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Sir Michael Wood

**Values in the International Community:  
*Jus cogens* in light of the International Law Commission's 2022  
Conclusions**

Berlin Potsdam Research Group "The International Rule of Law – Rise or Decline?"

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## Values in the International Community: *Jus cogens* in light of the International Law Commission’s 2022 Conclusions

Sir Michael Wood\*

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### **Abstract:**

The author discusses the UN International Law Commission’s 2022 draft conclusions on *jus cogens*, and suggests that it is in the interest of all States that the General Assembly take note of them in 2023. The debate in the Sixth Committee of the General Assembly in 2022 showed that some States remain highly critical of particular points in the draft conclusions. The conclusions do remain problematic in at least one important respect, the possible effect of *jus cogens* norms on binding Security Council decisions. Overall, however, they offer carefully judged clarifications on what is an important topic for the present and future of international law.

The systematic and rigorous approach proposed by the ILC’s draft conclusions for the identification of *jus cogens* norms, and the limited consequences of such norms set out in the conclusions, should enhance stability and the international rule of law. It may be concluded that recent developments in relation to *jus cogens* represent an advance for the rule of law as compared with 1969 when the term was included in the Vienna Convention on the Law of Treaties. This will be particularly so if the General Assembly now proceeds to adopt a resolution annexing the 2022 conclusions. Doing so would help to consolidate a sound understanding of *jus cogens*, and would be without prejudice to the positions of States on particular points of concern.

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## 1. Introduction

Let me begin by thanking Professor Hurrell for his generous words of introduction. It is always a pleasure to return to Berlin, a city I have known since my first visit in 1965. So much has changed since then. I recall passing through Checkpoint Charlie, on foot, into the heart of what in the West we called ‘East Berlin’.

I recall admiring *Unter den Linden*, even then so much more impressive than anything in ‘Westberlin’. Much later, I came to know East Berlin as the Soviet Sector, as *Berlin, Hauptstadt der DDR*. The legal status of Berlin and *Deutschland als Ganzes*<sup>1</sup> was the major aspect of my work during three years at the British Embassy in Bonn (in the *Vierergruppe*).<sup>2</sup> And then, in the summer of 1991, I spent some days at Schloss Schönhausen, in Berlin, for a key round of the Two-plus-Four negotiations on German unification.<sup>3</sup> I have a vivid image of Humboldt University at that time. During a break in the talks, I was sitting in a café, by the *Staatsoper*, when a line of students emerged from the Humboldt University’s main entrance protesting against unification. That brought home the complex politics of unification, complex here in Germany, but also politically sensitive in Thatcher’s Britain and elsewhere.

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The subject of my talk will be *jus cogens*, that is, peremptory norms of general international law, and specifically the draft conclusions adopted by the UN International Law Commission (ILC), with commentaries, in August 2022.<sup>4</sup>

I will not speak about the work of the ILC in general, though my overall assessment – after 13 years as a member – is a positive one.<sup>5</sup>

Nor will I talk about *jus cogens* in general: the ILC’s conclusions only deal with the methodology for the identification of peremptory norms and some (only some) of their legal consequences. They do not deal with such questions as a potential conflict between *jus cogens* norms; nor with how peremptory norms change over time; nor with specific consequences of peremptory norms beyond those set out in the 2001 articles on State responsibility.<sup>6</sup> And I cannot in the time available this

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<sup>1</sup> I. Hendry, M. Wood, *The Legal Status of Berlin* (Grotius Publications, 1988).

<sup>2</sup> M. Wood, ‘The United Kingdom and the Divided Germany: The Role of British Lawyers’, in J.A. Frowein et al (eds.), *Verhandeln für den Frieden – Negotiating for Peace, Liber Amicorum Tono Eitel* (Springer, 2003), pp. 847-858.

<sup>3</sup> J. Hill, M. Wood, ‘Germany, Re-unification of (1990)’, in *Max-Planck Encyclopedia of Public International Law* (online, 2021); J. Hill, M. Wood, ‘Law, Diplomacy and German Unification’, in D. Stewart, M. McGuinness (eds.), *Research Handbook on Law and Diplomacy* (Edward Elgar, 2022), pp. 23-40.

<sup>4</sup> Draft conclusions on Identification and legal consequences of peremptory norms of general international law (*jus cogens*), with commentaries: ILC Annual Report 2022, pp. 16-89.

