4.7.2 The Vienna Convention on the Law of Treaties 1969 Section 3

Section 3 of the VCT 1969 adopts a composite position. Article 31 states that treaties 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose'.

4.7.2.1 Good faith

The principle of good faith underlies the most fundamental norm of treaty law – *pacta sunt servanda*. If the parties to a treaty are required to perform the obligations of a treaty in 'good faith', it is logical to interpret the treaty in 'good faith'.

4.7.2.2 Ordinary meaning

The ordinary meaning does not necessarily result from a strict grammatical analysis. In order to arrive at the ordinary meaning account will need to be taken of all the consequences which reasonably flow from the text. It is also clear that the ordinary meaning of a phrase cannot be ascertained divorced from the context the phrase has in the treaty as a whole. In the *Employment of Women During the Night* case (1932), Judge Anzilotti said:

> I do not see how it is possible to say that an article of a convention is clear until the subject and aim of the convention have been ascertained, for the article only assumes its true import in this convention and in relation thereto. Only when it is known what the contracting parties intended to do and the aim that they had in view is it possible to say either that the natural meaning of terms used in a particular article corresponds with the real intention of the parties, or that the natural meaning of the terms used falls short of or goes further than such intention.[27]

This view can be contrasted with the decision of the ICJ given in the advisory opinion in the *Competence of the General Assembly for the Admission of a State to the UN* case (1950)[28] where the Court said that:

> the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.

4.7.2.3 Special meaning

Paragraph 4 of Article 31 provides that a special meaning shall be given to a term if it is established that the parties so intended. In the *Eastern Greenland* case, the PCIJ stated:

> The geographical meaning of the word 'Greenland', ie the name which is habitually used in maps to denote the whole island, must be regarded as the ordinary meaning of the word. If it is alleged by one of the parties that some unusual or exceptional meaning is to be attributed to it, it lies on that party to establish its contention.[29]

---

27 PCIJ Ser A/B, No 50 (1932).

28 [1950] *ICJ Rep* at p 8.

29 PCIJ Ser A/B, No 53 (1933).

4.7.2.4 The context and the object and purpose

The context, for the purposes of interpretation, includes the text, its preamble and annexes and any agreement relating to the treaty made between all the parties, or made by some of the parties and accepted by the other, in connection with the conclusion of the treaty. The text of the treaty must be read as a whole. The preamble to the treaty will often provide assistance in ascertaining the object and purpose of a treaty.

4.7.2.5 Supplementary means of interpretation

Although Article 32 talks of 'supplementary means of interpretation', in practice international tribunals do tend to blur any differences between Article 31 and Article 32 and the preparatory work often referred to by the French term *travaux préparatoires* is regarded as a considerable aid. In the *Employment of Women* case the PCIJ referred to the *travaux préparatoires* to confirm the clear meaning of the text. One possible restriction on the use of *travaux préparatoires* as an aid to interpretation arises where some of the parties to the dispute have not been involved in the preparatory work leading to the treaty. So, for example, in the *River Oder* case (1929) the PCIJ refused to allow reference to the preparatory work of the Treaty of Versailles 1919 on the grounds that several of the parties to the dispute had not taken part in the work of the Conference which had prepared the treaty.

4.8 Multilingual treaties

Treaties are often drafted in two or more languages. In the case of bilateral treaties, the normal practice is that the treaty texts should be drawn up in the two languages of the parties, both texts being equally authentic. Multilateral conventions may be concluded in many languages: conventions concluded under the auspices of the UN will be drawn up in Arabic, Chinese, English, French, Russian and Spanish; the treaty by which Greece became a member of the European Union was concluded in eight languages. A more common practice is to conclude a treaty in two or three widely spoken languages and for these two or three texts to be equally authentic, and for a number of official translations to be deposited with the signed original. If a number of texts are equally authentic, they may be read in conjunction in order to ascertain the meaning of the convention.

4.9 Validity of treaties

The VCT 1969 represents both codification of existing rules of customary international law and also the progressive development of international law. Part V of the Convention which deals with invalidity, termination and suspension represents more a 'progressive development' of the law than simple codification. In looking at the grounds of invalidity contained in the VCT 1969, it should be borne in mind that the customary law rules on validity may well not be as rigid or as settled.

