

Annex

JUS COGENS

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A. 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.

B. 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

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¹ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 191 *et seq.* Other more recent products of the Commission on treaty law include the Guide to Practice on Reservations to Treaties, adopted by the Commission at its sixty-third session, in 2011 (*Yearbook ... 2011*, vol. II (Part Three), pp. 23 *et seq.*), and the articles on the effects of armed conflicts on treaties, adopted by the Commission at the same session (*ibid.*, vol. II (Part Two), pp. 107 *et seq.*). The Guide to Practice on Reservations to Treaties is reproduced in the annex to General Assembly resolution 68/111 of 16 December 2013 and the articles on the effects of armed conflicts on treaties are reproduced in the annex to General Assembly resolution 66/99 of 9 December 2011.

² See annex I of the report of the Commission to the General Assembly on the work of its sixty-third session (*Yearbook ... 2011*, vol. II (Part Two)), p. 183, para. 1.

³ For a historical development of *jus cogens*, see A. Gómez Robledo, *El ius cogens internacional (Estudio histórico-crítico)*, Universidad Nacional Autónoma de México, 1982, pp. 9–68.

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.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 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 topic of the Commission 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 preemptory 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

⁴ *Jus cogens* was first included in the work of the Commission in the third report by G. G. Fitzmaurice, Special Rapporteur on the law of treaties under the title "Legality of the object" (*Yearbook ... 1958*, vol. II, document A/CN.4/115, pp. 26–28).

⁵ Already in the 1966 draft articles, the Commission noted that "[t]he 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" (*Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, p. 247, commentary to draft article 50, para. (1)).

⁶ *Yearbook ... 1993*, vol. II (Part One), p. 213, para. 2. On a similar note, 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 that "disagreement about [the] theoretical underpinnings [of *jus cogens*], scope of application and content remains as ripe as ever" (A/CN.4/L.682 and Corr.1 [and Add.1], para. 363; available from 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)).

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.⁷

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*.⁸ 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 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 its formation, operation, content and consequences or effects.⁹ States have at times also referred to *jus cogens* in support of positions

⁷ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, p. 248.

⁸ 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” (*ibid.*).

⁹ See, for example, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment*, I.C.J. Reports 1986, pp. 14 *et seq.*; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, *Judgment*, I.C.J. Reports 2002, pp. 3 *et seq.*; *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, pp. 6 *et seq.*; and *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, I.C.J. Reports 2012, pp. 99 *et seq.* See especially the dissenting opinion of Judge Cañado Trindade in the *Jurisdictional Immunities of the State* case (pp. 179 *et seq.*), the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal (pp. 63 *et seq.*) and the dissenting opinions of Judges Oda (pp. 46 *et seq.*), Al-Khasawneh (pp. 95 *et seq.*) and Judge *ad hoc* Van den Wyngaert (pp. 137 *et seq.*) in the *Arrest Warrant of 11 April 2000* case. See also *Al-Adsani v. the United Kingdom*, Application no. 35763/97, Judgment of 21 November 2001, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions* 2001-XI, pp. 79 *et seq.* See also the separate opinion of Judge *ad hoc* Lauterpacht in *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, pp. 325 *et seq.*, at pp. 440–441, paras. 100–104; and *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, Judgment of 24 March 1999, House of Lords, United Kingdom, ILR, vol. 119 (2002), pp. 135 *et seq.*

that they advance.¹⁰ 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 responsibility of States, 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.¹¹ In addition to repeating the list contained in the commentary to draft article 26, the 2006 report of the Commission’s Study Group on fragmentation of international law provides a list of “the most frequently cited candidates” for the status of *jus cogens*.¹² The Guide to Practice on Reservations to Treaties, adopted by the Commission in 2011, also provides detailed analysis on the effects of *jus cogens* on the permissibility and consequences of reservations.¹³

