Conclusions and Questions:
The Peremptory Norms of General International Law

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Jus cogens have the abbreviations JC and there was another fellow, very long ago, who could walk on water, who could turn water into wine and who also had the initials JC and I think this is suggesting something about the power of jus cogens and the impact that they potentially could have
- Dire Tladi, UN Special Rapporteur[1]

I. Introduction

The concept known as a peremptory or *jus cogens* norm[2] can potentially change the international law landscape. The term *"jus cogens"* means "compelling law"[3] while "peremptory" means "final; absolute; conclusive; incontrovertible."[4] This norm is the highest of all norms and invalidates all other sources of law in conflict with it. *Criddle* says that the "rise of peremptory norms over the past century has sent shock waves across international legal theory."[5]

On the one hand, such a powerful norm may usher in an era of a rule of law in the international community. But on the other hand it may de-stabilize the current system based on state sovereignty and consent. *Linderfalk* says

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[1] Ana Zdravkovic, *Finding the Core of International Law – Jus Cogens in the Work of International Law Commission,* 5 South Eastern Europe and the European Union - Legal Issues, 141, (2019).

[2] In this paper these two terms are used interchangeably.

[3] Evan J Criddle, & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 Yale J. Intl L. 331 (2009).

[4] Black's Law Dictionary (9th ed. 2009)

[5] Criddle, *supra* note 3 at 332.

that "if we take the existence of peremptory international law to its logical consequence…most actors on the international arena will consider the effects unacceptable."[6] Considering the great promise and peril posed by peremptory norms it is no surprise that there is a great body of literature written about peremptory norms. Adding to the pile is the most recent work of the International Law Commission (ILC).

In 2022, the ILC issued the "Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens) (DCILCPN)". The ILC also issued commentaries on each of the draft conclusions (Commentary). The DCILCPN is intended to settle many of the issues surrounding peremptory norms. The question is whether it has clarified the issues or has it added to the confusion.

This paper analyzes the DCILCPN and refers to the current legal scholarship on peremptory norms where appropriate. The paper also briefly situates the Philippine jurisprudence pertinent to peremptory norms in the current scholarship. The paper concludes by summarizing what is now clear and what is still confusing about the concept of peremptory norms. Thus, this paper hopes to provide the Philippine legal scholar or practitioner in orienting information on the current state of law and jurisprudence on peremptory norms.

A. Historical development of peremptory norms

Some would argue that the concept has its roots early in legal history. Some say that similar to many international law principles, "[t]he roots of *jus cogens* lie in Roman law: *jus publicum privatorum pactis mutari non potest*."[7] *Shelton* points out that "[s]ome early writers found the source of compulsory law in divine or religious law binding on all human and human institutions."[8] Other writers would say that, "[p]eremptory norms have been recognized

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[6] Ulf Linderfalk, *The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did you Ever Think About the Consequences?*, 18 European Journal of International Law, 853, (2008).

[7] Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, 665 (2008).

[8] Dinah Shelton, *Sherlock Holmes and the Mystery of Jus Cogens*, 46, Netherlands Yearbook of International Law, 23, 26,(2016).

and justiciable since the late 18th century."[9] But according to *Suy*, "the actual words *jus cogens* are not found in any text prior to the nineteenth century."[10] However, since 1945 there seems to be a consensus on the existence of this concept.[11]

The concept only obtained formal acceptance in international law, with the codification of the Vienna Convention on the Law of Treaties (VCLT). Article 53 of VCLT provided the definition of peremptory norms and the effect of existing peremptory norms on newly concluded treaties, while Article 64 provided for the effect of new peremptory norms to pre-existing treaties. Article 71 provides for further consequences of invalidity of treaties in conflict with peremptory norms. But the VCLT did not address all of the issues surrounding peremptory norms.

B. Issues with peremptory norms

1. Justificatory theory

Perhaps the main issue is which justificatory theory[12] provides a legal basis for the existence of peremptory norms.

a. Natural Law

One view is that peremptory norms emanate from natural law principles which "were unchangeable even by God [and thus] necessarily bound all sovereigns on earth."[13] If peremptory norms did form part of natural law then this would explain why they are hierarchically superior to other norms. However, if this is the case, peremptory norms are anachronistic and have no place in the current international legal community dominated by positivism.

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[9] William E. Conklin, *The Peremptory Norms of the International Community*, 23, European Journal of International Law, 837, 838 (2012).
[10] Shelton, *supra* note 8 at 28.
[11] Villiger, *supra* note 7 at 666.
[12] *See* Matthew Saul, *Identifying Jus Cogens Norms: The Interaction of Scholars and International Judges*, 5, Asian Journal of International Law, 26-27 (2015).
[13] Shelton, *supra* note 8 at 27.

b. Logical or legal necessity

Another view is that logical or legal necessity requires the existence of peremptory norms.[14] This "public order theory"[15] argues that "*jus cogens* norms exist as imperative and hierarchically superior to other international law in order to promote the interests of the international community as a whole and preserve core values."[16] *Shelton* points out that "any society operating under the law must have fundamental rules [which allow] no dissent if the existence of the law and society is to be maintained."[17] It is said that "the *ratio legis* of *jus cogens* is to protect the common concerns of the subjects of law, the values and interests considered indispensable by a society at a given time."[18] This view aligns with the idea that peremptory norms reflect and protect fundamental values.[19] But this view also requires that the international community has reached a point of cohesion that it shares common values. Given the current state affairs in international relations, such a cohesion or unity in the international community can hardly be seen.

c. General principles of law

Yet another view is that peremptory norms originate from general principles of law recognized in all legal systems.[20] *Shelton* points out that "[d]omestic laws generally provide for the invalidity of agreements that conflict with public policy."[21] *Magallona* argues that peremptory norms or norms hierarchically superior to others are common in municipal legal systems.[22] But the current list of accepted peremptory norms[23] do not seem to correspond with principles applicable in the domestic legal system.

d. Consent of states

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[14] Shelton, *supra* note 8 at 28.
[15] Shelton, *supra* note 8 at 29.
[16] *Id.*
[17] Shelton, *supra* note 8 at 28.
[18] Shelton, *supra* note 8 at 29.
[19] *See* discussion under Part II B 1 a.
[20] Shelton, *supra* note 8 at 30.
[21] *Id*.
[22] Merlin M. Magallona, *International Law Issues in Perspective*, (1996).
[23] *See* Annex of the DCILCPN.

Finally, scholars like *Magallona* would argue that peremptory norms in the international plane arise from the consent of states. They contend that "states themselves had recognized peremptory norms and their effect in customary international law."[24] *Dubois* would disagree and argue that an attempt to justify this using "a voluntarist consensual basis is incoherent, unconvincing and ultimately relies on a certain form of circular reasoning."[25] *Criddle*, would point out that "[b]y placing limits on state action, jus cogens challenges the positivist orthodoxy that views state consent as the wellsping of all international obligations."[26] Despite these objections, it may be argued that peremptory norms "came into positive law with the [Vienna Convention on the Law of Treaties.]"[27] The basis is that "Article 53 of the VCLT sanctioned the 'positivization' of natural law."[28]

This last view seems to be the prevailing view as "[m]ost contemporary commentators continue to view *jus cogens* through the prism of state consent." [29] Furthermore in one case[30]the ICJ "concluded that the prohibition against torture is a norm of *jus cogens* based on 'widespread international practice and on the *opinio juris* of States.'"[31] The problem with this view is that a consent-based system seems inconsistent with a norm that binds even states who do not give their consent. *Shelton* says "[t]he positivist concept of peremptory norms thus reaches a conundrum in having a consensual process with a non-consensual result - the imposition of rules adopted by a large majority on dissenting states."[32]

2. Practical value

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[24] Shelton, *supra note 8* at 32.
[25] Dan Dubois, *The Authority of Peremptory Norms in International Law: State Consent of Natural Law?,* 78, Nordic J. Int'l L., 133, 134 (2009).
[26] Criddle, *supra* note 5 at 332.
[27] Shelton, *supra note 8* at 33.
[28] *Id.*
[29] Shelton, *supra note 8* at 34.
[30] Question relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Judgment, 2012 I.C.J. ¶ 99 (Jul 20) cited in Shelton, *supra* note at 34.
[31] Shelton, *supra note 8* at 34.
[32] *Id.*

Another issue raised against the concept of peremptory norms is that it does not provide any practical value. Despite its popularity, the application of peremptory norms in practice has been limited.[33] *Zdravkovic* states that peremptory norms "were usually invoked in case law of international courts just to strengthen the moral appeal of some relevant arguments."[34] *Shelton* would argue that the concept of a peremptory norm "is largely if not entirely a literary construct, a theoretical proposal for what ought to be, rather than what was or is."[35] Thus, its actual function is to merely provide "symbolic expression or declaration of societal values."[36]

Despite these issues, peremptory norms remain prominent in legal scholarship. This popularity of peremptory norms in an international legal system dominated by the positivist point of view is surprising if it belongs to natural law.[37] Aside from legal scholarship, some have noted increasing references to peremptory norms in domestic and international courts.[38] Perhaps this is what prompted the ILC to come up with the DCILCPN.

