to set an example for future codification conferences, then the codification process as such might well suffer damage' (UN Doc. A/Conf. 117/SR 10, at 6 (1983)). France expressed the view that 'the process which had been followed was fraught with risks for the future development of international law' (*Id.* at 12). Portugal stressed that 'a United Nations convention of universal scale which was designed to become *jus cogens* should not be negotiated in such a fashion' (*Id.* at 21).

101 See UN Doc. A/CN. 4/404 (1987).

a clear affirmation of the universality of the future Code 'by saying that an offence against the peace and security of mankind was a breach of rules recognized by the international community as a whole, from which no state could derogate.'[102]

These developments and tendencies raise a number of legal and political issues of vital importance for the future of the international law-making process. As a formal matter, the legislative experience of both UNCLOS and the 1983 Vienna Conference on Succession of States requires a careful examination of the role of the UN General Assembly resolutions and multilateral treaties in peremptory rule-making. From a broader perspective, the major issue is the usefulness of policies aimed at asserting peremptory principles by majority votes against the opposition of significant minorities.

The evaluation of the role of the United Nations General Assembly resolution in the formation of norms of *jus cogens* adds a new dimension to the on-going debate about their impact on the international law-making.[103] The view according to which resolutions may produce rules of *jus cogens* was first expressed during the 1969 Vienna Conference on the Law of Treaties.[104] The same attitude was asserted by many developing states in the specific legislative contexts just described.[105] A number of commentators also support such a possibility.[106] Yet, there are serious doubts as to whether an instrument which at best can lay down rules vaguely described as 'soft law' (meaning still not hard genuine law) may by some 'alchemy'[107] become a legitimate vehicle for the creation of 'higher law'. Not surprisingly, there is a strong and persuasive opposition to such a development. In rejecting this view the representative of the US stressed that 'instant declarations and paper resolutions did not establish customary international law, much less did they give it a peremptory character.'[108] An analysis of the negotiations at both UNCLOS and the 1983 Vienna Conference on Succession of States indicates that many states once again confirmed their traditional and widely shared view according

102 I *Yearbook of the ILC* (1987) 12.

103 For a recent comprehensive discussion of the relevant issues, see Skubiszewski, 'Resolutions of the General Assembly of the United Nations. Preliminary Exposé', 61 *Institut de droit international* Annuaire (1985 I) 29ff.

104 See the statement of the representative of Ethiopia (UNCLOT I, at 315).

105 Thus, in asserting the peremptory character of the principle of the common heritage of mankind, Chile, Colombia, Ecuador and Peru maintained in a special Declaration issued at Lima that the UN General Assembly resolution on the sea-bed (*supra* note 81) was 'the outcome of a process of universal cooperation in the search for new rules of law having the character of *jus cogens*, namely, that of peremptory rules of international law from which no derogation is permitted.' XIV UNCLOS, at 108.

106 See, e.g., Caicedo Perdomo (*supra* note 29), at 265. Gómez Robledo (*supra* note 88) at 174-176. See also Virally, 'Panorama du droit international contemporain', 183 *Recueil des cours* (1983 V) 177-178. Sloan, 'General Assembly Resolutions Revisited (Forty Years Later)', 58 *British Yearbook of International Law* (1987) 39, 81.

107 Weil, 'Towards Relative Normativity in International Law?', 77 *American Journal of International Law* (1983) 413, 425.

108 UNCLOT II, at 102. See also the statement of the representative of Switzerland (*Id.* at 103).

to which the UN General Assembly resolutions are not even capable of producing ordinary legally binding obligations, let alone the norms of *jus cogens*.[109]

While the General Assembly resolutions cannot be regarded as a suitable channel for the creation of *jus cogens* because of the lack of legal authoritativeness, the major obstacle for the use of treaties appears to be the fact that they usually fail to attract a very high number of ratifications which may be described as 'acceptance and recognition' of the relevant rules by 'the international community of states as a whole.' As a result, the assertion of a peremptory character of a rule binds only parties to a particular treaty. In this connection it is useful to remember the statement of the representative of Spain at the Vienna Conference on the Law of Treaties who stressed that it was not clear how the existence of a rule of *jus cogens* could depend on any declaration by a group of states.[110] He continued:

> The current Conference, for example, could establish binding rules which might be peremptory *inter se*, but not in respect of third states; *jus cogens*, however, was universal peremptory law as recognized by the international community binding by its very nature.[111]

It appears that only treaties of a truly universal nature establishing general international law may produce peremptory rules. As a practical matter, however, treaties seem to be able to contribute to the development of general norms of *jus cogens* only with the help of the customary process.

