

Annex

Jus Cogens (Mr. Dire D. Tladi)

1. Introduction

1. Over the years, the Commission has contributed a significant body of work on the sources of international law, particularly in the area of the law of treaties. The 1966 Draft Articles on the Law of Treaties, which resulted in the 1969 Vienna Convention on the Law of Treaties, is a prime example of the Commission's work on the sources of international law.¹ The current programme of work of the Commission includes source-related topics such as subsequent agreements and subsequent practice in relation to treaty interpretation, the identification of customary international law and provisional application of treaties. This focus on sources by the Commission is appropriate because sources are a traditional topic of international law and questions relating to the sources lie at the heart of international law.²

2. Against this background, it is proposed that the Commission study another source-related topic, "*Jus cogens*". The title of the study should be broad in order to allow the Commission to address all relevant aspects, on the understanding that the Commission would need to define carefully the scope and limits of the project at an early stage.

2. Previous Consideration of *Jus Cogens* by the Commission

3. Although the concept of *jus cogens* predates the Commission's existence,³ the Commission has been very instrumental in the acceptance and development of *jus cogens*. In its 1966 Draft Articles on the Law of Treaties, the Commission included three draft articles on *jus cogens*, namely Draft Articles 50, 61 and 67. These provisions were retained, albeit with some amendments, in Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties (hereinafter referred to as the "Vienna Convention").⁴ Notwithstanding its inclusion in the Vienna Convention, the contours and legal effects of *jus cogens* remain ill-defined and contentious. Indeed, while there are numerous cases invoking *jus cogens*, to date there remains little case-law involving invocation of *jus cogens* to impeach the validity of a treaty. Consequently, while the existence of *jus cogens* as part of the modern fabric of

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¹ Other more recent products of the Commission on treaty law include the 2011 International Law Commission Guide to Practice on Reservations to Treaties and the 2011 International Law Commission Draft Articles on the Effects of Armed Conflicts on Treaties.

² See Annex A of the Report of the International Law Commission, Sixty Third Session (A/66/10) at para. 1.

³ For a historical development of *jus cogens* see, Antonio Gómez Robledo *El Ius Cogens Internacional (Estudio Histórico crítico)* (1982), 10 to 68.

⁴ *Jus cogens* was first included in the work of the Commission in the Third Report by GG Fitzmaurice, Special Rapporteur on the Law of Treaties (A/CN.4/115), under the title "legality of the object". See 1958 *Yearbook of the International Law Commission Volume II: Documents of the Tenth Session including the Report of the Commission to the General Assembly*, 26–27.

international law is now largely uncontroversial,⁵ its precise nature, what norms qualify as *jus cogens* and the consequences of *jus cogens* in international law remain unclear. It was in this context that former member of the Commission Andreas Jacovides presented a paper to a Working Group of the Planning Group on *jus cogens* as a possible ILC topic in 1993. In his paper, Mr Jacovides made the following observation, the essence of which remains true even today:

In the nearly quarter of a century since the Convention was adopted, no authoritative standards have emerged to determine the exact legal content of *jus cogens*, or the process by which international legal norms may rise to peremptory status.⁶

4. Notwithstanding the arguments advanced by Mr Jacovides for the inclusion of the topic in the Commission's programme of work, the Commission decided not to do so. Mr Bowett, then chair of the Working Group considering the proposal, explaining why it was not appropriate to include the topic, expressed doubt as to whether consideration by the Commission of the topic of *jus cogens* would "serve any useful purpose *at this stage*". He concluded that because practice on *jus cogens* "did not yet exist" it would be "premature for [the Commission] to enter into this kind of study". This reasoning is comparable to the reasons advanced by the Commission in its commentary to Draft Article 50 of the 1966 Draft Articles on the Law of Treaties. In paragraph 3 of the commentary, the Commission stated as follows:

The emergence of rules having the character of *jus cogens* is comparatively recent, while international law is in the process of rapid development. The Commission considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of the rule to be worked out in State practice and in the jurisprudence of international tribunals.