C. Recent developments

As mentioned, the ILC issued the DCILCPN in 2022. This was intended to clarify many of the issues raised by scholars over the years. But the DCILCPN did more than clarify outstanding issues. It created new rules that affected other sources of international law. It also added new requirements in existing rules (e.g., reservations, interpretation of treaties). Thus, in the process of clarifying the issues, the DCILCPN created new questions. As it generated additional requirements and concepts, some confusion may arise.

The DCILCPN is intended to provide "guidance to all those who may be called upon to determine the existence of peremptory norms of general international law (*jus cogens*) and their legal consequences."[39] These may be

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[33] Dubois, *supra* note 25 *at* 136.
[34] Zdravkovic, *supra* note 1 at 158.
[35] Shelton, *supra* note 8 at 24.
[36] Shelton *supra* note 8 at 35.
[37] *See for example* Dubois, *supra* note 25 at 133.
[38] Hélène Ruiz Fabri, *Enhancing the Rhetoric of Jus Cogens*, 23, 4, European Journal of International Law, 1049, (2012). 9; UN General Assembly, *Report of the International Law Commission,* 77th Sess. at 17 par. 2, U.N. Doc. A/77/10, (Aug. 12, 2022).
[39] A/77/10, *supra note 38* at 17 par*. 2.*

judges, legislators and policymakers. Thus, it is important for those with these roles in government to be aware of the DCILCPN.

The DCILCPN is "concerned primarily with the method for establishing whether a norm of general international law has the added quality of having a peremptory character."[40] This addresses one of the main issues raised against the concept, which is the criteria or methodology of determining whether a norm is peremptory or not.

Apart from identification, the DCILCPN deals with the legal consequences of peremptory norms. But the conclusions only "address general legal consequences of peremptory norms."[41] The ILC recognizes that individual peremptory norms "may have specific consequences that are distinct from the general consequences flowing from all peremptory norms"[42] but the conclusions are not concerned with them. Furthermore, "[t]he draft conclusions are significant because they draw upon, clarify and at times expand upon the previous work of the [ILC]."[43]

Thus, a thorough analysis of the provisions of the DCILCPN is very important.

II. Identification of Peremptory Norms

A. Terminologies

As explained by the Commentary, *jus cogens*, *peremptory norms* and *peremptory norms of general international law* "are sometimes used interchangeably in State practice, international jurisprudence and scholarly writings."[44] In this paper, the preferred term is "peremptory norm" and is deemed equivalent to the term "jus cogens norm."[45]

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[40] A/77/10, *supra* note 38 at 17 par. 4.
[41] A/77/10, *supra* note 38 at 17 par. 6.
[42] *Id.*
[43] *See* A/77/10, *supra* note 38 at 60 conclusion 15.
[44] A/77/10, *supra* note 38 at 17-18 par. 7.
[45] However, the more popular term in legals scholarship is "jus cogens" hence that term is retained when quoting from the works of scholars.

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

Conclusion 3 provides:

> 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 (*jus cogens*) having the same character.

Clearly, this definition is founded on Article 53 of the VCLT albeit "with modifications to fit the context of the draft conclusions."[46] This underscores the fact that this definition "has come to be accepted as a general definition of peremptory norms of general international law (*jus cogens*) that applies beyond the law of treaties."[47] It is "the most widely accepted definition in the practice of States and in the decisions of international courts and tribunals [and] commonly used in scholarly writings."[48]

Based on this definition, a peremptory norm consists of two main elements: [49]

- a norm of general international law; and
- "accepted and recognized by the international community of States as a whole as one from which no derogation is permitted, and which can only be modified by a norm having the same character."

Similarly, these constitute "the criteria for the identification of peremptory norms".[50]

III. Domestic, bilateral regional *jus cogens*

[46] A/77/10, *supra* note 38 at 27 par. 1.
[47] *Id.*
[48] A/77/10, *supra* note 38 at 27 par. 2.
[49] A/77/10, *supra* note 38 at 27, par.3.
[50] *Id.*

The Commentary explains that *jus cogens* norms in domestic legal systems, do not form part of the coverage of the draft conclusions neither do norms of a purely bilateral or regional character.[51] This supports the justificatory theory for peremptory norms based on general principles of law. It also suggests that not only are there national peremptory norms but also, regional or bilateral norms.

IV. Norm

The Commentary further explained that the term *norm* is used because it is understood to have a broader meaning than "rules" and "principles" although they can be used interchangeably.[52] Furthermore, *norm* was chosen in order to be consistent with the VCLT.[53]

A. Nature of peremptory norms of general international law

Conclusion 2 describes the nature of peremptory norms using *three essential characteristics*: [54]

> 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. [55]

1. Three essential characteristics

a. Reflect and Protect Fundamental Values

The first of these characteristics is that peremptory norms "reflect and protect fundamental values of the international community."[56] The terms

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[51] A/77/10, *supra* note 38 at 18 par. 8.
[52] A/77/10, *supra* note 38 at 18 par. 9.
[53] *Id.*
[54] A/77/10, *supra* note 38 at 18 par. 1.
[55] A/77/10, *supra* note 38 at 18.
[56] A/77/10, *supra* note 38, 18 par. 2.

reflect and protect "underline the dual function that fundamental values play in relation to peremptory norms of general international law."[57]

The term *reflect* indicates that fundamental values "provide, in part, a rationale for the peremptory status of the norm of general international law at issue" and "seeks to establish the idea that the norm in question gives effect to particular values."[58] This suggests that the peremptory norm is not the value itself but is based on or is a consequence of a fundamental value. Perhaps what is meant is similar to the relationship between good faith and *pacta sunt servanda*. The former being the principle that the latter is based on.

The term *protect* communicates that a peremptory norm "serves to protect the value(s) in question."[59] This further clarifies that the value is not the norm. How peremptory norms protect values was not explained by the Commentary but examples were provided.

In *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion,*[60] the ICJ "linked the prohibition of genocide [a peremptory norm] to fundamental values."[61] Particularly, it noted:

> that the prohibition was inspired by the commitment 'to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations.[62]

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[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] International Court of Justice, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion 1951 I.C.J. 15, 23 (May 28).
[61] A/77/10, *supra* note 38 at 19 par. 3.
[62] *Id.*

The court's further reference to the *conscience of mankind* and *moral law* is said to "evoke fundamental values shared by the international community."[63]

In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the Court suggested a relationship between peremptory norms and "obligations which protect essential humanitarian values."[64]

The Commentary further notes that "[t]he connection between values and the peremptory character of norms has also been made by other international courts and tribunals."[65] This link "can also be found in the practice of States,[66] in the decisions of national courts,[67] and in scholarly writings."[68]

That peremptory norms reflect and protect fundamental values imply that the latter determine the existence of peremptory norms. In other words, in order for a peremptory norm to exist, there must be a fundamental value involved. What is not clear from the Commentary is what exactly are fundamental values and how they are determined. While the conclusion explained the nature of peremptory norms, unfortunately it created a new term to be defined and explained.

The only guidance given by the Commentary is that "these values are not static and may evolve over time" and are "generally humanitarian in nature" but may include "other values, as long as they are shared by the international community."[69]

Shelton also points out that "only when there is a minimum degree of community feeling does it elevate certain values as necessary, with primacy over others."[70] Thus, peremptory norm start "to appear in positive law as

[63] A/77/10, *supra* note 38 at 19 par. 4.
[64] *Id.*
[65] *Id.*
[66] A/77/10, *supra* note 38 at 20 par. 5.
[67] *Id.*
[68] A/77/10, *supra* note 38 at 21 par. 6.
[69] A/77/10, *supra* note 38 at 22 par. 7.
[70] Shelton, *supra* note 8 at 29.

international society develops from relatively unorganized into an increasingly organized one with common interests and values."[71] The question therefore arises whether the international community has reached that point.

