

Peremptory norms of general international law (*jus cogens*)

- *An analysis of the practical merits of the International Law Commission's Draft Conclusions regarding the identification of peremptory norms of general international law*

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Introduction

According to Article 13, paragraph (1)(a), of the Charter of the United Nations one of the tasks of the General Assembly of the United Nations is to encourage the progressive development and the codification of international law. The International Law Commission (the “ILC”), being one of the bodies carrying out this task, was established in 1947 and has been occupied since with studying the *status quo* and the developments in different fields of international law. Article 15 of the Statute of the International Law Commission defines the twofold task delegated to it by the General Assembly as “*meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States*” (progressive development of international law) and “*the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine*” (codification of international law).¹

Among the many topics the ILC has been working on so far, there is one predestined to touch the foundations of the system of international law: The principle of peremptory norms of general international law, also known by their Latin synonym “*jus cogens*”.² The ILC decided in its sixty-seventh session in 2015 to include the topic of *jus cogens* in its work programme and appointed Mr Dire Tladi as the Special Rapporteur in this regard.³ Since then, it has considered the topic in four Sessions between 2015 to 2019 on the basis of the four reports of Mr Tladi. The outcome was a set of 23 Draft Conclusions on different aspects of the topic, provisionally adopted by the ILC on first reading. At the time this work was written, the General Assembly of the United Nations had yet to put the formal approval of the Draft Conclusion on its agenda.

While the concept of *jus cogens* was not undisputed at the time of the Vienna Conference on the Law of Treaties in 1968, its existence is well established today. Several Articles of the Vienna Convention on the Law of Treaties 1969 expressly refer to it and it has since been incorporated in customary international law.⁴ However, the Vienna Convention does not

¹ United Nations-General Assembly, *Statute of the International Law Commission and other resolutions of the General Assembly relating to the International Law Commission*, UNGAOR, UN Doc A/CN.4/4 (1949).

² Henceforth, the terms “peremptory norms of (general) international law” and “(norms of) *jus cogens*” will be used synonymously.

³ ILC, *Report of the International Law Commission on the work of its 67th Session*, UN Doc A/70/10, p 138, para 286.

⁴ Especially Articles 53, 64 and 71 of the *Vienna Convention on the Law of Treaties*, 24 May 1969, UNTS vol 1155, p 331, (entered into force 27 January 1980). See, e.g., Kadelbach, *Jus Cogens, Obligations Erga Omnes*

provide for any procedure to identify norms of *jus cogens*; intentionally, as was noted, and with the (so far unmet) expectations that subsequent state practice and jurisprudence that would work one out.⁵

The question that ought to be answered in the present study is whether the ILC by its work managed to cast into its Draft Conclusions aspects that provide for a better, clearer or more reliable way of identifying norms of *jus cogens*. In the light of the ILC's mandate this means primarily finding evidence that renders these elements ripe for codification. It shall be examined, if the ILC succeeded in clarifying the prerequisites and the process of identification of *jus cogens* or even introduced a standard method in this regard. In other words: The practical merits and applicability of the outcome of the ILC's work on the identification of peremptory norms of international law shall be put under examination.

The thematic order in which the set of Draft Conclusions is presented offered a good basis also for the structure of this work. The Draft Conclusions are arranged in four parts, of which Part Two is titled "Identification of peremptory norms of general international law (*jus cogens*)" and contains six Draft Conclusions (4 to 9). The last 2, Draft Conclusions 8 and 9 are concerned with the material sources for evidence but not particularly with the intellectual process of identifying *jus cogens*. Accordingly, primarily the Draft Conclusions 4 to 7 will be scrutinised. The examination will extend onto other Draft Conclusions, when found appropriate or necessary, in order to give a comprehensive picture of the subject.

The approach of the ILC was not so much to identify certain norms of international law as *jus cogens* norms and to examine their contents. Instead, it was of a procedural and methodological nature, focusing on the definition, identification and finally on legal effects and consequences of *jus cogens* in principle.⁶ This study will try to maintain the ILC's general approach as much as possible and try to spare out any excursions and detours that the Special Rapporteur in his thorough conduct deemed necessary for the ILC's work. Similarly, since tracing all the changes that were made to the Draft Conclusions in the course of the debate and the following work of

and Other Rules - the Identification of Fundamental Norms in Tomuschat/Thouvenin, *The Fundamental Rules of the International Legal Order* (2006), pp 21–40; 34.

⁵ Zemanek, *The Metamorphosis of Jus Cogens: From an Institution of Treaty Law to the Bedrock of the International Legal Order?* in Cannizzaro, Enzo (2011), *The Law of Treaties Beyond the Vienna Convention*, pp 381-410; 383.

⁶ Thus, Draft Conclusion 1 provides: "*The present draft conclusions concern the identification and legal consequences of peremptory norms of general international law (jus cogens)*", ILC, *Report of the International Law Commission*, 71 Sess, UN Doc A/74/10, p 142, para 56.

the Drafting Committee would go beyond the scope of this work, they will only selectively be pointed out when found of particular relevance or interest.

