

MERLIN M. MAGALLONA'S *JUS COGENS* THEORY

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I. Introduction

As many of his former students would attest, one of Dean Merlin M. Magallona's favorite topics is the concept of *jus cogens* norms. This paper organizes and summarizes Magallona's ideas concerning *jus cogens* norms (collectively referred to as "Magallona's *jus cogens* theory"). This paper also compares and analyzes this theory in light of current developments, particularly the International Law Commission's "Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (*jus cogens*)" (Conclusions). It will be noted that many of Magallona's ideas, written decades before, find confirmation in the Conclusions.

II. The Draft Conclusions of the ILC

In 2014, the International Law Commission (ILC) began considering the topic of "*jus cogens*". In 2015, the ILC appointed Dire D. Tladi as Special Rapporteur for the topic. From 2016 to 2022, the ILC considered five reports of the Special Rapporteur. During this time, the ILC also considered the draft conclusions proposed, which were referred to a drafting committee. During this period, the ILC decided to change the title of the topic from "*jus cogens*" to "peremptory norms of general international law (*jus cogens*).” When completed, the ILC transmitted the draft conclusions to governments for comments and observations. The final draft had twenty-three draft conclusions and an annex containing a non-exhaustive list of peremptory norms. The ILC also issued commentaries to the Conclusions (Commentary), which further explained the Conclusions.

III. Analysis of Magallona's *Jus Cogens* Theory

A. Definition, Elements, and Nature of *Jus Cogens*

1. Definition

Magallona does not provide his own definition of *jus cogens* but adopts the definition provided by Article 53 of the Vienna Convention on the Law of Treaties (VCLT) (i.e., “a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted”). The Conclusions also adopt this definition.¹

From this definition, Magallona identifies two elements: 1) a norm of general international law, and 2) accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted. The Commentary also identifies the same elements.² In fact, these elements constitute Conclusion 4 (Criteria for the identification of a peremptory norm of general international law).

2. Elements

a) Norm of General International Law

Magallona notes that the first element “requires that this norm should express the will of at least a broad majority of States as a rule binding on them.”³

In contrast, the term “general international law” in the Conclusions “refers to the scope of applicability of the norm in question,”⁴ such that it “must have equal force for all members of the international community.”⁵ Closer scrutiny of the Conclusions would reveal that what is required is that the *jus cogens* norm

¹ See Int'l Law Comm'n, Rep. on the Work of Its Seventy-Seventh Session, U.N. Doc. A/77/10, at 12 (2022) [hereinafter 'DC'].

² *Id.* at 29 para. 3.

³ Merlin M. Magallona, *International Law Issues in Perspective* 11 (1996).

⁴ DC, *supra* note 1, at 31 para. 2.

⁵ *Id.* (quoting *North Sea Continental Shelf, Judgment*, 1969 I.C.J., at pp. 39–40, para. 63.)

must emanate from the three formal sources of law (i.e., treaties, customs, and general principles of law).⁶

Thus, while Magallona considers the requirement as referring to the number of states, the Conclusions refer to the source of the norm. However, the Conclusions do require that the peremptory be accepted and recognized by a large majority of states. But this requirement falls under the second element of “acceptance and recognition” and not under the first element of it being a norm of general international law.

But this rule on sources is consistent with Magallona’s view that a *jus cogens* norm must either be a customary or conventional rule.⁷ The Conclusions also identify customs and treaties as sources or bases of peremptory norms. But it indicates that “[c]ustomary international law is the most common basis.”⁸ On the other hand, “[t]reaty provisions and general principles of law may also serve as bases.”⁹ The Commentary explains that:

The words “may also” are meant to indicate that while there is little practice to support the emergence of peremptory norms from these sources, the possibility of these other sources of international law forming the basis of peremptory norms of general international law (*jus cogens*) cannot be a priori excluded.

Thus, while the Conclusions recognize all formal sources under Article 38 as bases for peremptory norms, it admits that currently all peremptory norms are customary in nature.

b) Accepted and Recognized by the International Community of States as a Whole as a Norm from which No Derogation is Permitted

Magallona argues that a *jus cogens* norm must either be a universal one (i.e., “accepted as binding by all members of the international community”¹⁰) or

⁶ DC 5.2, *Id.* at 12.

⁷ Magallona, *supra* note 3, at 12.

⁸ DC 5.1, A/77/10, *supra* note 1, at 12.

⁹ DC 5.2, *Id.*

¹⁰ Magallona, *supra* note 3, at 12.