5. Two observations can be made about the Commission's previous decisions not to attempt detailed provisions on the full content and operation of *jus cogens*. First, both Mr Bowett's comments and the Commission's commentary to Draft Article 50 confirm that the Commission was of the view that there remained room for the further development of *jus cogens*.⁷ Second, it is clear from both Mr Bowett's statement and the commentary that the Commission felt, on both occasions, that detailed provisions on *jus cogens* could be worked out only after more practice relating to it had developed. Taken together, the Commentary to Draft Article 50 and the statement by Mr Bowett suggest that the further elucidation of the rules relating to *jus cogens* would be possible, perhaps desirable, if sufficient practice on which to base the work of the Commission were available.

6. In the period since the 1966 Draft Articles and the 1993 proposal by Mr Jacovides practice has developed at a rapid pace. In particular, national and international courts have often referred to *jus cogens* and in this way provided insights on some of the intricacies of

⁵ Already in the 1966 Draft Articles, the Commission noted that the "view that there is no rule of international law from which States cannot at their own free will contract out has become increasingly difficult to sustain". See paragraph 1 of the Commentary to Draft Article 50 of the 1966 Draft Articles on the Law of Treaties.

⁶ In a similar note, the International Law Commission's Study Group Report on Fragmentation: Difficulties Arising from the Diversification and Expansion of International Law of 13 April 2006 stated as follows: "disagreement about [*jus cogens*'] theoretical underpinnings, scope of application and content remains as ripe as ever" (at para. 363).

⁷ In paragraph 3 of the Commentary to Draft Article 50, the Commission stated that, at that point, it was appropriate to provide for the rule in general terms "and to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals".

its formation, operation, content and consequences or effects.⁸ States have at times also referred to *jus cogens* in support of positions that they advance.⁹ The Commission itself, in the course of considering other topics, has also made meaningful contributions to this development. Article 26 of the Draft Articles on State Responsibility, for example, provides that circumstances precluding wrongfulness provided in the Draft Articles may not be used to justify conduct that is inconsistent with *jus cogens*. The commentary thereto presents a non-exhaustive list of *jus cogens* norms.¹⁰ In addition to repeating the list contained in the commentary to Draft Article 26, the Report of the Study Group on Fragmentation provides a list of “the most frequently cited candidates” for the status of *jus cogens*.¹¹ The Commission’s Guide to Practice on Reservations to Treaties also provides detailed analysis on the effects of *jus cogens* on the permissibility and consequences of reservations.¹²

⁸ See e.g. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, ICJ Reports 1986, 14; *Arrest Warrant of 11 April 2000 (DRC v Belgium)* ICJ Reports 2002, 3; *Armed Activities on the Territory of the Congo (New Application 2002: DRC v Rwanda)*, ICJ Reports 2006, 99; *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, ICJ Reports 2012, 99. See especially the dissenting opinion of Judge Trindade in the *Jurisdictional Immunities of the State* case, the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal and the dissenting opinions of Judges Oda, Al-Khasawneh and van den Wyngaert in the *Arrest Warrant* case. *Al-Adsani v UK* (Application no. 35763/97), 21 November 2001. See also the separate opinion of Judge *ad hoc* Lauterpacht in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports 1993, 325 (Separate Opinion of Judge Lauterpacht), paras 100–104 and *Regina v. Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), 24 March 1999, House of Lords, 119 ILR, p. 136.

⁹ See for example, statement by Counsel to Belgium in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Oral Proceedings, 13 March 2012 (CR 2012/3), para 3 and statement by Counsel to Senegal in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Oral Proceedings, 15 March 2012 (CR 2012/4), para 39. See also Counter-Memorial of Senegal in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, para 51. Similarly, while Germany sought to limit the effects of *jus cogens* in the *Jurisdictional Immunities* case, its own statement not only did not dispute the existence of *jus cogens* but in fact positively asserted the character of certain norms as *jus cogens*. See, for example, the Memorial of the Federal Republic of Germany in the *Jurisdiction Immunities* case, 12 June 2009, para 86 where Germany states: “Undoubtedly, for instance, *jus cogens* prohibits genocide.”. See also Statement of South Africa of 29 October 2009 on the report of the International Law Commission (A/C.6/64/SR.15, paras. 69–70) cited in the Second Report of the Special Rapporteur, Mr Roman Kolodkin on Immunity of State Officials from Foreign Criminal Jurisdiction, 10 June 2010 (A/CN.4/631), para 9, especially footnote 13. On 28 October 2013, during the Sixth Committee’s consideration of the report of the International Law Commission, Portugal highlighted *jus cogens* as of “utmost importance”. (A/C.6/68/SR.17), para 88.

