Denver Journal of International Law & Policy

Volume 4
Number 2 *Fall*

Article 3

May 2020

Peremptory Norms of International Law: Their Source, Function and Future

N.G. Onuf

Richard K. Birney

PEREMPTORY NORMS OF INTERNATIONAL LAW: THEIR SOURCE, FUNCTION AND FUTURE

N.G. ONUF* AND RICHARD K. BIRNEY**

Peremptory norms of international law (jus cogens) have been the subject of much recent interest.[1] In light of their extensive and quite unprecedented treatment by the International Law Commission and the Vienna Conference on the Law of Treaties,[2] it may be surprising that attention has not been greater.[3] At the same time, inquiry into the relationship between peremptory norms and the sources and functions of international law has been virtually nonexistent.[4] This is indeed surprising, given the recent substantial interest in these areas as part of a larger "theoretical explosion" in international legal studies.[5]

In the following pages, we propose to examine the conceptual ramifications of the simple question, what is the source of peremptory norms? Further, we propose to use this conceptual examination to shed some light on certain profound but only dimly perceived trends that are presently at work in the international legal order. We do not intend to undertake a systematic examination of purported peremptory norms. Such an exercise is more properly the reserve of publicists who wish to gain credence for their personal visions of the natural order.[6] Instead, our interest is focused on peremptory norms as a

* Visiting Research Fellow, Center of International Studies, Princeton University; Lecturer, Johns Hopkins School of Advanced International Studies; Associate Professor, School of International Service, American University.

** M.A. in International Studies, American University; Lieutenant, USAF, SAC Headquarters, Offutt Air Force Base, Omaha, Nebraska.

1. V. Paul regards it as "one of the most discussed and controversial questions in the theory of international law today." Paul, *The Legal Consequences of Conflict between a Treaty and an Imperative Norm of General International Law (jus cogens)*, 22 OSTERREICHISCHE ZEITSCHRIFT FUR OFFENTLICHES RECHT 19 (1971).

2. For an exhaustive set of citations on the relevant deliberations of the International Law Commission and the Vienna Conference, see S. ROSENNE, THE LAW OF TREATIES, A LEGISLATIVE HISTORY OF THE VIENNA CONVENTION 290-93 (1970).

3. Paul's research uncovered approximately a dozen articles on the subject during the last decade. Paul, *supra* note 1, at 22-23, n.13-15. The relative lack of attention is revealed in the failure of a recent major treatise, A MANUAL OF PUBLIC INTERNATIONAL LAW (M. Sorensen ed. 1968), even to mention peremptory norms.

4. The principal exception seems to be Virally, *Reflexions sur le "jus cogens,"* 12 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 19-29 (1966).

5. A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW xii (1971). We share Professor D'Amato's view that "the underlying theory and structure of international law has been given unprecedented attention during the last three or four years." *Id.*

6. A good example is Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55 (1966).

category of norms with an identifiable source and a distinctive function to perform in the international legal order of today's world.

I

Precisely why the source and function of peremptory norms have gained so little attention is a matter that deserves consideration. The idea that some norms are "higher" than other norms in the international legal order has enjoyed a considerable revival in recent decades. Many writers believe that peremptory norms are the concrete form taken by higher law. As a matter of definition, peremptory norms are those which cannot be changed except by norms of a comparable status. All other norms can be changed by subsequent treaty or customary practice. The difference is such as to encourage the inference that peremptory norms have their origin in a higher natural order and that our knowledge of them is received directly. The law-making procedures of the community would simply be one available means for articulating and formalizing norms whose existence is independent of and antecedent to the perception of their existence.

Given the inherent nature of peremptory norms, their status would not be affected by imperfect adherence to established law-making procedures while they are being articulated. Their emanation from such forums as the U.N. General Assembly does not circumvent existing sources of international law or suggest the emergence of a new source. It merely indicates that the General Assembly is one likely place for the collective awareness of such norms to be concretized. Even if there is significant resistance in some quarters to the particular formulation adopted by the community as a whole, such that the emergence of an ordinary rule of law would be prevented, we would assume that either the formulation itself is defective or the capacity of some participants in the legal order to see the higher quality of such norms is blocked by narrow prejudice. The peremptory norm is not actually prevented from existing because of that resistance. This line of reasoning would see any concern for the formal source of peremptory norms as falsely conceived in its reference to the sources of ordinary positive norms, and any concern for their material source as properly a matter of metaphysical rather than legal inquiry.