“recognized by a great majority of States.”¹¹ He interprets the phrase “as a whole” as being “intended to preclude the possibility that an objection on the part of any state may operate as a veto to the characterization of a norm as *jus cogens*.”¹² Thus, “universal consent or unanimity is not intended as a basis for the determination of a *jus cogens* norm.”¹³ This aligns with the Conclusions that require that the acceptance and recognition be made “by a very large and representative majority of States [is] required for the identification of a norm,”¹⁴ and that “acceptance and recognition by all States is not required.”¹⁵

Magallona’s opinion that states may not object to the existence of a peremptory norm is also supported by the Conclusions, which provide that the persistent objector rule does not apply to peremptory norms.¹⁶

i. Magallona’s Dilemma

Curiously, Magallona argues that despite the fact that “[a] dissenting state cannot stop the binding operation of a [*jus cogens* norm]...[t]his should not mean...that such norm binds the dissenting state against its will.”¹⁷ With this statement, Magallona seems to be suggesting the possibility of a persistent objector rule applying to a *jus cogens* norm. As previously noted, under the Conclusions, this is not the case.¹⁸ The Commentary explains that the inapplicability of the persistent objector rule to peremptory norms “flows from both the universal application and hierarchical superiority of peremptory norms.”¹⁹

However, Magallona elaborates on his view by stating:

Norms of international law are created by agreement of States and *jus cogens* norms are not in any way distinct in that respect. **It is not**

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 13.

¹⁴ DC 7.2, *supra* note 1, at 12.

¹⁵ *Id.*

¹⁶ DC 14.3, *Id.* at 14.

¹⁷ Magallona, *supra* note 3, at 13.

¹⁸ DC 14.3, *supra* note 1, at 14.

¹⁹ *Id.* at 58 para. 10.

realistic, however, to think that a State would set itself apart from a *jus cogens* norm which corresponds with the interests of the great majority of States. Its relations with the rest of the members of the international community may precisely operate through the acceptance of that *jus cogens* norm.²⁰ (emphasis supplied)

Analyzing this closely, it would seem that from Magallona's *legal* perspective, a *jus cogens* norm is a product of consent; it would necessarily follow that a State cannot be subjected to a *jus cogens* norm without its consent. But from his *political* or *realist* perspective, Magallona argues that no state would reject a *jus cogens* norm.

Magallona's dilemma is in reconciling his argument that *jus cogens* norms emanate from the consent of states and their universal applicability. In customary international law, this dilemma is resolved somewhat by the possibility of a state being a persistent objector. However, the possibility of a state being exempted from a customary rule does mean that universal application is only a general rule and not an absolute rule. In the case of *jus cogens* norms, the intention seems to be that universal application is an absolute rule. As the Commentary explains, both the universal application and hierarchical superiority of these norms demand that there be no exemption.

But *jus cogens* norms being universally applicable does not necessarily conflict with the argument that their existence is based on the consent of states.²¹ The Conclusions provide that one of the essential characteristics of peremptory norms is that they "reflect and protect fundamental values."²² These fundamental values are "particular values shared by the international community."²³ It may be argued that these fundamental values are shared by all states without objection.

ii. *Consent to Invalidate*

²⁰ Magallona *supra* note 3, at 13.

²¹ It must be remembered that Magallona's insistence on this is intended to reject the notion that *jus cogens* norms emanate from natural law. Thus, if it is admitted that *jus cogens* norms are a product of the natural law perspective, then there would be no dilemma.

²² DC 2, *supra* note 1, at 11.

²³ *Id.* at 18 para. 2.

Magallona further says that the second element “calls for the expression of their consent on the specific character of a general norm as *jus cogens* norm, i.e., as a norm accepted by them as restricting their treaty-making competence and having the effect of invalidating their agreements contrary to its mandate.”²⁴ The Conclusions do not consider this as an element but a legal consequence of *jus cogens* norms. In fact, the Conclusions go beyond this. Treaties are not the only sources of law invalidated when in conflict with peremptory norms. Customary norms,²⁵ obligations created by unilateral acts,²⁶ and obligations created by acts of international organizations²⁷ that are in conflict with peremptory norms are also invalidated.