<sup>5</sup> O. Sender, M. Wood, ‘The Work of the International Law Commission between 1997 and 2022: A Positive Assessment’, 25 (2022) *Max Planck Yearbook of United Nations Law*, pp. 645-681.

<sup>6</sup> For a recent collection of essays on *jus cogens*, covering a wide range of matters, see D. Tladi (ed.), *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (Brill Nijhoff, 2021) (hereafter,

evening touch on every aspect of the draft conclusions themselves. I will not, for example, attempt to discuss the relationship between *jus cogens* norms and obligations *erga omnes*.<sup>7</sup>

Before turning to the draft conclusions, I should make one obvious but fundamental point about ILC outputs. They need to be approached quite differently from, say, treaty texts. A treaty in force has a clear status. It is binding law for the parties. There is, in principle, no need for recourse to extrinsic elements to establish its legal standing. That is emphatically not the case with ILC's outputs, whether they are draft articles intended to form the basis of an international convention, or a set of propositions variously referred to as 'conclusions', 'guidelines', 'principles', etc. ILC outcomes are not binding in themselves. But they may be accepted as restating, or codifying, existing rules of international law. They may also suggest that a certain rule does *not* form part of international law, or that a new rule is emerging or should be adopted. The ongoing project on the immunity of State officials from foreign criminal jurisdiction is a good illustration of all this.<sup>8</sup> In any event, as the ILC said in 2018 in connection with the identification of customary international law:

'The weight to be given to the Commission's determinations depends [...] on various factors, including the sources relied upon by the Commission, the stage reached in its work, and above all upon States' reception of its output.'<sup>9</sup>

I am going to speak today about the standing of peremptory norms of general international law within the current international legal system in light of the Commission's completion of its work on *jus cogens* in August 2022. Some may regard *jus cogens* as the ultimate manifestation of the international rule of law – though it is not entirely clear that this is what Germany meant when it said in October 2022 at the United Nations that '[t]he issue of legal effects and consequences arising from peremptory norms of international law (*jus cogens*) is of paramount importance to the overall architecture of the system of international law'.<sup>10</sup> I suppose we shall have to wait for Professor Stefan Talmon to tell us what Germany really meant.<sup>11</sup>

There is a further reason why it is appropriate to speak about *jus cogens* on this occasion. The ILC's Special Rapporteur on the topic, Professor Dire Tladi, spent some weeks in Berlin as a fellow of the

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'Tladi, *Disquisitions*'). Although written with reference to the first reading draft conclusions from 2019, this excellent volume remains fully relevant following the second reading in 2022; the changes made on second reading do not impact greatly on most of what is said in the book.

<sup>7</sup> See draft conclusion 17; M. Bradley, 'Jus cogens' Preferred Sister: Obligations *Erga Omnes* and the International Court of Justice – Fifty Years after the *Barcelona Traction Case*', in Tladi, *Disquisitions* (note 6), pp. 193-226.

<sup>8</sup> Draft articles on Immunity of State officials from foreign criminal jurisdiction, with commentaries: ILC Annual Report 2022, pp. 188-286.

<sup>9</sup> Yearbook of the International Law Commission (YBILC) 2018, Vol. II (Part Two), p. 105.

<sup>10</sup> Germany, statement in the UN General Assembly's Sixth Committee, 25 October 2022: [https://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/22mtg\\_germany\\_1.pdf](https://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/22mtg_germany_1.pdf).

<sup>11</sup> In a follow-up publication to: Stefan Talmon, *German Practice in International Law – 2019* (Cambridge University Press, 2022).

Berlin Potsdam Research Group on the International Rule of Law when preparing his first report on the topic.<sup>12</sup>

It is a good moment to address the topic because States still have to decide what, if anything, to do with the Commission's final output. In August 2022, the Commission recommended that the General Assembly take note of the draft conclusions as finally adopted, annex them to a UN General Assembly resolution, ensure their widest dissemination, and commend them, together with their commentaries, to the attention of States and to all who may be called upon to identify and apply norms of *jus cogens*.<sup>13</sup> The ensuing debate in the Sixth (Legal) Committee in 2022, however, revealed continuing concerns among States, and no final decision was taken. The matter will come up for reconsideration this autumn.