1. The Definition of *Jus Cogens*

As noted above, the big overarching questions at hand were: How can norms of *jus cogens* be identified; and how ought one to deal with them once identified? Although Part One, containing the Draft Conclusions 1 to 3, is of an introductory nature, it is reasonable to begin the examination with a glance at the progress regarding the definition of peremptory norms of general international law because it is important to be aware of, what it is, one is looking for. As will be seen, here some steps in codification can be noted.

Therefore, the examination will begin with Draft Conclusion 2, which reads:

“Conclusion 2

Definition of a peremptory norm of general international law (jus cogens)

*A peremptory norm of general international law (jus cogens) 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 only by a subsequent norm of general international law (jus cogens) having the same character.”*⁷

The two criteria put forward by this conclusion are expressly based on the legal definition of a peremptory norm of general international law in Article 53 of the 1969 Vienna Convention on the Law of Treaties.⁸ A comparison of the two makes this apparent. Article 53 provides that

*“[...] [f]or 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 only by a subsequent norm of general international law having the same character.”*⁹

⁷ *Supra* note 6.

⁸ Cf. ILC, *First report on jus cogens* by Dire Tladi, Special Rapporteur, 68th Session, UN Doc A/CN.4/693 (8 March 2016), p 16, para 32.

⁹ Art 53 of the *Vienna Convention* 1969. Emphasise added.

The ILC and its Special Rapporteur rightly began their exploration of the creation of *jus cogens* with this provision. The definition in Article 53 is a common starting point for the subject for scholars¹⁰ and international courts and tribunals¹¹ alike.

It seems that by simply reiterating (and rearranging) the criteria already put forward in Article 53 of the 1969 Vienna Convention, not much has been won. However, one has to bear in mind that Article 53 defines peremptory norms of international law expressly only “[f]or the purposes of the present Convention”.¹² Hence, this definition of peremptory norms could *per se* not be applied universally, that is beyond the scope of the 1969 Vienna Convention or even the regime of customary international treaty law, thus creating the “remarkable oddity” that “on the one hand, there exist fundamental principles which comprise the international public order, principles from which consequently States cannot derogate in their dealings; on the other hand it is only possible to rely upon these principles in relatively exceptional circumstances.”¹³ As noted above, one of the ILC’s tasks is to codify¹⁴ the international law. In the present case, to do this the ILC had to find evidence that the definition laid down by Article 53 has been widely accepted and used by the international community beyond the scope of the 1969 Vienna Convention and then, if necessary, reformulate it to render it more precise and comprehensible. Since it had found plenty of practice among states, many decisions of international courts and tribunals and, also, a wide acceptance among scholars,¹⁵ the ILC found it appropriate to codify the definition of Article 53 of the 1969 Vienna Convention by including it into its Draft Conclusion 2, as it has “come to be accepted as a general definition which applies beyond the law of treaties.”¹⁶ Thus, it necessarily has a universal scope of application in international law. As regards rephrasing the ILC did not find it necessary (or wise) to change anything, since it found, “it is the most widely accepted definition in the practice of States and in the decisions of international courts and tribunals.”¹⁷

¹⁰ See e.g. Shaw, *International Law* (2014), p 90; Hannikainen, *Peremptory norms (jus cogens) in international law: historical development, criteria, present status* (1988), p 3.

¹¹ See e.g. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996), I.C.J. Reports 1996, para 83; *Prosecutor v. Jelisić*, ICTY, Judgement, Case No IT-95-10-T (14 December 1999), para 60.

¹² See second sentence of Art 53 of the *Vienna Convention*. Cf. also Cassese, *International Law* (2001), p 142.

¹³ Cassese, *International Law*, p 142.

¹⁴ It seems useful at this point to recall the meaning of this term: According to Art 15 of the Statute of the ILC “the expression ‘codification of international law’ is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.”

¹⁵ Cf. *supra* note 6, paragraph (2) of the Commentary to Draft Conclusion 2.

¹⁶ *Ibid*, p 149, para 1.

¹⁷ *Ibid*, p 149, para 2.

Afterwards, the Special Rapporteur himself emphasised while “*these criteria are presented by the Commission as flowing naturally from the definition*” they, “*by no means, go without saying.*”¹⁸ And indeed, as stated above the contents of Conclusion 2 should not be seen as an automatic step, but as a necessary one in the process of the ILC’s work on the topic of peremptory norms of international law. In other words: By reciting the definition of peremptory norms of international law in Article 53 of the 1969 Vienna Convention the ILC confirmed that this can generally be regarded as the *go-to* definition of *jus cogens* for the international law community.

2. Criteria for the identification of *jus cogens*

Although the definition examined above already contains its two core elements, yet not much has been clarified about the creation and identification of *jus cogens*. Here, Part Two of the list of Draft Conclusions, “*the heart of the set of Draft Conclusions*”,¹⁹ comes into play. The initial conclusion and foundation of this part is Conclusion 4 which reads as follows:

**“Conclusion 4
Criteria for the identification of a peremptory norm of general international law (jus cogens)**

To identify a peremptory norm of general international law (jus cogens), it is necessary to establish that the norm in question meets the following criteria:

- (a) *it is a norm of general international law; and*
- (b) *it is 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 only by a subsequent norm of general international law having the same character.”²⁰

Once again, at first glance, this conclusion seems to reiterate the definition of *jus cogens* provided by Article 53 of the 1969 Vienna Convention as well as the contents of Draft Conclusion 2 as examined above and therefore appears to be superfluous.²¹ The reason why the ILC deemed it necessary to draft this conclusion nonetheless can be found in the careful

¹⁸ Tladi, *The International Law Commission’s Draft Conclusions on Peremptory Norms of General International Law (jus cogens): Making Wine from Water or More Water than Wine*, 89 NJIL (2020) 2, 244-270; pp 262-3.