4.9.1 Non-compliance with municipal law requirements

A state cannot plead a breach of its constitutional provisions as to the making of treaties as a reason for invalidating an agreement. For example, where the representative of the state has had her/his authority to consent on behalf of the state made subject to a specific restriction which is ignored, the state will still be bound by that consent except where the other negotiating states were aware of the restriction on authority prior to the expression of consent.

4.9.2 Error

Unlike the role of mistake in municipal contract law, the scope of error in international law is very limited. In practice, given the number of people and the character of states involved in the negotiation and conclusion of treaties, errors are not very likely to occur.

Article 48 declares that a state may only invoke an error in a treaty as invalidating its consent to be bound, if the error relates to a fact or situation which was assumed by that state to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound. The ground is not open to the state if it contributed to the error by its own conduct or the circumstances were such as to put it on notice of a possible error, or if the error related only to the wording of the text of the treaty.

4.9.3 Fraud and corruption

Where a state consents to be bound by a treaty as a result of the fraudulent conduct of another negotiating state, that state may under Article 49 of the VCT 1969 invoke the fraud as invalidating its consent to be bound. Fraud itself is not defined in the VCT 1969 and since there are no examples of treaties being invalidated as a result of fraud there is a lack of international precedents as to what constitutes fraudulent conduct.

If a state's consent to a treaty has been procured through the corruption of its representative, directly or indirectly by another negotiating state, the former state is entitled to claim that the treaty is invalid under Article 50 of the VCT 1969.

4.9.4 Coercion

4.9.4.1 Coercion of state representatives

Article 51 of the VCT 1969 provides that the expression of a state's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him/her shall be without any legal effect. It has long been an accepted rule of customary international law that duress exercised against a representative concluding a treaty has been a ground for invalidating the treaty.

4.9.4.2 Coercion of a state

There was considerable discussion about Article 52. In the 19th century force had often been seen as a legitimate extension of diplomacy and treaties procured by force were not uncommon. The concept that a treaty may be void if its conclusion has been procured by threat or use of force is therefore of recent

origin. At the Vienna Conference discussion centred on the exact definition of 'force'. A group of 19 African, Asian and Latin American states sought to define 'force' as including any economic or political pressure. The vast majority of Western states opposed such a definition, arguing that it would seriously undermine the stability of treaty relations given the width of possible interpretations of pressure. In the event, the 19 states did not push the issue to a vote, although the Conference adopted a declaration which called upon states to refrain from economic and political coercion when negotiating and concluding treaties.

It should be noted that it is acceptance of the treaty that must be coerced. A peace treaty which is signed as a matter of choice between two independent states is valid even though its terms may have been influenced by a prior use of force.

There have been few recent examples of treaties brought about by the use of coercion. One of the best known cases involved the treaty between Germany and Czechoslovakia under which a German Protectorate was established in former Czechoslovakian territory. The treaty was signed by President Hacha of Czechoslovakia in Berlin at 2.00am after he had allegedly been subject to considerable personal threats and told that, if he did not sign, German bombers could destroy Prague within two hours.

4.9.5 Unequal treaties

Many non-Western states take the view that treaties not concluded on the basis of the sovereign equality of all parties are invalid. Thus, treaties between economically powerful states and much weaker states under which the latter grants extensive privileges or facilities to the former should be set aside. For example, the 19th century treaties between the UK and China under which China ceded Hong Kong Island and Kowloon and leased the New Territories to the UK was challenged by the Chinese government on the basis that they were not concluded between two equal states. On the whole, Western writers have regarded the concept of unequal treaties as too vague to be implemented.

4.9.6 Jus cogens

In the ILC's preparation of the Vienna Convention considerable discussion took place about whether there were in international law certain rules so fundamental and of such universal importance that a state would not be entitled to derogate from them even by agreement with another state in a treaty. The ILC concluded that such rules did exist, for example, the prohibition on the unlawful use of force and the use of genocide.