## 2. The road to the ILC's 2022 draft conclusions

It was the International Law Commission that encouraged the reception of the notion of *jus cogens* into the practice of international law. Before the ILC's work on the law of treaties in the 1950s and 1960s, the notion was just that, a *notion* – a dream, if you like – in the minds of a limited number of academic authors.<sup>14</sup>

States themselves only really had to grapple with this notion at the Vienna Conference on the Law of Treaties in 1968 and 1969. And in 1969, the Conference came close to failure over *jus cogens*, particularly over concerns about the damage that could be done to the stability of treaty relations if the unilateral invocation of *jus cogens* was left unchecked. A fragile (and not entirely satisfactory) compromise was reached in the shape of compulsory dispute settlement provisions aimed at limiting abuses.<sup>15</sup> The idea that dispute settlement might help avert the dangers of auto-determination of *jus cogens* breaches returned with the present topic, as I will explain.

A proposal made in 1993 by Ambassador Jacovides of Cyprus for the Commission to study the topic of *jus cogens* was rejected at the time by the Commission's Planning Group, which considered that because practice on *jus cogens* 'did not yet exist', it would be 'premature for [the Commission] to enter into this kind of study'.<sup>16</sup> Except for references to *jus cogens* in certain of its other projects on the law of treaties,<sup>17</sup> the Commission made no significant contribution to the debate about *jus cogens*

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<sup>12</sup> First report on *jus cogens* by Dire Tladi, Special Rapporteur, A/CN.4/693, 8 March 2016; see the acknowledgment in the first (\*) footnote.

<sup>13</sup> ILC Annual Report 2022, para. 41.

<sup>14</sup> See, in particular, the early writings of Alfred Verdross (a member of the International Law Commission between 1957 and 1966).

<sup>15</sup> I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984), pp. 203-242.

<sup>16</sup> See YBILC 2014, Vol. II (Part Two), pp. 170-171, paras. 3-5.

<sup>17</sup> See Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986, arts 53, 64.

until it dealt with an aspect of the matter in the course of its work on the topic of State responsibility.<sup>18</sup> In fact, by 2001 the Commission could say that '[t]he concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine'.<sup>19</sup> Yet even if the notion of *jus cogens* was widely accepted, the same could not be said of its content and consequences, which were still viewed at least in part as *lex ferenda*. The 2006 report of the Commission's Study Group on 'Fragmentation of international law: difficulties arising from the diversification and expansion of international law' stated in relation to *jus cogens* that 'disagreement about its theoretical underpinnings, scope of application and content remains as rife as ever'.<sup>20</sup> That said, the Guide to Practice on Reservations to Treaties, adopted by the Commission in 2011, provided an analysis of the effects of *jus cogens* on the permissibility and consequences of reservations.<sup>21</sup>

Nowadays, *jus cogens* seems to be increasingly invoked. This is so not only in writings, but also before international as well as national courts and tribunals. Judges of the International Court of Justice may be expected to handle the matter with due care and attention. Other courts and tribunals may struggle.

It did not therefore come out of the blue when, in 2015, it was suggested that practice had developed at a rapid pace and attention was drawn in this regard to decisions of the International Court of Justice.<sup>22</sup> The Commission felt able to add '*Jus cogens*' to its long-term programme of work and to appoint a Special Rapporteur, Professor Dire Tladi.<sup>23</sup>

The lack of relevant or sufficient practice continued to be raised by States during the work on the topic; some have criticized the Commission and its Special Rapporteur for relying mostly on a limited number of not wholly convincing court pronouncements and doctrinal writings, rather than on what States say and do. While this criticism has some force, it is not in my view a good reason for rejecting the Commission's output on this particular topic. The Commission's role is not merely to restate existing law, but also to look to the future – to engage in 'progressive development', in the language of its Statute.

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<sup>18</sup> See in particular articles 26 and 40-41 of the 2001 Articles on State responsibility, discussed below in connection with draft conclusion 19.

<sup>19</sup> YBILC 2001, Vol. II (Part Two), p. 112, para. 2 of the commentary to draft article 40.

<sup>20</sup> YBILC 2006, Vol. II (Part Two), Addendum 2, p. 75, para. 363.

<sup>21</sup> See YBILC 2011, Vol. II (Part Three), especially p. 294.

