



**Advisory Committee  
on Public International Law**

# Advisory report on the draft conclusions of the International Law Commission on peremptory norms of general international law

Advisory report no. 37, 27 July 2020

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## Chapter 1 Introduction

On 31 May 2019, the International Law Commission (ILC) adopted 23 draft conclusions and a draft annex on peremptory norms of general international law (*jus cogens*),<sup>1</sup> and subsequently added commentaries to the conclusions in August 2019.<sup>2</sup> These draft conclusions and commentaries were the product of a five-year study by Special Rapporteur Dire Tladi (South Africa), which comprised four reports. In his letter of 26 November 2019, the Minister of Foreign Affairs requested the Advisory Committee on Issues of Public International Law (Commissie van Advies voor Volkenrechtelijke Vraagstukken; hereinafter CAVV) to prepare an advisory report on the draft conclusions. In its advisory report, the CAVV will discuss the ILC's approach, the identification of rules of *jus cogens*, the legal consequences of *jus cogens*, and the list of peremptory norms included by the ILC in the annex to the draft conclusions.

The CAVV adopted the advisory report on 27 July 2020, and recommends that the government take account of the following observations when determining its position on the ILC project concerning peremptory norms of general international law (*jus cogens*).

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<sup>1</sup> Where the advisory report refers to peremptory norms or rules of *jus cogens*, this should be taken to mean the same as the full expression, namely 'peremptory norms of general international law (*jus cogens*)'.

<sup>2</sup> Report of the International Law Commission on the Work of Its Seventy-first Session, UN General Assembly, 74th Session, Supplement No. 10, chapter V, UN Doc. A/74/10 (2019) [hereinafter ILC Report 2019].

## Chapter 2 Progressive development as opposed to codification of international law; essential characteristics of peremptory norms (*jus cogens*)

### **Conclusion 1: Scope**

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

The ILC states in its commentary on draft conclusion 1 (§ 2) that the aim of the draft conclusions is to provide guidance to all those who may be called upon to determine the existence of peremptory norms of general international law and their legal consequences. It adds that the identification of such norms and their legal consequences should be done systematically and in accordance with a generally accepted methodology. The ILC also states (in § 3) that the draft conclusions are primarily concerned with methodology and do not attempt to address the content of individual peremptory norms of general international law. According to the ILC (see § 3), the commentaries refer to different materials as examples of practice, including views of states, to illustrate the methodology for the identification of peremptory norms and their legal consequences. Nonetheless, as the ILC notes, this does not imply that it agrees with or endorses the views expressed in such materials.

The CAVV understands why the ILC has adopted this approach and sought to avoid getting lost in the patchwork of interpretations and controversies regarding the concept of *jus cogens*, the individual peremptory norms and their legal consequences. It has therefore noted with approval the ILC's focus on the system of international law, the place of *jus cogens* within it and the formal guidelines provided by the ILC for the identification of peremptory norms and their legal consequences. However, this approach has its limitations that do not necessarily enhance the usefulness of the draft conclusions. A particular problem, in the CAVV's opinion, is that the ILC does not critically reflect upon the underlying materials, such as the views of states, courts and publicists (see also the commentary on draft conclusion 8).

In its commentaries on the draft conclusions, the ILC often fails to indicate whether the conclusions relate to a codification of international law or, by contrast, its progressive development. In dealing with this subject, the ILC largely bases itself on the provisions of the Vienna Convention on the Law of Treaties (articles 53, 64, 71 in conjunction with 44, and 65-66) and its rules on the responsibility of states and international organisations (articles 26, 40-41, 42, 48 and 49-54). As regards the relationship between the peremptory norms of general international law (*jus cogens*) on the one hand and rules of customary international law and obligations created by unilateral acts of states and decisions of international organisations on the other (draft conclusions 14-16), the ILC reasons by analogy with the rules on treaties. The CAVV agrees with this method.

As regards the project's merits, the CAVV notes that a notable number of states have taken a critical stance in the Sixth Committee of the General Assembly.<sup>3</sup> The absence of (relevant)

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<sup>3</sup> For the positions of states in general, see the following provisional reports: A/C.6/71/SR.26, 5 December 2016; A/C.6/72/SR.26, 5 December 2017; A/C.6/73/SR.26, 23 November 2018; A/C.6/74/SR.24, 11 November 2019.

state practice is a recurrent theme in some areas. A number of the draft conclusions simply repeat what has already been laid down in law and/or in relevant documents, and their added value is therefore bound to be limited. It should also be noted that the commentaries on the draft conclusions draw heavily on court judgments and the teachings of publicists, both of which only have the status of subsidiary means for the determination, interpretation and application of international law.<sup>4</sup> Coupled with the lack of critical reflection on these underlying materials (see below under 'Identification of rules of *jus cogens*'), this leads the CAVV to believe that the project's success is not guaranteed in advance.

**Conclusion 2: 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.

**Conclusion 3: General 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, are hierarchically superior to other rules of international law and are universally applicable.

In part one (introduction) of the draft conclusions, the ILC states in draft conclusion 3 that peremptory norms of general international law reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable. The CAVV believes that these essential characteristics do indeed reflect the general nature of peremptory norms, as stated by the ILC in the commentary (§ 1). However, these essential characteristics do require some additional comments and suggestions.