¹⁹ *Ibid*, p 251.

²⁰ *Supra* note 6, p 142, para 56.

²¹ Also in the identical Article 50 of the Articles on the Law of Treaties 1966 (which served as the foundation of the Vienna Convention 1969) the ILC was reluctant to further elaborate on *jus cogens* and “[left] *the full content of this rule to be worked out in State practice and in the jurisprudence [...]*”, *Yearbook of the International Law Commission* (1966), Volume II, UN Doc A/CN.4/SER.A/1966/Add.1, p 248, para 3.

observations made by the Special Rapporteur in his second report. He noted that it is possible to interpret the text of Article 53 – and respectively Draft Conclusion 2 – in such ways that even *three* elements ought to be established for the identification of a peremptory norm.²² Although the Special Rapporteur dismisses this notion immediately, there are in fact scholars who identify even more than three elements in Article 53 of the 1969 Vienna Convention.²³ The careful approach of the Special Rapporteur was therefore not unreasonable and it becomes clear that Draft Conclusion 4 must be seen in the light of respective debates.

Apparently, this idea was not a very big stumbling block for the ILC since it could fall back on and reaffirm its previous work in which it had already described a two-step approach based on the two criteria.²⁴ The provisional adoption of this conclusion shows, however, that it approved of the cautious approach by the Special Rapporteur and thereby fortified this two-step approach in the identification process. Thus, it can be noted that the benefit of Draft Conclusion 4 is the confirmation, that there is sufficient evidence of state practice that the international community identifies peremptory norms of general international law by applying this two-step method.

All other Draft Conclusions in Part Two of the set of Draft Conclusions ought to elaborate further on these two core requirements of *jus cogens*. Thus, they shall be discussed hereinafter.

2.1. The first Step: A General Norm of International Law

If one is to strictly follow the identification process laid down by Draft Conclusion 4, the first question that ought to be asked is, what defines a norm of *general* international law. Since Draft Conclusion 4 (a), as cited above, states that it must first be determined that a rule is a norm of general international law it could be expected that the Draft Conclusions would further elaborate on this criterion. And in fact, the Special Rapporteur in his draft of Conclusion 5 had proposed an extra paragraph to define a norm of general international law as “*one which has a general scope of application.*”²⁵ However, this attempt to clarify the character of general norms of international law was omitted later on and the final Draft Conclusion 5 does not hold such an express definition anymore. Although in the course of the debate it was suggested that Draft

²² ILC, *Second report on jus cogens* by Dire Tladi, Special Rapporteur, 69th Session, UN Doc A/CN.4/706 (16 March 2017), pp 18-19, paras 37-38.

²³ See e.g., Hannikainen, *Peremptory norms*, pp 3, 207.

²⁴ See paragraph (5) of the commentary to Article 26 of the *Draft Articles on the Responsibility of States for internationally wrongful acts*, *Yearbook of the International Law Commission* (2001), vol II (Part Two) and corrigendum, UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2), p 85; cf. also paragraph 5 of the Commentary to Draft Conclusion 4, *supra* note 6, p 158.

²⁵ *Supra* note 22, p 46, para 91.

Conclusion 5 should clearly state the character of norms of general international law,²⁶ the reports do not explain the reasons for the omission of paragraph 1 of Draft Conclusion 5 without any replacement. The final version of this Draft Conclusion reads as follows:

“Conclusion 5

Bases for peremptory norms of general international law (jus cogens)

1. *Customary international law is the most common basis for peremptory norms of general international law (jus cogens).*
2. *Treaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (jus cogens).”²⁷*

However, Draft Conclusion 5 was still intended to further develop the first element provided by Draft Conclusion 4(a).²⁸ The commentaries to the Draft Conclusions give only a hint as to why the ILC chose to change the originally proposed design of the Draft Conclusion: Here, the ILC refers to its earlier work, where the stance was taken that there had been no accepted definition of general international law.²⁹ On another occasion, it has equated general international law with customary international law.³⁰ Although some authors share the notion that the term “general”, if descriptively applied to a norm of international law, first and foremost means that this norm is *generally applicable*, and therefore creating rights and obligations for all states or other subjects of international law,³¹ others have not expressly done so.³² Now, however, the ILC came to the conclusion that the term “general” in the context of peremptory norms “*refers to the scope of applicability of the norm in question*”.³³ Besides that, it was noted

²⁶ Cf. commentary to Draft Conclusion 5 in ILC, *Report of the International Law Commission*, 69th Session, UN Doc A/72/10, p 199.

²⁷ *Supra* note 6, p 143, para 56.

²⁸ See commentary to Draft Conclusion 5, *supra* note 6, p 159, para 2.

