

Crimes against humanity as a peremptory norm of general international law (*jus cogens*): There really is no doubt! But so what?

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Abstract

In 2019 the International Law Commission adopted two texts providing for the peremptory character of the prohibition of crimes against humanity, namely the draft articles on the prevention and punishment of crimes against humanity and the draft conclusions on peremptory norms of general international law. While both of these instruments recognise the peremptory character of the prohibition of crimes against humanity, neither of them address the consequences of the peremptory character of the prohibition of crimes against humanity. This article, on the basis, *inter alia*, of the internal processes leading to the adoption of these instruments, addresses the consequences of the peremptory character of the prohibition of crimes against humanity.

Keywords: *jus cogens*, crimes against humanity, consequences, immunity, International Law Commission

1 INTRODUCTION

The emergence of *jus cogens*, and its subsequent establishment within the mainstream of international law, is nothing short of a revolution. Prior to the adoption of the Vienna Convention, the concept of peremptory norms flourished only in scholarly writings. There was virtually no recognition of the concept, as we currently understand it,¹ in the practice of States. It was the work of the Commission,

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¹ There were, of course, invocations of treaty rules which could not be derogated from by parties to the relevant treaty as a matter of treaty law. These are not the same as peremptory norms. See Separate Opinion of Judge Schücking in *The Oscar Chinn case*, Judgment of 12 December 1934, Permanent Court of International Justice, Ser. A/B No. 63, p 65, at 148. See also *Pablo Najera (France) v United Mexican States*, Decision No. 30-A of 19 October 1928, Vol V UNRIIAA 466

which led to the adoption of the Vienna Convention, that brought *jus cogens* from the periphery into the mainstream of international law. Five decades later, the Commission is, yet again, at the forefront of advancing the stock of *jus cogens*. While the Commission's most recent work has tackled various aspects of peremptory norms, this article will restrict itself to the prohibition of crimes against humanity and its *jus cogens* status.

While the peremptory status of many rules of international law may be in doubt and subject to debate,² this is not the case for the prohibition of crimes against humanity. In two of its recent works, the International Law Commission affirmed the peremptory status of the prohibition of crimes against humanity. First, in the Draft Articles on the Prevention and Punishment of Crimes against Humanity, adopted on second reading, the Commission recognised the prohibition of crimes against humanity as a peremptory norm.³ Second, the Annex to the Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*), adopted on first reading, contains a non-exhaustive list of peremptory norms that also includes crimes against humanity as a peremptory norm.⁴ Also, while this is not an explicit recognition of the peremptory status of the prohibition, the

at 470 where the French-Mexican Claims Commission explicitly referred to the '*jus cogens*' character of art 18 of the Covenant of the League of Nations: 'le caractère d'une règle de droit à laquelle il n'est pas libre aux Etats, membres de la Société des Nations, de déroger par des stipulations particulières, entre eux (*jus cogens*)'. Yet, even here, the Commission makes it plain that, as a treaty rule, art 18 applies only between the members of the League ('entre eux'). For discussion, see the First Report of the Special Rapporteur on *Jus Cogens* (A/CN.4/693) (2016) para 28 et seq.

² For example, in a recent volume, Dire Tladi (ed) *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (2021), three contributions provide very different perspectives on the *jus cogens* status of self-determination: Tiyanjana Maluwa 'African State Practice and the Formation of Some Peremptory Norms of General International Law' (ch 10); Julia Sebutinde 'Is the Right to Self-Determination *Jus Cogens*: Reflections on the Chagos Advisory Opinion' (ch 15); Ki-Gab Park 'The Right to Self-Determination and Peremptory Norms' (ch 24).

³ ILC Draft Articles on the Prevention and Punishment of Crimes against Humanity, *Report of the International Law Commission, Seventy-First Session (A/74/10)*, fourth preambular paragraph ('Recalling also that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*)').

⁴ See Annex, the Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*) adopted on first reading, *Report of the International Law Commission, Seventy-First Session, General Assembly Official Records (A/74/10)* (2019). For a discussion of these Draft Conclusions, see the essays in Dire Tladi (ed) *Peremptory Norms of General International Law: Disquisitions and Disputations* (2021).