C. 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

¹⁰ See for example, the 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 the statement by Counsel to Senegal in the same case, *Oral Proceedings*, 15 March 2012 (CR 2012/4), para. 39. See also the Counter-Memorial of Senegal in that case, para. 51 (available from www.icj-cij.org, *Cases*). 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 *Jurisdictional Immunities* case, 12 June 2009, para. 86, where Germany states: “Undoubtedly, for instance, *jus cogens* prohibits genocide.” (available from www.icj-cij.org, *Cases*). See also the statement of South Africa of 26 October 2009 (*Official Records of the General Assembly, Sixty-fourth Session, Sixth Committee, 15th meeting, A/C.6/64/SR.15*, paras. 69–70) on the report of the Commission on the work of its sixty-first session (see *Yearbook ... 2009*, vol. II (Part Two)) cited in the second report of the Special Rapporteur, Mr. Roman Kolodkin, on immunity of State officials from foreign criminal jurisdiction (*Yearbook ... 2010*, vol. II (Part One), document A/CN.4/631, p. 399, para. 9, especially footnote 13). On 28 October 2013, during the Sixth Committee’s consideration of the report of the International Law Commission on the work of its sixty-fifth session (see *Yearbook ... 2013*, vol. II (Part Two)), Portugal highlighted *jus cogens* as of “utmost importance” (*Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee, 17th meeting, A/C.6/68/SR.17*, para. 88).

¹¹ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 84–85. The articles on responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session are reproduced in the annex to General Assembly resolution 56/83 of 12 December 2001. 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 recognized include the prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination” (*Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 85).

¹² A/CN.4/L.682 and Corr.1 [and Add.1] (see footnote 6 to this annex, above), para. 374. 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 (*Yearbook ... 2006*, vol. II (Part Two), p. 182).

¹³ See, for example, the commentaries to draft guidelines 3.1.5.4 and 4.4.3 of the Guide to Practice on Reservations to Treaties adopted by the Commission at its sixty-third session (*Yearbook ... 2011*, vol. II (Part Three), pp. 225–227 and 294, respectively). See also *Armed Activities on the Territory of the Congo (New Application 2002: Democratic Republic of the Congo v. Rwanda)* (see footnote 9 to this annex, above), separate opinion of Judge *ad hoc* Dugard (discussing the effect of reservations that violate *jus cogens*), para. 9. See also principle 8 of the guiding principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, *Yearbook ... 2006*, vol. II (Part Two), p. 90.

study of *jus cogens* remains the 1969 Vienna Convention. From the Vienna Convention, basic elements of the nature, requirements and consequences of *jus cogens* are spelled out. According to the Vienna Convention, *jus cogens* refers to peremptory norms of general international law defined as (a) norms (b) accepted and recognized by the international community of States as a whole (c) from which no derogation is permitted.¹⁴ The consequence of a norm acquiring the status of *jus cogens* is that treaties conflicting with it are void.¹⁵

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.¹⁶ 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”,¹⁷ article 53 of the 1969 Vienna Convention adds the qualifier “accepted and recognised by the international community of States as a whole”, thereby suggesting that 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, in 2006, the Commission's Study Group on the fragmentation of international law 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?”¹⁸ 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.¹⁹ This includes not only how norms of *jus cogens* interact with other rules of international law, for example, resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, but also the consequences of a violation of a *jus cogens* norm.²⁰ The Commission's previous work, including the articles on responsibility of States for internationally wrongful acts, could provide useful insights on some of these questions.²¹

¹⁴ Article 53 of the 1969 Vienna Convention.

¹⁵ Articles 53 and 64 of the 1969 Vienna Convention.

¹⁶ See, for example, A. von Verdross, “Forbidden treaties in international law: comments on Professor Garner's report on ‘The Law of Treaties’”, *AJIL*, vol. 31, No. 4 (1937), p. 571.

¹⁷ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, p. 247.

¹⁸ A/CN.4/L.682 and Corr.1 [and Add.1] (see footnote 6 to this annex, above), para. 375.

¹⁹ *Ibid.*, para. 367.

²⁰ *Ibid.*

²¹ See, for example, article 26 of the draft articles on responsibility of States for internationally wrongful acts and 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, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 84–85.

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.²²

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.²³ 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 in and against Nicaragua* case.²⁴ 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.²⁵ 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

²² See, especially, paragraphs (3) and (4) of the commentary to article 26 on the draft articles on responsibility of States for internationally wrongful acts, *ibid.*, p. 85.

