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The emergence of *jus cogens* in the Vienna Convention on the Law of Treaties[1]

Kształtowanie się norm *ius cogens* w Konwencji wiedeńskiej o prawie traktatów

The aim of this paper is to outline the emergence of *jus cogens* in the Vienna Convention on the Law of Treaties by analyzing its preparatory works for the Convention and the evolution of the concept itself. The analysis of the foundations of *jus cogens* norms, both expressed by jurists engaged in the theory and practice of international law before the Vienna Convention was concluded and by the authors of that treaty, is crucial to the proper description and application of the concept of *jus cogens* in the contemporary international law.

Keywords: international law, *jus cogens*, peremptory norms, Vienna Convention on the Law of Treaties

Celem niniejszego opracowania jest zarysowanie procesu kształtowania się koncepcji norm *ius cogens* w Konwencji wiedeńskiej o prawie traktatów za pomocą analizy prac przygotowawczych do wyżej wskazanej Konwencji oraz ewolucji pojęcia norm *ius cogens*. Analiza fundamentów norm *ius cogens*, zarówno wyrażanych przed uchwaleniem Konwencji wiedeńskiej przez prawników zajmujących się teorią i praktyką prawa międzynarodowego, jak i przez autorów tego traktatu, jest kluczowa dla właściwego opisania i zastosowania norm *ius cogens* we współczesnym prawie międzynarodowym.

Słowa kluczowe: *ius cogens*, Konwencja wiedeńska o prawie traktatów, normy peremptoryjne, prawo międzynarodowe

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[1] This article is the first paper in a series on the concept of jus cogens in international public law. It focuses on outlining the process of emergence of jus cogens in VCLT by analysing its preparatory works and the evolution of the concept itself. Subsequent articles will aim at the analysis of the normative construction of Article 53 of the VCLT and at an overview of the consequences of the conflict of treaties with jus cogens. The issue of the catalogue of peremptory norms and the description of the international legal norms that are most commonly indicated as having a *jus cogens* character will also be subject of the following papers.

Introduction and methods

Peremptory norms of international law (*jus cogens*) were formally introduced[2] into international law by Article 53 of the Vienna Convention on the Law of Treaties[3] (hereinafter: VCLT). *Jus cogens* are norms of general international law that are accepted and recognized by the international community of States as a whole as the norms from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Although the concept of *jus cogens* is described as "a vision of international order"[4], "hope for the humane public order"[5], "a set of identity values"[6], peremptory norms are rarely invoked in jurisprudence despite the fact that their violations entail far-reaching consequences not only in terms of the law of treaties but also in the area of responsibility of States for internationally wrongful acts. Moreover, despite the fact that peremptory norms have formally existed in international law for over 50 years, both doctrine and jurisprudence continue to formulate contradictory views on certain fundamental issues, such as the nature of *jus cogens*, their origin or their catalogue.

The research method for this paper is mainly jurisprudential, which along with historical method results in legal analysis of international provisions through the prism of their history of emergence. The article is based on the analysis of the *travaux préparatoires* of the VCLT and contains a review of doctrinal basis for the concept of *jus cogens* present in international legal literature. The doctrinal views on the peremptory norms highly influenced the works of the International Law Commission (hereinafter: ILC), the international body responsible for drafting the VCLT. The analysis and review of both preparatory works on the provisions of VCLT in terms of *jus cogens* and the international legal literature on peremptory norms is crucial to the proper theorization and application of the concept of *jus cogens* in contemporary international law.

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2 W. Czapliński, *Concepts of jus cogens and Obligations erga omnes in International Law in the Light of Recent Developments*, "Polish Yearbook of International Law" 1997–1998, vol. 23, p. 88.

3 Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

4 M. Petsche, *Jus Cogens as Vision of the International Legal Order*, "Penn State International Law Review" 2010, vol. 29, no. 2.

5 G. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, "Virginia Journal of International Law" 1988, vol. 28, no. 3, p. 590.

6 A. Bianchi, *Human Rights and the Magic of Jus Cogens*, "The European Journal of International Law" 2008, vol. 19, no. 3, p. 491.

Peremptory norms of general international law before the Vienna Convention on the law of treaties

The origins of the legal norms of peremptory character may be sought as early as in ancient Rome. Despite the fact that in Roman law there is no clear confirmation of the occurrence of peremptory norms in the modern sense[7], some elements of the concept of *jus cogens* are visible in the Roman division of law into *jus strictum* and *jus dispositivum*[8]. Also since Roman times it has been a rule that *jus publicum privatorum factis mutari non potest*[9].

