Conflict of Treaty Provisions with a Peremptory Norm of General International Law

Ulrich Scheuner

(1) During the first session of the UN Conference on the Law of Treaties in April and May 1968[1]), art. 50 of the Draft Treaty was one of the main objects of prolonged controversial discussions[2]). The importance attributed to this provision is easily understandable.

Art. 50 raises fundamental issues not only for the development of the rules of treaty-making but also for the whole structure of international law. The recognition of a body of strictly binding rules of a superior rank is not compatible with the traditional view of the international order as one founded upon the express or tacit will of the States and knowing no limitations on the contractual freedom of nations.

However, it was not this structural change involved in the recognition of *ius cogens* that led to controversy and opposition against the draft of art. 50, but the consequences which could flow from the acceptance of the article in its present and, in some respects, indeterminate form.

Doubts were already expressed during the deliberations of the International Law Commission (ILC). They concerned the fact that the intro-

---

[1]) The Official Documents of the first session of the UN Conference on the Law of Treaties are not yet available. Citations are therefore taken from the Provisional Summary Records of the Meetings. The main deliberations took place in the Committee of the Whole (cited as "Meeting"); the meetings concerned with arts. 50 and 61 were the 41st–42nd, 52nd–57th, 66th, 80th meetings. Further cited is the Draft Report of the Committee of the Whole concerning its work at the first session of the Conference (Doc. A/CONF. 39/C. 1/L. 370 Add. 1 and 2, cited as Report of the Committee of the Whole).

[2]) Since the publication of my former article (ZaöRV vol. 27, pp. 520 *et seq.*), but prior to the Vienna Conference, additional articles have appeared: Egon Schwelb, Some Aspects of International Jus cogens as formulated by the International Law Commission, The American Journal of International Law (AJIL) vol. 61 (1967), pp. 946 *et seq.*, Takeshi Minagawa, Jus cogens in International Law, Hitotsubashi Journal of Law and Politics, vol. 6 (1968), pp. 16 *et seq.*

duction of the category of peremptory norms of international law which cause contradictory treaties to be void or voidable could deliver in some cases a pretext for unilateral termination and evasion of treaty obligations.

In the Vienna debates this main practical and political issue was clearly further developed. One large group of States accepted the notion of peremptory norms and its consequences as a progressive elaboration of the international order, bringing it into harmony with the evolution of common moral and legal standards in the international community and drawing it closer to the hierarchical shape of domestic legal systems[3]). This group welcomed the restrictions imposed upon State sovereignty and the precedence given to general norms as against the contractual stipulations of States. Moreover, some States supported art. 50 also as a means of eliminating contractual obligations which had come into conflict with the subsequent progressive development of the rules of international law. In this respect the representative of Cyprus referred to the notion of *ius cogens* as a "dynamic and living" concept[4]).

The strongest adherence to the idea of higher norms of international law, which are unalterable for the parties to an international agreement, came from the delegates of the developing nations and from the socialist countries, whereas the greater part of the States of the Western Hemisphere, even if the representatives accepted the principle of *ius cogens*, were hesitant with regard to the effects of the present draft upon the stability of contractual agreements. This group of States gave higher priority to the principle of the integrity of treaties. Concern was expressed that the notion of *ius cogens*, if not precisely circumscribed and controlled in its exercise by judicial or arbitral adjudication, could "severely undermine the traditional principle of the rule pacta sunt servanda"[5]) and that "states might be tempted to invoke art. 50 in justification of the termination of treaties which were detrimental to an important public interest"[6]).

These States recommended further safeguards for the application of art. 50, especially a strict definition of the scope of peremptory rules and the obligation to resort to judicial or arbitral procedure if original or supervening nullity of a treaty was invoked. The conflicting opinions which found expression during the Vienna debates justify the observation of the French representative "that art. 50 had the formidable reputation of being

---

[3]) In the same sense Mr. Maresca, 54th Meeting.

[4]) Mr. Jacovides, 53rd Meeting.

[5]) Mr. Ratsimbazafy (Madagascar), 53rd Meeting; in the same sense Mr. Jiménez de Aréchaga (Uruguay), 53rd Meeting.

[6]) Mr. Small (New Zealand), 54th Meeting.

one of the most difficult provisions in the International Law Commission's draft" [7]).

In the end, the positive attitude prevailed at Vienna and the Committee of the Whole accepted art. 50 with an important amendment. The final decision, however, is left to the next session of the Conference, and therefore it may seem useful to discuss once again those points of the draft for which further elaboration still seems desirable.