¹⁰ See paragraph 5 of the Commentary to Draft Article 26 in which the Commission, in fairly unequivocal terms, states that those “peremptory norms that are clearly accepted and recognised include the prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination”.

¹¹ See Paragraph 374 of Report of the Study Group of the International Law Commission on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 13 April 2006 (A/CN.4/L.682). See also Conclusion 33 of the Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (2006).

¹² See, e.g., Commentary to Draft Guide 3.1.5.4 and Guide 4.4.3 of the Guide to Practice on Reservations to Treaties. See also *Armed Activities on the Territory of the Congo (New Application 2002: DRC v. Rwanda)* (Separate Opinion of Judge Dugard) (discussing the effect of reservations that violate *jus cogens*), para. 9. See also Principle 8 of the Guiding Principles applicable to unilateral

3. Elements of *Jus Cogens* in Judicial Decisions

7. Although the Commission's work has advanced the understanding of *jus cogens*, the starting point for any study of *jus cogens* remains the Vienna Convention. From the Vienna Convention basic elements of the nature, requirements and consequences of *jus cogens* are spelt out. According to the Vienna Convention, *jus cogens* refers to peremptory norms of general international law defined as (1) norms (2) accepted and recognised by the international community of states as a whole (3) from which no derogation is permitted.¹³ The consequence of a norm acquiring the status of *jus cogens* is that treaties conflicting with it are void.¹⁴

8. This formulation addresses some key issues which, prior to the Vienna Convention, may not have been clear. For example, the formulation addresses an important question concerning the nature of *jus cogens*. In its original conception, *jus cogens* was seen as a non-consensual source of law deriving from natural law.¹⁵ While Article 50 of the 1966 Draft Articles may have left this question open by simply defining *jus cogens* as "a peremptory norm of general international law from which no derogation is permitted", Article 53 of the Vienna Convention adds the qualifier "accepted and recognised by the international community of States as a whole", thereby suggesting acceptance by states as a whole is a requirement for *jus cogens*.

9. What Article 53 of the Vienna Convention does not specify is the process by which a norm of general international law rises to the level of being peremptory, nor does it specify how such norms are to be identified. Questions that arise in this respect include the meaning and implications of "accepted and recognised by the international community of States as a whole". For example, the ILC Study Group asked: "If it is the point of *jus cogens* to limit what may be lawfully agreed by States – can its content simultaneously be made dependent on what is agreed between States?"¹⁶ Furthermore, although the formulation addresses a basic issue of consequences for treaties, it leaves open several other issues relating to consequences, including consequences for other rules not contained in treaties.¹⁷ This includes not only how norms of *jus cogens* interact with other rules of international law, for example Chapter VII resolutions of the UN Security Council, but also the consequences of a violation of a *jus cogens* norm.¹⁸ The Commission's previous work, including the Articles on State Responsibility, could provide useful insights on some of these questions.¹⁹ Article 26, for example, provides that the grounds excluding wrongfulness in the Articles, may not be used to justify an act that is inconsistent with an obligation arising under a peremptory norm.²⁰

declarations of States capable of creating legal obligations, with commentaries thereto, *Yearbook of the International Law Commission*, 2006, vol. II, Part Two.

¹³ Article 53 of the Vienna Convention.

¹⁴ Articles 53 and 64 of the Vienna Convention.

¹⁵ See, e.g. Alfred Verdross "Forbidden Treaties in International Law: Comments on Professor Garner's Report on 'The Law of Treaties'" (1937) 31 *American Journal of International Law* 571.

¹⁶ See Report of the Study Group on Fragmentation, 13 April 2006, para. 375.

¹⁷ *Id.*, para. 367.

¹⁸ *Id.*

¹⁹ See, e.g. Draft Article 26 of the Draft Articles on State Responsibilities and the commentary thereto in relation to the potential conflict between a secondary rule on state responsibility, in particular grounds precluding wrongfulness, and a peremptory norm of international law.

