THE PROHIBITION OF TERRORISM AS A *JUS COGENS* NORM

Aniel de Beer*
Dire Tladi**

Abstract

In the years after 9/11, various resolutions of the United Nations General Assembly and the United Nations Security Council have condemned terrorism as a flagrant violation of international law and a grave threat to international peace and security. Furthermore, terrorist acts have been declared as unjustifiable regardless of the reasons invoked by its perpetrators. In light of the universal condemnation of terrorism, the question arises whether the prohibition of terrorism has attained the status of a peremptory norm of international law (jus cogens). This article analyses the criteria for jus cogens norms as set out in article 53 of the Vienna Convention on the Law of Treaties as well as the characteristics of jus cogens norms as have emerged under international law. It then considers whether the prohibition of terrorism meets the criteria for jus cogens norms, and in addition to this, whether it possesses the characteristics of jus cogens norms. Finally, it evaluates whether the prohibition of terrorism has attained the status of a jus cogens norm.

Keywords: jus cogens; criteria for the identification of jus cogens; Vienna Convention on the Law of Treaties; the prohibition of terrorism; fundamental values; hierarchy in international law; universalism

1 Introduction

Terrorism has become an issue of global concern. In Africa, the Islamist militant group Boko Haram has carried out numerous attacks against civilians in Nigeria, including suicide bomb attacks.[1] In 2017, the

* BProc MBA (cum laude) LLM (cum laude) LLD (UP) LLB (Stell), Research Associate: South African Research Chair in International Law, University of Johannesburg, anieldebeer@outlook.com. The article is based on the author's PhD thesis, conducted at the University of Pretoria, under the title 'Peremptory Norms of International Law (*Jus Cogens*) and the Prohibition of Terrorism.'

** Professor of International Law, University of Pretoria, Member of the UN International Law Commission and its Special Rapporteur on the topic Peremptory Norms of General International Law (*Jus Cogens*). The current article draws on the work done in connection with the International Law Commission Topic.

1 'At least 11 civilians killed in Boko Haram attack' *Al Jazeera* (2 September 2017) http://www.aljazeera.com/news/2017/09/11-civilians-killed-boko-haram-attack-170902043943431.html (accessed 1 October 2017).

© Juta and Company (Pty) Ltd

Al Qaeda-affiliated Al-Shabaab terrorist group carried out various attacks in southern Somalia, including an attack on an African Union convoy in July 2017.[2] Al-Shabaab also carried out terror attacks in Kenya, which included beheadings of men in villages and the killing of police officers.[3] In Europe, terror attacks continued to increase with stabbing attacks and suicide bombings in 2016, perpetrated by assailants who had sworn allegiance to the Islamic State of Iraq and Syria (ISIS).[4] In March 2016, at least 34 people were killed and 190 wounded when three bomb blasts shook Brussels: two at an airport and one at a subway – ISIS claimed responsibility.[5] In July 2016, two men stormed a church in Normandy, France, took five people hostage and murdered an elderly priest by stabbing him in the chest and slitting his throat. These men had carried out the attacks in the name of ISIS.[6] Also in July 2016, on Bastille Day, a large truck deliberately plowed into a large celebration in Nice, France, killing 84 people and injuring hundreds. It was later claimed that the assailant had been radicalised by ISIS.[7]

In November 2016, a coordinated string of attacks (bombings and mass shootings) erupted at a soccer stadium and a popular live music venue in Paris. Close to 130 people were massacred and scores more injured. ISIS took responsibility.[8] In 2017, an attack in London left seven people dead and 48 injured when a van hit pedestrians on London Bridge before three men got out of the vehicle and began stabbing people in the nearby market. Furthermore, an attack in Manchester left 22 people dead and 59 injured after a suicide bomber targeted children and young adults at a concert by singer Ariana Grande at the Manchester arena in the United Kingdom.[9]

Notwithstanding the fact that a great deal has been written on terrorism and *jus cogens* respectively, there is a paucity of literature

---

[2] R Beri 'Rise of Terrorism in Africa' *Institute for Defence Studies and Analyses* (13 April 2017) http://www.idsa.in/idsacomments/rise-of-terrorism-in-africa_rberi_130417 (accessed 1 October 2017); 'Al-Shabab fighters attack African Union convoy in southern Somalia, killing at least 8' *Fox News* (30 July 2017) http://www.foxnews.com/world/2017/07/30/al-shabab-fighters-attack-african-union-convoy-in-southern-somalia-killing-at-least-8.html (accessed 1 October 2017).

[3] 'Kenya: Nine beheaded in suspected al-Shabab' *Al Jazeera* http://www.aljazeera.com/news/2017/07/kenya-attack-170708103555604.html (9 July 2017) (accessed 1 October 2017).

[4] 'A timeline of recent terror attacks in Europe' *Time Magazine* (20 December 2016) http://time.com/4607481/europe-terrorism-timeline-berlin-paris-nice-brussels/ (accessed 1 October 2017).

[5] Ibid.

[6] Ibid.

[7] Ibid.

[8] 'London Bridge attack: Timeline of British terror attacks' *BBC News* http://www.bbc.com/news/uk-40013040 (accessed 1 October 2017).

[9] Ibid.

© Juta and Company (Pty) Ltd

comprehensively addressing the role of *jus cogens* in the rules of international law relating to terrorism.[10] While writers have discussed the threat posed by the 'war on terror' on civil liberties and human rights, very little attention has been paid to the role of *jus cogens* in combating terrorism, including whether the prohibition of terrorism itself has acquired *jus cogens* status.[11] This article will address whether the prohibition of terrorism has indeed attained *jus cogens* status under international law. To do this, it is necessary to analyse the criteria for the formation and identification of a *jus cogens* norm in terms of the Vienna Convention on the Law of Treaties (Vienna Convention).[12] It will further be considered whether the prohibition of terrorism possesses the core characteristics of *jus cogens* norms. In keeping with what has been termed a 'rigorous approach' to the identification of norms of international law, our consideration of whether terrorism meets these requirements is based purely on state practice.[13] Space constraints do not permit the consideration of other equally important issues, such as the consequences of terrorism having *jus cogens* status and its interaction with other *jus cogens* norms such as the prohibition on the use of force and the prohibition of torture.

This article will commence in the next section with a historical overview of the evolution of *jus cogens*. Section two will, firstly, briefly address the existence of the concept of *jus cogens* under early international law,

---

10 A Verdross 'Forbidden treaties in international law: Comments on Professor Garner's report on "The law of treaties"' (1937) 31 *American Journal of International Law* 571–577; U Scheuner 'Conflict of treaty provisions with a peremptory norm of general international law' (1969) 29 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 28–38; G Christenson '*Jus cogens*: Guarding interests fundamental to international society' (1987–1988) 28 *Virginia Journal of International Law* 594–648; S Marks 'Branding the "war on terrorism": Is there a "new paradigm" of international law?' (2006) 14 *Michigan State Journal of International Law* 71–119; B Saul *Defining Terrorism in International Law* (2006); 10–384; U Linderfalk 'The effect of *jus cogens* norms: Whoever opened Pandora's Box, did you ever think about the consequences?' (2007) 18 *European Journal of International Law* 853–871; R Pati *Due Process and International Terrorism: An International Legal Analysis* (2009) 1–520; T Weatherall 'The status of the prohibition of terrorism in international law: Recent developments' (2015) 46 *Georgetown Journal of International Law* 589–627; *Suresh v Canada (Minister of Citizenship and Immigration)* (2002) 1 SCR 3.

11 R Dolzer 'Clouds on the horizon of humanitarian law?' (2003) 28 *Yale Journal of International Law* 337–340; J Fitzpatrick 'Speaking law to power: The war against terrorism and human rights' (2003) 14 *European Journal of International Law* 241–264.

12 The Vienna Convention on the Law of Treaties, 1969.

13 See generally, S Yee 'Report on the ILC Project on "Identification of Customary International Law"' (2015) 14 *Chinese Journal of International Law* 382. See also D Tladi 'The International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters: Codification, progressive development or the creation of law from thin air?' (2017) 16 *Chinese Journal of International Law* 428.

© Juta and Company (Pty) Ltd

prior to the Second World War, followed by a discussion of *jus cogens* in the period after the Second World War up to the adoption of the Vienna Convention. Section three will discuss the criteria for *jus cogens* norms as set out in article 53 of the Vienna Convention and as have developed in practice. Section four will evaluate whether the prohibition of terrorism has become a *jus cogens* norm in the light of the requirements described in section three.

2 A Historical Overview of *Jus Cogens*

The historical evolution of *jus cogens* will be discussed with reference to two periods – the period before the negotiation and conclusion of the Vienna Convention (roughly overlapping with the period before the Second World War) and the period thereafter. While the discussion will provide a brief overview of the first period, the focus will be on the debates in the International Law Commission (ILC), after the Second World War, which lead to the adoption of the Vienna Convention.

2.1 Peremptory Norms in the Period prior to the Second World War

Early international law writers of the 17th to 19th centuries were of the view that there are certain necessary principles of international law, which are *jus scriptum* (obligatory law) and bind all states regardless of consent or agreement.[14] According to the authors, these rules permitted no derogation as they were derived from a higher source, namely natural law, and all treaties and customs which contravened this law were illegal.[15] The idea of a limit on state sovereignty and the existence of certain non-derogable obligations continued after the First World War. In 1919, the principle of non-derogable obligations in the context of the law of treaties was referred to in the Covenant of the League of Nations (Covenant). The Covenant provided for the abrogation of any obligations inconsistent with its terms and stated that members of the League of Nations would not enter into such obligations. [16] Although this provision was only applicable between members of the League of Nations and the

[14] H de Groot *De jure belli ac pacis libri tres* (1625) 1; E de Vattel *Le droit des gens, ou principes de la loi naturelle, appliqués à la conduit et aux affaires des nations et des souverains* (1758) 1 *Préliminaires* ss 7, 21, 27 (distinguishing 'le Droit des Gens Naturel, ou Nécessaire' or obligatory law from 'le Droit Volontaire' or voluntary law); C Wolff 'Jus Gentium Methodo Scientifica Pertractatum' in J Brown Scott (ed) *The Classics of International Law* (1764) 1 s 5; Caspar Bluntschli *Le droit international codifié* (1874) 238–240.

[15] Ibid. De Groot famously stated that principles of natural law were so immutable that not even God could change them.

[16] Article 20 of the Covenant of the League of Nations, 1919.

© Juta and Company (Pty) Ltd

provision itself was derogable, it illustrated the application of the concept of non-derogability, at least in treaty law.[17]

Moreover, international case law and writings of this period supported the invalidity of treaties on the basis of its inconsistency with other superior rules of international law.[18] It should, however, be noted that, the sources often cited as support for *jus cogens* could be explained through the normal theory of sources. The League of Nations example cited above, for example, was based on treaty rules, applicable only to the parties to the Covenant of the League of Nations. Similarly, the oft-cited opinion of Judge Schüking in the *Oscar Chinn* case was similarly based on a treaty rule.[19] Under the influence of positivism, consent remained central to law-making in international law.[20] What these authorities do show, however, is that the limits on the role of consent was not unknown in international law. The world emerged from the travesty of the Second World War with a new vision and the emergence of a new international law; an international law inspired by values and whose worship of consent was limited.[21]

Despite being firmly rooted in natural law, the idea of certain peremptory, non-derogable norms eventually received a positivist slant with its formal inclusion in treaty law. In this regard, it was the work of the

---

17 D Tladi '*Jus cogens*' A/69/10 Annex 277; A McNair *The Law of Treaties* (1961) 215.

18 P Fauchille & H Bonfils *Traité de Droit International Public* (1921) 1; Verdross (n 10 above) 571*; Oscar Chinn (United Kingdom v Belgium)* Judgment, PCIJ series A/B no 63ICGJ 313 (PCIJ 1932) (1934) (separate opinion of Judge Schücking) 149. See, further, *Pablo Nájera (France) v United Mexican States* Decision no 30-A (19 October 1928) 5 *UN Reports of International Arbitral Awards* 470, where the French-Mexican Claims Commission interpreted a rule of the Covenant of the League of Nations requiring the registration of treaties as a *jus cogens* rule from which no derogation was permitted.

19 Ibid *Oscar Chinn* case.

20 On support for state sovereignty and positivism, see *The SS Lotus Case (France v Turkey)* (7 September 1927) (1927) PCIJ Ser A no 10 case 18 ('International law governs relations between independent states. The rules of law binding upon states emanate from their own free will as expressed in conventions or by usages generally accepted as expressing the principles of law'). See, further, P Guggenheim *Traité de Droit International Public* (1953) 57–58: 'Les règles de droit international n'ont pas un caractère imperatif. Le droit international admet en conséquence qu'un traité peut avoir n'importe quel contenu ... L'appréciation de la moralité d'un traité conduit aisément à la reintroduction du droit naturel dans le droit des traités' (The rules of international law are not of a peremptory nature. International law accordingly recognises that a treaty may have any content ... The assessment of the character of a treaty easily leads to the reintroduction of natural law into the law of treaties [authors' translation]). See further H Kelsen *Principles of International Law* (1952) 344; and G Schwarzenberger 'International *jus cogens*?' (1965) 43 *Texas Law Review* 467, arguing that states cannot not be bound to any international norms without their consent.

21 D Tladi & P Dlagnekova 'The will of the state, consent and international law: Piercing the veil of positivism' (2006) 21 *South African Public Law* 116.

© Juta and Company (Pty) Ltd

ILC in drafting the text, which eventually became article 53 of the Vienna Convention, that gave *jus cogens* its positivist flavour and established the criteria for *jus cogens.*[22] The various debates within the ILC, comments of states on the ILC text and discussions at the Vienna Conference will be evaluated below.

