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Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur*

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I. Introduction

1. At its sixty-seventh session (2015), the Commission decided to place the topic on its current programme of work and to appoint a Special Rapporteur.[1]

2. At its sixty-eighth session (2016), the Commission considered the first report of the Special Rapporteur[2] and decided to refer two draft conclusions to the Drafting Committee.[3] At its sixty-ninth session (2017), the Commission had before it the second report of the Special Rapporteur.[4] In his second report, the Special Rapporteur sought to identify the criteria for the identification of peremptory norms of general international law (*jus cogens*). The Commission decided to refer all six draft conclusions to the Drafting Committee.[5] The Commission also decided to change the name of the topic from "*Jus cogens*" to "Peremptory norms of general international law (*jus cogens*)".

3. At its seventieth session (2018), the Commission had before it the third report of the Special Rapporteur, which addressed the legal consequences of peremptory norms of general international law (*jus cogens*).[6] The Commission decided to refer 12 draft conclusions to the Drafting Committee.[7]

4. The purpose of the present report is to address two main outstanding issues. First, the report will address the issue of regional *jus cogens* as promised in the third report. Second, the report will address the question of the illustrative list.

II. Previous consideration of the topic

A. Debate in the Commission

5. During the seventieth session, the third report elicited an intense debate spanning seven days with a total of 27 members of the Commission taking the floor. Nearly all members expressed agreement with the Special Rapporteur that the subject of the third report was particularly complicated and sensitive. On the whole, with some strongly worded exceptions,[8] the members of the Commission were supportive of the approach of the Special Rapporteur and the proposed draft conclusions.[9] A full

[1] See Report of the Commission on the work of its sixty-seventh session, *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), para. 286.

[2] A/CN.4/693.

[3] See Report of the Commission on the work of it sixty-eighth session, *Official Records of the General Assembly*, *Seventy-first Session, Supplement No. 10* (A/71/10), para. 100.

[4] A/CN.4/706.

[5] See Report of the Commission on the work of its sixty-ninth session, *Official Records of the General Assembly, Seventy-Second Session, Supplement No. 10* (A/72/10), para. 146.

[6] A/CN.4/714 and Corr.1.

[7] See Report of the Commission on the work of its seventieth session, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 96.

[8] Strongly critical statements were made by Mr. Zagaynov (A/CN.4/SR.3416); Mr. Murphy (A/CN.4/SR.3416); Mr. Rajput (A/CN.4/SR.3418); Mr. Huang (A/CN.4/SR.3419); Sir Michael Wood (A/CN.4/SR.3421); and Mr. Valencia-Ospina (A/CN.4/SR.3421). It bears mentioning that, unlike other critical members, Mr. Valencia-Ospina's criticism was not the Special Rapporteur went too far, but, on the contrary, that he did not go far enough. It might also be mentioned that Mr. Nolte (A/CN.4/SR.3417), while generally critical, was not as severe as the others.

[9] Most members adopted, on the whole, a positive attitude towards to the report and the draft conclusions, although some did suggest some drafting changes: Mr. Saboia (A/CN.4/SR.3415); Mr. Nguyen (*ibid.*); Mr. Šturma (A/CN.4/SR.3416); Mr. Park (*ibid.*); Mr. Ruda Santolaria (A/CN.4/SR.3417); Ms. Lehto (*ibid.*); Mr. Jalloh (A/CN.4/SR.3418); Mr. Ouazzani Chahdi (*ibid.*); Mr. Vázquez-Bermúdez (*ibid.*); Ms. Galvão Teles (A/CN.4/SR.3419); Mr. Hassouna (*ibid.*); Ms. Oral (*ibid.*); Mr. Reinisch (*ibid.*); Mr. Cissé (A/CN.4/SR.3420); Mr. Grossman

response by the Special Rapporteur to the debate addressed the major criticisms that had been raised.[10] A summary of the debate can be found in the report of the Commission and will not be reproduced here.[11] The current report will therefore only highlight those issues that attracted significant criticism.

6. It is useful to begin with a methodological criticism raised by Mr. Nolte[12] and supported by Mr. Grossman,[13] Mr. Murase[14] and Mr. Rajput[15] – particularly since this methodological criticism suddenly became the flavour of the day during the Sixth Committee's consideration of the Commission's report. In their statements, these members criticized the working method of the Commission *on this topic* in not sending the draft conclusions adopted by the Drafting Committee for adoption by the Commission with commentaries. They suggested that this manner of working reduced the possibility for Member States to influence the work of Commission.

7. There were several suggestions for consistency of terms.[16] On a more substantive level, some members suggested that the report (and its conclusions) were not supported by sufficient State practice.[17] Other members, however, expressed the view that the report was well supported by practice.[18]

8. As a general matter, many members raised the absence of the consideration of general principles of law as a source of international law.[19] Members pointed out that the legal consequences of *jus cogens* on general principles should also be addressed in the draft conclusions.

9. Although some fundamental structural issues were raised by two members,[20] on the whole members were satisfied with the content and structure of the first group of draft proposals.[21] There were, however, a number of drafting suggestions intended to bring draft conclusions into alignment with the Vienna Convention on the Law of Treaties (hereinafter, "1969 Vienna Convention").[22] Furthermore, while most members supported the third paragraph of draft conclusion 10 concerning the effects

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Guiloff (*ibid.*); Mr. Hmoud (*ibid.*); Mr. Al-Marri (*ibid.*); Mr. Peter (A/CN.4/SR.3421); Ms. Escobar Hernández (*ibid.*); and Mr. Gómez-Robledo (*ibid.*).

[10] A/CN.4/SR.3425.

[11] See A/73/10, paras. 111-152.

[12] A/CN.4/SR.3417.

[13] A/CN.4/SR.3420.

[14] A/CN.4/SR.3418.

[15] *Ibid*.

[16] See, for example, Mr. Vázquez-Bermúdez (A/CN.4/SR.3418) and Sir Michael Wood (A/CN.4/SR.3421) concerning the use of the word "effect" instead of "consequences".

[17] See, e.g., Mr. Zagaynov (A/CN.4/SR.3416). Other members, e.g. Mr. Murphy (*ibid.*), Mr. Rajput (A/CN.4/SR.3418) and Sir Michael Wood (A/CN.4/SR.3421), expressed the view that specific parts of the report and the associated draft conclusions were not supported by practice but fell short of making a general assertion about the lack of practice in the report.

[18] See, e.g., Mr. Saboia (A/CN.4/SR.3415); Mr. Šturma (A/CN.4/SR.3416); Mr. Ruda Santolaria (A/CN.4/SR.3417); Ms. Lehto (*ibid.*); Mr. Jalloh (A/CN.4/SR.3418); Mr. Vázquez-Bermúdez (*ibid.*); Ms. Oral (A/CN.4/SR.3419); and Mr. Hmoud (A/CN.4/SR.3420).

[19] See, e.g., Mr. Zagaynov (A/CN.4/SR.3416), Mr. Vázquez-Bermúdez (A/CN.4/SR.3418); Mr. Grossman Guiloff (A/CN.4/SR.3420); and Ms. Escobar Hernández (A/CN.4/SR.3421).

[20] Mr. Murphy (A/CN.4/SR.3416) and Ms. Oral (A/CN.4/SR.3419). See, for contrary views on the structure, Mr. Saboia (A/CN.4/SR.3415) and Mr. Nguyen (*ibid.*).

[21] As an example of issues that were raised, it was questioned whether it was appropriate to retain the distinction between emerging *jus cogens* and pre-existing *jus cogens,* for the purposes of severability.

[22] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

of *jus cogens* on interpretation,[23] several members expressed the view that the paragraph should be a general one applicable to all the sources of international law.[24]

10. The main source of discussion in the treaty-related group of draft conclusions concerned the appropriateness of draft conclusion 14 (recommended procedures for dispute settlement). While some members supported draft conclusion 14,[25] the provision was subjected to criticism from two opposing and mutually contradictory fronts. On the one front, some members suggested that the provision, notwithstanding its recommendatory status, sought to impose treaty obligations on States not party to the 1969 Vienna Convention and to States that had explicitly expressed their objection by entering a reservation to the dispute settlement provisions of that Convention.[26] On the other hand, other members suggested that the non-inclusion of the full framework of the 1969 Vienna Convention and reduction of the dispute settlement provisions to mere recommended procedures was diminishing what was a condition for the agreement on the *jus cogens* provisions in the Convention (arts. 53 and 64).[27]

11. The contents of draft conclusions 15 and 16 were generally supported, with minor suggestions made for drafting improvements.[28] Similarly, the contents of draft conclusion 17 were generally supported, the main issue of contention concerning the question of whether the text of the draft conclusion should explicitly refer to decisions of the Security Council.[29] The contents of draft conclusions 18, 19, 20 and 21 were also generally supported.[30] Other than minor issues, there were two main issues for discussion. First, one member lamented the fact that the issue of standing as reflected in article 48 of the articles on the responsibility of States for internationally wrongful acts of 2001 (hereinafter, "articles on State responsibility") was not included in the proposed draft conclusions.[31] The Special Rapporteur is in agreement with this criticism and hopes the Drafting Committee will be in a position to include a provision to that effect as a second paragraph of draft conclusion 18. Second, the exclusion of the word "serious" from the draft conclusions, contrary to the articles on State responsibility, was criticized by several members.[32]

12. It was, however, draft conclusions 22 and 23 that attracted the most debate. Strong criticism was expressed by some members.[33] Other members expressed support for the draft conclusions.[34] Taking into account the debate, and having

[23] Mr. Saboia (A/CN.4/SR.3415), Mr. Park (A/CN.4/SR.3416) and Ms. Lehto (A/CN.4/SR.3417) did, however, sound cautionary calls that this interpretative proposition should not be used to avoid the effects of *jus cogens*.

[24] See, e.g., Mr. Nolte (A/CN.4/SR.3417); Mr. Jalloh (A/CN.4/SR.3418); and Ms. Escobar Hernández (A/CN.4/SR.3421).

[25] See, e.g., Mr. Saboia (A/CN.4/SR.3415); Mr. Nguyen (*ibid.*); and Mr. Šturma (A/CN.4/SR.3416).

[26] See, e.g., Mr. Park (A/CN.4/SR.3416); Mr. Zagyanov (*ibid.*); and Ms. Galvão Teles (A/CN.4/SR.3419).

[27] See, especially, Mr. Murphy (A/CN.4/SR.3416) and Sir Michael Wood (A/CN.4/SR.3421).

[28] See, however, statements by Mr. Zagaynov (A/CN.4/SR.3416); Mr. Rajput (A/CN.4/SR.3418) and Sir Michael Wood (A/CN.4/SR.3421).

[29] This issue gave rise to two mini-debates (see A/CN.4/SR.3420 and A/CN.4/SR.3421).

[30] See, however, the strong criticism raised by Mr. Rajput (A/CN.4/SR.3418).

[31] Ms. Oral (A/CN.4/SR.3419). For the articles on State responsibility, see General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76-77.

[32] See, especially, Mr. Murphy (A/CN.4/SR.3416); Mr. Rajput (A/CN.4/SR.3418); and Sir Michael Wood (A/CN.4/SR.3421). For a strong of defence of the exclusion of the word "serious", see Mr. Hmoud (A/CN.4/SR.3420).

[33] Members that opposed these draft conclusions were: Mr. Zagaynov (A/CN.4/SR.3416); Mr. Murphy (*ibid.*); Mr. Nolte (A/CN.4/SR.3417); Mr. Rajput (A/CN.4/SR.3418); Mr. Huang (A/CN.4/SR.3419); and Sir Michael Wood (A/CN.4/SR.3421).

[34] Mr. Saboia (A/CN.4/SR.3415); Mr. Nguyen (*ibid.*); Mr. Šturma (A/CN.4/SR.3416); Mr. Ruda

responded to the criticism of draft conclusions 22 and 23, the Special Rapporteur proposed the replacement of draft conclusions 22 and 23 by a without prejudice clause.[35]

B. Debate in the Sixth Committee of the General Assembly

13. Before proceeding to describe (and in part respond to) the debate of the topic in the Sixth Committee during the seventy-third session of the General Assembly, the Special Rapporteur wishes to express his deep gratitude to the Chair of the Commission during its seventieth session for his statement at the end of the debate, in which he explained that members of the Commission, including Special Rapporteurs, attend the Sixth Committee voluntarily and at their own expense.[36] An unfortunate impression was created by an off-the-cuff remark of one delegation, that Special Rapporteurs were enjoying the beaches of Miami at the expense of the United Nations.[37]

14. While some States expressed concern with the approach of the Commission, most States welcomed the work of the Special Rapporteur and of the Commission on this topic.[38] In addition to commenting on specific draft conclusions, Member States

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Santolaria (A/CN.4/SR.3417); Ms. Lehto (*ibid.*); Mr. Jalloh (A/CN.4/SR.3418); Mr. Ouazzani Chahdi (*ibid.*); Ms. Galvão Teles (A/CN.4/SR.3419); Mr. Hassouna (*ibid.*); Ms. Oral (*ibid.*); Mr. Cissé (A/CN.4/SR.3420); Mr. Grossman Guilof (*ibid.*); Mr. Hmoud (*ibid.*); Mr. Peter (A/CN.4/SR.3421); and Ms. Escobar Hernández (*ibid.*). See, however, Mr. Reinisch (A/CN.4/SR.3419) who, though not questioning the substance of draft conclusion 23, suggested it ought not be included in these draft conclusions since it was being addressed in another topic.

[35] A/CN.4/SR.3425.

[36] Mr. Valencia-Ospina (A/C.6/73/SR.30).

[37] For the record, the Special Rapporteur routinely attends the Sixth Committee sessions at his own personal expense without assistance from the United Nations, his Government or any other institution.

[38] Of the States that commented on the topic, the following adopted a generally negative stance: China (A/C.6/73/SR.25); France (A/C.6/73/SR.26); Romania (*ibid.*); Israel (A/C.6/73/SR.27); Turkey (*ibid.*); and the United States of America (A/C.6/73/SR.29). States that adopted an overall positive stance were: Bahamas, on behalf of behalf of the Caribbean Community (CARICOM) (A/C.6/73/SR.20); Austria (statement of 26 October 2018; see also A/C.6/73/SR.25) (reiterating its appreciation of the Commission's work on this topic) (all statements to the Sixth Committee cited in the present report are available from the United Nations PaperSmart portal, at http://papersmart.unmeetings.org); Brazil (A/C.6/73/SR.25); Cyprus (*ibid.*); Egypt (*ibid.*); Mexico (*ibid.*) ("welcomed the fact that most of the draft conclusions proposed by the Special Rapporteur were based on provisions of instruments adopted by the Commission, in particular the Vienna Convention, the articles on State responsibility for internationally wrongful acts and the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations. It supported the inclusion of a draft conclusion on the consequences of *jus cogens* norms for the general principles of law, so as to embrace all sources of international law"); Singapore (statement of 30 October 2018; see also A/C.6/73/SR.25) (which emphasized that its comments did not seek to detract from its appreciation of the work done as a whole and the in-depth analysis which had gone into the preparation of the report); Estonia (A/C.6/73/SR.26); Japan (*ibid.*) ("his delegation supported the Special Rapporteur's approach"); New Zealand (*ibid.*); Portugal (*ibid.*); Thailand (*ibid.*); Greece (A/C.6/73/SR.27 and statement of 30 October 2018) ("commended the Special Rapporteur for the pragmatic and holistic approach he had managed to take in his third report … in spite of the scarcity of relevant State practice" and it extended appreciation to the Drafting Committee for its ongoing consideration of the draft conclusions); Islamic Republic of Iran (A/C.6/73/SR.27); Malaysia (statement of 30 October 2018; see also A/C.6/73/SR.27) (which expressed appreciation for the work done so far by the Special Rapporteur); Republic of Korea (A/C.6/73/SR.27 and statement of 30 October 2018) ("The Special Rapporteur had been able to prepare a comprehensive report that attempted to clarify those fundamental issues of international law, despite the dearth of State practice and jurisprudence" and the delegation highly commended the Special Rapporteur and the

addressed a range of issues, including the methodological approach of the Special Rapporteur and the Commission to the topic. Although the issues of regional *jus cogens* and the illustrative list also arose in the debates, they will not be addressed in the present section of the report, but rather in subsequent sections.

15. Like several members of the Commission, many States expressed dissatisfaction with the methodology employed by the Commission of retaining the draft conclusions in the Drafting Committee until a full set had been completed.[39] It is interesting to note that, while this approach was explicitly adopted several years earlier,[40] it is only being raised in the debates now. Moreover, the impression created that this is the first time that the Commission has worked in this way is not accurate. The Commission placed the topic "Formation and evidence of customary international law" (later renamed "Identification of customary international law") on its agenda in 2012. That topic was considered by the Commission in 2012, 2013, 2014, 2015, with the full set of draft conclusions and commentaries thereto adopted in 2016. The first time that the report of the Commission for that topic contained any draft conclusions with commentaries was in 2016 – the year in which the full set was adopted on first reading – yet not a single member of the Commission nor any Member States raised any concern about this methodology. Indeed, it is interesting that the delegation of France, in its intervention during the debate in the Sixth Committee, referred to the manner in which the topic "Identification of customary international law" was handled as the ideal method of working.[41] Yet the same delegation expressed concern about this same method of work now being employed in the topic "Peremptory norms of general international law (*jus cogens*)". The summary in the report of the Commission of the Special Rapporteur's response to the criticism of the three members of the Commission that initially raised the issue appears more apologetic than the response actually given in the summation of the debate.[42] It is therefore necessary to provide the verbatim response:

Commission for the invaluable work); South Africa (A/C.6/73/SR.27); Viet Nam (*ibid.*); and Mozambique (A/C.6/73/SR.28). Other States expressed their views on various provisions, without showing either a positive or a negative overall disposition to the manner in which the topic was being handled. Those included: Czech Republic (A/C.6/73/SR.25); Poland (*ibid.*); Germany (A/C.6/73/SR.26); India (*ibid.*); Netherlands (*ibid.*); Slovakia (*ibid.*); and the United Kingdom of Great Britain and Northern Ireland (A/C.6/73/SR.27). Italy (A/C.6/73/SR.25) is somewhat difficult to place. While the overall tone of its statement seemed positive, its proposal for the Commission to adopt a report suggested a strong negative disposition.

[39] France (A/C.6/73/SR.20) ("The Drafting Committee had provisionally adopted several conclusions on the topic 'Peremptory norms of general international law (*jus cogens*)', but none of them had yet been discussed or adopted by the Commission in plenary, and no commentaries had yet been provided. The profusion of topics also made it difficult for States to submit the comments that the Commission requested every year. It was therefore essential to return to the Commission's earlier practice of examining only a limited number of topics at each session, which would allow it to analyse the topics in detail and take stock of practice and case law around the world."); Finland (on behalf of the Nordic countries) (A/C.6/73/SR.24); China (A/C.6/73/SR.25); Singapore (*ibid.*); Germany (A/C.6/73/SR.26); Romania (*ibid.*); Israel (A/C.6/73/SR.27); and United States (A/C.6/73/SR.29).

[40] See, e.g., A/72/10, para. 210 ("[t]he Special Rapporteur reiterated his preference that the Drafting Committee finalize its work on all proposals for draft conclusions that he intended to make during the first reading before transmitting them back to the plenary"). See also statement of 9 August 2016 of the Chair of the Drafting Committee (Mr. Šturma) on *jus cogens* and statement of 26 July 2017 of the Chair of the Drafting Committee (Mr. Rajput) on peremptory norms of general international law (*jus cogens*).

[41] France (A/C.6/73/SR.20) ("For that reason, efforts must be made to enable Special Rapporteurs to receive useful information on different legal systems. The method adopted for the Commission's work on the topic 'Identification of customary international law' was a model that could be adopted in the future").

[42] A/73/10, para. 162.

I wish to begin my comments by responding to Mr. Nolte's concern about the methods of work. This concern was shared by Mr. Rajput, Mr. Grossman and Mr. Murase ….

It should be remembered that the particular method of work in this topic was first proposed to the Commission by the Special Rapporteur during the summary of the debate on the first report as a compromise in response to concerns by members like Mr. Nolte, Mr. Murphy, Mr. Wood who queried the suggestion in that first report that the Commission should adopt a fluid approach, i.e. adopt some conclusions but tweak them as the work progressed. The alternative, as I understood their suggestion then, was a more radical departure from the practice of the Commission. It was that the Special Rapporteur produce several reports without any draft conclusions and only later when all the issues were clear, prepare draft conclusions. Perhaps he has forgotten, but there is a saying in South Africa, the victim never forgets.

It is true that subsequent to this proposal, as Special Rapporteur I did see additional benefits to this approach, so that, while I initially proposed it as a compromise, I later fully embraced it.

But, I should also add that, even if this were not an intentional choice by the Special Rapporteur, the records will show that this topic has always been considered in the second half of the session. In none of the sessions that this topic had been considered, would it have been possible, in the two or three weeks left after its finalization in the Drafting Committee, to prepare the commentaries, submit them to editing and translation and have them ready for adoption by the Commission.

It is true that this could have been done for the following year, so that the draft conclusions considered in 2016 are adopted in 2017, draft conclusions considered in 2017 are adopted in 2018 and the draft conclusions that may be considered this year may be adopted in 2019. But this might be even more confusing for States who now receive both the summary of debate on the as yet unadopted text of the current year, plus the adopted text from the report of the previous year.

16. A second methodological issue raised by several delegations concerned the importance of practice in the consideration of the topic. A number of States questioned the Special Rapporteur's reliance on theory and doctrine rather than State practice.[43] It should be noted that, although a few States made this assertion, this was not the majority view and, in fact, some States explicitly observed that the Special Rapporteur's third report relied on State practice, notwithstanding the dearth

[43] Czech Republic (A/C.6/73/SR.25) ("the Special Rapporteur's approach was based primarily on references to doctrine rather than to international practice"); France (A/C.6/73/SR.26); Romania (*ibid*.) ("The Commission's consideration of the topic must be based on State practice, rather than on doctrinal approaches"); Slovakia (*ibid*.) ("Slovakia noted with concern that several of the draft conclusions on the topic proposed by the Special Rapporteur were based merely on doctrinal opinions rather than State practice"); and Israel (A/C.6/73/SR.27 and statement of 30 October 2018) (which had a number of concerns regarding the methodology employed by the Special Rapporteur, including that "the Special Rapporteur had relied too much on theory and doctrine, rather than on relevant State practice"). See also United States (A/C.6/73/SR.29) ("More generally, the lack of State practice or jurisprudence on the bulk of the questions addressed in the project had clear implications for the role and function of any draft conclusions ultimately adopted on the topic. Although framed as 'draft conclusions', the statements contained in the project were not grounded in legal authority, but rather reflected an effort to imagine, through deductive reasoning, ways in which certain principles could apply in hypothetical circumstances.").

thereof.[44] It is difficult to respond to the criticism that the work of the Special Rapporteur and the Commission has followed a theoretical approach and not relied on practice, since none of the States have pointed to a single draft conclusion entirely unsupported by practice. Not a single draft conclusion proposed in the third report (or for that matter any of the previous reports) is based solely on doctrine. Although only a small minority of States made this allegation, it is so serious and damning that,[45] exceptionally, some examples to refute it are necessary. State practice in the form of national judicial decisions,[46] statements by States,[47] treaty practice,[48] resolutions of the General Assembly,[49] and resolutions of the Security Council[50] is provided in the third report in abundance. The report is also replete with invocations of international and regional jurisprudence.[51]

17. As in the Commission, many States focused their attention on draft conclusion 14, as provisionally approved by the Drafting Committee in 2018,[52] concerning the

[44] Examples of States that explicitly made this observation include: Austria (statement of 26 October 2018; see also A/C.6/73/SR.25) (which welcomed the initial proposed draft conclusions 10 to 12, which it felt largely reflected the current state of the law as laid down in the 1969 Vienna Convention and corresponding customary international law); Brazil (A/C.6/73/SR.25) ("the Special Rapporteur was to be commended for the quality of his research and for proposing draft conclusions that reflected State practice in a manner consistent with the Vienna Convention on the Law of Treaties"); Japan (A/C.6/73/SR.26) ("his delegation supported the Special Rapporteur's … reliance on State practice and the decisions of international courts and tribunals to give content and meaning to the article"); Portugal (*ibid.*) ("The Commission had struck a good balance between theory and practice in its work on the topic at its seventieth session"); and South Africa (A/C.6/73/SR.27).

[45] The criticism is particularly serious in the light of the Special Rapporteur's commitment to avoiding a theoretical approach and focusing on practice. See third report (A/CN.4/714 and Corr.1), para. 23.

[46] See randomly selected examples from the third report (citations omitted): footnote 363 referring to *Nada (Youssef) v. State Secretariat for Economic Affairs* (Switzerland); footnote 352 for a reference to, *inter alia, Sabbithi v. Al Saleh* (United States); footnote 264 for a reference to *Nulyarimma v. Thompson* (Australia). Cases relating to draft conclusions 22 and 23 have been left out here because of the obvious controversy caused by those draft conclusions, which was unrelated to the use or not of State practice, but rather concerned the sufficiency of the practice.

[47] See, as randomly selected examples from the third report (citations omitted): footnote 79 of the third report containing statements by the Netherlands, Cyprus and Israel, on various treaties; footnote 81, containing the arguments of Australia in the *East Timor* case in relation to the Timor Gap Treaty; footnote 83 on the view of the United States concerning the Treaty of Friendship between the Soviet Union and Afghanistan; footnote 126 referring to the statement of Rwanda in connection with article 66 of the 1969 Vienna Convention; footnote 147 referring to the statements of several States (United Kingdom, Turkey) in a Security Council meeting pertaining to a complaint by Cyprus on the use of force by Turkey in Cyprus; footnote 266 referring to the statements of Burkina Faso and the Czech Republic concerning the relationship between *erga omnes* obligations and *jus cogens*.

[48] It suffices here to say that much of the work in the third report (A/CN.4/714 and Corr.1) is based on the 1969 Vienna Convention.

[49] See for randomly selected examples from the third report (citations omitted): footnote 86 referring to General Assembly resolution 33/28 A of 7 December 1979; footnote 248 referring to General Assembly resolution 3411 D of 28 November 1975.

[50] See for randomly selected examples from the third report (citations omitted): footnote 150 Security Council resolution 353 (1974); footnote 241 referring to Security Council resolution 276 (1970).