Commission included the prohibition of crimes against humanity on the list of crimes in respect of which immunity *ratione materiae* does not apply – the so-called *jus cogens* exceptions.⁵

Yet the recognition of the peremptory character of the prohibition of crimes against humanity in the Draft Articles on Crimes against Humanity was not a foregone conclusion. For one thing, in the third report in which the draft preamble was proposed, the Special Rapporteur on Crimes against Humanity had not included a preambular paragraph recognising the prohibition of crimes against humanity as a peremptory norm,⁶ suggesting perhaps that the Special Rapporteur did not see this recognition as essential.⁷ It was due to the insistence of some members that the Special Rapporteur, in the Drafting Committee, proposed a preambular provision on the *jus cogens* nature of the prohibition of crimes against humanity.⁸ Moreover, after the adoption of the Draft Articles on first reading,⁹ the inclusion of the preambular provision recognising the peremptory character of the prohibition of crimes against humanity was also questioned by some States¹⁰ and even some members of the Commission.¹¹ After a thorough debate, and taking into account the views of States, the Commission decided to retain the preambular recognition of the peremptory status of the prohibition of crimes against humanity. In the case of the Draft Conclusions, there was less discussion about the prohibition of crimes against humanity as a peremptory norm of general international law,¹² with

⁵ See Draft Article 7(1) of the Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction (provisionally adopted by the Commission), *Report of the International Law Commission, Sixty-Ninth Session, General Assembly Official Records (A/72/10)* (2017). See for discussion Kobina Daniel *Head of State Immunity under the Malabo Protocol: Triumph of Impunity over Accountability?* (forthcoming, 2021).

⁶ See the Third Report of the Special Rapporteur (Sean Murphy) on Crimes against Humanity (A/CN.4/704).

⁷ In his response to the debate, the Special Rapporteur appeared to take a rather agnostic view of the inclusion or not of the preambular paragraph. See ILC Summary Records (A/CN.4/SR.3354).

⁸ See, in particular, Vasquez-Bermuda (A/CN.4/SR.3353).

⁹ See the ILC Draft Articles on Crimes against Humanity, *Report of the International Law Commission, Sixty-Ninth Session (A/72/10)*, third preambular paragraph ('Recognizing further that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*)').

¹⁰ See the Fourth Report of the Special Rapporteur (Sean Murphy) on Crimes against Humanity (A/CN.4/725), para 34.

¹¹ See, eg, Wood, ILC Summary Records (A/CN.4/SR.3454), Zagaynov (A/CN.4/SR.3457).

¹² An exchange between Mr Petric and Mr Wood, on the first day of the debate on the Fourth Report of the Special Rapporteur (Dire Tladi) on Peremptory Norms of General International Law (*Jus Cogens*) (A/CN.4/727) is emblematic of the point. In that debate (see A/CN.4/SR.3359), Wood criticised the Special

the discussion focusing more on whether a list ought to be included at all.¹³ In the same vein, in the debate on exceptions to immunity, the inclusion of the prohibition of crimes against humanity was never at issue. Rather, the debate focused on whether to have that provision at all. For this reason, the current commentary will focus mainly on the Draft Articles, with some references to the Draft Conclusions and the Draft Articles on Immunity.

This article will begin by assessing the pushback by States and some members of the Commission against the recognition of the peremptory status of the prohibition of crimes against humanity in the Draft Articles. Having evaluated the pushback against the recognition of the peremptory status of crimes against humanity, the article will proceed to evaluate the Commission's treatment of the peremptory status of the prohibition of crimes against humanity in the work of the Commission. The evaluation of the assessment includes not only the propriety of including a preambular provision recognising the peremptory status of the prohibition of crimes against humanity and the prohibition in the Annex to the Draft Conclusions, but also the consequences of that recognition. I then offer some concluding observations.

Before addressing these issues, I pause to mention that the comments I make below, particularly those concerning the consequences of the peremptory status of the prohibition of crimes against humanity, would apply equally to other acts the prohibition of which constitute peremptory norms – what is sometimes termed *jus cogens* crimes. These include the prohibition of war breaches under international humanitarian law, the prohibition of genocide, and the crime of aggression in addition to crimes against humanity. Each of these are also widely recognised as constituting peremptory norms and many of the consequences that would flow from the peremptory character of the prohibition of crimes against humanity would apply equally to these other crimes.

Rapporteur's proposal of a list, and Petric asked whether Wood doubted the peremptory status of the norms listed. In response, Wood said that 'the question was whether the Commission was going to inscribe it as a rule in tablets of stone, or adopt a more subtle, flexible approach in commentaries'.

