Conflict of Treaty Provisions with a Peremptory Norm of General International Law and its Consequences

Comments on Arts. 50, 61 and 67 of the ILC's 1966 Draft Articles on the Law of Treaties

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I. The recognition of a body of rules in general international law which are exempt from the will of the parties

(1) The provisions of the draft in arts. 50, 61 and 67, which recognize the existence of a *ius cogens* in international law invalidating an opposing treaty, express a new legal idea which has not yet been applied in international law practice[1]). Up to about 1920 all norms of general international

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[1]) The suggestion that such a provision should be included in the draft on the Law of Treaties is first found in the First Report of H. Lauterpacht, Doc. A/CN. 4/63, YBILC, vol. II, p. 123 (arts. 1, 15 of the draft). It was included in the Second and Third Reports of G. G. Fitzmaurice, Doc. A/CN. 4/107 and 115, YBILC 1957, vol. II, p. 16 (art. 17 of the draft) and 1958, vol. II, p. 20 (arts. 16, 20 of the draft) and in the Second Report of Sir Humphrey Waldock, Doc. A/CN. 4/156, YBILC 1963, vol. II, p. 36 (art. 13 of the draft). In the text of the XVth Session (1963) of the ILC, the provisions were embodied in arts. 37 and 45, Doc. A/CN. 4/5509, YBILC 1963, vol. II, p. 187, also printed in AJIL vol. 58 (1964), p. 241. The final text adopted by the ILC in its XVIIIth Session (1966) is printed with the Commentary in AJIL vol. 61 (1967), pp. 263 *et seq.*, 285 *et seq.* There are not many comments on these provisions of the draft articles in the literature of international law. The most important are: Georg Schwarzenberger, International ius cogens? Texas Law Review, vol. 43 (1965), p. 456 *et seq.; idem,* The Problem of International Public Policy, Current Legal Problems, vol. 18 (1965), p. 191 *et seq.; idem,* The Inductive Approach to International Law (London 1965), pp. 100, 113, 122/23; R. Quadri, RdC vol. 131 (1961 III), p. 336 *et seq.;* Verdross, Ius Dispositivum and Ius Cogens in International Law, AJIL vol. 60 (1966), p. 55 *et seq.;* (with full bibliography); Jan Brownlie, Principles of Public International Law (Oxford 1966), p. 417 *et seq.*

law were considered as *ius dispositivum*[2]). No limitations on State sovereignty were made as regards the contents of treaties. The idea that the will of a State can be limited by fundamental rules of international law first appeared in the period after 1920[3]) but has been critized up till now by these authors who maintain the sovereignty and equality of all States or who consider that the development towards generally recognized higher principles of international law is not yet sufficiently stabilized[4]). The view that there exists a body of higher and absolutely binding law within international law only became widespread among legal scholars after the Second World War[5]). But up to the present day, there have only been occasional references to peremptory norms of general international law in the practice of international courts and courts of arbitration[6]).

(2) One has to agree with the recognition of certain legal norms of international law which should be absolutely binding on account of their fundamental nature and which, therefore, should stand on a higher level than general custom and conventional law, even though as yet this concept has found little basis in theory and practice. There are two reasons in favour of such a public order in modern international law. In contrast to the family of States based on unlimited sovereignty which existed in the period before 1914, States in the present international order are bound by common interests and by the acceptance of fundamental legal principles as well as by subordination to the rule of law to which principles a legal validity

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[2]) Cf. Franz von Liszt – Max Fleischmann, Das Völkerrecht (12th ed. Berlin 1925), p. 12.

[3]) See Fauchille, Le droit international public (Paris 1922) vol. I 3, p. 300; Le Fur, RdC vol. 41 (1932 III), p. 580. Earlier 19th century comments on the precedence of fundamental principles of humanity and morality are still based on ideas of natural law. A. W. Heffter, Das Europäische Völkerrecht der Gegenwart (Berlin 1844), pp. 12/13; Bluntschli, Le droit international codifié (3rd ed. Paris 1881) No. 411, p. 248.