For example, the commentary on this conclusion (§§ 2-7) sheds only very limited light on the question of what fundamental values underlie peremptory norms. For example, some peremptory norms are based on human rights values such as freedom, autonomy and physical integrity (prohibition of slavery, racial discrimination and apartheid, and torture), but these values are not integrally protected by peremptory norms. Other peremptory norms protect the state or a collective (prohibition of aggression, prohibition of genocide, right of self-determination), and although freedom, autonomy and physical integrity once again appear to be central, not all aspects of these values are protected by the relevant peremptory norm. The CAVV would therefore urge the ILC to reflect upon this and provide some clarification in this respect.

In draft conclusion 3 the ILC goes on to state that peremptory norms are hierarchically superior. In the commentary (§ 8), the ILC states that this is both an essential characteristic and a consequence of peremptory norms of general international law. It is noteworthy here that, besides mentioning judicial decisions and the teachings of publicists, the ILC merely refers to the positions taken by states during the Vienna Conference on the Law of Treaties in 1968 (§§ 10-11, footnote 726). Possibly, the ILC could cite a wider range of (recent) positions on this point, for example by reference to the views expressed in the Sixth

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<sup>4</sup> Article 38, paragraph 1 (d), of the Statute of the International Court of Justice. For a critical observation of this kind, see UNGA, Sixth Committee, A/C.6/71/SR.26, 5 December 2016, § 43 ( Netherlands).

Committee of the General Assembly. As a matter of practical application, the hierarchically higher status of peremptory norms seems to be conditioned upon a finding of a conflict of norms; this is discussed in more detail below under ‘Legal consequences’.

The last essential characteristic mentioned by the ILC is that rules of *jus cogens* are universally applicable and binding on all subjects of international law that they address (commentary on draft conclusion 3, § 12). As regards the universally binding nature of these norms, the ILC could provide further explanations with respect to the various subjects that are addressed. While states, and possibly international organisations too, are bound by all peremptory norms of general international law, the same cannot be said of other subjects such as peoples, liberation movements, armed opposition groups, multinational corporations and businesses, and individuals. What is more, the extent to which international law is binding for many of these subjects is unclear and is often limited to certain norms or particular areas of international law. More attention could be paid to this in the commentary.

The ILC infers from the universal applicability of peremptory norms that the ‘persistent objector’ doctrine is not applicable to such norms and that they do not apply on a bilateral or regional basis (commentary on draft conclusion 3, § 15). The CAVV will return to the issue of ‘persistent objection’ when discussing draft conclusion 14. It is noteworthy that the ILC’s rejection of the possibility of regional or bilateral *jus cogens* has been consigned to a passing mention in the commentary. Opinion among authors is divided on this point, and the Special Rapporteur analysed this debate at some length in his Fourth Report.<sup>5</sup> He argued that the notion of regional *jus cogens* finds no support in state practice, but did not consider it necessary to devote a draft conclusion to this topic as ‘an appropriate explanation could be included in the commentary’.<sup>6</sup> The CAVV notes that at present the commentary provides no ‘explanation’ whatever of the position taken by the ILC. In view of the ongoing debate on this subject, a further explanation by the ILC of its position would be most welcome.

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<sup>5</sup> Fourth Report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, 31 January 2019, A/CN.4/727, §§ 21-47.

<sup>6</sup> *Ibid.* § 47.

## Chapter 3 Identification of rules of *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 requirement of “acceptance and recognition” as a criterion for identifying a peremptory norm of general international law (*jus cogens*) 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 as one 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 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. Such forms of evidence include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; legislative and administrative acts; decisions of national courts; treaty provisions; and resolutions adopted by an international organization or at an intergovernmental conference.

### **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 (*jus cogens*).



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 (*jus cogens*).

In identifying individual peremptory norms, the ILC takes as its starting point the system originally laid down in article 53 of the Vienna Convention on the Law of Treaties and then builds on it.<sup>7</sup> As such, identification of a peremptory norm of general international law is dependent on the norm in question being 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 having the same character. The CAVV agrees that this is the right system, but notes that some of the positions taken by the ILC in enlarging on it in the draft conclusions and their commentaries give rise to a number of questions.

Building on the observations about universal applicability made above, the ILC states in the commentary on draft conclusion 5 (§ 2) that a norm of general international law is thus a norm which, in the words of the International Court of Justice,<sup>8</sup> ‘must have equal force for all members of the international community’. Although the ILC evidently does not consider that universal applicability constitutes a criterion for the identification of peremptory norms of general international law as such (see also the commentary on draft conclusion 3, §§ 1 and 16), this wording nonetheless indicates that such norms should be binding on all states. From that perspective, it is unclear why treaty provisions could serve as bases for *jus cogens*. After all, such provisions are binding only on states that have become parties to that treaty, and a treaty does not create any obligations for third states.<sup>9</sup> Hence, even when nearly all states are party to a particular treaty, it still cannot be assumed that third states will be bound by it. It follows that in such a case it will still have to be assumed that a particular treaty provision does not have equal effect for all members of the international community, as the ILC itself indicates in the commentary on draft conclusion 5 (§ 9).