> *Jus cogens*
>
> The concept that a treaty concluded in violation of a norm of *jus cogens* is null and void is highly controversial. Any analysis of the concept requires an investigation into the relevance in international law of private law analogies and into the extent to which, if at all, there exists an objective notion of international public policy consisting of legal rules from which states are not permitted to derogate by way of international agreement.
>
> But first, you may ask, what is *jus cogens*? Suy defines it as 'the body of those general rules of law whose non-observance may affect the very essence of the

legal system to which they belong to such an extent that the subject of law may not, under pain of absolute nullity, depart from them in virtue of particular agreements'.[30] From this definition it will be noted that the concept of *jus cogens* is wholly general in nature and applicable to any system of law. It is not a concept which has been specially developed within the framework of public international law; on the contrary, it derives from, and is deeply embedded in, particular systems of private law.

The origin of the notion of *jus cogens* has been traced back to Roman law. The maxim *jus publicum privatorum pactis mutari non potest* is to be found in the *Digest*. The *jus publicum* was to be understood in a wide sense as embracing not only public law in the strict sense (that is to say, the law governing relations between individuals and the state) but also rules from which individuals were not permitted to depart by virtue of particular agreements.

The pervading influence of this general notion can be recognised by the development of such concepts as *ordre public* and *öffentliche Ordnung* in French and German law respectively, and by the gradual establishment in common law of the principle that certain types of contract are, by their very nature, injurious to society and therefore contrary to public policy. The genesis of this principle in English law can be traced back to Elizabethan times, although it was only in the 18th century that its foundations were effectively laid in a series of decisions proclaiming, in somewhat vague and indeterminate language, the nullity of contracts injurious to the public good or *contra bonos mores*.[31]

It will, then, be seen that every developed national system of law has devised its own concept of public policy. In civil law jurisdictions the notion of *ordre public* is essentially variable and relative, evolving in accordance with the political, social and economic circumstances of the time. In English law it is less variable; certain defined heads of public policy have been established by the courts, and although these heads can be moulded to fit the new conditions of a changing world, it is rarely possible for the courts to establish new heads of public policy.[32]

Thus there has gradually evolved over the years, in practically all systems of municipal law, the principle that the will of the parties to conclude contracts is not unfettered but is subject to certain restraints essential to the continued existence of an ordered society. What the nature of these restraints is will vary according to the political, economic or social climate in the country concerned. Certain restraints may be imposed by statute, others may have been developed by the jurisprudence of the courts. So far as restraints imposed by statute are concerned, political and economic factors may lead to the imposition of new controls on the freedom of individuals to contract, thus in England, the Resale Prices Act 1964 rendered void (subject to an exemption procedure) any term or condition of a contract for the sale of goods by a supplier to a dealer in so far as it provided for the establishment of minimum prices for the resale of the goods.

Notwithstanding the close connection between *jus cogens* and public policy, the two concepts do not entirely coincide, at least if public policy is conceived of in the narrower sense as being confined to the circumstances in which the municipal courts will refuse to enforce a contract. *Jus cogens* is the sum of

30 Suy in *The Concept of* Jus Cogens *in International Law*, 18 (1967).

31 Cheshire and Fifoot, *Law of Contract*, 8th edn, 1972, London: Butterworths at pp 318–25.

32 *Janson v Driefontein Consolidated Mines* [1902] AC 484 at p 492; *Fender v St John-Mildmay* [1938] AC 1 at p 40; see, however, McCardie J in *Naylor Benzon Ltd v Krainische Ind Ges* [1918] 1 KB 331 at p 349 and *Shaw v Director of Public Prosecutions* [1962] AC 220.

absolute, ordering, prohibiting municipal law proscriptions, in contrast to *jus dispotivium*, that is to say, legal prescriptions which can, and do, yield to the will of the parties.

...

It now remains to consider the most controversial aspect of them all: if, on the balance of conflicting considerations, one is constrained to admit the existence of *jus cogens* in international law, what is its content? What are these peremptory norms of general international law from which states are not permitted to derogate by treaty?

Let us begin by taking the more obvious candidates. I have already discussed the extreme case of a treaty which purports to abolish both retrospectively and prospectively the rule *pacta sunt servanda* between the contracting parties; however improbable such a treaty may be, it is difficult to see how its validity could be sustained. But leaving aside treaties whose object and purpose is to deny the fundamental principle underlying the law of treaties itself, what other categories of treaty could be regarded as being inconsistent with rules of *jus cogens*?