The conceptual basis of the norms of *jus cogens* can also be traced back to the doctrine of *jus natural*, which can constitute a moral order determined by right reason common to humanity, and therefore universal[10]. The doctrine of natural law is also linked to the concept of the natural society of nations described by such thinkers as Francisco de Vitoria, Francisco Suarez, Christian Wolff and Friedrich Karl von Savigny. These are based on certain universal principles and rules from which no derogations are permitted[11]. The application of the concept of natural law to the law of nations was dealt with, among others, by the Swiss jurist and diplomat Emerich de Vattel[12], who distinguished the necessary law of nations (*droit des gens nécessaire*) and the voluntary law of nations (*droit des gens volontaire*)[13]. Obligations under the necessary law of nations were to be mandatory and necessary, and the law itself was immutable, nations could neither make any changes in it by their conventions, dispense with it in their own conduct, nor reciprocally release each other from the observance of it[14]. Any treaty or custom that violated the prohibitions or obligations of the necessary law of nations was

7 The concept of *jus cogens* appears only once in ancient texts, in the phrase *"donari videtur, qoud Nullo iure coegente conceditur"* as a definition of donation (Digest 50, 17, 82).

8 O. Dörr, K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Berlin Heidelberg 2012, p. 899.

9 The Latin public law cannot be changed by contracts of private persons. See M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden–Boston 2009, p. 665.

10 T. Weatherall, *Jus cogens. International Law and Social Contract*, Cambridge 2015, p. 111.

11 Separate opinion of Judge Moreno – Quintana in *Aplication of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)*, ICJ Reports 1958, pp. 106–107.

12 T. Weatherall, *op. cit.*, p. 117.

13 E. de Vattel, *The Law of Nations or, Principles of the law of nature, applied to the conduct and affairs of nations and sovereigns, with three early essays on the origin and nature of natural law and on luxury*, Indianapolis 2008, pp. 14–15.

14 *Ibid*, p. 70.

considered unlawful[15]. In addition, some representatives of the doctrine of legal positivism, although characterized by a very wide discretion of states in the formation of law, believed that international treaties that violated basic morality were void[16].

The invalidity of a contract contrary to certain overriding values was also considered in the 18th century legal orders of Western European countries. In England contracts were invalid if they were contrary to good morals (*contra bones mores*). Contracts violating the French (*ordre public*) or German (*öffentliche Ordnung*) social order were also invalid. They were treated as undesirable, even injurious to society as a whole[17]. Some references to peremptory norms of international law can also be found in the literature of the turn of the 19th and 20th centuries. Lassa Oppenheim wrote about the existence of universally recognized principles, the breach of which renders a treaty invalid, and recognized their effect as a recognized element of customary law[18]. William Edward Hall argued that the requirement that contracts should be in conformity with law invalidates, or at least renders voidable all agreements that are at variance with fundamental principles of international law[19].

The emerging concept of *jus cogens* norms also became the subject of an influential[20] article by Alfred Verdross[21] written in 1937 as a response to the Harvard draft Convention on the Law of Treaties[22]. In the article Verdross pointed to the existence of two types of norms that affect the freedom of states regarding the conclusion of treaties. The first group consisted of different, single, compulsory norms of customary international law. As an example, Verdross pointed to a trea-

15 *Ibid*, p. 71.

16 K. Schmalenbach – as examples of works by representatives of the doctrine of legal positivism that recognize the superiority of basic morality over the scope of the State's freedom to legislate – gives J. C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staten*, C.H. Beck, 1872; F. F. Martens, *Sovremennoe mezdunarodnoe pravo civilizovannych narodov*, 1883; A. River, *Principes du droit des gens Vol II*, 1896.

17 I. Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester 1984, p. 203.

18 Oppenheim called such norms "illegal obligations" and pointed to a treaty that would permit piracy as an example. See L. Oppenheim, *International Law. A treatise. Vol. 1. Peace.*, London 2012.

19 Hall identified as examples of unlawful treaties those which have as their object the conquest of a State or its division, the claiming of property rights over the high seas, and the authorization of slavery. See W. E. Hall, *Treatise on International Law*, Oxford 1890, p. 327.

