FACULTY COMMENT

PEREMPTORY NORMS — MAYBE EVEN LESS METAPHYSICAL AND WORRISOME

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Editor's Note: In the Fall 1974 issue of the DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY *an article by N. G. Onuf and Richard K. Birney entitled* PEREMPTORY NORMS OF INTERNATIONAL LAW: THEIR SOURCE, FUNCTION AND FUTURE *was published. The article dealt with the development of peremptory norms as a category of international law, with special reference to Article 53 of the Vienna Convention on the Law of Treaties. The following critique takes exception to several of the contentions of Messrs. Onuf and Birney.*

Messrs. Onuf and Birney are to be commended for their interesting, earnest, for the most part commendably lucid, and stimulatingly imaginative effort to clarify some troublesome questions concerning peremptory norms.[1] There are, however, four aspects of the work which require further comment: (a) their failure to examine the question more fully from a pragmatic base, (b) their over-generalized imputation of depth and foresight to Non-Western advocates of the relevant Articles of the Vienna Convention, (c) the strong criticism of the Western States' failure to clarify the concept at the Vienna Conference, and (d) the fact that they wrote so brief an article on so complex a subject.

I. BASIS FOR PEREMPTORY NORMS

After correctly discarding dangerous and obsolete quasi-natural law theories and hierarchically arranged notions, the authors speak of "differing importance." Yet they never appear to seek a pragmatic rationale for "importance." A case can be made for importance which has nothing to do with psychology, the drive for change, or the origin of the norm. What is missing is an analysis of international law which asks whether there are certain rules or norms which are indispensable to the very existence of the type of international society all states are pledged to support, and other norms which are means of implementing these basic rules or arrangements of convenience.[2] Such an analy-

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1. Onuf & Birney, *Peremptory Norms of International Law: Their Source, Function and Future*, 4 DENVER J. INT'L L. & POLICY 187 (1974).

2. The fact that the concept of peremptory norms has only been generally ac-

sis would be likely to yield the conclusion that all states have pledged themselves to a minimum world order and accepted by treaty or custom and usage that, if this order is to survive, war may not be considered a legitimate policy; what Justice Holmes called the hypostasis of prophecy. This general view, expressed first in codified form by the Kellogg-Briand Pact and subsequently by Article 2, paragraph 4 of the Charter of the United Nations, would be regarded as a norm of so fundamental a character and of such universal concern that no two states could contract out of the prohibition.[3] The length of time it took this norm to evolve speaks against the apparent fear of the authors that a forest of peremptory norms will spring up in the near future much less that the creation of new peremptory norms will be used to alter the existing rules in some radical fashion. There may well be other norms which are regarded as equally basic in the sense that they cannot be violated or derogated without radically altering and thus endangering the very existence of international order. Respect for fundamental human rights or at least the unacceptability of total transgression of these rights in an organized form such as slavery or the policy of apartheid may be further examples.

This approach is fully consistent with the authors' analysis that peremptory norms "whether in becoming norms or in becoming peremptory or both, must be considered in terms of the sources of international law."[4] What this above suggested analysis of the nature of peremptory norms does, in effect, is to undercut the authors' suggestion that peremptory norms need not be general. If the peremptory character of the norm derives from its perceived fundamental importance to the structure of international relations, it is inconceivable that they could be other than universally applicable in nature. The fact that Article 53 of the Vienna Convention requires that "a peremptory norm of international law . . . [be] accepted and recognized by the community of states as a whole as a norm from which

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cepted in a context which involves a formal system of judicial settlement of disputes would seem to mitigate the argument sometimes made that the international community is in too primitive a state to think in terms of public order.

3. The primary if not the only effect of the acceptance of a peremptory norm is that it establishes the illegality of a contract which is inconsistent therewith. It would be well to consider peremptory norms in the simple and unterrifying terms of the international analogue of the domestic law relating to illegal contracts. *Cf.* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §116 (1965).

4. The authors' simple and direct acknowledgement of this fact makes it difficult to understand why the authors seem so perturbed at the attenuated implications they work so hard to squeeze out of the concluding phrase of Article 53. One's puzzlement is enhanced by the fact that the authors demonstrate a sensitivity, at the bottom of page 191 and the top of page 192, for the subtle nature of the relationship in the treaty process between codification and the creation of a new norm.

no derogation is permitted"[5] not only underlines the inherent universality of the concept but provides a safeguard against the sort of development the authors fear.