(2) First, I should like to make a few observations on the general influence which the concept of *ius cogens* exercises upon the formation of international law. It has already been pointed out that the recognition of higher norms of international law, which limit the freedom and the law-making force of agreements between States, involves considerable changes in the theory of the international order and of the sources of international law.

The positivistic doctrine which based international law solely upon the will of the States and attributed overriding importance to treaties is no longer followed. The strictly binding rules of international law can only have an objective basis and are regarded as independent from the consent of the respective States. The ILC did not consider them to be natural law [8]). They are rather the expression of a common legal order developed within the entire community of nations. They represent rules which are based on a historically created common conviction among nations; therefore, they can also be subject to change or extension.

At all events, rules, *i. e.* general norms, are concerned and not merely the principle of public order, which – according to my opinion – is unjustifiably equated with *ius cogens* [9]). The recognition of these norms will also influence the mutual relationship between the sources of international law mentioned in art. 38 of the Statute of the International Court of Justice.

The creation and existence of *ius cogens* rules are matters which are independent from law-making treaties. These rules can be contained in such conventions in declaratory form. Their existence, however, is not connected with treaty norms. Mr. Schwelb [10]) pointed out that the Preamble of the Hague Conventions concerning the Law and Customs of Land

---

[7]) Mr. de Bresson, 54th Meeting.

[8]) Against an interpretation as natural law, Sir Humphrey Waldock, 56th Meeting.

[9]) In this respect Mr. Suy, 41st Meeting, who speaks expressly of a "body of legal rules".

[10]) *Loc. cit.* (note 2 above), pp. 956/57.

Warfare (1907) has expressly provided for the independent existence of general principles of the law of nations alongside the conventional agreement. For this reason, the existence of a peremptory rule cannot be affected when a convention, which recognizes this rule, allows the States parties to that convention to make reservations. This view is confirmed by art. 40 of the draft.

One difficult question is not decided by the provisions of the draft: Can third States attack a treaty concluded between other States on the ground that it offends against a peremptory norm of international law? Since the legal consequence of the offence is absolute nullity of the treaty, other States could also invoke this defect. Of course, this will only be possible in cases where the interests of the States are directly affected by the treaty[11]). Under the present law no procedure is provided by means of which a third State could claim the nullity of a treaty which violates art. 50[12]). General international law does not contain any provisions similar to art. 24 of the European Convention on Human Rights (1950) or to art. 41 of the UN Convention on Civil and Political Rights, provisions which authorize a State to institute proceedings before an international instance if another State is not fulfilling its obligations. The practice of the UN shows that in cases of threat of peace by violation of a peremptory rule, the UN has the possibility to take action. With the introduction of the legal category of *ius cogens* into international law a new stage was reached in the development of this legal order which also gives raise to a number of questions beyond the sphere of the Law of Treaties.

(3) At Vienna four problems in particular were discussed in relation to arts. 50 and 60 respectively:

a) A number of States wanted a more precise definition of the concept of peremptory norms to minimize the danger of a unilateral interpretation by individual States. The German representative pointed out that without some definition of art. 50, it would be like having a penal code which provided for the punishment of crimes without saying what acts constituted crimes[13]). In the same direction went the efforts to emphasize the validity within the entire community of nations as a characteristic feature of a peremptory norm and therefore to exclude those norms which have not found universal acceptance.

[11]) The representative of Ethiopia, Mr. Kebreth, emphasized this question in the 54th Meeting; see also Mr. Verosta, 53rd Meeting.

[12]) The question of the procedure initiated by third States is also studied by Mr. Minagawa, *loc. cit.* (note 2 above), p. 25.

[13]) The representative of the Federal Republic of Germany, Mr. Fleischhauer, 55th Meeting; see also Mr. de Bresson (France), 54th Meeting.

b) A number of States sought to clarify that art. 50 should not have retroactive effect.

c) Some States argued that a certain procedure should be established for the decision of the question whether a treaty was conflicting with a *ius cogens* norm[14]).

d) Finally, a number of States took up for consideration the proposal which had already been presented – but rejected – during the deliberations of the ILC. In this proposal it was suggested that, in cases where a peremptory rule has been violated, the treaty should not become null and void as a whole, but instead the rule of art. 41 of the draft should also be applied to art. 50, making it possible for other parts of such a treaty to remain valid[15]).