As in most metaphysical matters, it is impossible to prove that peremptory norms are not the substance of higher law. The inclination to view them in this manner is understandable in view of recent history and certainly helps to explain the fascination that the concept of peremptory norms holds for some scholars. Conversely, it is no easier to demonstrate that peremptory norms are superior because they are part of the natural order. However, even in the strictly positivist view, there is nothing in the logic of law or the structure of legal

orders to prevent some norms from being given a superior status.[7] On the contrary, this is one frequent configuration in a structurally differentiated legal order. Differentiation is an inevitable accompaniment to social complexity. It means that norms are divided into groups that are distinguishable in terms of some attribute, such as source, scope, conditions of bindingness and validity or, most notably, function.[8] Structures differentiated by function promote, but by no means guarantee, improved performance of functions.

Although the identification of peremptory norms of international law as a distinctive category indicates a differentiated legal order, one is not forced to conclude on this basis alone that peremptory norms are superior to ordinary rules. Actually, their differentiated, putatively superior status is not demonstrable by reference to level of compliance or other empirical criteria. Their status must be inferred from the stipulation that peremptory norms are not subject to derogation by ordinary norms. This could be a way of classifying peremptory norms as superior to other norms, but it could also mean that peremptory norms are simply unrelated to other norms. In fact, their status and substance are in no way dependent on changes in the substance of ordinary rules because they are doing something in the legal order upon which ordinary rules have little bearing.

On inspection, then, what appears to be a hierarchically arranged legal order could be something quite different, i.e., a legal order in which different kinds of law seem to be of differing importance because of the functions they perform. Although individual peremptory norms seem to have a *content* intrinsically more important than ordinary rules, it may actually be that they perform a *function* more vital to the workings of the legal order than do the overriding number of individual norms not designated as peremptory. If peremptory norms have nothing to do with ordinary rules in terms of their operation and yet seem to be superior because of their function, this is not to say that either kind is more *legal* in character than the other. Both kinds of norms are equally legal because they arise from a legally designated source of international law and are stated as law, no matter what function they perform in the legal order.

---

7. Indeed, H. Kelsen has argued the logical necessity of a hierarchical arrangement of positive norms in the international legal order. H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 408-38 (1952).

8. According to one authority, "[i]ntragroup differentiation represents a division of the group into subgroups that perform different functions in the group without being superior or inferior to each other. When such subgroups become ranked, as 'superior' and 'inferior' then intragroup differentiation becomes intragroup stratification." Sorokim, *Social Differentiation*, 14 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 406 (1968).

Norms in the international legal order can be arranged in different categories to serve different purposes if nation-states, as the major participants in the order, choose to have it that way. Peremptory norms are one category intended to be set apart from the bulk of norms making up the legal order. Furthermore, since nation-states can and do decide what the law shall be, the creation of peremptory norms is subject to the same rules of lawmaking as any valid norm. Finally, the process of acquiring legal status is identical to the process of acquiring a peremptory nature. The two processes may take place independently, as in cases where long-standing norms become peremptory at a later date, but they operate in the same way. This means simply that they operate in conformity with the requirements of one of the several modes in which the international community creates its norms. In short, peremptory norms, whether in becoming norms or in becoming peremptory or both, must be considered in terms of the sources of international law.

II

For our purposes the most salient feature of peremptory norms is their *general* nature. Their status as general international law is not a logical necessity so much as a compelling psychological association of normative superiority with universality.[9] What is decisive is the fact that the Vienna Convention on the Law of Treaties as well as the literature treats peremptory norms as general in character. In the language of Article 53 of the Vienna Convention:

> 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 international law is a norm accepted and recognized by the community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[10]

One of the stock assertions of international law texts is that general international law has its source in custom, whereas conven-

---

9. It is frequently argued (e.g., by Virally, *supra* note 4, at 13-17) that peremptory norms must be general because only the international community as a whole can create norms that are inalterable in the eyes of community members when they are not acting as a whole. Without altering the logic, the metaphor "international community" works to reinforce the psychological association.

A further argument, exemplified by Verdross, *supra* note 6, is to associate peremptory norms with the notion of a public order of the international community. We regard this municipal law analogy as inviting unnecessary criticism of the concept of peremptory norms by treating the international legal order as more advanced than it is. This was the nature of G. Schwarzenberger's famous attack on peremptory norms, cited and summarized in Verdross.