20 A.L. Paulus, *Jus Cogens in a Time of Hegemony and Fragmentation. An Attempt at a Re-appraisal*, "Nordic Journal of International Law" 2005, vol. 74, no. 3, s. 301.

21 A. Verdross, *Forbidden Treaties in International Law*, "American Journal of International Law" 1937, vol 31, no. 4, p. 571–577.

22 O. Dörr, K. Schmalenbach (eds.), *op. cit.*, p. 901.

ty in which states-parties exclude a third state from using the open seas. Such arrangements would be in contradiction to a compulsory principle of general international law and would therefore be null and void. In contrast, the norms Verdross called *jus cogens* were part of the second group he listed. These included the general rules prohibiting states from entering into treaties *contra bones mores*[23]. This prohibition, common to the legal orders of civilized states, is a consequence of the fact that every legal order regulates the rational and moral coexistence of the members of a community. Thus, no legal order can permit treaties between subjects that are obviously in contradiction to the ethics of the community. Alfred Verdross not only recognized the existence of this principle, but stated that no other legal principle is so universally recognized. The author also referred to the view that in international law there can be no conflict between general principles of law and norms of customary law or law derived from treaties, because they cannot be applied where there is a norm derived from another source of international law. Verdross found this argument inappropriate, as it only applies to non-mandatory norms of international law. A mandatory norm, on the other hand, cannot be derogated from either by customary law or by international agreement. According to Verdross, "a treaty norm, violative of a compulsory general principle of law, is, therefore, void; on the other hand, a general norm of customary international law in contradiction to a general principle of law cannot even come into existence because customary law must be formed by constant custom based on a general juridical conviction"[24].

The issue of contractual freedom of States was revisited after the end of the First World War[25], which is particularly evident in the jurisprudence. In the case of the ship S.S. Wimbledon[26], the subject of which was the problem of whether Germany, being neutral in the Polish-Bolshevik war, was in 1921 obliged under Article 380 of the Treaty of Versailles[27] to allow the transport of contraband to Poland through the Kiel Canal[28]. The issue of *jus cogens* was raised in a dissenting opinion by Judge Walther Schücking[29]. He stated that by permitting the trans-

23 A. Verdross, *op. cit.*, p. 572.

24 *Ibid*, p. 573.

25 O. Dörr, K. Schmalenbach (eds.), *op. cit.*, p. 901.

26 Permanent Court of International Justice, *S. S. Wimbledon*, PCIJ Series A, 1923, no. 1.

27 Treaty of Peace between the Allied and Associated Powers and Germany, signed at Versailles on 28 June 1919. Article 380 stated that "The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality".

28 E. Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, "The American Journal of International Law" 1967, vol. 61, no 4, p. 950.

29 Dissenting opinion of Judge W. Schücking in the case of *S. S. Wimbledon*, PCIJ Series A, 1923, no. 1, pp. 43–47.

port of contraband, Germany would be violating its neutral status. It could not be the intention of the victorious states to impose on Germany an obligation to violate the rights of third countries. Such an obligation would have been impossible, since it is impossible to impose an obligation on the basis of a treaty to act in a way which, in effect, violates the rights of third States. Another example of recourse to *jus cogens* norms in the jurisprudence of the interwar period was the case of Oscar Chinn[30]. In that case Judge Schücking in a separate opinion[31] held that it was possible to create a *jus cogens* from which no derogation would be permitted, and any act concluded in violation of it would automatically be void.

The issue of "illegal" treaties was also addressed by the Central American Court of Justice[32] in the 1916 dispute between Costa Rica and Nicaragua[33]. The Court ruled that Article 2 of the Bryan-Chamorro Treaty granting the United States a 99-year lease of a naval station belonging to Nicaragua, located in its territory in the Gulf of Fonesca, could not be applied because it violated the rights of Salvador and Honduras to the territory, which derived from customary international law[34].

It is also worth noting that some authors[35] consider the case of *Pablo Nájer*[36], settled by the Franco-Mexican Claims Commission, as a confirmation of the existence of *jus cogens* in the jurisprudence of the interwar period. The Commission had to undertake the interpretation of Article 18 of the Covenant of the League of Nations[37] and concluded that its provisions could not be derogated by mutual arrangements between the members of the League of Nations. The States are bound by the same imperative principles of law which limits their freedom of action to

30 Permanent Court of International Justice, *Oscar Chin (United Kingdom v. Belgium)*, PCIJ Series A/B, 1934, no. 63.

31 Separate opinion of Judge W. Schücking in *Oscar Chin (United Kingdom v. Belgium)*, PCIJ Series A/B, no. 63, 1934, p. 148–149.