Noticeably, conclusion 2 also says that these fundamental values are "of" the *international community*, suggesting that these emanate from this group. The reference to "international community" is significant because other draft conclusions refer to the *international community of States as a whole*.[72] The latter "is used in respect of the criteria for peremptory norms ... because in so far as the application of the criteria is concerned, it is the views of States that matter."[73] In contrast, the term *international community* "includes other actors beyond States, which may play an important role in the emergence of fundamental values."[74] Thus, while the opinions of non-state actors do not matter with respect to identifying peremptory norms, they do matter with respect to identifying fundamental values.

b. Universally applicable

That peremptory norms are universally applicable "means that they are binding on all subjects of international law that they address, including States and international organizations."[75] Thus, this characteristic deals with the coverage of peremptory norms. Individuals and other possible subjects of international law are not mentioned by the Commentary. But since the universal applicability of peremptory norms "flows from non-derogability"[76] peremptory norms should be binding on all subjects of international law. It makes no sense for peremptory norms to bind only states and international organizations and not individuals and other subjects of international law.

The universal applicability of peremptory norms, as defined by the Commentary, has two implications.[77] The first implication is that "the

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[71] *Id.*
[72] A/77/10, *supra* note 38 at 23 par. 9.
[73] *Id.*
[74] *Id.*
[75] A/77/10, *supra* note 38 at 23 par. 10.
[76] *Id.*
[77] A/77/10, *supra* note 38 at 24 par. 13.

persistent objector rule or doctrine is not applicable to peremptory norms".[78] The second implication is that peremptory norms "do not apply on a regional or bilateral basis."[79] Thus, while customary international law can be regional or local, a peremptory norm cannot have this character. This further implies that regional customs cannot ripen into peremptory norms.

c. Hierarchically superior

The third characteristic is that "peremptory norms ... are hierarchically superior to other norms of international law."[80] This means that other norms have no effect if it is in conflict with a peremptory norm. The Commentary however does not appear to adopt a theory justifying why peremptory norms are hierarchically superior.

2. Characteristics not criteria

The Commentary clarifies that these characteristics "are themselves not criteria for the identification of peremptory norms"[81] and are not "additional criteria for the identification of peremptory norms."[82] Thus, "[t]o identify a norm as a peremptory norm ...it is not necessary to advance evidence of the characteristics in draft conclusion 2."[83] However, "[t]hough they themselves are not criteria, the existence of the characteristics contained in draft conclusion 2 may provide context in the assessment of evidence for the identification of peremptory norms."[84] Thus:

> [E]vidence that a norm reflects and protects fundamental values of the international community, is hierarchically superior to other norms of international law and is universally applicable, may serve to support or confirm the peremptory status of a norm.[85]

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[78] *Id.*
[79] *Id.*
[80] A/77/10, *supra* note 38 at 24 par. 14.
[81] A/77/10, *supra* note 38 at 26 par. 18.
[82] *Id.*
[83] *Id.*
[84] A/77/10, *supra* note 38 at 27 par. 19.
[85] *Id.*

However, the Commentary explains that "[t]his supplementary evidence cannot, however, in and of itself, constitute the basis for identifying peremptory norms."[86]

There is however a problem created by this clarification that the characteristics are not criteria. Suppose a norm exists which has all three characteristics. But the implication of the Commentary's clarification is that this fact does not mean it is a peremptory norm if the criteria are not met. If such a norm exists, and it is not necessarily a peremptory norm as the Commentary clarifies, what type of norm is it? It would be better if the characteristics are simply considered the consequence of norms having a peremptory character instead of insisting that they do not necessarily mean that the norms are peremptory.

B. Criteria for Identification

Conclusion 4 provides for the criteria for identifying a peremptory norm. It says:

> 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:
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> 1. it is a norm of general international law; and
> 2. 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.

The Commentary explains that the phrase *it is necessary to establish* "indicates that the criteria must be shown to be present and that they should not be assumed to exist."[87] Moreover:

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[86] *Id.*

[87] A/77/10, *supra* note 38 at 29 par. 2.

> It is thus not sufficient to point to the importance or the role of a norm in order to show the peremptory character of that norm. Rather, "it is necessary to establish" the existence of the criteria enumerated in the draft conclusion.[88]

Thus pointing out that the norm is important to protect fundamental values is not sufficient. Furthermore, both criteria must be present.

1. First Criterion: A Norm of General International Law

a. The meaning of "general"

The term *general* in "refers to the scope of applicability of the norm in question."[89] Another way to define "general" is to distinguish it from "specialist systems" such as human rights law and environmental law. But *Zdravkovic* points out that "this kind of distinction might preclude some rules …from acquiring the status of *jus cogens*."[90] If peremptory norms can only emanate from general international law, then rules from such specialist systems will not obtain such a status. Thus, defining general international law as a scope of applicability is appropriate because this will not "deprive any branch of international law the chance to acquire the *jus cogens* status."[91] The Commentary elaborates that *norms of general international law* are "those norms of international law that ...must have equal force for all members of the international community."[92]

If *general* is defined in this way then it is identical with the characteristic that peremptory norms must be universally applicable. If both terms refer to the same concept then there is an overlap between characteristics and criteria and the insistence of the Commentary that the characteristics are not criteria becomes meaningless.

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[88] *Id.*
[89] A/77/10, *supra* note 38 at 31 par. 2.
[90] Zdranovic, *supra* note 1 at 145.
[91] *Id.*
[92] A/77/10, *supra* note 38 at 31 par. 2.

The criterion that the norm in question must be a norm of general international law is further explained in Conclusion 5 which provides that the "bases of peremptory norms of general international law" are, as follows:

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*).

If the term *genera*l refers to scope of applicability then there are problems with the two bases mentioned in Conclusion 5. First, while customary international law generally is applicable to all states, there are exceptions. One exception are regional or local customs. International law recognizes the possibility of customs arising between states and not all states as a whole. Second, while there may be treaties that are binding on most states of the world, a treaty by definition is binding only on state parties and are therefore not applicable to all.

The Commentary admits that "[t]reaties, in most cases, are not 'general international law' since they do not usually have a general scope of application with 'equal force for all members of the international community.'"[93] But it also explains that, "[t]he phrase "treaty provisions" is used instead of 'treaties' to indicate that what is at issue are the one or more norms contained in the treaty rather than the treaty itself."[94] But this does not solve the problem because every individual treaty provision is also only binding on parties.[95]

Perhaps it would be better to understand *general* not as scope of applicability but requirement that a peremptory norm emanates from the three formal sources of law.[96]

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[93] A/77/10, *supra* note 38 at 33 par. 8.
[94] *Id.*
[95] The inclusion of treaty provisions as a source of peremptory norms suggests that these treaty provisions must first become custom before they can become peremptory.
[96] Technically only two (i.e., custom and general principle of law), if a treaty provision is required to become customary before it can become peremptory.

b. Bases as Sources

The title of Conclusion 5 is "Bases for peremptory norms of general international law (*jus cogens*)."

The Commentary explains that the terms *basis* in paragraph 1 and *bases* in paragraph 2 of draft conclusion 5 "are to be understood flexibly and broadly" as "[t]hey are meant to capture the range of ways that various sources of international law may give rise to the emergence of a peremptory norm."[97] It further adds that "[t]he Commission decided not to use the words 'source' or 'sources' as these might create confusion with the notion of sources of international law in Article 38, paragraph 1, of the Statute of the International Court of Justice."[98] This implies however that the words *bases* and *basis* should be understood as being the equivalent of "source" and "sources." This also means that peremptory norms need to begin either as customary rules or treaty provisions or general principles of law before becoming peremptory norms. This further bolsters the argument that "general" does not mean "scope of applicability" but based on the formal sources of law.

Conclusion 5 paragraph 1 identifies customary international law, as "the most common basis for peremptory norms."[99] The Commentary explains that "[t]his is because customary international law is the most obvious manifestation of general international law."[100] But as pointed earlier not all customs are general in scope. However, "international tribunals often use 'general international law' and 'customary international law' as synonyms."[101]

Conclusion 5 paragraph 2 provides that treaty provisions and general principles of law may also serve as bases for peremptory norms. The Commentary explains that "[t]he words 'may also' are meant to indicate that while there is little practice to support the emergence of peremptory norms

[97] A/77/10, *supra* note 38 at 33 par. 5.
[98] *Id.*
[99] A/77/10, *supra* note 38 at 31 par. 4.
[100] *Id.*
[101] Zdravkovic, *supra* note 1 at 146.

from these sources, the possibility of these other sources of international law forming the basis of peremptory norms ... cannot be *a priori* excluded."[102] As mentioned earlier, some scholars consider general principles of law as justification for the existence of peremptory norms in international law. If they are correct, then a general principle of law serving as the basis of peremptory norms is not so far-fetched.