10. Convention on the Law of Treaties, *done* May 22, 1969, conveniently found in 8 INT'L LEGAL MATERIALS 698 (1969).

tions yield particular international law, that is, law whose binding effect is restricted to the parties. Of course, a convention with a great many parties may well be regarded as expressing rules of general international law, but what has happened is that the terms of the convention are co-extensive with customary law. Such law may have already existed, with the convention merely a declaratory expression of it, or it may have arisen in response to wide adherence to the convention and a community-wide appreciation of its salience in the relations of all states.[11]

It should also be noted that the source identified in the Statute of the International Court of Justice as "general principles of law recognized by civilized nations"[12] would by definition yield rules of general international law. Without entering into the perennial doctrinal disputes over general principles as a source of international law, we might observe that there are very few specific norms actually attributable to this source and those few seem generally to be *procedural* guidelines for international tribunals.[13] As such, it is unlikely that they would be viewed as having a peremptory character. Insofar as norms relating to the *substance* of interstate relations may be identified with general principles of law, the operative source is likely to be custom, doubtless structured by community responsiveness to the relevant general principles. Certainly in the instance of peremptory norms customary factors will have been brought to bear in their formation.

One might conclude, then, that peremptory norms are necessarily customary in character. The fact that those actual norms commonly asserted to be peremptory typically find their definitive formulation in the provisions of such conventions as the United Nations Charter does not mean that those provisions are themselves peremptory. It means only that there exist identical customary norms that are peremptory. The moment at which such norms come into existence or acquire full cogency is not something that can be determined by reference either to the convention or the manner of its conclusion. Thus when we are told that "a new norm of the character of *jus cogens* may appear in the form of a treaty or custom,"[14] we would be inclined to regard this as a convenient shorthand description of a more subtle process in which the terms of a convention can codify norms that have

11. The relation of conventions to customary law formation is thoroughly presented in Baxter, *Treaties and Custom*, 129 HAGUE ACADEMY RECUEIL DES COURS 31-104 (1970); and D'AMATO, *supra* note 5, at 103-66.

12. I.C.J. STAT. art. 38.

13. A typical treatment is Virally's in A MANUAL OF PUBLIC INTERNATIONAL LAW, *supra* note 3, at 143-48.

14. Paul, *supra* note 1, at 42.

already acquired a peremptory nature or are in the process of doing so. The process of codification, by focusing community attention on the importance of the norms in question, may be empirically related to the process of acquiring cogency, but the two are analytically separable.

The principal difficulty with this position arises in connection with the concluding words of Article 53: ". . . a peremptory norm . . . can be modified only by a subsequent norm having the same character." This entirely reasonable proposition indicates that peremptory norms are subject to alteration only through the emergence of new norms with the same overriding character but a different content.[15] Yet in the instance of norms that emerge by way of custom, such a development is hardly conceivable. In order for any established peremptory norm ever to be changed through subsequent contrary practice, there would have to be a full display of cogency in what is only a nascent, just discernible normative pattern. Without manifest cogency, legal effect would be denied as a matter of course. If, nonetheless, the normative pattern persisted and gathered cogency over time, it would have to be admitted that the prior norm was not peremptory after all but merely mistaken as such. As one writer put it: "to change a valid norm of *jus cogens* by means of a custom seems to be impossible in most cases, as any act, contrary to *jus cogens*, would be incompatible with it and unlawfull [sic]."[16]

On the few occasions in which anyone has addressed this problem, the proffered solution is simple enough. The International Law Commission, in its commentary on the draft articles on the law of treaties, noted that ". . . a modification of a rule of *jus cogens* would today most probably be effected through a general multilateral treaty . . ."[17] Similarly, Paul observed that changing a peremptory norm "seems to be possible only by a subsequent treaty."[18] This is, however, a bogus solution, since conventions do not create peremptory norms in their own right. If we accept the usual understanding of the term, "general international law," this conclusion is inescapable.

---

15. One writer, S.A. Riesenfeld, would disagree. "Certainly a peremptory norm might be subject to replacement by a non-peremptory norm. The rule accomplishing this change in status would itself be non-peremptory. The essential question is, how widespread the international acceptance of such a *capitis diminutio* would have to be." Editorial Comment, *Jus Dispositivum and Jus Cogens in International Law: In Light of the Recent Decision of the German Supreme Constitutional Court*, 60 AM. J. INT'L L. 511, 514 (1966).

16. Paul, *supra* note 1, at 43.

17. Report of the International Law Commission on the Second Part of its Seventeenth Session, January 3-28, 1966, and on its Eighteenth Session, May 4-July 19, 1966, reprinted in 61 AM. J. INT'L L. 411 (1967).