[4]) Setting out from the standpoint of the freedom of States who are parties to a treaty, a *ius cogens* is rejected by G. Schwarzenberger, International Law (3rd. ed. London 1957) vol. I, p. 425 *et seq.*; A. P. Sereni, Diritto Internazionale (Milano 1956) vol. I, p. 166 *et seq.* is against a hierarchy in the norms of international law.

[5]) Survey of opinions in A. Verdross, AJIL vol. 60 (1966), p. 56.

[6]) In the "Reservations to Genocide Convention" case, the International Court of Justice speaks of "principles which are recognized by civilized nations as binding on States, even without any conventional obligations" (I. C. J. Reports 1951, p. 63). The remark of Schücking (diss. op. in the Oscar Chinn case, P. C. I. J. Reports 1931, Series A/B No. 63, p. 150) that the court would execute no convention which offended against public morality, and in these cases the opinion of the court would be governed by considerations of international public policy, was only concerned with the question of the alteration of a multilateral treaty by some of its signatories in a later treaty. An express recognition of *ius cogens* may be found, however, in the diss. op. of Tanaka in "South West Africa Cases Second Phase" (I. C. J. Reports 1966, pp. 297/98), where the body of Human Rights is denoted as *ius cogens* and reference made to the proceedings of the ILC.

is ascribed independent of the will of individual states[7]). Further, as a result of the uniting of almost all States in the world in the United Nations and of the jurisprudence of the international courts, the tendency is strengthened to work out the principles of an international public order and to make them generally recognized, which did not exist in the international society of the 19th century. Secondly, the modern theory of international law has turned its back on the positivistic conception which ascribed the law-giving power only to the will of the States expressed in treaties. The modern theory sees the basis of the general rules of international law as lying in the acceptance of norms by the whole community of nations, which can also bind individual States without their express agreement.

(3) There are, above all, two practical objections against the idea of a *ius cogens* in international law, apart from the reasons rooted in the theory of international law, which cannot be discussed here. Schwarzenberger points to a widespread inclination today to find release from existing treaty obligations. The claim that a treaty violates a peremptory norm of international law or that a new rule of that sort, with which the treaty conflicts, has developed since its conclusion could provide a new opportunity for ending treaties unilaterally and thus undermine their sanctity[8]). This objection should not be lightly dismissed. The hesitations are increased, secondly, if the concept of *ius cogens* is extended beyond the limits of the fundamental norms of the international legal order that would be the case if one followed the view, expressed during the course of the Commission's deliberations, which maintained that the conclusion of unequal treaties which establish gross inequality between the obligations of the parties offends against fundamental international law[9]). If a rule that is so imprecise and liable to subjective evaluation were considered as peremptory, the stability of treaties might indeed be impaired. The difference in power and influence between States today is so great that the introduction of the idea of *laesio enormis* into international law could hinder the possibility

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[7]) That the whole United Nations policy constituted a "value-orientated jurisprudence, directed towards the emergence of a public order in the international community under a rule of law" was indicated in the proceedings of the ILC by Mr. Pal (YBILC 1963, vol. II, p. 65, para. 64). A similar point of view was uttered by de Luna, *ibid.*, p. 72, paras. 61, 62.

[8]) Georg Schwarzenberger, Current Legal Problems, vol. 18, pp. 213/14. In the same sense in the deliberations of the ILC Briggs, YBILC 1963, vol. II, pp. 62/63, paras. 34, 35 who refers to "the threat to the stability of treaties that would result from imprecisely drafted provisions on validity which, in the absence of compulsory jurisdiction would allow a unilateral right to nullify".

[9]) In this sense Tunkin, YBILC 1963, vol. II, p. 69, para. 28.

of treaty relations between large and small nations. The result would work out unfavourably for the weaker partner[10]).

(4) In connection with the objections made here, there arises the very important question whether the *ab initio* invalidity of a treaty can be established without any further proceedings by the State appealing to it, or whether it has to be established by the procedure prescribed in art. 62 of the 1966 draft. The question was briefly touched upon in the Commission's discussions in 1963, but a sufficiently clear result was not reached. Sir Humphrey Waldock considered in his report that the procedure prescribed in art. 62 (then art. 25) should also be extended to art. 50 (then art. 13). In his draft in 1963, he mentions expressly art. 13 among the regulations to which art. 25 (in the 1963 version) should refer[11]) and gave the same opinion in the discussion too[12]). On the contrary, Tunkin seems to have taken the standpoint that art. 25 concerns only the case of voidability, *i.e.*, of later invalidation of a treaty, but not the case of invalidity *ab initio*[13]).

