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THE LEGAL NATURE OF JUS COGENS IN CONTEMPORARY INTERNATIONAL LAW

Introduction

The problem of *jus cogens* in contempopary international law has been widely discussed by scholars representing different legal systems of the world. Indeed, the question whether there are rules of international law from which individual sub- jects of law may not derogate even by mutual consent has become not only a very important theoritical issue, but, and particularly after the Vienna Convention on the Law of Treaties had been opened for signing, it has become a very significant and complex political problem.

As is known, Article 53 of the Convention – "Treaties conflictiong with a pe- remptory norm of general international law *(jus cogens)*" – declares:

> " A treaty is void if, at the time of its conclusion, it conflicts with a perempto- ry norm of general international law. For the purposes of the present conven- tion, 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."

Articles 64 and 71 deal respectively with the emergence of a new peremptory norm of general international law *(jus cogens)* and consequences of the invalidity of a treaty which conflicts with a peremptory norm.

However, the Convention does not say anything about the criteria to be used for the identification of a *jus cogens* rule among others having a different nature. It left aside several other important questions which derive from the problem as a whole.

Chapter I

International jus cogens – lex lata or lex ferenda?

The recognition and correct implementation of the above-mentioned provi- sions by the international community of States depends, to a great extent, on the elaboration of a commonly acceptable and well-expressed legal notion of *jus co- gens* applicable to international law.

The first question, which arises in this connection, is whether the provisions of the Vienna Convention have reflected an institution existing within the framework of international law or they contain simply *lex ferenda,* which will have obligatory character after the Convention enters into force and only for the States Parties?

As is known, by the time when the Vienna Convention on the Law of Treaties was drafted, there had not been a single case dealing with *jus cogens*. The same can be said regarding the present time. Though, in some instances, judges of the Per- manent Court of International Justice and of the United Nations International Court of Justice have made references to *jus cogens* (Schücking – 1934, Tanaka – 1966,

1969, Padilla Nervo – 1969, Ammoun 1970)[1], they are contained in separate or dis- senting opinions and cannot be ascribed to the international law practice.

[1] See E. Suy, "The Concept of *Jus Cogens* in Public International Law", *The Concept of Jus Cogens in International Law. Papers and Proceedings II, Conference on Interna- tional Law,* Lagonissi, 3-8 April 1966, Geneva 1967, p. 63; J. Sztucki, Jus Cogens *and the Vienna Convention on the Law of Treaties. A Critical Appraisal,* Springer-Verlag, Vienna-New York 1974, pp. 13-16

Does it mean there is no such institution in general internationa law?

Turning to the doctrine of international law, we see a completely different picture.

While in the theory of international law the term *jus cogens* has appeared rath- er recently (from the beginning of the 1930s), an idea of absolutely compulsory rules of law serving as criteria of the validity of international treaties has existed in the doctrine of international law for centuries. Thus, the fathers of the bourgeois science of international law – Francisco de Vitoria, Francisco Suarez, Ayala Balt- hazar, Alberico Gentili, Hugo Grotius[2] – stressed the peremptory character of rules of natural law, placing it above positive law. E. Vattel stressed the fact that natural law, or the so-called "necessary law" of nations, was – "unshakeable and obligations imposed by it indispensable and unavoidable, nations cannot introduce into it any alterations by their agreements and can- not liberate themselves from those obligations either by unilateral acts or by mutual consent[3]".

The positivists of the nineteenth and twentieth centuries, except some most radical ones (G. Triepel, G. Ellinek), did not accept full freedom of the will of States making a treaty and attached the peremptory character to "universally recog- nized by civilized States" basic principles (origins) of international law and other vitally important norms of it (F. Martins, F. Liszt, A. Rivier, E. Nys, W. Hall), in- cluding even purely moral categories (A. Hefter, R. Phillimore, L. Oppenheim, P. Fiore)[4]. But nobody went into the details of this institution at that time and these provisions were rather born in analogy to the notion of public policy (*ordre public*) existing in domestic law.

The same postulates dominated in the first decades[5] after the Great October Socialist Revolution, that is during the period when a new historical type of interna- tional law, called upon to regulate relations between all States irrespective of their socio-economic systems, was in the process of establishment. It is to be mentioned that at that period there were some attempts to raise the problem of *jus cogens* in in- ternational law[6]. However, until the 1960s this question remained outside the main stream of the Western doctrine of international law.

As to the Soviet experts of international law, at that period they were stressing the voidness of any treaty which was in conflict with such a basic principle of inter- national law as the sovereign equality of States. The Soviet foreign policy and doc- trine rejected any treaty which contained provisions establishing unequal, colonial relations."We – stress V. I. Lenin, – reject all clauses on plunder and violance, but we shall welcome all clauses containing provisions for good-neighbourly relations and all economic agreements; we cannot reject these[7]."

The Soviet doctrine, through without mentioning the term *jus cogens,* was consistently rejecting the legality of treaties being in conflict with the basic prin- ciples of international law[8].

An impetus to a broad discussion of the problem of jus cogens in contempo- rary science of international law was given by the deliberation of the United Nations International Law Commission on the Draft Articles of the Law of Treaties started in 1953[9].

[2] G. Grotius, *De Jure Belli Ac Pacis,* Lib. I, ch. 1, X, 5 (Russian translation), Moscow 1956.

[3] Emer de Vattel, *Droit des gens, ou principes de la loi naturalle appliqués à la conduite et aux affaires de nations et des souverains,* Paris 1863, Vol. I, Préliminaires, paras. 7-9.

[4] F. Martens, Contemporary International Law of Civilized Nations, St. Pretersburg 1904, pp. 413-415. F. von Liszt, Das Völkerrecht (Russian translation of the 12th ed.), St. Pe- tersburg 1912, pp. 13-15; A. Rivier, Le droit international (Russian Translation), Moscow 1893, para. 47; E. Nys, Le droit international. Les principes, les théories, les faits, Bruxelles 1912, pp. 503-504; W. E. Hall, International Law, Oxford 1924, p. 819; A. Hefter, Das Europäische Völkerrecht der Gegenwart (Russian Translation), St. Petersburg 1890, § 83; R. Phillimore, Commentaries upon International Law, Vol. I, London 1879, p. 46; L. Oppenheim, International Law, Vol. 1, London 1920, § 506; P. Fiore, International Law Codified, New Yourk 1918, Art. 760; F. Martens, Contemporary International Law of Civilized Nations, St. Petersburg 1904, p. 190.

[5] Charles Ch. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, Boston 1951, Vol. 4, para. 490; P. Fauchille, *Traité de droit international public*, t. 1, partie 3, Paris 1926, para. 819.

[6] Von der Heydte, G. Jurt, A. Verdross – see E. Suy, op. cit., pp. 27-29.

[7] V. I. Lenin, On the Foreign Policy of the Soviet State, Progress Publishers, Moscow 1973, p. 17.

[8] E. Korovin, *Main Problems of International Relations*, Moscow 1954, pp. 5-56; F. Ko- zhevnikov, "Some Problems of Theory and Practice of International Treaties", *Soviet State and Law*, No. 2, 1954; V. Durdenevsky, M. Lazarev, *Five Principles of Peace- ful Coexistence*, Moscow 1957; A. Talalajev, *Legal Nature of International Treaties*, Moscow 1963, pp. 132-140; I. Lukashuk, "The USSR and International Treaties", *So- viet Yearbook of Interational Law* 1959, pp. 24-36; M. Rappaport, "Basic Principles of Peaceful Coexistence – Criteria of Contemporary International Legality", *Pravovede- nie*, No. 4, 1960.

[9] H. Lauterpacht, "Report on the Law of Treaties", Art. 15, *Yearbook of International Law Commission (YILC),* 1953, Vol. II, pp. 154-155; G. Fitzmaurice, "Third Report on the Law of Treaties", *YILC,* 1958, Vol. II, pp. 26-28, 40-41; H. Waldock, "Second Report on the

A predominant majority of Western international law experts, both among the members of the ILC and beyond it, irrespective of their methodological and con- ceptual approaches, welcomed this initiative and admitted the ex- istence of *jus co- gens* in contemporary international law[10]. The existence of international *jus cogens* has also been recognized by representatives of the developing countries[11].

In the last decade, in response to the recent events, representatives of the So- cialist doctrine of international law have published quite a number of articles and books dealing with the problem of jus cogens, which gives us ground to talk of a well-developed Socialist concept of international jus cogens, recognizing the ex- istence of rules of general international law from which States are not allowed to derogate by treaty agreements inter se[12].

Summing up the discussion which took place at the Lagonissi Conference in 1966, where experts of different legal systems were present, the Rapporteur G. Abi- Saab pointed out:

> "The consensus was that international law knew only two categories of rules, dispositive and imperative and that the later constituted the body of *jus co- gens* in contemporary international law …[13]"

Only several international law experts deny the existence of international *jus cogens,* asserting, *inter alia,* that there is no rule which could not be changed by a new international agreement.[14]

Law of Treaties", *YILC,* 1963, Vol. II, p. 120.