The ILC’s argument that treaty provisions can serve as an exceptional basis for *jus cogens* seems instead to be based on the fact that treaties can be a codification of customary international law.<sup>10</sup> Like the Dutch government, the CAVV is therefore not convinced that treaty provisions can serve as the basis for a peremptory norm of general international law,<sup>11</sup> at least not as an exclusive and independent foundation. This point can be illustrated by the fact that many of the treaties underlying the peremptory norms listed in the annex to the draft conclusions have not been universally ratified.<sup>12</sup> By way of comparison, see: Charter of the United Nations (aggression), 193 members;<sup>13</sup> the Genocide Convention, 152 parties;<sup>14</sup> the Conventions on International Humanitarian Law, 196 parties, and the Protocols, 174 and

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<sup>7</sup> Vienna Convention on the Law of Treaties, UNTS vol. 1155, 331.

<sup>8</sup> ICJ, North Sea Continental Shelf, Judgment, ICJ Reports 1969, p. 3, § 63.

<sup>9</sup> Articles 26 and 34, Vienna Convention on the Law of Treaties.

<sup>10</sup> In this sense, see UNGA, Sixth Committee, A/C.6/72/SR.26, 5 December 2017, § 31 (Netherlands).

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> Charter of the United Nations and Statute of the International Court of Justice, <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=I-1&chapter=1&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-1&chapter=1&clang=_en)>.

<sup>14</sup> Convention on the Prevention and Punishment of the Crime of Genocide, UNTS vol. 78, 277, <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-1&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en)>.

169 parties;<sup>15</sup> the Slavery Convention, 99 parties;<sup>16</sup> the Racial Discrimination Convention, 182 parties; the Convention on Apartheid, 109 parties;<sup>17</sup> the International Covenant on Civil and Political Rights, 173 parties; the International Covenant on Economic, Social and Cultural Rights (right of self-determination), 170 parties;<sup>18</sup> the Convention against Torture, 169 parties.<sup>19</sup>

On the subject of the general principles of law referred to in article 38, paragraph 1 (c) of the Statute of the International Court of Justice, the ILC states that they have a general scope of application with equal force for all members of the international community (commentary on draft conclusion 5, § 8). Here too, however, the CAVV, like the Dutch government,<sup>20</sup> is far from convinced that these general principles of law can serve as the basis for peremptory norms. Although the ILC can find support for this position in the literature (commentary on draft conclusion 5, § 8, footnote 764), the commentary does not give a single example of a peremptory norm based on a general principle of law. Moreover, it should be noted that it is also unclear whether a general principle of law can directly create obligations;<sup>21</sup> this could also explain why it is actually possible to derogate from general principles of law.

The CAVV takes the view that neither treaty provisions nor general principles of law can, in themselves, serve as a basis for peremptory norms. They should instead be viewed in conjunction with (evolving) rules of customary international law, as the ILC itself seems to indicate with regard to treaties.<sup>22</sup> It should also be noted that treaty provisions are mentioned separately in draft conclusion 8, paragraph 2 as a form of *evidence* of acceptance and recognition that a rule of general international law has the status *jus cogens*. Since treaties as such do not lay down rules of general international law, the CAVV thinks it would be more

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<sup>15</sup> Red Cross website: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>.

<sup>16</sup> Slavery Convention, UNTS vol. 212, 17,

<[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-2&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-2&chapter=18&clang=_en)>.

<sup>17</sup> International Convention on the Elimination of all Forms of Racial Discrimination, UNTS vol. 660, 195,

<[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-2&chapter=4](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4)>; International

Convention on the Suppression and Punishment of the Crime of Apartheid, UNTS vol. 1015, 243,

<[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-7&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-7&chapter=4&clang=_en)>.

<sup>18</sup> International Covenant on Economic, Social and Cultural Rights, UNTS vol. 993, 3,

<[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4)>; International

Covenant on Civil and Political Rights, UNTS vol. 999, 171,

<[https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=\\_en&mtdsg\\_no=IV-4&src=IND](https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND)>.

<sup>19</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNTS vol.

1465, 85, <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en)

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<sup>20</sup> UNGA, Sixth Committee, A/C.6/72/SR.26, 5 December 2017, § 31 (Netherlands).

<sup>21</sup> The International Court of Justice has held that while the principle of good faith admittedly governs the creation and performance of legal obligations, 'it is not in itself a source of obligation where none would otherwise exist'. ICJ, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1988, p. 69, § 94.

<sup>22</sup> In the commentary on draft conclusion 5, §9 (footnotes omitted), the ILC states as follows: 'The role of treaties as an exceptional basis for peremptory norms of general international law (*jus cogens*) may be understood as a consequence of the relationship between treaty rules and customary international law as described by the International Court of Justice in *North Sea Continental Shelf* cases. In that case, the Court observed that a treaty rule can codify (or be declaratory of) an existing general rule of international law, or the conclusion of a treaty rule can help crystallize an emerging general rule of international law, or that a treaty rule can, after adoption, come to reflect a general rule on the basis of subsequent practice.'

appropriate for the role of treaties in the identification of peremptory norms to be classified under draft conclusion 8.

In draft conclusion 7, the ILC indicates that the acceptance and recognition by the international community of states as a whole is relevant for the identification of peremptory norms and that, while the positions of other actors may be relevant, they cannot form part of such acceptance and recognition. In this way, the ILC is following the line it adopted previously in relation to the identification of customary international law, which was welcomed by the CAVV.<sup>23</sup> As regards the position the ILC has taken in this project too, the CAVV is of the opinion that views taken by other actors may be relevant, but are only of a subsidiary character compared with those taken by states.

