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DIVISIVE *JUS COGENS* RELOADED: SOME REMARKS ON THE PEREMPTORY CHARACTER OF SELF-DETERMINATION UNDER THE ICJ ADVISORY OPINION OF 19 JULY 2024

Abstract: *The article focusses on a specific aspect of the International Court of Justice's (ICJ) 2024 Advisory Opinion on the legal consequences arising from the policies and practices of Israel in the Occupied Palestinian Territory, namely the statement that the right to self-determination constitutes a peremptory norm of international law. The article submits that the finding of the ICJ can be at variance with the basic criteria set forth by the International Law Commission in the 2022 Conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens). In particular, limiting the peremptory effect of self-determination to cases of foreign occupation that lead to annexation risks undermining the unitary, universal character of peremptory rules. Overall, the case confirms the divisive potential of the concept of jus cogens in the international legal community.*

Keywords: peremptory rules, International Court of Justice, self-determination, codification of international law

INTRODUCTION

One can comfortably say that, more than 50 years after its formulation in Articles 53 and 64 of the Vienna Convention on the Law of Treaties (VCLT), the notion of *jus cogens* has made its way in the international legal order. As a matter of fact, the concept is increasingly quoted and its legal implications widely recognised in an impressive number of judicial decisions, at both the international and domestic levels.[1]

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[1] On international case law, *see e.g.* ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and admissibility, 3 February 2006, ICJ Rep 2006, p. 32, para. 64; ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, ICJ Rep 2012, p. 457, para. 99. On case law at the domestic level, *see* Tribunale di

At the same time, the concept has become smart money at the United Nations, particularly in the context of the codification works of the UN International Law Commission (ILC) and of the General Assembly (GA) Sixth (legal) Committee.[2] Nonetheless, it is not unusual to find in the current legal literature statements to the effect that the concept of *jus cogens* "continues to be controversial to this day".[3] In this vein, the divisive potential of the notion in international law is still under scrutiny.[4] A short paragraph of the Advisory Opinion rendered by the International Court of Justice (ICJ or the Court) on 19 July 2024, "Legal consequences arising from the policies and practices of Israel in the Occupied Palestinian Territory",[5] which affirms the peremptory character of the right to self-determination, also suggests that the very basic issue of the material scope of *jus cogens* is far from settled. The purpose of this short paper is to consider why it is so. To this end, a preliminary overview of the theoretical background underlying the identification of peremptory rules and the status of self-determination is provided (Section 1). Then, the treatment of the issue of self-determination in the 2024 Advisory Opinion and in the previous case law of the Court is considered (Section 2). Finally, some remarks on the implications of the peremptory character of self-determination as presented in the 2024 Advisory Opinion are put forward (Section 3).

Trapani, *Vos Thalassa*, sentenza 3 giugno 2019 (in Italian), available at: https://www.questionegiustizia.it/data/doc/2613/sentenza-vos-thalassa-gip-trapani-3-giugno-2019.pdf (accessed 30 June 2025), which stands out as one of the few instances of judicial application of Art. 53 VCLT.

[2] *Cf. Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *Report of the International Law Commission on the Work of its Fifty-third Session (23 April–1 June and 2 July–10 August 2001)*, Yearbook of the International Law Commission 2001, vol. 2, part 2, arts. 40–41, pp. 112–116; UNGA, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission*, 13 April 2006, A/CN.4/L.682; GAOR, *Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens)*, *Report of the International Law Commission, Seventy-third Session (18 April–3 June and 4 July–6 August 2022)*, Supplement No. 10 (A/77/10), p. 11 ff.

[3] *See* W. Czapliński, *Is There a Space for* Jus Cogens *in Present International Law? Remarks in the Context of a Ban on the Use of Force*, 11(2) Polish Review of International and European Law 149 (2022). A classic confutation of the notion of peremptory norms is in G. Schwarzenberger, *International Jus Cogens?*, 43(4) Texas Law Review 455 (1965); more recently, *see also* M. Glennon, *De l'absurdité du droit impératif (jus cogens)*, 110(3) Revue Générale de Droit International Public 529 (2006).

[4] *See* M. Arcari, B. Bonafé, *Divisive Jus Cogens*, in: K. Kowalik-Bańczyk, K. Wierczyńska, A. Jakubowski (eds.), *Euphony, Harmony and Dissonance in the International Legal Order*, ILS PAS, Warszawa: 2024, p. 43. For a comprehensive assessment of the legal literature on the topic, *see generally* R. Kolb, *Peremptory International Law – Jus Cogens: A General Inventory*, Hart Publishing, Oxford–Portland: 2015, pp. 15–29 and 30–44.

[5] ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, 19 July 2024, ICJ Rep 2024.