[10] A. McNair, The Law of Treaties, Oxford 1961, pp. 214-215; A. Verdross, "Jus Cogens and Jus Dispositivum in International Law", American Journal of International Law, Vol. 60, 1966, p. 55; E. Suy, op. cit., pp. 17-18; C. Wilfred Jenks, A New World of Law (A Study of the Creative Imagination in International Law), Longmans 1970, p. 169; E. Schwelb, "Some Aspects of International Jus Cogens as Formulated by the ILC", American Journal of International Law, Vol. 61, 1967, pp. 948-975; Ch. De Visscher, "Positivism et 'jus cogens'", Revue générale de droit international public, Paris 1971, t. 75, No. 1, pp. 5-11; G. Dham, Völkerrecht, Stuttgart, Bd. I, 1958, S. 17, Bd. II, 1961, S. 60; J. M. W. Verzijl, International Law in Historical Perspective, Vol. I, Leyden 1968; M. Virally, "Réflexions sur jus cogens", Annuaire français de droit international, Paris 1966, Vol. XII, pp. 7-29: Ch. Shaumont, "Cours général de droit international public", Recueil des cours, Vol. I-1971, pp. 370-380; M. Akehurst, "The Hierarchy of the Sources of International Law", British Year Book of International Law 1974-1975, London 1977, pp. 274-285; R. Ago, "Droit des traités à la lumière de la convention de Vienne", Recueil des cours, Vol. III-1971, pp. 321-323; R. Quadri, "Cours général de droit international public", Recueil des cours, Vol. III-1964, pp. 245-280; Ch. Rozakis, The Concept of Jus Cogens in the Law of Treaties, Amsterdam 1976; A. Uiloa, Derecho international publico, t. II, Madrid 1967, pp. 184-185; L. M. Moreno Quintana, Tratado de derecho international, t. 1, Buenos Aires 1963, p. 75, and many others. See also Con- ference on International Law, Lagonissi, pp. 86, 88-89, 91, 105-106, 112-114.

[11] C. F. Amerasinghe, O. Asamoah, M'Pe Bengali, B. Boutros-Ghali, B. S. Murty, J. M. Ruda, Conference on International Law, Lagonissi, pp. 79-83, 89, 90-91, 96, 101, 103- 104, 107-108; A. Fahmi, "Peremptory Norms as General Rules of International Law", OZöR, 22 (1971), pp. 383-400; T. Elias, The Modern Law of Treaties, Leiden 1974; N. Rao, "Jus Cogens and the Vienna Convention on the Law of Treaties", Indian Yearbook of International Law, New Delhi 1974, Vol. 14, No. 3-4.

[12] G. Tunkin, Theory of International Law, Moscow 1970, pp. 168-183; G. Tunkin, "Jus Cogens in Contemporary International Law", The University of Toledo Law Review, Vol. 1971, No. 1-2, pp. 107-118; G. Tunkin, "International Law in the International Sys- tem", Recueil des cours, Vol. IV-1975, pp. 85-94; L. Alexidze, "Problem of Jus Cogens in Contemporary International Law", Soviet Yearbook of International Law 1969, pp. 127-145 (English text – pp. 145-149); I. Karpenko, "Premptory Norms – Jus Cogens and Their Embodiment in International Treaties", Soviet Yearbook of International Law 1970, pp. 204-211; L. Shestakov, Some Questions of Jus Cogens Norms in Contempo- rary International Law, Moscow 1974; G. Geamanu, "Jus Cogens en droit international contemporain", Revue roumaine d'études internationales, Bucharest 1967, No. 1-2, pp. 87-105; V. Paul, "The Legal Consequences of Conflict between a Treaty and an Impera- tive Norm of General International Law (Jus Cogens)", OZöR, B. XXI, H. 1-2, 1971, S. 19-49; K. Wolke, "Jus Cogens in International Law (Regulation and Prospects)", Pol- ish Yearbook of International Law, 1974, Wroclaw, Vol, VI; P. Terz, "Zum Jus Cogens im demokratischen Völkerrecht", Staat und Recht, Berlin 7/78; J. Diaconu, Normale imperative in dreptul international – Jus Cogens, Bucharest 1977; G. Herczegh, "La place de l'Etat dans l'ordre juridique international (La communauté des Etats et le jus cogens)", Comparative Law. Droit comparé, Budapest 1978, pp. 73-83. See also: I. Lukashuk, International Legal Regulation of International Relations, Moscow 1975, pp. 148-149; A. Movchan, Codification and Progressive Development of International Law, Moscow 1972, pp. 21-25; A. Ushakov, Sovereignty in Contemporary International Law, Moscow 1963, pp. 125-126; A. Talalajev, Legal Nature of International Treaties, pp. 220-221; G. Ignatenko, International Law and Social Progress, Moscow 1972; R. Bobrov, Major Problems of the Theory of International Law, Moscow 1968, p. 193; N. Mironov, International Law: Norms and Their Legal Force, Moscow 1980, pp. 80-101; G. Haraszti, Some Fundamental Problems of the Law of Treaties, Budapest 1973; H. Bokor-Szego, New States and International Law, Budapest 1970; H. Bokor-Szegö, The Role of the United Nations in International Legislation, Budapest 1978; S. Nahlik, "The Grounds of Invalidity and Termination of Treaties", American Journal of International Law, Vol. 65, 1971, pp. 744-746.

[13] Conference on International Law, Lagonissi, pp. 11, 15.

[14] H. Kelsen, *Principles of International Law,* New York 1967, p. 783; P. Guggenheim, Traité de droit international public, t. 1, Geneva 1967, pp. 128-129; G. Schwarzen- berger, *International Law and Order,* London 1971, pp. 27-56.

Some authors, recognizing that international law as a sistem of law should contain *jus cogens* rules, warn against rushing to use this institution in interstate relations because of lack of a precise definition of its content, which in their opinion would create an anarchy in the international legal order[15].

Similar doubts were expressed by some members of the ILC during the elaboration of the draft articles on the Law of Treaties, but at last all the members came to the conclusion that there did exist *jus cogens* rules in contemporary general in- ternational law.

It is well known that the Sixth Committee of the General Assembly at its XVIIIth Session stated the following:

> "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 mat- ter as being a step of great significance and importance for the progressive development of international law … The evolution of the international com- munity 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*[16]."

Similar opinions have been expressed by representatives of States participat- ing in the Vienna Conference on the Law of Treaties. The representative of Leba- non stressed the fact that –

> "for the first time in history, almost all jurists, almost all States were agreed in recognizing the existence of a number of fundamental norms of interna- tional law from which no derogation was permitted, and on which the orga- nization of international society was based[17]".

Even States which expressed hesitation or doubts whether it was necessary to include in the Convention an article on *jus cogens* could not deny that "interna- tional law now contains certain peremptory rules" (the United Kingdom), that there are "certain rules like the prohibition of piracy which should perhaps be given a peremptory character and … other norms of international law might be recognized possessing a peremptory character …" (Australia)[18] or that there is "nothing very radical in the basic concept of the existence of certain rules from which no deroga- tion by way of treaty could be tolerated" (the United States)[19].

Only a number of States insisted that international *jus cogens* was "an entirely new" notion (Turkey)[20].

The fact that Article 53 of the Convention was adopted by 87 votes to 8, with 12 abstaining is very significant. If we recall that a majority of those States which voted against of abstained did admit the existence of *jus cogens* in contemporary international law and disagreed only on issues connected with implementation of this institution, we can come only to the conclusion that both the theory and law- making practice in the interstate relations maintain the existence of international *jus cogens* limiting the contractual freedom of States of behalf of interests of the whole international community of States.

We cannot agree with those who suggest that –

> "in the light of international practice, the question whether the concept of international *jus cogens* has been 'codified' in the convention, may be an- swered only in the sense that there has been nothing to codify[21]".

The absence of cases involving reference to *jus cogens* cannot be evidence of the absence of the institution itself. At the same time, in spite of the fact that the Vienna Convention stressed the positive, consensual character of

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15 K. Marek, "Contribution à l'étude du *jus cogens* en droit international", *Hommage Guggenheim,* p. 459; P. Vella, *Droit international public, Institutions internationales, 2nd ed.,* Paris 1970, pp. 186-188; J. Nissot, "Le concept de *jus cogens* envisagé par rap- port au droit international", *Revue belge de droit international,* Bruxelles 1968, No. 1, p. 1-7; Jean-Paul Jacque, *Eléments pour une théorie de l'acte juridique en droit inter- national public,* Paris 1972, pp. 154-161; T. Minagawa, "*Jus Cogens* in Public Inter- national Law", *Hitotsubashi Journal of International Law and Politics,* Vol. 6, Tokyo 1968, pp.16-28.

16 *Report of the Sixth Committee to the General Assembly,* Doc. A/5601, para. 18, 6 No- vember 1963 (emphasis added).

17 UN Conference on the Law of Treaties. First Session, Vienna 26 March-24 May 1968. Official Records, UN Publication, New York 1969, p. 297. For other similar statements see pp. 294-295, 298, 301-303, 306, 308-313, 315, 317-318, 321, 323.

18 *Ibid.,* pp. 304, 317.

19 *UN Conference on the Law of Treaties. Second Session,* Vienna, 9 April-22 May 1969. *Official Records,* UN Publicaton E. 70. V. 6, New York 1970, p. 102.

20 *Ibid.,* pp. 300-301.

21 J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties,* p. 94

international *jus cogens*, there is an important disagreement among scholars, regarding the legal nature, sources and content of international *jus cogens.*

Chapter II

THE NOTION OF JUS COGENS IN DOMESTIC LAW

A major problem in this connection is that of the legal nature of *jus cogens* in contemporary international law.

We cannot agree either with those who reject any analogy between legal insti- tutions of domestic and international laws, or with those who mechanically apply notions used in domestic law to the sphere of international law. Since international law is a system of law, though specific and independent from domestic law – it should be considered from the standpoint of general notions inherent in every sys- tem of law which is a particular phenomenon among other rules of social conduct. Only after that can we try to find out to what extent notions of domestic law are to be applied to public international law. The problem of *jus cogens* does deserve such an approach.

The concept of *jus cogens* in domestic law is linked to Roman law, though neither *Digesta,* nor other sources of this law mention the term[22].