2. Second criterion: Accepted and Recognized

The second criterion requires that "the norm must be 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 norm having the same character."[103] *Zdravkovic* argues that these criteria are actually steps such that "only after it has been determined that a norm belongs to the general international law"[104] can this next step of determining acceptance and recognition proceed.

The Commentary clarifies that "this second criterion, though composed of various elements, is a single composite criterion"[105] and further explains that:

> the non-derogation and modification elements are not themselves criteria but rather, form an integral part of the "acceptance and recognition" criterion. It is in this sense that the second criterion, though composed of several elements, constitutes a single criterion.[106]

It may be argued that it is sufficient that it is accepted and recognized that the norm is non-derogable regardless of whether in fact it has been non-derogable in practice.

a. A distinct acceptance and recognition

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[102] A/77/10, *supra* note 38 at 33 par. 7.
[103] *Id.* at 29, par. 3.
[104] Zdravkovic, *supra* note 1 at 149.
[105] A/77/10, *supra* note 38 at 29 par. 3.
[106] A/77/10 *supra* note 38 at 30 par 6.

The meaning of "acceptance and recognition" is further explained in Conclusion 6 which states:

> 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 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.

The Commentary explains that *acceptance and recognition* "denote[s] the range of ways that States may show their view that a norm has peremptory character."[107]

The acceptance and recognition in Conclusion 6 is distinct from *acceptance as law* (*opinio juris*),[108] as an element for the identification of customary international law, or *recognition*,[109] as an element for the identification of general principles of law.[110] Acceptance and recognition in Conclusion 6 is "qualitatively different"[111] because it "concerns the question of whether the international community of States as a whole recognizes a rule of general international law as having peremptory character."[112] This suggests that states must specifically indicate their acceptance and recognition that the norm is peremptory in character and not simply recognize its binding effect.

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[107] A/77/10 *supra* note 38 at 37 par. 4.
[108] A/77/10 *supra* note 38 at 36 par. 2. The Commentary states: "Acceptance as law (*opinio juris*) addresses the question of whether States accept a practice as a rule of law and is a constitutive element of customary international law".
[109] *Id.* The Commentary states: "Recognition as a general principle of law addresses the question of whether a principle has been recognized as provided for in Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice"
[110] *Id.*
[111] *Id.*
[112] *Id.*

The determination of acceptance and recognition "involves the weighing and assessment of evidence."[113] Thus, merely making a claim of acceptance and recognition is not sufficient There must be evidence as described in Conclusions 8 and 9.[114]

As to the actual practice of acceptance and recognition, *Shelton* notes that "few if any examples can be found where states have expressly indicated their intent to identify or create a peremptory norm; identification is thus by implication."[115] Only time will tell if the DCILCPN would encourage states to be more proactive in accepting and recognizing peremptory norms.

b. International Community of States

Conclusion 7 paragraph 1 states:

> 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*).

Thus, the acceptance and recognition must be made by the international community of States as a whole. The acceptance and recognition by other subjects of international law would not be relevant.[116]

The Commentary explains that "the words 'as a whole' are meant to indicate that it was not necessary for the peremptory nature of the norm in question 'to be accepted and recognized ... by all States' and that it would be sufficient if 'a very large majority did so.'"[117] As Conclusion 7 paragraph 2 states, "[a]cceptance and recognition by a very large and representative majority of States is required and not necessarily "by all States."" Thus, what is required is not a simple majority but a very large majority.[118] The

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[113] A/77/10 *supra* note 38 at 37 par 5.
[114] *Id.*
[115] Shelton, *supra* note 8 at 34.
[116] A/77/10, *supra* note 38 at 38 par. 3.
[117] A/77/10, *supra* note 38 at 40 par. 6.
[118] A/77/10, *supra* note 38 at 40 par. 7.

Commentary further explains that determining a very large majority is not "a mechanical exercise in which the number of States is to be counted. Rather than a purely quantitative assessment in which a majority was determined, the assessment had to be qualitative"[119] as "captured by the word 'representative' to qualify 'majority of States.'"[120] This means "the acceptance and recognition be across regions, legal systems and cultures."[121] The Commentary further explains that "[t]he combination of the phrases 'as a whole' and 'community of States' serves to emphasize that it is States as a collective or community that must accept and recognize the non-derogability of a norm."[122] *Zdrakovic* proposes that "at least two-thirds of all members of the international community, including the most powerful states in economic and military terms, should accept the norm in question."[123]

c. Evidence of acceptance and recognition

Conclusion 8 provides for the forms of evidence for acceptance and recognition. It states:

> 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.

[119] *Id.*
[120] A/77/10, *supra* note 38 at 40 par. 8.
[121] *Id.*
[122] A/77/10, *supra* note 38 at 40 par. 6.
[123] Zdrakovic, *supra* note 1 at 150.

The list of possible forms listed on paragraph 2 is not exclusive and "any material capable of expressing or reflecting the views of States would be relevant as evidence of acceptance and recognition."[124]

The Commentary clarifies that the forms identified are "not, individually, conclusive of the peremptory character of a norm [because] [t]he materials have to be weighed and assessed together, in their context, in order to determine whether they evince acceptance and recognition of the international community of States as a whole." Thus, a single source of evidence may not be enough. Multiple sources, taken collectively may be necessary.

It is noticeable that the kinds of evidence listed in paragraph 2 "are similar to forms of evidence of acceptance as law"[125] or the forms of evidence for *opinio juris.* This is "because the forms of evidence identified are those from which, as a general matter, the positions, opinions and views of States can be gleaned."[126] Thus, the same material used to establish *opinio juris* may be used to establish acceptance and recognition for purposes of establishing a peremptory norm.

While the use of similar evidence is understandable, one negative consequence is that the problems related to the issue of determining *opnio juris* is carried over into the identification of peremptory norms. The issues surrounding the concept of *opinio* juris are well documented in legal scholarship. It is very possible that these same issues will now hound acceptance and recognition of peremptory norms.

Furthermore, courts have the tendency to use the same evidence for both *opinio juris* and state practice resulting in double counting. Because of Conclusion 8 paragraph 2, this troubling tendency will be aggravated by the fact that the same evidence used to prove *opinio juris* and state practice will also be used to prove acceptance and recognition.

C. Subsidiary means for determining peremptory norms

[124] A/77/10, *supra* note 38 at 41 par. 2.
[125] A/77/10 *supra* note 38 at 38 par 4.
[126] *Id.*

1. Courts and tribunals

Conclusion 9 paragraph 1 states:

> 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.

The Commentary explains that "the word subsidiary in this context is not meant to diminish the importance of such materials, but is rather aimed at expressing the idea that those materials facilitate the identification of 'acceptance and recognition' but do not, in themselves, constitute evidence of such acceptance and recognition."[127] Thus, this provision is similar to Article 38 (1) (d) of the ICJ Statute.

Unlike Article 38, the second sentence of the paragraph makes it clear that even decisions of national courts may be a subsidiary means. But the "use the phrases 'may also' and 'as appropriate'... indicate that "although decisions of national courts may serve as subsidiary means for the determination of peremptory norms ... they should be resorted to with caution. In particular, the weight to be accorded to such national decisions will be dependent on the reasoning applied in the particular decision."[128] Thus, decisions of international courts and tribunals rank higher than decisions of domestic courts.

But it must be remembered that under Conclusion 8, decisions of national courts may also be evidence of acceptance and recognition. Thus, decisions of national courts can be either a subsidiary means for determining the peremptory character of norms or evidence of acceptance and recognition. The Commentary attempts to clarify this issue by stating that:

> When relied upon under draft conclusion 8, decisions of national courts provide evidence of the acceptance and

[127] A/77/10, *supra* note 38 at 43 par. 1.
[128] A/77/10, *supra* note 38 at 45 par. 5.

> recognition of the State in question. In that context, the relevance of the decision of the court concerns whether it evidences that State's position and not its broader assessment of the recognition and acceptance of the norm in question by the international community of States as a whole as peremptory in nature.[129]

Thus, courts are free to use national court decisions for either purpose.

2. Expert bodies and most highly qualified publicists

Conclusion 9 paragraph 2 states:

> 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.