²⁹ See *ibid*, p 159, para 2, where the ILC refers to the *Report of the Study Group on the fragmentation of international law: difficulties arising from the diversification and expansion of international law*, UN Doc A/CN.4/L.702 (18 July 2006), para 14, Conclusion (10) and footnote 11. There, in fact, the notion prevails that the term “general” ought to be seen as opposite to “special” and interpreted in the given context.

³⁰ See paragraph 2 (and footnote 667) of the Commentary to Draft Conclusion 1 of the *Draft conclusions on identification of customary international law*, ILC, *Report of the International Law Commission*, 73rd Sess, UN Doc A/73/10, p 123; Cf also *Pulp mills on the river Uruguay (Argentina v. Uruguay)*, Judgement, I.C.J. Reports 2010, p 14, para 104.

³¹ See, e.g., Hannikainen, *Peremptory norms*, pp 4, 208, who also mentions a disputable difference between “general” and “universal” application; see also Shaw, *International Law*, p 88, 91; and Orakhelashvili, *Peremptory norms in international law* (2006), 38-40, where this is implied by the rejection of regional *jus cogens*.

³² See e.g. Cassese, *International Law*, p 15-16, who, in this regard, speaks of “community obligations and rights”.

³³ Commentary to Draft Conclusion 5, *supra* note 6, p 159, para 2.

that “[t]he most obvious manifestation of general international law is customary international law.”³⁴

However, the Draft Conclusions do not make a clear connection between the requirement of “a norm of general international law”, the definition of such a norm and lastly, among which sources of international law to look for. Thus, the above observations lead to a peculiar situation: Even though Draft Conclusion 4(a) was (successfully) designed as to clearly provide two constitutive elements of peremptory norms of international law, and further states that one of these elements is that the rule in question is a norm of general international law, the Draft Conclusions do not provide any express definition of a “norm of general international law” – even though the ILC found that there was enough evidence to support the fact, that in this context this means to determine whether this rule is universally applicable. Instead, Draft Conclusion 5 provides that “[c]ustomary international law is the most common basis for peremptory norms of general international law” while “[t]reaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*).”³⁵ While this can be regarded as an implicit explanation of which norms belong to the category of general international norms, it may be a cause of confusion as the relationship between general international law and the mentioned sources of international law is not further specified.

However, it must be acknowledged that it is not contrary to a widely shared notion, that customary international law functions as the primary source for peremptory norms while general principles and treaty provisions are only of secondary importance – the latter even completely degraded to “mere” tools of affirmation.³⁶ Also, neither was it completely undisputed that there was (only) this two-step method in order to identify *jus cogens*, nor whether a *jus cogens* norm is also a norm of customary international law and must be determined *before* its peremptory character has been ascertained.³⁷

To conclude the above deliberations, the express denomination of possible sources of *jus cogens* can provide useful information on where to look for (emerging) *jus cogens* norms. But it does not actually provide a clear guideline on how to identify them. Additionally, while the wording of Draft Conclusion 5 suggests that the ILC recognised that customary international law is the main basis for *jus cogens*, it does not exclude other sources of international law, namely general

³⁴ *Supra* note 6, p 159, para 4.

³⁵ *Ibid*, p 143, para 56.

³⁶ Cf. Hannikainen, *Peremptory Norms*, pp 225-26; 242; 245-46; Orakhelashvili, *Peremptory norms*, p 113.

³⁷ Cf. Orakhelashvili, *Peremptory norms*, p 119.

principles and treaty provisions.³⁸ The decision to opt for such an open – one could also say: undecided – formulation apparently was due to doctrinal differences within the ILC and a lack of evidence of state practice.³⁹ While this is in any case a legitimate step, it renders Draft Conclusion 5 very vague and provides little support for the application of the introduced two-step method.

However, there is another Draft Conclusion which must be examined on the subject of norms of general international law. Draft Conclusion 3 states that peremptory norms of general international law “*reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable.*”⁴⁰ In the light of the above not only is it interesting that the “elusive” definition for the term “norm of general international law” is found in the last part of this Conclusion after the ILC omitted an express definition in the subsequent Draft Conclusion 4, but also it (provisionally) adopted the wording of this paragraph of Draft Conclusion 3 without change, even though the debate about it was much more controversial.⁴¹ Regardless of the chosen design of the Draft Conclusions, Draft Conclusion 3 expressly ascertains that peremptory norms of international law are *always* universally applicable, or, in other words, effective *erga omnes*.⁴²

Furthermore, in the commentary it was noted that the three characteristics contained in Draft Conclusion 3 “*are themselves not criteria for the identification of peremptory norms of general international law*” and that the universal application of peremptory norms of general international law “*is both a characteristic and a consequence of peremptory norms of general international law*.”⁴³ Since Draft Conclusion 3 ought to provide orientation for *all* the subsequent Conclusions, it was placed at the very beginning, namely in the introductory Part One.⁴⁴

In other words, the ILC did not mean for Draft Article 3 to play any operative part in the process of identifying *jus cogens* norms, even though it had the opinion that it holds an element that is

³⁸ See, on the other hand, *supra* note 22, p 31, para 59, where the Special Rapporteur takes a clearer stance and suggests that treaty rules “*do not, as such, constitute norms of general international law capable of forming the basis for jus cogens norms [...]*”. Therefore, they would naturally lack a prerequisite to become *jus cogens*.