Indeed, the first reference to the term *jus cogens* as well as an extended defini- tion of its legal concept is found with the Pandectists of the nineteenth century – F. Savigny, G. Pukhta, B. Windcheid, Y. Baron and others[23].

All legal rules of Roman law, from the standpoint of their compulsory charac- ter, were grouped into two main parts:

(a) peremptory or absolute law, i. e., *jus cogens* or, using the term of Roman sources of law, *jus publicum;*

(b) permissive law or *jus dispositivum.*

The peremptory rules excluded any freedom of the contracting parties in establishing legal relations *inter se* differing from a peremptory prescription. These rules demanded proper actions (a contract should be made in a form requested by law) or omission.

The permissive, dispositive legal rules admitted a contractual freedom of individu- als and could be implemented only if the contracting parties had not used the right to determine for themselves the content of a given contract.

Hence, private persons – subjects of law – were entitled to create an instrument having legal force only in the sphere of private law and only by proper contracts (deals, agreements).

Some legal norms had explicitly peremptory character and contracts contrary to them could easily be annulled by the court. However, many legal norms did not clearly express their peremptory character and the court itself had to determine the nature of the norm in question. In this case, the court was to be guided by the formula: *jus publicum privatorum pactis mutari non potest* (public law cannot be changed by agreement made between private persons).

In spite of the fact that Ulpian included in *jus publicum* questions dealing with the legal status of priests, religious cults and rights and duties of magistrates, i. e., norms *ad stadum rei Romanae spectat* (dealing with the status of the Roman State), actually *jus publicum* in ancient Rome was used as a term embracing:

(a) an aggregate of legal norms determining the political structure of society, activities of State authorities, the participation of people in political admini- stration, punishment of offenders, collection of taxes, etc. ;

(b) an aggregate of peremptory norms embracing not only public law, in its strict sense, but also rules of private law (a most carefully developed part of Roman law) serving as a pivot of this branch of law.

The necessity of slave-owners to fix and develop by legal norms their main political and economic demands

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[22] See E. Suy, *op. cit.,* pp. 18-19.

[23] F. Savigny, *System des heutigen romischen Rechts,* Berlin 1849, t. VIII, S. 35; B. Windcheid, *Lehrbuch der Pandektenrecht,* Bd. I, DÜsseldorf 1875, para. 30; G. Pukhta, *Course of the Roman Civil Law* (Russian translation), Moscow 1874, para. 110; J. Bar- on, *System of the Roman Civil Law* (Russian translation), Ess. I, book I, St. Petersburg 1909, para. 12.

emerged as the institution of *jus publicum*, i. e., *jus cogens* – legal rules having absolutely peremptory character. That is why peremp- tory norms primarily regulated spheres which dealt with the political structure of society. But even in private law, where most of the legal norms were of a *jus dis- positivum* nature, the peremptory norms played a very important role, channelling the legal relationship of private persons in the interests of the whole slave-owning class.

Struggling for political power, the bourgeoisie adopted from the Roman le- gal system both the division into public and private laws and the division of legal norms into peremptory and permissive ones, adapting them to the economic and political needs of the new ruling class.

The classification of legal rules used by the Pandectists of the nineteenth cen- tury aimed at justifying the legal order established by the bourgeoisie with refer- ence to the authority of Roman law. Later this division of legal norms into *jus cogens* and *jus dispositivum* was widely accepted, becoming one of the main parts of the bourgeois theory of law. This classification has been brought up to the present time: French, Italian and Spanish literature uses the term "imperative", the English labels it as "peremptory", the German – "Zwingende"[24].

The same applies to the developing countries which have accepted and introduced the institution of *jus cogens* in their legal systems. N. Rao stresses the point that "the concept of *jus cogens …* finds reception and recognition in all the principal legal systems of the world"[25].

Without recognizing the division of law into public and private, the socialist concept of law also accepts the classification of legal norms according to a degree of compulsion of the rules of conduct expressed in them. Some Soviet authors pre- fer to use the term "categorical norms"[26] but the meaning of this term is the same as that of "imperative" which is accepted by a majority of Soviet writers of law.[27] One of the latest manuals dealing with the Soviet law determines "*the imperative norm*" as –

> "a prescription addressed to bodies or individuals, which is expressed in the categorical form; no derogation from this prescription is allowed.
>
> The imperative character of such a norm is usually obvious due to its content or is stressed by the legislator with reference to its peremptory character.
>
> *The dispositive norms* grant to the participants of (legal) relations the pos- sibility of settling issues by themselves and to choose at their own discretion the most beneficial modes of conduct; if the participants have not used such a right, the rule of conduct expressed in a given norm will enter into force.[28]"

The peremptory norms (jus cogens) exist in every domestic legal system inde- pendently of judicial discretion: the court can only declare a contract void invoking the illegality of its object. Only in certain circumstances, when a norm does not explicitly forbid any derogation, the court is entitled to interpret a given rule as a peremptory or permissive one, taking into consideration the interrelation between a contract under consideration and the value of the norm concerned. The predomi- nant majority of the peremptory rules either have never been derogated from by the contracting parties (constitutional, administrative, criminal legal rules) or the court had no alternative but to recognize their jus cogens character. Very rarely the court invokes principles deduced from the legal and moral foundations of a given legal system as a whole, invoking "public policy" or "good moral".

The existence of the judicial system is not an absolute requirement for the existence of *jus cogens*. This system is a part of the State machinary called upon to implement all violated legal rules – both peremptory and permissive ones.

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[24] Julliot de la Morandier, *Droit civil,* Livre 1, Paris 1958, para. 28, 2; R. David, H. P. de Vries, *The French Legal System. An Introduction to Civil Law System,* New York 1958, pp. 99-104; L. Ennekzerus, *Course of German Civil Law* (Russian translation from Ger- man), Moscow 1949, Book I, para. 45.

[25] N. Rao, "*Jus cogens* and the Vienna Convention on the Law of Treaties", *Indian Journal of International Law,* New Delhi 1974, No. 3-4, p. 385.

[26] P. Nedbajlo, *Application of Soviet Legal Norms,* Moscow 1960, p. 80; A. Pyontkovsky, "Norms of Socialist Law", *Theory of State and Law (Fundamentals of the Marxist/Le- ninist Doctrine of State and Law),* Moscow 1962, p. 438.

[27] A. Shebanov, "Norms of Socialist Law", *Theory of State and Law,* Moscow 1968, p. 442; *General Theory of State and Law,* Leningrad 1961, pp. 340-341; A. Pygolkin, "Norms of Soviet Socialist State and Their Structure", *Questions of General Theory of Soviet Law,* Moscow 1960, p. 176.

[28] *The Soviet Law* (Ed. by prof. N. A. Teplova), Moscow 1980, p. 27.

The assertion that peremptory norms can exist only under the vertical system of law, where any legal norm is an order addressed by the State authority to the members of a given society, is correct only partially since it does not take into ac- count the binding element of the norm-creating capacity of the State authority and its class content.

Peremptory rules, like other norms of domestic law, express common interests of the politically and economically ruling class (classes) or, as is the case in a socialist society, those of the whole people. The common interests condition the formation of the common will of the ruling social forces, which expresses itself in the will of the State taking the form of legal rules.

A norm-creating body is not only an organ whose will stands above the wills of class opponents, but it juridically fixes the common class will, which is above the individual wills constituting this will.

The peremptory norms bind not only all individuals and juridical persons, but all the State bodies entitled to enter into contractual relations with other subjects of law. Therefore, the State will appear as a self-binding force establishing peremp- tory rules for all subjects of law, including itself. At the same time any *jus cogens* norm can be changed or even abrogated by the State authority when it is required by the interests of the ruling class, and if the class struggle, the disposition of major political forces and other factors afford such an opportunity. The *jus cogens* norms are not something absolutely beyond the will of human beings; on the contrary, they are a product of the State will of the dominant class (classes) or entire people and express the common will of members of these social groups aimed at establishing compulsory fundamentals of the legal order, derogation from which is not permit- ted even by the mutual consent of each and all subjects of law, including the State organs.

The participation of "ruling individuals" in forming the common State will creates a peremptory rule which legally binds every participant as well as those who do not participate if they constitute a minority group. In this sense the pe- remptory rules can be considered as a result of an agreement or co-ordination of wills of the majority of members of politically dominating social groups aimed at restricting the freedom of will of individual members. The co-ordination of wills, does not exclude the existence of *jus cogens*: on the contrary, it presupposes such an existence.

One should not attempt to identify *jus cogens* with the hierarchy of norms since the latter depends on levels of the legal force of rules which, in their turn, depend on the levels of bodies competent to enact or sanction legal norms.

The specificity of *jus cogens* lies in the *degree of legal bindingness of prescrip- tion formulated in a given rule.*

There can be a *jus dispositivum* norm standing above one having a *jus cogens* character due to the fact that the former is a constitutional law, or even just simply a law, and the latter belongs to a subordinate normative legal act other than the law.

There is a leading tendency among authors writing on law to identify peremp- tory rules of *jus cogens* with the notion of *ordre public* or public policy.

Summing up the consideration of various authors, V. Paul comes to the con- clusion that "the expression *jus cogens* is not often used *expressis verbis* and is frequently covered by the term international morality, public policy, etc."[29].

Such an approach does not seem justifiable since it ignores the historical devel- opment of the notion of *jus cogens*, particularly as it was elaborated by the Pandec- tists who introduced such a classification. There is no doubt that these two notions stand very close to each other, but there is a significant difference between them.

As E. Schwelb correctly pointed out:

> "The concepts of *ordre public* or *public policy,* which are known to the civil law and to the common law systems, do not entirely coincide with the con- cept of *jus cogens*[30]."