In fact, the regulation in art. 62 constitutes a necessary limitation on the proceedings of a State which wishes to effect the invalidity of a treaty or to invalidate it in any other way. The State is obliged to notify its views to the other party, and if the other country, which is party to the treaty, disputes its point of view, it must be prepared so submit itself to the proceedings for the peaceful settlement of differences provided in art. 33 of the Charter of the United Nations. It is not subjected to the compulsory jurisdiction of the International Court of Justice, as is clearly shown in the proceedings of the 699th and 700th session of the Commission[14]), but is only obliged to accept one of the various ways for solving disputes provided in art. 33 of the Charter[15]).

The obligatory nature of the proceedings prescribed by art. 62 is a key disposition of the whole draft[16]). It would, therefore, be correct, in agreement with Sir Humphrey Waldock, to accept that its proceedings should

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[10]) Criticizing the thesis that unequal treaties violate *ius cogens*, Jiménez de Aréchaga, YBILC 1963, vol. II, pp. 70/71, paras. 44–47.

[11]) YBILC 1963, vol. II, p. 87, para. 1.

[12]) 700th meeting, YBILC 1963, vol. I, p. 181, para. 63.

[13]) YBILC 1963, vol. I, p. 180, para. 50.

[14]) YBILC 1963, vol. I, pp. 170 *et seq.* and 176 *et seq.*

[15]) Cf. Tunkin, YBILC 1963, vol. I, p. 170, para. 4 *et seq.* and the comment thereto by Waldock, *ibid.*, p. 181, para. 55.

The importance of a system of independent adjudication for an authoritative determination of the area of *ius cogens* rules is indicated in the Commentary of the ILC to art. 50 (AJIL vol. 61 [1967], p. 411).

[16]) Cf. Castrén, YBILC 1963, vol. I, p. 167, para. 71 and p. 179, para. 31 as well as the Report A/CN. 4/5509 on art. 51, YBILC 1963, vol. II, p. 214, para. 1.

also be applied in the case of art. 50. This view is supported by the fact that art. 50 of the draft belongs to the same part V as does art. 62. The change of the expression between void (art. 50) and invalid (art. 62) cannot be authoritative. One would, however, recommend that there be a uniform terminology for all provisions concerned with the invalidity of a treaty (cf. arts. 40, 42, 48, 49, 50, 61, 62, 65 and 67).

(5) The effects of the invalidity of a treaty according to art. 50 as provided by art. 67 are not affected by the observance of the proceedings in art. 62. It is impossible for parties to a treaty which offends against a fundamental norm of international law to agree on the further existence of the treaty. They have no power over its legal validity. Third States cannot be prejudiced by the conduct of the parties to the treaty, because they cannot be bound by its provisions without their consent (art. 30). A treaty against *ius cogens* which affected their interests (*e.g.*, an agreement on the limitation of the High Seas) could also be declared invalid by them without any further proceedings. It would be possible to introduce an additional safeguard for third States by authorizing the agency which registers international contracts (the United Nations) to submit treaties which offend against *ius cogens* at the same time to the International Court of Justice or to apply to some other proceedings.

If appeal to art. 50 is subordinated to the proceedings in art. 62, then the objections which one feels against the possible danger of a party seeking to evade a treaty by unilateral action are decreased. The procedural checks erected in art. 62 have a great significance here[17]). It will not be necessary to formulate this conclusion expressly in the text of the treaty; but the interpretation of art. 62 indicated here should be emphasized if it is accepted.