³⁹ See *supra* note 18, p 263.

⁴⁰ Draft Conclusion 3, *supra* note 8, p 142, para 56. Emphasis added.

⁴¹ Cf. ILC, *Report of the International Law Commission*, 68th Sess, UN Doc A/71/10, p 303, paras 125-6; cf. *supra* note 18, pp 249-51.

⁴² This term, meaning obligation(s) that are owed to all states (in contrast to only other members to a treaty) is used synonymously with universal/general applicability. See e.g. Neuhold, *The Law of International Conflict*, p 25. For a comprehensive examination of similarities, differences and overlaps between *jus cogens* and *erga omnes* rules, see Kadelbach, *Jus Cogens*, pp 26-40.

⁴³ Commentary to Draft Conclusion 3, *supra* note 8, p 155, para 12.

⁴⁴ *Ibid.*, p 150-1, para 1.

in fact part of the definition of the first requirement of *jus cogens*. However, Draft Conclusion 4 (a) does not make any reference to Draft Conclusion 3.

As shown above, the ILC saw universal applicability as one of the two defining elements for norms of general international law. Consequently, Draft Conclusion 3 appears to be inconsistent with the general structure of the Draft Conclusions because actually it contains a (now somewhat concealed) element of the identification process without any reference to it by the other Draft Conclusions. In the light of doctrinal debates on the issue, if there could be regional or even bilateral *jus cogens*,⁴⁵ this decision seems problematic. If the Draft Conclusions had provided a clearer definition of the basic requirement “norm of *general* international law” the ILC would have taken a more consequent stance in this debate.

On another note, Draft Conclusion 3 might be interpreted in such a way as to suggest that only peremptory norms of general international law have the attribute of universal applicability. This is problematic because, while it is true that not all general norms of international law are peremptory norms, it seems that the ILC opted for the notion that all peremptory norms of international law must necessarily be general norms of international law which *per se* are universally applicable. Thus, Draft Conclusion 3 and 4 are ambiguous with regard to the definition and identification of norms of general international law.

This lack of reference from the other Draft Conclusions, especially Draft Conclusion 4, to the universal applicability of general international law in Draft Conclusion 3, also leaves a gap in the application of the proposed two-step method which gives leeway for contradictory argumentation. Draft Conclusion 5, on the other hand, fails to pick up the issue of Draft Conclusion 4(a), namely the requirement of a “norm of general international law” by – as it appears – prematurely jumping to the subject of “possible sources of peremptory norms of international law”.

On a sidenote it might also be mentioned that Draft Conclusion 3 contains a mixture of very different elements both relevant and irrelevant for the operative process of the identification of *jus cogens* (and its legal consequences), which can be regarded another inconsistency in the overall design of Chapter Two of the set of Draft Conclusions as well as blurring the stringency of the identification method.

⁴⁵ Cf. Orakhelashvili, *Peremptory norms*, p 39.

2.2. The Second Step: The Acceptance and Recognition

So far, only the first step of the process of identification of *jus cogens* has been examined. To recall Draft Conclusion 4(b), in order to rise up to a norm of *jus cogens* a rule must also be “*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 only by a subsequent norm of general international law having the same character.*”⁴⁶ The second step thus consists of the determination of a criterion which itself entails two elements. The first of these elements is addressed by Draft Conclusions 6 which provides:

“Conclusion 6 Acceptance and recognition

1. *The requirement of “acceptance and recognition” as a criterion for identifying a peremptory norm of general international law (jus cogens) is distinct from acceptance and recognition as a norm of general international law.*
2. *To identify a norm as a peremptory norm of general international law (jus cogens), there must be evidence that such a norm is accepted and recognized as one from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character.*⁴⁷

According to the report on the 69th session of the ILC, the originally proposed Draft Conclusion had a dual purpose: Firstly, it should emphasise that there is not only the requirement of Draft Conclusion 4(a), namely, to determine that a norm belongs to the subset of norms of general international law, but also the subjective element of acceptance and recognition by the international community of states (as a whole) that this norm is *a norm of international law from which no derogation is permitted*. Secondly, the *acceptance and recognition of the international community of states as a whole* should be highlighted as the crucial element of the second criterion (contained in Draft Conclusion 4(b)).⁴⁸

However, both paragraphs of Draft Conclusion 6 were changed drastically by the Drafting Committee. While the Special Rapporteur, in his attempt to clarify “*who must accept and recognize and what must be accepted and recognized*”,⁴⁹ had proposed in the first paragraph to focus on the point that only the non-derogability of the norm in question must be proven to be

⁴⁶ *Supra* note 6, p 143, para 56. Emphasise added.

⁴⁷ *Ibid.*

⁴⁸ *Supra* note 26, p 195, para 156.

⁴⁹ Cf. *supra* note 22, p 32, para 63.

accepted and recognised,⁵⁰ it now emphasises the distinction between the acceptance and recognition of a *general* norm on the one hand, and a *peremptory* norm of international law on the other. The focus of the paragraph has thus been shifted onto the emphasis that there is a difference between the acceptance as general international law (*opinio juris*) and the acceptance as peremptory international law (*opinio juris cogentis*).⁵¹ The reports do not suggest that the Special Rapporteur's restrictive interpretation of Article 53 was particularly controversial. However, it was suggested that Draft Conclusion 6 could be deleted as it didn't provide any additional information and only reiterated the "acceptance and recognition" element in Draft Conclusion 4.⁵² One is urged to note, however, that it seems more redundant to reiterate the difference between general norms and peremptory norms in this regard, because this fact is already implied by the preceding Draft Conclusions (as well as Article 53 of the 1969 Vienna Convention).

