

The International Law Commission's (ILC) Report on Peremptory norms of general international law (*jus cogens*): Has the ILC seconded the ICJ?

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Abstract:

The International Law Commission (ILC) is one of the central institutions that plays a pivotal role in the codification and progressive development of international law. The ILC established in the aftermath of World War II is instrumental in preparing draft articles, conclusions, principles, etc by taking into cognizance the views of the States. The ILC's work is acknowledged by the international courts and tribunals in several of its judgments. Moreover, in the absence of a centralized agency in international law, the ILC assumes significance. The ILC's work combines the observations of the states and the views of the special rapporteur. In the year 2016, the ILC undertook the work on the topic of peremptory norms of general international law. In essence, peremptory norms intend to safeguard the broader interest of the international community, from which there shall not be any derogation.

*Recently, the ILC prepared its report on the said topic, relying heavily upon the jurisprudence of the International Court of Justice (ICJ). Through the study of the recent ILC reports on the peremptory norm of general international law, the author argues that the ILC's report borrows greatly from the ICJ, this is significant as ICJ's interpretation of *jus cogens* is incapacious. The author pitches for tangible ways to overcome this dependency.*

1. Introduction

Historically international law developed through states entering into treaties.¹ The multiplicity of treaties between states led to the overlapping of obligations, especially on a similar topic. A less formal means in the development of international law is through customary

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¹ 2011 Treaty Event Towards Universal Participation and Implementation <https://treaties.un.org/doc/source/events/2011/press_kit/fact_sheet_1_english.pdf> accessed August 5, 2022; Randall Lesaffer in Bardo Fassbender and Anne Peters (eds.), *Oxford Handbook of the History of International Law* (OUP 2012) 71-94.

international law.² As customary international law is unwritten, it was left to the judges, arbitrators and states to interpret the formation of customary international law.³ The ILC established in the aftermath of World War II systematized the whole process of treaties and customary international law.⁴ Some of the major topics that the ILC deliberated include the law of treaties⁵, state immunities⁶, the law of the seas⁷, diplomatic and consular law, etc⁸. In the same line in 2016, the ILC undertook a study on the topic of *peremptory norm of general international law* under the aegis of the special rapporteur professor Dire Tladi.⁹

Despite its codification under Article 53 of the Vienna Convention on the Law of Treaties (VCLT), 1969.¹⁰ The concept of *peremptory norm* (hereinafter also referred to as *jus cogens*) has generated considerable debate amongst scholars, judges and States. Article 53 reads as:

“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the present Convention, a peremptory norm of general international law is a norm accepted and recognised 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. Although *jus cogens* is mentioned under the VCLT, the drafters failed to clarify its precise scope and content; this has resulted in the host of debates surrounding the expression today.”¹¹

² Laurence R. Helfer, Ingrid B. Wuerth, ‘Customary International Law: An Instrument Choice Perspective’ (2016) 37 Michigan Journal of International Law 563.

³ Stefan Talmon, ‘Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion’ (2015) 26 (2) EJIL 417 <<https://doi.org/10.1093/ejil/chv020>> Panos Merkouris, ‘Interpreting the Customary Rules on Interpretation’ (2017) 19(1) International Community Law Review 126

⁴ See Summaries of the Work of the International Law Commission <https://legal.un.org/ilc/summaries/1_1.shtml> accessed April 10, 2022.

⁵ See, Analytical Guide to the Work of the International Law Commission, <https://legal.un.org/ilc/guide/4_1.shtml> accessed April 12, 2022.

⁶ See, Analytical Guide to the Work of the International Law Commission, <https://legal.un.org/ilc/guide/8_2.shtml> April 12, 2022.

⁷ See, Analytical Guide to the Work of the International Law Commission, <https://legal.un.org/ilc/guide/8_2.shtml> accessed April 15, 2022.

⁸ See, Analytical Guide to the Work of the International Law Commission, <https://legal.un.org/ilc/guide/9_1.shtml> accessed April 15, 2022.

⁹ For the recent development in the topic see, Analytical Guide to the Work of the International Law Commission, <https://legal.un.org/ilc/guide/1_14.shtml> April 16, 2022.

¹⁰ Vienna Convention on the Law of Treaties 1969.

¹¹ Ibid.