¹³ See for discussion Dire Tladi 'The International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*): Making Wine from Water or More Water than Wine' (2020) 89 *Nordic Journal of International Law* 244 at 267.

2 PUSHBACK AGAINST THE PROHIBITION'S CHARACTERISATION AS *JUS COGENS*

It is worthwhile recalling that when the Special Rapporteur proposed a preambular text in his third report, he did not include any mention of the peremptory status of crimes against humanity.¹⁴ Yet members of the Commission felt that if a preamble was to be included in the Draft Articles, it should recognise the peremptory character of the prohibition.¹⁵ The fact that the Special Rapporteur did not propose a preambular recognition of the peremptory character of the prohibition does not necessarily mean that he was opposed to the notion. After all, the text adopted by the Drafting Committee was based on a proposal by the Special Rapporteur in the course of the deliberations in the Drafting Committee.¹⁶ The Special Rapporteur's attitude towards the inclusion of a provision affirming the peremptory character of the

¹⁴ See Third Report op cit note 6 para 301. In the First Report of the Special Rapporteur (Sean Murphy) on Crimes against Humanity (A/CN.4/680) para 39, the Special Rapporteur refers to earlier recognition of the peremptory status of the prohibition of crimes against humanity by the Commission and by the International Court of Justice: 'Since 1996, the Commission on occasion has addressed crimes against humanity. In 2001 the Commission indicated that the prohibition of crimes against humanity was "clearly accepted and recognized" as a peremptory norm of international law. The International Court of Justice has also indicated that the prohibition on certain acts, such as State-sponsored torture, has the character of *jus cogens*, which *a fortiori* suggests that a prohibition of the perpetration of that act on a widespread or systematic basis would also have the character of *jus cogens*.' The Fourth Report of the Special Rapporteur (Dire Tladi) on Peremptory Norms op cit note 12 paras 84–90 provided a slightly more comprehensive account of the peremptory status of the prohibition of crimes against humanity. The report referred to decisions of international courts, including the International Court of Justice (*Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*), Judgment of the International Court of Justice, 2012 ICJ Rep 422) and the International Criminal Tribunal for the former Yugoslavia (eg *Prosecutor v Radislav Krstić* IT-98-33-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 2 August 2001), state practice (eg decisions from the United States, Argentina and South Africa) and scholarly writings.

¹⁵ See, eg, especially Vázquez-Bermúdez (A/CN.4/SR.3353): 'A matter that informed the draft articles as a whole was the *jus cogens* nature of the prohibition of crimes against humanity, which had been recognized by the Commission itself, by regional and international courts and in domestic jurisprudence. The assertion that the prohibition of crimes against humanity was a *jus cogens* norm should be made explicitly in a preambular paragraph.' See also Nguyen (A/CN.4/SR.3349), Hmoud (A/CN.4/SR.3351) and Sturma (A/CN.4/SR.3351) who, though not in the context of the preamble, asserted that the prohibition of crimes against humanity was a peremptory norm.

¹⁶ See Statement of the Chairman of the Drafting Committee on Crimes against Humanity, Mr Aniruddha Rajput, 1 June 2017.

prohibition of crimes against humanity can therefore be described as agnostic rather than opposed.¹⁷

In response to the Commission's request for comments on the Draft Articles adopted on first reading, a number of States expressed concern about the inclusion of the preambular provision.¹⁸ Yet, a close inspection of the comments of these States reveals that, in the main, the concern was not directed at the peremptory status of the prohibition of crimes against humanity, but rather at the propriety of the explicit reference given. In the view of these States, because the Commission was already considering peremptory norms of general international law in a separate study, it was best not to address the issue in the Draft Articles on Crimes against Humanity. Thus, in the main, these States did not question the peremptory status of the prohibition,¹⁹ only the necessity or propriety of its inclusion in the Draft Articles.²⁰ More importantly, the overwhelming majority of States were supportive of the Draft Articles' recognition of the peremptory status of the prohibition of crimes against humanity in the preamble. More importantly, some States suggested that the implications of preambular reference to the

¹⁷ In his response to the debate and the suggestion that the peremptory status be included, the Special Rapporteur did not express agreement with the proposal but only suggested that the proposal could be discussed within the Drafting Committee (A/CN.4/SR.3354).