The use of the phrase "may also" in paragraph 2 as opposed to "are" in paragraph 1 indicate that the works of expert bodies and teachings of the most highly qualified publicists are given "less weight ... in comparison to judicial decisions."[130] This is a departure from Article 38 (1) (d) of the ICJ statute where no such hierarchy is provided. It would be interesting to see whether this hierarchical approach would later on affect ICJ interpretation of the application of Article 38 (1) (d).

The Commentary explains that the relevance of these works and teachings "depends on various factors" such as "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."[131] Thus, the rules propounded by these works and teachings cannot stand on their own despite their number, unanimity and consistency. Works and teachings must be corroborated by the acceptance of states and the decisions of courts and

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[129] A/77/10, *supra* note 38 at 45 par. 6.
[130] A/77/10, *supra* note 38 at 45 & 46 par. 7.
[131] *Id.*

tribunals. This seems to be an unfortunate limitation as new rules would require state practice before works and teachings become relevant. It's also not clear whether the corroboration must be made by a majority of states. If such is the case then works and teachings become redundant and meaningless. It is submitted that perhaps works and teachings should be given weight when evidence of acceptance by the state is limited due to the nature of the norm in question. Peremptory norms in certain situations may result in restricting state sovereignty. In such cases it may be expected that states may be less vocal in their acceptance of such norms.

With respect to expert bodies "the phrase 'established by States or international organizations' indicates that the paragraph refers to organs established by international organizations and subsidiary bodies of such organizations, such as the International Law Commission and expert treaty bodies."[132] The Commentary further explained that "[t]he qualification was necessary to emphasize that the expert body in question had to have an intergovernmental mandate and had to be created by States."[133] Thus, the voice of private expert bodies no matter how influential will not be heard. However, their individual members might arguably be considered as the most *highly qualified publicists.*

3. Other subsidiary means

The Commentary explains that "[i]t is worth pointing out that the subsidiary means identified in paragraphs 1 and 2 of draft conclusion 9 are not exhaustive" but are merely "the most common subsidiary means."[134] This opens the door to other forms of subsidiary means which are not available under Article 38 (1) (d).

V. Legal Consequences of Peremptory Norms

Peremptory norms "are hierarchically superior to other norms of international law and therefore override such norms in the case of

[132] A/77/10, *supra* note 38 at 46 par. 8.
[133] *Id.*
[134] A/77/10, *supra* note 38 at 47 par. 12.

conflict."[135] This hierarchical superiority is the primary reason why peremptory norms must be identified and is the legal justification for its invalidating effect on other sources of obligations.

A. Treaties Conflicting with Peremptory Norms

The invalidity of treaties that conflict with a peremptory norm is the legal effect that is most closely associated with it.[136]

According to *Shelton*, "the invalidity of a treaty due to conflict with a jus cogens norm appears to have arisen only once since the adoption of the VCLT."[137] This was in the *Aloeboetoe* case at the Inter-American Court of Human Rights. In this case the Court ruled that an entire treaty would be void if it violated a peremptory norm.[138]

The Commentary explains that "[t]he fact that treaties have rarely been invalidated on account of a conflict with peremptory norms is, however, not because the rule in article 53 is not accepted by States, but simply because States do not generally enter into treaties that conflict with peremptory norms."[139] Therefore, the fact that no treaty has been invalidated on the basis of being in conflict with a peremptory norm is taken as proof that the rule is valid. The other possible explanation is that until the DCILCPN there was lack of clarity on what rules are to be considered as peremptory norms.

1. A new treaty and an existing norm

a. Void in its entirety ab initio

Conclusion 10 paragraph 1 states:

> 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.

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[135] A/77/10, *supra* note 38 at 56 par. 3.
[136] A/77/10, *supra* note 38 at 48 par. 1.
[137] Shelton*, supra* note 8 at 36.
[138] *Id.*
[139] A/77/10, *supra* note 38 at 48 par. 1.

Thus, a treaty which from the very beginning conflicts with an existing peremptory norm is deemed to have never existed. It does not matter if states have validly given their consent and that it complies with the requirements of entry into force. The entire treaty is void *ab initio*.

Conclusion 11 paragraph 1 adds that such a treaty "is void in whole, and no separation of the provisions of the treaty is permitted."

If the norm already exists prior to the treaty, the entire treaty is void and not just the conflicting treaty provisions. Thus, the entire treaty is rendered void even if only one of its provisions are in conflict with a peremptory norm. This reasoning is based on Conclusion 11 paragraph 2 which deals with a treaty in conflict with a new peremptory norm. Under paragraph 2 (a) "the provisions that are in conflict with a peremptory norm ... are separable from the remainder of the treaty with regard to their application." As paragraph 1 states in the case of conflict with a pre-existing peremptory norm "no separation of the provisions of the treaty is permitted."

b. Legal obligations of parties

Conclusion 12 paragraph 1 states:

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*).

Conclusion 12 paragraph is identical to Article 71 paragraph 1 of the VCLT. Considering that the same rules are provided for by the VCLT, the value of Conclusion 12 paragraph 1 would be to make the rules binding on non-parties to the VCLT or to treaties not governed by the VCLT. However, if Article 71 has crystallized into custom after its adoption in Vienna in 1969[140] then Conclusion 12 paragraph 1 merely confirms the universal nature of the rules.

These rules recognize that particular consequences may have been produced by "acts ...performed in good faith in reliance on the void treaty."[141] Under subparagraph (a) the obligation is to "eliminate as far as possible" such consequences. It is an obligation of conduct, not of result because best efforts are sufficient.[142] It must be noted that only the consequences of acts performed *in reliance* on any part of the treaty, are to be eliminated.[143] Noticeably, these obligations only pertain to acts in relation to a treaty provision in conflict with an existing peremptory norm. Acts taken by parties in relation provisions of the treaty not in conflict with a peremptory norm are not covered by this rule.

Subparagraphs (a) and (b) appear to overlap. But one way to distinguish the two would be to consider that subparagraph (a) corrects past conduct, while subparagraph (b) corrects current and future conduct.

2. An existing treaty and a new norm

Conclusion 10 paragraph 2 states:

> 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.

[140] Villiger, *supra* note 11 at 882.
[141] A/77/10, *supra* note 38 at 53 par. 3
[142] A/77/10, *supra* note 38 at 54 par. 4.
[143] *Id.*

The situation covered by this rule is that case where a new peremptory norm emerges and becomes in conflict with an existing treaty and covers the same rule provided by Article 64 of the VCLT.[144]

Unlike the earlier case of a pre-existing norm, the treaty, in this case is not void *ab initio* "but only *becomes* void at the emergence of the peremptory norm." Specifically, "[t]he treaty becomes void from the moment the norm in question is recognized and accepted as one from which no derogation is permitted."[145]

Because this rule has repercussions on parties being freed from complying with the treaty, the exact point in time a treaty becomes void is crucial. The treaty does not automatically become void upon the emergence of the peremptory norm. Both the VCLT and the DCILCPN provides for a procedure for termination under this ground.

a. Procedure

A party to a treaty cannot unilaterally declare that a treaty is contrary to a peremptory norm and excuse itself from the duty to perform under the treaty. Conclusion 21 provides for the proper procedure.

b. Separability

The clause, "[s]ubject to paragraph 2 of draft conclusion 11" means that "paragraph 2 of draft conclusion 10 should be read together with draft conclusion 11 which makes provision for separability in certain cases."[146]

Conclusion 11 paragraph 2 states:

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[144] "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."
[145] A/77/10, *supra* note 38 at 50 par. 5.
[146] A/77/10, *supra* note 38 at 50 par. 6.

> 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 11 paragraph 2 is based on Article 44 paragraph 3 of the VCLT. The general rule is that the entire treaty becomes void if it conflicts with a peremptory norm even in cases where the peremptory norm emerges subsequent to the conclusion of the treaty.[147] The exception is when all three conditions in Conclusion 11 paragraph 2 are fulfilled.

c. Legal effect

Conclusion 12 paragraph 2[148] states:

> 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*).

[147] A/77/10, *supra* note 38 at 51 par. 4.
[148] A/77/10, *supra* note 38 at 52 par. 5. "The formulation in paragraph 2 of draft conclusion 12 follows closely the text of article 71, paragraph 2, of the 1969 Vienna Convention."

The text of Conclusion 12 paragraph 2 follows the text of Article 71 paragraph 2 (b) of the VCLT. Because the treaty only becomes invalid after the emergence of the peremptory norm, rights, obligations and legal situations created pursuant to the treaty prior to the emergence of the norm remain valid.[149] But such rights, obligations or legal situations subsist "only to the extent that their continued existence is not itself a violation of a peremptory norm."[150] So rights, obligations and legal situations in conflict with the new peremptory norm are terminated even if they existed prior to the norm. In this sense it can be argued that the emergence of a new peremptory norm can have retroactive effect.