[51] See for randomly selected examples from the third report (citations omitted): footnote 88 referring to *Prosecutor v. Taylor* (Special Court for Sierra Leone); footnote 124 referring to *Armed Activities on the Territory of the Congo* (judgment of the International Court of Justice), which advanced a narrow reading of article 66 of the 1969 Vienna Convention; footnote 154 referring to *Council of the European Union v. Front populaire pour la libération de la sauguia-el-hamra et du rio de oro (Front Polisario)*; footnote 163 referring to the *Oil Platforms case* (International Court of Justice).

[52] Available from http://legal.un.org/ilc/.

dispute settlement mechanism for the invalidation of treaties. In many ways, the comments expressed pull in different directions and reveal why the solution arrived at by the Drafting Committee is the optimal solution. At one end of the spectrum, States suggested a close alignment of the procedures with the 1969 Vienna Convention model, since doing otherwise might diminish the importance of the dispute settlement provisions contained in the Convention, which were an essential component of the *jus cogens* regime therein.[53] Other States, at the other end of the spectrum, viewed the inclusion of the draft conclusion, notwithstanding its basis in the 1969 Vienna Convention, as an imposition of a treaty rule on States that are not party to the treaty, since the draft conclusion cannot constitute a rule of customary international law.[54] In the Special Rapporteur's view, both of these concerns have *some* merit but also have flaws. Draft conclusion 14, as provisionally adopted by the Drafting Committee, seeks to mediate between these two conflicting concerns.

18. The present report will turn now to address two issues that are indirectly related to the role of practice and illustrate misunderstandings of some aspects of the third report. First, in its statement, Israel asserted that draft conclusions 20 and 21 were unacceptable as they were based solely on the articles on State responsibility, which, in its view, did not reflect customary international law.[55] The Commission routinely relies on its previous work and it would be strange if the Commission in this case departed from its previous work without offering any good reason. But more than that, those draft conclusions are based on more than just the articles on State responsibility. They are based on judicial decisions (national, regional and international),[56] statements by States[57] and resolutions of the Security Council and the General Assembly.[58] It is thus simply not accurate to say that those draft conclusions were based solely on the articles on State responsibility. At any rate, in the view of the Special Rapporteur, it would be difficult for the Commission, in 2018, to create the impression that it is in accordance with international law for States not to cooperate to bring to an end situations created by breaches of *jus cogens* and, even more, that it is, under international law, permissible for States to assist in the maintenance of such situations. In its statement, Turkey stated that the Special Rapporteur had argued that "non-derogability was a criterion ..., not a consequence of, *jus cogens*".[59] This is clearly a mistake because, in various places, the reports of the Special Rapporteur have made it clear that, in his view, non-derogability is a consequence.[60] The criterion is "acceptance and recognition" of non-derogability, referred to in the second report as *opinio juris cogentis*.

19. Divergent views were also expressed with respect to the question of the explicit mention of the Security Council in draft conclusion 17. Those views, no doubt, will

[53] See, e.g., India (A/C.6/73/SR.26); Netherlands (*ibid*.); and United Kingdom (statement of 30 October 2018; also A/C.6/73/SR.27);

[54] See, e.g., Poland (A/C.6/73/SR.25); Singapore (A/C.6/73/SR.25); Greece (A/C.6/73/SR.27); and Israel (A/C.6/73/SR.27).

[55] Israel (A/C.6/73/SR.27). See also United Kingdom (statement of 30 October 2018; also A/C.6/73/SR.27).

[56] See, e.g., from the third report, footnote 222 referring to *Legal Consequences of the Construction of Wall, Advisory Opinion*; footnote 225 referring to *South West Africa Cases, Preliminary Objections;* footnote 228 referring to the *Namibia* advisory opinion; footnote 239 referring to *A and others v. Secretary of State*; and footnote 215 referring to *La Cantuta v. Perú.*

[57] See, from the third report, footnote 222 referring to the statement of Iraq in a Security Council debate (S/PV.4503).

[58] See, e.g., from the third report, footnote 241 referring to Security Council resolution 276 (1970) and footnote 244 referring to General Assembly resolution 2145 (XXI) of 27 October 1966.

[59] Turkey (A/C.6/73/SR.27).

[60] See, e.g., second report (A/CN.4/706), para. 38, where the Special Rapporteur states that non-derogability "would not be criteria but rather a consequence of *jus cogens*". See also first report (A/CN.4/693), para. 62 ("[non-derogability] is a consequence of peremptoriness").

be taken into account into by the Drafting Committee when it considers draft conclusion 17.

20. As in the Commission, many States addressed the issue of individual criminal responsibility. Given the proposal by the Special Rapporteur to include a without prejudice clause, it is unnecessary to say more on this subject.

III. Regional *jus cogens*

21. The third report intimated that the question of regional *jus cogens* would be addressed in the fourth report.[61] The Special Rapporteur had already, in his first report, expressed his preliminary views on the question of regional *jus cogens:*

> The idea that *jus cogens* norms are universally applicable has itself two implications … A second, and more complicated implication of universal application is that *jus cogens* norms do not apply on a regional or bilateral basis. While there are some authors that hold the view that regional *jus cogens* is possible, the basis for this remains somewhat obscure. Since, if it exists, regional *jus cogens* would be an exception to this general principle of universal application of *jus cogens* norms. The subject of whether international law permits the doctrine of regional *jus cogens* will be considered in the final report, on miscellaneous issues.[62]

22. States have long been concerned about how the Commission would, eventually, address the question of regional *jus cogens.*[63] States have, in the course of the debate of the Commission's report in 2018, commented on the question of regional *jus cogens.* In their statements, those States that commented on the question of regional *jus cogens* generally rejected the possibility of regional *jus cogens.* Malaysia, while looking forward to further discussion on regional *jus cogens*, noted that such application "might not be consistent with … *jus cogens*" and that the concept of regional *jus cogens* "might also create confusion and should therefore be avoided".[64] The United Kingdom said it was "doubtful as to the utility of considering 'regional' *jus cogens*".[65] In its view, the "concept of 'regional' *jus cogens* would undermine the integrity of universally applicable *jus cogens* norms". In its statement, Thailand indicated that it was of the view that "that the acceptance of the existence of regional *jus cogens* would contradict and undermine the notion of *jus cogens* being norms 'accepted and recognized by the international community of States as a whole'" and therefore "would not be possible under international law".[66] Similarly, Finland, on behalf of the Nordic countries, said it was "unconvinced about the possibility of reconciling regional *jus cogens* with the notion of *jus cogens* as peremptory norms of general international law".[67] In even stronger terms, Greece stated that it firmly believed that the idea of regional *jus cogens* "ran contrary to the very notion of *jus cogens*, which was by definition universal".[68] Similarly, South Africa said that was "concerned that entertaining a concept such as regional *jus cogens* would have a watering-down effect on the supreme and universal nature of *jus cogens.*".[69] The United States, for its part, "questioned the utility of considering 'regional *jus cogens*'

[61] A/CN.4/714 and Corr.1, para. 162.
[62] A/CN.4/693, para. 68.
[63] K. Gastorn, "Defining the imprecise contours of *jus cogens* in international law", *Chinese Journal of International Law*, vol. 16 (2017), pp. 643–662, at pp. 659–660.
[64] Malaysia (A/C.6/73/SR.27).
[65] United Kingdom (statement of 30 October 2018; see also A/C.6/73/SR.27).
[66] Thailand (A/C.6/73/SR.26).
[67] Finland (on behalf of the Nordic countries) (A/C.6/73/SR.24).
[68] Greece (A/C.6/73/SR.27).
[69] South Africa (A/C.6/73/SR.27).

and agreed with other delegations that that concept appeared to be at variance with the view that *jus cogens* norms were 'accepted and recognized by the international community as a whole'".[70] Even Portugal, which stated that it may be "an appealing exercise from the intellectual point of view" to study the issue of regional *jus cogens,* urged some caution since the "integrity of peremptory norms of general international law as norms that are universally recognizable and applicable should not be jeopardized".[71]

23. As the Special Rapporteur's first report notes, some authors have advanced the idea of a regional *jus cogens.*[72] Chief amongst these is Robert Kolb.[73] However, Kolb's approach to *jus cogens*, discussed at length in the first report, which lacks the universalist, absolutist and hierarchical superiority ambition, may, in contrast to the approach adopted by the Commission, be fully consistent with the idea of regional *jus cogens*.[74] He views *jus cogens* as a "legal technique", one that can apply and be employed in variety of ways.[75] For him there are "different types of *jus cogens* whose role and effects in international law are not the same".[76] Under his theory, any rule which cannot be altered, including procedural rules of the International Court of Justice, can constitute *jus cogens*.[77] For example, the fact that parties to a dispute cannot request an advisory opinion from the Court, or cannot request the Court to provide them a non-official indication of the outcomes of its deliberations would be examples of *jus cogens* norms.[78] Under his broad conception of *jus cogens,* it is not difficult to conceive of regional (or even bilateral) *jus cogens*, since any agreement between States that a rule, any rule, may not be derogated from would qualify as a peremptory norm.[79] The conception of *jus cogens* reflected in the practice of States, as elaborated in the first, second and third reports, supports the idea of *jus cogens* based on a "hierarchy (of norms) [and] linked in turn with the idea of safeguarding via primacy what is most important, a supposedly universal, common core of human values".[80]

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[70] United States (A/C.6/73/SR.29).

[71] Portugal (statement of 26 October 2018 and A/C.6/73/SR.26).

[72] For a description of the debate, see U. Linderfalk, "Understanding the *jus cogens* debate: the pervasive influence of legal positivism and legal idealism", *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 51 ff., at pp. 70, 72 and 81. See also R. Hasmath, "The utility of regional *jus cogens*", paper presented at the American Political Science Association Annual Meeting (New Orleans, United States), 30 August-2 September 2012.

[73] See, also W. Czapliński, "*Jus Cogens* and the law of treaties" in C. Tomuschat and J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order:* Jus Cogens *and Obligations* Erga Omnes (Leiden, Martinus Nijhoff, 2006), pp. 83-98, at pp. 92-93. See also G. Gaja, "*Jus cogens* beyond the Vienna Convention", *Collected Courses of the Hague Academy of International Law, 1981-III*, vol. 172, pp. 271–278, at p. 284.

[74] See, generally, R. Kolb, *Peremptory International Law (*Jus Cogens*): A General Inventory* (Oxford, Hart, 2015), especially at pp. 97 *et seq.* See, for discussion, the first report (A/CN.4/693), especially para. 57.

[75] See, for description, T. Kleinlein, "*Jus cogens* re-examined: value formalism in international law", *European Journal of International Law*, vol. 28 (2017), pp. 295–315, who, at p. 297, describes Kolb's approach to the subject as "non-ideological, technical and analytical approach".

[76] Kolb, *Peremptory International Law (*Jus Cogens*) ...* (footnote 72 above), p. 45.

[77] *Ibid*., pp. 51-54.

[78] *Ibid*., pp. 51–52.

[79] *Ibid.*, p. 97 ("If one follows the legal technique view of *jus cogens,* as advocated in this monograph, there is no reason to deny the existence of regional peremptory norms").

[80] H.R. Fabri, "Enhancing the rhetoric of *jus cogens*", *European Journal of International Law*, vol. 23 (2012), pp. 1049–1058, at p. 1050. See C. Tomuschat, "The Security Council and *jus cogens*", in E. Cannizzaro (ed.), *The Present and Future of* Jus Cogens (Rome, Sapienza, 2015), pp. 7–98, at p. 8, who describes *jus cogens* as "the class of norms that protect the fundamental values of the international community". Later on, at p. 23, he notes that "*jus cogens* has strong moral overtones". See, especially, draft conclusion 2 of the draft conclusions on peremptory norms of

24. However, even some authors who generally accept the "absolutist" ideas of *jus cogens* seem to, albeit more cautiously, accept the view that, theoretically at least, regional *jus cogens* is possible. Erika de Wet, for example, tentatively suggests that the obligations in the European Convention on Human Rights [81] have become "regional customary law and arguably even … regional *jus cogens*".[82] This, she states, is evidenced by the "special status" that the European Convention enjoys in the territory of its members.[83] Czapliński adopts a somewhat ambivalent approach. First, echoing the sentiments expressed by States above, he states that it is "doubtful whether regional (particular) norms can be of a peremptory nature" since the definition of *jus cogens* in article 53 of the 1969 Vienna Convention is "composed exclusively of norms of general international law which are accepted and recognized by the international community as a whole".[84] Immediately thereafter, however, he states that the notion has developed since 1969, and that he could accept, *theoretically,* the existence of regional *jus cogens.*[85] Former member of the Commission, and judge of the International Court of Justice, Giorgio Gaja, has also adopted an open approach to the question of regional *jus cogens*:

> [T]he Convention indicates that peremptory norms necessarily pertain to "general international law" and apply to the "international community of States as a whole". No convincing reason has ever been given for ruling out the possibility of the existence of non-universal, or "regional" peremptory norms. Values prevailing in regional groups do not necessarily conflict with values operating in a larger framework. There may be norms which acquire a peremptory character only in a regional context.[86]

25. Another former member of the Commission, Alain Pellet, adopts a similar approach.[87] First, he suggests, correctly in the Special Rapporteur's view, that very often, the emergence of a universal norm of *jus cogens* originates from demands of civil society (he speaks broadly of non-State actors) and regions.[88] By this he does not mean, it seems, that norms of universal *jus cogens* are necessarily first regional *jus cogens*. Rather, as I understand Pellet, normal rules emerging in the regional context are often the impetus for the emergence of norms of *jus cogens*. But he does add, in explicit parentheses,[89] that he believes that there could be "regional *jus cogens* – there *is* a European system of peremptory human rights which is certainly more

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general international law (*jus cogens*) provisionally adopted by the Drafting Committee in 2017 (statement of the Chair of the Drafting Committee of 26 July 2017 (footnote 40 above), annex). In explaining this draft conclusion, the Chair of the Drafting Committee stated that the "view of the majority of members was that this was an important provision which provided a general orientation for the provisions that followed" (*ibid.*). See, for the substantiation of this approach in the practice of States and the decisions of international courts and tribunals, first report (A/CN.4/693), paras. 61-72; and second report (A/CN.4/706), paras. 18-30.

[81] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950), United Nations, *Treaty Series*, vol. 213, No. 2889, p. 221.

[82] E. de Wet, "The emergence of international and regional value systems as a manifestation of the emerging international constitutional order", *Leiden Journal of International Law*, vol. 19 (2006), pp. 611–632, at p. 617.

[83] *Ibid.*

[84] Czapliński, "*Jus cogens* and the law of treaties" (footnote 73 above), pp. 92–93.

[85] *Ibid*., p. 93.

[86] Gaja, "*Jus cogens* beyond the Vienna Convention" (footnote 73 above), p. 284.

[87] A. Pellet "Comments in response to Christine Chinkin and in defense of *jus cogens* as the best bastion against the excesses of fragmentation", *Finnish Yearbook of International Law*, vol. 17 (2006), p. 83.

[88] *Ibid*., p. 89.

[89] Which is to say, he places the comment in parentheses *and* states that the comments are in parentheses.

elaborate and more demanding than the very loose network of '*cogens*' human rights at the world level".[90]

26. While there are writers that have supported the notion of regional *jus cogens*, there are at least two problems with the concept. The first problem concerns the lack of practice to substantiate the existence of regional *jus cogens*. The second is a more theoretical one, which lies at the heart of the objections raised by States. For convenience's sake, the report will begin with the second, more theoretical problem. The problem is aptly captured in a set of questions posed by the Secretary-General of the Asian-African Legal Consultative Organization, Kennedy Gastorn.[91] He asks, for example, whether "it is meaningful for there to be *jus cogens* norms which only apply to certain States … in a way that distinguishes its peremptory character from the character of a normal particular regional custom" and whether a "peremptory norm [would] still be peremptory if only *some* States are bound by it but not all States".[92]

27. Orakhelashvili similarly questions the possibility of regional *jus cogens.*[93] He advances arguments very similar to those raised by States in the course of the 2018 debate in the Sixth Committee. In particular, he notes that the notion of regional *jus cogens* would not be compatible with the definition of *jus cogens* in article 53 of the 1969 Vienna Convention[94] – a definition that the Commission has largely accepted. Renowned German scholar (and former member of the Commission), Tomuschat, similarly makes the point that *jus cogens* "could never exist as a purely 'bilateral' norm since it derives its authority from the interests of the international community".[95] The same reasoning would appear to exclude the possibility of the existence of a regional *jus cogens*. However, over and above the definitional issues raised, the notion of regional *jus cogens* raises other fundamental difficulties.[96] These conceptual and practical difficulties flow from the inherently universal character of *jus cogens*, which applies "everywhere".[97]

28. The first conceptual difficulty concerns the establishment (or formation) of a regional *jus cogens.* It is difficult to explain, theoretically, why an individual State, in a region, perhaps a region hostile to that State, has to be bound, to the absolute extent that *jus cogens* norms bind States, to a norm that is not universal *jus cogens* and to which it has not consented (or if it has consented, has not consented to its peremptory status with the all attendant consequences). For peremptory norms of general international law (*jus cogens*), the rationale for this exceptional power of *jus cogens* and the possibility for its capacity to bind *sans* consent can be found in the fact that these are norms that are so fundamental to the international community that

[90] Pellet, "Comments in response to Christine Chinkin …" (footnote 87 above), p. 89 (emphasis in the original).

[91] Gastorn, "Defining the imprecise contours of *jus cogens* in international law" (footnote 63 above), p. 661.

[92] *Ibid.*

[93] A. Orakhelashvili, *Peremptory Norms of General International Law* (Oxford, Oxford University Press, 2006), pp. 38-39.

[94] *Ibid.*, p. 39.

[95] Tomuschat, "The Security Council and *jus cogens*" (footnote 80 above), p. 28.

[96] An objective reading of Tomuschat's contribution as a whole would confirm this conclusion. See especially at p. 33 (*ibid.*), where Tomuschat rejects Kolb's relativist (read non-absolutist) approach to *jus cogens* ("Recently, Robert Kolb has attempted to demonstrate that the exclusive reliance on the international value system is not correct and that *jus cogens* should be interpreted in a much broader sense. But all his examples miss the point. On the one hand, Kolb argues that certain axiological premises of the international legal order cannot be changed by States, thus the principle of *pacta sunt servanda.* But these are matters which lie outside the jurisdiction of an individual State. The maxims of *jus cogens* are not needed to deny the validity to (*sic*) attempts to destroy the legal edifice of the international legal order".).

[97] *Ibid.,* p. 25.

derogation from them cannot be permitted. The exceptional power thus derives from the very absolute pretence that Kolb denies as the essence of the *jus cogens*.[98] It is the case that the Commission has recently accepted the possibility of regional customary international law – referred to by the Commission as a "particular customary international law".[99] The question may thus be asked whether the same doctrinal reasoning that allows us to clear the hurdle of regional customary international law does not, in a similar manner, allow for the possibility of clearing the hurdle of regional *jus cogens*. The answer must be a definitive no. While regional customary international law must surely be subject to the persistent objector rule (at least if general customary international law is), this is probably not the case for any notion of regional *jus cogens*, otherwise it ceases to be *jus cogens* in any sense. If regional *jus cogens* were subject to the persistent objector rule, or any rule of objection for that matter, it would cease to have the character of peremptoriness.

29. The second conceptual difficulty relates to the question of definition of "region". Universal application is easily defined as all States. Regional *jus cogens*, as a matter of law, is, however, indeterminate. Does Southern Africa, as a region, include Burundi (which had applied to join the Southern African Development Community); does Europe, as a region and for the purposes of regional *jus cogens,* include Eastern Europe and, in particular, the Russian Federation? The same question(s) can be posed *vis-à-vis* the Americas, which have a number of components that can be configured differently depending on context. Normally, these concepts depend on and will, for the most part, require the agreement on the part of the States for the particular purpose. It is for this reason that the Southern African region means different things in the African Union and in the United Nations context. In the light of this uncertainty, the concept of regional *jus cogens* would create the conceptual and practical difficulty of knowing which States were bound by a particular norm of regional *jus cogens*.

30. Third, and linked to the above difficulty, it is not clear whether regional *jus cogens* must always be linked to an existing regional treaty regime. The examples of practice – discussed below – proffered to justify the notion of regional *jus cogens* have related either to the protection of rights in Europe or the inter-American human rights system. Yet, as treaty systems based on the agreement of the parties to those regional systems, it is unclear to what extent those could generate norms of *jus cogens* properly so called.[100] That doubt is cast on the ability of regional treaty regimes to establish regional *jus cogens* does not exclude the possibility that these regional treaty norms could lead to the evolution of norms of *jus cogens* properly so called. It may be argued (and here perhaps the Special Rapporteur jumps ahead of himself) that the prohibition of enforced disappearance, the origins of which are undoubtedly from the region of the Americas, is an example of how a regional treaty or customary norm can evolve to one of *jus cogens*.

31. The most common example advanced to justify the notion of regional *jus cogens* is Europe – either norms of the European Community or of the European Convention on Human Rights.[101] Thus, Kolb refers to the "European public order, which goes further than the universal one on issues of democracy, pre-eminence of law and separation of powers", in putting forward the idea of regional *jus cogens*.[102] Similarly,

[98] See Kolb, *Peremptory International Law (*Jus Cogens*) ...* (footnote 74 above), pp. 97 *et seq.*

[99] See draft conclusion 16 of the draft conclusions on the identification of customary international law, adopted by the Commission on second reading, A/73/10, para. 65, at p. 154.

[100] See, for discussion, the Special Rapporteur's second report (A/CN.4/706), paras. 53-59.

[101] Although the Inter-American system is also often referred to in the context of regional *jus cogens*, unlike the example of Europe, it is often referred to in the context of specific norms. This example will thus be considered when considering whether there exists practice in support of the notion of *jus cogens*.

[102] Kolb, *Peremptory International Law (*Jus Cogens*) ...* (footnote 74 above), p. 97.

De Wet refers to "the obligations in the" European Convention on Human Rights, which she argues, have evolved "arguably … into regional *jus cogens* norms".[103] These arguments are often based on the idea of a common identity forged by membership of a common community and, thus, the special nature of the rules that bind such a common community. Yet, this reasoning erroneously ascribes peremptory status to the special role or status that particular rules in a section of the community of States have. The fact that a set of rules binding on a particular community of States are, for that community of States, of special status does not make that set of rules *jus cogens*, regional or otherwise. *Jus cogens* norms are a particular type of norm that meet particular requirements as defined in the second report of the Special Rapporteur and for which particular consequences ensue.

32. Fourth, and flowing from the first three reasons, it should be recalled that *jus cogens* is exceptional. In general and as a rule, rules of international law are derogable and can be modified freely through the exercise of sovereignty.[104] It should not easily be assumed that, except where States have freely curtailed their right to contract out of international law rules, there are, outside of generally accepted norms of *jus cogens*, norms which constrain States. To the extent that norms of regional *jus cogens* are deemed to flow from the free exercise of the will of States to constrain their sovereignty, then these are not norms of *jus cogens* properly so called. Such rules, in which States agree to constrain themselves, are similar to non-derogability provisions in treaties that do not constitute *jus cogens*, at least not in the manner understood in the 1969 Vienna Convention. An example of similar provisions would be Article 20 of the Covenant of the League of Nations,[105] which provides, first, that the Covenant abrogates all obligations inconsistent with its terms and that members "will not enter into any engagements inconsistent" with the terms of the Covenant. As the first report noted, being itself a treaty rule, applicable only to members and subject to amendment and even abrogation by *any* later agreement, Article 20 could not be advanced as an example of peremptoriness in any significant way.

33. From a conceptual (and practical) perspective, the greatest difficulty for the notion of regional *jus cogens* relates not so much to the formation of norms of regional *jus cogens* but to their consequences. The Special Rapporteur proceeds here on the basis of the consequences of *jus cogens* identified in the third report. Although the Commission has yet to adopt any draft conclusions, and although a number of issues were raised in the plenary debate concerning the drafting of the proposed draft conclusions, no major issues were raised concerning the substance of the draft conclusions proposed by the Special Rapporteur.[106] It is difficult, particularly given the absence of practice, to see how these consequences might be given effect in respect of regional *jus cogens*. These difficulties can be illustrated with reference to the consequences identified in the third report.

34. The consequence of nullity of treaties in conflict with norms of *jus cogens* – the main consequence of *jus cogens* and the one provided for in article 53 of the 1969 Vienna Convention – provides a good starting point. According to article 53, any

[103] De Wet, "The emergence of international and regional value systems as a manifestation of the emerging international constitutional order" (footnote 82 above), p. 617.

[104] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 42, para. 72 ("Without attempting to enter into, still less pronounce upon any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties"); *South West Africa, Second Phase, I.C.J. Reports 1966*, p. 6, dissenting opinion of Judge Tanaka, p. 298 ("*jus cogens*, recently examined by the International Law Commission, [is] a kind of imperative law which constitutes the contrast to the *jus dispositivum*, capable of being changed by way of agreement between States").

[105] Covenant of the League of Nations (Versailles, 28 April 1919), League of Nations, *Official Journal*, No. 1, February 1920, p. 3.

[106] See generally A/73/10.

treaty that, at the time of its conclusion, is in conflict with a norm of *jus cogens* is void.[107] At the same time, article 64 provides that a treaty that is in conflict with a subsequently emerging norm of *jus cogens* becomes void. Leaving aside the issues of formation identified above, i.e., assuming that it were possible for a norm of regional *jus cogens* to emerge, nullity as a consequence of regional *jus cogens* would presumably mean that members of that region may not, *inter partes*, conclude treaties in conflict with such a norm and that any such treaties concluded by members of that region *inter se* would be void (or would become void). Yet, it is inconceivable to think that such treaties concluded with third States would also be void. It may, of course, be argued that a peculiar consequence of regional *jus cogens* is that it does not affect treaties concluded with States that are not members of the region. Yet, that would suggest that such norms do permit derogation and could thus not qualify as a peremptory norm in the manner we have thus far understood.