B. Magallona’s Domestic Law Analogy

Magallona argues that *jus cogens* norms exist in the domestic legal system. He explains that “[i]n the general theory of law, every legal system is said to contain general norms of imperative character which the subjects of law cannot modify or set aside in their contractual relations.”²⁸ *Jus cogens* “constitute the irreducible minimum principles in the legal system.”²⁹ Thus, “the concept of *jus cogens* is identified with the concept of *ordre public* in municipal law, understood as the aggregate of fundamental norms on ‘public policy and good morals.’”³⁰ The rationale for the preeminence given to *jus cogens* is the “superior interests of the community.”³¹

The idea that domestic *jus cogens* norms consist of *irreducible minimum principles*, identified with the *aggregate of fundamental norms*, and involve *superior interests of the community* is comparable to the Conclusions when it states that peremptory norms “reflect and protect fundamental values of the international community.”³² The Commentary explains that the words *reflect* and *protect* “underline the dual function that fundamental values play in relation to

²⁴ Magallona *supra* note 3, at 11.

²⁵ DC, *supra* note 1, at 14.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Magallona *supra* note 3, at 3.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² DC, *supra* note 1, at 11.

peremptory norms.”³³ Specifically, the word “reflect” means that fundamental values “provide ...a rationale for the peremptory status of the norm [and] seeks to establish the idea that the norm in question gives effect to particular values.”³⁴ Thus, the term provides for the nature of peremptory norms, while the word “protect” indicates the purpose of peremptory norms in relation to fundamental values. This implies that for every peremptory norm, there must be a fundamental value reflected and protected. Thus, it may be argued that Magallona’s domestic law analogy used to justify the rationale of peremptory norms is reflected in the Conclusions.

C. Jus Cogens in Theory versus Practice

Magallona recognizes that *jus cogens* has a history going as far back as Grotius and Vattel.³⁵ He notes, however, that:

[W]hile a broad agreement among reputable publicists supports the view that such norms exist on the international plane, many of their *de lege ferenda* prescriptions on the nature of *jus cogens* norms are quite apart from the historical realities and practices of states and are not in keeping with the legal nature of the international community itself.³⁶

He seems to be arguing that, despite the widespread acceptance of the existence of *jus cogens* norms in the international plane, historically, actual state practice and the nature of the international community of states do not conform to what *jus cogens* requires. Thus, while it is accepted in theory, it seems to be rejected in practice.

This apparent lack of practical application of the *jus cogens* concept is echoed in more recent scholarship. Shelton argues that the concept of a peremptory norm “is largely if not entirely a literary construct, a theoretical

³³ *Id.* at 18 para. 2.

³⁴ *Id.*

³⁵ Magallona, *supra* note 3, at 4.

³⁶ *Id.*

proposal for what ought to be, rather than what was or is.”³⁷ Thus, the only thing *jus cogens* provides is the “symbolic expression or declaration of societal values.”³⁸

It is true that there has been no treaty invalidated on the grounds of conflict with a peremptory norm. However, it may be argued that the absence of treaties being invalidated on the basis of being inconsistent with a peremptory norm is proof of the effectiveness of the concept. This is because this means that states do not enter into treaties conflicting with peremptory norms. Furthermore, there have been increasing references to peremptory norms in international courts, regional courts, national courts, States, and other actors.³⁹

D. Problems with the Municipal Law Analogy

Magallona argues that “[s]erious questions may precisely arise from an uncritical transference of *jus cogens* as a municipal law concept into international law.”⁴⁰

1. Overriding State Sovereignty

His concern is that the municipal law analogy may support “the existence of an international public order overriding state sovereignty, implying that ...*jus cogens* could acquire validity as legal norms independent of the consent of the individual members of the international community.”⁴¹ The result would be “plac[ing] the concept of *jus cogens* along the thinking which rejects the juridical equality of States.”⁴² He objects to a situation where “a group or majority of States may dictate international-law rules upon the rest of the international community.”⁴³

International law, following the will of the majority, seems to be exactly what the Conclusions adopt. Conclusion 7 paragraph 2 provides that “Acceptance

³⁷ Dinah Shelton, *Sherlock Holmes and the Mystery of Jus Cogens*, 46 Neth. Y.B. Int’l L., 24 (2016).

³⁸ *Id.* at 35.

³⁹ Hélène Ruiz Fabri, *Enhancing the Rhetoric of Jus Cogens*, 23, Eur. J. Int’l K., 1049, (2012); DC, *supra* note 1, at 16-17 para 2.

⁴⁰ Magallona. *supra* note 3, at 4.

⁴¹ *Id.* at 4-5.

⁴² *Id.* at 5.

⁴³ *Id.*

and recognition by a very large and representative majority of States is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*); acceptance and recognition by all States is not required.”

Perhaps Magallona's concern can be addressed by the fact that *jus cogens* norms must reflect and protect fundamental values. As mentioned previously, one of the three essential characteristics of any *jus cogens* norm is that it must reflect and protect a fundamental value of the international community.