2.2 The Negotiation and Conclusion of the Vienna Conference

In the aftermath of the Second World War, the United Nations (UN) was established and, subsequently, the ILC with a mandate to promote progressive development and codification of international law. At its first session in 1949, the ILC placed the law of treaties among the topics suitable for codification and appointed James Brierly as Special Rapporteur. Mr Brierly resigned in 1952 and was succeeded by Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice and Sir Humphrey Waldock, respectively.[23] Both Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice dealt with the issue of the validity of treaties in their respective reports.[24] In his first report on the Law of Treaties, Sir Lauterpacht dealt with the legality of the object of a treaty.[25] Although his report did not explicitly use the term *jus cogens,* in his commentary Sir Lauterpacht expressed the view that the test for the legality of the object of a treaty is inconsistency with those overriding principles of international law 'which may be regarded as constituting principles of international public policy *(ordre international public)*'.[26] He added that these principles need not necessarily have crystallised into a clearly accepted rule of law, but may be expressive of rules of international morality which are so cogent that an international tribunal would regard them as forming part of the principles of law generally recognised by civilised nations and which the International Court of Justice (ICJ) is bound to apply by virtue of article 38(1)(c) of the Statute of the ICJ.[27]

It was in the third report on the law of treaties that Sir Fitzmaurice specifically used the term *jus cogens*.[28] He proposed that it is essential

---

22 Id 17–18.

23 K Zemanek 'The Vienna Convention on the law of treaties' United Nations Audiovisual Library of International Law http://legal.un.org/avl/ha/vclt/vclt.html (accessed 4 December 2016) 1.

24 Report on the Special Rapporteur on the law of treaties, Sir H Lauterpacht, II *Yearbook of the International Law Commission,* 1953, A/CN.4/63 93; and ibid 1954, vol II, A/CN.4/87 & Corr 1.; Third report by the Special Rapporteur on the law of treaties, Sir G Fitzmaurice, Y*earbook of the International Law Commission* (1958) II A/CN4/115 & Corr 1 26–27 under the title 'Legality of the object (general)'.

25 Id Lauterpacht 154 paras 1–3.

26 Id 155 para 4.

27 Ibid.

28 Fitzmaurice (n 24 above) 26 para 2.

© Juta and Company (Pty) Ltd

to the validity of a treaty that it should not contravene principles of international law which are *jus cogens*.[29] Furthermore, he recognised the non-derogable nature of *jus cogens* rules by suggesting that states could not contract out of these rules *inter se.*[30] In his commentary, he described *jus cogens* rules as rules of international law which are 'mandatory and imperative in any circumstances' and distinguished these rules from *jus dispositivum* in respect of which variation by states is possible.[31]

The last special rapporteur on the Law of Treaties, Sir Humphrey Waldock, was appointed in 1961.[32] He prepared six reports and oriented the work towards the preparation of draft articles, which would be capable of serving as the basis for an international convention.[33] Sir Waldock proposed a definition for *jus cogens* in his second report, namely:

> a peremptory norm of general international law from which no derogation is permitted except upon a ground specifically sanctioned by general international law, and which may be modified or annulled only by a subsequent norm of general international law.[34]

Sir Waldock criticised as too broad Sir Lauterpacht's argument that a treaty is void if its performance would involve an act illegal under international law, and supported Sir Fitzmaurice's assertion of limiting the cases of illegality to infringements of rules of the nature of *jus cogens.*[35] He noted that it was uncertain exactly which rules of international law constitute *jus cogens* and that the concept was comparatively recent in the midst of international law being at a stage of rapid development.[36] He thus

29 Ibid.
30 Id 27.
31 Id 40 para 27.
32 See Zemanek (n 23 above).
33 See 'First Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur' A/CN.4/144 & Add.1 (26 March 1962); 'Second Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur' A/CN.4/156 & Add 1–3 (20 March, 10 April, 30 April and 5 June 1963); 'Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur', A/CN.4/167 & Add 1–3 (3 March, 9 June, 12 June and 7 July 1964); 'Fourth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur' A/CN.4/177 & Add 1 & 2 (19 March, 25 March and 17 June 1965), Fifth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur' A/CN.4/183 & Add 1–4 (15 November 1965, 4 December 1965, 20 December 1965, 3 January 1966 and 18 January 1966) and 'Sixth Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur' A/CN.4/186 & Add 1–7 (11 March, 25 March, 12 April, 11 May, 17 May, 24 May, 1 June and 14 June 1966).
34 See id Second Report on the Law of Treaties 39.
35 See id 52, regarding the commentary on art 13. Sir Waldock suggested that 'a treaty is contrary to international law and void if its object or its execution involves the infringement of a general rule or principle of international law having the character of *jus cogens*'.
36 Ibid.

© Juta and Company (Pty) Ltd

recommended that it is sufficient to state in general terms that a treaty is void if it conflicts with a rule of *jus cogens,* but to leave the full content of this rule to be worked out in state practice and the jurisprudence of international tribunals.[37]

The ILC discussed the draft article proposed by Sir Waldock at various meetings, and generally supported Sir Waldock's proposal that a treaty would be void if contrary to *jus cogens*.[38] The discussions in the ILC led to draft article 37, which modified the text proposed by Sir Waldock and stated that a treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[39] The ILC agreed to refer article 37 to the Drafting Committee.[40] When the wording was discussed again by the ILC in its 877th meeting in 1966 as draft article 50, the ILC stated in its commentary that the view that there 'is no rule from which states cannot at their own free will contract out [of] has become increasingly difficult to sustain', and that in codifying the law of treaties it must start from the basis that 'today there are certain rules which are non-derogable by states and may only be amended by another rule of the same character'.[41] States widely supported the concept of *jus cogens* during the meetings

---

[37] Ibid. See further 'Draft articles on the law of treaties with commentaries' II *Yearbook of the International Law Commission* (1966) para 3, where, in para 3 of the commentary to draft art 50, the ILC stated as follows: 'The emergence of rules having the character of *jus cogens* is comparatively recent, while international law is in the process of rapid development. The Commission considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of the rule to be worked out in state practice and in the jurisprudence of international tribunals'.

[38] 'Summary record of the 682nd meeting' A/CN4/SR682 1 *Yearbook of the International Law Commission* (1963) 53–60 especially paras 18 & 22: see, eg, Mr Rosenne's statement that this article is of utmost importance from a political and moral standpoint and that both Sir Waldock and Sir Lauterpacht argued that the law in this regard is *lex lata*; 'Summary record of the 683rd meeting' A/CN4/SR683 (1) *Yearbook of the International Law Commission* (1963) 62–67; 'Summary record of the 828th meeting' A/CN4/SR828 (1) *Yearbook of the International Law Commission* (1966) (part 1) 38 para 26: see, eg, statement by Mr Yasseen that the 'concept of *jus cogens* in international law was unchallengeable'.

[39] Fitzmaurice (n 24 above) 34.

[40] Id 41 para 64.

[41] 'Summary record of the 877th meeting' A/CN/4/SR877 (1) *Yearbook of the International Law Commission* (1966) (part 2) 227 & 230–231 regarding draft art 50; Draft articles on the law of treaties (n 37 above) 247–249 para 1 of the commentary to draft art 50. The same paragraph of the commentary also states that 'in codifying the law of treaties it must start from the basis that today there are certain rules from which states are not competent to derogate at all by a treaty arrangement, and which may be changed only by another rule of the same character'.

© Juta and Company (Pty) Ltd

of the ILC.[42] Ultimately, the ILC adopted draft article 50 which stated as follows:

> A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[43]

At the Vienna Conference, while a few states raised concerns that *jus cogens* was not well established, and a new rule of international law,[44]

42 See 'First Report on *Jus Cogens* by Dire Tladi, Special Rapporteur' A/CN.4/693 (8 March 2016) 18. See, further, Documents of the second part of the 17th session and the 18th session including the reports of the Commission to the General Assembly *Yearbook of the International Law Commission* 2 (1966) 21–22 regarding statements by states: eg, statement by the US, 21: 'the concept embodied in this article would, if properly applied, substantially further the rule of law in international relations'; Algeria, 21: 'The Algerian delegation endorses the approach of the Commission to the question of *jus cogens*'; Brazil, 21: 'whatever doctrinal divergencies there may be, the evolution of international society since the Second World War shows that it is essential to recognize the peremptory nature of certain rules'; Czechoslovakia, 22: 'that provision is largely supported by state practice and international law and is endorsed by many authorities'; Ecuador, 22: 'endorses the initiative of the Commission in including a violation of *jus cogens* as a ground for invalidating a treaty'; France, 22, referring to the concept of *jus cogens* as 'one of the genuinely key provisions of the draft articles'; Ghana, 22, who 'endorses the Commission's approach to the concept of *jus cogens*', and the Philippines, 22, who 'welcomes the Commission's decision to recognize the existence of peremptory norms of international law'.

43 Draft articles on the law of treaties with commentaries (n 37 above) 247–249.

44 See United Nations Conference on the Law of Treaties, First Session, Vienna (26 March – 24 May 1968) Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.39/11). Certain states were of the view that *jus cogens* was an emerging norm of international law. See, eg, statements by Mr Alvarez Tabio (Cuba) 52nd meeting, 296–297, para 34, who stated that article 50 represented an important contribution to the progressive development of international law and that his delegation strongly supported it'; Mr Fattal (Lebanon), 52nd meeting, 297, para 42: 'In spite of ideological difficulties, a shared philosophy of values was now emerging.'; Mr Ratsimbazafy (Madagascar), 53rd meeting, 301, para 21: 'once the notion was established and recognized as such, it would become increasingly important in the law and life of the international community'. Only Turkey and Australia expressed reservations about the principle of *jus cogens* itself and did not support the inclusion of the *jus cogens* provision in the law of treaties. See statement by Mr Miras (Turkey), 53rd meeting, 300, para 6. Turkey was of the view that the notion of *jus cogens* and the manner it had been articulated in the Commission's draft articles was 'not with a well-established rule, but with a new rule by means of which an attempt was being made to introduce into international law, through a treaty, the notion of "public policy" – "*ordre public*."' See further statement by Mr Harry (Australia) 55th meeting, 316, para 13. Australia was of the view that in the absence of any comprehensive list or any clear definition of which norms of general international law would have the character of *jus cogens,* it would be wrong to include the article in a convention on the law of treaties.

© Juta and Company (Pty) Ltd

there was substantial support for the existence of *jus cogens* norms.[45] France declared that 'the substance of *jus cogens* was what represented the undeniable expression of the universal conscience, the common denominator of what men of all nationalities regarded as sacrosanct, namely, respect for and protection of the rights of the human person'.[46]

The Holy See noted that principles such as the prohibition of slavery and genocide had entered positive law, but did so as rules of natural law ratified and sanctioned by positive law without losing their value as 'fundamental dictates of the universal conscience'.[47] Spain referred to international law as not being 'a creation of the will of states', but 'based on a natural law founded on the principles of *pacta sunt servanda* and *jus cogens*'.[48]

The Vienna Conference adopted a slightly modified version of the ILC's article 50 as article 53 of the Vienna Convention, adding a reference to the norm being accepted and recognised by the international community of states:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of 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

---

[45] See id United Nations Conference on the Law of Treaties. For example, see the statement by Mr Klestov (Union of Soviet Socialist Republics), 52nd meeting, 294, para 3, arguing that the principle of *jus cogens* was recognised by the Commission and by many eminent jurists; Mr Suarez (Mexico), 52nd meeting, 294, paras 6–8 stating that the existence of *jus cogens* is beyond doubt; Mr Yasseen (Iraq), 52nd meeting, 295, para 21 stating the existence of *jus cogens* is beyond dispute; Mr Mwendwa (Kenya), 52nd meeting, 296, para 28 stating that *jus cogens* is a clearly existing fact; Mr Ogundere (Nigeria), 52nd meeting, 298, para 48: '[i]nternational morality had become accepted as a vital element of international law, and eminent jurists had affirmed the principle of the existence of *jus cogens*, based on the universal recognition of an enduring international public policy deriving from the principle of a peremptory norm of general international law'; Mr Ruiz Varela (Colombia), 53rd meeting, 301, para 26: 'in principle the entire world recognized the existence of a public international order consisting of rules from which states could not derogate'; Mr Jacovides (Cyprus), 53rd meeting, 305, para 68: '[i]n recognizing the existence of a corresponding rule in public international law the International Law Commission had made a very great contribution both to the codification and to the progressive development of international law'; Mr de Castro (Spain), 55th meeting, 315, para 1: 'the existence of *jus cogens* rules is obvious'. See, however, the statement by Mr Miras (Turkey) at the 53rd meeting, 300, paras 1 & 6, arguing against *jus cogens* as a well-established rule of international law.

[46] Id United Nations Conference on the Law of Treaties 54th meeting, 309, para 32.

[47] Id United Nations Conference on the Law of Treaties 45th meeting, 258, para 74.

[48] Id United Nations Conference on the Law of Treaties Fourth Plenary Meeting, 7–8, para 2 (Mr De Castro (Spain) referring to a statement made by late Spanish international lawyer Antonia de Luna).

© Juta and Company (Pty) Ltd

can be modified only by a subsequent norm of general international law having the same character.[49]

Today, the concept of *jus cogens* is widely recognised by international publicists.[50] It has further been discussed with approval by international and municipal courts.[51] Notwithstanding this, the precise nature of *jus cogens* norms, which norms qualify as *jus cogens* and the consequences of *jus cogens* in international law, is still a subject of debate.[52] In 2014, the ILC placed the topic '*Jus Cogens*' on its long-term programme of work.[53] In 2015, the ILC decided to place the topic on its current programme of work and to appoint a Special Rapporteur.[54] The criteria for *jus cogens* norms under section 53 of the Vienna Convention as well as its core characteristics in the light of relevant state practice and international jurisprudence will be explored below.

3 The Identification of *Jus Cogens* Norms in International Law

3.1 The Criteria

Article 53 of the Vienna Convention is accepted as containing the criteria

---

49 Tladi (n 17 above) 275. The Commission also included art 64 (on the emergence of a new peremptory norm of general international law) and art 71 (consequences of the invalidity of a treaty which conflicts with the peremptory norm of general international law).

50 A Orakhelashvili *Peremptory Norms in International Law* (2008); R Kolb *Peremptory International Law* Jus Cogens *– A General Inventory* (2015); Tladi & Dlagnekova (n 21 above); EJ Criddle & E Fox-Decent 'A fiduciary theory of *jus cogens*' (2009) 34 *The Yale Journal of International Law* 331–387; C Christol 'Judge Manfred Lachs and the principle of *jus cogens*' (1994) 22 *Journal of Space Law* 33–46; J Dugard *International Law: A South African Perspective* (2001); E de Wet '*Jus cogens* and obligations *erga omnes*' in D Shelton (ed) (2013) *The Oxford Handbook of International Human Rights Law* 541–561; J Vidmar 'Norm conflicts and hierarchy in international law: Towards a vertical international legal system?' in E de Wet & J Vidmar (eds) *Hierarchy in International Law: The Place of Human Rights* (2012) 2, 11, 17.