In what correlation are peremptory norms with "*ordre public*" public policy accepted by all legal systems existing in the world? I imply here "*ordre public in- terne*", leaving aside the notion of "*ordre public international*", which belongs to private international law and cannot be applied to the problem of *jus cogens* in its present context.

Western authors usually stress "the difficulty" of defining public policy with precision. I can agree that every-

[29] V. Paul, *op. cit.,* p. 25.

[30] E. Schwelb, *op. cit.,* p. 948

body who tries to examine the problem of public policy *(ordre public)* in municipal law will meet a wide divergence of opinions. However, this divergence mainly concerns the problem of the content of this insti- tution. As a rule, the authors mention only some, most typical cases taken from the judicial practice[31]. As to the object of these norms there is a wide consensus among legal experts representing different legal systems – they consider *ordre public* as an aggregate of rules protecting the "common interests", "common benefits" of a society as a whole.

As was mentioned above, some legal norms clearly express their peremptory nature. But as far as contractual freedom in bourgeois private law had been legally fixed, it became necessary to establish certain limits on the use of this freedom and subject it to the interests of the ruling class as a whole.

Article 6 of Napoleon's code modified the well-known formula of *Digesta* in the following way: "On ne peut déroger par des conventions particulières aux lois qui intéressent l'ordre public et les bonnes moeurs."

At that time, the judicial practice of France used to recognise as contrary to "*ordre public*" contracts conflicting with norms regulating the State's political structure, functioning of State bodies, civil status of persons, etc. The same charac- ter was applied to this institution in other new bourgeois interests, preventing any restoration of feudal legal relations. This progressive role of application of public policy was later emasculated by the judicial practice, prompted by the aggravation of the class struggle within the bourgeois society. Nevertheless, *ordre public*, or public policy, is one of the commonly recognized institutions of the Western legal systems defending the basis of bourgeois socio-economic system.

As to the correlation between *ordre public* and *bonnes moeurs,* there is no agreement among Western scholars, and even judicial practice hardly differentiates between these two categories. While K. Marek considers *ordre public* as a neces- sary part of positive law, excluding moral categories[32], D. Lloyd, on the contrary, points out that:

> "There is no yardstick by which the exact line of demarcation between pub- lic order *(ordre public)* and morality *(bonnes moeurs)* can be determined. While those who stress the social purpose of all law are disposed to regard morality as no more than an aspect of public order *(ordre public),* others seek to found law upon a moral order inherent in Western society, so that conceptions of morality inevitably take first place, at any rate as an ideal to which law should seek to conform. English law, by stretching public policy to cover both these categories, and by its tendency at any rate since Bentham to stress the separateness of law and morality, seems more preoccupied with the social than moral consequences of particular transactions[33]."

It should be noted that German law, using the term "gute Sitten" (good morals) comprehends *ordre public* as well as *bonnes moeurs*[34].

Consideration of cases which have been discussed by different authors leads to the conclusion that, using the term "*ordre public*" or public policy, the court both in civil law and common law countries usually reffered to norms of existing positive law (constitutions, codes, ordinary laws, acts of the executive bodies, judicial prec- edents) and very rarely to moral principles, i. e., "good moral" in its strict sense. These moral principles are not only those on which the bourgeois legal conscious- ness is based, but those moral precepts which are the result of social development of a given society united by historical traditions, culture, religious convictions and which every State has to protect to keep the social and political life going on the desired direction.

The Marxist-Leninist theory of law has always stressed that even in an exploit- ing society the ruling class has to use State power "to fulfil common tasks deriv- ing from the nature of any society"[35] and, therefore, to exercise "common social functions" – necessary for every human society at a particular stage of its social development[36].

Protecting basic economic, political and legal institutions established after the October Revolution, the Soviet law has established and developed the notion of *or- dre public* in domestic law. In spite of the fact that the bulk of legal rules of Soviet law is of peremptory nature Soviet civil law, though rejecting division into public and private

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[31] Julio de la Morandier, *op. cit.,* Livre 1, para. 208, Livre 2, paras. 364-367; L. Ennekzerus, *op. cit.,* p. 177; H. F. Lusk, *Business Law. Principles and Cases,* 5th ed., 1957 (Russian translation), Moscow 1961, p. 173.

[32] K. Marek, *op. cit.,* pp. 427-428, 432.

[33] D. Lloyd, *Public Policy. A Comparative Study in English and French Law,* University of London, 1953, pp. 27-28.

[34] L. Ennekzerus, *op. cit.,* para. 177.

[35] K. Marx and F. Engels, *Selected Works,* Vol. 25, Moscow p. 422.

[36] D. Kerimov, *Philosophical Problems of Law,* Moscow 1972, p. 144; S. Alekseyev, *The Social Value of Law in the Soviet Society,* Moscow 1974.

laws, recognizes a wide autonomy of contractual parties under condi- tion that they “should observe the laws, respect the rules of socialist community and moral principles of the society building Communism”.

This formula, contained in Article 4 of the Fundamentals of Civil Legislation of the USSR and the Union Republics, 8 December 1961 (see also Article 5 of the Civil Code of the Georgian SSR, 1964), states the notion of *ordre public interne*, which embraces not only norms of positive law, but also political and moral de- mands of the whole people which can be applied by the court as principles deriving from “the common origin and purpose of Soviet legislation” (Article 12, the Funda- mentals of Civil Court Procedure of the USSR and the Union Republics, 1961).

Therefore, these political and moral principles can be applied by a judicial body on an extraordinary basis, when the latter finds something lacking in the exist- ing legal norms and solves the case under consideration by analogy with “the spirit of the law”, i. e., the court applies not a particular positive legal norm, but deduces a principle from political, moral and legal demands permeating the whole legal structure of socialist society.

It is obvious that in every legal system *ordre public*, or public policy, is largely an aggregate of peremptory rules of positive law stating “the basis of the whole le- gal system”, “common benefits and justice”, “common interests” of a given society, and only then purely moral and social demands which the ruling class finds necessary to preserve against the freedom of the will of individual subjects of law.

In every politically organized society the economically dominant class de- fends its interests, authorizing the court to settle the question of the consistency of a given contract with the political and legal demands acceptable to the ruling class at a given stage of the development of society. The application of the reservation on *ordre public* is an exception rather than a rule in the judicial practice within States, while acts of annulling contracts contravening laws take place on the usual basis. To what extent the court really defends “the common interests” and “public moral” of a given society depends on the class nature of this society, on its socioeconomic system and legal structure.

Socialist society, excluding exploitation of man by man based on the private property of means of production, puts the court on guard of the common interests of the whole people.

Jus cogens differs from *ordre public* by its scope – all rules of public policy belong to *jus cogens,* but not every rule of *jus cogens* is of *ordre public* nature. Even F. Savigny stressed the fact that some *jus cogens* rules protect the rights of private persons (the limitation of a person’s legal capability due to age), others express “moral fundamentals and public welfare”[37].

Therefore, a *jus cogens* norm can have vital social value prompted by laws of societal development, fixing one of the most important moral-political demands of the ruling social forces. On the other hand, it can be a mere rule of conduct considered by the ruling class, classes or the whole people as one which should be given peremptory character depending on the need of establishing some key rules in particular branches of the existing system of law.

Taking into account the above considerations, we can come to the following conclusions:

1. *Jus cogens* in domestic law is an aggregate of:
   (a) rules of positive (enacted or sanctioned by the State) law *expressis verbis* not allowing any derogation from their prescriptions to the contracting parties which want to establish legal relations *inter se;*
   (b) rules of positive law, which do not explicitly express their peremptory character but their content and place within the whole legal system or particular branches presupposes their peremptory character protecting the fundamentals of the juridical superstructure in a given society;
   (c) certain general principles deduced from the political and moral demands of the economically and politically dominant social forces on which the whole legal system is based.
2. Only the last two groups of norms can be covered by the notion of public policy, *ordre public,* in which the judicial system plays a significant, but not a decisive role since the judge’s discretion is not unlimited and should stay within the existing legal order, at least from the theoretical point of view.
3. In every legal system, *jus cogens* rules are the result of the common will, common consent of the members of the economically and politically ruling class (classes) or the whole people, establishing through the political machinery legal rules which are absolutely binding upon all individual subjects of law, including “the ruling individuals” who have to yield to the common interests and the common will of the ruling forces as a whole.

[37] F. Savighy, *op. cit.,* p. 35.

Therefore the notion of *jus cogens* does not exclude an element of self-bind-ingness; on the contrary, it presupposes the existence of such an element without which no norm-creating process can be understood.

Chapter III

THE LEGAL NATURE OF JUS COGENS IN CONTEMPORARY INTERNATIONAL LAW

Turning to international law we should determine whether the above-men- tioned notion of *jus cogens* can be applied to this system of law.

The doctrine of international law comprises a wide spectrum of views – schol- ars, basing on their concepts of international law in general, take from "*ordre public interne*" those features which fit their model of international *jus cogens.*

Representatives of the natural law concept, identify *jus cogens* with public policy and good morals, placing them above the will of the subjects of law. They consider international *jus cogens* as certain moral-ethical imperatives inherent in human beings, in their society and legally binding upon all States regardless of their will and irrespective of whether they have been fixed or not in customary or treaty rules; for, as A. Verdross puts it, "Only common rational and moral life of members can be the content of international law". The author divides peremptory norms into those of "positive international law" and norms of "world moral order", the latter extending beyond positive international law[38].