35. While some theoretical issues were raised by some members of the Commission,[108] no single member questioned the conclusion that a customary international law rule could not arise if it conflicted with norms of *jus cogens.* Yet regional *jus cogens* could not, in the face of a general practice accepted as law, prevent the emergence of a norm of customary international law, even if that general practice were not accompanied by acceptance and recognition of non-derogability (*opinio juris cogentis*). Indeed, in respect of regional *jus cogens*, it is unclear why a widespread practice within the region, accepted by members of the region as law, could not displace a so-called regional *jus cogens*, even if the new norm did not have the peremptory quality of the former

36. Matters become more complicated when other consequences are considered. One of the consequences identified in the third report, for which there was widespread support in the Commission,[109] is that a binding decision of an international organization does not establish legal obligations if they are in conflict with a norm of *jus cogens*. Yet, it is unclear why a binding decision of the United Nations, or an organ of the United Nations such as the Security Council, in conflict with a norm of regional *jus cogens* would not establish binding obligations for members of that region. It is not only in respect of nullity of rules that difficulties arise. The third report also proposed the existence of a duty not to recognize as lawful situations created by breach of a norm of *jus cogens.* Would a member in a region subject to a regional *jus cogens* be under a duty not to recognize a situation that is otherwise lawful if that situation were created by a breach of a peremptory norm of regional international law?

37. The possibility of regional *jus cogens* raises many theoretical problems. It is true that some responses to these theoretical problems can be advanced.[110] These responses, however, require intellectual gymnastics which, in the end, take non-derogability out of regional *jus cogens.* However, even if these responses to the theoretical problems were acceptable, there is a more serious (and insurmountable) problem with the notion of regional *jus cogens*, namely the lack of State practice

[107] See also draft conclusion 11 on separability of treaty provisions in conflict with a peremptory norm of general international law (*jus cogens*), provisionally adopted by the Drafting Committee (see statement of the Chair of the Drafting Committee of 26 July 2017 (footnote 40 above), annex).

[108] Mr. Zagaynov (A/CN.4/SR.3416), Mr. Rajput (A/CN.4/SR.3418), and Sir Michael Wood (A/CN.4/SR.3421) raised issues concerning the role of the persistent objector, while Mr. Murphy (A/CN.4/SR.3416) raised issues concerning modification. See also Report of the Commission on the work of its seventieth session (A/73/10), para. 128.

[109] Other than issues of drafting, the only real point of contention was whether the decisions of the Security Council should be explicitly mentioned in the draft conclusion.

[110] See, especially, Kolb, *Peremptory International Law (*Jus Cogens*)* ... (footnote 74 above), pp. 97-98.

supporting such a notion. In this respect, the United Kingdom in its statement noted that the concept did not have "any significant support in State practice". That there is no support in the practice of States is borne out by the absence of examples in the writings of those advocating for regional *jus cogens.*

38. To take Pellet as an example, while he states unambiguously (albeit in parenthesis) that he believes that "there *is* a European system of peremptory human rights which is certainly more elaborate and more demanding than the very loose network of '*cogens*' human rights at the world level",[111] no example is offered of this European peremptory rights system, of what makes the rights peremptory and not *jus dispositivum* or of what makes them exclusively European, i.e., whether such rights are not also rights in the African, Asian and Latin American regions. Kolb similarly refers to the European public order, which, he states, goes further than the universal one on issues such as democracy, the pre-eminence of the law and the separation of powers.[112] In the same vein, De Wet highlights the European system as "arguably" being "regional *jus cogens*".[113] She refers to the "special status that the [European Convention on Human Rights] enjoys within member States" as evidence of the potential regional *jus cogens* status of the European human rights.[114] Yet, neither a special status, nor the fact that regional rules are more stringent than universal, can be sufficient to translate into *jus cogens* within a region.

39. The decision of the Inter-American Commission on Human Rights in 1987 in *Roach and Pinkerton*[115] has also been advanced as evidence of the existence of regional *jus cogens.*[116] It is the case that, in *Roach and Pinkerton*, the Commission took the view that "in the member States of the [Organization of American States] there is recognized a norm of *jus cogens* which prohibits the State execution of children", noting that such a norm was "accepted by all States of the inter-American system".[117] Yet, it should be remembered that this was a decision of the Commission and not of any court, national, regional or international. Furthermore, the particular conclusion of the Commission was unsubstantiated save for the fact that *the norm* in question was "accepted", i.e., the Commission did not aver that the non-derogability of the norm in question was accepted. Moreover, to the extent that the quote should be read as referring to the acceptance of non-derogation, there is no indication that this acceptance is not by the international community of States as a whole. Indeed, in 2002, the Inter-American Commission concluded that the prohibition of the execution of persons under the age of 18 years was a peremptory norm of general international law.[118]

40. While it is the case that the inter-American system (the Commission and the Court) have more readily found the existence of norms of *jus cogens*,[119] this is not the

[111] Pellet, "Comments in response to Christine Chinkin …" (footnote 87 above), p. 89 (emphasis in original).

[112] Kolb, *Peremptory International Law (*Jus Cogens*) …* (footnote 74 above), p. 97.

[113] De Wet, "The emergence of international and regional value systems as a manifestation of the emerging international constitutional order" (footnote 82 above), p. 617.

[114] *Ibid.*

[115] *Roach and Pinkerton v. United States*, Case No. 9647, resolution No. 3/87, Inter-American Commission on Human Rights, 22 September 1987. See, for discussion, Hasmath, "The utility of regional *jus cogens*" (footnote 72 above).

[116] Kolb, *Peremptory International Law (*Jus Cogens*) …* (footnote 74 above), p. 97.

[117] *Roach and Pinkerton* (footnote 115 above), para. 56.

[118] *Michael Domingues v. United States,* Case No. 12.285, Merits, Inter-American Commission on Human Rights, 22 October 2002, para. 85 ("Moreover, the Commission is satisfied, based upon the information before it, that this rule has been recognized as being of a sufficiently indelible nature to now constitute a norm of *jus cogens*, a development anticipated by the Commission in its *Roach and Pinkerton* decision.").

[119] See, generally, L. Burgorgue-Larsen and A. Úbeda de Torres, *The Inter-American Court of*

same as an acceptance of the notion of regional *jus cogens*. While the Inter-American Court and Commission have been more open to recognizing norms of *jus cogens*, those norms of *jus cogens* have not been characterized as regional *jus cogens.* Thus, the Inter-American human rights system does not provide support for the notion of regional *jus cogens.*

41. During the height of the cold war, Grigory Tunkin advanced the idea of "particular" *jus cogens* norms among "countries of the socialist camp" – a sort of regional *jus cogens* not based on geography.[120] Such a "higher type of international law – a socialist international law", he argued, "is coming to replace contemporary general international law" but only "among States of the socialist system" or "in relations between countries of the world system of socialism".[121] Although Tunkin does not here refer to "regional" law in the sense of a geographic conception, what he describes is what is similar to the concept of "particular" custom in the Commission's draft conclusions on the identification of customary international law.[122] He states, for example, that the principles to which he refers "operate in relations between countries of the socialist commonwealth" and have "a more limited sphere of application in comparison with general international law".[123] Those principles would be peremptory in the manner that the Special Rapporteur (and the Drafting Committee) have defined the concept because they are "higher type" of law and evince a "higher quality".[124]

42. It would be tempting to dismiss Tunkin's arguments as *passé* given the end of the cold war and, with it, the divide between the law applicable in the relations between countries of the socialist commonwealth and general international law, the latter being heavily influenced by what Tunkin referred to as "bourgeois doctrine".[125] Yet, even if no longer valid, the existence of a regional or particular *jus cogens* for socialist State during the cold war would indicate the possibility (at least theoretically) of regional *jus cogens.*

43. There are, however, at least two problems with Tunkin's proposition as support for a regional *jus cogens.* First, like Kolb, Tunkin had advanced a very different understanding of *jus cogens* than the one advanced by the Special Rapporteur and accepted by the majority of members of the Commission. More importantly, the conception of *jus cogens* on which the reports of the Special Rapporteur are based is that reflected in the 1969 Vienna Convention and the practice of States. The theory

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Human Rights: Case Law and Commentary (Oxford, Oxford University Press, 2011). See, for examples of findings, *Case of Maritza Urrutia v. Guatemala*, Judgment (Merits, Reparations and Costs), Inter-American Court of Human Rights, 27 November 2007, Series C, No. 103, para. 92 ("The absolute prohibition of torture, in all its forms, is now part of international *jus cogens*)"; *Case of the "Mapiripán Massacre" v. Colombia,* Judgment (Merits, Reparations and Costs), Inter-American Court of Human Rights, 15 September 2005, Series C, No. 134, para. 178, holding that "the principle of equality and non-discrimination" has attained the status of *jus cogens*; *Case of Goiburú et al. v. Paraguay*, Judgment (Merits, Reparations and Costs), Inter-American Court of Human Rights, 22 September 2006, Series C, No. 153, para. 84 ("the prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens"*). For a further case on enforced disappearance, see *Case of Trujillo Oroza v. Bolivia*, Order (Monitoring Compliance with Judgment), Inter-American Court of Human Rights, 16 November 2009, Series C, No. 92, para. 34.

[120] G.I. Tunkin, *Theory of International Law*, p. 444. See Hasmath, "The utility of regional *jus cogens*" (footnote 72 above).

[121] *Ibid.*, pp. 444–446.

[122] Draft conclusion 16 of the draft conclusions on the identification of customary international law (see footnote 99 above).

[123] Tunkin, *Theory of International Law* (footnote 120 above), p. 445.

[124] *Ibid.*, pp. 444–445.

[125] *Ibid.*, p. 158.

advanced by Tunkin seems to be based unambiguously on State consent and the will of the respective States. In Tunkin's view, *jus cogens* norms "[a]s all other principles and norms of general international law … may be modified by the agreement of States".[126] Yet, as described in the second report of the Special Rapporteur, acceptance and recognition in article 53 of the 1969 Vienna Convention mean more than just State consent.[127] A conception of *jus cogens* that is based on a pure theory of State consent is much more compatible with the notion of regional (or particular) *jus cogens.* Tunkin's theory of a higher law for the "socialist commonwealth" of States cannot be advanced as support for regional *jus cogens* because, presumably, individual States could leave the commonwealth and thus no longer be bound by that higher law.

44. More importantly, since the Special Rapporteur has insisted, and States have demanded, that the work be based on practice, other than the ideological call for solidarity among socialist States, there exists no practice in support of a notion of a particular *jus cogens* applicable among socialist States. Although Tunkin does provide examples of the "operation of principles and norms of general international law in relations between countries of the socialist commonwealth", these are hardly norms of *jus cogens*, and to Tunkin's credit, he does not suggest that they are.[128] At best, Tunkin's claim can be supported as the (quite correct) insistence that a group of States can have, as applicable between them, rules of international law that are distinct from general international law and that, as in relations between those States, take priority over rules of general international law. This, however, is not *jus cogens* or even a species of *jus cogens*, since it allows derogation in several ways as described above.

45. That the notion of regional or particular *jus cogens* is not supported in practice does not mean that regions, or groups of States, cannot have a common set of unifying (and binding) norms that are, at least between those States, even more important than other rules.[129] The area of human rights perhaps best exemplifies this, as different regions may well have different conceptions of human rights. For example, the African human rights system is well known for its distinctive appeal to the collective.[130] The very name of the primary human rights instrument of Africa, the African Charter on Human and Peoples' Rights, is reflective of this distinctive character. Moreover, the African Charter contains a number of collective rights, such as the right to development and the right to the environment. It also contains, in addition to rights, duties for individuals.[131] There is also, without question, as put forward by De Wet, Kolb and Pellet, a distinct European conception of human rights.[132] The European Court of Human Rights' appeal to the "European public order" in its judgment in *Loizidou v. Turkey* is an example of such a conception.[133] It may even be argued that there is a more distinctive (and one might say generous) approach to the identification of norms in the inter-American system of human rights as can be seen by the number of *jus cogens* norms declared.

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[126] *Ibid.,* p. 159.

[127] See second report (A/CN.4/706), paras. 68 *et seq.*

[128] Tunkin, *Theory of International Law* (footnote 120 above), p. 446.

[129] See De Wet, "The emergence of international and regional value systems as a manifestation of the emerging international constitutional order" (footnote 82 above), p. 617.

[130] African Charter on Human and Peoples' Rights (Nairobi, 27 June 1981), United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217.

[131] *Ibid*., e.g., arts. 18–20.

[132] See De Wet, "The emergence of international and regional value systems as a manifestation of the emerging international constitutional order" (footnote 80 above), p. 617; Kolb, *Peremptory International Law (*Jus Cogens*) …* (footnote 74 above), p. 97; Pellet, "Comments in response to Christine Chinkin …" (footnote 82 above), p. 89.

[133] *Loizidou v. Turkey* (preliminary objections), Judgment, European Court of Human Rights, 23 March 1995, Series A, No. 310.

46. The existence of a common set of unifying and binding norms in different regions does not, however, translate into a recognition of regional *jus cogens.* It is simply a reflection of the general structure of international law, namely that States are free to have particular rules different and distinct from general rules of international law.

47. In the light of the analysis above, it can be concluded that the notion of regional *jus cogens* does not find support in the practice of States. While a draft conclusion explicitly stating that international law does not recognize the notion of regional *jus cogens* is possible, the Special Rapporteur is of the view that such a conclusion is not necessary, and an appropriate explanation could be included in the commentary. For this reason, no draft conclusion is proposed in relation to *regional* jus cogens.

IV. Illustrative list

A. To have or not to have (an illustrative list)

48. The syllabus of the Commission on the current topic identified an illustrative list as one of the issues to be addressed. During the debate leading up to adoption of the syllabus, the issue of the illustrative list was, unlike the other three elements of the syllabus, very contentious. While most members supported the idea of an illustrative list, several members questioned the appropriateness of the Commission compiling an illustrative list of norms of *jus cogens.* One member had suggested that, while there would "great value" in the elaboration of a list, such elaboration might change the nature of the project and that, accordingly, the Commission should not make an early decision but should wait until closer to the end to make a decision.[134] The time has now come for the Commission to make that decision.

49. The Special Rapporteur pauses to recall that, in adopting its 1966 draft articles on the law of treaties, the Commission had considered including a non-exhaustive list but decided against that course of action for fear that it might lead to, first, prolonged discussions within the Commission and, second, misunderstanding concerning the status of norms that were not included in the list. During the United Nations Conference on the Law of Treaties, held in Vienna in 1968 and 1969 (hereinafter, "Vienna Conference"), the United Kingdom expressed the view that a list of *jus cogens* should not "be rejected out of hand".[135] The United Kingdom, then set out two options for including a list of *jus cogens* norms: an exhaustive list or a non-exhaustive list.[136] It is thus not the first time that the question of whether to include some sort of a list has been considered.

50. During the Commission's consideration of the Special Rapporteur's first report, a number of members of the Commission expressed doubt about the elaboration of an illustrative list,[137] while many expressed support for such a course.[138] During the consideration of the second report of the Special Rapporteur, members who had been

[134] Mr. Donald McRae (A/CN.4/SR.3315).

[135] See the views of the United Kingdom, *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publication, Sales No. E.68.V.7), 53rd meeting, 6 May 1968, para. 55.

[136] *Ibid.*, paras. 55–56.

[137] Members opposed to or expressing doubt about the illustrative list were: Sir Michael Wood (A/CN.4/SR.3314); Mr. Nolte (A/CN.4/SR.3315); and Mr. Murphy (A/CN.4/SR.3316).

[138] Members supporting an illustrative list were: Mr. Murase (A/CN.4/SR.3314); Mr. Caflisch (*ibid.*); Mr. Kittichaisaree (A/CN.4/SR.3315); Mr. Park (A/CN.4/SR.3316); Mr. Saboia (*ibid.*); Mr. Candioti (A/CN.4/SR.3317); Mr. Forteau (*ibid.*); Mr. Vásquez Bermúdez (A/CN.4/SR.3322); Ms. Escobar Hernández (*ibid.*); and Mr. Niehaus (A/CN.4/SR.3323).

newly elected to the Commission and other members that had not had the opportunity to express their views on the issue of the illustrative list took the opportunity state their preferences. Many of these members expressed support for the illustrative list.[139] One member, however, suggested that "it might be unwise" to include an illustrative list.[140] There were also suggestions for some kind of middle ground.[141]

51. The difference of views within the Commission on whether an illustrative list should be elaborated is mirrored in the views of States, which were also divided. States expressed their views during the debate in the Sixth Committee on the report of the Commission at its sixty-sixth session. As in the Commission, a slight majority of the States that spoke supported the elaboration of an illustrative list.[142] States also expressed their views during the consideration of the 2018 report of the Commission. Again, as in the Commission, some States were supportive of an illustrative list[143] while other States were opposed to it.[144] Still other States seemed to be open-minded.[145]

52. Those members of the Commission and States that have supported the elaboration of an illustrative list have pointed out two main reasons for the inclusion of such a list. The main reason has been that it will be useful and valuable to identify examples of norms that already meet the criteria for *jus cogens*. The second reason is that an elaboration of an illustrative list will demonstrate how the criteria developed by the Commission are to be applied. Both of the reasons have some merit. Those that have opposed the elaboration of an illustrative list have also raised arguments with merit. First, they have pointed out that an elaboration of a list, no matter how carefully the caveats thereto are crafted, would create the impression that other norms are not *jus cogens*. This reason is rather reminiscent of the reasons advanced by the Commission when drafting the 1966 draft articles on the law of treaties for not including an illustrative list of norms therein.[146] Second, it has been noted that an attempt to elaborate an illustrative list would be inordinately difficult. Indeed, one former member quipped in an informal meeting that "it would take five minutes or fifty years to elaborate such a list". It will be recalled that the Special Rapporteur himself has oscillated between the two views. In introducing his first report, the

[139] Mr. Nguyen (A/CN.4/SR.3369); Mr. Šturma (A/CN.4/SR.3370); Mr. Jalloh (A/CN.4/SR.3372); Mr. Reinisch (*ibid.*); Ms. Galvão Teles (A/CN.4/SR.3373); and Ms. Oral (*ibid.*).

[140] Mr. Rajput (A/CN.4/SR.3369).

[141] For example, Mr. Hassouna suggested that an indirect illustrative list could be provided in the commentaries (A/CN.4/SR.3315), a view supported by Ms. Lehto (A/CN.4/SR.3372) and Mr. Ouazzani Chahdi (A/CN.4/SR.3373). This view was also adopted by Mr. Nolte (A/CN.4/SR.3315) during the consideration of the second report of the Special Rapporteur.

[142] See first report (A/CN.4/693), para. 9.

[143] Austria (A/C.6/73/SR.25); Cyprus (*ibid.*); Japan (A/C.6/73/SR.26); and Republic of Korea (A/C.6/73/SR.27);

[144] Finland (on behalf of the Nordic countries) (A/C.6/73/SR.24); Germany (A/C.6/73/SR.26); Netherlands (*ibid.*); Thailand (*ibid.*); Israel (A/C.6/73/SR.27); South Africa (*ibid.*); and Sudan (A/C.6/73/SR.28).

[145] Brazil (A/C.6/73/SR.25) ("It would be useful to find a creative way of elaborating an illustrative list of *jus cogens* norms while respecting the understanding that the Commission should be discussing process and method, as opposed to the content of the peremptory norms."); New Zealand (A/C.6/73/SR.26); Portugal (*ibid.*) ("an illustrative list would not impair the progressive development of *jus cogens*. However, it was likely that a debate on that list would be time-consuming and complex"); and Slovakia (*ibid.*) ("His delegation was open-minded about the elaboration of an illustrative list of peremptory norms and its future inclusion in the outcome of the topic. If such a list was not included in the text itself, it might be useful to mention it in the commentaries to the individual draft conclusions").

[146] Para. (3) of the commentary to draft article 50 of the draft articles on the law of treaties, *Yearbook ... 1966*, vol. II ("the mention of some cases of treaties void for conflict with a rule of *jus cogens* might, even with the most careful drafting, lead to misunderstanding as to the position concerning other cases not mentioned in the article").

Special Rapporteur asked members of the Commission to comment on the desirability of an illustrative list, and expressed his oscillation in the following terms:

> The view of the Special Rapporteur on this question remains that the Commission cannot exclude an issue for fear that it may be misinterpreted. In other words, we cannot decide not to provide an illustrative list simply because some might interpret it as a *numerus clausus* when we have clearly described it as an illustrative list.
>
> Nonetheless, I do wonder whether the provision of an illustrative list would substantially change the nature of our topic. The current topic is concerned with methodological and secondary rules. It is not concerned with the substantive or normative rules in different areas of international law. Would the Commission's inclusion of, for example, the prohibition of genocide as a *jus cogens* require the Commission do an in-depth study of the crime of genocide? Would this be consistent with the nature of the project? Although we can all agree that genocide is *jus cogens*, there may be other norms that are not as clear and whose inclusion in the list might require an in-depth study. The point is that deciding to provide an illustrative list might blur, perhaps slightly, the fundamentally process/methodological-oriented nature of the topic by shifting the focus towards the legal status of particular norms.[147]

53. In other words, while there would be great value in an illustrative list, it is a question whether the elaboration of such a list would fundamentally change the nature of the project. The Commission would need to go into detail on specific rules that themselves could be future topics for consideration by the Commission. Indeed, one norm that would be a candidate for inclusion on an illustrative list, the prohibition of the crime against humanity, is a topic currently being considered by the Commission. Another norm that would be a candidate, the right to self-determination, had been mentioned as a possible topic for future consideration by the Commission. While it might arguably not be necessary to go into detail with regard to "obvious" norms, it would certainly be necessary for other norms that have yet to be recognized by, for example, the International Court of Justice or the Commission itself. This tension was expressed by Brazil in its statement on the report of the Commission in 2018, when it encouraged the Special Rapporteur to "find a creative way of elaborating an illustrative list of *jus cogens* norms while respecting the understanding that the Commission should be discussing process and method, as opposed to the content of the peremptory norms".[148]

54. While this last reason for not having an illustrative list is compelling, the Special Rapporteur is of the view that that it would be a missed opportunity if the Commission did not provide "something". In this respect, inspiration may be taken from the encouragement of Brazil that a creative way be found to balance the two competing interests, i.e., the value of the illustrative list on the one hand and the fundamentally methodological nature of the current topic on the other. The Special Rapporteur found the alternative proposal of the Netherlands particularly helpful in this regard. While not supporting an illustrative list, the Netherlands did make the following observation:

> If the inclusion of a list was nevertheless considered necessary, a reference should be made to the commentaries to articles 26 and 40 of the articles on responsibility of States for internationally wrongful acts, which included tentative and non-limitative lists of *jus cogens* norms. [149]

[147] Statement by the Special Rapporteur introducing the first report (A/CN.4/693) (on file).
[148] Brazil (A/C.6/73/SR.25). See also Mr. McRae (A/CN.4/SR.3315).
[149] Netherlands (A/C.6/73/SR.26).

55. On this basis, the Special Rapporteur proposes to refer, in a single draft conclusion, to norms recognized by the Commission and to qualify the draft conclusion appropriately. However, it would not be sufficient to refer only to the work of the Commission and the International Court of Justice. The commentary would still need to show evidence of acceptance and recognition. It is on this basis that the report now turns to the norms that have been recognized by the Commission and the Court, while also providing other evidence.

B. Norms previously recognized by the Commission as possessing a peremptory character

1. General

56. The commentary to draft article 50 of the Commission's 1966 draft articles on the law of treaties, which eventually became article 53 of the 1969 Vienna Convention, identified "the law of the Charter concerning the prohibition of the use of force" as a "conspicuous example of a rule in international law having the character of *jus cogens*".[150] Other norms that were considered by the Commission included the prohibition of "act[s] criminal under international law … trade in slaves, piracy, or genocide", and "human rights, the equality of States [and] … self-determination".[151] The commentary states that that the "Commission decided against including any examples of rules of *jus cogens* in *the article*"[152] It is important to note that the commentary does not say that the Commission decided against including any of these other examples. The commentary only states that the Commission decides against including "*any* examples … in *the article*" (emphasis added). Thus, the attitude of the Commission at the time towards these other examples is ambiguous – it may either be read as the Commission having considered and rejected the peremptory status of these rules or that it considered all of the peremptory norms and decided to only refer to them in the commentary and not in the draft article itself. The latter would imply that the Commission, in 1966, believed all the norms mentioned in the commentary to be *jus cogens.* Indeed, in the commentary to the articles on State responsibility, the Commission seems to be of the view that all the norms in the 1966 draft articles constitute a list of that the Commission accepted as having attained the status of *jus cogens.*[153] It is also possible, and perhaps most likely, that the Commission did not take a position on the peremptory status of these norms, save for the "the law of the Charter concerning the prohibition of the use of force". Whatever the position of the Commission in 1966, the types of the norms in that list may provide a useful starting point for the identification of *jus cogens.*

57. While it is clear from that commentary that the Commission did not believe the rule concerning the prohibition on the use of force to be the only norms of *jus cogens,* it is equally clear that it had adopted the position that norms of *jus cogens* were few

[150] Para. (1) of the commentary to draft article 50 of the draft articles on the law of treaties, *Yearbook …1966*, vol. II, chap. II, sect. C, at p. 247.

[151] Para. (3), *ibid*.

[152] *Ibid.* (emphasis added).

[153] See para. (4) of the commentary to article 40 of the draft articles on State responsibility, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76–77, at p. 112 ("There also seems to be widespread agreement with other examples listed in the Commission's commentary to article 53: viz. the prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid."). See also the statement by the United States, *Official Records of the United Nations Conference on the Law of Treaties, First Session* (footnote 135 above), 52nd meeting, 4 May 1968, para. 16 ("In its commentary, the Commission had given examples of what was covered by *jus cogens*, such as treaties contemplating or conniving at aggressive war, genocide, piracy, or the slave trade, but had decided against inclusion of examples in the article itself").

in number.[154] That position is appropriate: since the idea of norms of general international law that cannot be derogated from is exceptional, it should be the case that such norms are few in number.