²⁰ See especially paragraphs 3 and 4 of the Commentary to Draft Article 26 on the Draft Articles on State Responsibility.

10. As mentioned earlier, *jus cogens* has been referred to in a number of judgments of both the Permanent Court of International Justice and the International Court of Justice as well as in dissenting and separate opinions of various judges.²¹ In earlier cases, however, the Court had not sought to clarify the nature, requirements, content or consequences of *jus cogens* and had been content to simply refer to *jus cogens*. A typical example in this regard is the Court's observations on the prohibition on the use of force in the *Military and Paramilitary Activities case*.²² The Court referred to the fact that the prohibition on the use of force is often referred to by states as being "a fundamental or cardinal principle of [customary international] law", that the Commission has referred to "the law of the Charter concerning the prohibition" as a "conspicuous example of a rule of international law having the character of *jus cogens*", and that both parties to the dispute referred to its *jus cogens* status.²³ The Court itself, however, did not state expressly that it viewed the prohibition on the use of force as constituting a norm of *jus cogens*.

11. In more recent cases, however, the Court has been more willing to characterise certain norms as *jus cogens* and to engage more with the intricacies of *jus cogens*. In *Questions Relating to the Obligation to Extradite or Prosecute*, for example, the Court states that "the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)".²⁴ Further, the Court indicated that the prohibition was "grounded in a widespread international practice and on the *opinio juris* of States," that it appeared "in numerous international instruments of universal application", that "it has

²¹ In the Report on the Fragmentation of International Law, the Study Group listed opinions of individual judges dealing with *jus cogens* which included the Oscar Chinn case, P.C.I.J. Series A/B, No. 63 (1934) (separate opinion of Judge Schücking) p. 149; *Application of the Convention of 1902 Governing the Guardianship of Infants (the Netherlands v. Sweden)* ICJ Reports 1958, 55 (separate opinion of Judge Moreno Quintana) pp. 106 *et seq.*; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* ICJ Reports 1969, 3 (separate opinion of Judges Padilla Nervo and Sörensen) pp. 97 and 248; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* ICJ Reports 1969, 3 (dissenting opinion of Judge Tanaka), at p. 182; *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase)* ICJ Reports 1970, 3 (separate opinion of Judge Ammoun), at p. 304; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* ICJ Reports 1986, 14 (separate opinion of President Nagendra Singh) p. 153; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* ICJ Reports 1986, 14 (separate opinion of Judge Sette-Camara) pp. 199 *et seq.*; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Yugoslavia (Serbia and Montenegro))* ICJ Reports 1993, 325 (separate opinion of Judge *ad hoc* Lauterpacht) p. 440; *Legality of Use of Force (Yugoslavia v. United States of America) Request for the Indication of Provisional Measures*, ICJ Reports 1999, 916 (dissenting opinion of judge *ad hoc* Kreća) pp. 53-61, paras. 10-17; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* ICJ Reports 2002, 3 (dissenting opinion of Judge Al-Khasawneh) p. 95, para. 3; *Oil Platforms (Islamic Republic of Iran v. United States of America)* ICJ Reports 2003, 161 (separate opinion of Judge Buergenthal), para. 23. See also *The Arbitral Award in the Matter between the Government of Kuwait and American Independent Oil Company*, (1982) 21 ILM 976, para 90. *Azanian People's Organisation (AZAPO) v Truth and Reconciliation* 1996 (4) SA 562 (C), 574B.

²² *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, 1986 ICJ Reports 14 at para 190.

²³ *Id.*, para. 190.

²⁴ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, ICJ Reports 2012, para. 99.

been introduced into the domestic law of almost all States”, and that “acts of torture are regularly denounced within national and international fora”.²⁵