18. Paul, *supra* note 1, at 42.

This line of reasoning, with its logically unacceptable outcome, should cause us to re-examine the initial premise that custom alone can yield norms of general international law. There has in fact been a minor flurry of discussion on this very issue, revolving around the apparent fact that at least some provisions of some multilateral conventions become general norms very rapidly, even "instantaneously," or indeed may be general norms from the outset.[19] Calling such norms customary, as is usually done, distorts the concept of custom almost beyond recognition. Alternatively, one of the present writers has argued the conceptual utility of viewing these norms as products of a new and distinctive source of international law.[20]

The putative new source is identified with certain outcomes of community-wide forums like the U.N. General Assembly and ad hoc international conferences called to conclude multilateral conventions. When these outcomes—whether resolutions or convention provisions—are set apart from other outcomes of the same forum by being formal in language, distinctively labeled or not susceptible to reservation, and when they are overwhelmingly supported, they reflect an intent of the participants to create direct and immediate obligations for all members of the community. At a more abstract level, we are suggesting that an increasingly complex and institutionalized international system has, or will soon have, both the need and the means for a more nearly legislative form of law-making than presently exists.

Two things prevent this new source from becoming a reality: (1) the resistance displayed by Western statesmen, who see it as a threat to their historic control over international law, and (2) its concomitant lack of expression in a legal vehicle, which would establish its formal validity.[21] Western acquiescence would surely result in

19. Much of this discussion is occasioned by the 1969 judgment and other opinions of the International Court of Justice in the North Sea Continental Shelf Cases, conveniently found in 8 INT'L LEGAL MATERIALS 340-433 (1969). In addition to the several opinions in that case, see Baxter, *supra* note 11, at 57-74; D'AMATO, *supra* note 5, at 103-12; D'Amato, *Manifest Intent and the Generation by Treaty of Customary Rules of International Law*, 64 AM. J. INT'L L. 892 (1970); Notes & Comments, *Further Thoughts on a New Source of International Law; Professor D'Amato's "Manifest Intent,"* 65 AM. J. INT'L L. 774 (1971).

20. Notes & Comments, *supra* note 19, at 776-778.

21. Notes & Comments, *Professor Falk on the Quasi-Legislative Competence of the General Assembly*, 64 AM. J. INT'L L. 349, 349-55 (1970); D'Amato, *On Consensus*, 8 CANADIAN YEARBOOK INT'L L. 104 (1970). *See also* Goldie, *The North Sea Continental Shelf Cases—A Ray of Hope for the International Court?*, 16 N.Y.L. F. 327, 344 (1970) for a critique of the concern for formal validity, as displayed in this essay, and a brilliant characterization of processes that exceed in density and self-consciousness the processes whereby practice consolidates into customary law. To Goldie, they yield a

rapid validation of the new source through expression in a rule arising from an existing source. Continued resistance of the West makes validation highly unlikely in the short run, since the embodiment of a new source in general law implies a supportive consensus that includes all major groups of states. Nonetheless, pressure for legal expression can build up gradually, with the point being conceded piecemeal by states unwilling to accept it outright. This has always been the way customary law emerges in situations of mixed or inconsistent practice and, barring a major change of heart in the West, must be the specific method by which a rule providing for the formal validity of a new source will arise. It should be emphasized, however, that it is a process involving a lengthy, if indeterminate, passage of time.

There are scattered signs of the first tentative movement toward legal expression of such a new source. Simply in their perception of it, certain publicists are contributing to that movement. More importantly, at the public level the International Court of Justice in its 1969 Judgment on the *North Sea Continental Shelf Cases* gave some support, however ambiguous, to the idea.[22] Some of the dissenting opinions in those cases did so less ambiguously.[23] Further, the formulation of Article 53 of the Vienna Convention on the Law of Treaties can be adduced to support the notion that a new source of general norms is emerging. The important thing here is that a large number of states, including many Western states, have joined in an authoritative statement whose terms can be seen to imply the operation of a new source in what is admittedly a restricted context.[24] That context is of course the production of peremptory norms. While the source of peremptory norms where none existed previously is not delimited in this fashion, it seems quite likely that they too will arise from this new source.

---

law different enough from anything we have had until now to be called "international common law." This of course is the law whose source is described here in briefer, more general terms.

22. 8 INT'L LEGAL MATERIALS 340, 373-77 (1969). *See* Notes & Comments, *supra* note 19, for elaboration.

23. Significantly, these were the opinions of the Socialist Judges, Koretsky and Lachs. 8 INT'L LEGAL MATERIALS 340, 400-03 and 417-21 (1969).