32 D. Shelton, *Normative Hierarchy in International Law*, "American Journal of International Law" 2006, vol. 100, no. 2, p. 298.

33 Central American Court of Justice, *Costa Rica v. Nicaragua*, "American Journal of International Law" 1917, vol. 11, no. 1, pp. 181–229.

34 D. Shelton, *op. cit.*, p. 298.

35 See M. Byers, *Conceptualizing the Relationship between Jus Cogens and Erga Omnes Rules*, "Nordic Journal of International Law" 1997, vol. 66, no 2–3, p. 213, C. Mik, *Jus Cogens in Contemporary International Law*, "Polish Yearbook of International Law" 2013, vol. XXXIII, p. 31.

36 French-Mexican Claims Commission, *Pablo Nájera (France) v. United Mexican States*, "Reports of International Arbitral Awards" 1928, vol. 5, pp. 466–508.

37 Covenant of the League of Nations. Article 18 provided that "All treaties or international obligations entered into in the future by a Member of the League shall be registered immediately by the Secretariat and promulgated as soon as possible. No such treaty or international obligation shall take effect until it has been registered".

enter into international agreements. However, as Magdalena Matusiak-Frączczak stated, in this case there was no reference to conventional *jus cogens*, because the scope of the norm interpreted in Article 18 of the Pact extends only to the states which decided to be bound by this norm[38] by joining the League of Nations.

The notion of *jus cogens* in the process of drafting and negotiating the Vienna Convention on the law of treaties

Following the establishment of the International Law Commission in 1949, the Secretary-General of the United Nations (hereinafter: UN) identified treaty law as one of the issues to be codified[39]. At its session in 1949, the ILC decided to give priority to this subject and appointed James L. Brierly as Special Rapporteur[40]. It is worth noting that the first Report of 1950 recognized that the initial draft of the articles of the Convention on the Law of Treaties was a continuation of the pre-1945 work[41], in particular the Harvard draft, which in the context of *jus cogens* was commented on by the aforementioned Alfred Verdross.

As early as 1950, Jesús María Yepes pointed out that in order for a treaty to be registered, its subject matter must be lawful – otherwise it should be invalid and may not be registered with the Secretariat of the United Nations[42]. This proposal was reflected in draft article 15 of the Convention contained in the report of the Special Rapporteur Hersch Lauterpacht[43]. According to the report, a treaty or part of its provisions is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice (hereinafter: ICJ). As an example of norms the violation of which would cause invalidity of the treaty, H. Lauterpacht indicated the prohibition of piracy and the prohibition of aggression.

The term "*jus cogens*" appeared explicitly in the Third Report of the Special Rapporteur Gerald Fitzmaurice[44]. It was used in draft articles 16, 17, 18 and 22. Draft articles 16, 17 and 18 referred to the legality of the object of the treaty. According to draft article 16, the provisions of a treaty should be in conformity with or not contravene, or that its execution should not involve an infraction of those principles and rules of international law which are in the nature of *jus cogens*[45].

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38 M. Matusiak-Frączczak, *Jus Cogens Revisited*, "Review of Comparative Law" 2016, vol. XXVI–XXVII, p. 57.

39 Yearbook of International Law Commission (hereinafter: YILC) 1949, pp. 48–49.

40 M. E. Villiger, *op. cit.*, p. 29.

41 YILC 1950 II, p. 226.

42 YILC 1950 I, pp. 299–300.

43 YILC 1953 II, pp. 154–156.

44 YILC 1958 II.

45 *Ibid*, p. 26.

This conformity was necessary for the validity of the treaty. Under draft article 17, the subject matter of a treaty is unlawful and the cause of invalidity can arise if the treaty involves a departure from or conflict with absolute and imperative rules or prohibitions of international law in the nature of *jus cogens*, and under draft article 18, a treaty in conflict with a previous international agreement that contains *jus cogens* provisions is also considered to be unlawful[46]. Under draft article 22 treaties whose subject matter is contrary to principles of international law of a *jus cogens* nature would not be enforceable[47]. Gerald Fitzmaurice identified the protection of prisoners of war, the prohibition of aggression and the prohibition of piracy as examples of *jus* cogens in his commentary on the draft of these articles. Such rules would have "absolute and non-rejectable character"[48].