The second paragraph of Draft Conclusion 6 returns to the subject itself and describes the two elements mentioned at the beginning of this chapter. It is noteworthy, that with the revision of this paragraph, the ILC apparently omitted the notion that the subjective element depicted in this paragraph comprises only one element, namely the accepting and recognising of the fact that from the norm in question *no derogation is permitted*; and expressly retrieved the second element, that the norm *can only be modified by a norm having the same character*, which the Special Rapporteur had proposed to leave unmentioned in this Draft Conclusion. This is crucial because wording and grammatical structure of Article 53 of the 1969 Vienna Convention leave leeway for multiple interpretations in this regard.⁵³ For example, it is possible to regard the fact that a peremptory norm can only be changed by another peremptory norm as an attribute which automatically comes with the peremptory character of a norm, and state that it is only the non-derogation which has to be accepted and recognised by the international community of states. Regardless of doctrinal debates that might exist in terms of a strict distinction between the criteria and the consequences of *jus cogens*, from a practical point of view, paragraph 2 is a careful, yet helpful step towards a clearer understanding of what it is that the international community of states must accept and recognise.

⁵⁰ *Ibid*, p 45, para 91.

⁵¹ In other words: "*Opinio juris cogentis*" means the opinion of a state that a certain rule is a peremptory norm of international law; Cf. Czapliński, *Jus Cogens and the Law of Treaties* in Tomuschat/Thouvenin, *The Fundamental Rules of the International Legal Order* (2006), pp. 83-97; 93; cf. Kleinlein, *Jus Cogens as the 'Highest Law'? Peremptory Norms and Legal Hierarchies*, Netherlands Yearbook of International Law 46 (2015), 173-210; p 195.

⁵² Cf. *supra* note 26, p 199, para 184.

⁵³ See, e.g., Hannikainen, *Peremptory Norms*, p 3.

2.3. The Second Step: The International Community of States as a whole

Draft Conclusion 7 deals with the final piece of the puzzle. The second element of “phase 2” in the two-step procedure requires evidence that the *international community of states as a whole* has accepted and recognized a rule as a peremptory norm of general international law from which no derogation is permitted. Accordingly, it reads as follows:

“Conclusion 7

International community of States as a whole

1. *It is the acceptance and recognition by the international community of States as a whole that is relevant for the identification of peremptory norms of general international law (jus cogens).*
2. *Acceptance and recognition by a very large 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.*
3. *While the positions of other actors may be relevant in providing context and for assessing acceptance and recognition by the international community of States as a whole, these positions cannot, in and of themselves, form a part of such acceptance and recognition.”⁵⁴*

This Draft Conclusion in its contents resemble more or less what was originally proposed by the Special Rapporteur.⁵⁵ There are two main aspects here to examine. The first one is, whose acceptance and recognition is required. Here, the words of paragraph 1 (and Article 53 of the 1969 Vienna Convention) are quite clear: It is the *states*, who have to accept and recognise a norm as peremptory. Although doctrinal debates on the role of non-state actors certainly exist, this point was not particularly controversial within the ILC since the ordinary meaning of the terms used is very clear and the ILC could rely on earlier findings in this matter.⁵⁶ Also, the International Court of Justice has indicated that it primarily grounds its findings on the existence of rules of *jus cogens* on the practice and *opinio juris* of states.⁵⁷ Yet, Draft Conclusion 7

⁵⁴ *Supra* note 6, p 143, para 56. Emphasise added.

⁵⁵ Cf. *supra* note 22, p 46, para 91. The changes are limited to restructuring and rephrasing of the content.

⁵⁶ See paragraph 3 of Article 54 of the *Draft articles on the law of treaties between States and international organizations or between international organizations with commentaries*, *Yearbook of the International Law Commission* (1982), vol II (Part Two), p 56.

⁵⁷ See, e.g., *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v Senegal), Judgment, I.C.J. Reports 2012, p 422, para 99.

reaffirms that it has been reviewed whether it is still the acceptance and recognition of states that is required and provides a welcomed clarification in this regard.

The second question regards the meaning of the phrase “as a whole”. In other words, it touches upon the issue of *how many states exactly* must accept and recognise the peremptory character of a norm to elevate it to the sphere of *jus cogens*. The Special Rapporteur noted⁵⁸ that the phrase “as a whole” was added by the Drafting Committee at the Vienna Conference on the Law of Treaties in 1968 in order to clarify “*that no individual State should have the right of veto.*”⁵⁹ Moreover, the Chairman of the Drafting Committee, Mr Yasseen, explained that “*if one State in isolation refused to accept the peremptory character of a rule, or if that State was supported by a very small number of States, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected.*”⁶⁰ From a present logical point of view this seems rather unproblematic because it could be expected that the drafters of the 1969 Vienna Convention would have used, for example, the phrase “by all states” if they had intended to express that peremptory norms could only emerge with the consent of each and every state. The mere fact that it chose the present wording indicates that this was not the case.