In draft conclusion 8, the ILC goes on to consider what materials can serve as evidence of acceptance and recognition by states of a peremptory norm of general international law. In its commentary (§ 6), the ILC rightly notes that: ‘it should also be recalled that such materials must speak to whether the norm has a peremptory character. The question is not whether a particular norm has been reflected in these materials but, rather, whether the materials establish the acceptance and recognition of the international community of States as a whole that the norm in question is one from which no derogation is permitted.’

In draft conclusion 9, the ILC then indicates that 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 (paragraph 1), and that this can also apply to works of expert bodies established by states or international organisations and the teachings of the most highly qualified publicists (paragraph 2).<sup>24</sup>

The CAVV basically agrees with the position that the relevant categories of person and institutions can serve as a subsidiary means of establishing peremptory norms. However, it fails to see why the degree of weight to be attached should depend on the category concerned. The factors mentioned by the ILC – the reasoning of the works or writings, whether the views expressed are accepted by states and the extent to which such views are corroborated by other forms of evidence mentioned in draft conclusion 8 or in decisions of courts and tribunals – should be generally applicable. The CAVV would point out here that critical reflection on views and positions taken by relevant actors, including states, courts and authors, is crucial to a proper understanding of the subject matter of the draft conclusions. Even the ILC’s own positions and reasoning, as discussed in the commentary on draft conclusion 9 (§ 8), are open to question.

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<sup>23</sup> See CAVV, The identification of customary international law, Advisory Report no. 29, November 2017, 6-7, available at <<https://www.advisorycommitteeinternationallaw.nl/publications/advisory-reports/2017/11/01/the-identification-of-customary-international-law>>.

<sup>24</sup> In its commentary (§ 5, and also § 9), the ILC states as follows with regard to the categories mentioned in paragraph 2: ‘The use of the phrase “may also” in paragraph 2, in contradistinction to the word “are” which is used to qualify decisions of international courts and tribunals in paragraph 1, indicates that less weight may attach to works of expert bodies and scholarly writings in comparison to judicial decisions. The relevance of these other materials as subsidiary means depends on other factors, including on the reasoning of the works or writings, the extent to which the views expressed are accepted by States and the extent to which such views are corroborated either by other forms of evidence listed in draft conclusion 8 or decisions of international courts and tribunals.’

By way of illustration, the CAVV notes that in the commentary on these draft conclusions the ILC sometimes advocates interpretations of underlying materials that are not necessarily consistent with the wording used. For example, the reference by the International Court of Justice to ‘intransgressible principles of customary international law’ in international humanitarian law in its advisory opinion on the legality of the use of nuclear weapons is interpreted by the ILC as a reference to peremptory norms (see commentary on draft conclusion 5, § 5). This is despite the fact that elsewhere in that same advisory opinion the International Court of Justice explicitly used the term *jus cogens* and indicated that it did not see the need to pronounce on the assertion that the principles and rules of humanitarian law are part of *jus cogens*.<sup>25</sup> Another example concerns the ILC’s assumption that the materials to which the International Court of Justice refers in the *Prosecute or Extradite* case serve to support the proposition that the prohibition of torture is a rule of peremptory law, whereas those materials actually provide much greater support for the position taken in the same paragraph that the prohibition of torture is enshrined in customary international law (see commentaries on draft conclusion 7, § 3, draft conclusion 8, § 2 and draft conclusion 9, § 5, footnote 795).<sup>26</sup>

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<sup>25</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, International Court of Justice (ICJ), 8 July 1996, p. 226, § 79 and § 83 respectively.

<sup>26</sup> ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, p. 422, § 99, where the ICJ noted that the prohibition was grounded in a widespread international practice and on the *opinio juris* of states. In support of this, the ICJ referred to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, a General Assembly resolution and the fact that the prohibition of torture has been introduced into the domestic law of almost all states and that acts of torture are regularly denounced within national and international fora.

## Chapter 4 Legal consequences

Despite widespread support for the notion that *jus cogens* norms have superior hierarchical status, there is considerable disagreement as to the legal consequences of this status. The CAVV would note in this context that a kind of tribal dispute is taking place between, on the one hand, authors and courts in favour of deducing the legal consequences from the hierarchically higher status of peremptory norms<sup>27</sup> and, on the other, authors who believe that such consequences should have a separate basis in treaty or customary law.<sup>28</sup> Authors belonging to the former group believe that the higher status of peremptory norms means they must prevail over other, lower-ranking rules in order to ensure their effectiveness. This would be so, for example, if rules governing the granting of immunity are to be rendered inoperative in cases involving peremptory norms. By contrast, authors in the second group often argue that the legal consequences can arise only in the event of a conflict, in the strict sense of the word, between peremptory norms and other rules of international law. In taking this position, they follow the finding of the International Court of Justice in the case between Germany and Italy, when it held that no conflict existed since the nature of the two sets of rules concerned differed: procedural (the rules of state immunity) as opposed to substantive (prohibition of war crimes and crimes against humanity).<sup>29</sup>