Special Rapporteur H. Waldock combined the proposals of Lauterpacht and Fitzmaurice[49] in draft article 13 of the Convention:

"Article 13 – Treaties void on grounds of unlawfulness

1. A treaty is contrary to international law and void if its object or its execution involves an infringement of a general principle of international law having the character of *jus cogens*.

2. In particular, a treaty is contrary to international law and void if its object or execution involves:

a. the use or threat of force in contravention of the principles of the United Nations Charter;

b. any act or omission characterized by international law as an international crime; or

c. any act or omission in the suppression or punishment of which every State is required by international law to co-operate

3. If a provision, the object or execution of which infringes a general rule or principle of international law having the character of jus cogens, is not essentially connected with the principal objects of the treaty and is clearly severable from the remainder of the treaty, only that provision shall be void.

4. The provisions of this article do not apply, however, to a general multilateral treaty which abrogates or modifies a rule having the character of *jus cogens*"[50].

Paragraph 4 of draft article 13 is worth noting. In contrast to the concluded text of the VCLT, the draft proposed by the Special Rapporteur Humphrey Waldock allowed for the possibility to change the norm of *jus cogens* on the basis of the provisions of multilateral treaties. In his commentary on that provision, the rationale for the paragraph 4 was to introduce a possibility to replace or modify

46 *Ibid*, p. 27.
47 *Ibid*, p. 28.
48 *Ibid*, p. 40.
49 O. Dörr, K. Schmalenbach (eds.), *op. cit.*, p. 902.
50 YILC 1963 II, p. 52.

the norm of *jus cogens*. This goal is undoubtedly realized in Article 53 of the VCLT, as it allows the modification of a peremptory norm by a subsequent norm of international law of the same nature. Moreover, in draft article 13 one may notice an attempt to create a basic catalogue of *jus cogens*. However, the draft article 13 did not intend to contain a closed catalogue, as evidenced by H. Waldock's use of the phrase "in particular"[51].

The provisions of article 37 of the draft contained in the 1963 ILC Report[52] and the provisions of article 50 of the draft contained in the 1966 ILC Report are already much closer to the finally adopted wording of Article 53 of the VCLT[53]. Under the 1963 and 1966 drafts, 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.

During the course of the work on the Convention, however, members of the ILC disagreed on the nature of *jus cogens*. Mustafa Kamil Yassen (Iraq) claimed that the concept of public international order derived from positive law, from the whole body of binding rules[54]. A similar opinion was held by Grigory Tunkin (Soviet Union), who added that the norms of *jus cogens* nature were not "imposed from above by the operation of some natural law", but result from the rules created by states, which are then recognized by them as peremptory[55]. A different view was held by Radhabinod Pal (India), who believed that the norms of *jus cogens* derive from the public policy that the legal system should contain which replaced the "sense of obligation based on expediency by a higher allegiance to the principle of justice" which has its expression in the Charter of the United Nations[56]. The importance of the Charter in the context of *jus cogens* was also stressed by Milan Bartoš (Yugoslavia) arguing that the concept of peremptory norms should not be narrowed only to acts of a criminal nature, but should include the legal principles of the international community created precisely on the basis of the UN Charter[57]. Shabtai Rosenne (Israel) stated that the question whether *jus cogens* derives from positive or natural law is not relevant to the case. In his opinion, *jus cogens* should be derived not only

51 *Ibid*, p. 53.

52 Report of the International Law Commission on the work of its Fifteenth Session, 6 July 1963, Official Records of the General Assembly, Eighteenth Session, Supplement (A/5509), A/CN.4/163, YILC 1963 II, p. 198.

53 Report of the of the International Law Commission on the work of its Eighteenth Session, 4 May – 19 July 1966, Official Records of the General Assembly, Twenty-first Session, Supplement No. 9 (A/6309/Rev.1), A/CN.4/191, YILC 1966 II, p. 247.

54 YILC 1963 I, p. 63.

55 *Ibid*, p. 69.

56 *Ibid*, p. 65.