2. *Argument for Rejection*

Magallona's other concern is that a “municipal law analogy has also been made a basis for rejecting international *jus cogens*.”⁴⁴ The argument is that “*jus cogens* could not yet mature in the field of international law because this concept ‘presupposes the existence of an elective *de jure* order.’”⁴⁵ This *de jure* order is said to require “legislative and judicial machinery, able to formulate rules of public policy and, in the last resort, can rely on overwhelming physical force.”⁴⁶ Thus, *jus cogens* can emanate from municipal law but not from international law because the latter lacks the structures that the former has.

Perhaps this concern can be addressed by the fact that the domestic law version of a *jus cogens* norm is only cited as an analogy in the process of explaining the reasonableness of the peremptory norm concept in international law. An analogy does not require perfect correspondence to be valid. Furthermore, there is no domestic *jus cogens* norm that is being transplanted into the international sphere. If that were the case, then looking into whether there are structures in international law similar to domestic law structures (that made the norm enforceable) may be necessary. But such is not the case. In fact, based on the list of peremptory norms annexed to the Conclusions, there is no indication of any *jus cogens* norm which originated from the domestic legal system.

3. *Magallona's Counterargument*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at n.9, quoting George Schwarzenberger & E.D. Brown, *A Manual of International Law*, 29–30 (6th ed. 1967).

Magallona addresses the said concerns by arguing that:

The emergence of the concept of *jus cogens* in positive international law is by no means a *lex lata* transformation of this concept as understood in such abstract, logical or natural law sense, particularly in its strict municipal law analogy. It is rather defined by the peculiar nature of international law, i.e, by the condition that in the international legal order the subject (States) of law are themselves the creators of the law on the basis of sovereign equality.⁴⁷

Magallona's argument is that *jus cogens* does not arise simply from natural law theorizing or copying from municipal law. *Jus cogens* norms exist because they are created by states. He concludes that "*jus cogens* norms are strictly inter-state law and reject a supranational source."⁴⁸

As a result, *jus cogens* norms do not override sovereignty. Neither does the domestic law analogy cause any problems because the concept arises purely from the international legal system. This is further supported by the requirement that *jus cogens* norms must emanate from the three formal sources of law (i.e., treaties, customs, and general principles of law).

E. Jus Cogens based on the consent of states

1. Consensual Nature

Contrary to the common view that the *jus cogens* concept is based on natural law, Magallona argues that it emanates from the positivist perspective. He states that "the process of identifying a general norm of international law as *jus cogens* is definitely a consensual mechanism."⁴⁹

Magallona points out "[t]hat it is the agreement of States which invests a norm with peremptory character."⁵⁰ This agreement can be seen in the

⁴⁷ *Id.* at 6.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 11.

requirements or elements for the identification of *jus cogens* norms under the VCLT. This requirement is also seen in the Conclusions.⁵¹

As further proof of consensual nature of *jus cogens* norms, Magallona points to the dispute settlement procedure when the *jus cogens* nature of a norm is invoked to invalidate a treaty. This consensual nature is made evident by the fact that a treaty cannot be nullified even on the basis of conflict with a *jus cogens* norm without the consent of parties. This procedure is also found in the Conclusions.⁵²

Thus, “[t]hat certain rules are normatively superior to others is brought about only by the concordance of wills of States themselves.”⁵³

2. *Consent Alone is Insufficient*

Despite its consensual nature, Magallona clarifies that a *jus cogens* norm does not arise simply by reason of the agreement of states.⁵⁴ Assume that treaty parties stipulate that “no derogation from that stipulation is to be permitted, with the intended result that another treaty which conflicts with that provision would be void.”⁵⁵ Such a stipulation “does not lend *jus cogens* character to that treaty provision.”⁵⁶ Magallona bolsters his argument by quoting the ILC: “It is not the form of a general rule of international law but the particular nature of the subject matter with which it deals that may...give it the character of *jus cogens*.”⁵⁷ In other words, there is more to a *jus cogens* norm than being non-derogable. This appears to be consistent with the Conclusions, as Conclusion 2 provides for the nature of *jus cogens* norms. Based on this conclusion, a *jus cogens* norm must have three essential characteristics. First, the norm must reflect and protect fundamental values of the international community. Second, the norm must be universally applicable. Third, the norm must be hierarchically superior to other rules of international law.

⁵¹ DC, *supra* note 1, at 12.

⁵² DC 21, *Id.* at 15-16.

⁵³ Magallona, *supra* note 3, at 29.