58. In addition to the commentary to draft article 50, the Commission has identified norms of *jus cogens* in other outcomes. The report of the Study Group on "Fragmentation of international law: difficulties arising from diversification and expansion of international law" (hereinafter, "Study Group on fragmentation of international law") identified the following as "the most frequently cited candidates for the status of *jus cogens*": the prohibition of "aggressive use of force", the right of self-defence, the prohibition of genocide, the prohibition of torture, crimes against humanity, the prohibition of slavery and the slave trade, the prohibition of piracy, the prohibition of "racial discrimination and *apartheid*", and the prohibition of "hostilities directed at civilian population ('basic rules of international humanitarian law')".[155] The list in the conclusions of the Study Group, contained in the report of the Commission of 2006, is different in that, while the report refers to "self-defence", the conclusions do not.[156] The decision to exclude self-defence probably makes sense because, by definition, the prohibition on the use of aggressive force does not include the right to use force in self-defence. In other words, the reference to aggressive force rather than just "the use of force" already caters for the right to use force in self-defence as part of the *jus cogens* norm. Instead of the right to use force in self-defence, the conclusions instead refer to the right of self-determination, which is not included in the 2006 report of the Study Group.[157]

59. In the articles on State responsibility, the Commission provided examples of norms of *jus cogens* that are the most cited.[158] In the commentary to article 26, the Commission identifies as "norms that are clearly accepted and recognized" as having achieved the status of *jus cogens* "the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination".[159] The commentary to article 40 itself provides a list of norms that, in the Commission's view, constituted norms of *jus cogens,* seemingly based on the commentary to article 50 of the draft articles on the law of treaties of 1966. First, consistent with paragraph (1) of the commentary to the 1966 draft articles, it refers to the prohibition of aggression[160] – referred to in 1966 as "the law of the Charter concerning the prohibition of the use of force". Second, the commentary identifies the norms referred to in paragraph (3) of the commentary to article 50 of the 1966

[154] Para. (2) of the commentary to draft article 50 of the draft articles on the law of treaties, *Yearbook …1966*, vol. II, chap. II, sect. C, at p. 248 ("Moreover, the majority of the general rules of international law do not have that character").

[155] See "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", report of the Study Group of the International Law Commission finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 and Add.1) (available on the Commission's website, documents of the fifty-eighth session; the final text will be published as an addendum to *Yearbook … 2006*, vol. II (Part One)), para. 374.

[156] See conclusions of the work of the Study Group on fragmentation of international law, *Yearbook … 2006,* vol II (Part II), para. 251, at para. (33).

[157] *Ibid.*

[158] M. den Heijer and H. van der Wilt, "*Jus cogens* and the humanization and fragmentation of international law", *Netherlands Yearbook of International Law*, vol. 46 (2015), p. 3, at p. 9, describing the *jus cogens* status of the norms in the articles on State responsibility as "beyond contestation". See also J.E. Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law* (Geneva, Schulthess, 2016), pp. 151–152; and T. Weatherall, Jus Cogens*: International Law and Social Contract* (Cambridge, Cambridge University Press, 2015), p. 202.

[159] See para. (5) of the commentary to article 26 of the articles on State responsibility, *Yearbook ….2001*, vol. II (Part Two) and corrigendum, paras. 76–77, at p. 85.

[160] Para. (4) of the commentary to article 40, *ibid.*, at p. 112.

draft articles, i.e., "the prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid", as norms that had achieved status of *jus cogens.*[161] While, as described above, the commentary to draft article 50 of the 1966 draft articles is rather ambiguous as to the status of these norms, the commentary to article 40 is clear that these norms have attained the status of *jus cogens.*[162] In addition to those norms, the commentary to draft article 40 identifies other norms not "specifically listed in the Commission's commentary to" article 50 of the 1966 draft articles.[163] These include "the prohibition against torture as defined" in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter, "Convention against Torture"),[164] the basic rules of international humanitarian law applicable in armed conflict and "the obligation to respect the right of self-determination".[165]

60. Although at times cautious, the Commission – including its Study Group on fragmentation of international law – has been fairly consistent with the norms it has alluded to as having attained the status of *jus cogens.* From the description above, the norms that the Commission has recognized as having attained the status of peremptory norms are:

- the prohibition of aggression or aggressive force (sometimes referred to as "the law of the Charter concerning the prohibition of the use of force");
- the prohibition of genocide;
- the prohibition of slavery;
- the prohibition of apartheid and racial discrimination;
- the prohibition of crimes against humanity;
- the prohibition of torture;
- the right to self-determination; and
- the basic rules of international humanitarian law.

61. Although this list has generally been accepted and recognized by States and writers,[166] it is still worth assessing, albeit briefly, on the basis of State practice and the jurisprudence of international courts and tribunals, whether the peremptory character of those norms is "accepted and recognized by the international community of States as a whole".[167] For the purpose of this assessment, the first criterion identified in the second report and provisionally adopted by the Drafting Committee, namely whether the norm is one of general international law, is assumed since there can be very little doubt that the rules identified above are rules of general international law. Second, given the methodological nature of the current topic, there is no attempt

[161] *Ibid*.

[162] *Ibid.* "There also seems to be widespread agreement with other examples listed in the Commission's commentary to draft article 50 (subsequently adopted as article 53 of the 1969 Vienna Convention): *viz.* the prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid. These practices have been prohibited in widely ratified international treaties and conventions admitting of no exception."

[163] Para. (5) of the commentary to article 40, *ibid*., p. 113.

[164] Convention against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (New York, 10 December 1984), United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85.

[165] Para. (5) of the commentary to article 40 of the articles on State responsibility, *Yearbook ….2001*, vol. II (Part Two) and corrigendum, paras. 76–77, at p. 113.

[166] One notable exception was Israel (A/C.6/73/SR.27), which questioned whether the right to self-determination was a norm of *jus cogens*.

[167] For comparison, see C. Mik, "*Jus cogens* in contemporary international law", *Polish Yearbook of International Law*, vol. 33 (2013), pp. 27–94, at p. 56.

to be comprehensive. Flowing from the last-mentioned reservation, the Special Rapporteur has, for the most part, omitted references to dissenting and concurring opinions, although these are very important.

2. The prohibition of aggression

62. It is appropriate to begin by assessing whether, in addition to the recognition in the work of the Commission, the prohibition of the use of force as a norm of *jus cogens* is recognized in practice as the Commission has broadly defined it. As a terminological matter, the present report will, from this point onwards, refer to the prohibition of aggression *in lieu* of the possible alternatives, i.e., the prohibition of the use of force, prohibition of aggressive force and the law of the Charter on the prohibition of force, save in cases of direct quotes.

63. The most cited example of the recognition of the prohibition of aggression is the *Military and Paramilitary Activities* case. In that case, the International Court of Justice famously made the following statement:

> A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also *a fundamental or cardinal principle of such law*. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*".[168]

64. Much has been written about whether the Court's comment can be seen as support for the proposition that the prohibition of aggression constitutes a norm of *jus cogens*.[169] While the Court is reluctant to "own" the identification of the prohibition as *jus cogens*, preferring to refer to the "statements by State representatives" and the view of the Commission "in the course of its work on the codification of the law of treaties", the Special Rapporteur is of the view, like Green, that on balance the Court can be said to have endorsed the peremptory character of the prohibition of aggression.[170] Moreover, the Commission itself, in its commentary to article 40 of the articles on State responsibility, took the view that the Court, in the *Military and Paramilitary Activities* case recognized the *jus cogens* status of the prohibition.[171] The ambivalence of the Court in the *Military and Paramilitary Activities* case, however, does not undermine the value of the Commission's determinations in the commentaries to both the 1966 draft articles on the law of treaties and the 2001 articles on State responsibility that the prohibition of aggression was a norm of *jus cogens*. First, the Court has subsequently, slightly less ambiguously, reaffirmed the

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[168] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua. v. United States) Merits, Judgment*, *I.C.J. Reports 1986*, p. 14, at p. 100, para. 190 (emphasis added).

[169] First report (A/CN.4/693), para. 46.

[170] J. Green, "Questioning the peremptory status of the prohibition of the use of force", *Michigan Journal of International Law*, vol. 32 (2011), pp. 215–258, at p. 223 ("It is the view of the present writer that the Court concluded here that the prohibition of the use of the force was a peremptory norm, although it must be said that others have a different interpretation of this passage").

[171] Para. (4) of the commentary to article 40 of the articles on State responsibility, *Yearbook … 2001,* vol. II (Part II) and corrigendum, paras. 76–77, at p. 112, referring to "the submissions of both parties in the *Military and Paramilitary Activities in and against Nicaragua* case and the Court's own position in that case" as evidence of the peremptory status of the prohibition of aggression.

jus cogens status of the prohibition of aggression. In the *Kosovo* advisory opinion, the Court stated that the illegality attached to previous unilateral declarations "stemmed, not from the unilateral character of the declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character".[172] Admittedly, it is possible that the Court excluded "the unlawful use of force" from the "other egregious violations of norms of international law, in particular those of peremptory character". However, such a reading would be far-fetched at best. Second, the conclusion of the Commission that the prohibition of aggression has the status of *jus cogens* is strongly supported by State practice. It is to this State practice that the report now turns.

65. General Assembly resolution 3314 (XXIX), on the definition of aggression, provides evidence of the acceptance and recognition of non-derogability of the prohibition against aggression. The resolution, adopted by consensus, defines aggression as "the most serious and dangerous form of the illegal use of force" and "the possible threat of a world conflict and all its catastrophic consequences".[173] Moreover, the preamble makes plain "that territory of a State shall not be violated by being the object, even temporarily, of military occupation or of other measures of force taken by another State in contravention of the Charter".[174] The prohibition, moreover, is not subject to any derogation.[175]

66. In the commentary to article 40 of the articles on State responsibility, the Commission referred to "uncontradicted statements by Governments in the course of the Vienna Conference" as evidence for the recognition and acceptance of the prohibition of aggression as a norm of *jus cogens.*[176] Several States explicitly identified the prohibition of aggression as one of several examples of modern *jus cogens*.[177] Other States at the Vienna Conference referred broadly to principles enumerated in Article 2 of the Charter of the United Nations, which would of course include Article 2, paragraph 4.[178] Even prior to the adoption of the 1966 draft articles on the law of treaties, States had, in the course of commenting on the Commission's work, frequently identified the prohibition of aggression as an example of a norm with the status of *jus cogens.*[179] States have also frequently identified the prohibition

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[172] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at p. 437, para. 81.

[173] See General Assembly resolution 3314 (XXIX) of 14 December 1974, annex, preamble.

[174] *Ibid*.

[175] *Ibid.* See, especially, art. 5. Although, article 7 may suggest derogation, it pertains more to the definition of aggression rather than any derogation ("Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration").

[176] Para. (4) of the commentary to article 40 of the articles on State responsibility, *Yearbook … 2001,* vol. II (Part II) and corrigendum, paras. 76–77, at p. 112.

[177] See Ghana, *Official Records of the United Nations Conference on the Law of Treaties, First Session* (footnote 135 above), 53rd meeting, 6 May 1968, para. 15; Uruguay, *ibid.*, para. 48; Cyprus *ibid.*, para. 70; Soviet Union, *ibid.*, 52nd meeting, 4 May 1968, para. 3; and Kenya, *ibid*., para. 31.

[178] See, e.g., Sierra Leone, *ibid.*, 53rd meeting, 6 May 1968, para. 9; Madagascar, *ibid.*, para. 22; Poland, *ibid.*, para. 35; Cuba, *ibid.*, 52nd meeting, 4 May 1968, para. 34; and Lebanon, *ibid.*, para. 43.

[179] See, e.g., Netherlands (A/C.6/SR.781, para. 2); Cyprus (A/C.6/SR.783, para. 18); Brazil (A/C.6/SR.793, para. 14); and the Federal Republic of Germany (A/C.6/41/SR.14, para. 33).

of aggression as *jus cogens* in the Security Council.[180] The *jus cogens* status of the prohibition of aggression has also been recognized by States in the course of the deliberations on the current topic.[181] Moreover, the prohibition of aggression has been cited as an example of *jus cogens* in many national court decisions.[182] The decision of German Federal Administrative Court concerning a disciplinary hearing of a person who had refused to comply with an order in respect of a war that was deemed to be illegal – the war in Iraq – is of particular interest.[183] There, the Court stated that "[i]nternational *ius cogens* includes *inter alia* the international prohibition of the use of force, as reflected in article 2 (4) of the Charter of the United Nations".[184]

67. In addition to the examples of State practice and the *Military and Paramilitary Activities* case cited above, the prohibition of aggression as a norm of *jus cogens* has also been referred to widely in dissenting and separate opinions of judges of international courts. Indeed, in the *Military and Paramilitary Activities* case, Judge Schwebel noted that "there was general agreement that, if *jus cogens* has any agreed

[180] Japan (S/PV.2350) ("The principle of the non-use of force is, in other words, a peremptory norm of international law."); Portugal (S/PV.2476) ("No argument relating to the security of States can be invoked as a pretext for the use of force in conditions which jeopardize the recognized principles of *jus cogens* and accepted norms of the international community"); Cyprus (S/PV.2537) ("it is guilty of aggression against the Republic of Cyprus by virtue of the use of its armed forces within the territory of the Republic in contravention of the peremptory norms of international law"); Azerbaijan (S/PV.6897) ("in particular its peremptory norms such those prohibiting the threat or use of force"); Peru (S/PV.8262) ("We cannot maintain international peace and security without respect for the rule of law. For example, one of the cornerstones of the international order is the prohibition of the use of force in any way that is incompatible with the Charter of the United Nations."); and Greece (S/PV.8262) ("the peremptory rule of the Charter that prohibits the use or the threat of use of force and acts of aggression in international relations is of utmost importance").

[181] See, e.g., South Africa (A/C.6/69/SR.20, para. 111) ("it was generally accepted that the prohibition on the use of force was *jus cogens* in nature"); Cyprus (A/C.6/73/SR.25) ("a breach of a peremptory norm, such as the prohibition of the threat or use of force, was deemed serious and entailed State responsibility"); Mozambique (A/C.6/73/SR.28) ("*Jus cogens* norms included principles set out in the Charter of the United Nations such as the prohibition of the use of force between States"); and Holy See (Observer) (*ibid.*).

[182] *A v. Federal Department of Economic Affairs*, Judgment of the Swiss Federal Supreme Court of 23 January 2008, *ILCD* 1200 (CH 2008), para. 8.2 ("A titre d'exemple, on cite généralement les normes ayant trait à l'interdiction du recours à la force" [As an example, we can generally cite the norms concerning the prohibition of the recourse to force"]); *Committee of US Citizens Living in Nicaragua and Others v. President Reagan and Others,* 859 F2d 929, at 941; *RM v. Attorney-General,* Judgment, High Court of Kenya, 1 December 2006, *ILDC* 699 (KE 2006), para. 42.

[183] *Federal Administrative Court,* Order of 21 June 2005, BVerwG 2 WD 12.04.

[184] *Ibid.* Translation courtesy of the Federal Republic of Germany.

core, it is Article 2, paragraph 4" of the Charter of the United Nations.[185] This prohibition is also generally recognized in the writings of authors.[186]

68. The brief survey above was not intended to be comprehensive. It was also not intended to delineate the scope of the prohibition of aggression or to address all the nuances relating to the prohibition, such as exceptions, the scope of the right to self-defence and other interesting debates surrounding the prohibition.[187] The purpose was simply to show that the Commission's recognition of the prohibition of aggression as a norm of *jus cogens* is supported by practice and other subsidiary materials.

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[185] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua. v. United States of America) Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, dissenting opinion of Judge Schwebel, at p. 615. See, other examples, in the *Military and Paramilitary Activities* case (footnote 168 above), separate opinion of President Nagendra Singh, at p. 151; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, dissenting of opinion of Judge Koroma, at p. 561; *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, I.C.J. Reports 1998*, p. 432, dissenting of opinion of Vice-President Weeramantry, at p. 502, para. 25; *Oil Platforms (Islamic Republic of Iran v. United States), Judgment, I.C.J. Reports 2003*, p. 161, dissenting opinion of Judge Kooijmans, at p. 262, para. 46, and separate opinion of Judge Simma, at pp. 326–327, para. 5; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, I.C.J. Reports 2011*, p. 6, separate opinion of Judge *ad hoc* Dugard, at p. 65, para. 15. See also *Prosecutor v. Jandrako Prlić*, IT-04-74-T, Judgment, International Tribunal for the Former Yugoslavia, 29 May 2013, separate and partially dissenting opinion of Jean-Claude Antonetti, at p. 249. See, further, D. Tladi, "The use of force against non-State actors, decline of collective security and the rise of unilateralism: whither international law?" in M.E. O'Connell, C. Tams and D. Tladi, *Max Planck Trialogues on War and Peace: Vol I – The Use of Force against Non-State Actors* (Cambridge, 2019, forthcoming), footnote 48.

[186] See, e.g., M.E. O'Connell, "Self-defence, pernicious doctrines, peremptory norms" in O'Connell, Tams and Tladi, *Max Planck Trialogues on War and Peace …* (footnote 185 above) ("Arguments to expand the right to resort to force … conflict with the peremptory prohibition on the use of force"). See C. Tams "Self-defence against non-State actors: making sense of the 'armed attack' requirement", *ibid.* ("self-defence operates on the same hierarchical level as the ban on force. Arguments about the peremptory status [of the prohibition of the use of force] should reflect as much: what is peremptory is the rule against unlawful uses of force"); D. Costelloe, *Legal Consequences of Peremptory Norms in International Law* (Cambridge, Cambridge University Press, 2017), p. 16; S. Knuchel, Jus Cogens*: Identification and Enforcement of Peremptory Norms* (Schultess, Zurich, 2015), p. 41; Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law* (footnote 152 above), p. 153 ("The prohibition of the use of force is a norm of general international law that undeniably possesses a *ius cogens* feature … [it] stands out … as one of the few consensual matters in the theory of *ius cogens*"); A.C. de Beer, *Peremptory Norms of General International Law (*Jus Cogens*) and the Prohibition of Terrorism* (Brill, 2019, forthcoming), especially chap. 5; Orakhelashvili, *Peremptory Norms of General International Law* (footnote 93 above), p. 113; L. Hannikainen, *Peremptory Norms* (Jus Cogens) *in International Law* (Helsinki, Finnish Lawyers', 1988), pp. 323 and 356; J.A. Frowein, "*Jus cogens*" in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law*, vol. VI (Oxford, Oxford University Press, 2009), pp. 443 ff., at p. 444, para. 8; J. Crawford, *The Creation of States in International Law* (2nd ed., Oxford, Clarendon, 2006), p. 146; T. Kleinlein, "*Jus cogens* as the 'highest law'? Peremptory norms and legal hierarchies", *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 173–210, at p. 180; E. Santalla Vargas, "In quest of the practical value of *jus cogens* norms", *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 211–240, at p. 229; and T. Cottier, "Improving compliance: *jus cogens* and international economic law", *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 329–356, at p. 330.

[187] On this, see U. Linderfalk, "The effect of *jus cogens* norms: whoever opened Pandora's box, did you ever think about the consequences?", *European Journal of International Law*, vol. 18 (2008), pp. 853–871, at pp. 859-863.

3. The prohibition of torture

69. The recognition by the International Court of Justice of the prohibition of torture has been explicit and unambiguous. The Court, in the *Belgium v. Senegal* case, stated unequivocally that in its "opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)".[188] The International Tribunal for the Former Yugoslavia, in its Trial Chamber, had, already in 1998, in *Prosecutor v. Delalić*, determined that the prohibition of torture was a norm of *jus cogens.*[189] A month later, in *Prosecutor v. Furundžija*, the Tribunal's Trial Chamber confirmed that "because of … the values it protects", the prohibition of torture "has evolved into a peremptory norm or *jus cogens*".[190] Those Trial Chamber judgments have been confirmed by the Appeals Chamber of the Tribunal.[191]

70. In addition to the jurisprudence of the International Court of Justice and the International Tribunal for the Former Yugoslavia, regional courts and other bodies have also recognized the peremptory status of the prohibition of torture. The Inter-American Court of Human Rights has consistently held that the prohibition of torture is a norm of *jus cogens.* In *Espinoza Gonzáles v. Peru,* for example, the Court made the following observations concerning torture:

> The prohibition of torture and cruel, inhuman or degrading treatment or punishment is absolute and non-derogable, even under the most difficult circumstances, such as war, threat of war, the fight against terrorism and any other crimes, states of emergency, or internal unrest or conflict, suspension of constitutional guarantees, internal political instability or other public emergencies or catastrophes. Nowadays, this prohibition is part of international *jus cogens*.[192]

71. The first reference to the prohibition of torture as *jus cogens* in the inter-American system was in a detailed separate opinion of Judge Cançado Trindade in *Blake v. Guatemala.*[193] There, Judge Cançado Trindade noted that the prohibition of the practice of torture "pave[s] the way for us to enter into the *terra nova* of the international *jus cogens*".[194] The Court itself recognized the prohibition of torture as *jus cogens* in 2000, in *Bámaca-Velásquez v. Guatemala*.[195] This position has been reiterated and confirmed in many subsequent judgments of the Inter-American

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[188] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at p. 457, para. 99.

[189] *Prosecutor v. Zejnil Delalić, Zdravko Mucić also known as "Pavo", Hazim Delić, Esad Landžo also known as "Zenga"*, No. IT-96-21-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 16 November 1998, *Judicial Reports 1998*, para. 454 ("Based on the foregoing, it can be said that the prohibition of torture is a norm of customary international law. It further constitutes a norm of *jus cogens*."). See also *Prosecutor v. Dragoljub Kunarac et al*., No. IT-96-23-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 22 February 2001, para. 466, among several other judgments of the Tribunal recognizing the prohibition of torture as *jus cogens.*

[190] *Prosecutor v. Anto Furundžija,* No. IT-95-17/1, Judgment, International Tribunal for the Former Yugoslavia, 10 December 1998, *Judicial Reports 1998*, paras. 153-156.

[191] *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka "Pavo"), Hazim Deli and Esad Landžo (aka "Zenga")*, No. IT-96-21-A, Judgment, Appeals Chamber, International Tribunal for the Former Yugoslavia, 20 February 2001, para. 172, in particular footnote 225.

[192] *Espinoza Gonzáles v. Peru*, Judgment (Preliminary objections, merits, reparations and costs), Inter-American Court of Human Rights, 20 November 2014, Series C, No. 289, para. 141.

[193] *Blake v. Guatemala*, Judgment (Merits), Inter-American Court of Human Rights, 24 January 1998, Series C, No. 36, separate opinion of Judge Cançado Trindade.

[194] *Ibid.*, para. 15.

[195] *Bámaca-Velásquez v. Guatemala*, Judgment (Merits), Inter-American Court of Human Rights, 25 November 2000, Series C, No. 70, para. 25.

Court.[196] This consistent jurisprudence has been affirmed by the Inter-American Commission on Human Rights in, for example, *Ortiz Hernandez v. Venezuela.*[197]

72. Like the Inter-American Court, the European Court of Human Rights has also been unequivocal in recognizing the *jus cogens* character of the prohibition against torture. In *Al-Adsani v. the United Kingdom,* a case often referred to as authority for the view that there are no exceptions to immunity even for *jus cogens* violations, the Court, having surveyed international practice, "accepts, on the basis of [that practice], that the prohibition of torture has achieved the status of a peremptory norm in international law".[198] Similarly, in the *Jones v. the United Kingdom* case, the Court proceeded from the assumption that the prohibition of torture is *jus cogens* and upheld, in all material respects, the *Al-Adsani* case.[199] The African Commission on Human and Peoples' Rights has likewise recognized, in *Mohammed Abdullah Saleh al-Asad v. Djibouti*, the prohibition of torture as a norm of *jus cogens*.[200]

73. This abundant jurisprudence of international courts and bodies has been largely inspired by the conclusion of the very first report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Kooijmans (later to become judge at the International Court of Justice), in 1986.[201] Having described the factual character of torture as "the plague of the second half of the twentieth century" in the first paragraph of that report, the Special Rapporteur went on to describe the legal character of its prohibition in the following terms:

> The struggle against torture has become one of the leading themes within the international community. Torture is now absolutely and without any reservation prohibited under international law whether in time of peace or of war. In all human rights instruments the prohibition of torture belongs to the group of rights from which no derogation can be made. The International Court of Justice has qualified the obligation to respect the basic human rights, to which

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[196] See, e.g., *Mendoza et al. v. Argentina*, Judgment (Preliminary objections, merits and reparations), Inter-American Court of Human Rights, 14 May 2013, Series C, No. 260, para. 199 ("the Court reiterates its case law to the effect that, today, the absolute prohibition of torture, both physical and mental, is part of international *jus cogens*"); *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, Judgment (Merits, reparations and costs), Inter-American Court of Human Rights, 25 October 2012, Series C, No. 252; *The Barrios Family v. Venezuela*, Judgment (Merits, reparations and costs), Inter-American Court of Human Rights, 24 November 2011, Series C, No. 237, para. 50; *Case of the "Las Dos Erres" Massacre v. Guatemala*, Judgment (Preliminary objection, merits, reparations, and costs), Inter-American Court of Human Rights, 24 November 2009, Series C, No. 211.

[197] *Johan Alexis Ortiz Hernández v. Venezuela,* Case 12.270, Report of the Inter-American Commission on Human Rights, Report No. 2/15 of 29 January 2015, para. 212. See also *Omar Maldonado Vargas, Alvaro Yánez del Villar, Mario Antonio Cornejo et al. v. Chile,* Case 12.500, Report of the Inter-American Commission on Human Rights, Report No. 119/13 of 8 November 2013; *Cosme Rosa Genoveva, Evandro de Oliveira and Others v. Brazil,* Cases 11.566 and 11.694, Report of the Inter-American Commission on Human Rights, Report No. 141/11 of 31 October 2011, para. 167.

[198] *Al-Adsani v. the United Kingdom*, No. 35763/91, Judgment, Grand Chamber, European Court of Human Rights, 21 November 2001, ECHR 2001-XI, para. 61.

[199] *Jones and Others v. the United Kingdom*, No. 34356/06 and 40528/06, Judgment, European Court of Human Rights, 14 January 2014, ECHR 2014, especially paras. 205-215. See also *A v. The Netherlands*, No. 4900/06, Judgment, European Court of Human Rights, 20 July 2010, para. 133, holding that "the rule prohibiting expulsion to face torture or ill-treatment … had arguably also attained the status of *ius cogens*, meaning that it had become a peremptory, non-derogable norm of international law".

[200] *Mohammed Abdullah Saleh al-Asad v. the Republic of Djibouti*, Communication 383/10, Decision of April-May 2014, para. 179 ("The prohibition of torture is a *jus cogens* rule of international law").

[201] Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. P. Kooijmans (E/CN.4/1986/15).