24. R.D. Kearney and D.E. Dalton, from their perspective as members of the U.S. delegation to the Vienna Conference, have commented that "there was no substantial attack on the concept of *jus cogens*." Kearney & Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495, 536 (1971).

On the roll call vote on art. 53, Canada, Denmark, Federal Republic of Germany, Greece, Holy See, Italy, Netherlands, Spain, Sweden, and the United States were among those states voting in favor. Australia, Belgium, France, Liechtenstein, Luxemburg, Monaco, and Switzerland voted against. Ireland, New Zealand, Norway, Portugal, and the United Kingdom abstained. On the roll call vote for the convention as a whole, only France voted against, while Australia and Switzerland were among nineteen nations which abstained. U.N. Doc. A/CONF.39/11/Add. 1 (1969).

More specifically, either new peremptory norms are generated or existing norms are made peremptory. In either case, that *process* is conveniently described as a "source" of international law. Note that the term "source" refers not simply to the named thing, like custom or customs, but to a dynamic, if structured, process of law coming into being through the agency of whatever that thing happens to be. In the instance at hand, the process is novel and not well-delineated. To the extent that it exists, it is a *new* source, one that manifestly involves an intent of the community, as expressed in a community-wide forum, to create general norms directly.[25]

III

The concept of peremptory norms originated in the thinking of Western publicists. Their faith in Western culture and institutions shaken by the convulsions of recent decades, these individuals were prompted by a desire to strengthen the international legal order as a vehicle for justice and order. Yet the concept was embodied in the Vienna Convention at the insistence of Asian, African, and Latin American states for altogether different purposes—purposes which looked to the future rather than the past. Specifically, these states saw the concept of peremptory norms as both an immediate symbol and eventual instrumentality for restructuring the international legal order.[26]

It would be instructive at this point to view peremptory norms as a subset of "general principles" of international law, which is something they would seem to be almost as a matter of definition.

25. Editorial Comment, *supra* note 15, at 514, may well have come to the same conclusion about *non*-peremptory norms that change existing peremptory norms. At least in principle such a change is possible "when there is widespread international consensus to such a change." *Id.* Riesenfeld did not elaborate on this suggestive proposition.

26. As early as 1963, comments in the General Assembly's Sixth Committee on the International Law Commission's draft articles on peremptory norms reveal the affirmative orientation of Asian, African and Latin American states toward the concept. U.N. Doc. A/CN.4/175, at 267-279 (1963). Socialist states also displayed a favorable though more particularized view of the concept. They also saw peremptory norms as reinforcing the fundamental position of the principles of peaceful coexistence in the international legal order, because the content of peremptory norms could be ascertained by reference to such principles, known in the context of the United Nations as the principles of friendly relations. In general, Western states were much less enthusiastic about the whole idea of peremptory norms. They tended to view the ILC's formulation as not legally operationalized, on the grounds that there was neither a definitive list of peremptory norms nor the means for determining when a treaty was in conflict with such norms.

See also the comments of I.M. Sinclair, a member of the British delegation to the Vienna Conference, to the same effect. Sinclair, *Vienna Conference on the Law of Treaties*, 19 INT'L & COMP. L. Q. 47, 66 (1970).

Non-Western states have demonstrated an active concern for establishing the importance and defining the content of these general principles.[27] The latter task has proven exceedingly difficult and where successful has been undertaken at a level of considerable generality. Inasmuch as general principles are inefficient for identifying individual instances of deviant behavior, we might conclude that their function is not specifically constraint-oriented. The major alternative is that they perform a symbolic function. Concretely, this could mean that such principles stand as generally understood and accepted characterizations of the abiding concerns of the international community. Apparently, general principles perform a service comparable to myth in any culture. A substantial change in the thematic content of such symbols signals the emergence of new concerns in the community including particularly the concerns of its newer, more restless members.

The ability to shape the content of prevailing symbols is usually an important psychological value in its own right. Beyond that, the expectations of members of the community are continuously being conditioned by these symbols. Ultimately, control over symbols yields a cumulatively significant element of control over behavior. The value in having such control is material as well as psychological.

All this helps to explain why the general principles of international law have engaged so much interest among non-Western states in the forum of the General Assembly.[28] Equally, it helps to explain why peremptory norms, as the paramount category of norms with a symbolic thrust, have been so important to those same states. Thus far the relative lack of concern for the content of peremptory norms indicates that their existence as a category, however devoid of content, is itself a substantial change in the structure of the international legal order. Furthermore, non-Western states see themselves as eventually being able to specify the content of peremptory norms along lines of their choice.