(4) To the first of these points Great Britain had proposed an amendment according to which the norms recognized as peremptory rules should be defined from time to time in protocols to the Convention[16]). This suggestion had in mind a list of the *ius cogens* rules which should either be exhaustive or should enumerate certain cases[17]). The proposal was later withdrawn. The view of the ILC seems to me convincing that the establishment of an exhaustive list raises too many difficulties. A list enumerating certain examples of such rules, however, would present some dangers. Therefore it was understandable that the Conference preferred the proposals which tried to improve the definition of the peremptory rules by laying more emphasis on the validity of the rules for the entire community of States. This idea was also suggested in an amendment proposed by Finland, Greece and Spain[18]). This amendment was sent to the Drafting Committee and was taken into consideration in the drafting of the definitive text of art. 50. This text, accepted at the 80th Meeting, reads as follows:

> "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified

---

[14]) More detailed statements by Mr. Harry (Australia), 55th Meeting.

[15]) The representative of Finland, Mr. Castrén, supporting especially the separability of treaty provisions in arts. 50 and 67 respectively, in relation to art. 41 referred to the article of the author, ZaöRV vol. 27, p. 520 (41st Meeting).

[16]) Sub-Amendment to the Amendment of the USA mentioned in note 20 (A/CONF. 39/C. 1/L. 312). Withdrawal: 57th Meeting.

[17]) Statement by Mr. Sinclair (UK), 53rd Meeting.

[18]) Doc. A/CONF. 39/C. 1/L. 306 and Add. 1 and 2.

only by a subsequent norm of general international law having the same character" [19]).

In contrast, the amendment presented by the USA which insisted upon a "recognition in common by the national and legal systems of the world" [20]) was not successful [21]).

The alteration achieved to this point of the text of art. 50 represents a not unimportant amelioration. It seeks to clarify the demand that the rule must be universally recognized and that the community of nations must accept it as a whole. This makes it clear that the number of peremptory rules ist not great and that it is necessary to examine very carefully whether the conditions for a positive answer concerning their general validity are fullfilled and whether the norm corresponds to a conviction common to the conscience of all nations.

This determination is all the more useful since the debates held in Vienna also showed that in international theory there are different opinions concerning the range and the nature of these peremptory rules. Besides such norms, which are generally recognized as strictly binding, principles were also mentioned whose nature is doubtful. The principle of non-aggression and of non-interference [22]) surely must be regarded as fundamental rules. The freedom of the High Seas can also be regarded as a fundamental rule although, according to recent developments, the extension of this rule is subject to growing restrictions. In addition to these general rules, certain humanitarian rules are repeatedly mentioned – the prohibition of slave trade and piracy – which, of course, are examples of a more hypothetical nature [23]). To-day the condemnation of genocide evidently is one of the peremptory rules. In this connection the general rule against racial discrimination, which underlies the UN Convention on elimination of all forms of racial discrimination, must also be mentioned [24]). From among the Human Rights, however, not all particular dispositions will belong to the fundamental rules, but only those basic rules, which protect human dignity,

[19]) The emphasis placed upon the fact that the peremptory norm is a "norm" is also based on the Amendment of Romania and of the Soviet Union (A/CONF. 39/C. 1/L. 258/Corr. 1).

[20]) A/CONF. 39/C. 1/L. 302 and Corr. 1.

[21]) Although a number of States of the Western Hemisphere had accepted this amendment, it was rejected in the 57th Meeting by a voting of 57:24:7.

[22]) This rule was especially defended by the Soviet Union in the 52nd Meeting.

[23]) See the observations of Mr. Sweeney (USA), 52nd Meeting.

[24]) This thesis which had already been presented by Judge Tanaka, diss. op. South-West Africa Cases (Second Phase) I.C.J. Reports 1966, pp. 298/99 and to which Mr. Mwenda (Kenya) referred in the 52nd Meeting, was accepted by various delegates. See Mr. Dadzie (Ghana), 52nd Meeting.

life, personal and spiritual liberty, equality, family rights and the free exercise of those human activities, which are derived from these highest principles[25]). However, when in this context the principle of self-determination is cited[26]), no precise interpretative criteria are offered which would permit a reliable decision[27]). The recognition of such rather dynamic and political principles would change the nature of *ius cogens*. The statement that a peremptory rule is violated by unequal treaties, *i. e.* treaties between partners of unequal strength which are influenced by that difference to the detriment of one side, also introduces a rather vague measure which would endanger the stability of international treaties[28]).

Taking these examples as a whole it would probably be desirable in the discussions of the Conference for the cited cases of *ius cogens* to be critically appreciated by all participants in order to avoid an interpretation of the concept of *ius cogens* which might become to broad and vague. It would also be advisable for States to emphasize the fact that the scope of action of *ius cogens* should be limited and that the recognition of such a rule should be a rather exceptional event.