⁵⁴ *Id.* at 11.

⁵⁵ *Id.*

⁵⁶ *Id.* at 11-12.

⁵⁷ *Id.* at 12.

Magallona clarifies that in his view, the *particular nature of the subject matter* “does not refer to some jus naturalistic factors outside the consensual regime of states.”⁵⁸ Instead, he says that the phrase is to be “interpreted as indicating the level of importance or special relevance by which the States regard the function of a particular norm of general international law.”⁵⁹ Thus, he agrees with the idea of fundamental principles if these arise from the “importance” or “relevance” given to these principles by states, but not if they arise from natural law.

F. Identification of Jus Cogens

Magallona points out that “*jus cogens* norms are to be identified by the [s]tate[s] themselves in their actual experience of struggle and cooperation.”⁶⁰ He adds that:

[I]t is the intention of the International Law Commission (ILC) in drafting the Convention rule on *jus cogens* to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals.⁶¹

Magallona agrees with this procedure, explaining that “the approach of the ILC emphasizes...more the fact that the identification of *jus cogens* norms is determined by the very real and concrete interests of States and therefore springs from necessity...and not from some abstract considerations extraneous to international life.”⁶²

The process of identifying *jus cogens* norms under the Conclusions supports Magallona’s view. Under Conclusion 4, a *jus cogens* norm must comply with certain criteria. First, it must be a norm of general international law. Based on Conclusion 5, this means that the norm must be a custom, a treaty provision, or a general principle of law. All these formal sources of law require the consent of states. Furthermore, the second requirement under Conclusion 4 is that the norm

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 6.

⁶¹ *Id.*

⁶² *Id.* at 7.

must be accepted and recognized by the international community of States as a whole.

G. Multilateralism as a Reason for the Hierarchy of Norms

Magallona notes that the development of multilateralism “as the most appropriate medium of achieving international cooperation”⁶³ has resulted in states prioritizing commitments in multilateral treaties over bilateral treaties. Thus, “States achieve agreement to structure their obligation into a hierarchy, thus upholding some norms or principles of law as superior to others.”⁶⁴ Thus, he argues that the current state of the international community accepts the idea of hierarchy of norms and is ready to accept the concept of *jus cogens* norms.

This forms part of Magallona's *jus cogens* theory that the concept arises from the development of international law. He says that “the rise of *jus cogens* in positive international law goes hand-in-hand with the concrete historical development of the international society.”⁶⁵ He adds:

Conditions for the reception of international *jus cogens* have matured in the relations of states, not for reason of abstract rationality but out of concrete political interests and social or economic requirements involved in the struggle and cooperation of States, in the pursuit of solution to compelling problems of the moment.⁶⁶

H. Effect of Jus Cogens Norms

1. When a Treaty is Invalidated

Magallona identifies an apparent conflict in the VCLT when a treaty is invalidated under Article 53 for being in conflict with a *jus cogens* norm at the time of its conclusion. Under Article 71, states have a duty to “eliminate as far as possible the consequences of any act performed in reliance on any provision which

⁶³ *Id.* at 8.

⁶⁴ *Id.* at 9.

⁶⁵ *Id.*

⁶⁶ *Id.*

conflicts with the peremptory norm.”⁶⁷ He points out that these words “are susceptible to the interpretation that the provisions of an invalid treaty are separable and that the duty of the parties to eliminate the consequences of any act arising from the treaty may not extend to those provisions which are not directly affected by the illegality.”⁶⁸ But this interpretation would conflict with Article 44 (5) which prohibits the separation of provisions of a treaty invalidated under Article 53. Magallona states that “together, ...Article 71 and Article 44(5) would create an absurd situation: separable consequences from non-separable provisions of an illegal treaty.”⁶⁹

Magallona reconciles this conflict by clarifying that Article 71 does not mean separability but only that “some consequences arising from a treaty which is [invalidated by]⁷⁰ Article 53 may be saved from the nullifying effect of a *jus cogens* norm.”⁷¹ He adds that the interpretation that “conflict with a *jus cogens* norm does not totally wipe out the consequences of a void treaty”⁷² is supported by Article 69 (2)(b), which provides that “acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty.” Applying this rule, Magallona concludes that these acts *performed in good faith* “should be deemed as valid and subsisting on the basis of a new agreement, expressly or tacitly made, which the parties may bring about as part of their effort to bring their mutual relations in line with the relevant *jus cogens* norm.”⁷³ Thus, “[a]ny attempt to maintain the validity of these acts cannot be anchored on any of the provisions of the invalidated treaty.”⁷⁴

The question, however, is what if the parties to the invalidated treaty do not make an explicit agreement to preserve such good faith acts? Magallona suggests that the agreement can be tacit. But supposing the parties make no effort

⁶⁷ Article 71 (1) (a) VCLT.