²³ In its report on the fragmentation of international law (A/CN.4/L.682 and Corr.1 [and Add.1] (see footnote 6 to this annex, above)), the Study Group listed opinions of individual judges dealing with *jus cogens* which included: *Oscar Chinn, 1934, P.C.I.J., Series A/B, No. 63* (separate opinion of Judge Schücking, p. 149); *Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden), Judgment of 28 November 1958, I.C.J. Reports 1958*, pp. 55 *et seq.* (separate opinion of Judge Moreno Quintana, pp. 106 *et seq.*); *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, pp. 3 *et seq.* (separate opinion of Judge Padilla Nervo and dissenting opinion of Judge Sørensen, pp. 97 and 248, and dissenting opinion of Judge Tanaka, p. 182); *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, pp. 3 *et seq.* (separate opinion of Judge Ammoun, p. 304); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment* (see footnote 9 to this annex, above), (separate opinion of President Nagendra Singh, *ibid.*, pp. 199 *et seq.*, and separate opinion of Judge Sette-Camara, pp. 199 *et seq.*); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993* (see footnote 9 to this annex, above) (separate opinion of Judge *ad hoc* Lauterpacht, p. 440); *Legality of Use of Force (Yugoslavia v. United States of America), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, pp. 916 *et seq.* (dissenting opinion of Judge *ad hoc* Kreća, pp. 965–973, paras. 10–17); *Arrest Warrant* (see footnote 9 to the annex, above) (dissenting opinion of Judge Al-Khasawneh, p. 96, para. 3); and *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, pp. 161 *et seq.* (separate opinion of Judge Buergenthal, p. 279, para. 23). See also the arbitral award in the case *The Government of the State of Kuwait v. The American Independent Oil Company (Aminoil)*, ILM, vol. 21, No 5 (1982), pp. 976 *et seq.*, at p. 1021, para. 90. See also *Azania People's Organisation (AZAPO) and Others v. Truth and Reconciliation Commission and Others, The South African Law Reports 1996 (4)*, pp. 562 *et seq.*, at p. 574.B [1996 (4) SA 562 (C), 574B].

²⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment* (see footnote 9 to this annex, above), p. 100, para. 190.

²⁵ *Ibid.*

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*)”.²⁶ 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 been introduced into the domestic law of almost all States”, and that “acts of torture are regularly denounced within national and international fora”.²⁷

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.²⁸ 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*.²⁹ 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”.³⁰ In addition to addressing the issue of the relationship between immunity

²⁶ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, pp. 422 et seq., at p. 457, para. 99.

²⁷ *Ibid.*

²⁸ *Jurisdictional Immunities of the State* (see footnote 9 to this annex, above), paras. 92, 95 and 97. See also paragraph 64 in *Armed Activities on the Territory of the Congo (New Application 2002: Democratic Republic of the Congo v. Rwanda)* (footnote 9 to this annex, above) concerning the consequences of *jus cogens* on jurisdiction, and paragraph 64 of the judgment of the European Court of Human Rights in the *Al-Adsani v. the United Kingdom* case (see footnote 9 to this annex, above). See also *Jones & Others v. United Kingdom*, Applications nos. 34356/06 and 40528/06, Judgment of 14 January 2014, European Court of Human Rights, *Reports of Judgments and Decisions* 2014, para. 198 (finding that “by February 2012, no *jus cogens* exception to State immunity had yet crystallised”).

²⁹ *Jurisdictional Immunities of the State* (see footnote 9 to this annex, above), para. 93. For a contrary position, see Judge Caçado Trindade’s dissenting opinion in the same case, the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case and the dissenting opinions of Judges Oda, Al-Khasawneh and Judge *ad hoc* van den Wyngaert in this latter 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, 625–627 (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, 776–777 (4th Cir. 2012) (denying immunity).

³⁰ *Jurisdictional Immunities of the State* (see footnote 9 to this annex, above), para. 95.

and *jus cogens*, the Court’s judgment also suggests that the prohibition of crimes against humanity constitutes *jus cogens*.³¹ 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 (Democratic Republic of the Congo 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 that dispute”.³² 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.

D. 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 1969 Vienna Convention conceptualises *jus cogens* as a norm of positive law, founded on consent. This was also borne out by the judgments of the International Court of Justice, including the *Questions relating to the Obligation to Prosecute or Extradite* 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”.³³ The Court also added that torture “is regularly denounced within national and international fora”.³⁴ The conceptualisation of *jus cogens* in positive law terms, as based on acceptance of States, may be a departure

³¹ *Ibid.*, referring to its judgment in the *Arrest Warrant* case.