> the right not to be tortured belongs beyond any doubt, as obligations *erga omnes* ... In view of these qualifications the prohibition of torture can be considered to belong to the rules of *jus cogens*.[202]

74. As the International Court of Justice held, torture is prohibited in practically all national legislation.[203] There is, in addition to legislation, widespread treaty practice on the prohibition of torture as a non-derogable obligation. The Convention against Torture, which has 165 State parties, prohibits torture and obliges States parties to take measures to prevent torture.[204] Article 2 of the Convention against Torture provides that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture", emphasizing the non-derogability of the prohibition.[205] Similarly article 7 of the International Covenant on Civil and Political Rights prohibits torture and cruel, inhuman or degrading treatment or punishment. More importantly, article 7 is included as a non-derogable right under the Covenant.[206] The right to be free from torture is also included in the Universal Declaration of Human Rights.[207] The prohibition is also reflected in regional human rights treaties.[208]

75. The recognition of the prohibition of torture as a norm of *jus cogens* has also been ubiquitous in the decisions of national courts. In Australia, the Federal Court, in *Habib v. the Commonwealth of Australia,* recognized that the prohibition of torture is "a peremptory norm of international law from which no derogation is permitted".[209] The *jus cogens* status of the prohibition of torture has also been recognized in other

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[202] *Ibid.*, para. 3.

[203] *Questions relating to the Obligation to Prosecute or Extradite* (footnote 188 above), para. 99. See, for a comprehensive list of national legislation prohibiting torture, Association for the Prevention of Torture, Compilation of Torture Laws, available at https://apt.ch/en/resources/compilation-of-torture-laws/ (accessed on 15 February 2019). See, for random examples of legislation prohibiting torture in absolute terms: sect. 25 of the Constitution, sects. 74, 86 and 87 of the Criminal Code, sect. 5 of the Criminal Procedure Code (Albania); arts. 34 and 132 of the Constitution and arts. 263 *bis, ter, quater* of the Penal Code (Algeria); sect. 274 of the Criminal Code Act (Australia); art. 5 of the Constitution (Brazil); art. 38 of the Constitution (Cambodia); art. 259A of the Penal Code (Czech Republic); sect. 157A of the Civil Criminal Code, sects. 10A and 27A of the Military Criminal Code (Denmark); sect. 44 of the Constitution (Iceland); art. 401 of the Criminal Code (Lebanon); art. 36 of the Constitution, art. 486 of the Penal Code, art. 227 of the Criminal Procedure Code (Malta); art. 31 of the Constitution (Kuwait).

[204] Convention against Torture, arts. 1 and 2, para. 1, and arts. 4 and 5.

[205] *Ibid.*, art. 2, para. 2.

[206] International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171, at art. 4, para. 2 ("No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision").

[207] Universal Declaration of Human Rights (1948), art. 5 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment").

[208] See, e.g., African Charter on Human and Peoples' Rights, art. 5 ("Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited"); American Convention on Human Rights (San José, 22 November 1969), United Nations, *Treaty Series*, vol. 1144, No. 17955, p. 123, art. 5, para. 2 ("No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment"); European Convention on Human Rights, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment"). See especially article 15, paragraph 2, which prohibits derogations from article 3.

[209] *Mamdouh Habib v. the Commonwealth of Australia,* Judgment, Federal Court of Australia, 25 February 2010 [2010] FCAFC 1518, para. 9.

jurisdictions, including Canada,[210] France,[211] Italy,[212] South Africa,[213] the United States,[214] the United Kingdom[215] and other jurisdictions.[216] The view that the prohibition of torture constituted a norm of *jus cogens* had also been expressed by States in the Sixth Committee.[217]

76. In addition to the abundance of practice, the prohibition of torture is also accepted as *jus cogens* in the literature.[218] Tomuschat, for example, states that "offences which debase the affected individual, striking at his/her dignity and existence, must be comprised in the circle of norms coming with the purview of *jus cogens*", including the "prohibition[] on ... torture".[219]

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[210] *Bouzari v. Islamic Republic of Iran and the Attorney-General of Canada,* Judgment, Court of Appeal for Ontario, Canada, 30 June 2004, para. 36 ("First, the action is based on torture by a foreign State, which is a violation of both international human rights and peremptory norms of public international law").

[211] *Lydienne X Prosecutor,* Appeal Judgment, Court of Cassation of France (Criminal Division), 19 March 2013, *ILDC* 2035 (FR2013), para. 10.4 ("l'interdiction de la torture a valeur de norme imperative ou jus cogens en droit international, laquelle prime les autres règles du droit international et constitute une restriction légitime á l'immunité de jurisdiction." [the prohibition of torture is of an imperative nature or *jus cogens,* which takes precedence over other rules of international law and constitutes a legitimate restriction of immunity from jurisdiction]).

[212] *Lozano v. Italy,* Judgment, Italian Court of Cassation (First Criminal Chamber), 24 July 2008, ILDC 1085, para. 6.

[213] *S v. Mthembu,* Judgment, South African Supreme Court of Appeal, 10 April 2008, para. 31 ("The [Convention against Torture] prohibits torture in absolute terms and no derogation from it is permissible, even in the event of a public emergency. It is thus a peremptory norm of international law").

[214] See, e.g., *Committee of US Citizens Living in Nicaragua and Others v. Reagan* (footnote 182 above), para. 56; *Siderman de Blake v. Argentina,* Judgment, United States Court of Appeal, Ninth Circuit, at 714 ("we agree with the Sidermans that official acts of torture of the sort they allege Argentina to have committed constitute a *jus cogens* violation"); *Yousuf v. Samantar,* Judgment, United States Court of Appeal, Fourth Circuit, at 19.

[215] See *Belhaj v. Straw; Rahmatullah v. Minister of Defence*, Judgment, United Kingdom Supreme Court, 17 January 2017, especially opinion of Lord Sumption, at 717, ("The prohibition has the status of *jus cogens erga omnes*. That is to say that it is a peremptory norm of international law which gives rise to obligations owed by each state to all other states and from which no derogation can be justified by any countervailing public interest"); *Jones and Others v. Ministry of Interior of Saudi Arabia*, Judgment, House of Lords of the United Kingdom, 14 June 2006, paras. 43 and 44 ("there is no doubt that the prohibition on torture is such a norm [of *jus cogens*] … The jus cogens is the prohibition on torture").

[216] See *Koigi v. Attorney-General,* Judgment, Court of Appeal of Kenya, 8 March 2015, at 6 ("The absolute ban on torture is a principle of jus cogens and is a peremptory norm of international law binding independent of treaty, convention or covenant"); *Mann v. Republic of Equatorial Guinea,* Judgment, the High Court of Zimbabwe, 23 January 2008, at 12 ("principle against torture has evolved into a peremptory norm or *jus cogens*, viz. a principle endowed with primacy in the hierarchy of rules that constitute the international normative order"); *A v. Federal Department of Economic Affairs* (footnote 182 above), at para. 8.2.

[217] See, e.g., South Africa (A/C.6/69/SR.20), para. 109; Israel (A/C.6/70/SR.18), para. 6; Islamic Republic of Iran (A/C.6/71/SR.26), para. 116; United Kingdom (A/C.6/71/SR.28), para. 29; and Argentina (A/C.6/72/SR.26), para. 13.

[218] See generally, E. de Wet, "The prohibition of torture as an international norm of *jus cogens* and its implications for national and customary law", *European Journal of International Law*, vol. 15 (2004), pp. 97–121. See also De Beer (footnote 186 above). See also De Wet, "The emergence of international and regional value systems as a manifestation of the emerging international constitutional order" (footnote 82 above), p. 616.

[219] Tomuschat, "The Security Council and *jus cogens*" (footnote 80 above), p. 36. See also Pellet, "Comments in response to Christine Chinkin …" (footnote 87 above), p. 83; K. Parker and L.B. Neylon, "*Jus cogens*: compelling the law of human rights", *Hastings International and Comparative Law Review*, vol. 11 (1988-1989), pp. 411–464, at p. 414; A.A. Cançado Trindade, "*Jus cogens*: the determination and the gradual expansion of its material content in contemporary international case-law", *Curso de Derecho Internacional*, vol. 35 (2008), pp. 3–30, at p. 5;

77. As with the discussion of the prohibition of aggression above, the preceding discussion was meant only to show that the Commission's conclusion that the prohibition of torture constitutes a norm of *jus cogens* can be supported with reference to both practice and doctrine. The discussion was not meant to address other incidental issues, such as whether other aspects related to the prohibition, such as non-refoulement, are also part of the *jus cogens* prohibition. Neither was the discussion concerned with the scope of the prohibition.

4. The prohibition of genocide

78. As with the prohibition of torture, the International Court of Justice has unambiguously recognized the prohibition of genocide as a norm of *jus cogens*. Although in the *Reservations to the Convention on Genocide* advisory opinion, the Court does not use the terms "*jus cogens*", "peremptory norms" or even "*erga omnes* obligations", the language the Court uses to describes the prohibition of genocide is consistent with the description of *jus cogens*.[220] In that advisory opinion, the Court made the following, oft-quoted remarks:

> The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge" (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope.[221]

79. Although the Court does not ascribe the status of *jus cogens* to the prohibition of genocide contained in the *Convention* on the Prevention and Punishment of the Crime of *Genocide* (hereinafter, "Genocide Convention"),[222] the language used reflects the general nature of peremptory norms as described in draft conclusion 2 on the present topic, provisionally adopted by the Drafting Committee in 2017.[223] More importantly, the Court itself, more than half a century later, in confirming the *jus cogens* character of the prohibition of genocide, had referred to the quotation from the 1951 advisory opinion as authority.[224] Having repeated the oft-quoted phrase from

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Knuchel, Jus Cogens*: Identification and Enforcement of Peremptory Norms* (footnote 186 above), p. 41; Costelloe, *Legal Consequences of Peremptory Norms in International Law* (footnote 186 above), p. 16; Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law* (footnote 158 above), pp. 209-212; A. Bianchi, "Human rights and the magic of *jus cogens*", *European Journal of International Law*, vol. 19 (2008), pp. 491–508, at p. 492; M. Cherif Bassiouni, "International crimes: *jus cogens* and *obligatio erga omnes" Law and Contemporary Problems*, vol. 59 (1996), pp. 63–74, at p. 70; and Kleinlein, "*Jus cogens* as the 'highest law'? Peremptory norms and legal hierarchies" (footnote 186 above), p. 180.

[220] *Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p.15.

[221] *Ibid.,* at p. 23.

[222] Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948), United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277.

[223] See statement of the Chair of the Drafting Committee of 26 July 2017 (footnote 40 above), annex.

[224] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, I.C.J. Reports 2006*, p. 6, at pp. 31–32, para. 64.

the 1951 advisory opinion, the Court proceeds to state that "it follows that" the prohibition contained in the Genocide Convention constitutes an *erga omnes* obligation and a norm of *jus cogens.*[225] More important, the Court affirms, expressly and unreservedly, that the prohibition of genocide is *jus cogens.*[226] The Court has, moreover, confirmed the *jus cogens* character of the prohibition of genocide in subsequent cases.[227] This view has also been supported in many dissenting and separate opinions of the Court.[228] As with the prohibition of torture, the prohibition of genocide had also been recognized as *jus cogens* in the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda.[229]

80. The *jus cogens* status of the prohibition of genocide is also generally accepted in the literature. Already in 1971, Roberto Ago had recognized the prohibition of genocide as a norm of *jus cogens*.[230] In their work, Criddle and Fox-Decent advance what they term a fiduciary model of *jus cogens* which, they claim, limits a State's legislative and administrative power and, in that way, prohibits offences such as genocide.[231] Bianchi, takes the view that norms of *jus cogens* can be described as either "'human rights', without any further qualification, or refer to particular human rights obligations like the prohibition of genocide or torture".[232] Among what he terms

[225] *Ibid.* See also *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), I.C.J. Reports 2007*, p. 43, at pp. 110–111, para. 161, where the Court, having quoted the 1951 advisory opinion, states that it, in the 2006 judgment, had "reaffirmed the 1951 … statement[] … *when* it added that the norm prohibiting genocide was assuredly a peremptory norm of international law (*jus cogens*)" (emphasis added).

[226] *Armed Activities on the Territory of the Congo* (footnote 224 above), pp. 31-32, para. 64 ("the fact that a dispute relates to compliance with a norm having such a character [of *jus cogens*], which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court").

[227] See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (footnote 225 above), para. 162; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), I.C.J. Reports 2015*, p. 3, at pp. 47–48, para. 88.

[228] First among these was the separate opinion of Judge *ad hoc* Lauterpacht in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993*, *I.C.J. Reports 1993*, p. 325, at p. 440, para. 100 ("the prohibition of genocide has long been regarded as one of the few undoubted examples of *jus cogens*"). See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (footnote 227 above), dissenting opinion of Judge Cançado Trindade, pp. 234 and 238, paras. 83 and 92; *Legality of the Threat or Use of Nuclear Weapons* (footnote 185 above), dissenting opinion of Judge Weeramantry, at p. 496.

[229] See, e.g., *Prosecutor v. Zoran Kupreškić et al*., IT-95-16-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 2000*, para. 520; *Prosecutor v. Radislav Krstić,* IT-98-33-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 2 August 2001, para. 541; *Prosecutor v. Milomir Stakić,* IT-97-24-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 31 July 2003; *Prosecutor v. Vidoje Blagojević and Dragan Jokić,* IT-02-60-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia (), 17 January 2005. For decisions of the International Tribunal for Rwanda see, for example, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T, Judgment, International Tribunal for Rwanda, 21 May 1999, *Reports of Orders, Decisions and Judgements 1999, vol. II*, para. 88 ("The Genocide Convention became widely accepted as an international human rights instrument. Furthermore, the crime of genocide is considered part of international customary law and, moreover, a norm of *jus cogens*.")

[230] R. Ago, "Droit des traités à la lumière de la Convention de Vienne", *Collected Courses of The Hague Academy of International Law*, vol. 134 (1971), pp. 297–332, at p. 324, footnote 37.

[231] E.J. Criddle and E. Fox-Decent, "A fiduciary theory of *jus* cogens", *Yale Journal of International Law*, vol. 34 (2009), pp. 331–388, at p. 369.

[232] Bianchi, "Human rights and the magic of *jus cogens*" (footnote 224 above), pp. 491–492. See also Kleinlein, "*Jus cogens* as the 'highest law'? Peremptory norms and legal hierarchies" (footnote 186 above), p. 180; and Cottier, "Improving compliance: *jus cogens* and international

"*jus cogens* crimes" – a term employed by the Special Rapporteur in the third report[233] – Cherif Bassiouni includes the prohibition of genocide, which, he states, "shock[s] mankind's conscience".[234] Similarly, justifying the existence of *jus cogens* in contemporary international law, Alain Pellet observed that the absolute non-derogability of genocide could, today, not be disputed.[235]

81. In addition to strong international jurisprudence confirming the *jus cogens* status of the prohibition of genocide, there is an abundance of State practice recognizing and accepting the prohibition of genocide as a norm of *jus cogens*, including in the form of domestic court decisions. The prohibition of genocide was, for example, recognized as a norm of *jus cogens* by the Swiss Federal Court in *A v. Federal Department of Economic Affairs.*[236] Similarly, in *RM v. Attorney-General*, the High Court of Kenya, denying the *jus cogens* status of the prohibition of discrimination against children born out of wedlock (and their mothers), included the prohibition of genocide in its list of norms that did qualify as *jus cogens*.[237] The German Constitutional Court, in the case concerning an appeal in relation to a conviction of a Bosnian-Serb for acts of genocide, relied on the International Court of Justice's finding that the prohibition of genocide constituted an *erga omnes* obligation and a norm of *jus cogens*.[238] The Canadian Court of Appeal, in *R v. Munyaneza,* a case concerning a Rwandan national implicated in the commission of genocide in Rwanda in 1994, determined that "the crime of genocide in 1994 was in contravention of all the peremptory rules of customary international law".[239] The United States Court of Appeal, in *Sarei v. Rio Tinto*, also held that that "the status of genocide as a *jus cogens* norm remains indisputable".[240]

82. As a matter of treaty practice, the criminalization of genocide, in addition to in the 1951 Genocide Convention, can be found in the Rome Statute of the International Criminal Court,[241] as well as the Malabo Protocol to the Statute of the African Court.[242] Though not treaties, the Statutes of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda also criminalize in absolute

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economic law" (footnote 186 above), p. 380.

[233] A/CN.4/714 and Corr.1. See also D. Tladi, "The International Law Commission's recent work on exceptions to immunity: charting the course for a brave new world in international law?", *Leiden Journal of International Law*, vol. 31 (2019).

[234] Cherif Bassiouni, "International crimes …" (footnote 219 above), p. 70; and A. Cassese, "The enhanced role of *jus cogens*" in Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford, Oxford University Press, 2012), pp. 158–171, at p. 162.

[235] A. Pellet, "Conclusions" in C. Tomuschat and J.M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order:* Jus Cogens *and Obligations* Erga Omnes (Leiden, Martinus Nijhoff, 2005), pp. 417–424, at p. 419 ("Personne aujourd'hui ne peut sérieusement prétendre qu'un traité organisant un génocide ou une agression n'est pas entaché de nullité" [No one today can seriously claim that a treaty organizing genocide or aggression is not a nullity]).

[236] *A v. Federal Department of Economic Affairs* (footnote 182 above), para. 8.2. See also *Committee of US Citizens Living in Nicaragua* (footnote 182 above), at 941; *Siderman de Blake* (footnote 214 above), at 714; *Yousuf v. Samantar* (footnote 214 above), at 19; *Lozano* (footnote 212 above), at para. 6.

[237] *RM v. Attorney-General,* Judgment, High Court of Kenya, 1 December 2006, [2006] *EKL.*

[238] *Beschluss der 4. Kammer des Zweiten Senats vom 12. Dezember 2000* [Federal Constitutional Court Order of 12 December 2000], 2 BVR 1290/90.

[239] *R v. Munyaneza,* Judgment, Superior Court (Criminal Division) of Canada, 22 May 2009, para. 75.

[240] *Sarei and Others v. Rio Tinto, PLC,* Judgment, United States Court of Appeals for the Ninth District, 25 October 2011, at 19360.

[241] Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3, art. 6.

[242] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo, 27 June 2014), available from www.au.int, annex, art. 28 (*b*).

terms acts of genocide.[243] None of those instruments provide any possibility for derogation. While grounds for excluding responsibility may be provided,[244] these are not derogations but affect the elements of the crime, such as the unlawfulness of the act and the *mens rea.*[245] There is also widespread legislative practice recognizing the non-derogability of the prohibition of genocide.[246] The view that the prohibition of genocide is a norm of *jus cogens* has also been expressed by States before organs of the United Nations.[247] It is inconceivable that today anyone would question the peremptory status of the prohibition of genocide.

83. On the basis of the above, it can be concluded that the Commission's inclusion of the prohibition of genocide in its previous list of norms of *jus cogens* is justified by the existing practice.

5. The prohibition of crimes against humanity

84. In addition to its previous works wherein it has provided lists of generally accepted norms of *jus cogens*, the Commission has recognized the prohibition of crimes against humanity as a norm of *jus cogens* in the preamble of the draft articles on crimes against humanity adopted on first reading during the sixty-ninth session.[248] As the Commission noted in the commentary to the preamble, the International Court of Justice, by recognizing the prohibition of torture as *jus cogens* in *Belgium v. Senegal*,[249] "*a fortiori* suggests that a prohibition of the perpetration of that act on a widespread or systematic basis amounting to crimes against humanity would also have the character of *jus cogens*". The peremptory status of the prohibition of crimes against humanity has also been affirmed in judgments of the International Tribunal for the Former Yugoslavia. In *Prosecutor v. Kupreškić*, the Trial Chamber of the Tribunal held that the prohibition of crimes against humanity along with the prohibition of genocide constituted peremptory norms of general international law.[250] The jurisprudence of the Tribunal has also, in some instances, identified torture, when committed as a crime against humanity, as a violation of a peremptory norm of general international law. In *Prosecutor v. Simić,* the accused had been "convicted of two

[243] Statute of the International Tribunal for the Former Yugoslavia, S/25704, annex, art. 4; statute of the International Tribunal for Rwanda, Security Council resolution 955 (1994), annex, art. 2.

[244] See, e.g., Rome Statute, art. 31.

[245] For example, mental illness (art. 31, para. 1 (*a*), of the Rome Statute), excludes the fault element, while self-defence (art. 31, para. 1 (*c*), of the Rome Statute), excludes the unlawfulness of any conduct.

[246] See, e.g., Criminal Code of Burkina Faso, art. 313; Penal Code of Côte d'Ivoire, art. 317; Criminal Code Amendment Act of 1993 of Ghana, sect. 1; Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990 of Rwanda, art. 2; Implementation of the Rome Statute of the International Criminal Court Act of South Africa, Schedule 1, Part 1; United States Code, chap. 50A, sect. § 1091; Law No. 2.889 of 1956 of Brazil, art. 1; Penal Code of Mexico, sect. 149 *bis*; Penal Code of Nicaragua, arts. 549 and 550; Penal Code of Cuba, art. 116; Law No. 5710-1950 on the Prevention and Punishment of Genocide of Israel; Penal Code of the Fiji Islands, chap. VIII; Criminal Code of the Republic of Tajikistan, art. 398; Criminal Code of the Republic of Albania, art. 73; Criminal Code of Austria, art. 321; Law Concerning the Repression of Grave Violations of International Law of Belgium, art. 1; Criminal Code of the Czech Republic, art. 259; Criminal Code of France, art. 211-1; Penal Code of Finland, sect. 6; Criminal Code of Germany, art. 220; Genocide Convention Act of Ireland, sect. 2; Law No. 962 of 1967; Penal Code of Portugal, art. 239; Penal Code of Spain, art. 607; Federal Criminal Code of the Russian Federation, art. 357.

[247] See, e.g., Belarus (A/C.6/73/SR.26); Mozambique (A/C.6/73/SR.28); Spain (A/C.6/73/SR.29). See also Azerbaijan in the Security Council, 17 October 2012 (S/PV.6849).

[248] Para. (4) of commentary to preamble to the draft articles on crimes against humanity, A/72/10, paras. 45-46, at p. 23.

[249] *Questions relating to the Obligation to Prosecute or Extradite* (footnote 188 above), at para. 99.

[250] *Kupreškić* (footnote 229 above), para. 520.

counts of torture, as crimes against humanity".[251] The Chamber stated that the prohibition of torture was a crime against humanity.[252] While the Chamber did not directly ascribe the status of *jus cogens* to the prohibition of crimes against humanity, it described the right to not to be tortured, or the prohibition against torture, as being "recognised in customary and conventional law and as a norm of *jus cogens*".[253] Since the torture for which the accused was convicted was a deemed a crime against humanity, it can be inferred that the Chamber accepted the prohibition of torture as a crime against humanity as constituting *jus cogens.* The International Criminal Court has similarly described the prohibition of crimes against humanity as *jus cogens*.[254]

85. The jurisprudence under the inter-American system has, likewise, described the prohibition of crimes against humanity as having peremptory status. In *Miguel Castro-Castro Prison v. Peru,* the Inter-American Court of Human Rights determined that the prohibition of crimes against humanity was part of peremptory norms of general international law.[255] The *Miguel Castro-Castro Prison* judgment was itself based on *Almonacid-Arellano v. Chile*, which concluded that the prohibition of crimes against humanity was a norm of *jus cogens* after an assessment of practice starting with the Nuremburg Principles.[256] The Inter-American Commission has also affirmed the *jus cogens* status of the prohibition of crimes against humanity.[257]

86. The peremptory status of the prohibition of crimes against humanity has also been affirmed in the decisions of national courts. In the United States, for example, the District Court for the Eastern District of New York stated, citing Cherif Bassiouni, [258] that the prohibition of crimes against humanity has "existed in customary international law for over half a century", and is "also deemed to be part of *jus cogens* – the highest standing in international legal norms".[259] The Supreme Court of Argentina, in the *Mazzeo, Julio Lilo* case, described *jus cogens* as the highest

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[251] *Prosecutor v. Milan Simić,* IT-95-9/2-S, Sentencing Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 17 October 2002, para. 34.

[252] *Ibid.*

[253] *Ibid.*

[254] See, e.g., *Prosecutor v. William Samoei Ruto and Joshua Arap Sang,* ICC-01/09-01/11, Decision of Trial Chamber on the Request of Mr. Ruto for Excusal from Continued Presence at Trial, International Criminal Court, 18 June 2013, para. 90 ("It is generally agreed that the interdiction of crimes against humanity enjoys the stature of *jus cogens*. In contrast, democracy as an international legal norm has not, so far, been known to enjoy the *jus cogens* status. Hence, in the event of any perceived conflict between the two norms, considerations of democracy must yield to the need to conduct proper inquiry into criminal responsibility of an elected official for crimes against humanity").

[255] *Miguel Castro-Castro Prison v. Peru,* Judgment (Merits, Reparations and Costs), Inter-American Court of Human Rights, 25 November 2006, para. 402.

[256] *Almonacid-Arellano and Others v. Chile*, Judgment (Preliminary Objections, Merits and Costs), Inter-American Court of Human Rights, 26 September 2006, Series C, No. 154, para. 99. See also *Goiburú* (footnote 119 above), para. 128, which described the prohibition of torture and enforced disappearance as crimes against humanity and *jus cogens.* See further *Manuel Cepeda Vargas v. Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, 26 May 2010, Series C, No. 213, para. 42.

[257] See, e.g., *Manuel Cepeda Vargas v. Republic of Colombia,* Case 12.531, Decision, Inter-American Commission on Human Rights, 14 November 2008, footnote 66; *Julia Gomes Lund and Others (Guerrilha do Araguaia) v. Brazil*, Case 11.552, Decision, Inter-American Commission on Human Rights, 26 March 2009, para. 185 (duty to investigate and prosecute crimes against humanity described as *jus cogens*); *Juan Gelman and Others v. Uruguay,* Case 12.607, Decision, Inter-American Commission on Human Rights, 21 January 2010, para. 66; *Marino Lopez and Others (Operation Genesis) v. Colombia,* Case 12.573, Merits, Decision, Inter-American Commission, 31 March 2011, Report No. 64/11, para. 256, at footnote 275.

[258] M. Cherif Bassiouni, "Crimes against humanity", in R. Gutman and D. Rieff (eds.) *Crimes of War: What the Public Should Know* (New York, Norton, 1999), pp. 135–136.

