

**Draft conclusions on identification and legal consequences of
peremptory norms of general international law (*jus cogens*)**

2022

Adopted by the International Law Commission at its seventy-third session, in 2022, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/77/10, para. 43). The report will appear in *Yearbook of the International Law Commission, 2022*, vol. II, Part Two.



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Identification and legal consequences of peremptory norms of general international law (*jus cogens*)

Part One

Introduction

Conclusion 1

Scope

The present draft conclusions concern the identification and legal consequences of peremptory norms of general international law (*jus cogens*).

Conclusion 2

Nature of peremptory norms of general international law (*jus cogens*)

Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community. They are universally applicable and are hierarchically superior to other rules of international law.

Conclusion 3

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

A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Part Two

Identification of peremptory norms of general international law (*jus cogens*)

Conclusion 4

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

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

- (a) it is a norm of general international law; and
- (b) it is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Conclusion 5

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

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

Conclusion 6

Acceptance and recognition

1. The criterion of acceptance and recognition referred to in draft conclusion 4, subparagraph (b), is distinct from acceptance and recognition as a norm of general international law.
2. To identify a norm as a peremptory norm of general international law (*jus cogens*), there must be evidence that such a norm is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character.

Conclusion 7

International community of States as a whole

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

Conclusion 8

Evidence of acceptance and recognition

1. Evidence of acceptance and recognition that a norm of general international law is a peremptory norm (*jus cogens*) may take a wide range of forms.
2. Forms of evidence include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; constitutional provisions; legislative and administrative acts; decisions of national courts; treaty provisions; resolutions adopted by an international organization or at an intergovernmental conference; and other conduct of States.

Conclusion 9

Subsidiary means for the determination of the peremptory character of norms of general international law

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for determining the peremptory character of norms of general international law. Regard may also be had, as appropriate, to decisions of national courts.
2. The works of expert bodies established by States or international organizations and the teachings of the most highly qualified publicists of the various nations may also serve as subsidiary means for determining the peremptory character of norms of general international law.

Part Three

Legal consequences of peremptory norms of general international law (*jus cogens*)

Conclusion 10

Treaties conflicting with a peremptory norm of general international law (*jus cogens*)

1. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*). The provisions of such a treaty have no legal force.
2. Subject to paragraph 2 of draft conclusion 11, if a new peremptory norm of general international law (*jus cogens*) emerges, any existing treaty which is in conflict with that norm becomes void and terminates. The parties to such a treaty are released from any obligation further to perform the treaty.

Conclusion 11

Separability of treaty provisions conflicting with a peremptory norm of general international law (*jus cogens*)

1. A treaty which, at the time of its conclusion, conflicts with a peremptory norm of general international law (*jus cogens*) is void in whole, and no separation of the provisions of the treaty is permitted.
2. A treaty which is in conflict with a new peremptory norm of general international law (*jus cogens*) becomes void and terminates in whole, unless:

(a) the provisions that are in conflict with a peremptory norm of general international law (*jus cogens*) are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of the said provisions was not an essential basis of the consent of the parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

Conclusion 12

Consequences of the invalidity and termination of treaties conflicting with a peremptory norm of general international law (*jus cogens*)

1. Parties to a treaty which is void as a result of being in conflict with a peremptory norm of general international law (*jus cogens*) at the time of the treaty's conclusion have a legal obligation to:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision of the treaty which conflicts with a peremptory norm of general international law (*jus cogens*); and

(b) bring their mutual relations into conformity with the peremptory norm of general international law (*jus cogens*).

2. The termination of a treaty on account of the emergence of a new peremptory norm of general international law (*jus cogens*) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to the termination of the treaty, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law (*jus cogens*).

Conclusion 13

Absence of effect of reservations to treaties on peremptory norms of general international law (*jus cogens*)

1. A reservation to a treaty provision that reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such.

2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*).

Conclusion 14

Rules of customary international law conflicting with a peremptory norm of general international law (*jus cogens*)

1. A rule of customary international law does not come into existence if it would conflict with an existing peremptory norm of general international law (*jus cogens*). This is without prejudice to the possible modification of a peremptory norm of general international law (*jus cogens*) by a subsequent norm of general international law having the same character.