51 *Siderman de Blake v Republic of Argentina* 965 F 2d 699 (9th Cir 1992); *Armed Activities on the Territory of the Congo (DRC v Rwanda)*, Preliminary Objections, 2006 ICJ Reports 6; *Nicaragua v US* (Jurisdiction and Admissibility) 1984 ICJ Reports 392; and Criddle and Fox-Decent (n 50 above) 339.

52 Tladi (n 17 above) 275; ILC 'Report of the International Law Commission on the work of its 66th session' (2014); See, in particular, the statement by Austria, A/C6/69/SR19, 15, para 110; the statement by Finland (on behalf of the Nordic states), A/C6/69/SR19, 12, para 86; the statement by Japan, A/C6/69/SR20, 9, para 50; and the statement by the Slovak Republic, A/C6/69/SR20, 12, para 76.

53 Ibid ILC 'Report of the International Law Commission on the work of the 66th session'.

54 See ILC 'Report of the International Law Commission on the work of its 67th session' A/RES/70/236 (2015) para 7.

© Juta and Company (Pty) Ltd

which a norm must meet to be identified as a norm of *jus cogens*.[55] In this regard, Linderfalk is of the view that while article 53 does not explain how *jus cogens* is created, it does provide the basis upon which a finding of *jus cogens* can be founded – in other words, the declaratory recognition by states of an existing rule of customary international law as a norm from which no derogation is permitted.[56] In addition to the criteria, the Drafting Committee of the ILC has identified the characteristics of *jus cogens* norms.[57] While article 53 reflects the formal requirements, the core characteristics speak to the typical features or qualities of *jus cogens* norms, which flow from and are a necessary consequence of the criteria set out in article 53 of the Vienna Convention. The characteristics are the normative requirements. These characteristics, and their implications for identification of *jus cogens* norms, are discussed separately.

The definition of *jus cogens* is contained in the second sentence of article 53 of the Vienna Convention, from which the criteria can be identified. It provides as follows:

> For the purposes of 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.[58]

On the basis of this definition, the criteria of *jus cogens* have been identified as follows:

(a) a norm of general international law
(b) accepted and recognised by international community of states as a whole as a norm from which no derogation is permitted.[59]

55 See U Linderfalk 'The creation of *jus cogens* – making sense of article 53 of the Vienna Convention' (2011) 71 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 359–378; K Hossain 'The concept of *jus cogens* and the obligation under the UN Charter' (2005) 3 *Santa Clara Journal of International Law* 75–76; G Danilenko 'International *jus cogens*: Issues of law-making' (1991) 2 *European Journal of International Law* 42–65.

56 Id Linderfalk 361–364, explains that this is similar to art 38(1) of the ICJ Statute not being constitutive, but declaratory of customary international law.

57 See draft conclusion 2 on peremptory norms of international law provisionally adopted by the drafting committee of the ILC at the 69th session of the International Law Commission (1 May – 2 June & 3 July – 4 August 2017), annexed to the statement of the chairman of the drafting committee on peremptory norms of general international law (*jus cogens*), Mr Aniruddha Rajput (26 July 2017).

58 Article 53 of the Vienna Convention (n 12 above).

59 Ibid. See further draft conclusion 3 adopted by the Drafting Committee of the International Law Commission (n 57 above) which states as follows: '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

© Juta and Company (Pty) Ltd

Each criterion will be discussed in turn below, before turning to the characteristics. Thereafter, the question whether the prohibition of terrorism is a norm of *jus cogens* will be considered.

3.1.1 A Norm of General International Law

For a norm to qualify as one of *jus cogens,* it must be a norm of general international law. The ILC Study Group on Fragmentation used the term 'general international law' to denote both customary rules and general principles of law.[60] The International Law Association (ILA) similarly confirmed that general international law, as the law that applies to all states, is not limited to general custom and may include other forms of unwritten law such as 'fundamental' or 'constitutional' principles of international law.[61]

Customary international law has been, in practice, the most common basis for *jus cogens* norms.[62] States, in their various communications, have expressed the view that norms of *jus cogens* arise from customary international law rules.[63] Both domestic courts[64] and international

---

is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

[60] See Analytical Report of the Study Group of the International Law Commission finalised by Chairman Martti Koskenniemi 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' UN Doc A/CN4/L682 (13 April 2006) 92, 194.

[61] ILA Committee on Formation of Customary (General) International Law, London Conference 'Final report of the committee: Statement of principles applicable to the formation of general customary international law' (2000) http://www.ila-hq.org/index.php/committees (accessed 1 September 2017) 6, para 8.

[62] See 'Second Report on *Jus Cogens* by Dire Tladi, Special Rapporteur' A/CN4/706 (16 March 2017) 21, paras 43–47.

[63] See, eg, statement by Pakistan, 34th session of the General Assembly, A/C.6/34/SR.22, 3, para 8: 'The principle of the non-use of force, and its corollary, were *jus cogens* not only by virtue of article 103 of the Charter but also because they had become norms of customary international law recognized by the international community'; see also United Kingdom, 34th session of the General Assembly, A/C.6/34/SR.61 11 para 46; Jamaica, 42nd session of the General Assembly, A/C.6/42/SR.29, 3, para 3: 'The right of peoples to self-determination and independence was a right under customary international law, and perhaps even a peremptory norm of general international law.'

[64] See, eg, *Siderman de Blake v Argentina* (n 51 above) 715 citing *Committee of United States Citizens Living in Nicaragua v Reagan* 859 F.2d 929 (DC 1988) (United States) 940, where the US Court of Appeals described *jus cogens* norms as 'an elite subset of the norms recognised as customary international law'. The court further noted that 'in contrast to ordinary rules of customary international law, *jus cogens* norms "embraces customary laws considered binding on all nations".' In *Buell v Mitchell,* 274 F.3d 337 (6th Cir. 1988) (United States) 373, the US Court of Appeal also noted with respect to *jus cogens,* that: 'Some customary norms of international law reach a "higher status"' namely that of *jus cogens*'. In *Kazemi Estate v Iran* [2014] 3 SCR 176 (Canada) para 151, the Supreme Court of Canada described *jus cogens* norms as 'higher form of customary international law'. In EXP. No. 0024-2010-PI/TC LIMA

© Juta and Company (Pty) Ltd

courts[65] have based their determination that a norm meets the criteria for *jus cogens* status on the basis of the customary international law status of the norm in question. The weight of academic literature similarly supports the idea that customary international law is the most obvious basis for *jus cogens* status of international law rules.[66] While the significance of customary international law in the identification of

25 Del Número Legal de Congresistas Sentencia del Pleno Jurisdiccional Del Tribunal Constitucional del Perú del 21 de Marzo de 2011, para 53, the Constitutional Tribunal of Peru stated that the *jus cogens* rules referred to 'customary international norms under the auspices of an *opinio juris seu necessitates*'. ('Las normas de *jus cogens* parecen pues encontrarse referidas a normas internacionales consuentudinarias que bajo el auspicio de una *opinio juris seu necessitatis*'). Similarly, Italian courts have also recognised that *jus cogens* norms emerged from rules of customary international law.

65 See *Belgium v Senegal (Questions Relating to the Obligation to Prosecute or Extradite)* 2012 ICJ Reports457, para 99. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits)* 1986 ICJ Reports 14, para 274, where the International Court of Justice recognised the prohibition of torture as 'part of customary international law' that 'has become a peremptory norm (*jus cogens*)'. The court referred to 'many of the rules of humanitarian law' as constituting 'intransgressible principles of international customary law', confirming the idea that *jus cogens* norms – referred to by the court as 'intransgressible principles' – have a customary-law basis. See also *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of 26 February 2007, 2007 ICJ Reports 43 para 161. See, further, the separate opinion of Judge Simma in the *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment of 6 November 2003, 2003 ICJ Reports 161 para 6: 'I find it regrettable that the Court has not mustered the courage of restating, and thus reconfirming, more fully fundamental principles of the law of the United Nations as well as customary international law (principles that in my view are of the nature of *jus cogens*) on the use of force, or rather the prohibition on armed force'. See further *Mucić et al (Čelebići)* (IT-96-21-T), ICTY Trial Judgment of 16 November 1998, para 454, where the ICTY has noted that the prohibition against torture is a 'norm of customary international law' and it 'further constitutes a norm of *jus cogens*'. Similarly in *Jelesić* (IT-95-10-T), ICTY Trial Judgment of 14 December 1999, para 60 the court stated that 'there can be absolutely no doubt' that the prohibition against genocide in the Genocide Convention falls 'under customary international law' and is now 'at the level of *jus cogens*.'

66 G Cahin *La Coutume internationale et les organisations internationales: l'incidence de la dimension institutionnelle sur le processus coutumier* (2001) 615 ('*voie normale et fréquente sinon exclusive.*') See also R Rivier *Droit International Public* 2nd ed (2013) 566: '[c]ustomary international law is at the forefront to give birth to rules designed to power the mandatory law'. See, additionally, A Cassese *International Law* (2005) 199: 'a special class of general rules made by custom has been endowed with a special legal force – they are peremptory in nature and make up the so-called *jus cogens*'. See, further, JE Christófolo *Solving Antimonies between Peremptory Norms in Public International Law* (2016) 115: 'As the most likely source of general international law, customary norms would constitute *ipso facto* and *ipso iure* a privileged source of *ius cogens* norms.' See, for a contrary view, M Janis 'The nature of *jus cogens*' (1987) 3 *Connecticut Journal of International Law* 359–363.

© Juta and Company (Pty) Ltd

norms of *jus cogens* is hardly in dispute,[67] there are differences of view concerning the other sources.[68] In our view, the view expressed in the second report of the Special Rapporteur, that general principles of law can also serve as the basis for *jus cogens* seems to be correct.[69] Like customary international law, general principles are generally applicable.[70] Kelsen is of the view that the term 'general international law' designates 'norms of international law which are valid for all the states of the world'.[71]

The ICJ has itself resorted to the use of the term 'general international law' in order to denote norms which are binding *erga omnes* and enforceable against all, as opposed to treaty (or other) norms which are binding *inter partes*.[72] General principles of law are, *per se,* part of general international law. Moreover, there is a particular correlation between *jus cogens* norms and general principles of law. Like *jus cogens,* 'general

---

67 Statement of the Chairman of the Drafting Committee on Peremptory Norms of General International Law (*jus cogens*) (n 57 above) 6: 'Members agreed with the important position of the customary international law in the formation of peremptory norms of general international law.'

68 Ibid.

69 'Second Report on *Jus Cogens*' (n 62 above) para 48.

70 See, eg, S Knuchel *Jus Cogens: Identification and Enforcement of Peremptory Norms* (2015) 52: 'general principles [of law] may be elevated to *jus cogens* if the international community of States recognise and accept them as such'. See further A Cançado Trindade '*Jus Cogens:* The material and the gradual expansion of its material content in contemporary international case law' (2008) 35 *Curso de Derecho International Organizado por el Comité Jurídico Interamericano* 27. See also Weatherall (n 10 above) 133; T Kleinlein '*Jus Cogens* as the "Highest Law"? Peremptory Norms and Legal Hierarchies' (2015) *Netherlands Yearbook of International Law* 195: 'a peremptory norm must first become general international law i.e. customary international law or general principles of law pursuant to article 38(1) of the ICJ Statute'. See also WE Conklin 'The Peremptory Norms of the International Community' (2012) 23 *European Journal of International Law* 840. Also compare, A Bianchi 'Human Rights and the Magic of *Jus Cogens'* (2008) 3 *European Journal of International Law* 493: 'The possibility that *jus cogens* could be created by treaty stands in sharp contrast to the view that peremptory norms can emerge only from customary law'; R Nieto-Navia 'International Peremptory Norms *(Jus Cogens)* and International Humanitarian Law' in LC Vorah, F Pocar, Y Featherstone *et al* (eds) *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (2003) 613–615: 'One can state generally that norms of *jus cogens* can be drawn generally from the following identified sources of international law: (i) General treaties [...] and (ii) General principles of law recognized by civilized nations'; Orakhelashvili (n 50 above) 126; ES Vargas 'In quest of the practical value of *jus cogens* norms' (2015) 46 *Netherlands Yearbook of International Law* 214: '*jus cogens* derives from customary law and general principles of international law'.

71 H Kelsen *Principles of International Law* (1952) 188.

72 *Barcelona Traction Light and Power Company, Limited* (5 February 1970) 1970 ICJ Reports 32. See further statement by Mr Ago, (1) *Yearbook of the International Law Commission* (Part One), 1966, Summary Record of the 828th Meeting (n 38 above) para 15: 'Even if a rule of *jus cogens* originated in a treaty, it was not from the treaty as such that it derived its character but from the fact that, even though derived from a treaty, it was already a rule of general international law.'

© Juta and Company (Pty) Ltd

principles of law' as a source has been described as having a specific nature as 'moral commandments … considered by the conscience of mankind to be indispensable for the coexistence of man in organized society'.[73]

Dugard is of the opinion that there is a natural law basis to general principles of law, as evidenced by the way in which international courts have invoked, amongst others, considerations of humanity and principles of non-discrimination under the scope of general principles of law.[74] This seems to find support in the *Corfu Channel* case, where the United Kingdom argued that the obligations upon the Albanian authorities of notifying and warning British warships of the existence of a minefield in Albanian territorial waters were based on certain general and well-recognised principles, namely '… the elementary considerations of humanity', which are '… even more exacting in peace than in war'.[75]

Accordingly, the analysis of whether the prohibition of terrorism is a norm of general international law will consider that general international law consists of both customary international law and general principles of law. In our view, treaty law does not constitute 'general international law' for the purposes of article 53 of the Vienna Convention.[76]

3.1.2 Acceptance and Recognition

Not all norms of general international law are *jus cogens.* Thus, in addition to showing that a norm is one of general international law, for *jus cogens* status it is also necessary to show that the said norm is accepted and recognised as having a certain quality, namely non-derogability. The language of article 53 of the Vienna Convention includes, in addition to non-derogability, the element that such a norm must be one that may be only modified by a subsequent norm having the same quality. The ILC Drafting Committee on *jus cogens* confirmed that non-derogation and modification only by a subsequent norm of general international law

---

[73] B Schlütter *Developments in Customary International Law* (2010) 74–79.