B. Reservations and Peremptory Norms

Conclusion 13 provides:

> 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*).

The first paragraph applies in situations where the "a treaty provision reflects a peremptory norm." It specifies that a reservation to that provision in no way affects the binding nature of the norm. Thus, "while the reservation may well affect the legal effect of the treaty provision in respect of the reserving State, the norm, as a peremptory norm ...will not be affected and will continue to apply."[151] It also appears that it does not matter whether the norm emerges earlier or later than the treaty provision. However, it may be argued that a reservation to a treaty provision which reflects an existing peremptory norm should be void. This is because a reservation is a right granted under a treaty and the VCLT. As a treaty-based right it terminates or is *void ab initio* if it is in conflict with a peremptory norm.

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[149] *Id.*
[150] *Id.*
[151] A/77/10, *supra* note 38 at 54 par. 2.

The second paragraph states that "[a] reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm." This can be considered an additional rule on the validity of reservations. It does not seem to require that the treaty provision subject to the reservation be reflective of a peremptory norm. The reservation is invalid if the legal effect of a reservation would be contrary to a peremptory norm.

C. Customary international law conflicting with peremptory norms

Similar to treaties, peremptory norms "prevail over conflicting rules of customary international law."[152] This is significant.

1. A new custom and an existing norm

Conclusion 14 paragraph 1 states:

> 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.

This means that even if the twin elements of state practice and *opinio juris* are met, a custom will still not arise if it conflicts with a pre-existing peremptory norm. In effect, this rule creates an additional requirement for the establishment of custom.

However, the same paragraph states that this rule is without prejudice to the modification of the pre-existing peremptory norm by a custom which is also a peremptory norm. It is not clear how this process can take place. Before a norm can obtain peremptory character, it must be a norm of general international law which means it must take the form of a treaty provision,

[152] A/77/10, *supra* note 38 at 56 par. 4.

custom or general principle of law. But if a new custom in conflict with a peremptory norm cannot even exist, there can never be a subsequent peremptory norm that originated as a custom.

2. An existing custom and a new norm

Conclusion 14 paragraph 2 states:

> 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*).

A custom that existed prior to a peremptory norm simply ceases to exist if it conflicts with the latter. It is also possible that the custom ceases to exist only "to the extent that it conflicts with a peremptory norm." This implies that there is a "part" of the custom that does conflict with the peremptory norm. This is difficult to imagine considering that most customs are simple rules and do not have "parts" like treaties.

Perhaps an alternative interpretation would be to consider different "applications" and not parts. By nature, customs are of a general nature and can apply in a variety of situations. Thus, this rule can apply in a situation where a pre-existing custom has a broader scope or application than a new peremptory norm. The custom would only cease to exist with respect to how the custom conflicts with the peremptory norm's narrower application.

3. Persistent objector rule and a peremptory norm

Conclusion 14 paragraph 3 states:

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

The persistent objector rule states that "a rule of customary international law is not opposable to a State that has persistently objected to

that rule of customary international law while it was in the process of formation for as long as that State maintains its objection."[153]

The concept of a persistent objector only matters in the context of a custom. This means that paragraph 3 contemplates a situation where the peremptory norm began as a custom. If a state is a persistent objector to a custom, it is not obligated to comply with the custom. But the same state becomes bound if that custom becomes a peremptory norm.

This rule also means that "a peremptory norm .. can … emerge in the face of persistent objection of one or a few States."[154] This is possible because "because persistent objection to a rule of customary international law by a few States does not prevent the rule's emergence; rather, such objection merely renders that rule not opposable to the State or States concerned for so long as the objection is maintained."[155] However, the existence of several persistent objectors may affect the acceptance and recognition of a rule of general international law and prevent it from becoming a peremptory norm.[156] This is because the existence of peremptory norms requires the acceptance and recognition of a very large and representative majority of states. While the presence of several persistent objector, while not enough to prevent the establishment of custom, may be sufficient "preclude the norm from being recognized as a peremptory norm."[157]

D. Obligations created by unilateral acts and peremptory norms

Conclusion 15 states:

> 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.

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[153] A/77/10, *supra* note 38 at 58 par. 9.
[154] A/77/10, *supra* note 38 at 59 par. 11.
[155] *Id.*
[156] A/77/10, *supra* note 38 at 59 par. 12.
[157] *Id.*

> 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*).

In 2006, the ILC issued "Guiding Principles applicable to unilateral declarations of States."[158]

But the scope of Conclusion 15 is broader than these guidelines because the latter is limited to unilateral declaration while the former covers unilateral acts in general.

The rules in Conclusion 15 is similar to that of treaties and customs except that it uses broader phrases, such as "'does not create such an obligation' and 'ceases to exist' so as to capture more fully the broader context of the draft conclusion, which is addressing unilateral acts in a broader sense."[159]

E. Obligations created by resolutions, decisions or other acts of international organizations

Conclusion 16 provides that:

> 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*).

This rule only covers resolutions, decisions and other acts of international organizations which have binding effects. Such acts of international organizations would only be binding if the treaty creating such international organization provides for binding effect.

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[158] UN General Assembly, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*, with commentaries thereto 2006, 58th Sess, U.N. Doc. A/61/10, (Aug. 11, 2006).
[159] A/77/10, *supra* note 38 at 61 par. 2.

F. Peremptory norms and obligations erga omnes

Conclusion 17 provides:

> 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.

This rule states that every peremptory norm is an *erga omnes* obligation. Therefore, this conclusion settles the connection between peremptory norms and *erga omnes* obligation.

As a result of this status, any State is entitled to invoke the responsibility of another State for a breach of a peremptory norm. It is presumed that all states are injured by the breach of a peremptory norm. All states have a legal interest in peremptory norms. The phrase *legal interest* "encompass the protection of the legal norm as such, including rights and obligations."[160] Thus, all states have a legal interest in the *protection* of the rights covered,[161] *observance* of the obligation in question,[162] and the *prevention* of acts covered by *erga omnes* obligations.[163]

However, this rule does not mean that all *erga omnes* obligations are peremptory norms.

G. Peremptory norms and circumstances precluding wrongfulness

Conclusion 18 provides:

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[160] A/77/10, *supra* note 38 at 67 par. 4.
[161] A/77/10, *supra* note 38 at 67 par. 5.
[162] *Id.*
[163] *Id.*

> 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*).

A state may excuse itself from responsibility for an internationally wrongful act if it can prove the existence of a circumstance precluding wrongfulness. But Conclusion 18 reiterates that rule found in the ARSIWA that a circumstance precluding wrongfulness cannot be invoked against a breach of a peremptory norm. This rule "applies even where the circumstance precluding wrongfulness itself involves a peremptory norm."[164]

H. Serious breaches of peremptory norms

Conclusion 19 provides for the consequences of serious breaches of peremptory norms.

1. Definition of Serious breach

A serious breach of a peremptory norm "involves a gross or systematic failure by the responsible State to fulfil that obligation."[165] This does not mean that there are breaches of peremptory norms that are "less than serious [but] it is intended to convey the sense that particular consequences flowed from [certain] breaches of peremptory norms."[166]

2. Obligations

a. Cooperate

States are obligated to "cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a

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[164] A/77/10, *supra* note 38 at 69 par. 2.
[165] A/77/10, *supra* note 38 at 15 conclusion 19 par. 3.
[166] A/77/10, *supra* note 38 at 78 par. 17.

peremptory norm."[167] This obligation "builds on the general obligation to cooperate under international law."[168]

The duty to cooperate does not mean that unilateral measures consistent with international law that are intended to bring to an end a serious breach of a peremptory norm are prohibited but only that the emphasis is on collective measures.[169]

b. Non-recognition and non-assistance

Conclusion 19 further obligates states not to "recognize as lawful a situation created by a serious breach by a State of an obligation arising under a peremptory norm nor render aid or assistance in maintaining that situation."[170] These are *negative duties* which "require States to refrain from acting."[171]

However, the obligation of non-recognition should "not...be implemented to the detriment of the affected population and deprive it of any advantages derived from international cooperation."[172]

The ILC explains that the duties of non-recognition and non-assistance are "concerned with a 'situation created by a serious breach' rather than the breach itself. Thus, contribution or support of the actual breach, while possibly entailing responsibility for that breach, is not covered under this draft conclusion."[173]

I. Interpretation and application of other rules of international law

Conclusion 20 provides that in case of a conflict between a peremptory norm and another rule of international law, "the latter is, as far as possible, to be interpreted and applied so as to be consistent with the former." While

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[167] A/77/10, *supra* note 38 at 15 conclusion 19 par. 1
[168] A/77/10, *supra* note 38 at 70 & 71 par. 2.
[169] A/77/10, *supra* note 38 at 72 par. 7.
[170] A/77/10, *supra* note 38, at 15 conclusion 19 par. 2.
[171] A/77/10, *supra* note 38 at 76 par. 12.
[172] A/77/10, *supra* note 38 at 76 par. 15.
[173] A/77/10, *supra* note 38 at 76 par. 16.

the conflict is not defined, "it may be understood, in this context, as the situation where two rules of international law cannot both be simultaneously applied without infringing on, or impairing, the other."[174] Thus, to the extent possible conflicts between peremptory norms and other sources of international law are to be avoided.