Enlarging on this last point, the CAVV would note that the hierarchically superior status of peremptory norms is primarily operative in the event of a conflict of norms, resulting in the invalidity of a treaty or the non-establishment of a legal obligation on the basis of a unilateral act or a decision of an international organisation. This is apparent from draft conclusions 10-16 and the accompanying commentaries, which refer to a conflict between peremptory norms on the one hand and other rules or obligations in international law on the other, albeit without making clear when such a conflict can be deemed to exist.<sup>30</sup> As the aim is to provide practical guidance, the CAVV considers it would be desirable for the ILC to explain in what situations such a conflict may be said to exist. Clarification could be provided with reference

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<sup>27</sup> See, for example, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, *Prosecutor v. Anton Furundžija*, Judgment of 10 December 1998, §§ 153-157 and 144, <<http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>>; and Antonio Cassese, 'For an Enhanced Role of *Jus Cogens*' in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012), 158.

<sup>28</sup> See Carlo Focarelli, *Promotional Jus Cogens: A Critical Appraisal of Jus Cogens' Legal Effects*, (2008) 77 *Nordic Journal of International Law*, 429, 444-455; see also Kolb, *Observation sur l'évolution du concept de jus cogens* (2009) 113 *RGDIP* 837, 840-841.

<sup>29</sup> *ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, ICJ Reports 2012, p. 99, § 92-97. See Alexander Orakhelashvili, *Peremptory Norms in International Law*, 320, and Carlos Espósito, 'Jus Cogens and Jurisdictional Immunities of States at the International Court of Justice: 'A Conflict Does Exist'' (2012) XXI *Italian Yearbook of International Law* 161, who advocate that immunities should be set aside as they conflict with *jus cogens*. But see Andrea Gattini, 'The Dispute on Jurisdictional Immunities of the State before the ICJ: Is the Time Ripe for a Change of the Law?' (2011) 24 *Leiden Journal of International Law* 173, and Stefan Talmon, 'Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished' (2012) 25 *Leiden Journal of International Law* 979, who reject this position.

<sup>30</sup> An exception to this is the ILC's observation in its commentary on draft conclusion 20 (§ 2): 'Whether or not a rule of international law conflicts with a peremptory norm of general international law (*jus cogens*) is a matter to be determined through interpretation.'

to the relevant observations of the International Court of Justice in the *Jurisdictional Immunities of the State* case and those of other courts.<sup>31</sup>

**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. 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 becomes void because of the emergence of a new peremptory norm of general international law (*jus cogens*) 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 any party 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 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*).

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<sup>31</sup> ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, ICJ Reports 2012, p. 99, §§ 92-97. As regards conflicts of norms, see also: François Boudreault, 'Identifying Conflicts of Norms: The ICJ Approach in the Case of the Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)' (2012) 25 *Leiden Journal of International Law* 1003, 1010; Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003), 164–188; Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (London/New York: Routledge 2011), 141-146; and Robert Kolb, 'Conflicts entre normes de jus cogens' in *Droit du pouvoir, pouvoir du droit: mélanges offerts à Jean Salmon* (Brussels: Bruylant, 2007), 481, 483.

Draft conclusions 10 to 12 largely coincide with the provisions of the Vienna Convention on the Law of Treaties on the legal consequences of peremptory norms and do not warrant further comment. Draft conclusion 13, concerning the relationship between peremptory norms and reservations to treaties, does not seem to be directly based on the Vienna Convention on the Law of Treaties, which is silent on whether or not it is possible to make reservations that would be inconsistent with such norms. Instead, this consequence is based on guideline 4.4.3 of the Guide to Practice on Reservations to Treaties, adopted by the ILC in 2011. As the CAVV is doubtful whether treaty provisions can serve as an independent basis for peremptory norms, it would be more appropriate for this consequence to be based on conflict with a peremptory norm established under customary international law.

**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 conflicts with a 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*).

In draft conclusion 14, the ILC addresses the relationship between peremptory norms and rules of customary international law. In principle, the CAVV agrees with the position taken by the ILC. In draft conclusion 14, paragraph 1 and in the commentary (§ 6), the ILC briefly addresses the issue of the modification of a peremptory norm, but does little more than repeat the relevant part of the definition in Article 53 of the Vienna Convention on the Law of Treaties that such a norm ‘... can be modified only by a subsequent norm [...] having the same character’ (see also the commentary on draft conclusion 4, §§ 4-6). The ILC postulates that a peremptory norm is most likely to be modified by a rule of customary international law having the same character. The CAVV wonders how a peremptory norm could be modified by an evolving rule of customary international law, if, as part of the constituent element of practice, states would have to act in a manner inconsistent with an existing rule of *jus cogens*. The only circumstance in which this would not pose a problem is where the modification involves an extension of the peremptory character of an existing rule of *jus cogens*. In all other cases, there would appear to be a derogation from the norm – a restriction of its peremptory character, a new exception or a new justification – and it remains unclear how the modification could or would occur, given the positions taken by the ILC in draft conclusions 10, 14, 15 and 16. Clarification by the ILC of the process of modification would therefore be highly desirable.