¹⁸ See, for the positions, Crimes against Humanity: Comments and Observations Received from Governments, International Organizations and Others (A/CN.4/726): France, at 10 ('There is some doubt, however, as to the desirability of qualifying the prohibition of crimes against humanity as a peremptory norm of general international law, since the Commission is currently working on the topic "Peremptory norms of general international law (*jus cogens*)", and since the preamble of the Rome Statute of the International Criminal Court itself does not refer to them'); the United Kingdom, at 24 ('In this context, the United Kingdom is unclear on the benefits of including a statement on whether the prohibition on crimes against humanity is a peremptory norm of general international law. The United Kingdom is aware that the International Law Commission is looking at the subject of *jus cogens* in a separate piece of work and suggests that this question is left to be considered following the outcome of that work'). See also for a summary of these views the Fourth Report *op cit* note 10, which also includes observations made by some States in oral statements at the UN General Assembly.

¹⁹ In truth, some States, in particular China, Iran and Turkey, questioned the evidence put forward by the Commission. But these views are addressed below.

²⁰ The Special Rapporteur, true to the agnostic attitude described above, while recommending that no change be made to the preamble (at para 40), expresses some sympathy for the views of these States, at para 35: 'It is correct to observe that such a reference typically is not included in the preamble of treaties addressing crimes.'

peremptory status of the prohibition should also be addressed in the Draft Articles.²¹

The same dynamic was evident in the Commission. As in the General Assembly, most members of the Commission supported the inclusion of the preambular recognition of the peremptory status of the prohibition of crimes against humanity.²² There were some members – a small minority, it must be said – who did not support the reference to *jus cogens* in the preamble.²³ This minority seemed to suggest that there was no practice supporting the peremptory status of crimes against humanity. Mr Huang, for example, noted that in *Belgium v Senegal*,²⁴ the International Court of Justice ‘had provided comprehensive reasoning’ with ‘detailed analysis of treaties, declarations, General Assembly resolutions and other international instruments, as well as national legislative practice’ for its determination that the prohibition of torture is a *jus cogens* norm, but that no such analysis was presented in the commentary to the preambular paragraph in the Draft Articles on Crimes against Humanity.²⁵

²¹ It should be noted that the vast majority of States that submitted comments simply did not comment on the preambular paragraph, indicating their support for it. See in this respect the Fourth Report on Peremptory Norms of General International Law op cit note 10: ‘The written responses of States to the preambular paragraph of those draft articles also point to the general recognition of States of the peremptory character of the prohibition of crimes against humanity.’ Of the 33 written comments received at the time of writing the present report, only one State, France, questioned the inclusion of the preambular paragraph. Tellingly, in its written input, France did not question the correctness of the preambular paragraph, but merely tentatively expressed doubt about its appropriateness given that the subject of *jus cogens* was being considered in a different topic. Most of the comments did not even mention the inclusion of the paragraph describing the prohibition of crimes against humanity as a peremptory norm of international law – a suggestion that it is such an obvious statement of fact that it does not require mentioning. Those States that did comment on it, other than France, did so with approval.

²² In addition to the statements referred to in note 15, see Tladi (A/CN.4/SR.3454); Park (A/CN.4/SR.3454); Hassouna (A/CN.4/SR.3454); Galvão Teles (A/CN.4/SR.3456); Hmoud (A/CN.4/SR.3456); Grossman Guiloff (A/CN.4/SR.3357); Cissé (A/CN.4/SR.3457); Petrić (A/CN.4/SR.3457); Saboia (A/CN.4/SR.3457); Oral (A/CN.4/SR.3457); Escobar Hernández (A/CN.4/SR.3457); Laraba (A/CN.4/SR.3458); Jalloh (A/CN.4/SR.3458); Sturma (A/CN.4/SR.3458).

²³ See, eg, Wood (A/CN.4/SR.3454); Zagaynov (A/CN.4/SR.3457) (‘... doubts on the qualification of the prohibition of crimes against humanity as a peremptory norm of international law. It was no coincidence that the practice of qualifying a norm embodied in a treaty as a peremptory norm was not widespread’); Huang (A/CN.4/3458).

²⁴ *Questions Relating to the Obligation to Prosecute or Extradite* op cit note 14.

²⁵ Op cit note 3.

Given the sheer volume of support, and the minuscule size of the opposition, it is perhaps an overstatement to speak of a pushback. States, and members of the Commission, have generally accepted the peremptory status of the prohibition of crimes against humanity. Two questions arise from this recognition, however. First, whatever this support, is the characterisation of the prohibition of crimes against humanity as a peremptory norm of general international law justified under the requirements for *jus cogens*?²⁶ Second, even if the inclusion of the peremptory character of the prohibition is justified by the state of international law, does it serve any purpose at all in the Draft Articles? It is to these questions that I turn, briefly.