The Commission's commentary gives three examples:

(a) A treaty contemplating an unlawful use of force contrary to the principles of the Charter.

(b) A treaty contemplating the performance of any other act criminal under international law.

(c) A treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every state is called upon to co-operate.

There would be little disposition among jurists to deny the nullity of a treaty contemplating an unlawful use of force contrary to the principles of the Charter; but, given the pervasive influence of the modern propaganda machine designed to stand everything on its head, it is of course necessary to distinguish a treaty of this nature from a perfectly valid treaty for the organisation of collective self-defence in the event of an armed attack or the threat of an armed attack.

The second example given by the Commission in part overlaps the first, since a treaty between states A and B for the initiation of a war of aggression against state C would, as already indicated, fall foul of both prohibitions. But the second example would presumably also cover the other instance cited by Fitzmaurice – that is to say, a treaty whereby two states agree not to take any prisoners of war and to execute all captured personnel, during future hostilities between them. In this connection, Schwelb aptly reminds us that the four Geneva Conventions of 1949 on the Protection of War Victims all contain denunciation clauses providing that each of the parties shall be at liberty to denounce the Convention; but the denunciation clauses specifically state that denunciation 'shall in no way impair the obligations which the parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity and the dictates of the public conscience'. Schwelb concludes that this is a reference to something akin to *jus cogens* since, if a single state cannot release itself from their provisions by the act of denouncing the Conventions, it appears to follow that two or more states cannot derogate from these principles by agreements amongst themselves. In this he is probably right, given the particular content of the Geneva Conventions. But it does not follow that the inclusion of such a provision would constitute conclusive evidence of the *jus cogens* character of the rules embodied in

that Convention since its purpose may be simply to preserve the operation of the rules as rules of customary international law. In the final analysis, it is the *content* of the rules which will be decisive in the determination of whether or not they have the attributes of *jus cogens*.

The third example given by the Commission opens up the floodgates of controversy. The majority of jurists would no doubt go along with the Commission in asserting that the rules prohibiting trade in slaves, piracy or genocide have become norms of *jus cogens* from which states are not free to derogate by treaty. But a word of caution is necessary here. It is right to recall that general multilateral Conventions (even those recently concluded) which prohibit or outlaw slavery and the slave trade and genocide contain normal denunciation clauses. If a state can release itself easily from the conventional obligations it has undertaken in these fields, can it be said that the prohibitions are in the nature of *jus cogens*? Of course, it may be said that the rule prohibiting slavery and the slave trade and the rule prohibiting genocide are rules of general international law which apply independently of the treaties embodying them. More to the point, it is clear that a treaty between two member states of the United Nations contemplating genocide or slavery would be wholly contrary to Articles 55 and 56 of the Charter and would therefore be unenforceable by virtue of Article 103, which provides that, in the event of conflict between the obligations of member states under the Charter and obligations under any other international agreement, Charter obligations prevail. The explanation for the existence of normal denunciation clauses in general multilateral conventions which contain asserted norms of *jus cogens* is, as Schwelb indicates, that 'the idea of international *jus cogens* has not yet penetrated into the day-to-day thinking and action of governments'.[33]

Other examples have been suggested: Barberis mentions treaties contrary to the rules of international law relating to the white slave traffic.[34] Verdross goes much wider in asserting that 'all rules of general international law created for a humanitarian purpose' constitute *jus cogens*.[35] Apart from the difficulty of delimiting what is and what is not a humanitarian purpose, this seems to go much too far. It implies that all human rights provisions contained in international treaties have the character of *jus cogens.* Given that even the United Nations Covenant on Civil and Political Rights is geared only towards 'achieving *progressively* the full realisation of the rights recognised in the present Covenant by all appropriate means',[36] it would be unwise to take at face value the suggestion that *jus cogens* embraces all human rights provisions, despite the fact that, in the Commission's commentary, certain members are recorded as having given treaties violating human rights as examples of treaties which would contravene a rule of *jus cogens*.[37]

33 Schwelb, 'Some aspects of international *jus cogens* as formulated by the International Law Commission' (1967) 61 *AJIL* at p 948.