[259] *In Re Agent Orange Product Liability Litigation,* Judgment, District Court of the United States, Easter District of New York, 28 March 2005, at 136.

international law imposed on States, noting that it "prohibits the commission of crimes against humanity, even during times of war".[260] In other jurisdictions it has been held that rules relating to the punishment of crimes against humanity, such as the inapplicability of prescription and the duty to prevent and punish, constitute peremptory norms of international law.[261] Similarly, though not explicitly describing the prohibition of crimes against humanity as *jus cogens*, the South African Constitutional Court's judgment in the *National Commissioner of Police v. Southern African Litigation Centre* appears to endorse the *jus cogens* status of the prohibition:

> Along with torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid require States, even in the absence of binding international treaty law, to suppress such conduct because "all States have an interest as they violate values that constitute the foundation of the world public order".[262]

87. Although the quoted extract does not directly relate to the *jus cogens* status of the relevant crime, two points are worth noting. First, the list of crimes identified by the Court, with the exception of the crime of piracy, correspond to the Commission's list of the most widely cited examples of norms of *jus cogens* in the articles on State responsibility. Second, the description of these crimes by the Court uses language that is similar to the descriptive characteristics provisionally adopted by the Drafting Committee, namely the protection of the "values that constitute the foundation of the world public order".[263] Other decisions, such as by the Court of Appeal of Kenya, have also described the prohibition of crimes against humanity in language that confirms its non-derogability.[264]

88. As mentioned earlier, the Commission, in its draft articles on crimes against humanity provisionally adopted on first reading in 2017, recognized in the preamble that the prohibition of crimes against humanity is a peremptory norm of general international law. The written responses of States to the preambular paragraph of those draft articles also point to the general recognition of States of the peremptory character of the prohibition of crimes against humanity. Of the 33 written comments [265] received at the time of writing the present report,[266] only one State, France, questioned

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[260] *Mazzeo, Julio Lilo and Others*, Judgment, Supreme Court of Argentina, 13 July 2007, para. 15 ("Se trata de la más alta fuente del derecho internacional que se impone a los estados y que prohíbe la comisión de crímenes contra la humanidad, incluso en épocas de guerra" [It is the highest source of international law that is imposed on States and that prohibits the commission of crimes against humanity, even in times of war]). See also *Arancibia Clavel, Enrique Lautaro*, Judgment, Supreme Court of Argentina, 24 August 2004, para. 28, and *Office of the Prosecutor v. Priebke*, Judgment, Supreme Court of Argentina, 2 November 1995, paras. 2-5.

[261] See, e.g., *Exp No. 0024-2010-PI/TC,* Judgment, Peruvian Constitutional Court, 21 March 2011, para. 53.

[262] *National Commissioner of Police v. Southern African Litigation Centre,* Judgment, South African Constitutional Court, 30 October 2014, para. 137.

[263] Draft conclusion 2, provisionally adopted by the Drafting Committee (see statement of the Chair of the Drafting Committee of 26 July 2017 (footnote 40 above), annex), refers to the protection of "fundamental values of the international community".

[264] See *Attorney-General and Others v. Kenya Section of International Commission of Jurists*, Judgment, Court of Appeal of Kenya, 16 February 2018, at 44.

[265] In his fourth report (A/CN.4/725 and Add.1), the Special Rapporteur for crimes against humanity, Mr. Sean Murphy, looked at more than just the written comments. He also reviewed the oral interventions of States during the Sixth Committee debates. According to that report, in statements before the Sixth Committee, other States questioned *the inclusion* of the preambular paragraph for various reasons, including that peremptory norms were being considered as part of another topic, that the commentary to the preambular paragraph provided little support for the paragraph, and that the preambular paragraph was inappropriate for a topic focused on criminalization and individual criminal responsibility.

[266] Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Canada, Chile,

the inclusion of the preambular paragraph. Tellingly, in its written input, France did not question the correctness of the preambular paragraph, but merely tentatively expressed doubt about its appropriateness given that the subject of *jus cogens* was being considered in a different topic.[267] Most of the comments did not even mention the inclusion of the paragraph describing the prohibition of crimes against humanity as a peremptory norm of international law – a suggestion that it is such an obvious statement of fact that it does not require mention. Those States that did comment on it, other than France, did so with approval. Belgium, for example noted that that, in the "draft preamble, it is rightly stated that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*)".[268] The United Kingdom, simply took note of the paragraph, stating that the Commission "has taken this view previously".[269] The written observations of Sierra Leone, similarly, take note of the *jus cogens* status of the prohibition of crimes against humanity when commenting on amnesties.[270]

89. Unsurprisingly, there is also ample support in academic writings for the view that the prohibition of crimes against humanity is a norm of *jus cogens*.[271] Where lists of norms of *jus cogens* are provided, invariably the prohibition of crimes against humanity is included.[272] Even when not identifying the prohibition of crimes against humanity explicitly as *jus cogens*, authors tend to assume its peremptory status.[273] Leila Sadat, for example, without explicitly stating that the prohibition of crimes against humanity is *jus cogens*, observes that the provisions in the Commission's draft articles on crimes against humanity are appropriate for "a convention addressing a *jus cogens* offence with the robust inter-State cooperation, mutual legal assistance and enforcement provisions".[274] In this respect, Christófolo observes that the "peremptory

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Costa Rica, Cuba, Czech Republic, El Salvador, Estonia, France, Germany, Greece, Israel, Japan, Liechtenstein, Malta, Morocco, New Zealand, Nordic countries (Denmark, Iceland, Sweden, Finland, Norway), Panama, Peru, Portugal, Sierra Leone, Singapore, Switzerland, Ukraine, United Kingdom, and Uruguay. See A/CN.4/726.

[267] *Ibid.* ("There is some doubt, however, as to the desirability of qualifying the prohibition of crimes against humanity as a peremptory norm of general international law, since the Commission is currently working on the topic 'Peremptory norms of general international law (jus cogens)', and since the preamble of the Rome Statute of the International Criminal Court itself does not refer to them.").

[268] *Ibid*. See also the written observations of Panama.

[269] *Ibid*.

[270] *Ibid*.

[271] See, e.g., Den Heijer and Van der Wilt, "*Jus cogens* and the humanization and fragmentation of international law" (footnote 158 above), p. 9.

[272] See, e.g. Linderfalk, "Understanding the *jus cogens* debate …" (footnote 72 above), p. 53; Kleinlein, "*Jus cogens* as the 'highest law'? Peremptory norms and legal hierarchies" (footnote 186 above), p. 197; L.J. Kotzé, "Constitutional conversations in the Anthropocene: in search of environmental *jus cogens* norms", *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 241–272, at p. 243; Criddle and Fox-Decent, "A fiduciary theory of *jus* cogens" (footnote 231 above), p. 369; and E. de Wet, "*Jus cogens* and obligations *erga omnes*", in D. Shelton (ed.) *The Oxford Handbook of International Human Rights Law* (Oxford, Oxford University Press, 2013), pp. 541–561.

[273] See, e.g., D. Shelton, "Sherlock Holmes and the mystery of *jus cogens*", *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 23–50, especially at p. 37, where she gives the invocation of accountability for crimes against humanity as an example of a function of *jus cogens* beyond rendering treaties void.

[274] L.N. Sadat, "A contextual and historical analysis of the International Law Commission's 2017 draft articles for a new global treaty on crimes against humanity", *Journal of International Criminal Justice*, vol. 16 (2018), pp. 683–704, at pp. 688 and 700 ("This language should be stronger still in light of current State and international practice, and given the *jus cogens* nature of crimes against humanity").

nature of the prohibition of crimes against humanity is inscribed within the same normative development of other norms of *ius cogens*".[275]

90. This brief of survey of sources illustrates that the prohibition of crimes against humanity is firmly established in both practice and doctrine as a norm that is accepted and recognized as one from which no derogation is permitted.

6. The prohibition of apartheid and racial discrimination

91. As with the discussion on the prohibition of aggression, it is useful to begin the consideration of the prohibition of apartheid by addressing a terminological issue. In some instances, reference has been made to the prohibition of apartheid, while in others the reference is made to the prohibition of racial discrimination. Like the commentary to draft article 40 of the articles on State responsibility, the Special Rapporteur will, throughout the fourth report, refer to the "the prohibition of apartheid and racial discrimination" except where a direct quote uses a different term. The phrase is not meant, in this context, to indicate separate prohibitions, namely the prohibition of racial discrimination *and* the prohibition of apartheid (or for that matter the prohibition of racial discrimination or the prohibition of apartheid). Rather it is intended to signify a composite act, namely the prohibition of apartheid with racial discrimination as an integral part of that. In this regard, the International Convention on the Suppression and Punishment of Apartheid defines apartheid in a broad sense to include "similar policies and practices of racial segregation and discrimination as practised in southern Africa" and covers and a number of specified acts.[276]

92. As a second preliminary point, acts of apartheid are prohibited as crimes against humanity. If, as the analysis above illustrates, crimes against humanity are *jus cogens*, then it stands to reason that acts of apartheid, which constitute crimes against humanity, would themselves also be prohibited as *jus cogens.* As with crimes against humanity, the International Court of Justice has not explicitly determined the prohibition of apartheid and racial discrimination to be a norm of *jus cogens.* In its famous declaration in the *Barcelona Traction* case, however, the Court included the prohibition of racial discrimination among norms with an *erga omnes* quality. The Court stated that obligations *erga omnes*

> derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.[277]

93. It will be noted that the examples provided by the Court are all part of the Commission's list of examples of norms of *jus cogens*. Moreover, like Pellet and

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[275] Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law* (footnote 186 above), p. 219.

[276] International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973), United Nations, *Treaty Series*, vol. 1015, No. 14861, p. 243, art. II. The acts specified in article II include: denial to a member or members of a racial group or groups of the right to life and liberty of person by specified means; deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part; any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country; any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups; exploitation of the labour of the members of a racial group or groups; and persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

[277] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 32, para. 34.

Cherif Bassiouni, the Special Rapporteur has taken the view that, while the concepts of *erga omnes* obligations and *jus cogens* are different, they are related in that one (*jus cogens*) concerns the content of the rule, while the other (*erga omnes*) tells us the addressees of the rule and is a consequence of the former.[278] In the *Namibia* advisory opinion, the Court determined that the apartheid and racial policies of South Africa constituted "a denial of fundamental human rights [that] is a flagrant violation of the purposes and principles of the Charter".[279] This is certainly an indication, though not definitive, that the International Court of Justice would include the prohibition of apartheid and racial discrimination as an example of *jus cogens*.

94. There is also ample State practice recognizing the prohibition of apartheid and racial discrimination as a peremptory norm of general international law. There have, for example, been many General Assembly and Security Council resolutions which attest to the non-derogability of the prohibition of apartheid and racial discrimination. In 1960, the General Assembly determined that the "subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights and is contrary to the Charter of the United Nations".[280] While this declaration did not address apartheid and racial discrimination specifically, it laid the foundation for further declarations expressing rejection of the policy of apartheid and racial discrimination. In 1965, for example, the General Assembly declared that the "all States shall contribute to the complete elimination of racial discrimination and colonialism in all its manifestations".[281] It is noteworthy that the resolution places an obligation on *all* States, and not only the affected States, to contribute to the eradication of racial discrimination and the domination of people. This, it will be recalled from the third report, is one of the key consequences of peremptory norms of international law – the obligation on all States to cooperate in the elimination of the legal consequences of breaches of *jus cogens*.

95. What is more, the relevant resolutions not only require States to cooperate in the eradication of the discriminatory policies, but they also *seem to*, or could be read to, exempt liberation movements fighting the scourge of apartheid and racial discrimination from particular rules of international law in efforts to liberate peoples

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[278] Pellet, "Conclusions" (footnote 235 above), p. 418 ("'Les règles fondamentales de l'ordre juridique international', en particulier le *jus cogens* et les obligations *erga omnes* – sans d'ailleurs que l'on sache très bien s'il s'agit d'un seul et même concept ou de deux choses différentes – même si pour ma part … je pense qu'il s'agit de deux notions distinctes: la caractère *cogens* d'une norme concerne la qualité du contenu même de celle-ci; l'expression *erga omnes* attire plutôt l'attention sur ses destinataires" ['The fundamental rules of international law', particularly *jus cogens* and *erga omnes* obligations – without, however, knowing very well if they constitute a single concept or two different things – though, for my part …, I think there are two separate concepts: the *cogens* character of a norm concerns the quality of the actual content of the norm; the expression *erga omnes* rather draws attention to its addressees]); Cherif Bassiouni, "International crimes …" (footnote 219 above), p. 63, who notes that the term *jus cogens* "refers to the legal status" of particular norms while "*obligatio erga omnes* pertains to the legal implications arising out of a … characterization of *jus cogens*".

[279] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 57, para. 131.

[280] General Assembly resolution 1514 (XV) on the declaration on the granting of independence to colonial countries and peoples of 14 December 1960, para. 1.

[281] General Assembly resolution 2131 (XX) of 21 December 1965 on the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, para. 6. See also General Assembly resolution 2625 (XXV) on the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, annex, para. 1 ("Solemnly proclaim [that] … States shall cooperate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all and in the elimination of all forms of racial discrimination ").

from the racial domination and apartheid. For example, the General Assembly resolution on the definition of aggression was subject to the caveat that the definition did not prejudice "in any way" the right of "peoples under colonial and racist regimes or other forms of alien domination …[to] struggle" for their rights and "to seek and receive support".

96. The General Assembly has also adopted South Africa and apartheid-specific resolutions and declarations. In 1975, the General Assembly adopted the resolution on the special responsibility of the United Nations towards the oppressed people of South Africa, in which it proclaimed that "the United Nations and the international community" owe a duty to the "oppressed people of South Africa and their liberation movements" to contribute to the end of *apartheid*.[282] Resolution 32/105 J, having reaffirmed "the legitimacy of the struggle of the oppressed people of South Africa", described the policy of South Africa as "the criminal policy of *apartheid*".[283] The resolution went as far as to endorse the "right to … struggle for the seizure of power by all available and appropriate means …, including armed struggle".[284] Importantly, consistent with the duty to cooperate to bring to an end violations of *jus cogens,* the resolution declared that "the international community should provide all assistance to the national liberation movement of South Africa" in its struggle to overthrow apartheid.[285] The General Assembly adopted many similar resolutions over a prolonged period of time, describing apartheid as, for example*,* "inhuman" and calling on the international community to assist in its eradication.[286] While these resolutions did not use the language of "*jus cogens*" or "peremptory norms", they did use language describing the prohibition in terms akin to those used to describe, for example, genocide and torture.

97. It is important to recall that it was not just the General Assembly that adopted a string of resolutions on the illegality and inhumanity of apartheid and racial discrimination. The Security Council also adopted its own resolutions. In 1984, in a strongly worded resolution, the Security Council described apartheid and racial discrimination as "a crime against the conscience and dignity of mankind" and as being "incompatible with the rights and dignity of man"[287] – language reminiscent of the International Court of Justice's oft-quote description of genocide in the advisory opinion on *Reservations to the Convention on Genocide*.[288] Reflecting the duty to cooperate to bring to an end serious breaches of *jus cogens* and not to provide

[282] General Assembly resolution 3411 C (XXX) of 28 November 1975 on the special responsibility of the United Nations and the international community towards the oppressed people of South Africa, para. 1.

[283] General Assembly resolution 32/105 J on assistance to the national liberation movement of South Africa of 14 December 1977, paras. 2–3.

[284] *Ibid.*, para. 3.

[285] *Ibid.* para. 4.

[286] In addition to those referred to above, see General Assembly resolution 31/6 A on the so-called independent Transkei and other bantustans of 26 October 1976, para. 1 ("strongly condemns the establishment of bantustans as designed to consolidate the inhuman policies of *apartheid*."). See also General Assembly resolution 34/93 O of 12 December 1979 on the Declaration on South Africa; General Assembly resolution 39/72 A of 13 December 1984 on comprehensive sanctions against the *apartheid* régime and support to the liberation struggle in South Africa; and General Assembly resolution 39/72 G of 13 December 1984 on concerted international action for the elimination of *apartheid*.

[287] Security Council resolution 473 (1980), para. 3. See also Security Council resolution 418 (1977); Security Council resolution 554 (1984) and resolution 569 (1985).

[288] *Reservations to the Convention on Genocide* (footnote 220 above), p. 23 ("it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations").

assistance for the maintenance of situations created by such breaches of *jus cogens,* in this case apartheid and racial discrimination, the Security Council provided for members of the United Nations to adopt various sanctions against South Africa.[289]

98. The complete and total rejection of the policy of apartheid and the discriminatory policies attendant to it, as a crime against humanity and the conscience of mankind, was codified in the International Convention on the Suppression and Punishment of the Crime of Apartheid.[290] In its preamble, the Convention condemned "racial segregation and apartheid" and committed parties "to prevent, prohibit and eradicate *all practices*" of racial segregation and apartheid.[291] The Convention declares apartheid to be "a crime against humanity" and that "inhuman acts" connected with the crime of apartheid, such as racial segregation and racial discrimination, "are crimes violating the principles of international law, in particular the purposes and principles of Charter of the United Nations".[292] Furthermore, consistent with the consequences of the serious breaches of *jus cogens,* the Convention provides for responsibility "irrespective of the motive" for anyone who commits or assists or cooperates in the commission of the crime of apartheid.[293]

99. The peremptory character of the prohibition of apartheid and racial discrimination has also been recognized in judicial decisions of national courts. For example, racial discrimination and inequality was recognized as one of the examples of norms of *jus cogens* in the Swiss case *A v. Department of Economic Affairs.*[294] Similarly, the United States Court of Appeals in *Committee of US Citizens Living in Nicaragua*, included racial discrimination in the list of norms of *jus cogens*.[295] In *Sarei v. Rio Tinto,* the United States Court of Appeal stated that there was "a great deal of support for the proposition that systematic racial discrimination by a State violates a *jus cogens* norm".[296]

100. Writings have also generally recognized the prohibition of apartheid and racial discrimination as a norm of *jus cogens.*[297] The clear recognition of the prohibition of apartheid and racial discrimination as a norm of *jus cogens* is aptly captured by Pellet, who states that "the universal (official) reprobation of racial discrimination has certainly resulted in a 'peremptorization' of the prohibition of racial discrimination (at least when committed on a large and/or systematic scale)".[298]

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[289] See, e.g. Security Council resolution 418 (1977); Security Council resolution 569 (1985); and Security Council resolution 591 (1986).

[290] International Convention on the Suppression and Punishment of the Crime of Apartheid.

[291] *Ibid.*, fourth preambular paragraph (emphasis added).

[292] *Ibid.*, art. I.

[293] *Ibid.*, art. III

[294] *A v. Department of Economic Affairs* (footnote 182 above), at para. 8.2.

[295] *Committee of US Citizens Living in Nicaragua v. Reagan* (footnote 182 above), at 941. See also *Siderman de Blake v. Argentina* (footnote 214 above) at 717.

[296] *Sarei v. Rio Tinto* (footnote 240 above), at 19378.

[297] See J. Dugard, *Confronting Apartheid: A Personal History of South Africa, Namibia and Palestine* (Johannesburg, Jacana, 2018), pp. 86 and 137. See also Ago, "Droit des traités à la lumière de la Convention de Vienne" (footnote 230 above), p. 324, footnote 37; Costelloe, *Legal Consequences of Peremptory Norms in International Law* (footnote 186 above), p. 16; Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law* (footnote 150 above), p. 222; Knuchel, Jus Cogens*: Identification and Enforcement of Peremptory Norms* (footnote 186 above), p. 41; De Wet, "The emergence of international and regional value systems as a manifestation of the emerging international constitutional order" (footnote 82 above), p. 616; Cassese, "The enhanced role of *jus cogens*" (footnote 234 above), p. 162; and Cottier, "Improving compliance: *jus cogens* and international economic law" (footnote 186 above).

[298] Pellet, "Comments in response to Christine Chinkin …" (footnote 87 above), p. 85.

101. The above discussion illustrates that the Commission's decision to include apartheid and racial discrimination in its list of examples of most cited norms of *jus cogens* was justified.

7. The prohibition of slavery

102. Understandably there are not many cases of what may be termed classical slavery in the modern world. As a result, the International Court of Justice has not had to rule on the prohibition of slavery and has thus not addressed the status of slavery as a norm of *jus cogens*. As with the prohibition of apartheid and racial discrimination, the Court's recognition of the *jus cogens* status of the prohibition of slavery has been indirect and through its inclusion of the prohibition in the list of rules creating *erga omnes* obligations.[299] Yet, the prohibition of slavery is one of the classical examples, with virtually universal acceptance, of peremptory norms of international law.[300] Its recognition as a norm from which no derogation is permitted can be seen in the practice of States, particularly in context of multilateral instruments.

103. Evidence of the *jus cogens* status of the prohibition of slavery can be seen in the practice of States adopting multilateral instruments. Slavery was first condemned in an international instrument in the 1815 Declaration Relative to the Universal Abolition of the Slave Trade.[301] In 1948, the Universal Declaration of Human Rights was adopted and it provides that "[n]o one shall be held in slavery or servitude" and that "slavery and the slave trade shall be prohibited in all their forms".[302] In the Durban Declaration, world leaders acknowledged that "slavery and the slave trade … were appalling tragedies in the history of humanity" in part "because of their abhorrent barbarism".[303] The Declaration further acknowledged "that slavery and the slave trade are a crime against humanity and should always have been so".[304]

104. The absolute and non-derogable nature of the prohibition on slavery is also evident in the treaty practice. In the 1926 Slavery Convention, States undertook to prevent and suppress "slavery" and the "slave trade".[305] The commitment in the Convention was subject to a number of qualifiers, which raise questions about the non-derogability of the prohibition at that time.[306] First, the Contracting States committed themselves to bring to an end slavery "progressively and as soon as possible".[307] This qualifier might suggest that the prohibition was viewed as derogable by the Contracting States. However, the qualifier seemed less a normative

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[299] *Barcelona Traction* (footnote 277 above), p. 32, para. 34.

[300] Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law* (footnote 158 above), p. 216 ("The prohibition of slavery is placed among the first undisputable peremptory norms that emerged in contemporary international law").

[301] Declaration Relative to the Universal Abolition of the Slave Trade (8 February 1815), *Consolidated Treaty Series*, vol. 63, No. 473. See D. Weissbrodt and Anti-Slavery International, *Abolishing Slavery and its Contemporary Forms* (New York and Geneva, United Nations, 2002; HR/PUB/02/4), p. 3.

[302] Art. 4.

[303] Durban Declaration adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, contained in *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 31 August – 8 September 2001*, A/CONF.189/12, p. 5, at para. 13.

[304] *Ibid.*

[305] Slavery Convention (Geneva, 25 September 1926), League of Nations, *Treaty* Series, vol. LX, No. 1414, p. 253, art. 2 (*a*) and (*b*).

[306] See Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law* (footnote 158 above), p. 216 ("But the 1926 Convention did not peremptorily abolish[] slavery. Article 2 only stipulates that States Parties agreed to upon the obligation to progressively bring about the complete elimination of slavery in all its forms").

[307] Slavery Convention, art. 2 (*b*).

qualifier and more of an empirical acceptance that slavery, even if completely illegal, did take place. This is in the same way that crimes against humanity today may take place notwithstanding their absolute proscription as a norm of *jus cogens.* This view is supported by the fact that the obligation to impose severe penalties was immediate and not subject the qualification of progressive eradication.[308] Nevertheless, the Convention did foresee the legal continuation of "forced labour" under certain strict conditions, and as such established a transitional arrangement to deal with instances of forced labour.[309] Forced labour, however, was not at the time characterized as slavery. Slavery was defined as the condition over which some form of ownership was exercised over a person,[310] while forced labour was always compensated and labourers could not be compelled to relocate.[311] The Supplementary Convention of 1956 extended the scope of the prohibition to cover practices similar to slavery, which would include the practice of forced labour.[312]

105. In addition to the 1926 and 1956 Slavery Conventions, other non-slavery-specific treaties prohibit slavery in absolute and non-derogable terms. The International Covenant on Civil and Political Rights provides an apt illustration. In article 8, "slavery and the slave-trade in all their forms" and "servitude" are prohibited. While the Covenant makes provision for derogation from certain rights, the prohibition of "slavery and slave-trade in all their forms" and "servitude" is explicitly excluded from the possibility of derogation.[313] Protocol II to the 1949 Geneva Conventions similarly states that "slavery and the slave trade in all their forms" "remain prohibited at any time and in any place whatsoever".[314] Examples of other treaties that, in some way or another, prohibit and/or criminalize slavery in absolute terms include the African Charter on Human and Peoples' Rights,[315] the Rome Statute of the International Criminal Court, which criminalizes slavery as a crime against humanity,[316] and the Protocol to Prevent and Punish Trafficking in Persons.[317]

106. In addition to State practice in the form of multilateral instruments, national court cases have also recognized slavery as a norm of *jus cogens.*[318] The peremptory

[308] See, e.g. article 6, which obliges States to adopt "severe penalties" for slavery. This obligation is not subject to the "progressive" qualifier of article 2 (*b*).

[309] *Ibid.*, art. 5.

[310] *Ibid.*, art. 1 ("Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised").

[311] *Ibid.*, art. 5, para. 2 ("So long as such forced or compulsory labour exists, this labour shall invariably be of an exceptional character, shall always receive adequate remuneration, and shall not involve the removal of the labourers from their usual place of residence").

[312] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Geneva, 7 September 1956), United Nations, *Treaty Series*, vol. 226, No. 3822, p. 40.

[313] International Covenant on Civil and Political Rights, art. 4, para. 2.

[314] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (Geneva, 8 June 1977), United Nations, *Treaty Series*, vol. 1125, No. 17513, p. 609, art. 4, para. 2 (*f*).

[315] African Charter on Human and Peoples' Rights, art. 5 ("All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited").

[316] Rome Statute, art. 7, para. 1 (*c*), and 7, para. 2 (*c*).

[317] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), United Nations, *Treaty Series*, vol. 2237, No. 39574, p. 319. See especially definition of "trafficking" and "exploitation" in article 3 (*a*). See also article 3 (b), which excludes "consent" as a justification.