[74] See *Corfu Channel Case (United Kingdom v Albania)* Merits ICJ (9 April 1949) 1949 ICJ Reports 6, 22; *Nicaragua v US* (n 65 above) para 114 (both cases invoking considerations of humanity); *South West Africa Cases (Ethiopia and Liberia v South Africa)* Second Phase (18 July 1966) 1966 ICJ Reports 6, 295–296 (referring to principles of non-discrimination). For views of writers that general principles in the sense of art 38(1)(c) have a natural-law basis, see M Shaw *International Law* (2003) 92; I Brownlie *Principles of Public International Law* (2003) 15; Dugard (n 50 above) 36; C Weeramantry *Universalising International Law* (2004) 267 & 268.

[75] Id *Corfu Channel* case 22.

[76] See, however, draft conclusion 5(2) adopted by the Drafting Committee of the International Law Commission (n 57 above), which states that: 'Treaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*).'

© Juta and Company (Pty) Ltd

are two aspects of the same criterion, namely that of acceptance and recognition, and not two separate tests for a norm to fulfil the criteria for a *jus cogens* norm.[77] Accordingly, these aspects will not be discussed separately.

The wording 'accepted and recognised by international community of states as a whole as a norm from which no derogation is permitted' has been the topic of some debate.[78] Draft article 50 proposed by the ILC in its final Draft Articles on the Law of Treaties stated only that '...a treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'[79] The Vienna Conference, however, adopted a slightly modified version of the ILC's article 50 as article 53 of the Vienna Convention, adding a reference to the norm being '...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.[80]

Positivists have argued that the above wording points to state consent because the words 'accepted' and 'recognised' imply consent to the peremptory character of the norm in question.[81] It has further been argued that *jus cogens* norms are subject to a double acceptance – a norm must first be recognised as a norm of general international law, whereafter the international community of states as a whole must further agree that such a norm is a norm from which no derogation is permitted.[82] The difficulty with any consent-based arguments in relation to *jus cogens* norms however is that non-derogability has been argued to lie at the core of these norms.[83] As such, *jus cogens* norms do not depend

---

77 See draft conclusion 4 adopted by the Drafting Committee of the International Law Commission (n 57 above).

78 Criddle & Fox-Decent (n 50 above) 339; G Tunkin '*Jus cogens* in contemporary international law' (1971) 1 & 2 *University of Toledo Law Review* 115.

79 Draft articles on the law of treaties with commentaries (n 37 above) 247–249.

80 Article 53 of the Vienna Convention (n 12 above).

81 M Weisburd 'The emptiness of the concept of *jus cogens* as illustrated by the war in Bosnia-Herzegovina' (1995) 17 *Michigan Journal of International Law* 1; Schwarzenberger (n 20 above) 471; D Shelton 'Normative hierarchy in international law' (2006) 100 *American Journal of International Law* 298. See further De Wet (n 50 above) chap 23, 542, stating: '[a]rticle 53 VCLT was thus negotiated so as to leave it to the "international community as a whole" to identify those international law norms belonging to the category of *jus cogens.* In essence, this implies that a particular norm is first recognised as customary international law, whereafter the international community of states as a whole further agrees that it is a norm from which no derogation is permitted. The international community of states as a whole would therefore subject a peremptory norm to "double acceptance."'

82 Ibid Shelton; ibid De Wet.

83 Kolb (n 50 above) 2–9.

© Juta and Company (Pty) Ltd

on, nor are they affected by, state consent and they embody principles of natural law common to all legal systems which do not require state consent.[84] The 'acceptance' or 'recognition' referred to in article 53 of the Vienna Convention, including the *opinio juris* of states discussed above, is not constitutive of *jus cogens* norms, but declaratory.[85] Article 53 does not purport to create a rule of *jus cogens.*[86] What article 53 requires is that states widely subscribe to the opinion that, on the basis of an authoritative set of rules existing in customary international law, no derogations from a certain rule are permitted and all modifications of the rule by means of ordinary international law are prohibited.[87]

Accordingly, an ordinary rule of customary international law becomes *jus cogens* due to the *opinio juris* of the international community of states as a whole that no derogation from such a rule is allowed (what is sometimes referred to as *opinio juris cogentis*). *Opinio juris cogentis* is different from *opinio juris sive necessitatis* in that, while the latter concerns the opinion of states that a particular norm is part of customary international law, the former concerns the opinion of states as to its non-derogability.

In connection with the requirement of 'acceptance and recognition', it is worth pointing out that it is the international community of States 'as a whole' that must accept and recognise the non-derogability of the norm in question. This has two implications. First, what must be sought is the acceptance and recognition of states and not non-state entities.[88] Second, the phrase 'as a whole' itself is meant to indicate that it is not the view of individual states that is sought, and that it is not required that each state accept and recognise the quality of the norm.[89] In the words of the Chairman of the Drafting Committee, Mr Yaseen, when the

---

[84] Orakhelashvili (n 50 above) 107; TS Rama Rao 'International custom' (1979) 19 *Indian Journal of International Law* 520; M Koskenniemi *From Apology to Utopia: The Structure of International Legal Argument* (1989) 363; M Janis 'The nature of *jus cogens*' (1988) 3 *Connecticut Journal of International Law* 361; ME O'Connell '*Jus cogens*: International law's higher ethical norms' in DE Childress (ed) *The Role of Ethics in International Law* (2011) 94.

[85] Linderfalk (n 55 above) 359–373.

[86] Id 359.

[87] Id 362 & 370.

[88] See draft conclusion 7(3) adopted by the Drafting Committee of the International Law Commission (n 57 above) which provides that '[w]hile the attitude of other actors may be relevant in providing context and for assessing acceptance and recognition of the international community of States as a whole, these cannot, in and of themselves, form a part of such acceptance and recognition'.

[89] See 'Second Report on *Jus Cogens*' (n 62 above) 34 para 67.

© Juta and Company (Pty) Ltd

Commission adopted the 1966 Draft Articles on the Law of Treaties, it would be sufficient 'if a very large majority did so.'[90]

3.2 The Core Characteristics of Jus Cogens Norms

In addition to the criteria for the identification of *jus cogens* described in 3.1 above, the Drafting Committee of the ILC has also identified certain characteristics of *jus cogens* norms.[91] These characteristics, however, are not additional elements or criteria of norms of *jus cogens,* but are rather descriptive elements. [92] The aforementioned characteristics may however be relevant in assessing the criteria for *jus cogens* norms of international law.[93]

In his First Report on *Jus Cogens,* the Special Rapporteur proposed that *jus cogens* norms evidence certain core elements: they protect the fundamental values of the international community, are hierarchically superior and are universally applicable.[94] Some states disagreed with these characteristics.[95] The vast majority of states, however, supported the characteristics.[96] At the 69th session of the ILC, the Drafting

---

[90] See the statement by Mr Yaseen, Chairman of the Drafting Committee, *Official Records of the United Nations Conference on the Law of Treaties, First Session*, 80th meeting, para 4. See also draft conclusion 7(2) adopted by the Drafting Committee of the International Law Commission (n 57 above) which provides that: 'Acceptance and recognition by a very large majority of States is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*); acceptance and recognition by all States is not required.' See also Vidmar (n 50 above) 543: 'This threshold for gaining peremptory status is high, for although it does not require consensus among all states … it does require the acceptance of a large majority of states.'

[91] See also draft conclusion 2 adopted by the Drafting Committee of the International Law Commission (n 57 above); see further 'Second Report on Jus Cogens' (n 62 above) 9 para 18.

[92] 'First report on *Jus Cogens*' (n 42 above) 44 para 72: 'While these are core characteristics of *jus cogens,* they do not tell us how *jus cogens* are to be identified in contemporary international law.'

[93] 'Second Report on Jus Cogens' (n 62 above) 9 para 18.

[94] 'First Report on Jus Cogens' (n 42 above) 38–44 paras 61–72.

[95] See Official Records of the General Assembly, 71st Session, Supplement No 10 (A/71/10). States that opposed the elements in draft conclusion 3 para 2 are: China (A/C6/71/SR 24), 16, para 89, noting that the elements 'are at variance with' art 53 of the Vienna Convention and the United States (A/C.6/71/SR26), 17 para 126.

[96] Ibid. States that supported the elements in para 2 of draft conclusion 3 are: Brazil (A/C.6/71/SR 26) 12 para 91; the Czech Republic (A/C.6/71/SR 24) 13 para 72: 'In our opinion *ius cogens* norms are exemptions to other rules of international law. They protect fundamental values of international community and are universally applicable'; El Salvador (A/C.6/71/25) 12 para 62; statement of Slovenia (on file with authors): 'notes the thorough consideration of the characteristics that are inherent in a *jus cogens* rule, and wishes to underline that it agrees with the enunciation of *jus cogens* as having special and exceptional character, reflecting the common and overarching values '[and requiring] universal adherence'; and South Africa, A/C.6/71/

© Juta and Company (Pty) Ltd

Committee on *jus cogens* adopted draft conclusion 2 setting out the general nature of *jus cogens* norms. The conclusion states that:

> Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable.[97]

It is further argued that these characteristics are interconnected. It is the fact that *jus cogens* norms protect fundamental values that necessitates their hierarchical superiority above other norms of customary international law and treaty law and supports their universal applicability. Furthermore, *jus cogens* norms cannot be argued to be universally applicable if they can be set aside by conflicting norms of international law – and the reason that they cannot be so set aside is again a testament to their superiority. The characteristics of *jus cogens* norms will be discussed below.

3.2.1 Fundamental Values

The ICJ has stated that 'the question whether a norm is part of *jus cogens* relates to the legal character of the norm'.[98] The ILC has similarly suggested that: 'It is not the form of a general rule of international law but the particular nature of the subject matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*.'[99] As reflected in the statements by France and the Holy See at the Vienna Conference, *jus cogens* norms represent the universal conscience and safeguard human rights.[100] There is support in both international jurisprudence and state practice for the notion that *jus cogens* norms safeguard the fundamental values of the international community as a whole. In national case law, for example, the Constitutional Court of Peru referred to the importance of the values underlying *jus cogens* norms.[101] South Africa's Constitutional Court has stated that *jus cogens*

SR 26, 12 para 87: 'We wish to express our disappointment and surprise that the Commission was not able to agree on what we believe are basic and uncontroversial characteristics. It is generally accepted that *jus cogens* norms are universally binding, reflect fundamental values and interests and hierarchically superior.'

[97] See draft conclusion 2 adopted by the drafting committee of the International Law Commission (n 57 above).

[98] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion of 8 July 1996, 1996 ICJ Reports 226 para 83.

[99] 'Draft articles on the law of treaties with commentaries' (n 37 above) 247.

[100] See (n 46 and n 47 above).

[101] *Sentencia del Pleno Jurisdiccional del Tribunal Constitucional del Perú* Exp n 0024-2010-PI/TC 53.

© Juta and Company (Pty) Ltd

reflected the most fundamental norms of the international community.[102] United States case law has further noted the importance of the values underlying *jus cogens* obligations. [103]

Additionally, in international jurisprudence the ICJ has used various terms to refer to the concept of fundamental values. For example, in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, the ICJ stated that *jus cogens* norms are peremptory because of the importance of the values they protect, and in this regard, it identified rules created for a humanitarian purpose as *jus cogens.*[104] In *Reservations to the Convention on Genocide,* the court expressed the view that genocide is contrary to moral law, as it 'shocks the conscience of mankind'.[105] The prohibition of torture has further been named by the ICTY as one of the most fundamental standards of the international community.[106] Furthermore, regional commissions such as the Inter-American Commission on Human Rights has confirmed that *jus cogens* norms derive their status from fundamental values held by the international community.[107]

In addition to this, various states have made statements before the United Nations General Assembly (UNGA) which support the view that *jus cogens* norms protect fundamental rights or fundamental humanitarian values.[108] Portugal has expressed the view that peremptory norms of international law are based on a common belief in certain fundamental values of international law and deserved to be 'better protected than

---

[102] *Kaunda & Others v President of the Republic of South Africa & Others (Society for the Abolition of the Death Penalty in South Africa intervening as Amicus Curiae)* 2005 4 SA 235 (CC).

[103] *Siderman de Blake* (n 51 above); *Alvarez-Machain v United States* 331 F 3d 604 (2003, 9th Cir) 613; *Estate of Hernandez-Rojas v United States* US Dist LEXIS 136922 (SD Cal 2013) 14; *Doe v Reddy* US Dist LEXIS 26120 (ND Cal 2003); *Al Rawi & Others, R (on the application of) v Secretary of State for Foreign and Commonwealth Affairs & Another* (2008) QB 289 153–154.

[104] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (n 65 above) para 160.

[105] *Application of Genocide* case (*Bosnia and Herzegovina v Serbia and Montenegro*) (n 65 above) 23; *Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (28 May 1951) 1951 ICJ Reports 15, 23.

[106] *Prosecutor v Furundzija* (Trial chamber of ICTY, Judgment, 10 December 1998) IT-95-17/1-T1, para 153; *Al-Adsani v UK* (2001) 34 EHRR 273, 123 ILR 24 para 55.

[107] *Michael Domingues v US* (Merits) (22 October 2000) Report no 62/02, http://cidh.org/annualrep/2002eng/USA.12285.htm_ftn1http://cidh.org/annualrep/2002eng/USA.12285.htm - _ftn1 case 12.285 para 49.

[108] Official Records of the General Assembly, 55th session, Sixth Committee, Agenda Item 159: 'Report on the work of the 52nd session (2000). For example, see statements by Germany, 55th meeting, A/C.6/55/SR14, 10 para 56, and Italy, 56th session, A/C.6/56/SR13, 4, para 15.