57 *Ibid*, pp. 66–67.

from legal rules, but also morality and international order should be taken into account. The assertion of whether a rule is peremptory should be determined in detail in the light of the material context in which the rule was placed[58]. The ILC in its report touches upon the differing views on the nature of *jus cogens*, at the same time indicating that, despite the ongoing development of international law, the Convention should state that "today there are certain rules and principles from which States are not competent to derogate by a treaty arrangement"[59]. The Commission pointed to examples of norms of general international law which in its view had the character of *jus cogens*. Examples of treaties conflicting with *jus cogens* included treaties contemplating an unlawful use of force contrary to the principles of United Nations Charter, treaties contemplating the performance of any other act criminal under international law and treaties 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[60].

In the course of work on the Convention, however, other norms were pointed out that should be peremptory in nature. These were the principles arising from the Charter of the United Nations[61] (Abdul Hakim Tabibi – Afghanistan), the principle of sovereign equality of States[62] (Manfred Lachs – Poland and Grigory Tunkin), the principle of freedom of navigation on the high seas[63] (Robert Ago – Italy), the Statute of the International Court of Justice for the parties of the dispute[64] (Humphrey Waldock – United Kingdom), the principles of the Geneva Conventions on the treatment of prisoners of war of 1929 and 1949[65] (Alfred Verdross – Austria) and the principle of *pacta sunt servanda*[66] (Grigory Tunkin). However, the ILC found it advisable not to include a catalogue, even an exemplary one, in the Convention. It decided to include only a general principle and leave it to the practice of the states and the jurisprudence of international courts

[58] *Ibid*, p. 64.

[59] YILC 1963 II, p. 198.

[60] *Ibid*, p. 199.

[61] YILC 1963 I, p. 63. The contrary view of R. Ago, who stated that he would prefer to avoid any reference to principles derived from the UN Charter, since not all of its principles are peremptory and not all peremptory principles of international law are embodied in the Chapter. See YILC 1963 I, p. 71.

[62] *Ibid*, pp. 68–69. Opposing this idea were R. Pal and E. Jimenez de Arechaga (Uruguay), who believed that the introduction of such a principle would introduce uncertainty in the case of the conclusion of international agreements between a clearly stronger state and a weaker state. See YILC 1963, p. 70.

[63] *Ibid*, p. 71.

[64] *Ibid*, p. 78.

[65] *Ibid*, p. 125.

[66] *Ibid*, p. 197.

to work out its concrete content[67]. As an example of the ILC members who were against including a catalogue of peremptory norms in the Convention, Erik Castrén[68] (Finland), Roberto Ago[69], Gilberto Amado[70] (Brazil) and Humphrey Waldock[71] can be pointed out.

States in general have responded positively[72] to the ILC's proposal to regulate the norms of *jus cogens* in the Convention. Turkey, the United Kingdom[73] and the United States[74], on the other hand were of the opinion that an effective dispute settlement procedure should be established before provisions relating to peremptory norms should be included in the Convention. The greatest reservations were also raised by an issue of legal uncertainty connected with the invalidity of treaties conflicting with *jus cogens*, the catalogue of which was unspecified – in the opinion of some states such a situation could lead to international disputes[75]. The greatest opponent of including such provisions in the Convention was the Luxembourg delegation. Luxembourg openly opposed the idea, claiming that it would introduce great uncertainty into international law. The members of the delegation thought that the adoption of such a concept would make it much more difficult to apply successive treaties on the same subject. They argued that since the principle of *pacta sunt servanda* should be regarded as the peremptory norm, any treaty that differed from a treaty concluded earlier could be declared null and void. They also argued that in light of the proposed provisions it was unclear who would have the power to determine whether a norm was peremptory or not. They regarded the concept of *jus cogens* itself as an attempt to transfer to international law the private law notion of evaluating private law contracts from the perspective of morality and public policy. The Luxembourg delegation stated that such concepts were not adapted for use in international law[76]. Consequently, the ILC at its 840th meeting on 26 January 1966, adopted draft article 37 of the Convention (later Article 50). There were fourteen "yes" votes, one "no" vote and one delegate abstained[77].