1. THEORETICAL BACKGROUND: THE IDENTIFICATION OF PEREMPTORY NORMS AND THE STATUS OF SELF-DETERMINATION IN THE ILC DRAFT CONCLUSIONS ON *JUS COGENS*

The most recent stocktaking on *jus cogens* was provided by the ILC with the adoption on second reading, in 2022, of a set of "Draft Conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)" (Conclusions).[6] The ILC Conclusions are basically conceived to serve as methodological tool, namely to provide guidance to those who may be called upon to determine the existence of peremptory norms of general international law and their legal consequences. As stated in the relevant ILC commentary, the Conclusions "are concerned primarily with the method of establishing whether a norm of general international law has the added quality of having a peremptory character" and "are thus not concerned with the determination of the content of peremptory norms themselves."[7] This methodological purpose explains why the Conclusions are framed as guidelines, intended to describe the basic function and nature of *jus cogens* and to provide relevant criteria for identifying when a norm has peremptory character. For example, Conclusion 2 describes the nature of peremptory norms by stating that they "reflect and protect fundamental values of the international community. They are universally applicable and are hierarchically superior to other rules of international law."[8] Conclusion 4 sets forth the criteria for the identification of a peremptory norm, and states that it must be established that "(a) it is a norm of general international law" and "(b) it is accepted and recognized by the international community of States as 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."[9] Conclusion 6 further elaborates on the requirement of "acceptance and recognition", by pointing out that when referred to peremptory norms, this criterion "is distinct from acceptance and recognition as a norm of general international law." This means that in order to conclude that a certain rule is endowed with *jus cogens* character, "there must be evidence that such a norm is accepted and recognized by the international community of States as a whole as

[6] For the text of the draft Conclusions and the commentaries thereto, *see* GAOR, *Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens), Report of the International Law Commission, Seventy-third Session (18 April–3 June and 4 July–6 August 2022)*, Supplement No. 10 (A/77/10), pp. 11–89.

[7] *Ibidem*, p. 17, para. 4, Conclusion 1 ("Scope").

[8] *Ibidem*, p. 18, Conclusion 2 ("Nature of peremptory norms of general international law (*jus cogens*)").

[9] *Ibidem*, p. 29, Conclusion 4 ("Criteria for the identification of a peremptory norm of general international law (*jus cogens*)").

a norm from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character."[10] Very importantly, Conclusion 7 clarifies the meaning of the expression "international community of States as a whole", by explaining that "acceptance and recognition by a very large and representative 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."[11] The other Conclusions deal with the legal consequences of peremptory norms. Some of these draw from and elaborate on the rules embodied in Arts. 53 and 64 of the VCLT, by providing for the invalidity or termination of treaties conflicting with peremptory rules of international law.[12] Other conclusions deal with international responsibility arising from the breach of peremptory norms, by establishing the obligation for all states to not recognise as lawful the situation created by the breach and to not render aid or assistance in the maintenance of such situation.[13]

The consistency of the methodological approach adopted by the ILC appears to be called into question by Conclusion 23, which tentatively addresses the substantive content of *jus cogens*. The annex to Conclusion 23 provides a "Non-exhaustive list" of eight norms asserted to possess peremptory status, ranging from "(a) the prohibition of aggression" to "(h) the right of self-determination."[14] In the commentary on Conclusion 23, the ILC insists on the point that the identification of specific norms having a peremptory status would fall beyond the scope of the Conclusions, and underscores that the purpose of the non-exhaustive list is merely "to illustrate, by reference to previous work of the Commission, the types of norms that have routinely been identified as having peremptory character, without itself, at this time, making an assessment of those norms." Rather paradoxically, the ILC emphasised that, in drafting this non-exhaustive list, "it did not apply the methodology it set forth in the Conclusions for identifying peremptory norms."[15]

The ILC decided to maintain the non-exhaustive list notwithstanding the criticisms expressed by many states in their comments to the first reading of the Conclusions, and their suggestion to drop the list. According to these states, the

[10] *Ibidem*, p. 36, respectively paras 1 and 2 of Conclusion 6 ("Acceptance and Recognition").

[11] *Ibidem*, p. 37, para. 2 of Conclusion 7 ("International community of States as a whole").

[12] *Ibidem*, p. 48, Conclusion 10 ("Treaties conflicting with a peremptory norm of general international law (*jus cogens*)").

[13] *Ibidem*, p. 70, Conclusion 19 ("Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)").

[14] *Ibidem*, pp. 85 and 89, Conclusion 23 ("Non exhaustive list") and Annex. Other listed examples of *jus cogens* norms include "(b) the prohibition of genocide; (c) the prohibition of crimes against humanity; (d) the basic rules of international humanitarian law; (e) the prohibition of racial discrimination and apartheid; (f) the prohibition of slavery; (g) the prohibition of torture".

