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# THE UN ILC'S DRAFT CONCLUSIONS ON THE PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW: THE TALE OF THE ANNEX

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## ABSTRACT

This paper examines the implications of the General Assembly's failure to adopt a resolution on the International Law Commission's Draft Conclusions on Peremptory Norms ("Draft Conclusions") during its seventy-seventh session. While the non-decision does not affect the legal status of the Draft Conclusions, it raises questions about its reception and the underlying reasons for the lack of resolution adoption. The inclusion of an Annex with a non-exhaustive list, particularly addressing the right to self-determination, led to opposition from a subset of States. Despite the strong pedigree of the norms in the Annex, dissenting voices, primarily questioning the status of certain norms, played a pivotal role in the non-decision. This paper contends that the dissenters' success in preventing the adoption of a resolution could prompt the International Law Commission to exercise greater caution in its future work. The Commission may become more inclined to avoid addressing sensitive issues, potentially leading to a tendency to seek the lowest common denominator in its outputs. The analysis delves into the potential impact on the Commission's approach and the broader implications for the development and acceptance of peremptory norms of general international law.

## Introduction

In August 2022, the International Law Commission adopted the Draft Conclusions on Peremptory Norms of General International Law ("Draft Conclusions"). The adoption of these Draft Conclusions was the result of work undertaken since 2015, during which period I served as Special Rapporteur for the topic. The Draft Conclusions consist of four parts: an introductory part, a part addressing identification of peremptory norms, a part concerning consequences of peremptory norms and a part with general provisions. Finally, the Draft Conclusions have an Annex containing a non-exhaustive list of *jus cogens* norms.

On the adoption of the Draft Conclusions, the Commission made two recommendations to the General Assembly. First, it recommended that the General Assembly take note of the Draft Conclusions and its Annex, and to ensure their widest dissemination. Second, the Commission recommended that General Assembly *"commend the Draft Conclusions ... to the attention of States and to all who may be called upon to"* apply *jus cogens*. In its consideration of the item, the General Assembly was not able to come to an agreement, and instead included in the omnibus resolution on the work of the ILC a provision to defer consideration of the ILC's work on peremptory norms to its next session in the following terms:

> *Decides that the consideration of chapter IV of the report of the International Law Commission on the work of its seventy-third session, dealing with the topic "Identification and legal consequences of peremptory norms of general international law (jus cogens)", shall be continued at the seventy-eighth session of the General Assembly, during the consideration of the report of the Commission on the work of its seventy-fourth session.*

First, of all, it is likely that the General Assembly will, at its next session, take *some kind* of action on the topic. Second, even if does not, the actions of the General Assembly on ILC topics, save where there is a decision to elaborate a treaty, do not, as such, and should not affect the content or even legal status of the work of the ILC. When asked, during an academic conference in Miami, what would it mean for the Draft Conclusions if the General Assembly did not *"take it note*" of the text, I said that at the end of the day the Commissions work has *"to be able to stand on its own two feet"*. While this is true, the failure to adopt a decision – or at least to adopt a decision at first asking – is worth pondering. In particular, it is worth pondering the reasons since this might impact on the assessment of the Draft Conclusions by those *"called upon"* to apply *jus cogens*.

This paper seeks to assess and evaluate the non-decision by the General Assembly and in particular the reasons for the non-decision. As explained below, the processes for adoption of UN resolutions, including those of the General Assembly, are, at best, very opaque and non-transparent. Thus, the reasons put forward for the non-adoption are not made public, although it may be possible to decipher these from the general debate of the Sixth Committee. While reference will be made to the debate, the paper will rely more on information relayed from within the informal consultations – the opaque process through which informal consultations are made. As will become clear below, the main reason for the failure of the General Assembly to decide on the Draft Conclusions is the Annex containing the non-exhaustive list and, in particular the inclusion of the right to self-determination. This raises the question whether the peremptory status of the norms in the Annex, in particular the right to self-determination, should be called into question. While no comprehensive assessment of any of the norms is provided in this paper, some thoughts will be provided but only in the context of the General Assembly's consideration of the ILC Draft Conclusions.