As regards a possible conflict between an existing rule of customary international law and a peremptory norm that evolves later, as dealt with in draft conclusion 14, paragraph 2 (see also the commentary, § 7), the CAVV does not understand how this could be construed logically, unless the rule of customary international law were itself going through a process of

change. Moreover, the CAVV sees, in the words of the International Court of Justice,<sup>32</sup> a 'logical problem' with the conclusion set out in paragraph 3, which excludes the possibility of 'persistent objection'. The possibility of protest in the sense of a persistent objection is open to a state only in the case of an evolving rule of customary international law. This therefore means that a rule of general international law may not yet have evolved to the point where a peremptory norm could be established. The two-step approach, as advocated by the ILC and formulated in draft conclusion 4 and its commentary (§ 6), clearly implies an asynchronous development in which there is only very limited scope for persistent objection. The process by which a peremptory norm evolves should not be used simply to impose a rule on one or more states that have persistently objected to it while it was still in the process of developing into a rule of customary international law (draft conclusion 14, §§ 10-11).

**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*).

Draft conclusion 15 on unilateral acts of states needs no comment. By contrast, draft conclusion 16, which provides that resolutions, decisions or other acts of an international organisation that would otherwise have binding effect do not create obligations under international law if and to the extent that they conflict with a peremptory norm, could have far-reaching consequences. As is apparent from the statements by states, as referred to in the commentary on draft conclusion 16 (§ 4, footnote 858), the Charter of the United Nations especially deserves attention owing to article 103, which provides that obligations under the Charter prevail over obligations under any other international agreement. As these statements show, there is a certain concern that this draft conclusion could undermine the primacy of the Security Council in maintaining international peace and security and could be used for disregarding obligations imposed by Security Council resolutions.<sup>33</sup>

The CAVV agrees with the ILC's position that, as a matter of principle, binding decisions of international organisations in general, and decisions of the Security Council in particular, cannot create obligations that conflict with a peremptory norm. However, the CAVV does consider that, in paragraph 5 of the commentary, the ILC should look more closely at the

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<sup>32</sup> ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, ICJ Reports 2012, p. 99, § 82.

<sup>33</sup> In this connection, see the attempt by Bosnia and Herzegovina to have the arms embargo imposed upon the former Yugoslavia lifted before the International Court of Justice: ICJ, *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993, p. 325, § 2 (k)-(p) (claims of Bosnia and Herzegovina) and §§ 40-41, and see Separate Opinion of Judge Lauterpacht, *ibid.*, p. 407, §§ 98-106 and 123 B.



(very) wide discretion exercised by the Security Council in the case of decisions under Chapter VII of the Charter,<sup>34</sup> and that draft conclusion 20 – which provides for interpretation consistent with peremptory norms – should therefore be given special weight in relation to such decisions. In this context, the CAVV would once again like to repeat its suggestion that the ILC should explain in greater depth the circumstances in which a conflict of norms can be deemed to exist.

**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 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 a serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*) may entail under international law.

Draft conclusions 17, 18 and 19 relate to the effect of rules of *jus cogens* on the responsibility of states, and the ILC bases itself in this connection on articles 26, 40-41, 48 and 54 of the Articles on Responsibility of States for Internationally Wrongful Acts.<sup>35</sup>

The CAVV sees no need to comment on draft conclusion 17. In draft conclusion 18, the ILC states, in accordance with article 26 of the Articles on State Responsibility, that circumstances precluding wrongfulness may not be invoked with regard to acts of states that are not in

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<sup>34</sup> ICTY, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, §§ 28-32 and 39, <<https://www.icty.org/x/cases/tadic/acdec/en/51002.hm>>; STL, Decision on the Defence Appeals against the Trial Chamber's 'Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal', 24 October 2012, §§ 37 and 52, <[https://www.stl-tsl.org/crs/assets/Uploads/20121024\\_F0020\\_PUBLIC\\_AC\\_Decision\\_on\\_DC\\_Appeals\\_against\\_TC\\_Dec\\_Juris\\_Legality\\_WEB\\_EN.pdf](https://www.stl-tsl.org/crs/assets/Uploads/20121024_F0020_PUBLIC_AC_Decision_on_DC_Appeals_against_TC_Dec_Juris_Legality_WEB_EN.pdf)>.

<sup>35</sup> *Responsibility of States for Internationally Wrongful Acts*, in Report of the International Law Commission on the work of its fifty-third session, YBILC 2001, vol. II (2), 26-30.

conformity with an obligation arising under a peremptory norm. The CAVV is in general agreement with this provision.

Draft conclusion 19, and in particular its commentary, gives rise to a number of observations. The ILC states (in § 2 of the commentary) that the obligation to cooperate to bring to an end through lawful means serious breaches of peremptory norms is now recognized under customary international law, although it had expressed doubts about this in 2001.<sup>36</sup> In support of this position, the ILC refers almost exclusively to judicial reasoning in certain cases and not, as might be expected, to the practice and legal opinions of states. The CAVV believes that it would be useful to enlarge on this point in the commentary.

The ILC then indicates (in §§ 3-4 of the commentary) that cooperation should take place through collective measures, preferably within the framework of international organisations. The CAVV shares the ILC's position on this point. It would note, however, that international organisations often do not have the competence and powers to take action against breaches of obligations that fall outside the scope of their founding treaty, and that the United Nations and in particular the Security Council are often unable to act for political reasons. This is why the CAVV welcomes the ILC's observation (in § 4 of the commentary) that states ought to enact measures to end breaches of peremptory norms even outside the framework of international institutions.