34 Berberis, '*La liberté de traiter des états et le jus cogen*s' (1970) ZaoRV pp 19–45 at p 35.

35 Verdors, '*Jus dispositivum* and *jus cogens* in international law' (1966) 60 *AJIL* pp 55–63 at p 59.

36 Article 2(I).

37 [1966] *ILC Rep* at p 77.

Scheuner[38] suggests three categories of norms of *jus cogens*: firstly, rules protecting the foundations of law, peace and humanity, such as the prohibition of genocide, slavery or the use of force; secondly, rules of peaceful co-operation in the protection of common interests, such as freedom of the seas; and thirdly, rules protecting the most fundamental and basic human rights (to which might, as Crawford suggests,[39] be added the basic rules for the protection of civilians and combatants in time of war). There would be little dispute with the first and, subject to what is said above about human rights provisions, the third of these three categories; but the second category is, as Crawford implies, very doubtful.[40] Jimenez de Arechaga would embrace within the first of Scheuner's three categories rules prohibiting racial discrimination, terrorism or the taking of hostages;[41] and Brownlie tentatively puts forward as candidate rules the principle of permanent sovereignty over natural resources and the principle of self-determination.[42]

Marek, in an attempt to find an underlying principle, advances the superficially attractive proposition that a treaty violative of *jus cogens* is any treaty in which two or more states undertake to commit acts which would be illegal if committed by a single state.[43] But even this appears to go too wide; it would seem to exclude the possibility of *inter se* modification of a multilateral treaty, even although *inter se* modification is permissible under certain conditions.

...

Whatever their doctrinal point of departure, the majority of jurists would no doubt willingly concede to the sceptics that there is little or no evidence in positive international law for the concept that nullity attaches to a treaty concluded in violation of *jus cogens*. But they would be constrained to admit that the validity of a treaty between two states to wage a war of aggression against a third state or to engage in acts of physical or armed force against a third state could not be upheld; and, having made this admission, they may be taken to have accepted the principle that there may exist norms of international law so fundamental to the maintenance of an international legal order that a treaty in violation of them is a nullity.

Some (among whom may be counted your author) would be prepared to go this far, but would immediately wish to qualify this acceptance of the principle involved by sketching out the limits within which it may be operative in present-day international law. In the first place, they would insist that, in the present state of international society, the concept of an 'international legal order' of hierarchically superior norms binding all states is only just beginning to emerge. Ideological differences and disparities of wealth between the individual states

38 Scheuner, 'Conflict of treaty provisions with a peremptory norm of general international law and its consequences' (1967) *Zeitschrift für ausländisches öffentliches Recht und Volkerrecht* at p 526.

39 Crawford, *The Creation of States in International Law*, 1979, Oxford: Oxford University Press at p 81.

40 *Ibid*.

41 Jimenez de Arechaga, 'International law in the past third of a century' (1978) 159 *Recueil des Cours* at p 64.

42 Brownlie, *Principles of Public International Law*, 1979, Oxford: Oxford University Press at p 513. But note that there is considerable controversy over the content of these principles, even as *jus dispositivum*; the suggestion that they may constitute rules of *jus cogens* is accordingly far-fetched.

43 Marek, '*Contribution à l'étude du jus cogens en droit international*' in *Hommage à Paul Guggenheim*, 1968, Geneva: Faculté de droit de l'Université de Genève pp 426–59 at p 452.

which make up the international community, combined with the contrasts between the objectives sought by them, hinder the development of an overarching consensus upon the content of *jus cogens*. Indeed, it is the existence of these very differences and disparities which constitute the principal danger implicit in an unqualified recognition of *jus cogens*; for it would be only too easy to postulate as a norm of *jus cogens* a principle which happened neatly to serve a particular ideological or economic goal. In the second place, they would test any assertion that a particular rule constitutes a norm of *jus cogens* by reference to the evidence for its acceptance as such by the international community as a whole, and they would require that the burden of proof should be discharged by those who allege the *jus cogens* character of the rule. Applying this test, and leaving aside the highly theoretical case of a treaty purporting to deny the application of the principle of *pacta sunt servanda*, it would seem that sufficient evidence for ascribing the character of *jus cogens* to a rule of international law exists in relation to the rule which requires states to refrain in their international relations from the threat of force against the territorial integrity or political independence of any other state. There is ample evidence for the proposition that, subject to the necessary exceptions about the use of force in self-defence or under the authority of a competent organ of the United Nations or a regional agency acting in accordance with the Charter, use of armed or physical force against the territorial integrity or political independence of any state is now prohibited. This proposition is so central to the existence of any international legal order of individual nation states (however nascent that international legal order may be) that it must be taken to have the character of *jus cogens.* Just as national legal systems begin to discard, at an early stage of their development, such concepts as 'trial by battle', so also must the international legal order be assumed now to deny any cover of legality to violations of the fundamental rule embodied in Article 2(4) of the Charter.