12. In the *Jurisdictional Immunities of the State* case, the Court considered various aspects of *jus cogens*, including its relationship with sovereign immunity from jurisdiction. It held that, because rules of immunities and possible *jus cogens* norms of the law of armed conflict “address different matters”, there was no conflict between them.²⁶ According to the Court, immunities are procedural in nature, regulating the exercise of national jurisdiction in respect of particular conduct, and not the lawfulness of the conduct being proscribed by *jus cogens*. There could, therefore, be no conflict between immunity and *jus cogens*.²⁷ The Court draws a firm distinction between the substantive prohibition on state conduct constituting *jus cogens* and the procedural immunity states enjoy from national jurisdiction, holding that they operate on different planes such that they cannot be in conflict even in cases where “a means by which a *jus cogens* rule might be enforced was rendered unavailable”.²⁸ In addition to addressing the issue of the relationship between immunity and *jus cogens*, the Court’s judgment also suggests that the prohibition of crimes against humanity constitutes *jus cogens*.²⁹ A similar view of the relationship between *jus cogens* and procedural rules is adopted by the Court in *Armed Activities on the Territory of the Congo (DRC v. Rwanda)*, where the Court found that the fact that a matter related to a *jus cogens* norm, in that case the prohibition on genocide, “cannot of itself provide a basis for the jurisdiction of the Court to entertain the dispute”.³⁰ The Court’s reasoning in these cases could be interpreted as suggesting that international rules unrelated to the legality of the underlying conduct are not affected by the fact that the prohibition of that conduct is *jus cogens*. In any event, these recent cases address the issue of the relationship between *jus cogens* and other rules of international law in a way that could assist the Commission in systematising the rules of international law in this area.

²⁵ *Id.*

²⁶ See paras 92, 95 and 97 of the *Jurisdictional Immunities of the State* case. See also para 64 in the *Armed Activities in the Congo* case (*New Application 2002: DRC v Rwanda*) concerning the consequences of *jus cogens* on jurisdiction and para 64 in the *Al-Adsani* case. See also *Jones & Others v. United Kingdom* (Applications nos. 34356/06 and 40528/06), E.C.H.R. para. 198 (Jan. 14, 2014) (finding that “by February 2012, no *jus cogens* exception to State immunity had yet crystallised”).

²⁷ Para 93 of the *Jurisdictional Immunities of the State* case. For a contrary position see Judge Cançado Trindade’s dissenting opinion in the *Jurisdictional Immunities* case, the joint separate of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case, the dissenting opinions of Judges Oda, Al-Khasawneh and Judge ad hoc van den Wyngaert in the *Arrest Warrant* case. With respect to national court decisions, in *Jurisdictional Immunities of the State* the Court cited to decisions in Canada, Greece, New Zealand, Poland, Slovenia, and the United Kingdom where sovereign immunity was acknowledged even in the face of allegations of *jus cogens* violations. *Jurisdictional Immunities of the State*, para. 96. For the United States, intermediate courts have rejected an implied exception to sovereign immunity where the foreign State was accused of violating *jus cogens* norms. See *Siderman de Blake v. Argentina*, 965 F.2d 699 (9th Cir. 1992); *Princz v. Germany*, 26 F.3d 1166 (D.C. Cir. 1994); *Smith v. Libya*, 101 F.3d 239 (2d Cir. 1997); and *Sampson v. Germany*, 250 F.3d 1145 (7th Cir. 2001). For immunity of officials, compare *Ye v. Zemin*, 383 F.3d 620, 625-27 (7th Cir. 2004); *Matar v. Dichter*, 563 F.3d 9, 14-15 (2d Cir. 2009); *Giraldo v. Drummond Co.*, 493 Fed. Appx. 106 (D.C. Cir. 2012) (acknowledging immunity of foreign government officials despite allegations of *jus cogens* violations), with *Yousuf v. Samantar*, 699 F.3d 763, 776-77 (4th Cir. 2012) (denying immunity).

²⁸ Para. 95 of the *Jurisdictional Immunities of the State* case.

²⁹ *Id.* at 95 referring to its judgement in the *Arrest Warrant* case.

³⁰ *Armed Activities on the Territory of Congo* case at para. 64.

4. Legal Issues to be studied

13. The Commission could make a useful contribution to the progressive development and codification of international law by analysing the state of international law on *jus cogens* and providing an authoritative statement of the nature of *jus cogens*, the requirements for characterising a norm as *jus cogens* and the consequences or effects of *jus cogens*. The Commission could also provide an illustrative list of existing *jus cogens* norms. The consideration of the topic by the Commission could, therefore, focus on the following elements:

- (a) the nature of *jus cogens*;
- (b) requirements for the identification of a norm as *jus cogens*;
- (c) an illustrative list of norms which have achieved the status of *jus cogens*;
- (d) consequences or effects of *jus cogens*.