II. RATIONALE OF NON-WESTERN PROPONENTS

It may be that the authors have perceived a rationale for Non-Western proponents of *jus cogens* which, although never articulated, did in fact form the underlying basis for their positions. If, however, one abjures the hazardous effort to analyze motives which were never articulated, one is left with a much simpler if related explanation. To begin with, it would be useful to recall that Part V of the Vienna Convention on the Law of Treaties was not intended to be and is not a philosophical disquisition on the sources of law or a political how-to manual on the method of altering general international law. Part V of the Convention is rather a list of reasons for asserting the invalidity of treaties.

It seems to this writer more likely that Non-Western States believed, rightly or wrongly, that many treaties had been imposed upon them or that there was a negotiating imbalance at the time of their drafting because of superior negotiating skill or greater knowledge of the details. This is certainly what the record of statements of Non-Western spokesmen indicates. The Non-Western States, moreover, feared that unless they established some grounds for invalidity, they would be subject to retributive action of one form or another under the banner of an unmitigated and omnipotent doctrine of *pacta sunt servanda*. While this analysis bears a strong resemblance to the authors' analysis, it is far less sweeping and thus cannot be used as a basis for constructing an intent to use the General Assembly for the widespread creation of new peremptory norms.

III. WESTERN FAILURE TO CLARIFY

The strength of the criticism of Western spokesmen for failing to demand hard answers to hard questions is, it is submitted, due partly to the authors' insistence on perceiving Article 53 as potentially undermining the whole of international law rather than constituting a limited safety valve with carefully constructed procedural safeguards of a type long accepted in the vaguely analogous field of the domestic law of contracts.[6] Before leaping to the conclusion that Western

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

6. It should also be noted that the United States did not suddenly give in to the acceptance of the doctrine of *jus cogens* under the pressure of time and expediency. As early as 1963 no less an American spokesman and leading lawyer than Francis T. P. Plimpton stated in the Legal Committee of the General Assembly with regard to ILC's draft article on *jus cogens* "[It] would do much to advance the rule of international law and should be supported." U. N. Doc. A/C.6/SR 784, para. 30 (1963).

spokesmen were careless, preoccupied or afraid of exposing sensitivities unnecessarily, the authors would do well to consider the degree of specificity, or more precisely, the lack thereof that exists with regard to other subtle grounds for invalidity such as "error" (Article 48), "fraud" (Article 49), or "fundamental change of circumstance" (Article 62). It would also seem useful if the authors considered the extent to which the notion of "contrary to public policy" or *"ordre publique"* is spelled out with satisfying clarity in Anglo-American or French law.

The most important oversight of the authors is their failure to even note the role played by the dispute settlement provisions of the Vienna Convention. The consistent position of the United States and virtually all of the Western nations was that of willingness to accept the notion of peremptory norms if there was some reasonable means of determining what they were.[7] This took the precise form of insisting on meaningful dispute settlement provisions. The Convention provides that all disputes relating to the Articles that deal with peremptory norms, Articles 53 and 64, shall be submitted to the International Court of Justice.[8] The inclusion of acceptable dispute settlement provisions relating to peremptory norms and to the whole of Part V was the key to the successful conclusion of the Conference.

It is difficult to be certain whether the authors' quantum leap from a somewhat overrefined analysis of the background and meaning of Article 53 to conclusions on the nature and implications of the General Assembly as a source of law would be more comprehensible had they chosen to write a longer, less telescoped article. Absent evidence to the contrary, it seems more likely that the leap reflects the authors' imaginative capacity in the long jump rather than the existence of any logical, political or even psychological bridge.

In sum, I wish modestly to suggest that if the wake of the practioner may contain pitfalls based on expediency, that of the scholar may contain strawmen created by overrefined analyses.[9]

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7. See statements to the effect by the U.S. and various other states. Official Records of the Vienna Conference on the Law of Treaties, First Sess., U.N. Doc. A/Conf. 39/11, at 472-73 (1968).

8. See Int'l L. Comm'n. Report, 21 U.N. GAOR Supp. 9, at 180, U.N. Doc. A/6309 Rev. 1 (1966) for early U. S. statements on the importance of the International Court of Justice in this context.

9. The writer admits that his defense of the decisions relating to Article 53 may be colored by his having been, as a member of the American Delegation to the Conference, implicated to some extent in the actions. The writer also pleads guilty to responding to the authors with a note which may well be vulnerable to his own criticism of dealing with very complex issues in too brief a manner.