<sup>22</sup> *Supra* note 16, at pp. 172-173, paras. 10-12.

<sup>23</sup> In 2017, the Commission decided to change the title of the topic from '*Jus cogens*' to 'Peremptory norms of general international law (*jus cogens*)' (to emphasize that it dealt with *jus cogens* in international law and not in national legal systems). Finally, on second reading, the title of the conclusions was expanded to refer to identification and consequences.



In 2019, the Commission adopted on first reading a set of 23 draft conclusions, with commentaries (and an annex).<sup>24</sup> This was the first time that States were able to comment seriously on the project, and the reception was mixed, as can be seen from what States said in the Sixth Committee in 2019<sup>25</sup> and in their subsequent written observations.<sup>26</sup>

Then, in August 2022, the Commission adopted, on second and final reading, a revised set of 23 draft conclusions, with annex, and commentaries.<sup>27</sup> The second reading went relatively smoothly. As is quite often the case, the Commission – while carefully considering the views of States – for the most part decided not to depart from compromises reached at the first reading stage. The few and relatively minor changes from the first reading text are improvements and take into account some of the comments from States.<sup>28</sup> A reluctance to engage in an in-depth reconsideration upon second reading, while understandable on pragmatic grounds, does not always lead to the best results. The second reading of the topic on State responsibility, which took place between 1997 and 2001, is a good example of what can be done.

### 3. More positive aspects of the draft conclusions

I shall first mention what I see as some of the more helpful of the draft conclusions, and then turn to those that may still be problematic – though in my view they are not as problematic as some have suggested.

First, on the positive side of the ledger: the draft conclusions enshrine a systematic and generally rigorous approach to the identification of *jus cogens* norms. If judges, writers, and others were to follow this methodology conscientiously and consistently, that would contribute to greater acceptance of this important international legal concept and more generally to the rule of law in international affairs.

The central conclusions are those that explain the two distinct stages for the identification of *jus cogens* norms. The definition of a norm of *jus cogens* in conclusion 3 follows word-for-word the definition in the second sentence of article 53 of the 1969 Vienna Convention on the Law of Treaties. This is in itself significant because the Convention definition was expressly ‘for the purposes of [the

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<sup>24</sup> A/74/10: Report of the International Law Commission on the work of its Seventy-first session (29 April–7 June and 8 July–9 August 2019), pp. 142-208.

<sup>25</sup> A/CN.4/734: Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-fourth session, prepared by the Secretariat, paras. 75-98.

<sup>26</sup> A/CN.4/748: Peremptory norms of general international law (*jus cogens*). Comments and observations received from Governments (2022).

<sup>27</sup> *Supra* note 4.

<sup>28</sup> For details, see the statement of the Chairperson of the Drafting Committee [https://legal.un.org/ilc/documentation/english/statements/2022\\_dc\\_chairman\\_statement\\_jc.pdf](https://legal.un.org/ilc/documentation/english/statements/2022_dc_chairman_statement_jc.pdf).

Vienna] Convention'.<sup>29</sup> The conclusions then set out the two criteria required for the identification of a peremptory norm, again based precisely on the Convention's language:

- First, there needs to be evidence of a norm of general international law – draft conclusion 4(a). Thus, a rule of customary international law has to be found to exist, through application of the two-element approach (a general practice and acceptance as law),<sup>30</sup> or, less commonly and less obviously, one has to find a rule of treaty law of general application or a general principle of law – draft conclusion 5.
- Second, there must be evidence that the norm of general international law is accepted and recognized by the international community of States as a whole as a norm of a peremptory character – draft conclusions 4(b), 6, 7, 8 and 9.

I might note in passing that, to an English lawyer, or at least to me, the word 'norm' sounds strange and ambiguous, though in the present context it is the equivalent of 'rule'.<sup>31</sup>

The draft conclusions setting out the legal consequences of peremptory norms (conclusions 10-19) are largely based on the Commission's earlier work, though they go beyond that earlier work in important respects. Unlike the Vienna Convention they concern a wide range of international law, not just treaties. There is a saving clause for any legal consequences that particular rules of *jus cogens* may have;<sup>32</sup> the conclusions do not, for example, deal with the effect, if any, of *jus cogens* norms on immunities.<sup>33</sup>

There are two other general provisions in the last part of the conclusions that I think are of particular significance.