During the United Nations Conference on the Law of Treaties, the subject of *jus cogens* was raised repeatedly[78]. It is said that discussion on peremptory norms

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67 YILC 1963 II, p. 199.
68 YILC 1963 I, pp. 65–66
69 *Ibid.*
70 *Ibid*, p. 69.
71 *Ibid*, p. 78.
72 YILC 1966 II, *passim.*
73 *Ibid*, p. 21.
74 *Ibid*, p. 341.
75 O. Dörr, K. Schmalenbach (eds.), *op. cit.*, p. 904.
76 YILC 1966 II, pp. 20–21.
77 YILC 1966 I/2, p. 121. Herbert W. Briggs (United States) abstained from voting.
78 It was addressed at the 52nd, 53rd, 54th, 55th, 56th, 57th, 80th meeting of the first session, and at the 19th and 20th meetings of the second session.

was one of the longest, most animated and unorganized[79]. It caused controversy and even divided the participants of the Conference[80]. The representatives of the Soviet Union also considered the issue of *jus cogens* to be one of the most important in the whole project[81]. States did not agree on the "freshness" of the concept. Chile[82] and Turkey[83] regarded the concept of peremptory norms as a novelty of international law, while Italy, among others, regarded *jus cogens* as an old practice with a long history in international law which is sourced in natural law[84]. States also disagreed as to the basis from which peremptory norms derive. The representative of Mexico argued that *jus cogens* "were those rules which derived from principles that the legal conscience of mankind deemed absolutely essential to coexistence in the international community at a given stage of its historical development"[85]. The representative of Colombia saw their source in the "rules of universal legal conscience of civilized countries"[86] and the representative of Cyprus stated that they "rested upon the conscience of mankind and existed in order to protect the higher interests of the international community as a whole"[87]. Some problems were also discussed that resulted from the wording of the draft article. The vagueness of the provisions, in particular the lack of clarity as to what constituted *jus cogens*[88], the need to ensure an impartial settlement of disputes as to *jus cogens*[89] and the possibility of excluding only part of the provisions of a treaty when only part of an international agreement violated the norms of *jus cogens*[90] were signaled.

In the course of the Conference many proposals were also made concerning the catalogue of norms of peremptory character. During the negotiations the following norms were mentioned as norms of possible *jus cogens* character:

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79 See M. E. Villiger, *op. cit.*, p. 667; E. Schwelb, *op. cit.*, p. 947.

80 D. Shelton, *op. cit.*, p. 300.

81 Official Records of the United Nations Conference on the Law of Treaties (hereinafter: UNCLOT) vol. I, p. 294.

82 *Ibid*, p. 298.

83 *Ibid*, p. 300.

84 UNCLOT II, p. 104.

85 UNCLOT I, p. 294.

86 *Ibid*, p. 301.

87 *Ibid*, p. 305.

88 See statements by representatives of Madagascar, Austria, the United Kingdom, Sweden, France, Australia, Japan, Belgium, Monaco or Norway. UNCLOT I, pp. 301–325.

89 See statements by representatives of Finland, Lebanon, Italy, Pakistan, Australia, Japan, Germany, Belgium, Canada, Norway, Iraq, Kenya, Cuba, Sierra Leone, Cyprus, Israel, Romania and Trinidad and Tobago, *ibid*, pp. 294–327.

90 The possibility of removing only some of the provisions was supported by the representatives of Finland and Canada, while the representatives of Cuba, Belarus, Hungary and Ukraine were against it, *ibid*, p. 294, 297, 307, 312, 322, 323.

the obligation to maintain international peace and security[91], the prohibition of the use or threat of the use of force[92], the prohibition of aggression[93], the principle of non-intervention[94], the principle of sovereign equality of states[95], the preamble of the UN Charter[96], Article 1 of the UN Charter[97], Article 2 of the UN Charter[98], the prohibition of human trafficking[99], the prohibition of slavery[100], the prohibition of genocide[101], the principle of the protection of fundamental human rights[102], the principle of wartime treatment of protected persons[103], the prohibition of piracy[104], the prohibition of imperialism, the prohibition of forced labour, the principle of equality of human beings, Article 33 of the UN Charter, Article 51 of the UN Charter[105], prohibition of racial discrimination[106], principle of freedom of the high seas, certain principles of land warfare[107], prohibition of colonialism[108], principles of diplomatic and consular relations[109] and certain principles of the Conventions of the International Labour Organization[110].

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91 See statement by the representative of Belarus, *ibid*, p. 307.

92 See statements by representatives of Greece, Kenya, Chile, Uruguay, Germany, Ecuador, Tanzania and Ukraine, *ibid*, pp. 295–298, 303, 318, 320–322.

93 See statements by representatives of the USSR, Uruguay, Czechoslovakia, Ukraine and Canada, *ibid*, pp. 294, 303, 318, 322, 323.