[15] *Ibidem*, p. 85, paras. 1–3 of the commentary to Conclusion 23.

non-exhaustive list is of dubious utility,[16] "rather simplistic, [...] unclear and undefined",[17] with "no added value",[18] "unconvincing and contradictory",[19] as well as "inconsistent with the recognized standard for determining the existence of a *jus cogens* norm".[20] It is worth adding that some states also expressed doubts as to the very content of the non-exhaustive list. Israel and the United States, for example, specifically contested the peremptory character of the right to self-determination.[21]

With this background in mind, we can now consider the contribution to the issue offered by the ICJ's 2024 Advisory Opinion.

2. SELF-DETERMINATION IN THE ICJ CASE LAW AND ITS SIGNIFICANCE IN THE 2024 ADVISORY OPINION

In its Advisory Opinion of 19 July 2024, the Court held that Israel's continued presence in the Occupied Palestinian Territory (OPT) is unlawful.[22] The Court came to this conclusion on the grounds that the legal status of Israel's occupation of the OPT entails a series of policies and practices which violate different international rules, among which the prohibition of the use of force[23] and the principle of self-determination of peoples are paramount.[24] Especially the latter principle was expressly mentioned in the GA request for the Advisory Opinion, which asked the Court to determine the legal consequences arising "from the ongoing violation by Israel of the right of the Palestinian people to self-determination."[25] It is to be noted that the Court had already considered the issue, while in a more limited context, in its 2004 Opinion, "Legal consequences of the construction of a wall in the Occupied

[16] See UNGA, *Peremptory Norms of General International Law (jus cogens): Comments and Observations Received from Governments*, 9 March 2022, A/CN.4/748, p. 99 (the comment of Australia).

[17] *Ibidem*, p. 101 (the comment by the Czech Republic).

[18] *Ibidem*, p. 106 (the comment by the Netherlands).

[19] *Ibidem* (the comment by the Russian Federation).

[20] *Ibidem*, p. 113 (the comment by the United States).

[21] *Ibidem*, p. 104 (Israel) and p. 113 (United States).

[22] *See* ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, ICJ Rep 2024, para. 285(3).This conclusion was reached by eleven votes to four (Vice-President Sebutinde, Judges Tomka, Abraham and Aurescu).

[23] The impact of the prohibition on the use of force in the context of the Advisory Opinion is not considered herein; on this issue, *see* M. Arcari, *Un'occupazione, un'annessione, una norma imperativa. Note sul parere della Corte internazionale di giustizia del 19 luglio 2024*, 18(3) Diritti Umani e Diritto Internazionale 633 (2024), pp. 636–641.

[24] *See* ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, ICJ Rep 2024, especially paras 174–179, concerning the prohibition of the acquisition of territory by force, and paras 230–243, concerning the question of self-determination.

[25] *See* UNGA resolution of 30 December 2022, *Israeli practices and settlement activities affecting the rights of the Palestinian people and other Arabs of the occupied territories*, Doc. A/RES/77/247, para. 18(a).

Palestinian Territory", in which it found that it constituted a breach of the right of the Palestinian people to self-determination.[26] Thus, the conclusion reached in the most recent ruling is not surprising, as long as the Court maintains that the prolonged nature of Israel's unlawful policies and practices amounts to an aggravation of the aforementioned violation. The main novelty of the 2024 Advisory Opinion is then to be found in a short sentence contained in its paragraph 233, which will presumably acquire the status of a precedent in the ICJ's case law. In that paragraph "[t]he Court considers that, *in cases of foreign occupation such as the present case*, the right to self-determination constitutes a peremptory norm of international law."[27]

The statement is of utmost significance, especially if compared to the Court's previous case law on the subject, where the ICJ recognised the fundamental character of self-determination by qualifying it as "one of the essential principles of international law"[28] and underscoring that the "respect for the right to self-determination is an obligation *erga omnes*."[29] At the same time, however, in its previous case law, the Court had refrained from explicitly affirming the peremptory character of self-determination. The reasons for the Court's recent leap forward are not elaborated in the context of the 2024 Advisory Opinion, and are only addressed in some of the Judges' individual opinions or declarations attached thereto.[30]

One could be tempted to suggest that paragraph 233 intends to finalise the process of consolidating the peremptory character of the right to self-determination, which was in some respect prompted and anticipated by the ILC through its inclusion of self-determination in the non-exhaustive list of peremptory norms annexed to the 2022 Conclusions. This point is made by Judge Tladi, who at the very outset of his fairly elaborated Declaration laments the Court's "historical reluctance" to pronounce itself clearly on the peremptory status of norms.[31] In order to overcome the ambivalence of the Court on the question, Judge Tladi endeavours to wipe

[26] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep 2004, p. 184, para. 122: "That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right."

[27] *See* ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, para. 233 (emphasis added).

[28] ICJ, *East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, ICJ Rep 1995, p. 102, para. 29.