**Draft conclusion 20** states that, where there may a conflict between a *jus cogens* norm and another rule of international law, the latter is, as far as possible, to be interpreted and applied so as to be consistent with the peremptory norm.<sup>34</sup> This is important since the alternative to 'reading down' the other rule in this way may that a whole treaty is void. It is, however, also important to note the limits

<sup>29</sup> Article 53 of the Vienna Convention reads: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'

<sup>30</sup> As set out in the ILC's 2018 Conclusions on 'Identification of customary international law': see YBILC 2018, Vol. II (Part Two), p. 93, Conclusion 2.

<sup>31</sup> The Court treated it as such in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99.

<sup>32</sup> Draft conclusion 22.

<sup>33</sup> See para. 3 of the commentary to draft conclusion 22.

<sup>34</sup> Sâ Benjamin Traoré, 'Peremptory Norms and Interpretation in International law', in *Tladi, Disquisitions* (note 6), pp. 132-176.

of this interpretative principle: it only operates where there may otherwise be a conflict – and whether there is a ‘conflict’ in any particular case requires careful consideration. And above all,

[t]he words “as far as possible” in the draft conclusion are intended to emphasize that, in the exercise of interpreting rules of international law in a manner consistent with peremptory norms of general international law (*jus cogens*), the bounds of interpretation may not be exceeded. In other words, the rule in question may not be given a meaning or content that does not flow from the normal application of the rules and methodology of interpretation in order to achieve consistency with peremptory norms of general international law (*jus cogens*).<sup>35</sup>

This was the approach adopted just a few weeks ago by the English High Court in the *Western Sahara Campaign UK* case.<sup>36</sup> There the Court ‘remain[ed] completely unpersuaded’ that the taking into account of *jus cogens* norms ‘permit[s] a departure from the ordinary meaning in the exercise of interpretation’.<sup>37</sup>

The second general provision I wish to mention is **draft conclusion 21**, a ‘recommended procedure’ for invoking a norm of *jus cogens* as a ground for the invalidity or termination of a rule of international law. This was substantially revised on second reading following comments from States. It was still criticized, chiefly for being out of place in conclusions that are not intended to become a binding instrument. In my view, this non-binding dispute settlement provision serves a very important purpose, in the interest of legal security, since it is aimed at discouraging the unilateral invocation of *jus cogens* to invalidate otherwise binding rules of law. In this regard, draft conclusion 21 is a safeguard, comparable in importance to the dispute settlement provisions which saved the day at the Vienna Conference in 1969. It is difficult to see why States should be against a provision that seeks to avoid the negative effects of the unilateral invocation of *jus cogens*. It would seem to be very much in the interests of the rule of law that States implement conclusion 21 in good faith if and when it comes into play.<sup>38</sup>

#### 4. Draft conclusions still seen as somewhat problematic

I turn now to five of the 23 draft conclusions that are still seen by some States as problematic, and first to **Conclusion 2**. This is entitled ‘Nature of peremptory norms of general international law (*jus*

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<sup>35</sup> Para. 2 of the commentary to draft conclusion 20: ILC Annual Report 2022, p. 80. See also para. 6 of the commentary: ‘As noted in paragraph (2) of this commentary, the words “as far as possible” are meant to indicate that the rule in this draft conclusion does not permit the limits of interpretation to be exceeded.’

<sup>36</sup> *Western Sahara Campaign UK v Secretary of State for International Trade, Her Majesty's Treasury v Secretary of State for Foreign, Commonwealth and Development Affairs, Confédération Marocaine de l'Agriculture et du Développement Rural ("Comader")*, Judgment of 5 December 2022 [2022] EWHC 3108 (Admin), 2022 WL 1741751.

<sup>37</sup> *Ibid.*, at para. 101, referring to the ILC's commentary on the Articles on the Responsibility of States for Internationally Wrongful Acts.

<sup>38</sup> M. Wood, ‘The Unilateral Invocation of *Jus Cogens* Norms’, in *Tladi, Disquisitions* (note 6), pp. 366-385.