The paper does not seek to provide a detailed analysis of the Draft Conclusions (Tladi, 2020; & Tladi, 2019). At the same time, the paper does not seek to provide a substantive assessment of the views of States. Rather, this paper is limited to thoughts on the process for the General Assembly's consideration and what the outcome means for the list of norms in the Annex, in particular the right to self-determination. In the next section, the paper will provide a description, in broad terms, of the reception of the ILC's Draft Conclusions by States in the General Assembly. The third section will describe concerns expressed in the informal consultations on the Sixth Committee resolution on *jus cogens*, including the source of the concerns and the attempts at finding compromise. The fourth section evaluates the implications on the Annex of the failure of the General Assembly to adopt a resolution on *jus cogens*. Finally,some concluding remarks are offered.

## General Reception of the ILC Draft Conclusions by States in the General Assembly

### *A Brief Overview of the Draft Conclusions*

Before describing the reception of the Draft Conclusions in the General Assembly, it is useful to provide a broad and brief overview of the Draft Conclusions. The text adopted by the ILC consists of 23 Draft Conclusions and an Annex. The Draft Conclusions are divided in four parts. The first, introductory part, has two substantive Draft Conclusions, namely the general nature and the definition. The definition, contained in Draft Conclusion 3 merely reiterates the definition of jus cogens contained in the Vienna Convention on the Law of Treaties. Article 53 of the Vienna Convention, it will be recalled, provide that norms of jus cogens are *"accepted and recognised as norms from which no derogation is permitted and which can be modified only by norms have the same character"*. Draft Conclusion 2, titled *"General Nature"*, which proved somewhat contentious during the consideration of the topic (Brill, 2021), provides as follows:

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

The second part of the Draft Conclusions concerns the identification of *jus cogens*. The basic rule, contained in Draft Conclusion 4, provides criteria for *jus cogens* that are sourced from Article 53 of the Vienna Convention. Draft Conclusion 4 provides as follows:

> To identify a peremptory norm of general international law (jus cogens), it is necessary to establish that the norm in question meets the following criteria:
>
> (a) it is a norm of general international law; and
>
> (b) it is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The rest of Part II of the Draft Conclusions delves into the separate elements of the criterion. For example, Draft Conclusion 7 describes that acceptance and recognition by the *"international community of States as a whole"* means acceptance and recognition *"by a very large and representative majority of States"* and that acceptance and recognition *"by all States is not required"*.

Part III of the Draft Conclusions is dedicated to the consequences of *jus cogens*. Draft Conclusions 10 to 16 concern consequences of *jus cogens* for sources of obligations under international law. For example, Draft Conclusions 10 to 13 address consequences for treaty law, namely invalidity and the particular consequences that flow from invalidity. Draft Conclusion 16 concerns consequences for decisions of international organisations, stating that decisions of international organisations that are inconsistent with *jus cogens*, do not create obligations under international law. A key issue under Draft Conclusion 16 is not reflected in the text of Draft Conclusion itself but is rather referred to in the commentary. It is that the provision applies equally to decisions of the Security Council. Draft Conclusions 17 to 19 addresses the consequences of State responsibility and are based entirely on the Articles of States Responsibility.

Part IV, titled General Provisions, contains several unrelated provisions of general application. Draft Conclusion 20 concerns interpretation of rules of international law to promote consistency with *jus cogens*. Draft Conclusion 21 sets forth a recommended procedure for invocation of the consequences in Part III to avoid unilateralism and auto-interpretation. Draft Conclusion 23 and the related Annex put forward a list of jus cogens norms previously identified by the Commission. These include, for example, the prohibition of aggression, the right to self-determination and the prohibition of genocide. It this Draft Conclusion, and its associated Annex, that was at the heart of the discussions of the informal consultations on the resolution on *jus cogens*.

### *The Sixth Committee Debate*

In general, the output of the work of the Commission was well received by States in the General Assembly debate (United Nations, 2023). There was, however, a small minority of States that were generally concerned by the Draft Conclusions (United Nations, 2023). There were other States, whose statements were, on balance, neutral. Of course, even States that generally supported the product did not agree with every provision. The Nordic States, for example, *"commend[ed]"* and *"applaud[ed]"* the Commission for their work on *jus cogens* (Ministry of Foreign Affairs, Malaysia, 2022). Nonetheless, the Nordic States did identify some provisions that raised concern for them. For example, the Nordic States believed that the precise role of non-State actors in the identification of *jus cogens* should be made clearer. Similarly, the Nordic States also expressed caution about the Annex with the non-exhaustive list. This pattern is visible with other States that generally supported the Draft Conclusions. South Africa, for example, while expressing support for the Draft Conclusions (United Nations, 2022), also took issue with the fact that the text of Draft Conclusion 5 provides the possibility for treaty provisions to form the basis of *jus cogens*. Similarly, Greece welcomed the adoption of the Draft Conclusions on second reading but expressed the view that characteristics in Draft Conclusion 3 (general nature), should play a greater role in the criteria for the identification of *jus cogens* (United Nations, 2022). Similarly, Iran, while praising the work of the Commission, did identify aspects of the Draft Conclusions that they did not (fully) support.