© Juta and Company (Pty) Ltd

others'.[109] Similarly, South Africa, Yugoslavia and Costa Rica have pointed out that *jus cogens* norms are essential for the protection of the fundamental interests or values of the international community, while Greece referred to the protection of the fundamental interests of humanity. Mali and Morocco, for their part, noted that *jus cogens* norms protect the fundamental interests of mankind.[110] Despite differences in terminology, including references to fundamental 'interests', 'values', 'standards', 'fundamental interests of mankind' and 'values of the international community', there is ample reference in international jurisprudence and state practice to *jus cogens* reflecting and safeguarding fundamental, basic or higher interests or fundamental humanitarian values.[111]

It is worthwhile to conclude this section by noting the correlation between fundamental values and non-derogation. Hannikainen expresses the view that allowing derogations from a norm that protects

[109] Id Official Records of the General Assembly Portugal, 56th session, A/C.6/56/SR14, 10–11, para. 66.

[110] Id South Africa, 55th session of the UN General Assembly, Sixth Committee Agenda Item 159: 'Report of the International Law Commission on the work of its 52nd session' (2000) para 29; Yugoslavia, 31st Session of the UN General Assembly, Sixth Committee, Agenda Item 106: 'Report of the International Law Commission on the work of its 28th session' (1976) para 43; Costa Rica, 55th Session of the UN General Assembly, Sixth Committee, Agenda Item 159: 'Report of the International Law Commission on the work of its 52nd session' (2000) para 63; Greece, 49th Session of the UN General Assembly, Sixth Committee, Agenda Item 137: 'Report of the International Law Commission the work of its 46th session' (1994) para 90; Mali, 31st Session of the UN General Assembly, Sixth Committee, Agenda Item 106: 'Report of the International Law Commission on the work of its 28th session' (1976) para 69; Morocco, 40th Session of the UN General Assembly, Sixth Committee, Agenda Item 138: 'Report of the International Law Commission on the work Fragmentation Report (n 59 above) para 374. See also USSR, 31st Session of the UN General Assembly, Sixth Committee, Agenda Item 106: 'Report of the International Law Commission on the Work of its 28th Session' paras 24 & 43; France, 51st Session of the UN General Assembly, Sixth Committee Agenda Item 146: 'Report of the ILC on the work of its 48th session' (6 May - 26 July 1996) A/51/10 Supplement no 10 para 26; Argentina, 56th Session of the UN General Assembly, Sixth Committee, Agenda Item 162: 'Report of the International Law Commission on the work of its 53rd session' para 52; *Siderman de Blake* (n 51 above) 717; *Alvarez-Machain v US* (n 103 above) 613; *Estate of Hernandez-Rojas v US* (n 103 above); *Doe v Reddy* (n 103 above).

[111] Ibid USSR; ibid Yugoslavia; ibid France; Iran, 53rd Session of the UN General Assembly, Sixth Committee, Agenda Item 150: 'Report of the International Law Commission on the work of its 50th session' para 12; id South Africa paras 18, 29, 56 & 63; ibid Costa Rica, Slovakia, 56th Session of the UN General Assembly, Sixth Committee, Agenda Item 162: 'Report of the International Law Commission on the work of its 52nd session' para 18; id Argentina paras 13, 52 & 66; id para 87; Spain, 27th Session of the UN General Assembly, Sixth Committee, Agenda Item 89; id Greece para 90; *Al Rawi* case (n 103 above) 153; ibid Portugal; *Sentencia Del Pleno Jurisdiccional* case (n 113 above); *Michael Domingues* case (n 106 above) 49; ibid *Siderman de Blake*; *Alvarez-Machain v US* (n 116 above); id *Estate of Hernandez-Rojas v US* (2013) 14; id *Doe v Reddy* fn 5; *Kaunda* case (n 114 above) 169.

© Juta and Company (Pty) Ltd

an overriding value of the international community of states would seriously jeopardise such a value.[112] Byers adds that the non-derogable character of *jus cogens* norms results from the fact that states simply do not believe that it is possible to persistently object to, or contract out of, norms reflecting fundamental values of the international community.[113] *Jus cogens* rules limit the ability of states to create or change rules of international law and prevent states from violating fundamental rules of international public policy.[114]

3.2.2 Hierarchical Superiority

Authors have argued that *jus cogens* is a constitutive legal norm, allowing for the creation of norms which are hierarchically superior to other norms of international law.[115] This places *jus cogens* outside the formal sources of law as set out in article 38 of the ICJ Statute as higher norms derived from a non-consensual source.[116] As noted by Cassesse, it is the fact that *jus cogens* norms have the power to invalidate conflicting rules of law which is a testament to, as well as a consequence of, its normative superiority.[117]

Dugard is of the opinion that the reason why *jus cogens* norms enjoy a hierarchically superior position to other norms in the international legal order is that they are 'a blend of principle and policy.'[118] It has been argued that *jus cogens* norms are 'super-norms' or 'super-laws' or 'supercustom' that hold the highest hierarchical position amongst all other norms and principles.[119] They hold this uppermost hierarchical point in international law regardless of where they originate from and whether states have consented or agreed to them or their standing.[120]

Certain national courts specifically referred to the hierarchical position of *jus cogens* norms vis-à-vis other norms of international law. The

---

112 L Hannikainen *Peremptory Norms* (*Jus Cogens*) *in International Law* (1988) 207.

113 M Byers 'Conceptualising the relationship between *jus cogens* and *erga omnes* rules' (1997) 66 *Nordic Journal of International Law* 211, 212 & 219–220.

114 Id 212 & 219–220.

115 Christol (n 50 above) 33; A Verdross '*Jus Dispositivum* and *jus cogens* in international law' (1966) 60 *American Journal of International Law* 55.

116 Orakhelashvili (n 50 above) 37–38.

117 A Cassese '*Jus cogens*' in A Cassese (ed) *Realizing Utopia: The Future of International Law* (2012) 159.

118 Dugard (n 50 above) 39.

119 C Focarelli 'Promotional *jus cogens*: A critical appraisal of *jus cogens*' legal effects' (2008) 77 *Nordic Journal of International Law* 429–459; WM Reisman 'Unilateral action and the transformations of the world constitutive process: The special problem of humanitarian intervention' (2000) 11 *European Journal of International Law* 15; M Cherif Bassiouni 'A functional approach to "general principles of international law"' (1990) 11 *Michigan Journal of International Law* 801–809; Shaw (n 64 above) 117.

120 *Siderman de Blake* (n 51 above) 176.

© Juta and Company (Pty) Ltd

Supreme Court of the Republic of the Philippines noted that a *jus cogens* norm holds 'the highest hierarchical position among all other customary norms and principles'.[121] The High Court of Zimbabwe confirmed that a *jus cogens* norm has primacy in the hierarchy of rules constituting the international normative order.[122] In *Siderman de Blake,* the US Court of Appeals similarly referred to the supremacy of *jus cogens* over all rules of international law.[123] Furthermore, the US District Court held that these norms enjoy the highest status in international law and prevail over both customary international law and treaties.[124] United Kingdom domestic courts referred to *jus cogens* as norms enjoying a higher rank than treaty law and customary rules, while the Supreme Court of Argentina stated that *jus cogens* norms are the highest source of international law, not only above treaty law, but over all of the sources of law. [125] Various other national court cases referred to *jus cogens* having a higher rank than treaty law and customary rules.[126] Other cases referred to superior rules, or rules with the highest status or standing in international law.[127]

The notion of *jus cogens* norms as hierarchically superior has further

---

[121] *Bayan Muna v Alberto Romulo (in his capacity as Executive Secretary)* (2011) PHSC 112.

[122] *Mann v Republic of Equatorial Guinea* (2008) 1 ZWHHC 12.

[123] *Siderman de Blake* (n 51 above) 716. See, also, *Jones v Ministry of Interior for the Kingdom of Saudi Arabia & Others* (2007) 1 AC 270 (HL), 1 All ER 113 39.

[124] See judgment by the US District Court for the District of Columbia in *Committee of US Citizens Living in Nicaragua v Reagan* (n 64 above) 935, applied in *Princz v Federal Republic of Germany* 26 F 3d 1166 (DC Cir 1994) 1173 and in *Sabbithi v Al Saleh* 623 F Supp 2d 93 (DDC 2009) 129; see further the US Court of Appeals, Second Circuit, in *United States v Yousef* 327 F 3d 56 (2d Cir 2003) 94; the US District Court for New York in *Garb v Republic of Poland* 207 F Supp 2d 16 (EDNY 2002) 129 and the US Court of Appeals for the Ninth Circuit in *Sarei v Rio Tinto PLC* 671 F.3d 736 (9th Cir 2010) 776 (Judge Schroeder, for the majority).

[125] *Mazzeo Julio Lilo y otros* (Judgment of 13 July 2007) 2007-III-573 (Arg Supreme Court) para 53.

[126] *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)* (2000) 1 AC 147; *A & Others v Secretary of State for the Home Department (No 2)* (2005) (HL)1 WLR 414 436; *Al Rawi* (n 103 above) 153; *A & Others v Secretary of State for the Home Department (No 2)* (2006) 2 AC 221 (HL), 1 All ER 575 33; *Al-Saadoon & Another, R (on the application of) v Secretary of State for Defence* (2008) EWHC 3098 85; *Youssef v Secretary of State for Foreign and Commonwealth Affairs* (2014) QB 728 53 and (2016) 2 WLR 509 17*; Al-Adsani v UK* (n 106 above) 30 (majority).

[127] See, eg, judgments by the Court of First Instance of the European Communities in *Yusuf and Al Barakaat International Foundation v Council and Commission* (21 September 2005) ECR II-3533 282; *Kadi v Council and Commission* (21 September 2005) ECR II-3649 231 (referring to 'superior rules'). See further, the judgments of US domestic courts in *Committee of US Citizens Living in Nicaragua v Reagan* (n 64 above) 935; *US v Yousef* (n 124 above)*; Hwang Geum Joo v Japan* 172 F Supp 2d 52 (DC 2001) fn 4; *Garb v Republic of Poland* (n 124 above) 129; *Sabbithi v Al Saleh* (n 124 above) 12 (referring to 'higher status') and *Sarei v Rio Tinto* (n 124 above) 776 (Schroeder J,

© Juta and Company (Pty) Ltd

been confirmed in international jurisprudence.[128] In his separate opinion in the *Application of the Genocide Convention* case, Judge Lauterpacht noted that '*jus cogens* is a concept which is superior to both customary international law and treaty'.[129] In the *Furundžija* case, the ICJ stated that the prohibition of torture as a norm of *jus cogens* relates to 'the hierarchy of rules in the international normative order,' and that it has evolved into a *jus cogens* norm, which has a higher rank in the international hierarchy than treaty law and customary rules.[130] The IACHR has stated that *jus cogens* is a 'superior order of legal norms, which the laws of man or nations may not contravene'.[131] The European Court of Human Rights (ECtHR) similarly regarded *jus cogens* as a higher-ranking norm.[132]

Moreover, states have made statements referring to the higher status of *jus cogens* norms before the UNGA. Cuba referred to the higher principles of *jus cogens*, while Cyprus and Slovakia referred to hierarchically higher rules.[133] Portugal was of the view that *jus cogens* focused on the idea of a material hierarchy of norms, and that there are certain superior norms, which are non-derogable.[134] The Netherlands stated that *jus cogens* is 'hierarchically superior within the international law system, irrespective of whether it took the form of written law or customary law'. [135] Finland was of the view that '*jus cogens* was the only instance of a real hierarchy

for the majority). See judgments of the US Court of Appeals in *United States v Matta Ballesteros* 71 F 3d 754 (10th Cir 1995) and *Siderman de Blake* (n 51 above); 715 & 717. In UK domestic courts, see, further, *Al-Adsani v UK* (n 106 above) 57; id *Pinochet (nr 3)* 147 (referring to rules with a 'higher standing').

128 Ibid.

129 *Application of Genocide* case (*Bosnia and Herzegovina v Serbia and Montenegro)* (n 65 above) paras 325 & 440 (separate opinion of Judge Lauterpacht).

130 *Furundzija* (n 106 above). See, further, *DRC v Rwanda* (n 51 above) para 10 regarding the separate opinion of Judge ad hoc Dugard. See, also, the dissenting opinion of Judge Al Khasawneh in *Arrest Warrant of 11 April 2000 (DRC v Belgium)* (14 February 2002) 2002 ICJ Reports 3; (2002) 41 ILM 536 para 7.

131 *Michael Domingues v US* (n 106 above) 49.

132 *Al-Dulimi and Montana Management Inc v Switzerland* Application no 5809/08 ECHR (21 June 2016) 576 para 34.

133 Mr Alvarez Tabio (Cuba), 22nd Session of the UN General Assembly, Sixth Committee, Agenda Item 86: 'Law of treaties' (1967) para 22; see further statements by Cyprus and Slovakia at the 54th Session of the UN General Assembly, Sixth Committee, Agenda Item 154: 'United Nations Decade of International Law' para 48.

134 See further statement by Portugal, 56th session of the General Assembly, Sixth Committee: 'The concepts of *jus cogens*, obligations *erga omnes* and international crimes of State or serious breaches of obligations under peremptory norms of general international law were based on a common belief in certain fundamental values of international law which, because of their importance to the international community as a whole, deserved to be better protected than others.'

135 Netherlands, 68th Session of the UN General Assembly, Sixth Committee, A/C.6/68/SR.

© Juta and Company (Pty) Ltd

in international law'.[136] The hierarchical superiority of *jus cogens* norms is necessary in light of the fact that conflicting acts are of no force and effect and that no derogation from *jus cogens* norms are permitted.[137] The idea that a *jus cogens* norm can invalidate other norms necessarily implies the existence of a hierarchy of norms.

3.2.3 Universal Application

The fact that no state may derogate from *jus cogens* norms may serve as a testament to the universal character of *jus cogens* norms. *Jus cogens* norms have been described as 'universally binding by their very nature'.[138] There is a close relationship between the universal application of *jus cogens* norms and the fact that *jus cogens* norms lead to *erga omnes* obligations.[139]

The idea that *jus cogens* norms are universally applicable and binding is also well-supported by state practice, including in the form of domestic court cases.[140] The United States, for example, argued that the *jus cogens* norm of the prohibition of the use of force is a 'universal norm'.[141] Similarly, Bosnia and Herzegovina was of the view in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* that *jus cogens* norms bind all states.[142] In a statement before the UNGA, Mongolia equated *jus cogens* norms with universally recognised principles. [143] The ICJ itself has described the *jus cogens* norm of the prohibition of genocide as a norm with a 'universal character'.[144] In *Questions Relating to the Obligation to Extradite or*

136 Finland (on behalf of Denmark, Finland, Iceland, Norway and Sweden), 60th Session of the UN General Assembly, Sixth Committee, Agenda Item 80: 'Report of the ILC on the work of its 57th session' (2 May – 3 June and 11 July – 5 August 2005) A/60/10.