This harmonization should be done "as far as possible" means that "in the exercise of interpreting rules of international law in a manner consistent with peremptory norms ...the bounds of interpretation may not be exceeded."[175] This means that "the rule in question may not be given a meaning or content that does not flow from the normal application of the rules and methodology of interpretation in order to achieve consistency with peremptory norms."[176]

J. Procedure for invocation of conflict with peremptory norms

Conclusion 21 provides for the procedure for the invocation of invalidity of rules of international law in conflict with peremptory norms. A State cannot simply assume that a rule of international law is invalid or terminated. The procedure outlined, follows the prescribed procedure under Article 65 of the VCLT.

A state seeking to invalidate or terminate a rule of international law should first notify other States of its claim.[177] This notification should be in writing and should indicate the measure proposed to be taken with respect to the rule of international law in question.[178] The notification should specify a reasonable period, not less than three months, within which an objection must be made.[179] The waiting period may be less than three months "in cases of special urgency."[180] The proposed measure may be carried out by the invoking state if no state raises an objection within the specified period.

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[174] A/77/10, *supra* note 38 at 79 and 80 par 1.
[175] A/77/10, *supra* note 38 at 80 par. 2.
[176] *Id.*
[177] A/77/10, *supra* note 38 at 16 conclusion 21 par. 1.
[178] *Id.*
[179] A/77/10, *supra* note 38 at 83 par. 7.
[180] A/77/10, *supra* note 38 at 16 conclusion 21 par. 2.

If "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."[181]

The invoking state still cannot carry out its proposed measure even if after 12 months no solution is reached provided that and the objecting State offers to submit the matter to the International Court of Justice or to some other procedure entailing binding decisions.[182] The invoking State must wait until the dispute is resolved.

K. Non-Exhaustive list

The Annex of the DCILCPN provides for a non-exhaustive list of peremptory norms.

Curiously, in making the list, the ILC admitted that it did not apply the methodology it set forth in draft conclusions 4 to 9.[183] ILC explained that the list was simply "intended to illustrate, by reference to previous work of the Commission, the types of norms that have routinely been identified as having peremptory character, without itself, at this time, making an assessment of those norms."[184] Thus, this list raises the following questions. Are the norms on the list peremptory norms since it is not established that they comply with the standards set by the current state of international law? If the norms on the list are peremptory norms without complying with the standards set by the conclusions, does that mean that it is possible for norms to achieve a peremptory character without complying with the conclusions? For example if the ICJ or some other international court identifies a new peremptory norm would that identification be sufficient even if the said court did not undergo the process outlined in the DCILCPN?

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[181] A/77/10, *supra* note 38 at 16 conclusion 21, par. 3.
[182] *Id.*
[183] A/77/10, *supra* note 38 at 85 par. 3.
[184] *Id.*

The list includes the following norms:[185]

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.

Zdravkovic criticizes this list because "at the very moment [the non-exhaustive list] was chosen…all of the norms that did not find their place in the list was deemed to be seen as ones that have not yet gained the *jus cogens* status."[186]

VI. Peremptory Norms under Philippine law

There are a few Philippine cases that discuss peremptory or *jus cogens* norms.

A case that seems to discuss *jus cogens* norms in detail is *Vinuya v. Romulo*.[187] In this case, the Court had occasion to rule that "even the invocation of *jus cogens* norms and *erga omnes* obligations will not alter … analysis" in the earlier part of the Decision that the State had no duty to exercise diplomatic protection. The Court expressed doubt as to whether *jus cogens* norms existed in 1951. This reflects the view that peremptory norms only began to exist after the VCLT.

The Court further noted that the petitioners failed to show that the crimes committed by the Japanese army violated *jus cogens* prohibitions at the time the Treaty of Peace was signed, or that the duty to prosecute perpetrators of international crimes had attained the status of *jus cogens.* Thus, it did not say that these peremptory norms did not exist but only that

[185] A/77/10, *supra* note 38 at 89 par. 16.
[186] Zdravkovic, *supra* note 1 at 155.
[187] Vinuya v. Romulo, 633 PHIL 538-589 (2010).

the petitioners failed to prove that peremptory norms existed at the time the crimes were committed.

In the process of explaining peremptory norms the Decision stated:

> The term is closely connected with the international law concept of jus cogens. In international law, the term "jus cogens" (literally, "compelling law") refers to norms that command peremptory authority, superseding conflicting treaties and custom. Jus cogens norms are considered peremptory in the sense that they are mandatory, do not admit derogation, and can be modified only by general international norms of equivalent authority.
>
> Early strains of the *jus cogens* doctrine have existed since the 1700s, but peremptory norms began to attract greater scholarly attention with the publication of Alfred von Verdross's influential 1937 article, Forbidden Treaties in International Law. The recognition of *jus cogens* gained even more force in the 1950s and 1960s with the ILC's preparation of the Vienna Convention on the Law of Treaties (VCLT). Though there was a consensus that certain international norms had attained the status of *jus cogens,* the ILC was unable to reach a consensus on the proper criteria for identifying peremptory norms.
>
> After an extended debate over these and other theories of *jus cogens*, the ILC concluded ruefully in 1963 that "there is not as yet any generally accepted criterion by which to identify a general rule of international law as having the character of jus cogens." In a commentary accompanying the draft convention, the ILC indicated that "the prudent course seems to be to . . . leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals." Thus, while the existence of *jus cogens* in international law is undisputed, no consensus exists on its substance, beyond a tiny core of principles and rules. (citations omitted)

Thus, the Court ruled as it did because of the apparent lack of criteria to determine the existence of peremptory norms.

However, in an earlier decision the Court recognized the existence of peremptory norms. *Bayan Muna v. Romulo,*[188] the Court in process of explaining why the US can exercise jurisdiction over crimes not covered by their domestic legislation explained that such crimes have attained the status of *jus cogens* norms. It added:

> The term *'jus cogens'* means the 'compelling law'. Corollary, "a *jus cogens* norm holds the highest hierarchical position among all other customary norms and principles." As a result, *jus cogens* norms are deemed "peremptory and non-derogable." When applied to international crimes, *"jus cogens* crimes have been deemed so fundamental to the existence of a just international legal order that states cannot derogate from them, even by agreement".
>
> These *jus cogens* crimes relate to the principle of universal jurisdiction, *i.e.,* "any state may exercise jurisdiction over an individual who commits certain heinous and widely condemned offenses, even when no other recognized basis for jurisdiction exists." The rationale behind this principle is that the crime committed is so egregious that it is considered to be committed "against all members of the international community" and thus granting every State jurisdiction over the crime.
>
> Therefore, even with the current lack of domestic legislation on the part of the US, it still has both the doctrine of incorporation and universal jurisdiction to try these crimes. (citations omitted)

[188] Bayan Muna v. Romulo, 656 PHIL 246-336 (2011).

While the description of peremptory norms as holding the highest hierarchical position is correct, the reference to universal jurisdiction is incorrect.

In *Province of North Cotabato v. Government of the Republic of the Philippines*[189]
the Court ruled that:

> The sovereign people may, if it so desired, go to the extent of giving up a portion of its own territory to the Moros for the sake of peace, for it can change the Constitution in any it wants, so long as the change is not inconsistent with what, in international law, is known as Jus Cogens.

This brief statement suggests that constitutional amendments are limited by peremptory norms. In making this statement the Court cited as authority *Planas v. Commission on Elections,*[190] where the Court similarly said that a constitutional convention was "legally free to postulate any amendment it may deem fit to propose — save perhaps what is or may be inconsistent with what is now known, particularly in international law, as Jus Cogens." This ruling suggests Philippine state practice placing a superior hierarchical position to *jus cogens* norms as early as 1973.