(5) Through the acceptance of the American amendment which had inserted the words "at the time of its conclusion" in the first sentence of art. 50[29]), it has been made clear that only that agreement is void *ab initio* which conflicts with a peremptory rule at the moment of the ratification of the treaty. In case the conflict arises later, art. 61 will apply. The nullity of an existing treaty does not involve genuine retroactivity but is only the application of a new rule to existing legal conditions[30]). This modification represents an improvement in the wording of the treaty provision. Nevertheless, another difficult question remains open, *i. e.* when does a rule obtain the character of a peremptory norm? The application of arts. 50 and 61 will depend upon the exact determination of this time factor.

(6) A serious gap in the draft is the complete absence of a provision concerning a judicial or an arbitral procedure to clarify the question whether a State has the right to invoke the provision of a treaty conflicting with a *ius cogens* rule. A number of States have stressed that without such

---

[25]) See Mr. de Bresson (France) and Mr. Maresca (Italy), 54th Meeting.

[26]) See Mr. Cole (Sierra Leone) and Mr. Jacovides (Cyprus), 53rd Meeting.

[27]) The same is true for the reference to the principle of decolonization made by Mr. Makarevich (Ukrainian Soviet Republic) in the 56th Meeting.

[28]) Against this principle, Mr. de Bresson, 54th Meeting.

[29]) A/CONF. 39/C. 1/L. 302 and Corr. 1, accepted in the 57th Meeting.

[30]) This difference between direct and indirect retroactivity was pointed out by Mr. Alvarez Tabío, 66th Meeting. The American amendment only declared what the ILC had already explained in the commentary to art. 50 para. 6. See Schwelb, *loc. cit.* (note 2 above), p. 868.

a procedural arrangement the danger of unilateral action by individual States will be greatly increased[31]). In Vienna, this request collided with a strong phalanx of States which adamantly refused to accept the imposition of any obligation to settle such a conflict by means of a judicial procedure. This attitude was the result of a tendency among the new States, which had already been observed for a long time by the sponsors of pacific settlement of international disputes through judicial or arbitral decision, to avoid submission to such decisions. Notwithstanding the limited prospects for obtainig a change in this respect, efforts should not be abandoned to reinforce art. 62 para. 3 by means of an invitation to judicial or arbitral settlement and to include reference to such forms of settlement of disputes into art. 50. A series of governments have directed the Conference's attention to the major practical significance of this point, and it should be clear that the negative decision of the Vienna Conference signifies a setback for the idea of international adjudication.

(7) It would be particularly desirable if the second session of the Conference would not accept the opinion of the Committee of the Whole, that a violation of a fundamental rule of art. 50 always made the entire treaty void. The ILC had assumed that the exclusion of separability should not be valid for art. 61 (see art. 41 para. 5 of the draft)[32]). However, the text of art. 61 as formulated by the ILC was not entirely clear because it referred back to art. 50. During the debates at Vienna Finland proposed a clarification which should also exclude any retroactivity of art. 61[33]). Art. 61 was accepted by the Committee of the Whole and transferred together with the Finnish proposal to the drafting Committee. The text as it emerged from that body[34]) omits the reference to art. 50 and makes it clear that the treaty does only become void and terminate after the emergence of a new peremptory rule of international law. The conclusion can be drawn from the debates and from the revised text that the principle of separability applies according to the provisions of art. 41 of the draft Law of Treaties, where the separation of provisions is only excluded for arts. 48, 49 and 50.

In so far, as this question concerned art. 50, it was discussed in connection with art. 41 which contains the principle of separability. Art. 41

---

[31]) See Mr. Fleischhauer (Federal Republic of Germany), 55th Meeting, Mr. Harry (Australia), 55th Meeting, Mr. Samad (Pakistan), 55th Meeting.

[32]) For the same opinion see Schwelb, *loc. cit.* (note 2 above), pp. 971 *et seq.*

[33]) A/CONF. 39/C. 1/L. 294.

[34]) The text as revised by the drafting Committee (see International Legal Materials, vol. 7 nr. 4, p. 77 *et seq.*) is as follows: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates".

was slightly restricted by the following modification; a separation of provisions is only possible when, in addition to the preconditions already established in art. 41, the continued performance of the remaining part of the treaty is not unjust[35]). The approbation of the text of art. 41 para. 5 signified at the same time a decision with regard to art. 50, because art. 41 para. 5 declares that the rule of separability of treaty dispositions must not be applied to art. 50. During the discussions held on art. 41 a similar conflict had already developed between those opinions which were in favour of declaring a treaty containing defects completely null and void and those which preferred to partially preserve such a treaty instead of destroying it in its entirety. In this connection the latter group referred to the significance of greater elasticity instead of strict rigidity[36]).