137 Article 53 of the Vienna Convention (n 12 above).

138 *Smith v Socialist People's Libyan Arab Jamahiriya* 101 F 3d 239 (2nd Cir 1996) 242.

139 De Wet (n 50 above).

140 In the US domestic courts, see *Tel-Oren v Libyan Arab Republic* (Judgment of 3 February 1984) 726 F2d 774, 233 (US App DC) 384; *Siderman de Blake* (n 51 above) 715; *Sampson v Federal Republic of Germany & Claims Conference* 250 F3d 1145 (7th Cir. 2001) 1150; *Belhas v Moshe Ya'Alon*, 515 F3d 1279 (DC Cir 2008) 1291–1292; *Abelesz v Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir 2012) 676. See further the judgment of the Federal Court of Australia in *Nulyarimma v Thompson* (1999) FCA 1192 (1 September 1999) 145 (Judge Merkel dissenting).

141 *Nicaragua* case (n 65 above) para 313.

142 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case (n 65 above) para 132.

143 See statement by Mongolia, 26th Session of the UN General Assembly, Sixth Committee, Agenda Item 89: 'Report of the Special Committee on the Question of Defining Aggression' para 34.

144 *Reservations to the Genocide Convention* case (n 105 above) 21.

© Juta and Company (Pty) Ltd

Prosecute, Judge Cançado Trindade stated that '*jus cogens* [is based] on the very foundations of a truly universal international law'.[145]

In addition to this, there are certain universally condemned offences, which clearly correspond to the violation of *jus cogens* human rights.[146] Although it is not the aim of this paragraph to discuss issues of universal jurisdiction, this serves as further evidence of the 'universality' inherent in the *jus cogens* regime. Furthermore, due to the universal nature of a *jus cogens* norm, it does not seem plausible that there could be a different interpretation than the enforcement of such a norm being applicable against all states. [147]

4 Does the Prohibition of Terrorism Meet the Criteria and Characteristics of a *Jus Cogens* Norm?

There is, yet, no authoritative statement by an international juridical organ which confirms the *jus cogens* status of the prohibition of terrorism.[148] However, the test for whether a norm is *jus cogens* is not whether international courts have determined that it is so. It is, as stated in the introduction to this article, whether states accept and recognise such a norm as one from which no derogation is permitted. This requires an assessment, not of international court decisions, but of actual state practice – although, of course, international court decisions can assist as a subsidiary tool in determining whether the norm is recognised and accepted as non-derogable. In this section, we will consider whether the prohibition of terrorism meets the criteria for *jus cogens*. We will do this by testing whether it meets the formal requirements as discussed in section 3.1. We will then assess whether the prohibition reflects the core characteristics described in section 3.2.

4.1 The Prohibition of Terrorism and the Criteria for Jus Cogens *Norms*

4.1.1 The Prohibition of Terrorism as a Norm of General International Law

As discussed, for a norm to qualify as a norm of *jus cogens*, it must first be shown to be a norm of general international law, which includes

[145] *Belgium v Senegal (Questions Relating to the Obligation to Prosecute or Extradite* (n 65 above).
[146] P Zenović 'Human rights enforcement via peremptory norms – a challenge to state sovereignty' (2012) *Riga Graduate School of Law Research Papers* No 6 http://www.rgsl.edu.lv/uploads/files/RP_6_Zenovic_final.pdf (accessed 13 September 2016) 44.
[147] Ibid.
[148] Weatherall (n 10 above) 616.

© Juta and Company (Pty) Ltd

both rules of customary law and general principles of law. To determine whether the prohibition of terrorism is a norm of *jus cogens* thus requires an assessment of whether the prohibition is a norm of general international law, either in the form of customary international law or a general principle of law. As will be illustrated below, the prohibition of terrorism is reflected widely in practice and accepted as law.

State practice with regard to the prohibition of terrorism is evidenced by acts of states in connection with treaties as well as legislative acts and national jurisprudence.[149] Numerous international treaties and protocols have been criminalising certain terrorist conduct.[150] These treaties and protocols define offences relating to specific conduct, ranging from crimes against the person, civil aviation and shipping to crimes that involve the use, possession or threatened use of bombs or nuclear materials and crimes concerning the financing of terrorism.[151]

The aforementioned sectoral anti-terrorism treaties enjoy widespread ratification by states.[152] For example, out of the 193 member states of the UN, the Tokyo Convention has been ratified by 186 member states, the Montreal Convention by 188 member states and the Hague Convention

149 See, further, draft conclusion 7 of the ILC 'Report on the work of the 66th session' (n 52 above) 241, in terms of which state practice includes 'the conduct of States "on the ground", diplomatic acts and correspondence, legislative acts, judgments of national courts, official publications in the field of international law, statements on behalf of States concerning codification efforts, practice in connection with treaties and acts in connection with resolutions of organs of international organizations and conferences'. In terms of draft resolution 11, *opinio juris* includes 'statements by States which indicate what are or are not rules of customary international law, diplomatic correspondence, the jurisprudence of national courts, the opinions of Government legal advisers, official publications in fields of international law, treaty practice and action in connection with resolutions of organs of international organizations and of international conferences. Inaction may also serve as evidence of acceptance as law'.

150 The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft ('Tokyo Convention') the 1979 International Convention against the Taking of Hostages ('Hostages Convention'); the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ('Maritime Safety Convention'); the 1997 International Convention for the Suppression of Terrorist Bombings ('Terrorist Bombings Convention'); the 1999 Convention for the Unification of Certain Rules for International Carriage by Air ('Montreal Convention'); the 1999 International Convention for the Suppression of the Financing of Terrorism ('Terrorism Financing Convention'); the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism ('Nuclear Terrorism Convention').

151 Ibid.

152 With regard to subsequent practice as a means of treaty interpretation, see International Law Commission 'First report on subsequent agreements and subsequent practice in relation to treaty interpretation' (19 March 2013) UN Doc A/CN4/660 para 111; International Law Commission 'Second report on subsequent agreements and subsequent practice in relation to treaty interpretation' (26 March 2014) UN Doc A/CN4/671 para 119.

© Juta and Company (Pty) Ltd

by 185 member states.[153] In addition to this, the Terrorism Bombings Convention has been ratified by 170 states and the Terrorist Financing Convention by 188 states.[154] Moreover, UNSC resolution 1373 of 2001 requires all member states to make terrorism a serious crime in domestic legislation.[155] Many states have adopted national legislation prohibiting terrorism.[156] The condemnation of terrorism is further supported in national jurisprudence and statements at the ILC.[157]

---

153 The Tokyo Convention (n 150 above); the Montreal Convention (n 150 above); the Convention for the Suppression of Unlawful Seizure of Aircraft, 1970 (Hague Convention). For treaty ratifications see UN Growth in United Nations membership, 1945-present http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html (accessed 6 January 2016).

154 The Terrorist Bombings Convention (n 150 above); the Terrorism Financing Convention (n 150 above). For treaty ratifications, see| further United States Treaty Collection International Convention for the Suppression of Terrorist Bombings https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-9&chapter=18&clang=_en (accessed 11 August 2017); United States Treaty Collection International Convention for the Suppression of the Financing of Terrorism (accessed 11 August 2017).

155 Art 2(3) of S/RES 1373 (2001).

156 See South Africa's Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004; the Botswana Counter-terrorism Act 24 of 2014; the Lesotho Penal Code Act 6 of 2012; the Uganda Anti-Terrorism Act, 2002; the Ghana Anti-terrorism Act 762 of 2008; the Nigerian Terrorism (Prevention) Act, 2011; the Cameroon Law on the Suppression of Acts of Terrorism 28 of 2014; s 87*bis* of the Algerian Penal Code, promulgated by Order No 66-156 of 18 Safar 1386 corresponding to 8 June 1966; the Egyptian Anti-terrorism Law, 2015; the Tanzanian Prevention of Terrorism Act, 2002; the Ethiopian Anti-terrorism Proclamation no 652 of 2009; the Tunisian Anti-terrorism Law 26 of 2015; s 329 of the Penal Code of Bhutan, 2008; the Bangladesh Anti-Terrorism Ordinance, 2004; s 130B of the Malaysian Penal Code Act 574 of 2015; s 218*bis* of the Penal Code of the Democratic Republic of Timor-Leste 19 of 2009; the Jamaican Terrorism Prevention Act, 2005; the Seychelles Prevention of Terrorism Act 7 of 2004; the Dominican Suppression of the Financing of Terrorism (Amendment) Act 10 of 2011; s 73C of the Vanuatu Penal Code [Cap 135] 1981; the Antigua and Barbados Prevention of Terrorism Act 12 of 2001; the Trinidad and Tobago Anti-Terrorism Act 26 of 2005; arts 571–580 of the Penal Code of Spain, 1995 (as amended by Organic Law 5/2010); s 8(1) para 2(b) of the Belgian Organic Law on the Intelligence and Security Services, 1998; the Netherlands Crimes of Terrorism Act, 2004; s 311 of the Criminal Code of the Czech Republic Act 40 of 2009; s 258 of the Criminal Code of Ukraine, 2001; s 330 of the Criminal Code Of the Republic Of Albania, Law no 7895 of 1995; s 230 of the Andorra New Penal Code, 2005; the Saudi-Arabia Penal Law for Crimes of Terrorism and its Financing, 2013; s 100(1) of the Australian Criminal Act Code, 1995; the New Zealand Terrorism Suppression Act, 2002; s 1 of 18 USC 2331, 2004; s 3 of the Bahamas Anti-Terrorism Act, 2004; s 391 of the Guatemalan Criminal Code, 1973; s 2 of the Brazilian Anti-Terrorism Law, 2016; s 421 of the French Penal Code, 1791.

157 *Barcelona Traction Light and Power Company, Limited* (n 72 above) 32. See further statement by Mr Ago, *Yearbook of the International Law Commission* I (Part One), 1966, Summary Record of the 828th Meeting (n 38 above) para 15: 'E]ven if a rule of *jus cogens* originated in a treaty, it was not from the treaty as such that it derived its character but from the fact that, even though derived from a treaty, it was already a rule of general international law.'

© Juta and Company (Pty) Ltd

With regard to *opinio juris*, writers have argued that unanimous resolutions can be evidence of *opinio juris*, and UNGA resolutions, although not formally binding, can be evidence of *opinio juris* in instances when there is sufficient state practice to support the usage element.[158] The *opinio juris* of states are reflected in numerous UNGA resolutions, which unequivocally condemn terrorism.[159] Furthermore, the customary nature of the prohibition of terrorising the civilian population is further indicated in article 51(2) of Additional Protocol I to the Geneva Convention and article 13 of Additional Protocol II, both of which prohibit acts or threats of violence with the primary purpose to spread terror among civilians, and both of which articles enjoy widespread support. Article 51(2) was adopted with 77 votes in favour, one against and 16 abstentions, and no concerns or reservations were expressed by states,[160] while article 13 was adopted by consensus.[161] Furthermore, state practice, such as

[158] B Cheng 'United Nations resolutions on outer space: "Instant" international customary law?' (1965) 5 *Indian Journal of International Law* 35–40; J Cantegreil 'The audacity of the Texaco/Calasiatic award: René-Jean Dupuy and the internationalization of foreign investment law' (2011) 22 *European Journal of International Law* 449; H Thirlway *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (1972) 67.

[159] Earlier resolutions referred to measures to 'prevent' international terrorism, see A/RES/40/61 (1985) para 1 and A/RES 42/159 (1987) para 1 (153 votes to 2 (Israel and the US), 1 abstention; (by consensus). Later resolutions used stronger wording to refer to measures to 'eliminate' international terrorism, such as A/RES 46/51 (1991) preamble (by consensus); A/RES 50/53 (1995) para 1 (by consensus), A/RES 51/210 (1996) para 1 (by consensus); A/RES 52/165 (1997) para 1 (by consensus), A/RES 54/110 (2000) para 1 by 149 votes to 0; 2 abstentions); A/RES 55/158 (2001) para 1 (by 151 votes to 0, 2 abstentions). Further resolutions, while supporting the view that terrorism must be eliminated, also focused on the violation of human rights in the context of terrorism: A/RES 48/122 (1993) para 1 (by consensus); A/RES 49/185 (1994) para 1; A/RES 50/186 (1995) para 2; A/RES/52/133 (1997) para 3; A/RES 54/164 (2000) (para 2); A/RES 57/219 (2003) preamble; A/RES 58/81 (2004) para 1. See further A/RES 59/153 (2005).

[160] Article 51(2) of Additional Protocol I to the Geneva Conventions, 1949 states that '[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited'.

[161] Article 13 of Additional Protocol I to the Geneva Conventions, 1949 provides that: '1. [t]he civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances. 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. 3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.' See further *Prosecutor v Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgment, 30 November 2006, para 87. See further L Paredi 'The war crime of terror: An analysis of international jurisprudence' www.internationalcrimesdatabase.org (accessed 11 November 2017) 4.