The law-makers may, of course, try to present the relevant treaty provisions as reflecting rules of *jus cogens* that existed prior to the conclusion of the treaty. In such a case a claim may be put forward that the treaty provisions are evidence of an already universally binding peremptory rule. Such a claim may be verified, however, only by examining the attitudes of states *dehors* the treaty context. Furthermore, if the relevant treaty has not received wide support it will lose much of its persuasiveness as evidence of peremptory rules of general international law.

This observation brings us to the principal political legal problem raised by the recent attempts to establish new peremptory rules. The existing experience clearly demonstrates that opposition by an important element of the international community, even if it constitutes a small minority, can effectively prevent the emergence of new norms of *jus cogens*. While in the UNCLOS context such an opposition thwarted the efforts to incorporate a relevant provision into the treaty text, the clear dissent of the Western states at the 1983 Vienna Conference on Succession of States will undoubtedly affect the value of the adopted Convention as a vehicle for the establishment or the evidence of the existence of the alleged *jus cogens* norms.

109 See, e.g., the statements at UNCLOS of the representatives of the US (IX UNCLOS, at 104) and Italy (*Id.* at 107) and at the 1983 Conference of the representatives of the US (UN Doc. A/Conf. 117/C. 1/SR 15, at 5), France (SR 16, at 2) and UK (*Id.* at 3).

110 UNCLOT I, at 315.

111 *Id.*

From a political-legal perspective, it is also important to note that in these situations the individual states, apart from relying on the blocking mechanism of the 'group dissent', continued to assert their sovereign right to disassociate themselves from the emerging rules notwithstanding their allegedly peremptory character. Thus, in responding to a claim that the common heritage of mankind principle prohibits unilateral mining of the sea-bed, the US stated:

> The United States could not accept the suggestion that, without its consent, other states would be able, by resolutions or statements to deny or alter its rights under international law.[112]

France made it clear that in her view 'no government could be bound under international law unless it agreed to be so bound in a treaty, and that in no case could a government be bound by a legal rule which others sought to impose on it.'[113] Similarly, Belgium stressed that 'no state could be bound by international law without its consent.'[114] These unequivocal statements indicate that notwithstanding far-reaching claims to the contrary many states continue to take seriously their right of dissent, even in situations involving the alleged emergence of peremptory rules.

These developments also show that while emphasizing the importance of some of the procedural issues, the existing law-making practice relating to peremptory rules did not succeed in reconciling the fundamental differences in approaches to the law-making aspect of *jus cogens*. Divergent legal positions expressed at the time when the concept was negotiated reemerged in conflicting normative claims of different groups of states who are struggling to define the best possible process for accommodating the community and nation-state interests in that still highly controversial context.

V. Conclusion

The idea of international *jus cogens* as a body of rules having vital importance for the international community as a whole requires the creation of certain basic universal principles binding all states. In this regard it reflects the deeply felt need of the increasingly interdependent global community for a public order for all mankind. While the idea of overriding legal norms reflecting the fundamental interest of the international community as such clearly calls for some kind of legislation, it is far from established that its acceptance by the international legal order resulted in the introduction of such legislation on the basis of majority rule-making. The foregoing analysis shows that both the envisaged normative models for the peremptory law-making and the recent attempts to use the concept for legislative purposes remain

112 IX UNCLOS, at 106.
113 *Id.*
114 *Id.* at 107.

controversial. The claim as to the recognition of majority rule-making in the context of *jus cogens* appears to enjoy some support. However, this view was firmly rejected by a significant number of states not only in principle, at the time when the novel concept was mooted, but also in concrete situations involving assertions and counter-assertions relating to the establishment of specific peremptory norms.

In the absence of an accepted international legislative power the emergence of effective international peremptory norms obviously requires the achievement of a genuine consensus among all the essential components of the modern international community. From a policy perspective, attempts to exploit the concept of *jus cogens* as a normative instrument for imposing the views of the majorities on the dissenting minority appear to be unwise. Such a policy fails to take into account the political realities prevailing in international relations. It is clear that as a practical matter a treaty or any other legal instrument purporting to embody peremptory rules cannot be effective if it lacks broad support. From this perspective, majority votes may turn out to be just Pyrrhic victories. While the debate as to whether a single nation or a very limited number of isolated states may be held bound by peremptory rules against their expressed will continues, it appears established that opposition to a proposed norm on the part of at least one important element of the international community, whatever its numerical strength, would undermine any claim that such norm is a general peremptory rule recognized as such by 'the international community of states as a whole.' As 'higher law' *jus cogens* clearly requires the application of higher standards for the ascertainment of the existence of community consensus as regards both the content and the peremptory character of the relevant rules. Only such an approach may ensure the required universality in the formation and subsequent implementation of rules designed to reflect and to protect the fundamental interests of the World Community.