In *Pangilinan v. Cayetano*,[191] the Court said that:

> Generally, *jus cogens* rules of customary international law cannot be amended by treaties. As Articles 121, 122, and 123 allow the amendment of provisions of the Rome Statute, this indicates that the Rome Statute is not *jus cogens*.

The first sentence is not accurate. Not only are peremptory norms not amendable by treaties *generally* but are not amendable *absolutely*. Under international law under no circumstance can any treaty change the content or binding effect of a peremptory norm. The statement of the *ponente* in this

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[189] Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain, 589 PHIL 387-732 (2008).
[190] Planas v. Commission on Elections, 151 PHIL 217-296 (1973).
[191] Pangilinan v. Cayetano, G.R. Nos. 238875, 239483 & 240954, (2021).

case is reflective of the general view posed by the decision in this case that domestic law is superior to international law.[192] It must also be noted that this portion of the decision may be considered as *obiter dictum.*

VII. Summary

A. Creation

The DCILCPN created new rules or amended existing ones.

1. Reservations

The second paragraph of Conclusion 13 effectively adds to the requirements for a valid reservation. It states that "[a] reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm." Thus, even if a reservation complies with the requirements of a valid reservation under the VCLT it would be void.

2. Customs and unilateral declarations

Because the rule on peremptory norms can only be found in the VCLT, the concept only affected treaties. But with the DCILCPN, there is now a legal basis for invalidating customs and unilateral declarations on the basis of being in conflict with peremptory norms.

It can also be argued that the DCILCPN adds another requirement apart from the twin elements of general practice and acceptance as law (*opinio juris*). This is because Conclusion 14 paragraph 1 states that a custom does not come into existence if it conflicts with an existing peremptory norm. Thus, even if the twin requirements are met, the custom does not arise.

The same can be said about unilateral declarations. Even is a state makes a public declarations and manifested the will to be bound[193] it would not create an obligation if it conflicts with a peremptory norm.

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[192] *See* Moot and Academic.
[193] *See* Principle 1, Guiding Principles Applicable to Unilateral Declarations of States.

B. Clarity

The DCILCPN provided clarity to the legal regime governing peremptory norms.

1. Definition

Previously, the definition of peremptory norms was only found in the VCLT. Thus, it was not clear if this definition applied also when the issue does not involve treaties. It also raised questions as to the effect of peremptory norms on conflicting customs. Because of Conclusion 1, the definition of peremptory norms found in the VCLT is now the definition of peremptory norms even if the issue does not involve treaties. Thus, the concept of peremptory norms can be applied in any legal question and is no longer limited to the law on treaties.

2. Criteria

Conclusion 4 clarifies the criteria for identifying peremptory norms. The requirements for each criteria are also further elaborated on in succeeding conclusions. By clearly explaining the criteria, it is now possible for states to objectively argue for the existence of peremptory norms. In case of dispute, courts can apply the criteria to objectively determine the existence of peremptory norm. Because "it is necessary to establish" the compliance with the criteria before a peremptory norm can be said to exist, it would no longer be enough to simply point out the importance of the rule. It would also be more difficult to argue against the existence of a peremptory norm that meets the criteria. This situation may encourage the development of state practice and jurisprudence for the further development of the concept of peremptory norms.

3. Obligations *Erga Omnes*

Conclusion 17 clarifies that all peremptory norms are *erga omnes* obligations. This confirms what has been suggested by legal scholarship. The Commentary also clarifies that not all *erga omnes* obligations are peremptory norms.

C. Confusion

But the DCILCPN also raised new issues which hopefully will be clarified in the near future.

1. Fundamental Values

The DCILCPN requires that peremptory norms reflect and protect fundamental values. But it is not clear from the Commentary what exactly are fundamental values and how they are determined. Thus, the manner by which fundamental values are identified need to be clarified. As Kolb points out, "[i]t is not sufficient for a lawyer to speak about fundamental values; he must proceed to give these values and the legal constructs that carry them a precise setting in legal technique."[194] Furthermore, as discussed earlier the existence of fundamental values require *a minimum degree of community feeling*[195] or an increasingly organized community with common interests and values.[196] Given the lack of unity among states in the international community even regarding matters of planetary survival (e.g., nuclear weapons, climate change) this international community has not been established.

2. Characteristics are not criteria

The Commentary explains that the characteristics of peremptory norms found in Conclusion 2 are not criteria for determining the existence of such norms. However, this implies that a norm which has all the characteristics listed[197] will not necessarily be a peremptory norm. If that is the case, then what type of norm is it? Perhaps it should be clarified that these

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[194] Robert Kolb*, Peremptory International Law – Jus Cogens*, (2015).
[195] Shelton, *supra* note 8 at 29.
[196] *Id.*
[197] Reflects and protects fundamental values, universally applicable and hierarchically superior.

characteristics are necessary consequences of being a peremptory norms. Thus, if all the characteristics are present then that means the norm is peremptory.

3. The meaning of general international law

One of the criteria for determining the existence of a peremptory norm is that it must emanant from *general international law*. The Commentary explains that "general" refers to the scope of applicability such the law must have equal force for all members of the international law community. There are two problems with this.

First, defining the first criteria in this way would make it identical with the universal applicability characteristic of the peremptory norm. Thus, because of this redundancy the insistence that the characteristics are not criteria loses some validity.

Second, Conclusion 5 provides that the "[b]ases for peremptory norms of general international law (jus cogens)" are, "(1) customary international law and (2) treaty provisions and general principles of law." The problem is that customs and treaties are necessarily universal in scope. For customs, the exception to its universal applicability are local/regional customs and persistent objectors. For treaties, only State parties are bound by treaty provisions. Furthermore, some state parties may opt out of certain treaty provisions through reservations. Thus, no treaty is binding on all states not unless all states of the world are state parties and no reservations are allowed.

Thus, the requirement that the peremptory norm must come from a law that has equal force for all members of the international law may not always be complied with.

4. Modification of a peremptory norm

A peremptory norm by definition can only be modified by another peremptory norm.[198] However, before a new peremptory norm can arise to "challenge" an existing peremptory the former must first be in the form of a custom, treaty provision or general principle of law.[199] But a treaty provision in conflict with a peremptory norm would make the entire treaty void.[200] Furthermore, a new custom in conflict with a peremptory norm will never arise.[201] The only option left is if a peremptory norm originates as a general principle of law. Interestingly there is no conclusion providing for the invalidity of a general principle of law in conflict with a peremptory norm.

It may also be argued that a peremptory norm cannot be changed by a rule in conflict with it but can only be modified by another peremptory norm not in conflict with it. This view is supported by the argument that the VCLT and Conclusion 2 both use the word "modified." Thus an existing peremptory norm can never be terminated or diminished. But it can be added to. In this way a new norm modifying it would not be in conflict with it but can arise initially as a custom or treaty provision. For example a peremptory norm X which requires states to perform obligation A may be modified by a new norm Y which requires states to perform obligation A and B.

5. The Non-Compliant Annex

The ILC attached a non-exhaustive list of peremptory norms as an Annex to the DCILCPN. However, the ILC admitted that in coming up with the list, the requirements under the DCILCPN were not complied with. This raises some issues.

First, it would seem that the list may have been derived from previous decisions of the ICJ. Thus, should the Annex be interpreted to mean that ICJ identification of peremptory norms is an alternative to the procedure discussed under the DCILCPN.

Second, the list contains fairly broad categories. For example, the list includes "the basic rules of international humanitarian law." This category is

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[198] 10 United Nations, Treaty Series, Vol 1155 at 334, Art 53 (1980) and A/77, *supra* note 38 at 12 conclusion 3.
[199] A/77/10, *supra* note 38 at 12 conclusion 5.
[200] A/77/10, *supra* note 38 at 13 conclusion 10.
[201] A/77/10, *supra* note 38 at 14 conclusion 14.

both broad and vague. There are many treaties involving international humanitarian law. Are all their provisions peremptory? How does one determine what is basic? Another example is the right to self-determination. Does the category merely refer to Article 1 of the International Covenant on Civil and Political Rights or also Article 1 of the International Covenant on Economic, Social and Cultural Rights? There are also certain aspects to the right to self-determination. Are all aspects peremptory?

VI. Conclusion

By embarking on providing rules pertinent to peremptory norms, the DCILCPN creates new rules and amends existing ones. It clarifies several issues previously hounding the concept of peremptory norms but it also adds to the confusion. Only time will tell if the DCILCPN would contribute to the development of peremptory norms in particular and international law in general.