R. Quadri places international *jus cogens* among the "primary principles" standing above customary and treaty obligations[39], and belonging to the realm of "a psychological feeling of the collective body" capable of imposing its will upon individual members[40]. The author continues:

> "rien n'empêche de parler d'un *ordre public international* au sens do droit international public, c'est-à-dire d'un ensemble de règles *obligatoires (jus cogens)* qui effacent toute règle contraire soit d'origine coutumière, soit d'origine conventionnelle ou pactice[41].

Other sholars, placing the notion of *jus cogens* (public policy) within the framework of positive domestic law and connecting it with legislative and judi- cial bodies, find it difficult to transplant this institution to international law, where subjects of law create and execute rules of law themselves, until the international community of States has developed into a community with a higher degree of or- ganization.

> "To sum up, – writes J. Sinclair, – 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 legal order is, at present, inchoate, unformed and only just discernable[42]".

G. Schwarzenberger, basing on the presumption that there is no "general in- ternational law" (described by him as "customary law") which cannot be changed by treaties, totally denies the existence of international *jus cogens.* He admits that States can create by treaties a "consensual *jus cogens*" but, in his opinion, it cannot be *jus cogens* in its proper meaning[43].

Hence, while some authors adhere to international *jus cogens,* denying the importance of the will of States, and particularly the factor of their consent, others, recognizing the importance of the will of States in the norm-creating process in the international arena and the specificity of international law, come to the conclusion that particularly leaves no room for the existence of international *jus cogens,* which, in their opinion, cannot have either "a consensual character", or "a metapositive, natural law character".

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38 A. Verdross, *Völkerrecht* (Russian translatin of the 4th edition), Moscow 1959, pp. 107, 185-186.

39 R. Quadri, "Cours général de droit international public", *Recueil des cours,* Vol. III – 1964, p. 335.

40 *Ibid.,* pp. 319-321, 330-331.

41 *Ibid.,* p. 335

42 J. Sinclair, *Vienna Convention on the Law of Treaties,* Manchester, 1973, p. 139; see also Ch. Rousseau, *Droit international public,* t. 1, Paris 1970, pp. 150-151 and others mentioned above in footnote No. 15.

43 G. Schwarzenberger, *International Law and Order,* London 1971, p. 29.

It is difficult to agree either with the former or the latter.

The Marxist-Leninist approach to the problem of international *jus cogens* is based on its concept of general international law and primarily on the legal nature and social content of the latter.

Realities of contemporary international relations show that the international community of States constitutes a specific international system based on the prin- ciple of self-government.

G. Tunkin points out that this system includes:

> "States and statelike entities, peoples and nations fighting for their inde- pendence, which are actually States in the process of formation; intergov- ernmental organizations and other associations of States, relations between these elements; it also comprises international law and other social norms operating in international relations, involving States with diametrically different social systems, peaceful coexistence among which is an objective ne- cessity of present-day international life[44]."

Norms of international law are established on the basis of agreements between States which are both the "leg- islators", "executives" and "defenders of norms es- tablished", and these norms fix rules of behaviour acceptable and beneficial to the ruling classes of all or a majority of the States at a given stage of the development of interna- tional relations.

Contemporary general international law is of a generally democratic nature, it is neither socialist, nor capitalist international law, it reflects the co-ordination of the will of States with different socio-economic systems aimed at establishing a mutually acceptable legal rule of conduct meeting the class interests of the par- ties involved at that particular moment. This common co-ordinated will does not dissolve one class will into another. At the same time, it is not a mere sum of these wills, since every agreement turns into a common will reflecting mutually con- di- tioned and socially adjusted different wills which are brought together under the pressure of existing objective factors responsible for the emergence of common interests: the existence in these States of two different econom- ic bases and derivate world and local economic relations, political, social, cultural and other factors forc- ing the ruling classes to resolve international problems by taking into consideration mutual, even conflicting interests. It is the meaning of the term "common interest" that is an objectively existing phenomenon forcing States to seek to establish le- gally binding rules reflecting the results of their cooperation and struggle.

The State will of ruling forces, even representing different socio-economic systems, can be mutually co-or- dinated; this brings to existence a concrete common will of the States involved, establishing mutually acceptable political or legal rules of conduct which provide each State with a necessary freedom of action dictated by the final class goals using these rules but within the limit outlined by the latter.

Commenting on the Final Act of the Helsinki Conference on Security and Co- operation in Europe, L. I. Brezhnev pointed out that this Act reflected compromises, which were beneficial for peace, without erasing differences in the ideology and social systems; the Act expressed "the common political will of the Statespartici- pants" in conditions of the existence of States with different social systems[45].

Such a political will can be expressed either through mere political statements, understandings, declarations, etc., or fixed in legally binding forms accepted and recognized by the States.

When a rule is recognized as legally binding by all or almost all States of the world it means that a common co-ordinated will of the international community of States has emerged; after that, it is this will, formed on the basis of obligation of a given rule of general international law.

One or a number of States cannot bar the process of formation of the common will of the international com- munity of States, cannot undermine the generally rec- ognized character of a given rule since a predominant major- ity of States with dif- ferent socio-economic systems have expressed their will of this subject. Dissenting, opposing States are exempt from this rule (unless they later recognize its legally binding effect) under condition that they will not violate the rights of other States formulated by this rule.

The terms "generally recognised" and "legally binding" (rule) mean the same for consenting States, and any violation of a given rule gives rise to legal respon- sibility entitling the infringed State to resort to means whose

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[44] See G. Tunkin, "International Law in the International System", *Recueil des cours,* Vol. IV – 1975, pp. 59-60; I. Likashuk, *International Legal Regulation of International Rela- tions,* Moscow 1975.

[45] *Pravda,* 2 August 1975.

froms have also been agreed upon either by the international community as a whole or by the conflicting States themselves. Therefore, the common co-ordinated will of the international community is not something standing above the will of States or a mysterious phe- nomenon which cannot be understood (G. Tripel)[46], or spontaneous legal feeling (R. Ago)[47], or psychological feeling of a collective body (R. Quadri)[48]. It is the common consent of States and consequently their common will to impart to their relations a specific, legally binding form which cannot be ruptured arbitrarily by any State participating in the formation of this will, without adverse consequences, the latter having settled and recognized legal forms.

Nevertheless, the will of a State regarding the existent international legal order is not unlimited. Though the majority of international law rules bind a State only under condition that the latter has expressed its will to accept a given rule, contem- porary general international law contains rules whose legal force is absolute for each member of the international community of States, i. e., irrespective of whether these rules have been recognized by the already existing States or by new ones, including a new government coming to power in an already existing State.

In this case “general recognition” should be very close to “universality”: there should be a common co-ordinated will of all or almost all States based on the con- sent of an overwhelming majority of States of each group – socialist, developed capitalist and developing countries. Therefore, “the generally recognized” charac- ter here coincides with “the generally binding” force of such rules.

This does not mean that one group of States forces another to accept its will. It only means that the international community of States as a whole cannot allow individual States to undermine the legal order established by this community, fixing the most vital generally recognized moral and social values which have emerged as a result of the progressive development of mankind and are conditioned by the necessity to maintaining peaceful coexistence of States with diamertically different socio-economic systems in the present day world.

Contemporary general international law is a product of a long historical devel- opment of the human society.

Indeed, struggling for political power within the feudal society, the bourgeoi- sie put forward moral-political and legal ideas progressive for that time, accumulat- ing everything that had been done before and adding new demands prompted by the capitalist mode of production. Nobody can deny the revolutionary character of the bourgeois natural law concepts of the seventeenth-eighteenth centuries, both in domestic as international spheres. It was the period when the concept of funda- mental rights of nations emerged. Step by step these ideas, declaring the equality of peoples, inviolability of their sovereignty and territorial integrity, etc., have been put into legal forms, transforming the feudal legal structure into bourgeois.

V. I. Lenin pointed out that the entire nineteenth century, the century which gave to humanity as a whole civilization and culture, passed under the sign of the French Revolution, which gave to the entire world such fundamentals of bourgeois democracy as “freedom, equality, and fraternity”[49].

At the beginning, bourgeois ideologists and statesmen, while ascribing legal force to natural law precepts, used to recognize the common consent of States as a source of particular and general international law of “the Christian community of States”. Lately, after the bourgeoisie had come to power and had expressed its political demands as legal rules of positive international law, the consent of States became the only norm-creating source in the international arena. Rules of inter- national law created primarity by the great powers of Europe and America and imposed upon small bourgeois countries, constituted the law of civilized nations, the latter declared to be formally equal to each other. The community of “civilized States” was a closed society admission to which for a new State depended on the common consent of its members, of course largely on the consensus of the great powers, and on condition that “this new member would recognize the existing gen- eral international law of civilized States”.

The then existing international law consisted of two categories of rules: (a) norms and principles of “general international law”, i. e., mostly commonly recog- nized customary rules, and (b) norms and principles regulating interstate relations on a local level – treaty and customary rules binding upon two or more States. It was the first group of norms that was obligatory for a new member irrespective of its will. After admission into “the community of civilized States” the new State was formally put on the same footing with the “old members” with regard to all

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[46] G. Triepel, “Les rapports entre le droit interne et le droit international”, *Recueil des cours,* t. 1, 1923, pp. 82-85.

[47] R. Ago, “Positive Law and International Law”, *American Journal of International Law,* Vol. 57, 1957, p. 728.

[48] R. Quadri, “Le fondement du caractère obligatoire du droit international public”, Re- cueil des cours, Vol. I-1952, pp. 624-629.

[49] V. I. Lenin, *Collected Works,* Vol. 38, p. 367.

rules which could emerge in future – the principle of sovereign equality of States was closely linked to the principle that no rule could be imposed on a State without its consent. The principle of sovereign equality of States, under the dominant theory, was presented as the basis of international law, expressing moral-ethical precepts of the Christian civilization. While the majority of these precepts were declared to be embodied in customary and treaty rules, some of them were proclaimed to be the fundamentals of humanity, being in force independently of positive law.