It should be noted that even those States that were generally concerned by the Draft Conclusions adopted on second reading, did manage to point out some positives. An example of this is Singapore, which while expressing the view that the Draft Conclusions could *"further improved or clarified in the manner proposed in [their] written comments"*, also stated that it *"greatly appreciate[s] the Commission's clear efforts to engage with Member States"*. Indeed, while the general tone of Singapore is non-support, only three issues are identified as requiring further consideration, and as explained below, these are not the central issues of the Draft Conclusions. Similarly, the United States, while adopting an overall negative view of the Draft Conclusions, did also express positive comments concerning of some of the adaptations to the Draft Conclusions based on the written comments by States.

What is more important, however, is that even the few States that took an overall negative view of the Commission's work on *jus cogens*, generally supported (or did not oppose) the central elements of the Commission's work, namely the basic rule concerning the identification of *jus cogens* and the general rules on consequences. Indeed, only one State, namely Armenia, opposed the basic methodology of the identification of *jus cogens*. In its intervention, Armenia stated that it has *"ongoing concerns about the positivist"* approach of the Commission and that, in its view, *"the moral law is the foundation for their historical recognition, not State practice"*. Not even the biggest critics of the Draft Conclusion throughout the project – the United States and Israel – have shared this rather damning of view of the project. On the criteria for the identification of *jus cogens* norms, for example, the United States stated that it *"favours ... the retention of draft conclusion 4 which, unlike draft conclusion 3 (sic), is reflective of Article 53 of the Vienna Convention on the Law of Treaties (International Law Commission, 2024)"*. Similarly, it seems apparent from its intervention in the Sixth Committee, that while Israel does not believe that the Commission accurately captured the threshold of evidence for the second criterion in Draft Conclusion 4, it accepts the basic framework for the criteria established in Draft Conclusion.

There were in fact, for those States, that had a decidedly negative view of the Draft Conclusions, three main areas of consternation. The first area of concern is the inclusion of the characteristics in Draft Conclusion 2. Second, several States, questioned the specific reference, albeit in the commentary, to decisions of the Security Council as decisions that do not create obligations under international law if they conflict with *jus cogens*. Finally, the inclusion of a non-exhaustive list has caused some consternation for several States. Of course, there were other issues, but it was three issues that caused many States to adopt the particularly negative stance toward the project.

## The Informal Consultations and the Right to Self-Determination

### *The Problem of the Annex*

In the course of the informal consultations, delegations expressing concern about the Draft Conclusions focused their attention more and more on the annexed non-exhaustive list. The nature of jus cogens in

Draft Conclusion 2 and the reference to the Security Council became secondary issues. This would seem counter-intuitive given the number of disclaimers and caveats qualifying the non-exhaustive list. Draft Conclusion 23 states as follows:

> *Without prejudice to the existence or subsequent emergence of other peremptory norms of general international law (jus cogens), a non-exhaustive list of norms that the International Law Commission has previously referred to as having that status is to be found in the annex to the present draft conclusions.*

It will not be lost on the reader that not only is the list said to be non-exhaustive and without prejudice to other norms, past, present or future, but the list is qualified as being *"a list of norms that the International Law Commission has previously referred to as"* being *jus cogens*. This history of this qualifier is that it was meant to assuage those members of the Commission who were uncertain that all the norms on the list qualified as norms of *jus cogens*. Moreover, this qualifier was intended to address a major concern, namely that the Commission did not, in putting together this list adhere to its own methodology for identification of *jus cogens* norms. In other words, the Commission did not, in the period of this project, seek to determine whether the norms on the list were *"accepted and recognised"* by a *"a very large and representative"* majority of States as ones from which no derogation is permitted. By describing the list as a list of norms previously referred to by the Commission, the Commission was stating an empirical fact and not necessarily a normative claim (International Law Commission, 2022). This point is buttressed by the fact that apart from references to the Commissions previous work, there are no references in the commentary to other norms to support any of the norms – indicating that the Commission was not, at this time, making its own assessment.