3 THE TREATMENT OF *JUS COGENS* IN THE DRAFT ARTICLES

3.1 Peremptory character of the prohibition

As described above, a small minority of States as well as a small minority of members in the Commission have expressed doubt about the express affirmation of the peremptory character of prohibition of crimes against humanity. Yet, the pedigree of the prohibition of crimes against humanity as a peremptory norm is, at this stage in our history, beyond doubt.²⁷ It bears mentioning that, in addition to the preamble to the Draft Articles on Crimes against Humanity and the Draft Conclusions on Peremptory Norms, the Commission has characterised the prohibition of crimes against humanity as a peremptory norm in its other outputs.²⁸

For a rule of international law to be considered a peremptory norm of general international law it has to meet two requirements.²⁹ First, the rule in question must be a rule of general international law – no one would seriously put forward the argument that the prohibition

²⁶ See Draft Conclusion 4 of the Draft Conclusions on Peremptory Norms of General International Law op cit note 4.

²⁷ For a discussion see the Fourth Report on Peremptory Norms of General International Law op cit note 12 paras 84–90 on which the following section is based.

²⁸ See para (5) of the commentary to Draft Article 26 of the Articles on Responsibility of States for Internationally Wrongful Acts, *Report of the International Law Commission, Fifty-Third Session, General Assembly Official Records (A/56/10)*. See also para 274 of the *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi (A/CN.4/L.682) (2006)*.

²⁹ See, generally, ILC Draft Conclusions on Peremptory Norms op cit note 4, especially Draft Conclusion 4.

of crimes against humanity is not a general rule of international law. Second, the rule in question must be accepted by the international community of States as one from which no derogation is permitted – what can be termed the acceptance and recognition requirement. Evidence for the acceptance and recognition of non-derogation can be found in a variety of sources, including the jurisprudence of international courts, State conduct and scholarly writings.³⁰ I turn to a brief description of some of the materials that may provide evidence of the peremptory character of the prohibition.

The International Court of Justice has, albeit implicitly, recognised the prohibition of crimes against humanity as *jus cogens*. In *Belgium v Senegal*,³¹ the Court characterised torture as *jus cogens*, which by definition means that acts of torture committed on a widespread or systematic basis, which constitute crimes against humanity, would be peremptory in nature.³² Decisions of international criminal tribunals have also identified the prohibition of crimes against humanity as *jus cogens*. These include the decisions of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Kupreškić*³³ and *Prosecutor v Simić*,³⁴ and the International Criminal Court's decision in *Prosecutor v William Samoei Ruto and Joshua Arap Sang*.³⁵ The jurisprudence of the Inter-American System has, likewise, described the prohibition of crimes against humanity as having peremptory status.³⁶ There is also ample support in the jurisprudence of domestic courts for the peremptory character of the prohibition of crimes against

³⁰ Ibid, Draft Conclusions 8 and 9.

³¹ *Belgium v Senegal* supra note 15 para 99.

³² Fourth Report on Peremptory Norms op cit note 12 para 84.

³³ *Prosecutor v Zoran Kupreškić et al*, IT-95-16-T, Judgment of 2000 para 520.

³⁴ *Prosecutor v Milan Simić*, IT-95-9/2-S, Sentencing Judgment, 2002 para 34.

³⁵ *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision of Trial Chamber on the Request of Mr. Ruto for Excusal from Continued Presence at Trial, International Criminal Court, 18 June 2013, para 90 ('It is generally agreed that the interdiction of crimes against humanity enjoys the stature of *jus cogens*.')

³⁶ *Miguel Castro-Castro Prison v Peru*, Judgment (Merits, Reparations and Costs), Inter-American Court of Human Rights, 2006, para 402; *Almonacid-Arellano and Others v Chile*, Judgment (Preliminary Objections, Merits and Costs), Inter-American Court of Human Rights, 2006, Series C, No. 154, para 99. See also *Case of Goiburú et al v Paraguay*, Judgment (Merits, Reparations and Costs), Inter-American Court of Human Rights, 2006, Series C, No. 153, paras 84 and 128; *Manuel Cepeda Vargas v Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, 2010, Series C, No. 213, para 42. For discussion of the Inter-American System's contribution to peremptory norms, including some of these cases, see Juan Jose Ruda Santolaria 'The Treatment of Peremptory Norms of General International Law (*Jus Cogens*) in the Inter-American Human Rights System' in Tladi op cit note 4.