*cogens*). You may have been wondering when I would come to the ‘values’ of the international community, since the word features in the title of my talk. The truth is that I am not much impressed by references to ‘values’ in legal argument. Such references are highly subjective. I suspect that each of us has a different idea about ‘values [or ‘fundamental values’] of the international community’. Even if we could agree on what they are, we would surely disagree on their precise meaning and effect.

Nevertheless, conclusion 2 asserts that *jus cogens* norms ‘reflect and protect fundamental values of the international community’.<sup>39</sup> That may often be the case, but do any legal consequences follow? There was a view in the Commission and among States that, what was then draft conclusion 3 of the first reading text was not only unnecessary, but might be read as introducing a new requirement for *jus cogens* norms, additional to the two found in article 53 of the Vienna Convention (a norm of general international law; accepted and recognized as having a peremptory character).

In fact, it is now clear, both from the new placement of the conclusion and from the commentary, that there is no suggestion of a new criterion. In the 2022 draft conclusions the text appears before the definition of peremptory norms (now conclusion 3), which is to be read together with the elaboration of the criteria that follows. Conclusion 2 thus has more of a preambular or explanatory character; it does not qualify the definition or the criteria. The reference to values is therefore no more than descriptive and carries no legal implications.

I turn next to **Conclusion 7**, which concerns the key requirement for a *jus cogens* norm: its acceptance and recognition as such by ‘the international community of States as a whole’. The reference to ‘States’ makes it clear that it is the position of States that is relevant, and not that of other actors.<sup>40</sup> What might be thought of as a State-centric approach has been retained unchanged after more than 50 years. Paragraph 1, the general statement, and paragraph 3, on non-State actors, are largely unproblematic; though in this audience I might ask if it really is the case that acceptance and recognition by the European Union, if it were to be classified for this purpose as a ‘non-state actor’, is excluded from the application of paragraph 1.

Paragraph 2 of draft conclusion 7 seeks to address the crucial issue of the required threshold of acceptance and recognition, that is, what acceptance and recognition by ‘the international community of States as a whole’ means. The Chair of the Drafting Committee at the Vienna Conference on

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<sup>39</sup> P. Galvão Teles, ‘Peremptory Norms of General International Law (*Jus Cogens*) and the Fundamental Values of the International Community’, in *Tladi, Disquisitions* (note 6), pp. 44-67.

<sup>40</sup> Paras. 3-4 of the commentary to conclusion 7: ILC Annual Report 2022, pp. 38-39. Jean Allain speculates that at the Vienna Conference the words ‘of States’ were included because Western States wanted to limit the participation in treaties to certain States only and that it had nothing to do with excluding non-State actors: Jean Allain, ‘*Jus Cogens* and the International Community “of States” as a Whole’ in *Tladi, Disquisition* (note 6), pp. 68-91. Even if this were so, which given the actual wording seems improbable, since at least 2001 the words have signified that it is for States, and States alone, to accept and recognize the peremptory character of a norm of general international law.

the Law of Treaties, the distinguished Iraqi jurist, Mustafa Kamil Yasseen, stated that the requirement was for a ‘very large’ majority;<sup>41</sup> this seemed to satisfy delegates in 1968. The intent was to emphasise the exceptional nature of the majority required, indeed that there should be an overwhelming majority. Fifty years later, however, the term ‘very large majority’ was criticised as too vague.<sup>42</sup> Nevertheless, the expression remained, though with the addition of the words ‘and representative’;<sup>43</sup> it now reads: ‘a very large and representative majority of States’. The addition makes it clear that the required majority is not simply a numerical one, and should go at least some way towards addressing the concerns voiced by some.

**Draft Conclusion 16** deals with ‘Obligations created by resolutions, decisions or other acts of international organizations conflicting with a peremptory norm of general international law (*jus cogens*)’. While otherwise uncontentious, it raises the question whether compliance with binding decisions of the UN Security Council may in some way be subject to peremptory norms, notwithstanding Article 103 of the UN Charter (under which States agree that in the event of a conflict between obligations under the Charter and any other obligations, obligations under the Charter shall prevail). The view that such decisions may be ignored if they are contrary to a peremptory norm has not surprisingly been heavily criticized by certain States. It has been pointed out that to permit the unilateral invocation of *jus cogens* to excuse non-compliance with decisions of the Security Council could be highly damaging to the effectiveness of the Security Council and the international rule of law, and that there is little if any practice to support such a position.<sup>44</sup> Germany, for example, said in the Sixth Committee in 2022 that it

‘continue[d] to share the concerns expressed by States that there is little state practice in support of this conclusion and that it might imply a risk of abuse by unilaterally disregarding binding Security Council decisions on its basis, which could undermine the authority of the Security Council acting under Chapter VII of the UN Charter and potentially jeopardize the overall effectiveness of Security Council action.’<sup>45</sup>

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<sup>41</sup> *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)*, 80th meeting, para. 12.