In any case, Special Rapporteur Mr Tladi did not deem it necessary to examine the requirement of the acceptance and recognition of the international community “as a whole” beyond these observations. Neither was it controversial that the point that the international community “as a whole” does not mean *all* states, nor that at least majority of states is needed. So much has been reaffirmed by the ILC. The crucial question remaining is, how many states exactly are required to accept and recognise the peremptory character of norm of international law. Several members of the ILC were in favour of a “*very large majority*” of states or even “*substantially all states*”.⁶¹ As the wording of Draft Conclusion 7 shows, the former notion has prevailed.

Yet, it must be noted that another question was left unanswered, namely whether the conduct of all states is given equal weight. Cassese, for example, indicates that the consent of some states is more important than the consent of others.⁶²

⁵⁸ *Supra* note 22, p 34, para 67.

⁵⁹ Statement by Mr Yasseen in *Official Records of the United Nations Conference on the Law of Treaties: Summary records of the plenary meeting and of the meetings of the Committee of the Whole*, First Session (Vienna 26 March-24 May 1968), 80th meeting, p 471, para 7.

⁶⁰ *Ibid.*, p 472, para 12.

⁶¹ *Supra* note 26, p 199, para 185.

⁶² Cf. Cassese, *International Law* (2001), p 140.

Although this substantiation of the element “international community as a whole” does not entirely solve the practical problem of determining whether enough states have accepted and recognised a norm as peremptory, it should be regarded as a step forward. First of all, as Hannikainen points out, this phrase in Article 53 of the 1969 Vienna Convention was a controversial point at the time, for it touches upon the fundamental question of whether a majority can impose a peremptory rule upon a minority of states, and this may lead to further averting from the principle that in international law states can be bound only with their consent.⁶³ It must be concluded, that this question, at least, has been answered in the affirmative: For the identification of a *jus cogens* norm, even a “persistent objector” – a concept primarily used in the context of the emergence of customary international law – is not decisive.⁶⁴

On the other hand, other – sometimes even more cryptic – means were found in order get a hold of the essence of this required “portion” of the international community of states.⁶⁵ In this regard, it is a welcomed clarification that in search of peremptory norms of international law one will have to look for “very large majorities” among states, accepting and recognising the norm in question as *jus cogens*.

3. Conclusions

The first conclusion that can be drawn from the above deliberations is that the ILC laid the necessary foundations for any future work on the topic by reaffirming the applicability of the definition of peremptory norms of general international law enshrined within Article 53 beyond the scope of the 1969 Vienna Convention. As explained in the Introduction, it did this in a conservative manner but in line with its mandate to codification. Although it may not be of too much practical relevance, since Article 53 has been the starting point for the research of the majority of scholars and tribunals for a long time now, one should bear in mind that naturally this is a prerequisite for the codification of customary international law.

From a practical point of view, the very clear suggestion of a two-step approach for the identification of *jus cogens* norms must be appreciated as it provides a fundamental

⁶³ See Hannikainen, *Peremptory norms*, pp 210-11.

⁶⁴ This view is supported, e.g., by Orakhelashvili, *Peremptory norms*, p 119; and the Inter-American Commission on Human Rights in *Michael Domingues v. United States*, Case 12.285, Report No. 62/02, Inter-Am. C.H.R. (22 October 2002), Annual Report of the IACHR 2002, para 48.

⁶⁵ See, e.g., Hannikainen, *Peremptory norms*, pp 214, who concludes, that “*the prevailing view seems to be that the ‘acceptance by the international community of States as a whole’ means the acceptance by all essential components of the international community of States.*” Emphasis added.

methodological guidance. However, a more stringent and clear proceeding regarding the sub-elements of the two steps would have been desirable. Recalling the above-mentioned inconsistencies surrounding the Draft Conclusions 3, 4 and 5, it is questionable whether the design of some paragraphs did not come at the expense of too much clarity and coherence as well as leaving too much open terrain for contradicting argumentation. Especially the issue of the relationship between general norms of international law – which build the pool for emerging peremptory norms of international law – and *jus cogens* lacks clarification. Unfortunately, the reports do not provide information on the procedures that led to this outcome, although it appears that the ILC had in fact taken a clear stance in this regard. This is particularly noteworthy, since the ILC decided to emphasise certain criteria or elements that did not seem problematic. The emphasise on the distinction between *opinio juris* and *opinio juris cogentis* in Draft Conclusion 6 may be named here, as an example. On the other hand, it was reluctant to elaborate on some more controversial aspects, for example, to provide a clearer understanding of what states have to accept and recognise.

Regarding some of the Draft Articles, it would be easy to conclude that not much could be gained by merely reiterate what has already been provided by Article 53 of the 1969 Vienna Convention. But one has to keep in mind that the task at hand for the ILC was to codify rules on *jus cogens*. Therefore, the issue was to find a more precise formulation and systematization of rules of international law that were supported by extensive State practice, precedent and doctrine. While this has been achieved successfully on some fronts, a chance for a more profound work on other issues has not been seized. As the Special Rapporteur Mr Tladi himself put it, the Draft Conclusions on the identification of *jus cogens* norms, “though certainly not earth-shattering, also clarify important aspects of the methodology to be applied when identifying peremptory norms, while leaving room for development where the practice is lacking.”⁶⁶

⁶⁶ *Supra* note 18, p 263.