© Juta and Company (Pty) Ltd

declarations by government officials and military manuals confirms that the prohibition of terrorism is part of customary international law.[162]

With regard to international jurisprudence, in *Prosecutor v Galić* Stanislav Galić, Commander of the Bosnian Serb forces, was accused of having conducted a protracted campaign of sniping and shelling against the civilian population in Sarajevo in contravention of articles 51(2) and 13 of the First and Second Additional Protocols to the Geneva Convention, respectively.[163] The International Criminal Tribunal for Yugoslavia (ICTY) Trial Chamber found Galić guilty of the war crime of terrorism.[164] Galić appealed the judgment on the basis that the Trial Chamber could only exercise jurisdiction over customary law-based crimes.[165] On appeal, the

[162] See Islamic Statement against Terrorism: 'The undersigned, leaders of Islamic movements, are horrified by the events of Tuesday 11 September 2001 in the United States which resulted in massive killing, destruction and attack on innocent lives. We express our deepest sympathies and sorrow. We condemn, in the strongest terms, the incidents, which are against all human and Islamic norms. This is grounded in the Noble Laws of Islam which forbid all forms of attacks on innocents … (Surah al-Isra 17:15)' *MSA News* (14 September 2001) archive.org (accessed 11 November 2017. See Ecuador's Naval Manual (1989): '[t] he civilian population as such, as well as individual civilians, may not be the object of attack or of threats or acts of intentional terrorization', Germany's Military Manual (1992): 'measures of intimidation or of terrorism' are prohibited use of acts or threats of violence in order to spread terror among the civilian population; Ireland's Basic LOAC Guide (2005): 'Attacks or threats of violence intended to terrorise the civilian population are also prohibited'; Kenya's LOAC Manual (1997): it is forbidden 'to spread terror among the civilian population through acts or threats of violence'; Nigeria's Manual on the Laws of War: '[t]error attacks directed mainly against the civilian population are forbidden'; the UK LOAC Manual (2004): 'Acts or threats of violence, the primary purpose of which is to spread terror among the civilian population are prohibited'; Sweden's IHL Manual (1991): 'attacks deliberately aimed at causing heavy losses and creating fear among the civilian population' are prohibited; the US Naval Handbook (1995): 'The civilian population as such, as well as individual civilians, may not be the object of attack or of threats or acts of intentional terrorization'; the US Air Force Pamphlet (1976): 'Acts or threats of violence which have the primary object of spreading terror among the civilian population are prohibited.'

[163] See Count 1: Infliction of terror, *Prosecutor v Stanislav Galić* Case No IT-98-29-I, Indictment, 26 March 1999. The accusation in Count 1 read as follows: 'Violations of the Laws or Customs of War (unlawfully inflicting terror upon civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949) punishable under article 3 of the Statute of the Tribunal. From about 10 September 1992 to about 10 August 1994, STANISLAV GALIĆ, as Commander of Bosnian Serbs forces comprising or attached to the Sarajevo Romanija Corps, conducted a protracted campaign of shelling and sniping upon civilian areas of Sarajevo and upon the civilian population thereby inflicting terror and mental suffering upon its civilian population.' See further Paredi (n 161 above) 2.

[164] See *Prosecutor v Stanislav Galić*, Case No IT-98-29-T, Trial Chamber, Judgment, 5 December 2003, 769 (5 December 2003) (Count 1). Galić was convicted of unlawfully inflicting terror upon civilians as set out in art 51 of Additional Protocol I and art 13 of Additional Protocol II to the Geneva Conventions of 1949.

[165] *Prosecutor v Stanislav Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgment, 30 November 2006, paras 69-98. See further Paredi (n 161 above) 2.

© Juta and Company (Pty) Ltd

Appeals Chamber had to determine whether terrorism had emerged in customary international law as an international crime.[166] It found that the prohibition of terrorism enshrined in the Additional Protocols to the Geneva Conventions indeed belongs to customary international law.[167] Furthermore, in the *Israeli Wall Advisory Opinion*, the ICJ confirmed that 'deliberate and indiscriminate attacks against civilians with the intent to kill are the core element of terrorism which has been unconditionally condemned by the international community regardless of the motives which have inspired them'.[168]

In addition to the above, the decision by the Appeals Chamber of the Special Tribunal for Lebanon (STL) in *Prosecutor v Ayyash*, involving the consideration of the crime of terrorism under Lebanese law as well as customary international law, is relevant.[169] The Appeals Chamber held that 'a customary rule of international law regarding the international crime of terrorism, at least in time of peace, has indeed emerged'.[170] It further identified 'a belief of states that the punishment of terrorism responds to a social necessity (*opinio necessitatis*) and is hence rendered obligatory by the existence of a rule requiring it (*opinio juris*)' as evidenced by state practice.[171] The Appeals Chamber stated that state practice evidencing *opinio juris sive necessitates* 'share[s] a core concept: terrorism is a criminal action that aims at spreading terror or coercing governmental authorities and is a threat to the stability of society or the State' and the few states still insisting on an exception to the definition of terrorism can, at most, be considered persistent objectors.[172]

It is argued that the prohibition of terrorism protects an overriding value of the international community – the right to human dignity – which supports its unequivocal condemnation by states. In light of what is set out above, it is a norm of customary international law. As customary international law forms part of general international law, it follows that the prohibition of terrorism is a norm of general international law.

---

[166] Ibid Paredi.

[167] Id 90: 'the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II clearly belonged to customary international law from at least the time of its inclusion in those treaties.'

[168] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004 ICJ Reports 136 paras 4–5.

[169] *Prosecutor v Ayyash et al* (STL-11-01/I), Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Appeals Chamber, 16 February 2011 paras 42–62.

[170] Id *Ayyash* para 85.

[171] Id para 102.

[172] Id paras 102 & 110.

© Juta and Company (Pty) Ltd

4.1.2 Acceptance and Recognition of the Prohibition of Terrorism as Non-derogable

As discussed in this section, terrorism is prohibited under various anti-terrorism treaties[173] and United Nations Security Council (UNSC) and UNGA resolutions. These treaties make it clear that the prohibition of terrorism is non-derogable: terrorism is under no circumstances justifiable by political, philosophical, ideological, racial, ethnic, religious or other considerations. For example, the Terrorist Bombings, Terrorism Financing and Nuclear Terrorism Conventions confirm that the political offence exception does not apply and that terrorism is under no circumstances justifiable.[174]

The Draft Comprehensive Convention on International Terrorism further requires that states must establish jurisdiction over terrorist offences, make these offences punishable by appropriate penalties and adopt measures to ensure that these offences are not justifiable by political, philosophical, ideological, racial, ethnic, religious or similar considerations.[175] Terrorism is prohibited in the national legislation of numerous states and states' support of this prohibition is evidenced by mandatory state reports to the Counter-Terrorism Committee[176] In national

---

[173] See, eg, art 2(1) of the Terrorism Financing Convention (n 150 above) which provides that: 'Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act'. Article 18(1) further provides that states parties shall cooperate in the prevention of these offences by taking all practicable measures, including by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of such offences, including (a) measures to *prohibit* illegal activities of persons and organisations that knowingly encourage, instigate, organise or engage in the commission of such offences (emphasis added). See further art 15 of the Terrorist Bombing Convention (n 150 above) which contains similar wording in respect of offences under this convention as well as art 7 of the Nuclear Terrorism Convention (n 150 above).

[174] Articles 5 & 11 of the Terrorist Bombings Convention (n 150 above); arts 6 & 14 of the Terrorism Financing Convention (n 150 above); arts 6 & 15 of Nuclear Terrorism Convention (n 150 above).

[175] Articles 5 & 7 of the Draft Comprehensive Convention on International Terrorism, 2006.

[176] See (n 156 above). See further UNSC Counter-Terrorism Committee *Country reports: Resolution 1373 (2001)* http://www.un.org/en/sc/ctc/resources/countryreports.html (accessed 8 January 2017) where states for example reported on legislation and procedures that exist for freezing accounts and assets at banks and financial institutions. See, letter dated 22 December 2001 from the Chargé d'affaires of the

© Juta and Company (Pty) Ltd

jurisprudence, the prohibition of terrorism has similarly been supported. In the *Clavel* case, for example, the Argentinian Supreme Court defined terrorism as a crime *juris gentium* and stated that its prosecution is in the interest of all civilised nations.[177]

Furthermore, UNGA resolutions, the majority of which were adopted by consensus, are reflective of the *opinio juris* of states and unequivocally condemned terrorism 'wherever and by whomever committed' as criminal and unjustifiable in all its forms and manifestations.[178] While earlier UNGA resolutions still referred to exceptions for the conduct of national liberation movements with regard to terrorist acts, later UNGA resolutions excluded these references and while they acknowledged the right to self-determination, at the same time unequivocally condemned terrorism.[179] The strongly worded UNGA Declaration on Measures to Eliminate International Terrorism of 1994 states that criminal acts intended to provoke a state of terror in the general public for political purposes are in any circumstance unjustifiable, irrespective of any justification of a political, philosophical, ideological, racial, ethnic, religious or any other nature.[180] This resolution as well as a further UNGA Resolution

---

Permanent Mission of the People's Republic of China to the United Nations addressed to the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism S/2001/1270 (27 December 2001) https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/721/10/PDF/N0172110.pdf?OpenElement (accessed 23 October 2017), where China referred to its laws concerning the control of the sources of terrorist assets. See further Country Reports: East Asia and Pacific Overview https://www.state.gov/j/ct/rls/crt/2015/257515.htm (2015) (accessed 23 October 2017), which included reports by Australia and China. Australia noted that its legal framework to counter terrorism included 'significant penalties for committing terrorist acts; recruiting for and supporting terrorist organizations; financing terrorism; urging violence and advocating terrorism; and traveling abroad to commit terrorist acts and recruitment offenses'. China reported on comprehensive counterterrorism law approved in 2015 to 'provide legal support for counterterrorism activities as well as collaboration with the international community'. See further letter dated 26 January 2006 from the Permanent Representative of the United States of America to the United Nations addressed to the Chairman of the Counter-Terrorism Committee S2006/69 (3 February 2006). https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/235/16/PDF/N0623516.pdf?OpenElement (accessed 23 October 2017). The US reported that s 806 of the US Patriot Act resulted therein that terrorist-related property may be made subject to civil forfeiture. See further letter dated 17 March 2004 from the Permanent Representative of France to the United Nations addressed to the Chairman of the Counter-Terrorism Committee S/2004/226 (29 March 2004) https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/288/37/PDF/N0428837.pdf?OpenElement (accessed 23 October 2017) referring to regulations to control and prevent terrorist access to weapons.

177 *Enrique Lautaro Arancibia Clavel* 259 (Arg Supreme Court) (2004). See further *Suresh v Canada (Minister of Citizenship and Immigration)* (2002) 1 SCR 3) para 93.

178 See Saul (n 10 above) 204. See further (n 159 above).

179 A/RES 44/29 (1989) 301–302 & A/RES/46/51 (1991) 15. These resolutions reaffirm the right to self-determination, yet offer an unqualified condemnation of terrorism.

180 A/RES/49/60 (1994) (Measures to eliminate international terrorism).

© Juta and Company (Pty) Ltd

on measures to eliminate international terrorism of 1996, which recalled the 1994 resolution, was adopted by consensus and various binding UNSC resolutions confirmed the unequivocal condemnation of terrorism.[181] These resolutions reiterated the condemnation of terrorism in all its forms and manifestations and declared terrorist acts as being unjustifiable regardless of the reasons invoked by its perpetrators.[182]

The consistent and repeated condemnation of acts of terrorism by states and the reiteration that nothing can ever justify terrorism further illustrate the *opinio juris* of states regarding the prohibition of terrorism.[183] World leaders denounced the 2016 massacre at an Orlando

---

181 A/RES/51/210 (1996); S/RES 1368 (2001). Paragraph 1 '*Unequivocally condemns* in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security'; S/RES/1373 (2001) '*Reaffirming also* its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts', S/RES/1377 (2001) '*[r]eaffirms* its unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed'; S/RES/2249 (2005) '*Reaffirming* that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed.'

182 Ibid.

183 Official Records of the General Assembly, 69th session, Summary Records of the Sixth Committee, 28th meeting, A/C6/55/SR28 (7 October - 14 November 2014) https://papersmart.unmeetings.org/ga/69th-session/general-debate/statements/ (accessed 8 August 2017). See, eg, the statements by Mr GH Dehghani of the Islamic Republic of Iran: 'the Non-Aligned Movement condemns terrorism in all its forms and manifestations, wherever, by whoever and against whomsoever committed … which are unjustifiable whatever considerations or facts that may be invoked to justify them.'; Mr E Zagaynov on behalf of the member states of the Shanghai Co-operation Organisation and the Russian Federation reiterates the 'fundamental position of condemning terrorism in all its forms and manifestations, regardless of its motivation, whenever, wherever and by whomsoever committed'; Ms E Cujo on behalf of the European Union: 'the international community must respond jointly by condemning terrorism in all its forms and manifestations'; Mr T Joyini on behalf of South Africa (speaking for the African Group): 'There is no justification for terrorism. African states strongly and unequivocally condemn terrorism in all its forms and manifestations, as well as all acts, methods and practices of terrorism wherever, by whomever, against whomever committed, including state terrorism. For no cause or grievance can terrorism be justified'; Dr AM Khan on behalf of Pakistan: 'Pakistan denounces terrorism in all its forms and manifestations and condemns killings by terrorists anywhere in the world, committed for whatever purpose. Nothing – no ideology, no religion, no creed, no cause – can justify or sanction the dastardly acts and heinous crimes committed under the banner of terrorism'; Mr H Haniff on behalf of Malaysia: 'Malaysia would like to express in the strongest terms our condemnation of terrorism in all its forms and manifestations, as well as all acts, methods and practices of terrorism irrespective of where, when or whomever commits it and the reason behind it. No matter how feasible it might be, any hideous act of terrorism

© Juta and Company (Pty) Ltd

nightclub, perpetrated by a self-described adherent of the Islamic State ('ISIL / Daesh'). Afghanistan President Ashraf Ghani stated that nothing can justify killing of civilians, while leaders of the Arab States (Saudi Arabia, the UAE, Kuwait, Qatar and Egypt) called the attacks immoral and inhumane.[184] In its condemnation of the terrorist attacks on Paris and Istanbul's Ataturk Airport in 2016, the G20 stated that: 'We condemn, in the strongest possible terms, the heinous terrorist attacks in Paris on 13 November and in Ankara on 10 October. They are an unacceptable affront to all humanity.'[185]