(6) In addition, it must be emphasized that the group of rules recognized as peremptory norms of international law should be strictly limited to those principles which have a fundamental significance for the stability and legal security of the international community[18]). The rules of general international law, which are inalienable, will always form an exception and be rare. The fundamental character of the rules of *ius cogens* should also be emphasized for another reason. Norms can only claim this higher rank if they are the expression of a conviction, accepted in all parts of the world community, which touches the deeper conscience of all nations. Hence, one cannot include under *ius cogens* principles which do not have

[17]) Cf. Sir Humphrey Waldock in the Report A/CN. 4/5509, YBILC 1963, vol. II, p. 215, paras. 2–6.

[18]) This was indicated by H. Lauterpacht, YBILC 1953, vol. II, p. 155; Ago, YBILC 1963, vol. I, p. 66, para. 77; Quadri, RdC vol. 131 (1961 III), p. 337.

uniform validity within the various legal systems and different forms of government and social relations or which can be differently interpreted. This applies, for example, to the principle of self-determination, which certainly must be regarded as a legally binding norm, in that it is an essential part of the Conventions on Human Rights accepted in December 1966 by the General Assembly of the United Nations, but which, because of the difficulty in its interpretation, is not suitable to be counted among the peremptory norms[19]).

II. The extension of ius cogens

(7) The 1966 draft does not attempt to enumerate examples of the peremptory rules of international law although earlier drafts did so. This decision is correct, having regard to the legislative technique which requires that legal problems should be solved by definitions and general maxims, but not by individual examples. But when an agreement on the Law of Treaties is concluded, it will be necessary to delimit the extent of *ius cogens* in the clearest possible form and to corroborate this by means of interpretative explanations. The concept of international public order has been extended too far in the proceedings of the ILC and in some literary comments. This would lead to a limitation of the independence of States and make their cooperation more difficult. It is important first of all to distinguish the peremptory norms of international law from other groups of norms and principles:

a) The question of *ius cogens* is completely different from the problem of the relationship of prior treaties to later conventions, which is dealt with in arts. 26, 37, 56 of the 1966 draft. The divergence of a later agreement cannot lead to the invalidity or illegality of the second treaty, but can at the most injure the rights of other States and create a basis for the responsibility of governments involved.

b) It is not necessary to ascribe to *ius cogens* those principles which are based in the general structure of the international order, such as *pacta sunt servanda*, the sovereignty and equality of States, etc. The peremptory rules of general international law of fundamental character are rules which deal

[19]) The principle of self-determination is considered as *ius cogens* by Jan Brownlie, *loc. cit. supra* note 1, p. 418. But he himself points out that this principle would possibly conflict with the compulsory prohibition of the use of force, if one wanted to deduce from this a permission to use force (*ibid.*, p. 159). One may remark generally that the concept of *ius cogens* is not suitable to be employed in connection with territorial settlements.

with definite material questions in particular areas of international life, not consequences drawn from the legal structure of the international legal order.

(8) The question which rules of international law appear to be non alienable cannot be answered definitely; one can only make suggestions. Three groups of norms may be indicated. The first that come into consideration are the maxims of international law which protect the foundations of law, peace and humanity in the international order and which at present are considered by nations as the minimum standard for their mutual relations. This is true of the prohibition of genocide[20]). Slavery and piracy are also often mentioned in this connection. However, they are theoretical cases. Piracy can only be committed by private individuals[21]), and the idea that States might bind themselves in a treaty to make such activities easier is not realistic. On the other hand, the prohibition of war and violence in State relations also belongs to this group. Treaties which are directed toward aggression or the use of violence against another State would violate the foundations of the international order[22]).

A second group of rules and principles are comprised in the rules of peaceful cooperation in the sphere of international law which protect fundamental common interests. The rule of freedom on the High Seas can be reckoned in this group[23]). A treaty by which States attempted to exclude other countries from part of the ocean would be without effect. Anyhow, according to the general rules of international law, it could not restrict the rights of others (see draft 1966 art. 30). The principles accepted by the General Assembly that outer space should be preserved for peaceful purposes[24]) could develop in the future into a rule of *ius cogens*.

A third sphere of imperative norms regards the protection of humanity, especially of the most essential human rights. It is doubtful whether all regulations of the Conventions on Civil and Political Rights and on Economic, Social and Cultural Rights passed on the 16th December 1966 by the General Assembly are to be considered as peremptory. It seems more correct to answer this question in the negative since some of these rules only lay obligations of activity upon States, and not all of them have the same fundamental significance. But those rules which protect human dignity,

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[20]) Cf. Convention for the Prevention and Punishment of the Crime of Genocide (1948) UNTS vol. 78.