³² *Armed Activities on the Territory of the Congo (New Application 2002: Democratic Republic of the Congo v. Rwanda)* (see footnote 9 to this annex, above), p. 32, para. 64.

³³ *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 26 to this annex, above), p. 457, para. 99.

³⁴ *Ibid.*

from an earlier understanding rooted in natural law thinking.³⁵ 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.³⁶

15. The requirements for a norm to achieve the status of *jus cogens* are spelled out in article 53 of the 1969 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*. The reasons advanced by the Court in *Questions relating to the Obligation to Prosecute or Extradite* for the proposition that prohibition of torture qualifies as *jus cogens*, for example, could provide useful guidance in the search for specific requirements for the identification of *jus cogens*.³⁷ 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 International Court of Justice 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 for internationally wrongful acts and commentaries to guideline 3.1.5.4 of the Guide to Practice on Reservations to Treaties. 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 emphasize 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.³⁸ 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.³⁹ Previous work of the Commission, in particular the commentary to article 26 of the articles on responsibility of States for internationally wrongful acts as well as paragraphs 324 to 409 of the report of the Study Group on the fragmentation of international law, 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.

E. 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 State practice to permit progressive development, and codification and should be concrete and feasible.⁴⁰

19. The topic is important for States by promoting greater clarity on *jus cogens*, its formation and effects.

³⁵ See, for example, A. Jacovides, *International Law and Diplomacy: Selected Writings*, Leiden/Boston, Martinus Nijhoff, 2011, p. 18. See also the *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal*, Decision of 31 July 1989, UNRIIAA, vol. XX (Sales No. E/F.93.V.3), pp. 119 *et seq.*, at p. 136, para. 44 (suggesting a *jus cogens* norm can develop as either custom or by the formation of a general principle of law) (in French; the English translation is reproduced in *ibid.*, annex to the *Application Instituting Proceedings of the Government of the Republic of Guinea-Bissau*). See also *Siderman de Blake v. Argentina* (footnote 29 to this annex, above), p. 715 (arguing that *jus cogens* is derived from fundamental values of the international community, rather than the choice of States).

³⁶ For example, the commentary to 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” (*Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, p. 248, para. (2)).

³⁷ *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 26 to this annex, above), p. 457, para. 99.

³⁸ See *Jurisdictional Immunities of the State* (footnote 9 above to this annex, above), pp. 140–141, para. 94, and *Armed Activities on the Territory of the Congo (New Application 2002: Democratic Republic of the Congo v. Rwanda)* (see footnote 9 to this annex, above), pp. 31–32, para. 64. See also, generally, E. de Wet, “*Jus cogens* and obligations *erga omnes*”, in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law*, Oxford University Press, 2013, pp. 541–561.

³⁹ See *Stichting Mothers of Srebrenica and Others v. the Netherlands* (dec.), Application no. 65542/12, European Court of Human Rights, *Reports of Judgments and Decisions* 2013 (extracts) (holding that *jus cogens* does not trump immunity of international organizations). See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993* (see footnote 9 to this annex, above), pp. 440–441, paras. 100–104. See also *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment of 10 December 1998, Trial Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 1998*, vol. 1, pp. 466 *et seq.*, at p. 573, 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).

⁴⁰ *Yearbook ... 1998*, vol. II (Part Two), p. 110, para. 553.

Several recent disputes between States have implicated *jus cogens* or potential *jus cogens* norms.⁴¹ 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.⁴² 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

⁴¹ Examples, in this regard, include *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 26 to this annex, above), *Jurisdictional Immunities of State* (see footnote 9 above to this annex, above) and *Armed Activities on the Territory of the Congo (New Application 2002: Democratic Republic of the Congo v. Rwanda)* (see footnote 9 to this annex, above).