The actual decision concerning art. 50 was made in the discussions of that article. Finland had proposed an amendment which sought to add a second paragraph which would have read as follows:

> "2. Under the conditions specified in article 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"[37]).

Through this amendment the representative of Finland, Mr. Castrén, took up the idea which was already expressed in regard to art. 41, of applying the concept of *ius cogens* cautiously and in a manner acceptable to all and of accepting as generally applicable the principle of separability of provisions[38]). Although several delegates expressed themselves in favour of adopting the principle of separability also in art. 50, the greater part of the represented States were categorically against the proposal and finally it was withdrawn in the 56th Meeting. This result is deeply regrettable. It brings into the treaty an unjustified differentiation between the various reasons for which a treaty becomes void. If a treaty can remain partly valid or if it ceases to exist for reasons other than those provided for in arts. 48, 49 and 50 or if it terminates because of cancellation or for other reasons, then there is no convincing ground for not recognizing as a general principle the separability of treaty provisions, a separability recognized in most of the legal systems of the world. Evidently the decision of the Conference is founded upon the idea that the provisions contained in arts. 50, 48 and 49 respectively, have a punitive character: Those who violate a fundamental rule of international law must not benefit from that action. Yet, the

---

[35]) See the text in A/CONF. 39/C. 1/L. 370, Add. 1 (part B).
[36]) See Mr. Eurigenis (Greece), 42nd Meeting.
[37]) A/CONF. 39/C. 1/L. 293.
[38]) See Mr. Castrén, 41st and 52nd Meetings.

defenders of this opinion do not recognize that it is possible for States unintentionally to violate a peremptory rule. In a treaty of commerce which, in addition to other objects, also regulates the legal position of aliens, an accidental violation of the rule of protection of human rights might occur. At the beginning such a defect might remain unnoticed. But later another State could use it to cancel the whole treaty. In such a case, would it be just and appropriate to destroy the whole treaty because of a single defective provision? Excluding from consideration those who doubt in principle that single treaty provisions could continue to exist at all when other parts have already become void[39]), the opponents of separability have only stated as the main support for their view that the conception of the peremptory rules requires as a consequence the nullity of the defective agreement in its entirety. The violation of a peremptory norm would have to be considered as "such a serious matter" that the sanction of nullity should apply to the whole treaty[40]). This view can only be defended by the supposition that a violation of *ius cogens* always takes place deliberately. That, however, can not be assumed. The control exercised in several States by means of judicial review of the constitutionality of laws has shown that in most cases violations occur when either the conflict with the higher norm was overlooked or was dubious.

As many of the new States were in favour of applying the principle of nullity without exception to an agreement falling under art. 50, the thought might have influenced them that, by accepting this rule the cancellation of treaties which had become legally binding for these States through State succession would become possible. It is doubtful whether this view is correct. According to the author's opinion the principle of the nullity of unequal treaties does not seem to belong to the realm of *ius cogens;* this principle is too vague for a strict legal rule. Furthermore, in so far as treaties taken over from the pre-independence period have defects, they will most probably be of such a nature that they will cause the nullity of the whole treaty. In this connection, therefore, the principle of separability will be of little importance. On the other hand, one could imagine cases where the existence of new treaties concluded between independent States could be in danger because one of the parties could raise doubts based on art. 50 against one of the provisions of these treaties. The requirement that the stability of treaties be maintained as well as the flexibility of international law is fulfilled much better by also applying the principles of art. 41 to art. 50. For this reason in the second session one should try again to revise and

[39]) This is the opinion of Mr. Sh. Rosenne (Israel), 54th Meeting.
[40]) In the same respect see also Mr. Jacovides (Cyprus), 53rd Meeting.

correct the views expressed on that point, for example, in the form proposed by the Finnish amendment submitted during the first session.

The introduction of the concept of *ius cogens* in the international legal order is of great importance. Its significance has not as yet been fully recognized and many more problems will result from it. Therefore it is all the more necessary that this measure – which is more like a process of international legislation than of a declaratory statement – should be taken with caution and moderation, thereby aiding the States to conform to this new rule which restricts their liberty of action and underscores the concept of the common interest.