[21]) See Convention on the High Seas (1958), art. 15. Critical of this example also Schwarzenberger, Current Legal Problems, vol. 18, p. 199 *et seq.*

[22]) See Report of Sir Humphrey Waldock, YBILC 1963, vol. II, p. 52.

[23]) See Third Report of G. G. Fitzmaurice, YBILC 1958, vol. II, p. 40, para. 76.

[24]) Resolution 1962 (XVIII) AJIL vol. 58 (1964), p. 477.

personal and racial equality, life and personal freedom can certainly be acknowledged as inalienable law[25]).

(9) The evolution of a common opinion and the formation of the conscience of nations is of decisive importance for the constitution and enforcement of peremptory rules. Wherever the development of common principles is in question, the United Nations will throw its weight on the scales. But it would be going too far to declare all regulations of the Charter of the United Nations as peremptory rules[26]), or even to ascribe to resolutions of the General Assembly the power to set up such norms[27]). The law of the Charter is only important in this context when it is in agreement with a general fundamental legal opinion of the nations, such as the prohibition of violence. If this is the case, then even a Resolution of the General Assembly can express the establishment of a new rule of *ius cogens*.

The offending of a treaty against the requirements of international morality is not included in the provision of art. 50, and it seems also right not to blur the limits of the concept of peremptory norms of general international law by reference to moral principles. The ideas on the maxims of international morality are not clearly enough developed in the present community of States to be able to base serious consequences for the existence of treaties upon them.

III. Legal consequences of the conflict between peremptory rules of general international law and a treaty

(10) When provisions of a treaty offend against a compulsory norm of international law, it results in their invalidity. Does this resulting invalidity concern only the clauses of the treaty which are in conflict with *ius cogens*, or the whole treaty? The 1966 draft has decided in favour of the latter solution, but this attitude may not be satisfactory and is not supported by sufficient reasons; it contradicts the standpoint taken in other articles of the draft (arts. 26, 37). In the earlier drafts between the years

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[25]) Tanaka expresses himself in favour of Human Rights being ascribed to *ius cogens*, diss. op., South West Africa Cases (Second Phase) I. C. J. Reports 1966, pp. 298/99.

[26]) This over-extension of the concept is defended by Bartoš, YBILC 1963, vol. II, p. 66, para. 83.

[27]) For a careful valuation of the Resolutions of the General Assembly, see Rosenne, YBILC 1963, vol. II, p. 74, para. 12, and de Luna, *ibid.*, p. 75, para. 25.

[28]) Draft 1953 (Lauterpacht) art. 15: "A treaty or any of its provisions is void, if its performance involves an act which is illegal under international law and if it is declared so by the International Court of Justice" (YBILC 1953, vol. II, p. 154).

1953[28]) and 1963[29]), it was provided that the invalidity extended only to that part of a treaty which offended against a peremptory norm, as long as the provision concerned was not essentially connected with the subject matter of the whole treaty and was clearly separable from the remainder. In the proceedings of the ILC for 1963 a number of voices were raised for the retention of severability. They referred to the principle that when defects arose, as much as possible of the treaty should be remain applicable. Others, on the contrary, considered that a defect in a treaty which violated imperative norms of international law was so serious that it must affect the whole. The Drafting Committee of the XVth Session (1963) followed the latter view and abandoned the idea that only parts of a treaty might be invalid because of an infringement of *ius cogens*[30]). When giving its reasons, it remarked that the parties could revise the treaty, so that it would then correspond to international law; if they did not do so, then the sanction of invalidity would extend to the whole agreement[31]).

This reason is not convincing. If the treaty is, according to art. 50, null *ab initio*, it cannot be revised when the defect of a single provision is realized. Apart from this, as remarked above under (3), the case will normally be that of a unilateral declaration of one party asserting a violation of a peremptory norm which leads to the invalidity of the treaty. The treaty can then often no longer be improved.