Beyond this, uncertainty begins, and one must tread with considerable caution. The dictates of logic, and overriding considerations of morality, would appear to require that one should characterise as *jus cogens* those rules which prohibit the slave trade and genocide; but the evidence is ambivalent, since the treaties which embody these prohibitions contain normal denunciation clauses. Of course, it may be argued that the presence or absence of normal denunciaton clauses should not be taken as being decisive; denunciation clauses are regularly embodied in treaties for traditional, rather than practical, reasons. In any event, it is likely that the prohibitions may now be taken to form part of general international law binding all states regardless of whether they are parties to the treaties embodying them. The unenforceability of any treaty contemplating genocide or the slave trade is further assured by the fact that such a treaty would contravene the Charter of the United Nations, which prevails in the event of a conflict.

To sum up, there is a place for the concept of *jus cogens* in international law. Its growth and development will parallel the growth and development of an international legal order expressive of the consensus of the international community as a whole. Such an international legal order is, at present, inchoate, unformed and only just discernible. *Jus cogens* is neither Dr Jekyll nor Mr Hyde; but it has the potentialities of both. If it is invoked indiscriminately and to serve short-term political purposes, it could rapidly be destructive of confidence in the security of treaties; if it is developed with wisdom and restraint in the overall interest of the international community it could constitute a useful check upon the unbridled will of individual states.

This was the conclusion presented in the first edition of this book, published more than 10 years ago. It is a conclusion which the author considers is still valid.

But he would wish to add the following. In the 14 years which have elapsed since the adoption of the Convention, there has been continued and continuing disputation among scholars as to the content and significance of *jus cogens*, not only in the context of the law of treaties, but also in other contexts. We have already seen how the notion of *jus cogens* has been used by way of analogy to sustain a distinction between so-called 'international crimes' and 'international delicts' within the framework of the law of state responsibility.[44] The question has also been raised whether, and if so to what extent, *jus cogens* may, despite all the difficulties, be applicable to problems of territorial status – that is to say, whether an entity has been created or extinguished in circumstances of such illegality that international law may, exceptionally, treat an effective entity as not a state (or, conversely, a non-effective entity as continuing to be a state).[45] There has also been speculation about how far, if at all, prescription can be operative if the norm violated is one of *jus cogens*;[46] it is at any rate clear from the Convention (Article 45) that acquiescence is not admissible in the case of conflict of a treaty with an existing or emerging norm of *jus cogens*.

It is of course only right that there should be a thorough and sustained examination by scholars of the implications of *jus cogens* in the law of treaties and also in other branches of international law. What is, however, significant is that, during the past 14 years, there have been few, if any, instances in state practice where the validity of a treaty has been seriously challenged on the ground that it conflicted with a rule of *jus cogens*. The mystery of *jus cogens* remains a mystery. To borrow another analogy from English literature,[47] it has some of the attributes of the Cheshire cat which had the disconcerting habit of vanishing and then reappearing to deliver further words of wisdom. *Jus cogens* will undoubtedly continue to exercise its influence on the development of international law in the foreseeable future. How far that influence will extend to the actual practice of states remains to be seen, although there must now be a consciousness among the legal advisers to foreign ministries that international law does impose certain limitations upon the freedom of states to enter into treaties regardless of their object or content.[48]

Jurists have from time to time attempted to classify rules, or rights and duties, on the international plane by use of terms like 'fundamental' or, in respect to rights, 'inalienable' or 'inherent'. Such classifications have not had much success, but have intermittently affected the interpretation of treaties by tribunals. In the recent past some eminent opinions have supported the view that certain overriding principles of international law exist, forming a body of *jus cogens.*