Considering this concept of "the international community of civilized States", we should keep in mind the narrow class nature of the bourgeois theories of law in general and those of international law, in particular: indeed the right to war was one of the means for settling international disputes, the right to sovereign equality was often reduced to nothing by treaties imposed by great powers upon small bourgeois States. Besides that, both in theory and practice the inalienability of the fundamen- tal rights of nations (States) belonged, at this stage, only to the European and Amer- ican big and small bourgeois States and to a number of powerful feudal monarchies surviving in Europe. As to other "non-Christian" States and peoples, located on the Asian, African and American Continents, they, with some exceptions, were placed outside "the civilized world" and turned into an object of occupation and coloniza- tion on the part of European "civilized States". The capitalist States either imposed on these peoples unequal treaties or directly subjected them to the economics and administration of the metropolises. In this area the capitalist, later imperialist States were bound only by "rules of humanity and justice"[50] which could not save the colonized peoples from barbarous invasions and the cruelty of colonial troops and administrations. This fact has been recognized even by Western scholars[51].

However, the concept of fundamental rights of States, including rights to in- dependence and equality with other members of the international community, like the whole bourgeois theory of natural law in the seventeenth-eighteenth centuries, played an important role in the development of international law. The positivistic approach which dominated in the theory of international law in the nineteenth-twen- tieth centuries was not so rigid as the positivism in the general theory of law which, rejecting all social and moral considerations, recognized only a law established by the will of States in accordance with settled procedures[52]. While the fundamental rights of peoples were changed by the positivists into the fundamental rights of a specific abstract entity possessing its own will, by the beginning of the nineteenth century this concept continued to play a progressive role in the international arena. It was used by small bourgeois States, and first of all by new Latin American States, to protect their independence against the dictatorial policies of great powers and in their struggle for further domcratization of the existing international legal order within the framework of "civilized States".

Therefore, by the beginning of the twentieth century the theory of consent of States as the basis of obligation of international law was dominant in the bourgeois theory of international law. This theory, and even practice, recognized the existence of principles and rules (norms) constituting the pivot of the legal order, protecting the moral-ethical fundamentals of the "civilized world", derogation from which was forbidden even by mutual consent of States. Though the term *jus cogens* was not used, the meaning of this notion was obviously present both at the scientific[53] and diplomatic (international law) levels[54].

The Great October Socialist Revolution brought into the international arena radically new revolutionary ideas and international law practice, pursued by the first proletarian State building a socialist society. The Soviet State, basing on the Marxist-Leninist theory of the State and law, emerged as a State protecting everyt- ing progressive and democratic that had been introduced into international law by human history, by the bourgeois revolutions and their progressive ideology, as well as by the international practice of the community of "civilized States". The Soviet Government, from the beginning of its existence, recognized the bulk of fundamen- tal rights of States (sovereign equality, non-interference, territorial integrity and so on) and rejected all reactionary, non-democratic principles: the right to war, to the subjection and colonization of other peoples. The Soviet Government rejected the notion of "community of civilized nations" and declared the right of every nation to self-determination as one of the fundamental principles of international law.

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[50] See F. Liszt, *Das Völkerrecht* (Russian translation), St. Petersburg 1912, S. 6-7.

[51] See J. Verzijl, *International Law in Historical Perspective,* Vol. I, Leyden, 1968, pp. 437-438.

[52] Y. Baskin and D. Feldman, *The Teaching of Kant and Hegel on International Law, and the Present,* Kazan 1977, p. 55.

[53] See above footnote No. 52.

[54] See Preamble of the Hague Convention (IV) Respecting the Laws and Customs of War on Land (18 October 1907).

Under the consistent influence of Soviet foreign policy, introducing new legal forms of interstate relations, particularly towards peoples of the East bordering the Soviet State, which had never known before really equal legal relations with great powers, general internatinal law has undergone substantial changes: former bour- geois principles and rules that proved applicable to the new conditions prompted by the existence of two diametrically different socio-economic systems have been further developed and filled with new, more democratic content (sovereign equality of States, non-iterference in domestic affairs, inviolability of the territorial integ- rity of States, *pacta sunt servanda,* good faith); as to new principles, introduced by the Soviet Government and very quickly penetrating into the legal conscious- ness of progressive mankind, it took some time to get them introduced into general international law (the principle of peaceful co-existence of States irrespective of their socio-economic systems, ban on the use of war as a means of national policy, recognition of the right of colonial and dependent nations and peoples to self-deter- mination and equality, respect of human rights, and so on).

Joined by the other socialist States, which emerged after the Second World War, supported by new independent States of Asia, Africa and Latin America, the Soviet Union has been continuing the struggle for the democratization of international law. As a result of this policy, new, radically new international law has been created – contemporary international law is a new historic type of international law based on the principle of peaceful coexistence of States with different socio- economic systems. Contemporary general international law is the law of peace, is the law binding all the States of the world and rejecting inequality of nations and the division of them into "civilized" and "non-civilized"[55]. One of the important peculiarities of contemporary international law lies in the fact that its main trend is the defence of peace and security of nations, strengthening of neighbourly and friendly relations among all States of all parts of the world, defence of the rights of individuals regardless of race, sex, language and creed and other moral values of today's mankind.

Today there is not a single corner on the Earth where an overwhelming major- ity of people does not understand the justice of lasting international peace and secu- rity of nations based on the principles of self-determination of nations and peoples, non-interference in the domestic affairs of States, and mutually beneficial economic and cultural co-operation. It can be affirmed that at the present stage a uniform legal consciousness of progressive mankind has emerged perceiving a whole complex of norms which should be followed by the participants of international law relations; these are moral and political principles worked out by progressive mankind, the ones to be followed by States in the world arena. V. I. Lenin called it "the legal con- sciousness of democracy, in general, and of the working classes, in particular"[56].

Many of these norms, due to the efforts of the USSR and other Socialist coun- tries, have been partly of fully embodied in the principles of contemporary interna- tional law. A part of them still lies in the sphere of moral and political demands of progressive mankind, being of an objective nature, that is they necessarily emerge in public consciousness from certain economic relations regardless of whether in- dividuals or individual classes want it. These demands are a product of the progres- sive development of mankind from the moment of its emergence up to our days, stemming from the objective necessity of peaceful coexistence of States with dif- ferent social systems, which determines the whole course of present international relations.

A number of these moral norms are so axiomatic that they are ascribed the character of "natural law", standing by their legal validity above the positive law ir- respective of time or social conditions. In reality, the "naturalness" of these norms, as seen from the foregoing, can be explained only by specific historical situations, and certain stages in the development of human society which engender appropriate political and other demands.

At the same time one should not confuse the moral and political precepts of progressive humanity with legal norms which impart a legally obligatory nature to them. Until the moral norms are fixed in law they, with all their effectiveness as factors influencing the behaviour of States, cannot serve as a source of law; they remain as non-legal demands finding their expression in different political and other social slogans and principles advanced by the public opinion and peace- loving States. This is precisely the point that is "forgotten" by representatives of the natural law trend when they dissolve law in morality: moral factors in contempo- rary international law play a great role in imparting to certain norms of international law the nature of general human values and in strengthening their legal compulsory nature; however, such factors cannot replace legal rules within the international legal order.

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[55] G. Tunkin, "International Law in the International System", *Recueil des cours,* Vol. IV- 1975, pp. 41-55; R. Bobrov, *Major Problems of the Theory of International Law,* Lenin- grad 1968, pp. 58-121; G. Ignatenko, *International Law and Social Progress,* Moscow 1972, pp. 24-65.

[56] V. I. Lenin, *On the Foreign Policy of the Soviet State,* Moscow 1973, p. 12.

The fact that contemporary general international law fixes the moral values of progressive mankind does not change the general democratic character of this system of law, it remains a result of mutually co-ordinated wills of States with different socio-economic systems. Many of these values serve the interests of any State irrespective of its socio-economic system, protecting its security and indepen- dence. Only most reactionary social forces, including those ruling in some States, dare to reject some commonly recognized values fixed by general international law, and openly adhere to fascism, colonialism, apartheid, which flagrantly violate the United Nations Charter's principles.

The progressive, generally democratic character of general international law is particularly expressed in its fundamental principles enumerated in the Preamble and Articles 1 and 2 of the United Nations Charter, which were developed by the United Nations Declaration on Principles of International Law (1970) and the Final Act of the Helsinki Conference (1975). This character has been reflected in other principles and norms contained in different branches of international law called upon to preserve the fundamentals of contemporary international legal order from any violation on the part of one or more States in case the latter decides to under- mine peace and security of States and peoples, the main principles of humanity, fundamentals of diplomatic and consular relations, as well as the main principles of international co-operation of States in spheres vitally important both to a State and to the international community of States as a whole.

All these rules (principles) are mandatory for any State, which cannot violate them in regard to another State. However some of them can be derogated from by the mutual consent of States. There are many such legal rules.

It will suffice to mention the principle of inviolability of diplomatic immuni- ties of persons entitled to possess them, many rules constituting the institution of high seas (the inviolability of civil ships from any action on the part of vessels of other States connected with stopping, searching, arresting on condition that the former have not committed an illegal act), the right of peaceful passage through the territorial waters of other States, the inviolability of land, air and water frontiers of States, and other principles and more concrete norms of general international law.

All these rules can be derogated from, that is substituted by other rules of conduct established on a consensual basis by contracting States and reducing or abrogating the above-mentioned rules only in regard to the mutual relations of those States.