⁶⁸ MAGALLONA, *supra* note 3, at 15.

⁶⁹ *Id.*

⁷⁰ The original term used by Magallona was “illegal”. The author believes this is not accurate because what is being discussed is a treaty with “illegal” and “legal” provisions, legality being determined by whether or not they conflict with a *jus cogens* norm. Thus, illegality pertains to the provisions and not to the entire treaty itself. So, it is more accurate to say that the treaty is invalidated or void but it is not necessarily illegal in its entirety.

⁷¹ MAGALLONA, *supra* note 3, at 16.

⁷² *Id.*

⁷³ *Id.* at 16-17.

⁷⁴ *Id.* at 17.

to preserve such consequences, there would be no tacit agreement, and the parties would be in breach of Article 71. But any compliance with Article 71 would automatically mean a new tacit agreement is created. This would result in a strange situation wherein the agreement is the result of the compliance rather than its cause. Perhaps the fiction of a new agreement is not necessary, since Article 71 itself is the basis of the obligation to preserve good faith consequences.

2. *Procedure for Invoking Jus Cogens Norms*

Magallona points out that “[a] *jus cogens* norm does not automatically invalidate a treaty conflicting with it. The Convention prescribes a particular procedure to be followed by a party to a treaty in establishing its invalidity.”⁷⁵ He also cites Article 65 as outlining the procedure for invoking a *jus cogens* norm to invalidate a treaty.

Magallona’s view that invalidating a treaty on the basis of conflict with a *jus cogens* norm is not automatic and is consistent with the Conclusions. Conclusion 21 requires that a State which invokes a *jus cogens* norm as a ground for the invalidity or termination of a rule of international law should do so by notify the other States concerned in writing.⁷⁶ The notice should also indicate the measure proposed to be taken with respect to the rule of international law in question.⁷⁷ But even after notice, the invoking state can only carry out the proposed measure if none of the other States “raises an objection within a period which, except in cases of special urgency, will not be less than three months.”⁷⁸ In case there is an objection, the States concerned should first resolve the dispute under Article 33 of the UN Charter or later through the International Court of Justice or some other procedure entailing binding decisions.⁷⁹ Pending the resolution of the dispute, the invoking state cannot carry out its proposed measure.

Magallona further adds that “[t]he basic limitation in the effective enforcement of *jus cogens* norms in the regime of the law of treaties is that this

⁷⁵ *Id.* at 19.

⁷⁶ DC 21 (1), *supra* note 1, at 81 par. 1.

⁷⁷ *Id.*

⁷⁸ DC 21 (2), *Id.* at 81.

⁷⁹ DC 21 (3), *Id.* at 81.

ground of invalidity may be invoked only by the parties to the Convention.”⁸⁰ Thus, “it is not possible for a third State (not a party to the treaty under question) to invoke the *jus cogens* ground in the attempt to establish its invalidity or bring about its termination.”⁸¹

However, if Conclusion 21 is considered as binding, then the procedure is no longer limited to parties to the VCLT. Thus, even non-parties to the VCLT may be able to invalidate treaties on the ground of conflict with a *jus cogens* norm.

Magallona also laments that:

The other basic limitation to invalidation or termination on [the] *jus cogens* ground is that the Convention in effect requires that this be established by the consent of the parties to the treaty in question. In fact, the serious implication of this consensual requirement is that in the event no agreement is reached by the parties to invalidate or terminate the treaty by authority of Article 53 or 64 of the Convention, it would seem that nothing can be done about the treaty in question of the part on the international community. Consequently, the treaty in conflict with the peremptory norm of international law would continue to subsist.⁸²

This issue is resolved somewhat by the third paragraph of Conclusion 21. This paragraph provides that if, after applying Article 33 of the UN Charter:

[N]o solution is reached within a period of twelve months, and the objecting State offers to submit the matter to the International Court of Justice or to some other procedure entailing binding decisions, the invoking State should not carry out the measure which it has proposed until the dispute is resolved.

The referral to the International Court of Justice (ICJ) is not found in Article 65 of the VCLT. But the same problem identified by Magallona may arise because submission of the dispute to the court requires the consent of both

⁸⁰ Magallona, *supra* note 3, at 19.

⁸¹ *Id.* at 23.