humanity.³⁷ Finally, there is widespread recognition of the peremptory character of peremptory norms in scholarly writings.³⁸

3.2 The prohibition is *jus cogens*, but so what?

The really difficult question, however, is not whether the prohibition of crimes against humanity has acquired peremptory character – that seems to be an easy conclusion to make. The really difficult question, for me, is whether the identification of the prohibition as *jus cogens* has any consequences in international law. The ILC Draft Conclusions on Peremptory Norms of General International Law spell out a series of consequences which, without more, would apply to crimes against humanity.³⁹ These include the invalidity of conflicting obligations,⁴⁰ particular consequences for the rules on State responsibility,⁴¹ and

³⁷ In *Re Agent Orange Product Liability Litigation*, Judgment, District Court of the United States, Easter District of New York, 28 March 2005, at 136; *Mazzeo, Julio Lilo and Others*, Judgment, Supreme Court of Argentina, 13 July 2007, para 15 (*'Se trata de la más alta fuente del derecho internacional que se impone a los estados y que prohíbe la comisión de crímenes contra la humanidad, incluso en épocas de guerra'* [It is the highest source of international law that is imposed on States and that prohibits the commission of crimes against humanity, even in times of war]). See also *Arancibia Clavel, Enrique Lautaro*, Judgment, Supreme Court of Argentina, 24 August 2004, para 28, and *Office of the Prosecutor v Priebeke*, Judgment, Supreme Court of Argentina, 2 November 1995, paras 2–5; Exp No. 0024-2010-PI/TC, Judgment, Peruvian Constitutional Court, 21 March 2011, para 53 and *National Commissioner of Police v Southern African Litigation Centre*, Judgment, South African Constitutional Court, 30 October 2014, para 137.

³⁸ See, eg, Maarten den Heijer and Harmen van der Wilt '*Jus Cogens* and the Humanization and Fragmentation of International Law' (2015) 46 *Netherlands Yearbook of International Law* 3 at 9; Louis Kotzé '*Constitutional Conversations in the Anthropocene: In Search of Environmental Jus Cogens Norms*' (2015) 46 *Netherlands Yearbook of International Law* 241 at 243; Dinah Shelton '*Sherlock Holmes and the Mystery of Jus Cogens*' (2015) 46 *Netherlands Yearbook of International Law* 23, especially at 37. See also the co-editor of this volume, Leila Sadat '*A Contextual and Historical Analysis of the International Law Commission's 2017 Draft Articles for a New Global Treaty on Crimes against Humanity*' (2017) 16 *Journal of International Criminal Justice* 683 at 688 and 700: '*This language should be stronger still in light of current State and international practice, and given the jus cogens nature of crimes against humanity.*'

³⁹ See Draft Conclusions op cit note 4.

⁴⁰ *Ibid*, Draft Conclusions 10–13 (treaties), Draft Conclusion 14 (customary international law), Draft Conclusion 15 (obligations flowing from unilateral acts), Draft Conclusion 16 (obligations from decisions of international organisations).

⁴¹ *Ibid*, Draft Conclusion 17 (*erga omnes* obligations and invocation), Draft Conclusion 18 (grounds precluding justifications), Draft Conclusion 19 (particular consequences of peremptory norms). See Helmut Aust '*Legal Consequences of Serious Breaches of Peremptory Norms in the Law of State Responsibility: Observations in the Light of the Recent Work of the International Law Commission*' in Tladi op cit note 4.

rules of interpretation.⁴² Each of these general consequences of peremptory norms would apply equally to the prohibition of crimes against humanity.⁴³ In other words, a treaty which conflicts with the prohibition of crimes against humanity would, in accordance with Draft Conclusion 10, be invalid (or become invalid). Similarly, pursuant to Draft Conclusion 20, to the extent possible, a treaty should be interpreted in such a way that it is consistent with the prohibition of customary international law. Those Draft Conclusions, however, are not exhaustive and do not address the consequences of particular peremptory norms, such as the prohibition of crimes against humanity.⁴⁴

Indeed, the reason advanced by the Commission for not addressing questions of immunity and criminal responsibility, for example, under the peremptory norms topics was that the Draft Conclusions were concerned with methodological questions and not with the consequences of particular peremptory norms.⁴⁵ The question thus arises whether there are particular consequences flowing from the peremptory character of the prohibition of crimes against humanity.⁴⁶

⁴² Ibid, Draft Conclusion 20. See in this regard Sa Benjamin Traore 'Peremptory Norms and Interpretation in International Law' in Tladi op cit note 4.