However, in contemporary general international law there are norms deroga- tion from which cannot be allowed to States through their mutual consent. These rules belong to positive international law.

In his intervention at the Vienna Conference on the Law of Treaties, Sir Hum- phrey Waldock explained that:

> "the International Law Commission had 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 prin- ciples of international law which were of a peremptory character[57]."

The same approach was adopted by a predominant majority of the Vienna Conference participants, resulting in the well-known Article 53 – only a rule of general international law "accepted and recognized by the international community of States as a whole as a peremptory norm *(jus cogens)*".

Therefore, the Convention closely connects international *jus cogens* with the consensual character of general international law, excluding any possibility of iden- tifying it with "natural law standing above the will of States" – it is the common will of the international community of States that decides or defines whether or not a given rule has a peremptory character. Of course this will is prompted by varios factors having economic, political and moral nature, and primarily by protection relations, dominating in States, world economic and political relations emerged on their basis, class struggle within States and in the world arena, world public opinion. However, only the common co-ordinated will of States renders a rule ab- solutely binding.

J. Sztucki, criticizing the consensual concept of peremptory norms adopted by the Vienna Convention, expressed his position in the following words:

> "The consensual concept … has developed in the long process of drafting and discussions … It was only at the Vienna Conference that the notion of peremptory norms took its present shape. The position of government rep- resentatives who so essentially redrafted the article in question may be well understood.

[57] *United Nations Conference on the Law of Treaties, Official Records,* First Session (Vi- enna 26 March-24 May 1968), New York 1969, pp. 327-328.

> Otherwise, they would have to accept that peremptory norms, which exist objectively and independently of the will of States, had been established either by a supranational authority or by law of nature. And this alternative, certainly, could not have had much appealing force. But an op- posite attitude – although perhaps more realistic – created its own problems, apart from the fact that a *jus cogens* which is to be accepted and recognized in that quality, by the prospective parties to treaties is, apparently, no *jus cogens* in the usual meaning of the term[58]."

It is correct that the first Rapporteur of the ILC Sir Hersch Lauterpacht, using the term "International public policy", meant under it principles which should nei- ther be codified nor crystallized: "they may be expressive of rules of international morality so cogent that an international tribunal would consider them as forming part of principles of law generally recognized by civilized nations[59]."

Sir Gerald Fitzmaurice also preferred to talk about *jus cogens* as an institution embracing "not only legal rules but considerations of morals and of international good order"[60].

Both Rapporteurs, being representatives of the common law system, closely linked the notion of *jus cogens* to international tribunals which were supposed to be an ultimate body entitled to define which rules of customary law and moral precept make a given treaty null and void. Nevertheless, the ILC has not followed this approach. Moreover, it rejected the term "international public policy" to avoid such implications "as would have arisen from using the municipal law term"[61], and confined itself only to the recognition that it is "the particular nature of the subject- matter" with which a general rule of international law deals and "not the form" of it that may give it the character of *jus cogens*[62].

Therefore, the ILC accepted a reduced notion of *jus cogens* comprising only norms of positive international law, and excluding purely moral precepts. The Vien- na Conference followed the same attitude, making clear some points which resulted in the final text of the relevant articles. Norms of international law are created by the common consent of States. Only the latter decide which institutionalized forms should be norm-creating and competent to apply the rules created. It is an objective specificity of interstate relations that international law has a decentralized character regulating the relationship between independent political entities within the frame- work of self-governed international systems.

The fact that States themselves create, observe and protect rules of *jus cogens* should not lead us to the conclusion that there is no international *jus cogens* at all. As was shown above, even in domestic law, the common will of the ruling social forces creates legal rules, including *jus cogens,* which are binding on every "ruling individual" or group and restricting their freedom of will in the interests of the rul- ing forces as a whole. The legislative, executive and judicial bodies are institutions of the political machinery without which no domestic law can exist.

As to the international community of States, based on the principles of self- government, it would be wrong to try to introduce into it all the attributes of *jus cogens* known in domestic law, including the notions of public policy and good moral heavily depending on the court system.

Scholars can produce various kinds of concepts and theories, but all of them would be ineffective if they ignored the reality of life and its objective laws of de- velopment which have been reflecting in political and legal superstructures based on world economic relations.

International *jus cogens* is an aggregate of those rules of general international law which the international community of States *expressis verbis* or implicitly rec- ognized and accepted as norms, no legal derogation from which is permitted to the contracting parties. Those rules can be formulated either by general multilateral treaty or generally recognized customs, or by the so-called mixed norms: treaty- customary norms, binding upon the parties to the treaty, on the one hand, and – by the customary process – upon those States which are not parties to the treaty[63].

It is well known that the ILC stressed this point, stating: "any modification of a rule of *jus cogens* would today most probably be effected by the conclusion of a general multilateral treaty"[64].

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[58] J. Sztucki, *op. cit.,* pp. 97-98.

[59] *Yearbook of the ILC,* 1953, Vol. II, pp. 154-155.

[60] Yearbook of the ILC, 1958, Vol. II, pp. 26-28, 40-41.

[61] See G. Tunkin's intervention at the Lagonissi Conference on International Law (see above, footnote No. 1).

[62] *Yearbook of the ILC,* 1966, Vol. II, p. 248.

[63] G. Tunkin, "International Law in the International System", *Recueil des cours,* Vol. IV-1975, pp. 140-141.

[64] *Yearbook of ILC,* 1963, Vol. II, p. 199; *Ibid.,* 1966, Vol. II, p. 248.

All attempts to interpret the term “general international law” as customary law only (R. Ago, J. Brownlie, Ch. De Visscher, G. Schwarzenberger, J. Barberis) contradict the international law practice, which was once more proved at the Vienna Conference on the Law of Treaties. Even authors who belong to most persistent op- ponents of the consensual notion of international *jus cogens* have to admit that:

> “Still, since 1963 one may observe a growing support for the category of an international *jus cogens,* with simultaneous departure from the recogni- tion of custom as the only possible source of that category of norms. This phenomenon manifests itself both on the official level and in the scholarly discussion parallel to the work of the ILC, and is probably connected with attempts at ‘denaturalization’ of the concept of *jus cogens* and at putting it on a more ‘positivist’ ground[65].”

Indeed, Article 53 clearly indicates that international *jus cogens* belongs to general international law and its legal nature does not differ from other rules of this law having the *jus dispositivum* character – all rules of general international law have to be “accepted and recognized by the international community of States as a whole”.

Does this mean that a State, or even a number of States, can ignore the com- mon will of a predominant majority or, using the phrase of the Chairman of the Drafting Committee at the Vienna Conference, “a very large majority” of States, and bar the process of the formation of a peremptory norm? The Drafting Committee expressed the opinion that neither one State, nor a very small number of States, can affect the formation of a peremptory norm[66].

What kind of majority can be qualified as “the international community of States as a whole” if there is no unanimity?

It is difficult to accept the reasoning of those who reduce the term “as a whole” to a simply quantitative phenomenon embracing “a sufficient majority of States” and ignoring the real disposition of political forces in the world arena.

The Socialist doctrine has always stressed the objective necessity of peaceful coexistence of States with different social systems and primarily with diametrically different social systems and primarily with diametrically different socio-economic systems – socialist and capitalist.

> “However, – writes G. Tunkin, – a purely quantitative characteristic of an ‘overwhelming majority’ is at present not sufficient. There are three groups of States which differ from each other qualitatively: the socialist, capitalist and so-called developing States … At present an ‘overwhelming majority of States’ should include States belonging to different socio-economic systems which may be considered as sufficiently representative of the corresponding groups of States[67]“.

The policy of peaceful coexistence pusued by the Soviet Government has proved the reality and correctness of this course. Presenting a Programme of Peace for the 1980s, which has further developed the Programmes adopted by the twenty- fourth and twenty-fifth CPSU Congresses, the General Secretary of the Party, L. I. Brezhnev, in his report to the twenty-sixth Congress, stressed that the policy of peaceful coexistence, projected by V. I. Lenin, has exerted an increasingly deter- mining influence upon contemporary international relations, which was convinc- ingly proved by the 1970s; life demands fruitful co-operation of all States with a view to solving peaceful, constructive tasks facing each people and the whole of mankind[68].

Only a rule accepted by all or almost all States with different social systems can be qualified as a rule of general international law.

This approach has been increasingly accepted by Western scholars, stressing that “there is no world consensus without the West”[69].

R. Ago is more elaborate on this point:

> “pour être considérée comme impérative et produire les effets prévus sur la validité d’un traité, une norme de droit international général doit avoir été acceptée comme telle par la communauté internationale des

[65] J. Sztucki, *op. cit.,* p. 75.

[66] UN Conference on the Law of Treaties, p. 472.

[67] G. Tunkin, *International Law in the International System*, p. 131; see also A. Movchan, *Codification and Progressive Development of Interntional Law,* Moscow 1972, p. 28; R. Bobrov, *Major Problems of Theory of International Law,* Leningrad 1968.

[68] *Pravda,* 24 February 1981.

[69] N. Onuf, Pr*ofessor Falk on the Quasi-Legislative Competence of the General Assembly*, *American Journal of International Law,* Vol. 64, 1970, p. 355.

Etats dans son ensemble. Ceci revient à dire, notamment, qu'il faut que la conviction du caractère impératif de la règle soit partagée par toutes les composantes es- sentielles 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[70]."

According to some Western scholars, the rules of *jus cogens* should be appli- cable to dissenting or new States subject to acceptance of them by a considerable majority of States[71]. Others maintain that:

"a rule in order to be qualified as *jus cogens,* must pass two tests – it must be accepted as law by all the States in the world, and an overwhelming majority of States must regard it as *jus cogens*[72]".