⁸² *Id.* at 22-23.

parties. It may be assumed that the invoking state would give its consent because it wasn't the treaty provision invalidated, and it cannot act until the issue is resolved. However, the objecting state must offer to bring the dispute to the ICJ. This state can simply not offer or refuse to bring the dispute to the ICJ, and the provision in question would remain in effect. But in the Commentary, the ILC explained that paragraph 3 is intended as a "submission of an unresolved dispute to judicial settlement of disputes."⁸³

3. *Effect of Jus Cogens Norm on Existing Treaties*

Magallona identifies a problem and questions "whether Articles 53 and 64 apply in a situation where the treaty in question has been concluded before the Convention's entry into force but the time of conflict between the treaty and a *jus cogens* norm comes after its entry into force."⁸⁴ Based on Article 4, the VCLT "applies only to treaties which are concluded by States after the entry into force of the [VCLT] with regard to such States." Magallona admits that a "plain application of the non-retroactivity rule in the Convention would seem to exclude such situation from the coverage of the Convention's rules on *jus cogens*."⁸⁵ But he argues that:

[T]his same situation could perfectly come within the normal operation of Article 64 at least: an existing treaty, validly concluded before the Convention's entry into force becomes void and terminates for the reason that it comes into conflict with a new *jus cogens* norm which emerges after the Convention comes into force.⁸⁶

He quotes from the ILC Commentaries,⁸⁷ where it is stated that:

Manifestly, if a new rule of that character – a new rule of *jus cogens* – emerges, its effect must be to render void not only future but *existing* treaties. This follows from the fact that a rule of *jus cogens*,

⁸³ DC, *supra* note 1, at 83-84 par. 9.

⁸⁴ Magallona, *supra* note 3, at 24-25.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Cited as "ILC Commentaries, p. 81."

is an overriding rule depriving any act or situation which is in conflict with it of legality.⁸⁸

Magallona suggests that “by ‘existing treaties’ the Commission ...was referring to treaties already concluded before the convention enters into force.”⁸⁹ He argues that “[i]t would be reasonable to interpret the Commission’s view as meaning that existing treaties, *although concluded before the Convention’s entry into force*, are affected by the invalidating force of a *jus cogens* norm.”⁹⁰ He adds:

In this case, the non-retroactivity rule in Article 4 does not relate so much to the fact that the treaty in question was concluded before the Convention’s entry into force – which is the literal requirement of that article – as to the non-retroactive effect of a particular *jus cogens* norm on a treaty concluded before the Convention’s entry into force. To determine the correct application of the non-retroactive rule under Article 4 in relation to Article 64, the relevant issue is *not* whether the treaty in question was concluded before or after the Convention’s entry into force, but from what point of time after the Convention’s entry into force should a *jus cogens* norm invalidate that treaty.

He seems to be suggesting that Article 4 does not prohibit the application of Article 64⁹¹ to treaties concluded before the entry into force of the VCLT. Instead, Article 4 only affects the point in time when the *jus cogens* norm would invalidate the treaty.

Magallona buttresses his point by arguing that:

On the basis of the nature of the *jus cogens* rule in Article 64, the more precise non-retroactivity rule applicable is not Article 4, but paragraph 2(b), Article 71, which provides, *inter alia*, that the termination of a treaty under Article 64 “does not affect any right,

⁸⁸ Magallona, *supra* note 3, at 25.

⁸⁹ *Id.* at 26.

⁹⁰ *Id.*

⁹¹ Article 64 proves: If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

obligation or legal situation of the parties created by the execution of the treaty prior to its termination.”

Hence, while under Article 53 the point of reference for the operation of the non-retroactivity rule is the date of the Convention's entry into force, under Article 64 it is the time of emergence of the *jus cogens* norm.⁹²

Magallona's arguments are a radical interpretation of the VCLT, considering that it conflicts with the literal interpretation of Article 4 of the VCLT. His argument would require that the existence and effect of *jus cogens* norms are customary in nature and not solely depend on the VCLT. While this position lacked support at the time Magallona made the argument, the Conclusions now support it. In this sense, his arguments were ahead of his time.

4. *Two Categories of Jus Cogens*

Magallona says that the use of the term “new” in Article 64 creates two categories of *jus cogens* norms: (1) those existing on the date of the Convention's entry into force which takes on binding force upon the entry into force of the Convention and (2) those which become *jus cogens* norms only sometime later after the Convention has entered into force.