[318] *Okenyo v. Attorney-General,* Judgment of the 29 March 2012, para. para. 61; *RM v. Attorney-General* (above footnote 237); *Committee of US Citizens Living in Nicaragua v. Reagan* (above footnote 182), at 941; *United States v. Yousef*, Judgment, United States Court of Appeal, Second

status of the prohibition has also been recognized in decisions of regional courts, in particular the Inter-American Court. In *Aloeboetoe v. Suriname,* for example, the Inter-American Court held that a treaty between the Netherlands and the Saramakas community providing for the transport of slaves would be "null and void because it contradicts the norms of *jus cogens superveniens*".[319] In *Río Negro Massacres v. Guatemala,* the Court held that the failure to investigate and prosecute "slavery and involuntary servitude" contravened "non-derogable norms (*jus cogens*)".[320] The prohibition of slavery is also recognized in academic writings as a norm of *jus cogens.*[321] The *jus cogens* status of the prohibition of slavery is so well accepted that Trindade has remarked, "I understand that no one … would dare to deny that, e.g., slave work … would likewise affront the universal juridical conscience, and effectively collide with the peremptory norms of the *jus cogens*".[322] Similarly, Den Heijer and Van der Wilt include slavery among *jus cogens* norms "beyond contestation".[323] Likewise, Christófolo states that "it seems undisputable that the general prohibition of slavery and slave trade has reached a universal peremptory nature in public international law".[324]

107. It can be concluded, on the basis of the brief description above, that the Commission's inclusion of the prohibition of slavery in the list of notable examples of norms of *jus cogens* is justified. What the discussion did not address is what types of conduct are prohibited under the general prohibition of slavery and slave trade. Nonetheless, given the constant refrain contained in the instruments that slavery "in all its forms" is prohibited, it can be stated that modern forms of slavery, however they may be defined, fall within the scope of the prohibition.

8. The right to self-determination

108. The right to self-determination is another norm previously identified by the Commission as a norm of *jus cogens.* The right to self-determination is a classical

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Circuit, 4 April 2003, at 94 *et seq*., where the Court stated that only a few rules of international law possessed *jus cogens* character and illustrating this by noting that a treaty providing for trade in slaves would be void while one providing for trade in ivory, even if violating some rule of international law, would not be void; *Siderman de Blake v. Argentina* (footnote 214 above), at 714; *Yousuf v. Samantar* (footnote 214 above), at 19. See also opinion of Kirby, J in *R v. Tang,* High Court of Australia of 28 August 2008, paras. 110-117.

[319] *Aloeboetoe and Others v. Suriname, Reparation and Costs,* Judgment, Inter-American Court of Human Rights, 10 September 1993, Series C, No. 15, para. 57.

[320] *Río Negro Massacres v. Guatemala,* Judgement, Inter-American Court of Human Rights, 4 September 2012, Series C, No. 250, at para. 227.

[321] See, e.g., Ago, "Droit des traités à la lumière de la Convention de Vienne" (footnote 230 above), p. 324, footnote 37. See also A. Verdross, "*Jus dispositivum* and *jus cogens* in international law", *American Journal of International Law*, vol. 60 (1966), pp. 55–63, at p. 59; Mik, "*Jus cogens* in contemporary international law" (footnote 167 above), p. 59; S. Kadelbach, "Genesis, function and identification of *jus cogens* norms", *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 147–172, at p. 151; Bianchi, "Human rights and the magic of *jus cogens*" (footnote 232 above), p. 495; Criddle and Fox-Decent, "A fiduciary theory of *jus* cogens" (footnote 231 above), p. 355; Knuchel, Jus Cogens*: Identification and Enforcement of Peremptory Norms* (footnote 186 above), p. 41; Costelloe, *Legal Consequences of Peremptory Norms in International Law* (footnote 186 above), p. 16; Cassese, "The enhanced role of *jus cogens*" (footnote 234 above), p. 162; Cherif Bassiouni, "International crimes …" (footnote 219 above), p. 70; and Cottier, "Improving compliance: *jus cogens* and international economic law" (footnote 186 above), p. 133.

[322] Cançado Trindade, "*Jus cogens*: the determination and the gradual expansion of its material content in contemporary international case-law" (footnote 219 above), p. 13.

[323] Den Heijer and Van der Wilt, "*Jus cogens* and the humanization and fragmentation of international law" (footnote 158 above), p. 9.

[324] Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law* (footnote 158 above), p. 219.

norm of *jus cogens* whose peremptory status is virtually universally accepted. It is true that one State, in the Sixth Committee debate on the work of the Commission during its seventieth session (2018), expressed the view that, contrary to the Commission's previous conclusions, the *jus cogens* status of self-determination was "questionable".[325] For the reasons that will be advanced in the coming paragraphs of the present report, the Special Rapporteur is of the view that the Commission's previous conclusions concerning the right to self-determination was justified by the practice and that its inclusion in the list previously provided by the Commission is not in error.

109. The report has already referred to the relationship between *erga omnes* and *jus cogens* above and the Special Rapporteur's view that the latter from flows from the former. In its judgment in the *East Timor* case, the International Court of Justice stated that the "assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable".[326] It described the principle of self-determination as "one of the essential principles of contemporary international law".[327] Before the *East Timor* case, the Court had emphasized the importance of the right to self-determination in its advisory opinions on *Nambia* and *Western Sahara.*[328] The *erga omnes* character of the obligation to respect the right to self-determination was also recognized in the *Wall* advisory opinion.[329] Moreover, the Court applied the consequences of serious breaches of *jus cogens* – in particular the duty to cooperate to bring to end a situation created by the breach – to the breach of the duty to respect the right to self-determination.[330]

110. The *jus cogens* status of the right to self-determination has also been recognized in the practice of States in the context of multilateral instruments. There have, for example, been many General Assembly resolutions proclaiming the fundamental character of the right to self-determination. Perhaps one of the most important instruments in this respect is the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, which provided for a right to self-determination in absolute terms and was referred to by the International Court of Justice in establishing the *erga omnes* nature of the right.[331] Equally important is the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.[332] In the preamble to that Declaration, the principle of self-determination is described as "significant".[333] In several places the declaration stresses the importance of the right to self-determination.[334] The 1965 Declaration on the Inadmissibility of Intervention

[325] Israel (A/C.6/73/SR.27).

[326] *East Timor (Portugal v. Australia), I.C.J. Reports 1995*, p. 90, p. 102, para. 29.

[327] *Ibid.*

[328] See, generally, *Namibia* (footnote 279 above); *Western Sahara, Advisory Opinion, ICJ Reports 1975*, p. 12.

[329] *Legal Consequences of the Construction of the Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, especially at pp. 171–172, 196, paras. 88, 149 and 155.

[330] *Ibid.*, para. 159 ("[there is a duty on] all States … to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end").

[331] General Assembly resolution 1514 (XV), especially paras. 1 and 2. See *Namibia* (footnote 279 above), p. 31, para. 52, where the Court considered the Declaration as an "further important stage" in the development of the *erga omnes* applicability of the right of self-determination "which embraces all peoples and territories which 'have not yet attained independence'".

[332] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

[333] *Ibid.*, fourteenth preambular para.

[334] For example: "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and

in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, for its part, provided that "[a]ll States shall respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms".[335] The importance and fundamental character of the right to self-determination is evident from the fact that General Assembly resolution 3314 (XXIX) on the definition of aggression provided that none of the rules identified by the Assembly on aggression "could in any way prejudice the right to self-determination".[336] The fundamental character of the right to self-determination has also been affirmed in country-specific resolutions.[337] The General Assembly has also declared an agreement invalid on account of it being inconsistent with the right to self-determination.[338]

111. The Security Council has itself also affirmed the right to self-determination, albeit not as often or as directly as the General Assembly.[339] In resolution 384 (1975), the Council recognized "the inalienable right of the people of Timor-Leste to self-determination" and called upon all States to respect that right.[340] The resolution also applied the consequences of serious breaches of *jus cogens*, namely the duty to cooperate to bring to an end situations created by the breach, to the breach of the right of self-determination of the people of Timor-Leste.[341]

112. The right to self-determination has also been reflected in treaty practice. The Charter of the United Nations provides that the purposes of the United Nations are, *inter alia*, to "develop friendly relations among nations based on respect for the

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cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter"; "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle "; and "Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence".

[335] General Assembly resolution 2131 (XX), annex, para. 6.

[336] General Assembly resolution 3314 (XXIX), annex, art. 7.

[337] See, e.g., General Assembly resolution 66/146 of 19 December 2011 on the right of the Palestinian people to self-determination, which, in its preamble, recalls the International Court of Justice's description of the right to self-determination as establishing an *erga omnes* obligation and, in paragraph 1, reaffirms the right of Palestine to self-determination. See also General Assembly resolution 67/19 of 29 November 2012 on the status of Palestine in the United Nations, which, for example, refers to "the inalienable rights of the Palestinian people, primarily the right to self-determination" (ninth preambular para.). On South Africa, see, for example, General Assembly resolution 32/105 J, para. 2, and resolution 34/93 O, para. 3.

[338] General Assembly resolution 33/28 A of 7 December 1978 on the question of Palestine, para. 4 ("the validity of agreements purporting to solve the problem of Palestine requires that they be within the framework of the United Nations and its Charter and its resolutions on the basis of the full attainment and exercise of the inalienable rights of the Palestinian people, including the right of return and the right to national independence and sovereignty in Palestine, and with the participation of the Palestine Liberation Organization").

[339] See, for an example of an indirect affirmation of the right to self-determination, Security Council resolution 554 (1984), preamble ("Reaffirming the legitimacy of the struggle of the oppressed people of South Africa for the elimination of *apartheid* and for the establishment of a society in which all the people of South Africa as a whole, irrespective of race, colour, sex or creed, will enjoy equal and full political and other rights and participate freely in the determination of their destiny").

[340] Security Council resolution 384 (1975), preamble and para. 1.

[341] *Ibid.,* para. 4 ("Urges all States and other parties to cooperate fully with the efforts of the United Nations to achieve a peaceful solution to the existing situation and to facilitate the decolonisation of the Territory"). See also Security Council resolution 389 (1976).

principle of equal rights and self-determination of peoples".[342] Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights proclaim that "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[343] In its general comment No. 12, the Human Rights Committee observed that the "right of self-determination is of particular importance because its realization is an essential condition for the effective" protection of human rights.[344] According to the Committee, that was the reason that States included the right "in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants".[345] The Committee described it as an "inalienable right". Importantly, according to the Committee, the obligations flowing from the right exist independent of the Covenants.[346] The African Charter on Human and Peoples Rights provides that "[a]ll peoples shall have the right to existence" and that they "shall have the unquestionable and inalienable right to self-determination".[347]

113. The *jus cogens* status of the right to self-determination has also been affirmed in national and regional court decisions. The German Constitutional Court, for example, included the right to self-determination as a rule of *jus cogens,* describing the latter as "rules of law which are firmly rooted in the legal conviction of the community of States".[348] In the *Council of the European Union v. Front populaire pour la libération de la saguia-el-hamra et du rio de oro,* the Grand Chamber of the European Court of Justice described the right to self-determination as a principle of international law that is a "legally enforceable right *erga omnes* and one of the essential principles of international law".[349] The African Commission on Human and Peoples' Rights has also affirmed the fundamental importance of the right to self-determination.[350]

114. Writers have also generally recognized the right to self-determination as a norm of *jus cogens*.[351] Kadelbach includes the right to self-determination among the norms

[342] Charter of the United Nations, Art. I, para. 2.

[343] International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 993, No. 14531, p. 3, common art. 1.

[344] Human Rights Committee, general comment No. 12 (1984), *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40* (A/39/40), annex VI, para. 1.

[345] *Ibid.*

[346] *Ibid.*, paras. 2 and 6 ("The obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not. It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination").

[347] African Charter on Human and Peoples' Rights, art. 20, para. 1.

[348] Federal Constitutional Court Order of 26 October 2004 – 2 BVR 1038/01 (English translation) provided by Permanent Mission of the Federal Republic of Germany to the United Nations (New York). See also *Saharawi Arab Democratic Republic and Others v. Cherry Blossom and Others,* Judgment of the High Court of South Africa of 15 June 2016, especially at para. 39 *et seq.*

[349] *Council of the European Union v. Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)*, Case C-104/16 P, Judgment, Grand Chamber, European Court of Justice, 21 December 2016, *Official Journal of the European Union*, C 53/19 (20 February 2017), para. 88.

[350] *Congrès du peuple katangais v. DRC,* Communication 75/92, Decision, African Commission on Human and Peoples' Rights, para. 4, and *Kevin Mgwanga Gunme et al. v Cameroon,* Communication 266/03, Decision, African Commission on Human and Peoples' Rights. In both cases, the Commission stressed that the right could be exercised in ways other than secession.

[351] See, e.g., S.Y. Marochkin, "On the recent development of international law: some Russian perspectives", *Chinese Journal of International Law*, vol. 8 (2009), pp. 695–714, at p. 710; Tomuschat, "The Security Council and *jus cogens*" (footnote 80 above), p. 35; Frowein, "*Jus*

whose *jus cogens* status is "widely undisputed".[352] Alexidze, similarly, expresses the view that the *jus cogens* status of the right to self-determination is beyond dispute.[353] He states, definitively, that there is "not a single corner on the Earth" that would not recognize the fundamental importance of self-determination.[354] "[E]qual rights and self-determination of peoples", he asserts, are among the "principles any derogation from which is *absolutely* forbidden, even *inter se*".[355] He includes the right to self-determination as one of those norms whose *jus cogens* status is "obvious".[356] Mik notes that norms that are principles should not be accorded *jus cogens* status.[357] This would include a rule like the right to self-determination. However, he notes that a principle such as the right to self-determination may have regulatory implications and can thus be recognized as a norm of *jus cogens*.[358]

115. Consistent with the general approach adopted in the present report, the discussion above has not attempted to solve the more complex problem of what constitutes the right to self-determination, i.e., whether the right applies only in the context of decolonization and whether the circumstances in which the right applies would permit external self-determination (secession) and, if so, under what circumstances. The discussion has only sought to show that the Commission's choice in including the right to self-determination, however it may be defined, as one of the widely accepted norms of *jus cogens* is justifiable.

9. The basic rules of international humanitarian law

116. It is, as in previous sections, necessary to preface the present section with some comments about terminology. What is termed here "basic rules of international humanitarian law", is variably referred to elsewhere as "principles of humanitarian law", "principles of international humanitarian law", "grave breaches" and the "prohibition of war crimes". For purposes of the present report, the phrase "basic rules of international humanitarian law" is used, since this is the phrase adopted by the Commission in its articles on State responsibility, on which the current section of the report is based.

117. The *jus cogens* status of basic rules of international humanitarian law has been affirmed in the jurisprudence of international courts and tribunals. The International Court of Justice, in the *Nuclear Weapons* advisory opinion, considered the question of whether "rules and principles of humanitarian law" rose to the level of *jus cogens*.[359] The Court, however, opted not to directly address the question.[360] It did,

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cogens" (footnote 186 above), p. 443, para. 3; Cassese, "The enhanced role of *jus cogens*" (footnote 234 above), p. 162; Costelloe, *Legal Consequences of Peremptory Norms in International Law* (footnote 186 above), p. 16.

[352] Kadelbach, "Genesis, function and identification of *jus cogens* norms" (footnote 321 above), p. 152; Santalla Vargas, "In quest of the practical value of *jus cogens* norms" (footnote 186 above), p. 227. See also Pellet, "Comments in response to Christine Chinkin …" (footnote 87 above), p. 86.

[353] L. Alexidze, "The legal nature of *jus cogens* in contemporary international law", *Collected Courses of the Hague Academy of International Law, 1981-III*, vol. 172, pp. 219 ff., at p. 229.

[354] *Ibid.,* p. 251.

[355] *Ibid.*, p. 260. He notes further that the principle of territorial integrity, while also fundamental, can be derogated from as long as the principle of self-determination is observed.

[356] *Ibid*., p. 262.

[357] Mik, "*Jus cogens* in contemporary international law" (footnote 167 above), p. 34.

[358] *Ibid.* See also pp. 36, 82 and 83 for confirmation of the peremptory status of *jus cogens.*

[359] *Legality of the Threat or Use of Nuclear Weapons* (footnote 185 above), at p. 258, para. 83. See also *Corfu Channel case, Judgment of April 9th 1949, I.C.J. Reports 1949*, p. 4, at p. 22 ("Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war").

[360] *Legality of the Threat or Use of Nuclear Weapons* (footnote 185 above), at p. 258, para. 83 ("The

however, indirectly recognize the *jus cogens* status of some principles of international humanitarian law when it described these as "intransgressible".[361] It may be contended that the term "intransgressible" does not mean the same thing as *jus cogens* peremptory norms. However, it is not clear what else the term can mean in that context. It surely could not mean rules that may not be violated – the literal meaning of the term "intransgressible" – since, by definition all rules, including rules of a *jus dispositivum* character, would be of that nature.[362] At any rate some individual opinions in the *Nuclear Weapons* advisory opinion did address the question of the *jus cogens* status of the rule directly.[363] Moreover, the *erga omnes* character of some rules of international humanitarian law was later proclaimed by the Court in its advisory opinion on the *Wall.*[364]

118. While the International Court of Justice's recognition of the *jus cogens* status of basic principles of international humanitarian law has been tentative and indirect, other courts and tribunals have been less tentative. In *Kupreškić*, the Trial Chamber of the International Tribunal for the Former Yugoslavia stated that "most norms of international humanitarian law", including in particular "those prohibiting war crimes … are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character".[365] Similarly, in the *Tadić* decision on the defence motion for interlocutory appeal on jurisdiction, the Tribunal's Appeals Chamber, in determining the applicable rules of international law, held that it may apply any treaty

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question whether a norm is part of the *jus cogens* relates to the legal character of the norm. The request addressed to the Court by the General Assembly raises the question of the applicability of the principles and rules of humanitarian law in cases of recourse to nuclear weapons and the consequences of that applicability for the legality of recourse to these weapons. But it does not raise the question of the character of the humanitarian law which would apply to the use of nuclear weapons. There is, therefore, no need for the Court to pronounce on this matter."). *Cf. Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Report 2012*, p. 99, at p. 140, para. 93, where the Court, without deciding the matter, assumes that principles of humanitarian law allegedly breached by Germany had the character of *jus cogens* ("Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity").

[361] *Legality of the Threat or Use of Nuclear Weapons* (footnote 185 above), at p. 257, para. 79 ("It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' … that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law").

[362] See Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law* (footnote 158 above), p. 231.

[363] See, e.g., *Legality of the Threat or Use of Nuclear Weapons* (footnote 185 above), declaration of Judge Bedjaoui, at p. 273, para. 21 ("I have no doubt that most of the principles and rules of humanitarian law and, in any event, the two principles, one of which prohibits the use of weapons with indiscriminate effects and the other the use of arms causing unnecessary suffering, form part of *jus cogens*"); *ibid.*, dissenting opinion of Judge Weeramantry, at p. 496 ("The rules of the humanitarian law of war have clearly acquired the status of *jus cogens*, for they are fundamental rules of a humanitarian character, from which no derogation is possible without negating the basic considerations of humanity which they are intended to protect"); *ibid.*, dissenting opinion of Judge Koroma, at pp. 573 *et seq*., see especially at p. 574, where Judge Koroma criticizes the Court for its "judicial policy of 'non-pronouncement'".

[364] *Wall* (footnote 329 above), p. 199, para. 155 ("The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law").

[365] *Kupreškić* (footnote 229 above), para. 520.

which was "not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law".[366]

119. The *jus cogens* status of the prohibition of war crimes, as a subset of the basic rules of humanitarian law, has also been recognized in decisions of national courts. In *Agent Orange Product Liability Litigation*, the United States District Court held that the "rules against torture, war crimes and genocide" were *jus cogens.*[367] The Argentine Supreme Court had similarly held that the prohibition of war crimes, including the non-applicability of prescription for war crimes, was *jus cogens*.[368] The Constitutional Court of Colombia also held that rules of humanitarian law "are binding on States and all parties in armed conflict, even if they have not approved the respective treaties, because [of their] peremptoriness".[369]

120. The *jus cogens* status of basic rules of humanitarian law is also generally recognized in the literature.[370] Kleinlein, having identified those norms that the International Court of Justice has described as *jus cogens* (torture and genocide), states that the "[m]ore inclusive lists also refer to war crimes and the basic principles of international humanitarian law".[371]

121. There are obvious issues of uncertainty in relation to *jus cogens* and basic rules of international humanitarian law, most notably which rules of international humanitarian law qualify as the "most basic" and thus meet the criteria of *jus cogens.* It was not the purpose of this discussion to delineate the scope – that may well be a topic for the future. What this discussion has illustrated, however, is that the Commission's decision in the articles on responsibility to include these basic rules of international humanitarian law was well justified.

C. Other possible norms of *jus cogens* not identified in the Commission's previous works

122. As explained above, the list in the Commission's commentaries to the articles on State responsibility represents the norms that are most widely cited as examples of norms of *jus cogens.* It is these norms which, in the view of the Special Rapporteur,

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[366] *Prosecutor v. Dušan Tadić et al*., Case No. IT-94-1, Decision of the Appeals Chamber on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, *Judicial Reports 1994–1995*, para. 143. See also *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 5 December 2003, para. 98.

[367] *In Re Agent Orange Product Liability Litigation* (footnote 259 above).

[368] *Arancibia Clavel, Enrique Lautaro s/ Homicidio Calificado y Asociación Ilícita y Otros*, Case No. 259, judgment, Supreme Court of Argentina, 24 August 2004 ("Que esta convención sólo afirma la imprescriptibilidad, lo que importa el reconocimiento de una norma ya vigente (jus cogens) en función del derecho internacional público de origen consuetudinario" [That this Convention only affirms imprescriptibility, which is important for the recognition of a norm already in force (*jus cogens*) in function of the public international law of customary origin]).

[369] Judgment No C-225/95 of the Constitutional Court of Colombia.

[370] See Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law* (footnote 158 above); Den Heijer and Van der Wilt, "*Jus cogens* and the humanization and fragmentation of international law" (footnote 158 above), p. 12; Linderfalk, "Understanding the *jus cogens* debate …" (footnote 72 above), p. 53; A. Orakhelashvili, "Audience and authority – the merit of the doctrine of *jus cogens*", *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 115–146, at pp. 138 *et seq*.; Kleinlein, "*Jus cogens* as the 'highest law'? Peremptory norms and legal hierarchies" (footnote 186 above), p. 184; Knuchel, Jus Cogens*: Identification and Enforcement of Peremptory Norms* (footnote 186 above), p. 41; Cherif Bassiouni, "International crimes …" (above footnote 219), p. 70; and Frowein, "*Jus cogens*" (footnote 186 above), p. 443, at para. 3.

[371] Kleinlein, "*Jus cogens* as the 'highest law'? Peremptory norms and legal hierarchies" (footnote 186 above), p. 197.

should be included in a draft conclusion. This is the *only* objective means by which to determine which norms to include and which norms to exclude in a potential non-exhaustive or illustrative list, given the methodological slant of this topic, which prevents a comprehensive assessment of all possible norms. A confession is appropriate here. This list – and indeed *any* list, even if accurate and as comprehensive possible – is likely to raise questions, and likely to be unsatisfactory to some, at least from a normative perspective.[372] In particular, it is likely to be criticized for not including other deserving norms. Two points in (tentative) response can be offered. First, the list of examples in the draft conclusion itself is only a confirmation in a text (as opposed to a commentary) of a previous list of *jus cogens* norms identified by the Commission. There most certainly are other norms of *jus cogens* beyond the ones identified and the draft conclusion will make it clear that the list is not exhaustive. Second, to the extent that any normatively deserving norm has not acquired the status of *jus cogens* because of insufficient recognition and acceptance by the international community of States as a whole, nothing prevents such a norm from acquiring the status of *jus cogens* in the future. Indeed, in many instances, there may be insufficient evidence as to its status only because States and courts – both national and international – have not given thought to addressing a specific norm or because problems relating to that norm have not arisen. The present report (and any possible conclusions and commentaries adopted by the Commission) may serve as impetus for the generation of further evidence of acceptance and recognition by the international community of States as a whole of the peremptory character of additional norms.

123. Beyond the list here proposed, other norms that have been cited as norms of *jus cogens*, and whose *jus cogens* status enjoys a degree of support, include the prohibition of enforced disappearance, the right to life, the principle of non-refoulement, the prohibition of human trafficking, the right to due process (the right to a fair trial), the prohibition of discrimination, environmental rights, and the prohibition of terrorism. The number and diversity of norms that have been put forward as candidates for *jus cogens* are large. In this regard, Shelton makes the following observation:

> Proponents have argued for inclusion of all human rights, all humanitarian norms (human rights and the laws of war), the duty not to cause transboundary environmental harm, the duty to assassinate dictators, the right to life of animals, self-determination and territorial integrity (despite legions of treaties transferring territory from one State to another).[373]

124. The present section of the report provides a very brief account of the support in practice and doctrine for the peremptory status of some of the norms listed above. There is no attempt at comprehensiveness, either in respect of the number of norms (breadth) or in relation to particular norms (depth). The point is merely to illustrate that there are other norms, i.e., other than the ones proposed for inclusion in the draft conclusion, that have been advanced as examples of *jus cogens*. For this purpose, the present section will provide some discussion on three norms that enjoy wide support though not included in the draft conclusion.

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[372] See, for a critique, H. Charlesworth and C. Chinkin, "The gender of *jus cogens*", *Human Rights Quarterly*, vol. 15 (1993), pp. 63–76.

[373] Shelton, "Sherlock Holmes and the mystery of *jus cogens*" (footnote 273 above), p. 47. See also Kleinlein, "*Jus cogens* as the 'highest law'? Peremptory norms and legal hierarchies" (footnote 186 above), pp. 197-198 ("Less safe candidates are the basic rights of the human person in general and basic principles of environmental law. All these norms, due to their subject matter, carry a particular normative weight. This normative weight establishes a '*material* hierarchy of norms'. Yet, *jus cogens* is defined not just by its weight, but also by the reasons for its weightiness.").

125. The *jus cogens* nature of the prohibition of enforced disappearance has received a large degree of support. The main instrument for the prohibition of enforced disappearance is the International Convention for the Protection of All Persons from Enforced Disappearance (hereinafter the "Enforced Disappearance Convention").[374] Article 1 states, in absolute terms, that "[n]o shall be subject to enforced disappearance". The Enforced Disappearance Convention also provides, in what is clear indication of the impermissibility of derogations, "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance".[375] It further states that enforced disappearance, when committed as part of a "widespread or systematic practice", constitutes a crime against humanity (art. 5).