<sup>42</sup> A/CN.4/734, *supra* note 25, at para. 84.

<sup>43</sup> Para. 8 of the commentary to conclusion 7: The commentary explains that the acceptance and recognition by the international community of States as a whole ‘requires that the acceptance and recognition be across regions, legal systems and cultures’.

<sup>44</sup> See D. Costelloe, ‘Peremptory Norms and Resolutions of the United Nations Security Council’, in *Tladi, Disquisitions* (note 6), pp. 441–467; M. Wood and E. Sthoeger, *The UN Security Council and International Law* (Cambridge University Press, 2022), pp. 78–83.

<sup>45</sup> Statement of 25 October 2022, available at [https://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/22mtg\\_germany\\_1.pdf](https://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/22mtg_germany_1.pdf). See also A/C.6/77/SR.22, p. 10.

The last paragraph of the commentary to the draft conclusion is important in this regard. It makes it clear that States cannot avoid binding decisions of international organizations by unilaterally invoking a *jus cogens* norm. They must at least go through the procedure for such invocation recommended in conclusion 21.

**Draft Conclusion 19** concerns particular consequences of serious breaches of *jus cogens* norms.<sup>46</sup> Paragraphs 1 to 3 repeat article 41 of the ILC's 2001 articles on State responsibility: they provide that 'States shall cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*)', and that '[n]o State shall recognize as lawful a situation created by' such a serious breach, nor recognize such a situation as lawful or render aid or assistance in maintaining it. Paragraph 4 is a saving clause for other possible consequences, for the wrongdoing State and other States.

The 2022 commentary states, somewhat boldly and apparently based only on one or two (questionable) national and regional court decisions, that the obligation to cooperate expressed in paragraph 1 of conclusion 19 now reflects customary international law.<sup>47</sup> The Commission had expressed doubts about this in 2001 and it is not clear why its position had changed.

In 2022, there was much controversy within the Commission over other aspects of the commentary to draft conclusion 19. A draft commentary was proposed that was considerably revised from the first reading draft; in particular it included extended references to resolutions on Ukraine in 2022 as examples of draft conclusion 19 in action. Yet it is not in the tradition of the ILC to engage with matters of current political dispute, since to do so might distract from the central focus of its work on questions of international law more generally. In the end, the references to Ukraine were reduced, and other 'examples' were added, thus making the commentary even heavier. Yet it remains doubtful whether any of the cases mentioned reflect practice within the scope of draft conclusion 19. Do States regard all or some of what they do to assist Ukraine as required by international law? Such assistance is based on policy considerations, not on a sense of legal obligation.

**Draft Conclusion 23** introduces an annex consisting of a non-exhaustive list of eight norms that the Commission 'has previously referred to as having the status' of peremptory norms. This is a cautiously worded provision: the ILC was not, in 2022, claiming that the listed norms were of a peremptory character, but merely recalling that it had 'previously referred to [them] as having that status'. The commentary indicates where this was done, from which it may be seen that on these earlier

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<sup>46</sup> See H. Aust, 'Legal Consequences of Serious Breaches of Peremptory Norms in the Law of State Responsibility: Observations in the Light of the Recent Work of the International Law Commission, in *Tladi, Disquisitions* (note 6), pp. 227-255.

<sup>47</sup> Paras. 2 to 12 of the commentary to draft conclusion 19: ILC Annual Report 2022, pp. 70-76.

occasions the Commission did not apply the strict methodology that the draft conclusions themselves now mandate, nor did it give careful consideration to the particular wording of each norm. This methodological point was one reason for States to criticise the Commission for including a list of norms, even such a qualified one. In any event, the list is not a necessary or even an appropriate element of the topic. In retrospect its inclusion may be seen to have been unfortunate, introducing an unnecessary element of controversy. The Special Rapporteur's initial instinct not to include such a list was perhaps wiser than the Commission's eventual decision, one effect of which might be to make it harder to find *jus cogens* norms beyond the list, despite the Commission's emphasis on its non-exhaustiveness.