(11) The solution now chosen in arts. 50, 61 and 67 departs without sufficient reason from the principle recognized in the modern development of international law that single provisions of treaties may and should be treated separately[32]). This principle is true as much for the question how far later agreements of the parties may alter particular clauses without impairing the existence of the whole, as for the problem whether parts of a treaty can be denounced[33]).

The International Court of Justice has applied separate treatment to

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[29]) Draft 1963 (Sir Humphrey Waldock) art. 13 (3): "If a provision, the object or execution of which infringes a general rule or principle of international law having the character of *ius 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 should be void".

[30]) See the deliberations in the 705th meeting of the ILC of 21 June 1963, YBILC 1963, vol. II, p. 213.

[31]) Note on art. 37 of the draft of the Committee (1963), AJIL vol. 58 (1964), p. 266.

[32]) The principle is presented in detail in its particular applications by Lord McNair, The Law of Treaties (Oxford 1961), pp. 474–484.

[33]) An especially clear example for the later alteration of single provisions without impairing the remainder is provided by the peace treaties. On the treaties of 1919 and 1947 (Italy), see Edwin C. Hoyt, The Unanimity Rule in the Revision of Treaties (The Hague 1959), pp. 93 *et seq.*, 102 *et seq.*

parts of treaties in repeated decisions. In the case of the steamer "Wimbledon", it considered arts. 380–386 of the Treaty of Versailles regarding the Kiel Canal to be "self-contained" and independent of the other provisions of the Treaty[34]) and took the same standpoint in evaluating art. 435 of the Treaty of Versailles in its application on the regime of the Free Zone of Savoy[35]). Sir Hersch Lauterpacht discussed the problem of the severance of treaty provisions at great length in his separate opinion on the "Norwegian Loans" case and referred to the general principles in municipal law "that it is legitimate and perhaps obligatory to sever an invalid condition from the rest of the instrument and to treat the latter as valid, provided that having regard to the intention of the parties and the nature of the instrument, the provision in question does not constitute an essential part of the instrument"[36]). With some force Philipp G. Jessup insists upon the principle of severability of treaty clauses in his separate opinion in the South West African cases (First Phase):

> "The principle of severability is now accepted in the law of treaties, especially with reference to multipartite treaties, although the older classical writers tended to reject it. It is a doctrine which exists in municipal contract law (sometimes under the lebel of 'dividibility') and in the law governing the construction of statutes"[37]).

(12) The 1966 draft on the Law of Treaties recognizes the independence of parts of a treaty when it is a question of the relationship of a later treaty to the prior agreement on the same subject (art. 26 sect. 3). The 1966 draft (art. 37 sect. 1 (b)) also sets out from the possibility of treating parts of a treaty differently in its attitude to the modification of multilateral treaties between certain of their parties. In art. 41, the principle of separability is applied generally to cases invalidating or withdrawing from or suspending a treaty[38]). The restoration of the provision that, even where there are offences against a peremptory norm of international law, the whole treaty is not necessarily invalid, should therefore be recommended; in order to remove contradictions within the draft. Other reasons for the

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[34]) PCIJ Ser. A No. 1, pp. 23/24.

[35]) PCIJ Ser. A/B No. 46, p. 140.

[36]) ICJ Reports 1957, pp. 56/57. In the actual case, Lauterpacht did not recognize that the invalid clause could be separated from the whole of the convention.

[37]) ICJ Reports 1962, p. 408. See also Sir Humphrey Waldock's criticisms on these remarks of the I. C. J. in BYBIL 1963, vol. 2, pp. 91/92, paras. 6–9.

[38]) The ILC itself felt that in the case of art. 61 (illegality *superveniens* by the development of a new norm of peremptory character) the principle of separability should apply (AJIL vol. 61 [1967], p. 438). This opinion is not clearly indicated in the text. The difference, however, between the case of art. 61 and the illegality *ab initio* seems not deep enough to justify such a differential treatment.

invalidity of a treaty on account of defects in form are no less serious, but they do not affect the whole treaty.