126. The recognition of the prohibition of enforced disappearance as a norm of *jus cogens* has been particularly consistent in the inter-American system. In the case of *Goiburú*, the Inter-American Court of Human Rights held that not only was "the prohibition of the forced disappearance of persons" a norm of *jus cogens,* but also attributed *jus cogens* status to the "corresponding obligation to investigate and punish those responsible" for acts of enforced disappearance.[376] In the *Osorio Rivera and Family Members v. Peru* case, the Court noted that enforced disappearance "constitutes a gross violation of human rights" and "involves a blatant rejection of the essential principles", before affirming that its prohibition was a norm of *jus cogens*.[377]

127. The *jus cogens* character of the prohibition of enforced disappearance has also been recognized in a number of domestic jurisdictions. The Supreme Court of Argentina stated that the prohibition contained in the Enforced Disappearance

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[374] International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006), United Nations, *Treaty Series*, vol. 2716, No. 48088, p. 3.

[375] *Ibid.,* art. 1, para. 2.

[376] *Goiburú* (footnote 119 above), para. 84.

[377] *Osorio Rivera and Family Members v. Peru*, Judgment (Preliminary objections, merits, reparations, and costs), Inter-American Court of Human Rights, 26 November 2013, Series C, No. 274, para. 112. See also, for other examples, *García and Family Members v. Guatemala,* Judgment (Merits, reparations and costs), Inter-American Court of Human Rights, 29 November 2012, Series C, No. 258, para. 96 ("In sum, the practice of forced disappearance involves a heinous abandonment of the essential principles on which the inter-American human rights system is founded and its prohibition has achieved *jus cogens* status"); *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*, Judgment (Merits, reparations and costs), Inter-American Court of Human Rights, 20 November 2012, Series C, No. 253, para. 232; *Contreras et al. v. El Salvador,* Judgment (Merits, reparations and costs), Inter-American Court of Human Rights, 30 August 2011, Series C, No. 232, para. 83; *Gelman v. Uruguay,* Judgment (Merits and reparations), Inter-American Court of Human Rights, 24 February 2011, Series C, No. 221, para. 75 ("The practice of enforced disappearance of persons constitutes an inexcusable abandonment of the essential principles on which the Inter-American System of Human Rights is founded, and whose prohibition has reached the character of *jus cogens*"); *Gomes Lund et al. ("Guerrilha Do Araguaia") v. Brazil,* Judgment (Preliminary objections, merits, reparations, and costs), Inter-American Court of Human Rights, 24 November 2010, Series C, No. 219, para. 105; *Ibsen Cárdenas and Ibsen Peña v. Bolivia,* Judgment (Merits, reparations, and costs), Inter-American Court of Human Rights, 1 September 2010, Series C, No. 217, paras. 61 and 197; *Chitay Nech et al. v. Guatemala,* Judgment (Preliminary objections, merits, reparations, and costs), Inter-American Court of Human Rights, 25 May 2010, Series C, No. 212, para. 193; *Radilla-Pacheco v. Mexico*, Judgment (Preliminary objections, merits, reparations, and costs), Inter-American Court of Human Rights, 23 November 2009, Series C, No. 209, para. 139 ("Forced disappearance constitutes an inexcusable abandonment of the essential principles on which the Inter-American System is based and its prohibition has reached a nature of jus cogens"); and *Anzualdo Castro v. Peru*, Judgment (Preliminary objections, merits, reparations, and costs), Inter-American Court of Human Rights, 22 September 2009, Series C, No. 202, para. 59.

Convention enshrined the inderogable law of *jus cogens.* [378] Similarly, the Constitutional Court of Peru has described the prohibition of enforced disappearance as part of core inderogable rules of peremptory international law, in addition to being part of the Peruvian constitutional framework.[379] Referring to the Third Restatement, the United States Court of Appeals has, in *Siderman de Blake*, also referred to the prohibition of "causing disappearance of individuals" as a norm of *jus cogens*.[380] The prohibition of enforced disappearance has also been recognized in writings as a norm of *jus cogens.* Criddle and Fox-Decent, whose fiduciary theory of *jus cogens* serves to prevent "flagrant abuses of State power [that] deny a State's beneficiaries secure and equal freedom", would include as a norm of *jus cogens* "forced disappearances".[381]

128. There is also some support for the peremptory character of the right to life, or at least the prohibition on the arbitrary deprivation of life (right not to be arbitrarily deprived of life). In *Nada v. State Secretariat for Economic Affairs,* the Swiss Federal Supreme Court determined that "*jus cogens* includes elementary human rights such as the right to life".[382] In *RM v. Attorney-General,* the High Court of Kenya, having rejected the argument that parental rights were *jus cogens*, said that the closest linkage between the parental rights and *jus cogens* was the right to life (which was *jus cogens*), but did not accept that the actions complained of threatened that right. [383]

129. The right not to be arbitrarily deprived of life is also recognized as non-derogable in treaty law. Article 6 of the International Covenant on Civil and Political Rights provides that everyone "has the inherent right to life" and further provides that "[n]o one shall be arbitrarily deprived of his life".[384] The rights in article 6 are included in the list of non-derogable rights under article 4 of the Covenant. Similarly the European Convention on Human Rights provides for the right to life and that no one may be deprived of life save in very specifically enumerated circumstances.[385] As with the International Covenant on Civil and Political Rights, the right to life in the European Convention is non-derogable.[386] The importance of this right under the European system has been underscored by the case law, where the right has been described as "one of the most fundamental provisions in the Convention, from which

[378] *Simón (Julio Héctor) v. Office of the Public Prosecutor,* Judgment, Supreme Court of Argentina, 14 June 2005, para. 38.

[379] *Guillén de Rivero v. Peruvian Supreme Court,* Judgment, Constitutional Court of Peru, 12 August 2005.

[380] See, e.g., *Hanoch Tel-Oren v. Libya,* Judgment, United States Court of Appeals, District of Columbia, 3 February 1984, at 391; See also *Siderman de Blake v. Argentina* (footnote 214 above), at 714.

[381] Criddle and Fox-Decent, "A fiduciary theory of *jus* cogens" (footnote 231 above), pp. 369–370. See also J. Sarkin, "Why the prohibition of enforced disappearance has attained *jus cogens* status in international law", *Nordic Journal of International Law*, vol. 81 (2012), pp. 537–584; A.A. Cançado Trindade, "Enforced disappearances of persons as a violation of *jus cogens*: the contribution of the Inter-American Court of Human Rights", *Nordic Journal of International Law*, vol. 81 (2012), pp. 507–536; Shelton, "Sherlock Holmes and the mystery of *jus cogens*" (footnote 273 above), p. 39; and Kadelbach, "Genesis, function and identification of *jus cogens* norms" (footnote 321 above), p. 168.

[382] *Nada v. State Secretariat for Economic Affairs* (footnote 46 above), at 7.3 ("Allgemein werden zum ius cogens elementare menschenrechte wie das Recht auf Leben" [In general, fundamental human rights such as the right to life become *jus cogens*]).

[383] See *RM v. Attorney-General* (footnote 237 above) ("On this, a perusal of the authoritative sources and international jurisprudence reveals that although the applicants are correct in the definition of *jus cogens* as outlined above and its current classifications it has not yet embraced parental responsibility and the rights associated with it. The closest linkage is the right to life and we are not convinced that the challenged section(s) threaten the right to life").

[384] International Covenant on Civil and Political Rights, art. 6 para. 1.

[385] European Convention on Human Rights, art. 2.

[386] *Ibid.*, art 15.

no derogation is permitted" and one which "enshrines one of the basic values of the democratic societies making up the Council of Europe".[387] The prohibition of arbitrary deprivation of life is also contained in other human rights instruments, such as the African Charter[388] and the American Convention on Human Rights.[389] In its general comment No. 29, the Human Rights Committee, while recognizing that not all the rights that were non-derogable under article 4 were *jus cogens*, expressed the view that the right not be arbitrarily deprived of life was a norm of *jus cogens*.[390] Similarly, the African Commission on Human and Peoples' Rights has stated that "right not to be arbitrarily deprived of one's life is recognised as part of customary international law … and is also recognised as a *jus cogens* norm, universally binding at all times".[391]

130. In the view of the Special Rapporteur, the permissibility of the death penalty is not an obstacle to the emergence of the right not to be arbitrarily deprived of life as a norm of *jus cogens.* Whatever view one adopts concerning the consistency of the death penalty with international law,[392] this ought to have no effect on the question of the peremptory character of the prohibition of arbitrary deprivation of life since, rightly or wrongly, the death penalty imposed after strict observance with due process standards is probably not "arbitrary".

131. The principle of non-refoulement is another principle of international law whose candidacy for peremptory status has ample support.[393] In its advisory opinion on *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection,* the Inter-American Court of Human Rights linked the principle of non-refoulement to the prohibition of torture and held that because of its relation with the prohibition of torture, the principle is "is absolute and also becomes

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[387] *Makaratzis v. Greece*, No. 50385/99, Judgment, Grand Chamber, European Court of Human Rights, 20 December 2004, ECHR 2004-XI, para. 56.

[388] African Charter on Human and Peoples' Rights, art. 4.

[389] American Convention on Human Rights, art. 4.

[390] Human Rights Committee, general comment No. 29 (2001) on derogation during a state of emergency, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40*, vol. I (A/56/40 (Vol. I)), annex VI, para. 11. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/23/47), para. 36 ("The Special Rapporteur recalls the supremacy and non-derogability of the right to life under both treaty and customary international law").

[391] African Commission on Human and Peoples' Rights, general comment No 3 on the African Charter on Human and Peoples' Rights: The right to life (article 4), para. 5. See also *Victims of the Tugboat "13 de Marzo" v. Cuba*, Case 11.436, Decision of the Inter-American Commission on Human Rights, 16 October 1996, Report 47/96, para. 79 ("Another point that the Inter-American Commission on Human Rights must stress is that the right to life, understood as a basic right of human beings enshrined in the American Declaration and in various international instruments of regional and universal scope, has the status of *jus cogens*. That is, it is a peremptory rule of international law, and, therefore, cannot be derogable. The concept of *jus cogens* is derived from a higher order of norms established in ancient times and which cannot be contravened by the laws of man or of nations").

[392] See *S v. Makwanyane and Another* [1995] (6) BCLR 665, para. 36.

[393] See for examples of writings offering deep analysis of the peremptory status of non-refoulment, C. Costello and M. Foster, "Non-refoulement as custom and *jus cogens*? Putting the prohibition to the test", *Netherlands Yearbook of International Law*, vol. 46 (2015), pp. 273–323; and J. Allain, "The *jus cogens* nature of non-refoulement", *International Journal of Refugee* Law, vol. 13 (2001), pp. 533–558. For discussion of the implication of this, see A. Farmer, "Non-refoulement and *jus cogens:* limiting anti-terror measures that threaten refugee protection", *Georgetown Immigration Law Journal*, vol. 23 (2008), pp. 1–38. See however, *Sale v. Haitian Centres Council,* Judgment, United States Supreme Court, 21 June 1993, which upheld an executive order permitting refoulment. See, for discussion, H. Hongju Koh, "Reflections on *refoulement* and the Haitian Centres Council", *Harvard International Law Journal*, vol. 35 (1994), p. 1.

a peremptory norm of customary international law; in other words, of *ius cogens*".[394] In response, Latin American States have recognized the jurisprudence of the Court relating to "the right to seek and be granted asylum enshrined in the regional human rights instruments" and its "relationship to international refugee instruments [and] the *jus cogens* character of the principle of *non-refoulement*".[395] The principle has been described by the General Assembly as "a fundamental principle" which "is not subject to derogation".[396] The General Assembly has also "[d]eplore[d] the refoulement and unlawful expulsion of refugees and asylum-seekers".[397] In 2009, the African Union undertook "to deploy all necessary measures to ensure full respect for the fundamental principle of non-refoulement".[398]

132. There is also much support for the principle in treaty practice. It is contained, in particular, in refugee-related conventions. The Convention relating to the Status of Refugees (hereinafter, "Refugee Convention") provides for the principle of non-refoulement in its article 33.[399] Under the Convention, non-refoulement is subject to the security interests of the State concerned.[400] The Organization of African Unity's Convention Governing the Specific Aspects of Refugee Problems in Africa also contains the principle of non-refoulement with similar exclusions as the Refugee Convention.[401] The Convention against Torture provides for the principle of non-refoulement in the context of torture without any of the restrictions contained in the Refugee Convention.[402] Similarly, the Enforced Disappearance Convention prohibits, in absolute terms, refoulement if it could lead to enforced disappearance.[403]

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[394] *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection,* Advisory Opinion, Inter-American Court of Human Rights, 19 August 2014, para. 225.

[395] Brazil Declaration: "A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean", 3 December 2014.

[396] General Assembly resolution 51/75 of 12 December 1996 on the Office of the United Nations High Commissioner for Refugees, para. 3. See also General Assembly resolution 34/60 of 29 November 1979 on the report of the United Nations High Commissioner for Refugees, para. 3, where the General Assembly urged governments to "grant[] asylum to those seeking refuge and [to] scrupulously observ[e] the principle of *non-refoulement*".

[397] General Assembly resolution 63/148 of 18 December 2008 on the Office of the United Nations High Commissioner for Refugees, para. 13.

[398] Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa, 23 October 2009, para. 6.

[399] Convention relating to the Status of Refugees (Geneva, 28 July 1951), United Nations, *Treaty Series*, vol. 189, No. 2545, p. 137, art. 33 ("No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion").

[400] *Ibid.*, art. 33, para. 2 ("The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country"). See Farmer, "Non-refoulement and *jus cogens* ..." (footnote 394 above), who argues that the peremptory status of non-refoulement would require a restricted interpretation of article 33, paragraph 2.

[401] OAU Convention Governing Specific Aspects of Refugee Problems in Africa (Addis Ababa, 10 September 1969), United Nations, *Treaty Series*, vol. 1001, No. 14691, p. 45, art. II, para. 3, read with art. I, para. 5. See also the American Convention on Human Rights, art. 22, para. 8 ("In no case may an alien be deported or returned to country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinion").

[402] Convention against Torture, art. 3 ("No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture").

[403] International Convention for the Protection of All Persons from Enforced Disappearance, art. 16,

133. Several writers have described the principle of non-refoulement as a norm of *jus cogens.* These include Allain, Orakhelashvili and Farmer.[404] There have, of course, been authors who have concluded that the principle of non-refoulement is not a norm of *jus cogens*.[405] Cassese regarded the principle of non-refoulement as an emerging norm of *jus cogens.*[406] Costello and Foster undertake an excellent, in-depth analysis, looking at both arguments for and against, and come to the conclusion that the principle of non-refoulement is a norm of *jus cogens*.[407]

134. The present report does not take a view on whether the norms in this section do qualify as norms of *jus cogens.* The Special Rapporteur would note, however, that there is strong support for the *jus cogens* status of these norms. Additionally, there exist other norms whose *jus cogens* status enjoys *some* support. These include the prohibition against arbitrary arrest,[408] the right to due process[409] and the prohibition of terrorism, among others.[410] Other norms that have been advanced as *jus cogens,* and that may in the future attain the necessary recognition and acceptance of non-derogability, include the duty to protect the environment (or some aspects of this duty) and the prohibition of discrimination.

135. The principle of non-discrimination is one that has also received some support for peremptory status and that raises interesting questions (and exemplifies the dangers of an illustrative list). The question has often been raised, why is the prohibition of racial discrimination on most lists but not the prohibition of gender discrimination[411] (the Special Rapporteur leaves aside the fact that the report has not included the prohibition of racial discrimination as such, but rather the prohibition of apartheid and racial discrimination as a composite prohibition)? There certainly is

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para. 1 ("No State Party shall expel, return ('refouler'), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance").

[404] See Allain, "The *jus cogens* nature of non-refoulement" (footnote 394 above); Farmer, "Non-refoulement and *jus cogens* ..." (footnote 394 above); and Orakhelashvili, *Peremptory Norms of General International Law* (footnote 93 above), p. 56.

[405] See, e.g., A. Duffy "Expulsion to face torture? *Non-refoulement* in international law", *International Journal of Refugee Law*, vol. 20 (2008), pp. 373–390, who expresses doubt about the *jus cogens* status of non-refoulement.

[406] Cassese, "The enhanced role of *jus cogens*" (footnote 234 above), pp. 162–163.

[407] Costello and Foster, "Non-refoulement as custom and *jus cogens*? Putting the prohibition to the test" (footnote 394 above).

[408] *Belhaj v. Straw; Rahmatullah v. Minister of Defence* (above footnote 215), Opinion of Lord Sumption, para. 271 ("The … Working Group regarded this irreducible core as *jus cogens*… In my opinion they were right to do so"); *Committee of US Citizens Living in Nicaragua v Reagan* (footnote 182 above), at 941. See also Report of the Working Group on Arbitrary Detention, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of their Liberty to Bring Proceedings Before a Court (A/HRC/30/37), especially at para. 11.

[409] *AA v. Austria,* Judgment, Supreme Court of Justice of Austria, 30 September 2008. See, however, *A v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs,* Judgment, Switzerland Federal Supreme Court, 22 April 2008, and *Nada v. State Secretariat for Economic Affairs* (footnote 46 above).

[410] See, for discussion, De Beer (footnote 186 above).

[411] See generally Charlesworth and Chinkin, "The gender of *jus cogens*" (footnote 372 above). While the Special Rapporteur believes, as a normative proposition, that gender discrimination should be prohibited in the same way as other *jus cogens* norms, one of the hurdles that this proposition would have to overcome is the significant number of reservations that are attached to the principal instrument on gender discrimination, namely the Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979), United Nations, *Treaty Series*, vol. 1249, No. 20378, p. 13, which has, at present, more than 55 reservations. See, Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW/SP/2006/2).

some support for the idea that the prohibition of discrimination *as a whole*, which would include both race and gender discrimination, but also other forms of discrimination, is a norm of *jus cogens.* For the most part, the proposition that the prohibition of discrimination as a whole is a peremptory norm can be found in the jurisprudence of the Inter-American Court of Human Rights.[412] From a normative and moral perspective, there can be no argument against this call for the prohibition arbitrary discrimination to be accorded *jus cogens* status. Yet, there is limited explicit *opinio juris cogentis*[413] regarding the prohibition of discrimination in general (or the more limited, prohibition of gender discrimination).

136. By virtue of the importance of the subject matter and the catastrophic consequence that could result from the destruction of the environment,[414] it might seem obvious that norms that aim at protecting the environment (at least some of them) would have the status of *jus cogens*.[415] Yet, there seems to be little evidence of

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[412] See, e.g., *Yatama v. Nicaragua*, Judgment (Preliminary objections, merits, reparations and costs), Inter-American Court of Human Rights, 23 June 2005, Series C, No. 127, para. 184 ("At the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*"); *Servellón-García et al. v. Honduras*, Judgment (Merits, reparations and costs), Inter-American Court of Human Rights, 21 September 2006, Series C, No. 152, para. 94 ("This Tribunal considers that the fundamental principle of equality and non-discrimination belongs to the realm of *jus cogens* that, of a peremptory character, entails obligations *erga omnes* of protection that bind all States and result in effects with regard to third parties, including individuals"); *Expelled Dominicans and Haitians v. Dominican Republic*, Judgment (Preliminary objections, merits, reparations and costs), Inter-American Court of Human Rights, 28 August 2014, Series C, No. 282, para. 264 ("the Court reiterates that the *jus cogens* principle of equal and effective protection of the law and non-discrimination requires States, when regulating the mechanisms for granting nationality, to abstain from establishing discriminatory regulations or regulations that have discriminatory effects on different groups of a population when they exercise their rights"); *Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile,* Judgment (Merits, reparations and costs), Inter-American Court of Human Rights, 29 May 2014, Series C, No. 279, para. 197 ("Regarding the principle of equality before the law and non-discrimination, the Court has indicated that 'the notion of equality springs directly from the oneness of the human family, and is linked to the essential dignity of the individual.' Thus, any situation is incompatible with this concept that, by considering one group superior to another group, leads to treating it in a privileged way; or, inversely, by considering a given group to be inferior, treats it with hostility or otherwise subjects it to discrimination in the enjoyment of rights that are accorded to those who are not so classified. The Court's case law has also indicated that, at the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the sphere of jus cogens. It constitutes the foundation for the legal framework of national and international public order and permeate[s] the whole legal system."); *Veliz Franco et al. v. Guatemala,* Judgment (Preliminary objections, merits, reparations and costs), Inter-American Court of Human Rights, 19 May 2014, Series C, No. 277, para. 205 ("At the actual stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm *of jus cogens*").

[413] This refers to the acceptance and recognition of the international community of States as a whole. See generally, second report (A/CN.4/706).

[414] On the importance of the environment, see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, separate opinion of Judge Weeramantry, at pp. 91–92 ("The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments").

[415] This theme was explored in E.M. Kornicker Uhlmann, "State community interests, *jus cogens* and protection of the global environment: developing criteria for peremptory norms", *Georgetown International Environmental Law Review*, vol. 11 (1998), pp. 101–136. Her article was "based on the premise that today State community interests play a paramount role in the creation of fundamental international norms and that the protection of the global environment is the prototype of a State community interest". See also Orakhelashvili, *Peremptory Norms of*

the required "acceptance and recognition of the international community of States as a whole" that the environmental norms (or some of them) have acquired peremptory status, notwithstanding this empirical fact of the importance of environmental rules for the very survival of humanity and the planet.[416] The paradox was noted by Krista Singleton-Cambage, who noted that, at the time (1995), "environmental rights and responsibilities are not recognized as having" the status of *jus cogens* "despite the fact that global environmental preservation represents an essential interest of all individuals within the entire international society".[417] In the Commission's own work, the importance of the atmosphere, as an empirical fact, has been acknowledged, yet there has been no recognition of the peremptory status of protecting the atmosphere – a resource on which life on earth depends.[418] It is the case that there are many declarations and treaties on the environment, yet none of them provide strong evidence of non-derogability. Orakhelashvili does make a spirited argument for the *jus cogens* status of specific norms related to the environment, yet even he accepts that there is "lack of evidence". Although not referring to norms of *jus cogens*, John Dugard has described particular rules relating to the protection of the environment as establishing obligations *erga omnes*.[419] It may well be that that some rules, like some relating to the environment, have the status of *jus cogens* which has yet to be accepted and recognized by the international community of States as a whole, with the result that the effects in law of *jus cogens* do not yet flow from such.[420]

General International Law (footnote 93 above), p. 65 ("The system of environmental law, like human rights law, protects community interests, not merely those of States *inter se*").

[416] See, e.g., P. Birnie, A. Boyle, and C. Redgwell, *International Law and the Environment* (3rd ed., Oxford, Oxford University Press, 2009), pp. 109–110 ("No such [*jus cogens*] norms of international environmental law have yet been convincingly identified"). In her analysis, Kornicker Uhlman ("State community interests, *jus cogens* and protection of the global environment: developing criteria for peremptory norms" (footnote 416 above)) comes to the conclusion that, while the "prohibition of willful serious damage to the environment during armed conflicts is a *jus cogens* norm", the "general prohibition of causing or not preventing environmental damage that threatens the international community as a whole has not yet fully developed into *jus cogens*" (*ibid.*, p. 35). See also N.A. Robinson "Environmental law: is an obligation *erga omnes* emerging?" paper presented at a panel discussion at the United Nations, 4 June 2018. Available at www.iucn.org/sites/dev/files/content/documents/2018/environmental_law_is_an_obligation_erga_omnes_emerging_interamcthradvisoryopinionjune2018_pdf (accessed 15 January 2019). See however, Orakhelashvili, *Peremptory Norms of General International Law* (footnote 93 above), p. 65.

[417] K. Singleton-Cambage, "International legal sources and global environmental crises: the inadequacy of principles, treaties, and custom", *ILSA Journal of International and Comparative Law*, vol. 2 (1995), pp. 171–188, at p. 185.

[418] See draft guidelines on the protection of the atmosphere, together with preamble, adopted by the Commission on first reading, A/73/10, para. 77, at preamble ("Acknowledging that the atmosphere is essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems").

[419] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica, Judgment*, the International Court of Justice, 2 February 2018, dissenting opinion of Judge *ad hoc* Dugard, para. 35 ("The obligation not to engage in wrongful deforestation that results in the release of carbon into the atmosphere and the loss of gas sequestration services is certainly an obligation *erga omnes*").

[420] See, for discussion, first report (A/CN.4/693), para. 59. See also M. Koskenniemi, *From Apology to Utopia: The Structure of Legal Argument* (Cambridge, Cambridge University Press, 2006), pp. 307 *et seq.*, especially p. 308 ("neither contrasting position can be consistently preferred because they also rely on each other"). At p. 323, specifically on *jus cogens*, he says: "Initially, *jus cogens* seems to be descending, non-consensualist. It seems to bind States irrespective of their consent. But a law which would make no reference to what States have consented to would seem to collapse into a natural morality [but] the reference to recognition by 'international community of States' [makes it] … ascending, consensualist.".

V. Proposed draft conclusion

137. On the basis of the above discussion, the Special Rapporteur proposes one draft conclusion in relation to the question of an illustrative list. No proposal is made with respect to regional *jus cogens.* The proposed draft conclusion reads as follows:

Draft conclusion 24
Non-exhaustive list of peremptory norms of general international law (*jus cogens*)

Without prejudice to the existence of other peremptory norms of general international law (*jus cogens*), the most widely recognized examples of peremptory norms of general international law (*jus cogens*) are:

(*a*) the prohibition of aggression or aggressive force;

(*b*) the prohibition of genocide;

(*c*) the prohibition of slavery;

(*d*) the prohibition of apartheid and racial discrimination;

(*e*) the prohibition of crimes against humanity;

(*f*) the prohibition of torture;

(*g*) the right to self-determination; and

(*h*) the basic rules of international humanitarian law.

138. Other norms, that have not been included, but for which there is *some* support, would be referred to in the commentary with the necessary caveats and qualifiers.

VI. Future work

139. It is anticipated that a full set of draft conclusions could be adopted on first reading in 2019. The Special Rapporteur intends to produce a full set of commentaries to the draft conclusions adopted by the Drafting Committee by the beginning May 2019.

140. If the topic is completed on first reading at the end of 2019, a second reading could be completed in 2021, during the final year of the quinquennium.