It is apparent that the question of the non-exhaustive or illustrative list weighed heavily on me as Special Rapporteur. Each of the first four reports, described Special Rapporteurs uncertainty and requested members of the Commission to comment on the question of list – receiving in each case divergent views (International Law Commission, 2024). This uncertainty was already expressed in the first report, where, having expressed support for the list, the report went on as follows:

> *Nonetheless, there may be different reasons to reconsider the illustrative list. The topic, as proposed in the syllabus, is inherently about process and methodology rather than the content of specific rules and norms. In other words, like the Commission's consideration of the topic of customary international law, it is not concerned with the substantive rules; rather, the present topic is concerned with the process of the identification of the rules of jus cogens and its consequences. An illustrative list might have the effect of blurring the fundamentally process-oriented nature of the topic by shifting the focus of discussion towards the legal status of particular norms, as opposed to the identification of the broader requirements and effects of jus cogens*
>
> (International Law Commission, 2024)

This reason is reiterated in the commentaries, not only in the Commentary to Draft Conclusion 23 but also the Commentary to Draft Conclusion 1. However, quite apart from explaining the nature and limitations of the Annex, these explanations reveal something else about the Annex and its place in the great scheme of things. They suggest by their language of qualifiers and caveats that the Annex is not the central contribution (or even an important contribution) of the Draft Conclusions. The Annex, in fact, seems to be a rather peripheral appendage to the project. It is, in the words of the commentary, *"intended to illustrate …. the types"* of norms that *"have been routinely identified"* as *jus cogens*. This serves to emphasise it while the project was about methodology, the Annex in contrast, was not concerned with methodology nor was it put it together necessarily applying the relevant methodology.

Yet, within the informal consultations – that opaque process through which the resolutions are adopted – it was the Annex that apparently took centre stage and caused the greatest divisions. It is important to recall that no ILC instrument is ever embraced by all States. Divergences of opinion on the instruments as well as on particular provisions are commonplace. Yet, within the informal consultations, the strong dividing line between neutrality, reflected in the common *"take note"*, and rejection of the instrument pursued by other delegations, was the Annex which, as described above, was counter-intuitive given the

peripheral status of the Annex. To be fair, Michael Wood, one of the fierce opponents of the list, did prophesy that the Annex could be the undoing of the Commission's work:

> *Not seeking to have a list in the draft conclusions themselves would make the draft conclusions less controversial and more acceptable to States generally. It would avoid linking the draft conclusions directly to what would inevitably be a contested list in many quarters, including among States, non-governmental organizations and writers*
>
> (International Law Commission, 2019)

In the debate itself, the list was criticised from several different perspectives. From one perspective the list was not arrived at following the methodology elaborated in the Draft Conclusions. From a second perspective, the Annex was over-inclusive, which is to say, it included norms that did not qualify as *jus cogens*. From a third perspective, the Annex was under-inclusive in that it did not include particular norms that ought to have been included. The statement of Morocco is an apt example since it draws on each of these concerns (United Nations, 2019). Each of these problems, true though they are, could easily have been addressed by relying on the caveats in Draft Conclusion 23 and the commentaries as described above. For the first objection, it could be pointed that the methodology was not used because the Commission was merely referring to norms it had previously referred to as *jus cogens*, such that the application of the methodology was unnecessary. This same response could be used to also address the second objection (over-inclusiveness). In response to the third objection, it only needed to be mentioned that Draft Conclusion 23 states, in various ways, that it is non-exhaustive.

While these responses would normally have been sufficient, within the informal consultations it was revealed that they would be insufficient because of the second objection, i.e. over-inclusiveness, in particular because of the inclusion of a particular norm, namely self-determination. A few States were concerned about the inclusion of self-determination arguing that its peremptory status was far from assured. Indeed, the States most vocal at the first informal consultations ae those that have issues with the right of self-determination, namely Israel, Morocco, China and Cameroon. The United States, which was also at the forefront of the discussions in the informal consultations, has often acted as an ally of Israel.