Finally, the CAVV notes that in draft conclusion 19.1 and its commentary the ILC avoids the doctrinal debate about the possibility of countermeasures by a state other than an injured state. It merely observes (in § 3 of the commentary) that serious breaches of peremptory norms may not serve as a justification for the breach of other rules of international law. In 2001, the ILC considered that state practice on countermeasures taken in the collective interest was insufficiently developed, and shelved the subject for the time being by incorporating a saving clause in article 54 of the Articles on State Responsibility.<sup>37</sup> In the commentary, the ILC noted at that time:

'[...], the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest. Consequently, it is not appropriate to include in the present articles a provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures in order to induce a responsible State to comply with its obligations. Instead, chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law.'<sup>38</sup>

The CAVV considers that the legal consequences of breaches of *jus cogens* cannot be discussed in the present draft conclusions without openly addressing this thorny issue, and

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<sup>36</sup> The ILC refers in the text of the commentary (§ 2) to the 'articles on the law of treaties', but in view of footnote 878 it presumably meant the 'Articles on State Responsibility' instead.

<sup>37</sup> Commentary on article 54 of the Articles on the Responsibility of States for Internationally Wrongful Acts, footnote 35, 139, §§ 6-7.

<sup>38</sup> Ibid. § 6.

adds that as a matter of substance developments since 2001 would seem to justify reconsideration of the position taken at that time.

As regards states' obligations of non-recognition and non-assistance, the CAVV supports the position taken by the ILC.<sup>39</sup> Once again, the ILC cites judicial rulings in support of its reasoning concerning these obligations, in this case supplemented by examples from the practice of the United Nations General Assembly and Security Council. On the subject of that practice, it should be noted that it is often unclear whether the recommendations or decisions of the relevant bodies did indeed reflect existing obligations of states or were, on the contrary, constitutive in creating those obligations. However, the scope of the obligations of non-recognition and non-assistance is not immediately clear. For example, an expert group established by the Dutch government has recently concluded that the provision of political support for the illegal use of force does not conflict with these obligations, since such support does not entail recognition of the lawfulness of the situation that has arisen or the provision of assistance in maintaining that situation.<sup>40</sup> Although the Dutch government has supported this interpretation, it notes that the possibility cannot be excluded that an international court might reach a different conclusion.<sup>41</sup> The CAVV would therefore urge the ILC to consider at greater length the scope and content of the obligations referred to in draft conclusion 19, paragraph 2.

**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: Procedural requirements**

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 is to notify other States concerned of its claim. The notification is to be in writing and is to 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, shall not be less than three months, the invoking State may carry out the measure which it has proposed.
3. If any State concerned raises an objection, then the States concerned are to seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

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<sup>39</sup> In this connection, see generally Stefan Talmon, *The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?*, in Christian Tomuschat and Jean-Marc Thouvenin (eds.), *The Fundamental Rules of the International Legal Order, Jus Cogens and Obligations Erga Omnes* (Brill 2006), 99.

<sup>40</sup> *Humanitarian Intervention and Political Support for Interstate Use of Force*, Report of the Expert Group established by the Minister of Foreign Affairs of the Netherlands, 19 December 2019, § 43, <<https://www.rijksoverheid.nl/documenten/rapporten/2019/12/19/humanitarian-intervention-and-political-support-for-interstate-use-of-force>>.

<sup>41</sup> Letter to parliament containing the government's response to the final report of the expert group on the interstate use of force and humanitarian intervention, 17 April 2020, third page, <<https://www.rijksoverheid.nl/documenten/kamerstukken/2020/04/17/kamerbrief-met-reactie-kabinet-op-eindrapport-expertgroep-inzake-politieke-steun-aan-interstatelijk-geweldsgebruik-en-in-inzake-humanitaire-interventie>>.

4. If no solution is reached within a period of twelve months, and the objecting State or States concerned offer to submit the matter to the International Court of Justice, the invoking State may not carry out the measure which it has proposed until the dispute is resolved.

5. This draft conclusion is without prejudice to the procedural requirements set forth in the Vienna Convention on the Law of Treaties, the relevant rules concerning the jurisdiction of the International Court of Justice, or other applicable dispute settlement provisions agreed by the States concerned.

Draft conclusion 20 provides that in the event of a potential conflict between a rule of international law and a peremptory norm, the former should, as far as possible, be interpreted and applied so as to be consistent with the latter. The CAVV endorses the ILC's comment about the limits of interpretation,<sup>42</sup> and sees no reason to comment further on this point. As regards draft conclusion 21, which suggests certain procedural obligations, the CAVV has doubts about the value, or at least the practical application, of the 'rules' it contains.<sup>43</sup> The position taken by the ILC on the legal consequence of an offer to refer a case to the International Court of Justice also raises doubts. In such a case, draft conclusion 21, paragraph 4, provides that a state invoking a peremptory norm as a ground for the invalidity or termination of a rule of international law may not carry out the intended measure until the dispute is resolved. Not only is the status of this position unclear under international law, but it also does not seem desirable since the International Court of Justice has the power to order provisional measures and thus will be able to assess the usefulness and necessity of the envisaged measure at an early stage.