14. With respect to the nature of *jus cogens*, the Vienna Convention conceptualises *jus cogens* as a norm of positive law, founded on consent. This was also borne out by the judgments of the ICJ, including the *Belgium v. Senegal case* where, when justifying its conclusion that the prohibition against torture is a norm of *jus cogens*, the Court noted that the prohibition was grounded on “widespread international practice and on the *opinio juris* of States”, noting further that it “appears in numerous international instruments of universal application” and that “it has been introduced into the domestic law of almost all States”.³¹ The Court also added that torture “is regularly denounced within national and international fora”.³² The conceptualisation of *jus cogens* in positive law terms, as based on acceptance of states, may be a departure from an earlier understanding rooted in natural law thinking.³³ The study of the nature of *jus cogens* could also permit the Commission to consider the type of norms that thus far have acquired the status of *jus cogens* in order to determine whether norms of *jus cogens* have common attributes. A study of the nature of *jus cogens* would also touch upon, for example, the relationship between *jus cogens* and customary international law as well as the distinction between *jus cogens* and other possibly related concepts such as non-derogable rights found in international human rights treaties and *erga omnes* obligations.³⁴

15. The requirements for a norm to achieve the status of *jus cogens* are spelt out in Article 53 of the Vienna Convention. However, there is room for the Commission to provide elements that could be used to indicate that a norm, beyond being a norm of general international law, has achieved the status of *jus cogens*. A study of those cases in which courts or tribunals found the existence of *jus cogens* could assist the Commission in identifying the mode of formation as well as criteria for identifying norms of *jus cogens*.

³¹ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, *I.C.J. Reports 2012*, 422 at para 99.

³² *Ibid.*

³³ See, e.g., Andrew Jacovides *International Law and Diplomacy: Selected Writings* (2011), 18. Cf. *Case concerning the Delimitation of Maritime Boundary between Guinea-Bissau and Senegal*, Arbitral Award, 31 July 1989, Vol XX *UNRIIAA*, 119, at para 44 (suggesting a *jus cogens* norm can develop as either custom or by the formation of a general principle of law). See also *Siderman de Blake v. Argentina*, 965 F.2d at 715 (arguing that *jus cogens* is derived from fundamental values of the international community, rather than the choice of states).

³⁴ For example, the commentary to Draft Article 50 of the Draft Articles on the Law of Treaties clarifies that “[n]or would it be correct to say that a provision in a treaty possesses the character of *jus cogens* merely because the parties have stipulated that no derogation from that provision is to be permitted, so that another treaty which conflicted with that provision would be void” (para. 2).

The reasons advanced by the Court in *Belgium v. Senegal* for the proposition that torture qualifies as *jus cogens*, for example, could provide useful guidance in the search for specific requirements for the identification of *jus cogens*.³⁵ Statements by States, to the extent that they do more than suggest that this or that norm is a norm of *jus cogens*, could also assist the Commission in this exercise. A related matter concerns the process through which norms of *jus cogens* are replaced by subsequent norms of *jus cogens* as defined in article 53 of the Vienna Convention.

16. The proposal also entails producing an illustrative list of norms that currently qualify as *jus cogens*. Such a list would be based on an assessment of the judgments of the ICJ and other courts and tribunals as well as the previous work of the Commission, in particular the commentaries to Draft Article 50 of the 1966 Draft Articles, commentaries to Article 26 of the Articles on the Responsibility of States and commentaries to Guideline 3.1.5.4 of the Guide to Practice on Reservations. It would be important for any list produced by the Commission to specify clearly that it is not a closed list. There may well be fears that a list, even with most careful drafting, could lead to the conclusion that it is exclusive. While this is always possible, this concern should not be overstated. It only serves to emphasise that not only should the illustrative list be carefully drafted but also that the commentary should be sufficiently clear so as to avoid misunderstanding.