The view that the offence against *ius cogens* inevitably causes the invalidity of the whole treaty depends too much on examples in which both parties consciously intend to offend against imperative norms or accept them as part of the agreement. This case is in fact rather exceptional. The more likely situation is where the legal defect in the treaty is not noticed at once by the parties. This will be even more true of agreements, where a conflict comes into existence only because a new rule of peremptory international law has developed. In a commercial treaty it is possible that provisions about the establishment and position of the aliens could be considered as contradicting imperative norms protecting Human Rights. For this reason, other provisions of the treaty concerning freedom and promotion of trade and navigation, access of aliens and regulation of payments are not necessarily invalid. If several States, to give another example, were to take measures to protect the living resources of the High Seas from unlimited exploitation by forbidding fishing in certain parts of the ocean serving as breeding areas and were to exclude all navigation therefrom so as to prevent contraventions, then this exclusion of navigation could offend against the inalienable right of freedom of the High Seas. The rest of the treaty could remain untouched because even without this provision the protection could be achieved.

(13) Therefore, it seems necessary to abandon the idea of the invalidity of the whole treaty in the text of the draft as expressed in arts. 50, 61, 67 and to replace it by the principles developed in art. 41. To achieve this, it is not everywhere necessary to introduce a special new section, but it is sufficient to say "the treaty or any of its provisions" in the places where the invalidity of the treaty is mentioned and then to refer to the principles laid down in art. 41. It is only in art. 50 that clarity requires a special section to be added.

The following version of art. 50 is suggested:

(1) 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.

(2) Under the conditions specified in art. 41 if only certain clauses of the treaty are in conflict with the peremptory norm of general international law, these clauses only shall be void.

The following alterations are suggested for art. 61:

If ... established, any existing treaty or, under the conditions specified in art. 41, those of its provisions which are in conflict with that norm, become void and terminate.

The following alterations are suggested for art. 67:

(1) In the case of a treaty or certain of its provisions void under article 50 ...

(b) bring their contractual obligations into conformity.

(2) In the case of a treaty or certain of its clauses which become void and terminate under art. 61 ...

(a) ... further to perform the treaty or under the conditions of art. 50 (2), those of its provisions which are in conflict with a peremptory norm of general international law.

The alteration suggested for art. 67, sect. 1 (b) is directed against the too imprecise wording in the present draft. Following the wording in the case of an offence against *ius cogens*, the parties are required to reconcile their "mutual relations" with the peremptory norm of general international law. This version goes too far. The obligation which evalues upon the parties because of the defect in the treaty is limited to the treaty and its subject matter. Above all, if one accepts separability, it is possible to adjust the treaty to international law by an alteration. However, in the context of the law of treaties only the contractual obligations are to be dealt with. The wording of the text concerns quite generally the duty of States to submit themselves to a rule of *ius cogens*, even outside a treaty. This goes beyond the sphere of the draft.

(14) Summary: 1. The present development of a community of nations united by common fundamental legal and moral conceptions and the significance of the almost universal cooperation of States achieved in the United Nations leads to the conclusion that the norms of international law create obligations upon States independent of their agreement. This also creates the foundation for the acceptance of such norms of general international law which are unalterable and from which States cannot depart in treaties. These norms of peremptory law (*ius cogens*) will, however, constitute an exception, and they are limited to rules of a fundamental character, the violation of which would either constitute an international crime or a deviation which would impair the order of the whole international community.

2. Appeal to the regulation in art. 50 is subjected to the provisions on proceedings in art. 62.

3. The principle that international treaties are to be preserved as far as possible in their effectiveness and stability operates in conformity with the conceptions of municipal law so that single provisions of a treaty may have a special treatment as regards validity, without affecting the further existence of the whole agreement. The principle of the separability of certain clauses of a treaty, which has been generally accepted in art. 41 of the draft, should be applied also in cases of an offence against *ius cogens* for such parts of a treaty as can be separated from the whole and which are not a presupposition for its continued existence.

4. If a treaty or a regulation thereof is removed because it offends against a peremptory norm, the only duty of the parties is to adapt their contractual relations to this higher rule. The obligation that they should go beyond this and reconcile their mutual relations with that norm of compulsory international law overreaches the sphere of the Law of Treaties and should therefore not find expression therein.