***The Search for Compromise***

Resolutions are almost always the product of a compromise. The coordinator of the resolution, Matúš Košuth from Slovakia presented a draft resolution based on a template for other similar resolutions in the past. In the first place, the draft resolution welcomed the work of the Commission on *jus cogens*, and expressed its appreciation for its continued efforts in codification and progressive development. In the zero draft, the coordinator had inserted in square brackets a paragraph that is not traditionally part of the resolutions on the work of the Commission:

> *Takes note of the statements in the Sixth Committee on the subject, including those made at the seventy-seventh session of the General Assembly, after the International Law Commission had completed its consideration of this topic following its statute.*

The language in this paragraph was inspired by comments initially made by Israel and subsequently supported by several States. When responding to the debate in my capacity as Special Rapporteur, I had expressed an openness to the proposal to account for the views of States, as long as it included the views of all States:

> *While it is not for me to intervene in the negotiations of States, I hope that any references to the views of States ... would be balanced and non-prejudicial. To do otherwise would be to disenfranchise the very large and representative majority of States that have expressed support for these draft conclusions. I wish to end my comments on the substance of the debate, by recalling the powerful notion that JC is the weapon of the weak and the disenfranchised against abuses of power by the powerful and privileged*
>
> (United Nations, 2022)

Operative paragraph 4 and 5, drawn from the recommendation of the Commission to the General Assembly, were the main elements of the proposed resolution:

> *4. [Also] takes note of the conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens) and the annex thereto, the text of which is annexed to the present resolution, as well as the commentaries thereto, brings them to the attention of States, and encourages their widest possible dissemination;*
>
> *5. Commends the conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens) and the annex and commentaries thereto to the attention of States and all who may be called upon to identify peremptory norms of general international law (jus cogens) and to apply their legal consequences*

On paragraph 3, the United States and Morocco proposed that reference be made not just to the views of States, but rather to the *"divergent views"*. Australia's proposal was that the resolution should provide for *"all the comments and observations"* as opposed to *"divergent views"*. This proposal was subsequently supported by South Africa.

The United States proposed the deletion of paragraph 5 and made extensive proposals on paragraph 4. The main element of the US and Morocco proposals in paragraph 4 was to exclude any references to the Draft Conclusions being annexed to the resolution. Both proposals would also delete the phrase "and encourages their widest possible dissemination". The Australian proposal, which was intended to be a compromise, provided for the Draft Conclusions to be annexed to the resolution but did not refer to the Annex with the non-exhaustive list in the text of the resolution:

> *[Also] takes note of the conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), the text of which is annexed to the present resolution, as well as the commentaries thereto, brings them to the attention of States and all who may be called upon to identify peremptory norms of general international law (jus cogens) and to apply their legal consequences, and encourages their dissemination [as appropriate].*

The Australian text, which was the subject of deliberations, received general support including from States that had initially been opposed to the coordinators text such as the United States and the United Kingdom. It is this text that was eventually put under silence procedure. While this text enjoyed broad support, silence was broken by six States. Of these, two States, South Africa and Sierra Leone, actually supported the resolution. South Africa and Sierra Leone broke silence only for strategic reason to preserve their original position and they did so only after silence had been broken by States opposed to the resolution. The other States that broke silence were China, Morocco, Cameroon and Russia. Except of Russia, the States that broke silence did so on account of the Annex. All four States that objected to the resolution are States against which allegations of breaches of the norms in the Annex, including the right of self-determining, currently exist.

**Implications of the Impasse for the Draft Conclusions and its Annex**

The General Assembly was unable to agree on an appropriate response to the Commission's recommendation. As noted in the introduction, from a legal perspective, this does not have a direct effect on the Draft Conclusions. It should be understood that the action recommended by the Commission, i.e. to take note of the Draft Conclusions and to commend them to all those that may be called upon to identify *jus cogens* and apply its consequences, is legally insignificant. Neither amount to an endorsement or approval nor would either of those actions excuse those called upon to apply *jus cogens* from assessing the correctness of the Conclusions. The action of the General Assembly to *"take note"* or *"commend"* would thus not elevate the Draft Conclusions, nor does the failure to *"take note"* or *"commend"* undermine their value. The Draft Conclusions remain the Draft Conclusions adopted by the Commission with whatever status or value they had at the time of adoption. Indeed, even if the General Assembly had taken note of them and commended them to States and all those that may be called it upon to identify *jus cogens* or apply its legal consequences, they would remain simply ILC Draft Conclusions without any formal status in international law save as a subsidiary means for the determination of rules of international law. Yet, the impasse is not without consequence.