The major distinguishing feature of such rules is their relative indelibility. They are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect. The least controversial examples of the class are the prohibition of the use of force,[49]

44 See Chapter 10.

45 Crawford, *The Creation of States in International Law*, 1979, Oxford: Oxford University Press at p 82.

46 Brownlie, *Principles of Public International Law*, 1979,Oxford: Oxford University Press at p 514.

47 Lewis Carroll, *Alice's Adventures in Wonderland*, 1978, London: Methuen, Chapter VI.

48 IM Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edn, 1984, Manchester: Manchester University Press at pp 202–03, 215–18, 222–24.

49 McNair, *Law of Treaties*, 1961, Oxford: Clarendon Press at pp 214–15; Dept of State Memo (1980) 74 *AJIL* at p 418; judgment of the ICJ in the *Case Concerning Military and Para-military Activities in and against Nicaragua (Merits)* [1986] *ICJ Reps* 100–01 (para 190).

the law of genocide, the principle of racial non-discrimination,[50] crimes against humanity, and the rules prohibiting trade in slaves and piracy.[51] In the *Barcelona Traction* case (Second Phase),[52] the majority judgment of the International Court, supported by 12 judges, drew a distinction between obligations of a state arising *vis-à-vis* another state and obligations 'towards the international community as a whole'. The Court said:

> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.

Other rules which probably have this special status include the principle of permanent sovereignty over natural resources[53] and the principle of self-determination.[54]

The concept of *jus cogens* was accepted by the International Law Commission and incorporated in the final draft of the Vienna Convention on the Law of Treaties in 1966, Article 50, which provided that: '... a treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.' The Commission's commentary makes it clear that by 'derogation' is meant the use of agreement (and presumably acquiescence as a form of agreement) to contract out of rules of general international law. Thus an agreement by a state to allow another state to stop and search its ships on the high seas is valid, but an agreement with a neighbouring state to carry out a joint operation against a racial group straddling the frontier which would constitute genocide, if carried out, is void since the prohibition with which the treaty conflicts is a rule of *jus cogens.* After some controversy, the Vienna Conference on the Law of Treaties reached agreement on a provision (Art 53) similar to the draft article except that, for the purposes of the Vienna Convention on the Law of Treaties, a peremptory norm of general international law is defined as 'a norm accepted and recognised by the international community of states as a whole and which can be modified only by a subsequent norm of general international law having the same character'. Charles de Visscher[55] has pointed out that the proponent of a rule of *jus cogens* in relation to this article will have a considerable burden of proof.

Apart form the law of treaties the specific content of norms of this kind involves the irrelevance of protest, recognition, and acquiescence: prescription cannot

---

50 Judge Tanaka, diss op, *South West Africa* cases (Second Phase) [1966] *ICJ Rep* at 298; Judge Ammoun, sep op, *Barcelona Traction* case (Second Phase) [1970] *ICJ Rep* at 304; Judge Ammoun, sep op, *Namibia* opinion [1971] *ICJ Rep* at 78–81. The principle of religious non-discrimination must have the same status as also the principle of non-discrimination as to sex.

51 This statement in the third edition of the work (p 513) was quoted by the Inter-American Commission of Human Rights in the *Case of Roach and Pinkerton*, Decision of 27 March 1987 (OAS General Secretariat) 33–36.

52 [1970] *ICJ Rep* at 3 at p 32. See also *In re Koch*, ILR 30, 496 at 503; *Assessment of Aliens* case, ILR 43, 3 at 8; *Tokyo Suikosha* case (1969) 13 *Japanese Ann of IL* 113 at 115.

53 Declaration on Permanent Sovereignty over Natural Resources, Un GA Res 1803 (XVII) of 14 December 1962 adopted by 87 votes to 2 with 12 abstentions.

54 Judge Ammoun, sep op, *Barcelona Traction* case (Second Phase) [1970] *ICJ Rep* at p 304.

55 *Théories et réalistes en droit international*, 4th edn, 1970, Paris: Pedane at pp 295–96.