⁴² During the consideration of the Commission's report in the Sixth Committee during the 2013 session of the General Assembly, several delegations expressed support for the consideration of the topic of *jus cogens*. Portugal for example, highlighted the topic as being "of the utmost importance". See the summary record of the 17th meeting of the Sixth Committee, 28 October 2013 (A/C.6/68/SR.17) (footnote 10 to this annex, above), para. 88. Similarly, the Islamic Republic of Iran expressed support for the consideration of the topic, see summary record of the 26th meeting of the Sixth Committee, 5 November 2013 (*Official Records of the General Assembly, Sixty-eighth Session, Sixth Committee, 26th meeting*, A/C.6/68/SR.26), para. 4.

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.

F. 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.

Selected reading list

A. International Law Commission

Draft articles on the law of treaties adopted by the Commission at its eighteenth session (1966), with commentaries, *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 177 *et seq.*

Outlines prepared by members of the Commission on selected topics of international law: *Jus cogens*, by Mr. Andreas Jacovides, *Yearbook ... 1993*, vol. II (Part One), document A/CN.4/454, pp. 213–220.

Articles on responsibility of States for international wrongful acts adopted by the Commission at its fifty-third session (2001), with commentaries, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76–77. The articles on responsibility of States for internationally wrongful acts are reproduced in the annex to General Assembly resolution 56/83 of 12 December 2001.

Conclusions of the work of the Study Group on the fragmentation of international law: difficulties arising from the diversification and expansion of international law, *Yearbook ... 2006*, vol. II (Part Two), p. 177–184.

Fragmentation of international law: difficulties arising from the diversification and expansion of international law, report of the Study Group finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 and Add.1), available from 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)).

Guide to Practice on Reservations to Treaties adopted by the Commission at its sixty-third session (2011), with commentaries, *Yearbook ... 2011*, vol. II (Part Three).

B. Select cases

1. INTERNATIONAL COURT OF JUSTICE

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*, pp. 6 *et seq.*

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), *Judgment*, *I.C.J. Reports 2002*, pp. 3 *et seq.*

Barcelona Traction, Light and Power Company, Limited, *Judgment*, *I.C.J. Reports 1970*, pp. 3 *et seq.*

Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), *Judgment*, *I.C.J. Reports 2012*, pp. 99 *et seq.*

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), *Merits, Judgment*, *I.C.J. Reports 1986*, pp. 14 *et seq.*

Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), *Judgment*, *I.C.J. Reports 2012*, pp. 422 *et seq.*

2. OTHER COURTS AND TRIBUNALS

Al-Adsani v. the United Kingdom, Application no. 35763/97, Judgment of 21 November 2001, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions 2001-XI*.

Aloeboetoe et al. v. Suriname, Judgment of 10 September 1993 (*Reparations and costs*), Inter-American Court of Human Rights, Series. C, No. 15.

Azanian People's Organisation (AZAPO) and Others v. Truth and Reconciliation Commission and Others, *The South African Law Reports 1996 (4)*, pp. 562 *et seq.* [1996 (4) SA 562 (C)].

Blake v. Guatemala, Judgment of 24 January 1998, Inter-American Court of Human Rights, Series C, No. 36.

Case concerning the delimitation of the maritime boundary between Guinea-Bissau and Senegal, Decision of 31 July 1989, UNRIAA, vol. XX (United Nations Publication, Sales No. E/F.93.V.3), pp. 119 *et seq.*

Giraldo v. Drummond Co., 493 Fed. Appx. 106 (D.C. Cir. 2012) (United States).

The Government of the State of Kuwait v. The American Independent Oil Company (Aminoil), ILM, vol. 21, No. 5 (1982), pp. 976 *et seq.*

Matar v. Dichter, 563 F.3d 9 (2d Cir. 2009) (United States).

Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T, Judgment of 10 December 1998, Trial Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 1998*, vol. 1, pp. 466 *et seq.*

Southern African Litigation Centre and Another v. National Director of Public Prosecutions and Others, Case No. 77150/09, Judgment of 8 May 2012, High Court of South Africa (unreported) (South Africa).

Stichting Mothers of Srebrenica and Others v. the Netherlands (dec.), Application no. 65542/12, European Court of Human Rights, *Reports of Judgments and Decisions 2013* (extracts).

Ye v. Zemin, 383 F.3d 620 (7th Cir. 2004) (United States).

Yousuf v. Samantar, 699 F.3d 763 (4th Cir. 2012) (United States).

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