94 See the statement by the representative of the USSR, *ibid*, p. 294.

95 See statements by representatives of the USSR, Sierra Leone and Ghana, ibid, pp. 294, 300, 301.

96 See the statement by the Cuban representative, *ibid*, p. 297.

97 See statements by representatives of the USSR, Cuba and Czechoslovakia, *ibid*, pp. 294, 297, 318.

98 See statements by representatives of the USSR, Cuba, Lebanon, Sierra Leone, Poland and Czechoslovakia, *ibid*, pp. 294, 297, 300, 302, 318.

99 See statements by representatives of Iraq, Czechoslovakia and Tanzania, *ibid*, pp. 295, 318, 321.

100 See statements by representatives of Lebanon, Chile, Sierra Leone, Ghana and Poland, *ibid*, pp. 297, 299–302.

101 See statements by representatives of Lebanon, Ghana, Poland, Uruguay, Czechoslovakia, Tanzania and Canada, *ibid*, pp. 297, 301–303, 318, 321, 323.

102 See statements by representatives of Kenya, Sierra Leone, Uruguay and Canada, *ibid*, pp. 296, 300, 303, 318, 321, 323.

103 See statements by representatives of Lebanon, Italy and Switzerland, *ibid*, pp. 297, 311, 324.

104 See statements by representatives of Chile, Australia and Czechoslovakia, *ibid*, pp. 299, 317, 318.

105 See statement by the representative of Sierra Leone, *ibid*, p. 300.

106 See statements by representatives of Sierra Leone and Poland, *ibid*, pp. 300, 302.

107 See the statement by the Polish representative, *ibid*, p. 302.

108 See statements by representatives of Belarus and Ukraine, *ibid*, pp. 307, 322.

109 See the statement by the Italian representative, *ibid*, p. 311.

110 See statement by the Swiss representative, *ibid*, p. 324.

During the Conference it was added to the wording of draft article 50 that the *jus cogens* must be "the norm accepted and recognized by the international community of States as a whole". The proposal put forward by the United States to add the phrase "at the time of its conclusion"[111] was also accepted. One hundred and seven States[112] eventually took part in the vote on draft article 50 of the Convention (now Article 53). Eighty-seven States were in favor, eight were against[113] and twelve abstained[114]. The opposition to the proposed article mainly consisted of western European states. Strong support to the idea was given, however, by the Soviet Union, together with Ukraine and Belarus, and the post-colonial states, which saw in *jus cogens* the possibility of abandoning certain treaties concluded during the colonial era[115]. It is worth noting that one of the main reasons why France decided not to be bound by the VCLT was the "vagueness" of the provisions in terms of *jus cogens* norms[116]. Moreover, a number of States made reservations (to varying extents) relating precisely to Article 53, as well as Articles 64 and 66(a) of the Vienna Convention on the Law of Treaties relating to the issue of *jus cogens.*

Conclusions

Although the notion of *jus cogens* was formally incorporated into international law through provisions of VCLT, the concept of peremptory norms of general international law from which no derogation is permitted existed in the views of many jurists engaged in the theory and practice of international law before the works on the treaty began. This doctrinal heritage was the foundation upon which ILC built the drafts of provisions of VCLT, which led to the final wording of Article 53 of VCLT. The analysis of the preparatory works of such significant, but blurred and rarely-invoked-in-jurisprudence concept as the *jus cogens* can be helpful in the process of interpreting the provisions of international agreements. In accordance with Article 32 of VCLT, it is possible to refer to the preparatory work and the circumstances of the conclusion of the treaty in question in order to confirm the meaning resulting from the general rule of interpretation or to determine the meaning when such an interpretation leaves the meaning ambigu-

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111 UNCLOT III, p. 174.

112 UNCLOT II, pp. 106–107.

113 They were, in order of voting: Switzerland, Turkey, Australia, Belgium, France, Liechtenstein, Luxembourg and Monaco.

114 These were, in voting order, New Zealand, Norway, Portugal, Senegal, South Africa, Tunisia, the United Kingdom, Gabon, Ireland, Japan, Malaysia and Malta.

115 D. Shelton, *op. cit.*, p. 300.

116 Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, vol. I, p. 8.

ous or unclear or leads to a result that is manifestly absurd or unreasonable. The understanding of the history of the development of *jus cogens* will also improve understanding of the essence of peremptory norms, which is a *condition sine qua non* for proper analysis of the Article 53 of VCLT and its consequences for treaties and significance in the area of international responsibility.

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