## 5. Concluding remarks

The debate in the Sixth Committee in 2022 showed that some States remained highly critical of particular points in the draft conclusions.<sup>48</sup> This is important, since, as we have seen, the weight to be accorded to the Commission's output depends above all on the reactions of States, the law-makers in the international legal system. In 2022 the Sixth Committee did not move to endorse the ILC's output and conclude the work as recommended by the Commission. It is understandable that some felt a need for more time for reflection on what is acknowledged to be a difficult topic.

My own view is that the ILC's conclusions remain problematic in at least one respect (the possible effect of peremptory norms on binding Security Council decisions, even if this is more theoretical than real); but overall – and read together with the commentaries – they offer carefully judged clarifications on what is an important matter for the future of international law. The clarifications are likely to be helpful to judges and to others seeking to apply international law in practice, and thus to the international rule of law. It is, in my view, in the interest of all States that the General Assembly complete its consideration of the topic now by annexing the conclusions to a consensus resolution, and bringing them, together with the commentaries, to the attention of States. The adoption of such a resolution would preserve the important clarifications embodied in the conclusions and commentaries, while at the same time safeguarding the positions put on the record by States in regard to particular elements on which they may still have concerns.

There are of course other options. The General Assembly could defer the matter again, for more reflection. But that would risk simply letting the topic drift, a kind of fallback position given the Sixth Committee's tradition of acting only by consensus; it is hardly a respectable option in the present case. The General Assembly could even send the topic back to the ILC, as was eventually done with the topic of immunity of States and their property in light of well-known changes in position (and earlier with the rules on arbitral procedure), but that is unlikely to prove useful on this occasion.

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<sup>48</sup> A/CN.4/755: Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-seventh session, prepared by the Secretariat, paras. 116-145.

Given the current state of affairs, is *jus cogens* on the rise or in decline? Where indeed do we want it to go? The question may certainly be asked whether ambitious understandings of *jus cogens*, especially among writers and even some judges, fit the times in which we live; and whether they contribute to or rather weaken international law.

The acceptance, since the 1960s, of a category of rules with ‘peremptory’ status in international law, *jus cogens* norms, was seen by many as an important victory for the international rule of law. It was a key move in the direction of a more ‘communitarian’ international law. The first great step forward was taken in 1969 with the adoption of the Vienna Convention on the Law of Treaties. Some 37 years passed before the International Court of Justice fully embraced the concept, in 2006.<sup>49</sup> The adoption in 2022 of the ILC’s draft conclusions is a further important step, though we await a clear reaction from the General Assembly. All this surely represents an important ‘rise’ in the international rule of law. The systematic and rigorous approach proposed in the ILC’s draft conclusions for the identification of *jus cogens* norms, and the limited consequences of such norms set out therein, should enhance stability and the international rule of law. A less rigorous approach, or more far-reaching consequences, might have undermined the credibility of international law itself – and weakened the concept of *jus cogens*.

At the same time, it may be thought that the important progress anticipated from the adoption of article 53 of the VCLT in 1969 has not in fact materialized, in that *jus cogens* still rarely ‘leaves the garage’,<sup>50</sup> and that it has done little to promote ‘values’. Even if *jus cogens* is frequently invoked, especially in the literature and by campaigning lawyers, its importance in practice has proved to be quite limited. And the risk of an abusive invocation of *jus cogens* is ever present. *Jus cogens* can do more harm than good unless it is approached responsibly.

On balance, I believe that recent developments in relation to *jus cogens* represent an advance for the rule of law compared with the position in, say, 1969. This will be particularly so if the General Assembly now adopts a resolution annexing the ILC’s 2022 *jus cogens* conclusions. That would help to consolidate a sound understanding of *jus cogens*, and could do so without prejudice to the positions of States on particular points of concern.

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<sup>49</sup> *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 32, para. 64.

<sup>50</sup> I. Brownlie, ‘Comment’, in J.H.H. Weiler and A. Cassese (eds.), *Change and Stability in International Law-Making* (Walter de Gruyter, 1988), p. 110.



## The Author



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