2. A rule of customary international law not of a peremptory character ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law (*jus cogens*).

3. The persistent objector rule does not apply to peremptory norms of general international law (*jus cogens*).

Conclusion 15

Obligations created by unilateral acts of States conflicting with a peremptory norm of general international law (*jus cogens*)

1. A unilateral act of a State manifesting the intention to be bound by an obligation under international law that would be in conflict with a peremptory norm of general international law (*jus cogens*) does not create such an obligation.

2. An obligation under international law created by a unilateral act of a State ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law (*jus cogens*).

Conclusion 16

Obligations created by resolutions, decisions or other acts of international organizations conflicting with a peremptory norm of general international law (*jus cogens*)

A resolution, decision or other act of an international organization that would otherwise have binding effect does not create obligations under international law if and to the extent that they conflict with a peremptory norm of general international law (*jus cogens*).

Conclusion 17

Peremptory norms of general international law (*jus cogens*) as obligations owed to the international community as a whole (obligations *erga omnes*)

1. Peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*), in relation to which all States have a legal interest.

2. Any State is entitled to invoke the responsibility of another State for a breach of a peremptory norm of general international law (*jus cogens*), in accordance with the rules on the responsibility of States for internationally wrongful acts.

Conclusion 18

Peremptory norms of general international law (*jus cogens*) and circumstances precluding wrongfulness

No circumstance precluding wrongfulness under the rules on the responsibility of States for internationally wrongful acts may be invoked with regard to any act of a State that is not in conformity with an obligation arising under a peremptory norm of general international law (*jus cogens*).

Conclusion 19

Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)

1. 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*).

2. No State shall recognize as lawful a situation created by a serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*), nor render aid or assistance in maintaining that situation.

3. A breach of an obligation arising under a peremptory norm of general international law (*jus cogens*) is serious if it involves a gross or systematic failure by the responsible State to fulfil that obligation.

4. This draft conclusion is without prejudice to the other consequences that any breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*) may entail under international law.

Part Four

General provisions

Conclusion 20

Interpretation and application consistent with peremptory norms of general international law (*jus cogens*)

Where it appears that there may be a conflict between a peremptory norm of general international law (*jus cogens*) 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 former.

Conclusion 21

Recommended procedure

1. A State which invokes a peremptory norm of general international law (*jus cogens*) as a ground for the invalidity or termination of a rule of international law should do so by notifying other States concerned of its claim. The notification should be in writing and should indicate the measure proposed to be taken with respect to the rule of international law in question.
2. If none of the other States concerned raises an objection within a period which, except in cases of special urgency, will not be less than three months, the invoking State may carry out the measure which it has proposed.
3. If, however, any State concerned raises an objection, the States concerned should seek a solution through the means indicated in Article 33 of the Charter of the United Nations. If no solution is reached within a period of twelve months, and the objecting State offers to submit the matter to the International Court of Justice or to some other procedure entailing binding decisions, the invoking State should not carry out the measure which it has proposed until the dispute is resolved.
4. This draft conclusion is without prejudice to the procedures set forth in the Vienna Convention on the Law of Treaties, to the relevant rules concerning the jurisdiction of the International Court of Justice, or to other applicable dispute settlement provisions agreed by the States concerned.

Conclusion 22

Without prejudice to consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail

The present draft conclusions are without prejudice to consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail under international law.

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Non-exhaustive list

Without prejudice to the existence or subsequent emergence of other peremptory norms of general international law (*jus cogens*), a non-exhaustive list of norms that the International Law Commission has previously referred to as having that status is to be found in the annex to the present draft conclusions.

Annex

- (a) The prohibition of aggression;
- (b) the prohibition of genocide;
- (c) the prohibition of crimes against humanity;
- (d) the basic rules of international humanitarian law;
- (e) the prohibition of racial discrimination and apartheid;
- (f) the prohibition of slavery;
- (g) the prohibition of torture;
- (h) the right of self-determination.