These observations lead to a second general factor in explaining why non-Western states have become so concerned about peremptory norms. These states are deeply resentful of the grip that Western states have on the content of existing international law through their

27. For elaboration, *see* Onuf, *The Principle of Nonintervention, the United Nations, and the International System*, 25 INT'L ORG. 209 (1971).

28. An alternative explanation, usually offered in reference to Latin Americans, simply assumes that an enthusiasm for rhetoric over substance is a cultural artifact, unrelated to significant social function or even dysfunctional. For an example, see Dreier, *The Special Nature of Western Hemisphere Experience with International Organization*, in INTERNATIONAL ORGANIZATION IN THE WESTERN HEMISPHERE 12 (R.W. Gregg ed. 1968).

control over its traditional sources. Manipulation of symbols will eventually expedite a change in the content of specific norms, but non-Western states would like to hurry that process. The existence of a new source, having the attributes discussed in these pages, would be indispensable for this purpose. The process of renovating the legal order is further hastened if, instead of changing the content of myriad existing norms one by one through such a new source, attention were focused on a smaller number of norms which are designated as peremptory and thus central to the emerging legal order. The consequence would be to enormously amplify the amount of change actually undertaken. Effectively, the designation of some few new norms as peremptory obviates the need to change everything at once to accomplish great change. It recognizes that some norms, especially those called peremptory, are *constitutive* of the legal order, while the rest are merely *declaratory* of the effect of the legal order in stipulated circumstances.[29]

Conceived this way, generally stated peremptory norms are simultaneously the decisive symbols of the international legal order and its constitutive propositions. Moreover, these two roles are powerfully and reciprocally reinforcing. If this is an accurate representation of the situation, then the struggle over peremptory norms first as a category, and then as items whose content is to be elaborated, and the emergence of a new source of international law are related developments which are integral to the future of the international legal order.

With so much ultimately at stake, it is hard to believe that the participants in the Vienna Conference never really thought about the implications of the way they worded Article 53. Obviously, they could have been careless or simply absorbed in other concerns.[30] At least on the surface, it does seem to be true that the matter was never faced; one Western spokesman raised a series of unanswered questions about the source and nature of peremptory norms, only to be completely ignored in subsequent debate.[31] Yet statesmen are generally

29. The distinction between constitutive and declaratory effects, long familiar in recognition theory, also brings to mind the work of Myres McDougal and associates in connection with constitutive as opposed to public order decisions. The similarity is more apparent than real. *See* the succinct statement in McDougal, Lasswell, & Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188, 297 (1968).

30. Kearney & Dalton, *supra* note 24, thought that "the real problem was how to define the test for recognizing a rule of *jus cogens*." This concern, focused by an amendment of the United States, did dominate debate, as summarized in *id.* at 536-38.

31. M. Bindschedler (Switzerland) asked: "First, how did a new peremptory norm of international law emerge? Secondly, was a peremptory norm engendered by custom,

careful not to acquire unwanted obligations by being absent-minded. Alternatively, there may have been a tacit agreement not to raise these issues, knowing full well what their implications were, because doing so would merely expose sensitivities unnecessarily. The desired result may possibly have been to intentionally obscure the intent of Article 53.

In contrast to the generation of norms through the new source in question, where intent is decisive, custom as a source is ultimately dependent on behavior, to which intent is contributory along with many other factors. Obviously, where intent is clear, its impact is heightened. Although no such clarity of intent surrounds the drafting of Article 53, the very act of drafting it in such a way as to imply the existence of a new source is indicative behavior. It promotes, however modestly, the emergence of a *customary* rule expressing that new source. Much more in the way of germane behavior is required, particularly if the new source is not to be restricted to the narrow domain of peremptory norms. Some of that behavior may even come in the form of responses to Article 53 as a significant expression of a new source, regardless of whether that was even the intention.

---

by a treaty, or by both? Thirdly, to become a peremptory norm, did a rule have to be accepted by all States of the international community, or only by a majority of those States, and, in the latter case, by what majority? Fourthly, must a new peremptory norm contain an express declaration concerning its peremptory character, or did that character follow from the content of the new norm? Fifthly, was a peremptory norm valid only for the parties to a treaty or for all States? The Swiss delegation believed that the former presumption was correct." United Nations Conference on the Law of Treaties, 22d Plenary Meeting, U.N. Doc. A/CONF.39/11/Add. 1 (1969).