**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.

Although the ILC's attempt to avoid placing its own interpretation on the underlying subject matter and steer clear of doctrinal disputes and controversies may be understandable, it is sometimes problematic. In the commentary on draft conclusion 1 (§ 5), the ILC states that the draft conclusions focus on legal consequences that generally flow from peremptory norms and do not attempt to determine the (potential) specific consequences of individual peremptory norms. In this way, the ILC sidesteps a debate about a range of legal consequences which are stated or suggested in the literature to flow from peremptory norms, but without providing any (clear) explanation of why it considers that such (specific) consequences apply only to individual and not to all peremptory norms. In the commentary on draft conclusion 22 (§ 4), the ILC states that legal consequences of peremptory norms that prohibit the commission of certain crimes (genocide, crimes against humanity and war crimes), such as the consequences for immunity and the jurisdiction of national courts, relate

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<sup>42</sup> Cf. commentary on draft conclusion 20, § 6.

<sup>43</sup> It has to be wondered whether the position taken by the ILC in paragraph 2 of draft conclusion 21 implies that states that have been silent for three months (or longer) are deemed to share the view of the invoking State that there is indeed a peremptory norm and that a conflict exists. In addition, the ILC itself already indicates (in § 4 of the commentary) that 'Not every aspect of the detailed procedure set forth in draft conclusion 21 constitutes customary international law.' The value of this draft conclusion is therefore not apparent, considering also the text of paragraph 5 of draft conclusion 21.

only to specific peremptory norms. However, the ILC fails to provide any further explanation as to why that would be the case.<sup>44</sup>

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<sup>44</sup> For example, the Dutch government called on the ILC specifically to address the consequences of *Jus cogens* norms for jurisdiction and immunity: UNGA, Sixth Committee, A/C.6/72/SR.26, 5 December 2017, § 34 (Netherlands).

## Chapter 5 Draft conclusion 23 and the list of peremptory norms

### **Conclusion 23: 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.

As its final draft conclusion, the ILC refers to a non-exhaustive list (in the annex to the draft conclusions) of peremptory norms previously described as such by the ILC itself. The Dutch government has expressed its concern that the inclusion of such a list will create a high barrier to the acceptance of future norms as *jus cogens*.<sup>45</sup> Like the Dutch government, the CAVV has serious doubts about the inclusion of such a list. These doubts are partly prompted by the fact that the ILC itself states in the commentary (§ 1) that a thorough study of existing or potential peremptory norms falls beyond the scope of the draft conclusions. The ILC tries to evade the restrictions it has imposed on itself by simply referring to norms which it has itself previously identified as having that status, without taking into account that at the time there were no underlying in-depth studies that used the methodology of the current draft conclusions.<sup>46</sup> The list is therefore built on quicksand. Although it is understandable that the ILC makes no attempt (in § 3 of the commentary) to define the scope, content or application of the identified norms, this does create complications when it comes to identifying the norms concerned. If the ILC carries out its intention of including this non-exhaustive list as an annex to the draft conclusions, the following observations will be of importance in order to make possible clarifications.

The ILC lists the prohibition of aggression in point (a) of the Annex and mentions its previous references to this prohibition in the commentary on draft conclusion 23 (§ 5) and that the 'Report on the fragmentation of international law' referred to 'the prohibition of aggressive use of force'. However, the difference between the prohibition of aggression and the prohibition of the use of force remains unclear. The precise relationship between the two has

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<sup>45</sup> See UNGA, Sixth Committee, A/C.6/71/SR.26, 5 December 2016, § 44 (Netherlands). See also UNGA, Sixth Committee, A/C.6/72/SR.26, 5 December 2017, § 33 (Netherlands); UNGA, Sixth Committee, A/C.6/73/SR.26, 23 November 2018, § 58 (Netherlands); UNGA, Sixth Committee, A/C.6/74/SR.24, 11 November 2019, § 5 (Netherlands).

<sup>46</sup> In a recent publication, Murphy, an ILC member, also pointed out that not all peremptory norms previously mentioned by the ILC were included on this list as such, but that the ILC observed that there appeared to be widespread support for certain rules to have the status of peremptory norms. See Sean Murphy, *Peremptory Norms of General International Law (Jus Cogens) and Other Topics: The Seventy-First Session of the International Law Commission*, (2020) 114 *American Journal of International Law* 68, 71-72.

an important bearing on the problematics of exceptions to peremptory prohibitions and hence also on the process of modifying peremptory norms.

The ILC lists the prohibition of crimes against humanity in point (c) of the annex and describes its previous work on this subject in the commentary. However, exactly what acts may not be derogated from remains unclear. The CAVV notes that the inclusion of this norm appears to be supported by only a single court judgment. The same seems to be true of the inclusion under (d) of the basic rules of international humanitarian law, regarding which it should be noted that the ILC has at no time specified what rules of international humanitarian law ought to be considered as basic.

It is also unclear what may not be derogated from in the case of the right of self-determination listed under (h) of the annex. A workable arrangement could be created if the scope of this peremptory norm were to be limited to the prohibitions on colonial rule, foreign occupation or oppression by racist regimes. If that scope were to be extended to all internal political and representative structures of a state, it would be necessary to make clear what is specifically required in order to come within the scope of the peremptory norm.