⁴³ The content of these is discussed in Tladi op cit note 28 and will not be discussed here.

⁴⁴ See, in this regard, Draft Conclusion 22: 'The present draft conclusions are without prejudice to consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail under international law.'

⁴⁵ See para 5 of the Commentary to Draft Conclusion 1 of the Draft Conclusions op cit note 4: 'Moreover, individual peremptory norms of general international law (*jus cogens*) may have specific consequences that are distinct from the general consequences flowing from all peremptory norms. The present draft conclusions, however, are not concerned with such specific consequences, nor do they seek to determine whether individual peremptory norms have specific consequences. The draft conclusions only address general legal consequences of peremptory norms of general international law.'

⁴⁶ This question was posed by some members of the Commission and some States. See, eg, Hassouna (A/CN.4/SR.3454): 'The third preambular paragraph, which recognized the prohibition of crimes against humanity as a peremptory norm of general international law (*jus cogens*), should be retained, but the commentary should include a brief analysis of the consequences flowing from that status in the specific context of crimes against humanity.' Indeed, even those who questioned the inclusion of the preambular paragraph did so on the basis that it was meaningless to refer to the *jus cogens* character of the norm since we were not identifying any consequences flowing from that character. See, eg, Michael Wood (A/CN.4/SR.3454): 'the inclusion of that paragraph could be seen to suggest that consequences within the scope of the draft articles followed from the *jus cogens* status of the prohibition, which was not the case.' The Special Rapporteur's agnosticism towards the preambular paragraph also seemed to flow from that concern. See Fourth Report op cit note 10 para 35: 'The reason for not including [a reference to the

If there are such consequences, you would expect them to be addressed in the Draft Articles on the Prevention and Punishment of Crimes against Humanity. Yet, the Draft Articles themselves do not specify any specific consequences that flow from the peremptory status of the prohibition on crimes against humanity. Some potential consequences were discussed within the Commission. Possible consequences that could have been addressed in the Draft Articles include the non-applicability of immunity and amnesties.⁴⁷ In the end, the Commission decided not to include any reference to any additional consequences for crimes against humanity. Does this mean that no consequences flow from the peremptory character? I believe not.

First, the general consequences flowing from the peremptory character outlined in the Draft Conclusions on Peremptory Norms continue to apply. Second, it should be recalled that the Draft Articles were drafted as a possible treaty and would thus apply particular rules as between the parties.⁴⁸ The application of the instrument adopted pursuant to the Draft Articles would therefore be without prejudice to the existing rules of international law and would certainly be without prejudice to the rules on peremptory norms. In relation to immunities, this point is made explicit in the commentaries to the Draft Articles.⁴⁹ This means that if, as I believe to be the case, there is an exception

peremptory character of the prohibition of crimes against humanity] may relate, at least in part, to uncertainty as to what consequences flow from such a status.' See also Wood (A/CN.4/SR.3454): 'More importantly, as the Special Rapporteur seemed to acknowledge, the inclusion of that paragraph could be seen to suggest that consequences within the scope of the draft articles followed from the *ius cogens* status of the prohibition, which was not the case. The Commission should not include an unnecessary paragraph that might make a convention based on the draft articles harder for some States to accept.'

⁴⁷ See, eg, Tladi (A/CN.4/SR.3454); Park (A/CN.4/SR.3454); Hassouna (A/CN.4/SR.3454); Hmoud (A/CN.4/SR.3456); Ms. Escobar Hernández (A/CN.4/SR.3457).

⁴⁸ See Draft Articles op cit note 3 para 3 of the general commentary: 'Hence, the proposal for this topic, as adopted by the Commission at its sixty-fifth session in 2013, states that the "objective of the International Law Commission on this topic ... would be to draft articles for what would become a Convention on the Prevention and Punishment of Crimes against Humanity". While some aspects of these draft articles may reflect customary international law, codification of existing law is not the objective of these draft articles; rather, the objective is the drafting of provisions that would be both effective and likely acceptable to States, based on provisions often used in widely adhered to treaties addressing crimes, as a basis for a possible future convention.'