Terrorist attacks in 2017 were similarly condemned by states. Following

could not be justifiable'; Mr O Hilale on behalf of Morocco: 'Le Royaume du Maroc tient à cette occasion à réitérer sa condamnation ferme du terrorisme dans toutes ses formes, en oulignant que rien ne peut justifier un acte terroriste' (translated as: The Kingdom of Morocco wishes at this occasion to reiterate its firm condemnation of terrorism in all its forms, while emphasising that nothing can justify a terrorist act); Mr A Heumann on behalf of Israel: 'Israel wishes to reaffirm its strong commitment to counter terrorism and its uncompromising condemnation of terrorism in all its forms and manifestations, irrespective of its motivations'; Mr DM Laki on behalf of Uganda: 'Uganda condemns terrorism in all its forms and manifestations, for whatever purpose and by whomsoever. Terrorism can never be justified under any pretext'; Mr LA Ajawin on behalf of South Sudan: 'My government strongly rejects and condemns terrorism in all its forms and manifestations, committed by whomever, whatever, for whatever objective'; Mr F Metrev on behalf of Algeria: 'Algeria would like to reiterate its strong and unequivocal condemnation of all forms of terrorism, regardless of its motivation, wherever, whenever and by whomsoever committed'. See, further, 8th BRICS Summit – Goa Declaration (16 January 2017) https://brics2017.org/English/Documents/Summit/201701/t20170125_1410.html (accessed 26 October 2017) para 57: 'We strongly condemn terrorism in all its forms and manifestations and stressed that there can be no justification whatsoever for any acts of terrorism, whether based upon ideological, religious, political, racial, ethnic or any other reasons' and the Declaration on preventing and countering terrorism and violent extremism (Jakarta, Indonesia, March 2017), where the governments of the member states of the Indian Ocean Rim Association, Australia, Bangladesh, Comoros, India, Indonesia, Iran, Kenya, Madagascar, Malaysia, Mauritius, Mozambique, Oman, Seychelles, Singapore, Somalia, South Africa, Sri Lanka, Tanzania, Thailand, United Arab Emirates and Yemen stated that they 'unequivocally condemn all acts of terrorism'. See further D Burke 'Muslim leaders: 'We will not allow the extremists to define us' http://edition.cnn.com/2016/06/14/living/orlando-muslims-statement/ (accessed 1 December 2016); D Pollock & M Abdelaziz 'Arab states condemn "terrorist" Paris attacks http://english.alarabiya.net/en/News/middle-east/2015/11/14/Arab-states-denounce-Paris-attacks-as-violation-of-human-values-.html (accessed 1 December 2016); 'Arab Government and Media Reactions to the Orlando Attack 15 June 2016' http://www.washingtoninstitute.org/policy-analysis/view/arab-government-and-media-reactions-to-the-orlando-attack (accessed 7 August 2016); US Department of State 'United States Condemns Terrorist Attack on Istanbul's Ataturk Airport' (28 June 2016) http://www.state.gov/r/pa/prs/ps/2016/06/259153.htm (accessed 7 August 2016); G20 Statement on the Fight Against Terrorism http://www.consilium.europa.eu/en/meetings/international-summit/2015/11/g20-statement-on-the-fight-against-terrorism_pdf/ (accessed 7 August 2016).

184 Id.

185 Ibid G20 Statement.

© Juta and Company (Pty) Ltd

the bombing at a pop concert in Manchester in May 2017 that killed 22 people, United Kingdom Prime Minister Theresa May stated that: 'All acts of terrorism are cowardly attacks on innocent people but this attack stands out for its appalling, sickening cowardice, deliberately targeting innocent, defenceless children and young people.'[186] In response to the terror attack in August 2017 in Barcelona, where a van rammed into a crowd of pedestrians, killing 13 people and injuring numerous others, Spanish Prime Minister Mariano Rajoy said: 'Today the fight against terrorism is the principal priority for free and open societies like ours. It is a global threat and the response has to be global.' President Vladimir Putin called for the world to unite in an 'uncompromising battle against the forces of terror' and condemned this 'cruel and cynical crime against civilians'.[187] Already in 1998, it had been suggested that '[t]errorism has achieved the status of almost universal condemnation, as have slavery, genocide, and piracy, and the terrorist is the modern era's *hosti humani generis* – an enemy of all mankind'.[188]

4.2 The Core Characteristics and the Prohibition of Terrorism as a Jus Cogens *Norm*

Based on the analysis above, it can be concluded that the prohibition of terrorism is a norm of *jus cogens.* While the characteristics described in section 3.2 are themselves not requirements, they may bolster and confirm the *jus cogens* character of a norm and may be relevant in assessing the criteria for *jus cogens* norms of international law.[189] It is, therefore, useful to inquire whether the prohibition of terrorism reflects the core characteristics.

Firstly, *jus cogens* norms seek to protect fundamental, basic or higher interests or fundamental humanitarian values.[190] These fundamental values include human rights and the right to human dignity, which are fundamental and belong to all people.[191] It seems clear that the prohibition of terrorism safeguards the fundamental values of humanity

[186] 'Theresa May's Downing Street statement on Manchester terror attack in full' *The Telegraph* (17 May 2017) http://www.telegraph.co.uk/news/2017/05/23/theresa-mays-downing-street-statement-manchester-terror-attack/ (accessed 27 August 2017).

[187] 'How the world reacted to the Barcelona terror attack' *The Telegraph* (18 August 2017) http://www.telegraph.co.uk/news/2017/08/17/world-reacted-barcelona-terror-attack/ (accessed 27 August 2017).

[188] *Flatow v Islamic Republic of Iran* 999 F Supp 23 (DDC 1998).

[189] 'Second Report on Jus Cogens' (n 62 above) 18.

[190] *Germany v Italy (Jurisdictional Immunities of the State)* (3 February 2012) 2012 ICJ Reports 99, para 92.

[191] B Simma & P Alston 'The sources of human rights law: Custom, *jus cogens*, and general principles' (1995) 6 *European Journal of International Law* 43.

© Juta and Company (Pty) Ltd

and human dignity. Terrorism constitutes a threat to the basic human dignity and its prohibition reflects 'the general will of the international community'.[192] Acts of terrorism are committed with the intent to spread fear amongst innocent civilians.[193] This infringes on the basic right to human dignity and for human beings not to be used as instruments for the furtherance of a political or ideological goal.

In the *Madan* case, the Supreme Court of India was of the view that terrorist violence 'affects society as a whole by terrorising and disturbing the harmony of society'.[194] Similarly, the Argentinian Supreme Court in the *Clavel* case defined terrorism as a 'crime *jus gentium*' the prosecution of which is not in the exclusive interest of the state injured by it, but 'benefits, ultimately, all civilised nations who are therefore obligated to co-operate in the global fight against terrorism'.[195] Further, as stated by the ICJ in the *Reservations to the Convention on Genocide* case and as evidenced by near-universal condemnation by states, terrorism can be said to 'shock the conscience of mankind'.[196] These cases confirm the obvious fact that the prohibition of terrorism reflects and protects the fundamental values of the international community.

Secondly, it is argued that if the prohibition of terrorism has the power to nullify competing norms, it suggests a form of hierarchy vis-à-vis other norms of international law. By way of analogy, there can be no valid treaty or UNSC resolution sanctioning terrorist acts. The condemnation of terrorism under treaty law, custom, UNGA and UNSC resolutions and international jurisprudence, irrespective of its justifications, as well as the acceptance and recognition by the international community of states as a whole that no derogation from this prohibition is permitted, may indicate support for the hierarchical superiority of the prohibition of terrorism vis-à-vis other norms of international law. For example, UNSC resolution 1624 of 2005 confirmed the imperative to fight terrorism in all its forms and manifestations by all means in accordance with the UN Charter. This resolution condemned terrorism in all its forms and manifestations as unjustifiable and one of the most serious threats to peace and security and affirmed that states must take all necessary and

---

192 Weatherall (n 10 above) 626; *Jurisdictional Immunities of the State* (n 95 above) para 92.

193 Paragraph 3 of S/RES/1566 (2004) (threats to international peace and security); *Prosecutor v Ayyash et al* (STL-11-01/I) Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Appeals Chamber, 16 February 2011; *Prosecutor v Galić* (Trial judgment) ICTY 5 December 2003 IT-98-29-I para 41; *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall* (n 168 above) paras 4–5.

194 *Madan Singh v State of Bihar* (2004) INSC 225 (2 Apr 2004).

195 *Clavel* (n 177 above) 51–52.

196 See (n 105 above).

© Juta and Company (Pty) Ltd

appropriate measures in accordance with international law to protect the right to life.[197] This strong condemnation supports a position of this norm as hierarchically superior to 'ordinary' norms of customary international law or treaty law.

Lastly, the hierarchical superiority of *jus cogens* norms ties in with its universal applicability. Although sectoral treaties are only enforceable between the parties to the treaty, anti-terrorism treaties have been widely ratified and many of the later anti-terrorism treaties made provision for universal jurisdiction over the proscribed terrorist offences and oblige states parties to extradite or prosecute any suspected offenders found in their territory.[198] This may further support the universal applicability of the prohibition of terrorism. In *United States v Yousef*, the United States Court of Appeals noted that certain *jus cogens* crimes, such as piracy and crimes against humanity, are not only universally condemned, but occur outside of a zone in which an adequate judicial system operates and thus necessitates universal jurisdiction.[199] Although there is more

---

[197] See S/RES 1624 (2005) (counter-terrorism implementation task force).

[198] See, eg, arts 3, 6, 7 & 8 of the Terrorist Bombings Convention (n 150 above). Art 8(1) states that: 'The State Party in the territory of which the alleged offender is present shall, in cases to which art 6 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.' See further arts 3, 7 & 10 of the Terrorist Financing Convention (n 150 above). Art 10(1) of the Terrorist Financing Convention mirrors the wording of art 8(1) of the Terrorist Bombings Convention. See further arts 3, 9 & 11 of the Nuclear Terrorism Convention (n 150 above) and arts 4 & 7 of the Hague Convention (n 153 above). Art 11(1) of the Nuclear Terrorism Convention mirrors the wording of art 8(1) of the Terrorist Bombings Convention. Art 7 of the Hague Convention states that: 'The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State'; and arts 5 & 7 of the Montreal Convention (n 153 above). Art 7 states that: 'The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.' See further arts 3 & 7 of Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, 1973; arts 5 & 8 of the Hostages Convention (n 150 above). The wording of art 8 of the Hostages Convention is similar to that of art 8(1) of the Terrorist Bombings Convention and art 10(1) of the Terrorist Financing Convention. See further arts 6, 7 & 11 of the Maritime Safety Convention (n 150 above).

[199] See *Yousef* case (n 124 above).

© Juta and Company (Pty) Ltd

case law supporting fundamental values protected by the prohibition of *jus cogens,* the various UNSC resolutions condemning terrorism which are binding on all states and impose quasi-legislative obligations on states as well as various sectoral conventions which provide for universal jurisdiction, could possibly be an indication of the universal applicability of the prohibition of terrorism. For example, in 1987, the Restatement (Third) of Foreign Relations Law suggested that certain acts of terrorism could possibly be counted among 'offences recognized by the community of nations as of universal concern', which support universal jurisdiction to define and punish those acts.[200]

The universal applicability of the prohibition of terrorism is necessary in light of its hierarchical superiority and the fact that the prohibition of terrorism is an issue of global concern. As discussed, The Terrorist Bombings, Terrorism Financing and Nuclear Terrorism Conventions require that state parties establish jurisdiction over and make punishable under their domestic laws the offences proscribed and extradite or prosecute persons accused of committing or aiding in the commission of these offences. [201] Furthermore, the UNSC has taken measures, which are legally binding on all states, to address terrorism as a threat to global peace and security.[202] For example, resolution 1373 of 1999 is binding on all states and requires all member states to make terrorism a serious crime in domestic legislation.[203]

5 Conclusion

This article set out to establish whether the prohibition of terrorism has attained *jus cogens* status. In order to understand why *jus cogens* norms have binding power, the evolution of the concept through the ages was discussed. Although steeped in the natural law tradition, it was illustrated that *jus cogens* obtained a positivist flavour in the 19th and

200 Restatement (Third) of Foreign Relations Law of the United States (1987) para 404.

201 Arts 3, 6 & 7 of the Terrorist Bombings Convention (n 150 above); arts 3, 7 & 10 of the Terrorist Financing Convention (n 150 above); arts 3, 9 & 11 of the Nuclear Terrorism Convention (n 150 above).

202 See art 25 of the UN Charter, which states that all members of the United Nations 'agree to carry out and accept the decisions of the Security Council in accordance with the present Charter'. See further I Hurd 'The UN Security Council and the International Rule of Law' (2014) *The Chinese Journal of International Politics* 6: '[t]he Charter is a multilateral treaty that is binding on the states that sign it. It requires that they comply with its terms, and these terms include an extensive degree of deference to the Security Council.' See further E de Wet & J Vidmar (eds) *Hierarchy in International Law: The Place of Human Rights* (2012) 6.

203 T Chimimba 'United Nations Security Council resolution 1373 (2001) as a tool for criminal law enforcement' in T Maluwa *et al* (eds) *The Pursuit of a Brave New World in International Law: Essays in Honour of John Dugard* (2017) 535–526; art 2(3) of S/RES 1373 (2001).

© Juta and Company (Pty) Ltd

20th centuries when the ideas of nationalism and state sovereignty were paramount. Even in these times though, positivism still clung to a certain ethical notion of justice founded in natural law.

Article 53 of the Vienna Convention gave *jus cogens* norms objective and concrete form by identifying the criteria for these norms to be elevated to *jus cogens* status. The prohibition of *jus cogens* is not only a rule of customary international law, there is ample evidence that it is accepted and recognised by the international community of states as a norm from which no derogation is permitted. Moreover, the prohibition of terrorism reflects the core characteristics of *jus cogens* norms. The prohibition protects the fundamental values of the international community, is hierarchically superior to other norms of international law and is universally applicable.

In many ways, the prohibition of terrorism tells us much about the emergence of *jus cogens* norms. It tells us, for example, that *jus cogens* norms can emerge, and are thus not immutable. They often emerge in response to contemporary challenges. It is doubtful that, 20 years ago, the argument that the prohibition of terrorism was *jus cogens*, could have been undisputed. Twenty years ago, there was very little practice in support of the existence of general norm of international law prohibiting terrorism, and even less supporting the idea that such prohibition was non-derogable. Yet, the rise in incidences of terrorism and the solidarity of the world against terrorism has led to the emergence of the prohibition, not only as a general rule of international law, but as a norm of *jus cogens.* Weatherall aptly describes the emergence of the prohibition of terrorism as the most recent *jus cogens* norm to emerge in response to historical exigencies by making the following observation:

> Peremptory norms emerge as legal responses to the needs of international society to prohibit conduct that shocks the conscience of humanity. Historically, terrorism has been condemned as an affront to the dignity of the human person: human beings cannot be reduced to instruments of political gain through violence and incitement of fear. [204]

[204] Weatherall (n 10 above) 627.

© Juta and Company (Pty) Ltd