I do not think that there is any reason to establish a specific criterion for the no- tion of *jus cogens* in regard to the "acceptance and recognition by the international community of States as a whole".

A rule of *jus cogens* should be accepted by the same majority as is the case with every forbidding rule protecting the vital moral values of contemporary civi- lization as fixed by contemporary international law. A number of States should not be allowed to oppose the common co-ordinated will of States reflecting most vital objective societal laws of the development of mankind.

Apparently, we should come to the conclusion that the term "international com- munity as a whole" can mean only one thing: it should comprise all or almost all States of each of the main world political groups of States – the socialist, developed capitalist and developing ones. One or two members of each group cannot affect the will of others directed at establishing a *jus cogens* rule in co-ordination with other groups. The dissenting States will be under obligation to obey these rules because the international community as a whole cannot allow any two or more States to derogate from international *jus cogens* by mutual consent expressed through a local treaty.

Chapter III

CRITERIA FOR THE IDENTIFICATION OF NORMS *OF* INTERNATIONAL JUS COGENS

The problem of the content of international *jus cogens* is a most complicated and difficult issue: every author suggests his own approach to the identification of a rule having a *jus cogens* character[73]. Both the Commission of International Law and the Vienna Conference of the Law of Treaties abstained from listing peremp- tory rules since there was no common agreement regarding various rules. It was precisely this issue that was used by the Western States to motivate their negative position on Article 53 of the Convention.

There is an attempt among scholars to link international *jus cogens* to the hier- archy of norms[74]. It is difficult to agree with this.

First of all a hierarchy presumes the existence of several levels of legal rules standing one above the other. Since every treaty derogating from a *jus cogens* rule is null and void *ab initio,* there is no place for it in international law at all[75].

Secondly, in general international law there is no hierarchy of norms analo- gous to the hierarchy existing in domestic law. The latter depends on the level of the competence of the body which has enacted or sanctioned a given rule of law – the parliament, the executive bodies, the court, etc.

International treaties and customs stand on an equal footing, and customs have the same level of legal bindingness with regard to the forms of expression of the will of States. Only the character of rules and scope of their recognition within the international community of States can give us a clue for determining the level of legal bindingness.

In this connection the following hierarchy of legal rules can be presented:

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[70] R. Ago, *Droit des traités à la lumière de la convention de Vienne*, *Recueil des cours,* Vol. II-1974, p. 323.

[71] Ch. Rozakis, *The Concept of* Jus Cogens *in the Law of Treaties,* Amsterdam, 1976, p. 12.

[72] M. Akehurst, *The Hierarchy of the Sourses of International Law*, *British Year Book of International Law,* 1974-1975, Oxford 1977, p. 285.

[73] For details see E. Suy and J. Sztucki (above, footnote No. 1).

[74] J. Barberis, *La liberté de traiter des Etats et le jus cogens*, *ZAöRV,* Band 30, No. 1, 1970, pp. 19-45.

[75] L. Shestakov, *Some Questions of* Jus Cogens *Norms in Contemporary International Law,* Moscow 1974, p.17.

1. The fundamental principles of international law recognized by all the States of the world as basic rules of conduct obligatory for each member of the international community of States.
2. Principles establishing basic rules of conduct within separate branches of this system of law.
3. Rules established by States in accordance with the fundamental and branch principles of general international law.
4. Principles and rules contained in local treaties and customs, provided that they are not at variance with the above-mentioned principles and rules of general international law.

Such a gradation permits us to consider the whole system of international law as an aggregate of interrelated and interdependent rules of conduct differing from each other by the degree of generalization and level of legal bindingness.

Does this mean that only the first category of rules, i. e., the fundamnetal prin- ciples, is the sphere where international *jus cogens* should be looked for? There is no doubt that the fundamental principles of general international law are those in which international *jus cogens* should be sought. While not all these principles can be qualified as *jus cogens* rules the bulk of the fundamental principles have a peremptory character.

In using the term "bulk", I would like to single out principles any derogation from which is *absolutely* forbidden even *inter se*: a ban on the use of force or the threat to use it, non-interference in domestic affairs of other States, mutual co- operation for the maintenance of peace and the struggle against aggression, equal rights and self-determination of peoples, peaceful settlement of international dis- putes, respect of vital fundamental human rights.

On the other hand, it is difficult to consider as a *jus cogens* rule the principle *pacta sunt servanda* or even the whole principle of fulfilment of international ob- ligations, due to the actual impossibility of derogating from these principles by the contracting States within the framework of their legal relationship.

As to principles of sovereign equality of States, inviolability of territorial in- tegrity and frontiers, they can be derogated from by the contracting parties on con- dition that the latter observe the principles of self-determination of peoples and good faith.

At the same time there are many *jus cogens* principles and rules within sepa- rate branches of general international law, i. e., at levels subordinated to the funda- mental principles.

Jus cogens should not be reduced to the notion of hierarchy of norms. On the contrary, it should be rather placed outside this hierarchy due to its specific nature connected with *the degree of the obligatory character of prescriptions.* Such a rule can be found at any level of the existing hierarchy of norms of general international law. The essence of this character is its outstanding moral value for contemporary mankind, its progressive, democratic nature as determined by the present stage of civilization resulting from objective economic and social factors mentioned above. This is the main difference between the Marxist-Leninist approach to the moral factor in law and the natural law school, the latter deducting these factors from the nature of human beings as such, taken in isolation from the socio-economic back- ground of their existence[76].

International *jus cogens* contains only those principles or rules of general in- ternational law which contain such moral demands of progressive mankind which cannot be derogated from even by mutual agreement of contracting States. The following criteria should be used for the identification of a *jus cogens* norm in con-temporary international law:

(a) a rule should be recognized as legally binding by the international community of States as a whole, i.e., by all or almost all States with different socio- economic systems;

(b) the peremptory character of a rule should be recognized by States either *expressis verbis,* or such a character can be presumed due to its vital social and moral value for the functioning of the whole contemporary international legal order;

(c) any derogation from a rule by the mutual consent of States on the local level, aimed at worsening the commonly recognized legal standards of civilization, is null and void;

(d) the voidness of agreements derogating from a given treaty or customary rule cannot be avoided even if the participants of a derogating agreement try to free themselves from treaties or customs containing *jus cogens* norms.

[76] See V. Tumanov, *Bourgeois Legal Ideology,* Moscow 1971, p. 344.

At this stage, i. e., so far as the international community of States itself has not indicated *expressis verbis* which rule is of *jus cogens* character, only a rule containing all the above-mentioned features can be qualified as having a *jus cogens* nature. Only such an approach allows us to presume that there is a common consent of States to consider a given rule as a *jus cogens* one due to its obvious commonly recognized moral value expressing the legal consciousness of mankind.

That is why the international community of States has a right to prevent the implementation of a derogating agreement between two or more States. No partici- pant of a derogating agreement can justify an action – illegal under *jus cogens* – invoking the consent of the other side; the participants cannot justify their action on the ground that if affects only the participants' rights and not those of third States.

Therefore, international *jus cogens* in contemporary general international law is an aggregate of legally binding rules commonly recognized through treaty or custom expressing the explicit or implicit common co-ordinated will of the inter- national community of States aimed at preventing the given rules from any deroga- tion by local agreements entered into not only by States which have participated in the creation of these rules, but even by those few States which openly reject these prescriptions. For such agreements, formally affecting only the contracting States, worsen the recognized general democratic standards – legally fixed vital values of contemporary civilization – and undermine the moral and legal foundations of the whole international legal order.

Using these criteria and proceeding from the close link of norms of *jus cogens* with the main moral requirements of progressive mankind, which correspond to the objective laws of development of the community of States and peoples at the present stage, without which progress of civilization is unthinkable, it is possible to form several groups of universally recognized principles (norms) of contemporary

international law whose peremptory character is obvious:

(a) *principles which establish the main sovereign rights of States and peoples:* equality and self-determination of peoples, non-interference;

(b) *principles defending the peace and security of nations:* prohibition of the use or threat of use of force, peaceful solution of disputes; collective struggle against aggression in accordance with the United Nations Charter;

(c) *principles establishing major demands of humanity:* defending the freedom, honour and dignity of human beings regardless of their race, sex, language and creed; ban on genocide, apartheid and all other kinds of racial discrimination, prohibition of slavery, slave trade, trade in women and children, etc., prohibition of piracy, inviolability of the major economic, social, cultural, political and civil rights of individuals;

(d) *principles prohibiting crimes against humanity,* as established in the Statutes of the Nurenberg and Tokyo Tribunals, and in the Geneva Convetions of 1949 on Victims of War;

(e) *principles prohibiting the appropriation of parts of space vitally important to all States of the world:* freedom of the High Seas and air space above, principles of peaceful uses of Outer Space, the Moon and other celestial bodies, principles of peaceful use of Antarctica.

This list cannot, of course, be considered exhaustive and the principles enumerated in it are only a part of the whole aggregate of the norms of *jus cogens* permeating all branches of contemporary international law.

The revealing of all norms of *jus cogens* is a long and arduous work to be done both by scholars and by international law practice of States and in particular by the Unit- ed Nations bodies engaged in the progressive development of international law. The existence of the world socialist system and other peace-loving States rules out the possibility of establishing in general international law norms of an anti-demo- cratic character and ensures progressive development of international law, which includes the development of new norms of *jus cogens* and *jus dispositivum* through multilateral treaties and generally recognized customs. Contemporary international law – formed under the active influence of the USSR, all socialist and other peace- loving countries and broad popular masses – constitutes an aggregate of generally democratic norms which meet the interests of all States regardless of their social systems. Norms of *jus cogens* form the basis of progressive law and order.