He argues that:

If the term “new peremptory norm of general international law” in Article 64 refers only to the second category, treaties existing at the time the Convention enters into force are not affected by the operation of that “new” *jus cogens* norm. Neither are those treaties affected by the application of Article 53, because they were concluded before the Convention comes into force. The result is that they continue to subsist despite their incompatibility with the *jus cogens* norms which come into effect as such upon the entry into force of the Convention. The lacunae may be so seriously broad as to nullify the whole rationale of introducing the concept of *jus cogens* into positive international law through the Convention. In effect, the former legal regime, in conflict with the *jus cogens* norms

⁹² Magallona, *supra* note 3, at 26.

at the time the Convention take effect, cannot be brought into conformity with the peremptory norms of the new international legal order.⁹³

It is submitted that the inability of *jus cogens* norms to affect pre-VCLT treaties is the result of the Article 4 non-retroactivity rule. In this way, Magallona's arguments here go back to his objection to the interpretation that Article 4 prevents the application of Article 64 to pre-VCLT treaties. Magallona's solution to the problem, which he identified, is to consider as a new norm under Article 64, norms which existed upon the entry into force of the VCLT.⁹⁴ This would allow the invocation of Article 64 to "adjust" the pre-VCLT regime to conform to *jus cogens* norms.

It is submitted that what determines whether a norm is "new" in the context of Article 64 is not the entry into force of the VCLT but the entry into force of the treaty sought to be invalidated. Thus, a *jus cogens* norm is "new" in the context of Article 64 if it emerges after the treaty in question. If *jus cogens* norms are considered to have existed even prior to the VCLT⁹⁵ or are considered customary as the Conclusions suggest, then it is irrelevant that the treaty in question was concluded prior to the entry into force of the VCLT.

5. *Modification of Jus Cogens Norms*

Magallona posits that "certain State practices, may develop contrary to an existing *jus cogens* norm and, in the absence of significant protest, broaden into a customary rule adhered to by the majority of States, thus gaining the status of a norm of general international law."⁹⁶

However, under the Conclusions, this is no longer possible because a custom in conflict with a *jus cogens* norm cannot emerge. Conclusion 14 provides that "a rule of customary international law does not come into existence if it would

⁹³ *Id.* at 27.

⁹⁴ *Id.*

⁹⁵ In this view, the VCLT did not create *jus cogens* norms but only recognized and put into writing what had already existed. Similar to the declaratory and constitutive theory of recognition of states, the VCLT would only be declaratory and not constitutive in nature.

⁹⁶ Magallona, *supra* note 3, at 28.

conflict with an existing peremptory norm of general international law (*jus cogens*).”

While this resolves the issue raised by Magallona, this rule raises another issue. How can existing *jus cogens* norms be modified? According to Conclusion 5, *jus cogens* norms must be sourced from customary international law (CIL), treaty provisions, or general principles of law. It also states that CIL is the most common basis or source. While treaty provisions and general principles of law “may also serve as bases”, the ILC admits that “there is little practice to support the emergence of peremptory norms from these sources.”⁹⁷ Thus, a new *jus cogens* norm that can modify an existing *jus cogens* norm (a “modifying norm”) must first be a custom, treaty provision, or general principle of law. But as mentioned previously, a custom that is in conflict with an existing *jus cogens* norm can never emerge. If a modifying norm cannot even be a custom, how can it become a *jus cogens* norm to challenge an existing *jus cogens* norm? The same can be said for treaty provisions. Conclusion 10 provides that a treaty is void if, at the time of its conclusion, it conflicts with a *jus cogens* norm. It categorically states that “[t]he provisions of such a treaty have no legal force.” Thus, how can a modifying norm from a treaty provision ever arise? The only possible option seems to be a modifying norm arising from general principles of law. Interestingly, the Conclusions do not provide for a rule invalidating a general principle of law for being inconsistent with the *jus cogens* norm.

IV. Conclusion

Magallona's *jus cogens* theory, written decades ago, appears for the most part consistent with the current thinking about the concept. Among the areas of alignment include:

- the definition of *jus cogens* norms;
- the source of *jus cogens* norms being custom or treaty;
- the requirement of acceptance and recognition;
- the inapplicability of the persistent objector rule;
- the elements of *jus cogens* norms; and
- the procedure for invalidating norms.

⁹⁷ DC, *supra* note 1, at 33 par. 7.

Magallona's further contribution to *jus cogens* theory is his argument regarding the rationale or justification for the concepts. He argues against the popular notion that *jus cogens* norms are a natural law concept. He repeatedly stressed that the basis of *jus cogens* norms is the consent of states and is therefore consistent with the positivist framework.

Magallona's contribution to *jus cogens* theory remains despite the passage of time.