17. Finally, the study should also address the effects and consequences of *jus cogens*. This would include the legal effect of *jus cogens* on other rules of international law. While Articles 53 and 64 spell out consequences of *jus cogens* for the validity of treaties, the legal effects of *jus cogens* on other rules are not addressed. Recent decisions of the Court, in particular, *Jurisdictional Immunities of the State case* and *the Armed Activities in the Congo case* address the relationship between *jus cogens* and procedural and secondary rules of international law.³⁶ In addition to state and official immunity, international tribunals have addressed other possible consequences, such as immunity of international organizations, the relationship with Security Council resolutions, the effect of statutes of limitations, and the effect on extradition treaties.³⁷ Previous work of the Commission, in particular the commentary to Article 26 of the Articles on State Responsibility as well as Section E of the Report of the Study Group Fragmentation, also provide relevant insights for studying the effects of *jus cogens* on other rules of international law. The consideration of the effects and consequences of *jus cogens* is likely to be the most challenging part of the study and will require careful analysis of the jurisprudence of both international and domestic courts.

5. The Topic Meets the Requirement for Selection of New Topics

18. The topic meets the requirements for selection of new topics set by the Commission. These requirements are that new topics should reflect the needs of states in respect of codification and progressive development, should be significantly advanced in terms of

³⁵ See para. 99 of *Obligation to Prosecute or Extradite*.

³⁶ See *Jurisdictional Immunities of the State* at 94 and *Armed Activities on the Territory of the Congo (New Application 2002: DRC v Rwanda)* at para 64. See also generally Erika de Wet “*Jus Cogens and Obligations Erga Omnes*” in Dinah Shelton (Ed) *The Oxford Handbook of International Human Rights Law* (2013).

³⁷ *Stichting Mothers of Srebrenica and Others v. Netherlands*, App no. 65542/12 (ECHR 2013) (holding that *jus cogens* does not trump immunity of international organizations). *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* at paras 100–104. *Prosecutor v. Furundzija* (Judgment) ICTY-95-17/1 (10 December 1998) at para 157 (mentioning lack of a statute of limitations and not allowing a political offence exemption in extradition treaties for *jus cogens* torture violations as two possible implications of *jus cogens* violations).

state practice to permit progressive development, and codification and should be concrete and feasible.

19. The topic is important for states by promoting greater clarity on *jus cogens*, its formation and effects. Several recent disputes between States have implicated *jus cogens* or potential *jus cogens* norms.³⁸ While States have often agreed that the specific norms in question qualified as *jus cogens*, the dispute has often related to the effect of the *jus cogens* norms on other rules of international law. Clarifying some of the legal aspects of *jus cogens* could facilitate the resolution of international disputes.³⁹ As with the topic on customary international law, clarifying the rules on *jus cogens* would be particularly useful for domestic judges and other lawyers not experts in international law who may be called upon to apply international law, including *jus cogens*. In particular, the study could provide useful guidelines for national courts on how to identify norms of *jus cogens* and how such norms interact with other rules of international law. As is evident from the recent practice described above, the topic is sufficiently advanced in terms of practice to permit codification and progressive development and is concrete and feasible.

6. Conclusion

20. That *jus cogens* forms part of the body of modern international law is not seriously in dispute. Nonetheless, the precise contours, content and effects of *jus cogens* remains in dispute. The Commission could make a meaningful contribution to the codification and progressive development of international law by addressing the elements identified.

21. The outcome of the work of the Commission on this topic can take any one of a number of forms. However, Draft Conclusions with commentaries appear, at this stage, the most appropriate form. The conclusions, while containing minimum normative content, would also have to be drafted in such a way as not to arrest the development of *jus cogens* or “cool down” its normative effect.

³⁸ Examples, in this regard, include *Belgium v. Senegal*, *Jurisdictional Immunities of State* and the *Armed Activities in the Congo case*.

³⁹ During the consideration of the Commission’s report during the 2013 session of the Sixth Committee of the General Assembly, several delegations expressed support for the consideration of the topic of *jus cogens*. Portugal for example, highlighted the topic as “of utmost importance”. See Summary Records of the 17th Meeting of the Sixth Committee, 28 October 2013 (A/C.6/68/SR.17), para. 88. Similarly Iran expressed support for the consideration of the topic. See Summary Records of the 26th Meeting of the Sixth Committee, 5 November 2013 (A/C.6/68/SR.26), para. 4.

Selected reading list

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