⁴⁹ Ibid, para 5 of the Commentary to Draft Article 6: 'By contrast, paragraph 5 has no effect on any procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction, which continues to be governed by conventional and customary international law. Further, paragraph 5 is without prejudice to the Commission's work on the topic "Immunity of State officials from foreign criminal jurisdiction".'

to the rules on immunity, in particular immunity *ratione materiae*, flowing from *jus cogens* crimes such as the prohibition of crimes against humanity,⁵⁰ immunity *ratione materiae* would not prevent the prosecution of any individual under the Draft Articles, nor would it provide a justification for any State not to comply with its obligation to prosecute under the Draft Articles. I have always maintained that the primary contribution of this set of Draft Articles (or a Convention if one is ever drafted and adopted) will be the establishment of a robust inter-state cooperation mechanism to promote national prosecution and therefore positive complementarity.⁵¹ Thus a State on whose territory a person who is accused of committing crimes against humanity is present would, if requested by a third State, be obliged to either extradite or prosecute such a person. Under such circumstances, the State would be precluded from raising immunity *ratione materiae*, notwithstanding the fact that the Draft Articles are silent on that question. The peremptory character of the prohibition can also have an interpretative effect on the application of the inter-State mechanism. This point was made vividly by Hmoud, who noted that ‘although there was no provision on immunities’, any State that invoked the immunity of its officials to avoid its obligation to prosecute crimes against humanity would be violating its obligations to criminalise and prosecute, and/or to extradite.⁵²

The effect of the foregoing is that, in my view, assuming a Convention were adopted with the precise same text, immunity *ratione personae* would continue to apply, limiting the scope of the obligations under such a Convention, but that immunity *ratione materiae* would not apply by virtue of the *jus cogens* status of the crimes against humanity. This would be the case notwithstanding the silence of the Draft Articles on the question of immunity. Under this scenario, a State would have to either prosecute its own official accused of having committed crimes against immunity or, in the event that it was unable

⁵⁰ See Dire Tladi ‘The International Law Commission’s Recent Work on Exceptions to Immunity: Charting the Course for a Brave New World in International Law?’ (2019) 31 *Leiden Journal of International Law* 169. See, commenting on a recent German judgment (at the time of writing, the judgment was yet to be published), Claus Kreß ‘German Court Major Judgment on Foreign Officials’ Lack of Immunity in War Crimes Trials’ *Just Security* 1 February 2021. See, however, Kobina Egyir Daniel *Head of State Immunity under the Malabo Protocol: Triumph of Impunity over Accountability?* (forthcoming).

⁵¹ Dire Tladi ‘A Horizontal Treaty on Cooperation in International Criminal Matters: The Next Step for the Evolution of a Comprehensive International Criminal Justice System?’ (2014) 29 *Southern African Public Law* 368 and Dire Tladi ‘Complementarity and Cooperation in International Criminal Justice’ *ISS Paper Series* 24 November 2014.

⁵² Hmoud (A/CN.4/SR.3456).

or unwilling to do so, extradite such an official to another State willing to prosecute. These scenarios, however, assume that the States will leave the immunity provisions of the Draft Articles unamended – a most unlikely scenario. The more likely scenario is that States would seek to make explicit the applicability or not of the immunity under any Convention so drafted.

4 CONCLUSION

The prohibition of crimes against humanity is, without question, a peremptory norm of general international law (*jus cogens*). The recognition by the ILC of this fact in the preamble of the Draft Articles and the Annex of the Draft Conclusions did not have, and could not have had, a formative effect. Rather, this recognition confirmed a legal fact which would be valid even without its recognition in the Draft Articles or the Draft Conclusions. Neither the Draft Conclusions nor the Draft Articles address the particular consequences of the peremptory status of the prohibition on crimes against humanity. While the methodological character of the Draft Conclusions made it difficult to address the particular consequences of any particular *jus cogens* norm such as the prohibition of crimes against humanity, the Draft Articles could have done so. Yet even this should not detract from the significance of the Draft Articles from the perspective of peremptory norms. As a potential treaty regime, it is understood that the Draft Articles are not intended to cover all aspects of crimes against humanity and that other rules of international law not addressed in the Draft Articles continue to apply. Yet, when elaborating a future Convention on the basis of the Draft Articles – or other text – States would be well advised to address the particular *jus cogens* consequences of the prohibition of crimes against humanity (and other *jus cogens* crimes).