In assessing the consequence of the impasse, it is important to be clear about what the General Assembly decided and what it did not decide. It decided that it would consider the matter during the following session. It did not decide to not take note of the Draft Conclusions, nor did it decide to not commend the Draft Conclusions to the States. It simply decided not to take action (yet) on the Draft Conclusions. Moreover, it should be clear that out of 194 member States of the United Nations, only six broke the silence on a possible resolution, and of those, two broke silence out of a desire to save the resolution. Thus, out of 194 member States, only four opposed the adoption of a resolution *"taking note"* of the ILC's Draft Conclusion on Peremptory Norms and commending the Draft Conclusions to States and other actors. In other words, whatever the significance of the non-adoption of a resolution, it should always be recalled that the adoption was prevented by four States, and that the overwhelming majority of States supported (or at least were willing to accept) the adoption of the resolution.

It also cannot be ignored that the four States that prevented the adoption of the resolution are States that are currently accused of serious breaches of *jus cogens*, whatever the veracity of the allegations. Separatist movements in Cameroon, for example, claim the right to self-determination for the anglophone people of North Cameroon, with other abuses being committed in the context of the conflict between the government and the separatist movement (Nairobi, 2022). Claims that Morocco's occupation of Western Sahara is in breach of the right to self-determination and that Morocco is guilty of other breaches in the territory of Western Sahara are ubiquitous. Similarly, the accusations of crimes against humanity, denial of the right of self-determination as well as other breaches against China are well documented (United Nations Human Rights Office of the High Commissioner, 2022; Anonymous, 2010; & Loper, 2003). Finally, the intervention by Russia in Ukraine has been characterised as aggression, resulting in several other violations of norms on the list in the Annex, such as the right of self-determination and war crimes (United Nations, 2022).

The fact that the States in question have had allegations of breaches of the norms listed in the Annex leveled against them does not mean that the views of those States are irrelevant. Their views remain relevant for assessing whether there is acceptance and recognition of the international community of States as a whole. However, the fact that there are currently allegations of breaches is context that should be taken into account in assessing the impact of the views of these States on acceptance and recognition. Part of this context is that even without the Draft Conclusions, the norms on the list, including self-determination – the cause for the vehement objection against Draft Conclusions – are generally accepted as being *jus cogens* (Shelton, 2016; Kadelbach, 2016; Santalla Vargas, 2016). Indeed when the Commission included this list in the 2001 Articles on States Responsibility, States did not question this list – not even the right of self-determination. Thus, while the views of these objecting States, and there may be others, are relevant, given that the list of norms in the Annex, including the right of self-determination, was already largely accepted at the time of the adoption of the Draft Conclusions, the value of their value the objection of these States is that it creates a platform for the potential modification of the existing *jus cogens* norm in the form of either abrogation or demotion (Brill, 2021). For abrogation or demotion of any of the norms, however, there would need to be a *"very large and representative majority of States"* adopt a similar view. Merely four, or even ten States simply would not meet that high threshold.

Yet, while not having any impact on the Draft Conclusions or the norms of the Annex, the failure to adopt a resolution may have a more insidious effect. While the Commission is a subsidiary body of the General Assembly, it is not a mouthpiece of the Assembly. In other words, the Commission is not supposed to simply present the General Assembly with the views of members of the States or produce products that would be acceptable to all States. The function of the Commission is to independently assess the state of the law and to present its findings to the General Assembly. The Commission takes into account the views of States, but does not (or should not) merely regurgitate these. The treatment of the ILC's Draft Conclusion on *jus cogens*, where four States, alleged to have breached the norms addressed in the work of the Commission, may send the message to the Commission in the future to not conduct its work independently, but to ensure that its work does not touch on negatively affect sensitive aspects of States, particularly those States that may be willing to block consensus on said topic.

## Conclusion

The failure of the General Assembly to adopt a resolution on the ILC Draft Conclusions on Peremptory Norms at its seventy-seventh session will possibly impact on its reception. However, as a legal matter, it has no impact on the status of the Draft Conclusions. What is significant, however, is the reasons for the failure to adopt a resolution taking note of the Draft Conclusions. It seems clear that the failure to adopt a resolution on the Draft Conclusions was occasioned by the Commission's decision to include an Annex with a non-exhaustive list with a handful of States opposing the Draft Conclusions. In particular, these States questioned the status of some of the norms on the list in the non-exhaustive list. Yet, the list of norms in the Annex has a very strong pedigree. While in recent times, there has been a small group of States that have questioned the right of self-determination, this dissent is not sufficient to result in the demotion of the right of self-determination.

A more significant impact of the voice of the dissenters in their success in preventing the resolution taking note of the Draft Conclusions may be to cause the Commission to be more cautious. In particular, it may cause the Commission to ensure that its products do not address the sensitive issue and, as a result, the Commission may start to seek the lowest common denominator.

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