Bibliography:

Books:

- Cassese, Antonio (2001), *International Law*, Oxford University Press, Oxford.
- Hannikainen, Lauri (1988), *Peremptory norms (jus cogens) in international law - historical development, criteria, present status*, Lakimiesliiton Kustannus, Finnish Lawyers Publishing Company, Helsinki.
- Neuhold, Hanspeter (2016), *The law of international conflicts: force, intervention and peaceful dispute settlement*, Brill Nijhoff, Leiden/Boston.
- Orakhelashvili, Alexander (2006), *Peremptory norms in international law*, Oxford University Press, Oxford.
- Shaw, Malcom N. (2014). *International Law (7th Edition)*, Cambridge University Press, Cambridge.

Articles:

- Czapliński, Władysław, *Jus Cogens and the Law of Treaties* in Tomuschat, Christian and Thouvenin, Jean-Marc, *The Fundamental Rules of the International Legal Order* (2006), pp 83-97.
- Kadelbach, Stefan, *Jus Cogens, Obligations Erga Omnes and Other Rules - the Identification of Fundamental Norms* in: Tomuschat, Christian. and Thouvenin, Jean-Marc: *The Fundamental Rules of the International Legal Order* (2006), pp. 21–40. Martinus Nijhoff, Leiden/Boston.
- Kleinlein, Thomas, *Jus Cogens as the 'Highest Law'? Peremptory Norms and Legal Hierarchies*, *Netherlands Yearbook of International Law* 46 (2015), pp 173–210.
- Tladi, Dire (2020). *The International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (jus cogens): Making Wine from Water or More Water than Wine*, *Nordic Journal of International Law* (2020), 89(2), pp 244-270.
- Zemanek, Karl, *The Metamorphosis of Jus Cogens: From an Institution of Treaty Law to the Bedrock of the International Legal Order?* In: Cannizzaro, Enzo (2011): *The Law of Treaties Beyond the Vienna Convention*. Oxford University Press, pp 381-410.

Cases:

- *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996), I.C.J. Reports 1996.
- *Prosecutor v. Jelisić*, International Criminal Tribunal for the Former Yugoslavia, Judgement, Case No IT-95-10-T (14 December 1999).
- *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment, I.C.J. Reports 2012, p 422 (20 July 2012).
- *Michael Domingues v. United States*, Report of the Inter-American Commission on Human Rights, Case 12.285, Report No. 62/02 (22 October 2002), Annual Report of the IACHR 2002.

- *Pulp mills on the river Uruguay (Argentina v. Uruguay), Judgement, I.C.J. Reports 2010*, p 14 (20 April 2010).

Documents of the United Nations:

- ILC, *Yearbook of the International Law Commission* (1966), Volume II, UN Document A/CN.4/SER.A/1966/Add.1.
- ILC, *Yearbook of the International Law Commission* (1982), Volume II (Part Two), UN Document A/CN.4/SER.A/1982/Add.1 (Part 2).
- ILC, *Report of the International Law Commission on the work of its fifty-third Session* (23 April–1 June and 2 July–10 August 2001), UN Doc. A/56/10 in: ILC, *Yearbook of the International Law Commission* (2001), Volume II (Part Two) and corrigendum, UN Document A/CN.4/SER.A/2001/Add.1 (Part 2), p 20-144.
- ILC, *First report on jus cogens* by Dire Tladi, Special Rapporteur, 68th Session, UN Document A/CN.4/693 (8 March 2016).
- ILC, *Second report on jus cogens* by Dire Tladi, Special Rapporteur, 69th Session, UN Document A/CN.4/706 (16 March 2017).
- ILC, *Report of the International Law Commission on the work of its sixty-seventh Session* (4 May–5 June and 6 July–7 August 2015), UN Doc A/70/10
- ILC, *Report of the International Law Commission on the work of its sixty-eighth Session* (2 May–10 June and 4 July–12 August 2016), UN Document A/71/10.
- ILC, *Report of the International Law Commission on the work of its sixty-ninth Session* (1 May–2 June and 3 July–4 August 2017), UN Document A/72/10.
- ILC, *Report of the International Law Commission on the work of its seventieth Session* (30 April–1 June and 2 July–10 August 2018), UN Document A/73/10.
- ILC, *Report of the International Law Commission on the work of its seventy-first Session* (29 April–7 June and 8 July–9 August 2019), UN Document A/74/10.
- ILC, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law – Report of the Study Group of the International Law Commission*, 58th Session (1 May–9 June and 3 July–11 August 2006), UN Document A/CN.4/L.702 (18 July 2006).
- UN, *Official Records of the United Nations Conference on the Law of Treaties: Summary records of the plenary meeting and of the meetings of the Committee of the Whole*, First Session (Vienna 26 March–24 May 1968, UN publication, Sales No. E.68.V.7, New York, 1969).

Legal Sources/Treaties:

- *Vienna Convention on the Law of Treaties*, 24 May 1969, UNTS vol 1155, p 331, (entered into force 27 January 1980).