[29] ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, ICJ Rep 2019, p. 139, para. 180; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep 2004, p. 199, para. 155.

[30] *See* Declaration of Judge Xue, paras 2–5, available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-06-en.pdf; Separate Opinion of Judge Gómez Robledo, paras 18–28, available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-12-encs.pdf; Declaration of Judge Tladi, paras 14–35, available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-14-en.pdf (all accessed 30 June 2025).

[31] *See* Declaration of Judge Tladi, *supra* note 30, para. 16.

out uncertainties over the peremptory status of self-determination. To this end, he specifically refers to the fact that it has been supported by "a very large majority of States" participating in the *Chagos* and current proceedings; that "not a single State" opposed the peremptoriness of self-determination in 2001 during the final elaboration of the ILC Articles on State Responsibility; and that in 2022, out of a total of 86 states commenting on the ILC Draft Conclusions on *jus cogens*, only five – namely Israel, the United States, Estonia, the United Kingdom and Morocco – questioned the peremptory status of self-determination.[32] The conclusion on the issue is that "the recent objections from only five States, [sic] cannot have the effect of casting doubt on what has, for a long time, been seen as an eminently uncontroversial proposition."[33]

This reasoning is purportedly intended to situate the question "in the context of the criteria for the identification of peremptory norms" as set forth in the ILC 2022 Conclusions.[34] In this perspective, ILC Conclusion 7 is likely to assume a critical impact, insofar as it maintains that for a norm to have a peremptory character the acceptance and recognition of the totality of states are not required, but it needs the support of a "very large" and "representative" majority.[35] According to the ILC commentary,

> [d]etermining whether there was a very large majority of States accepting and recognizing the peremptory status of a norm was not, however, a mechanical exercise in which the number of States is to be counted. Rather than a purely quantitative assessment in which a majority was determined, the assessment had to be *qualitative*. [...] The idea that what is required is a qualitative assessment is also captured by the word "representative" to qualify "majority of States". The acceptance and recognition by the international community of States as a whole requires that the acceptance and recognition be across regions, legal systems and cultures.[36]

Admitting that this yardstick is retained, the data provided by Judge Tladi concerning the rejection "by only five States" of the peremptoriness of self-determination may perhaps meet the *quantitative* requirement of acceptance and recognition by a very large majority of states. However, if one considers who the five recalcitrant States are, reservations can be made about whether the *qualitative* requirement of

[32] *Ibidem*, para. 25.

[33] *Ibidem*, para. 26.

[34] *Ibidem*, para. 24.

[35] *See* GAOR, *Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens), Report of the International Law Commission, Seventy-third Session (18 April–3 June and 4 July–6 August 2022)*, Supplement No. 10 (A/77/10), para. 2 of Conclusion 7 ("International community of States as a whole").

[36] *See ibidem*, p. 40, paras 7–8 of the ILC commentary to Conclusion 7 (emphasis added).

acceptance and recognition by a representative majority of states is fully respected in the case at hand. In other words, the fact that the above-mentioned objections are coming from an important sector of the international community, together with the circumstance that several states involved in the ICJ proceedings have supported a very flexible view of the right to self-determination (see *infra*), might cast doubt on the conclusion that the requirements laid down by the ILC for establishing the peremptory nature of a norm are fully met.

Given such difficulties, it could be hard to read in paragraph 233 of the 2024 Advisory Opinion a general and definitive restatement of the peremptory character of self-determination in all cases. This does not exclude, however, that the *obiter dictum* under review would respond to a more limited purpose. It can be suggested that the Court wished to reply to a peculiar argument raised in the context of the advisory proceedings. Some states had claimed that the right to self-determination of the Palestinian people would have had in the specific circumstances of the case a "relative" character: that is to say, such a right would have had to be counterbalanced with Israel's security needs and, in any event, it had to be implemented in the context of a process of negotiation between the parties involved.[37] It is at this stage that the role of the main legal instruments produced in the context of that negotiation, namely the so-called Oslo Agreements concluded between Israel and the Palestinian side between 1993 and 1995, came to the forefront.[38] These instruments were mentioned in part IV of the 2024 Advisory Opinion, dealing with applicable law; the final paragraph of that section concluded with the statement "the Court will take the Oslo Accords into account as appropriate."[39] In the subsequent parts

[37] *Cf.* ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Request for an Advisory Opinion). Memorial of Fiji*, Written statement of Fiji, 25 July 2023, p. 8, ICJ Rep 2023, available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20230725-wri-37-00-en.pdf: "Self-determination is a relative right, [sic] that must be respected with other rights, including the rights of the Jewish people to self-determination and to security. This is why a solution to the conflict must be found through a political process." For similar remarks, *see also* ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Written Statement of the United States of America, 25 July 2023, p. 4, paras 1.6 ff., ICJ Rep 2023, available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20230725-wri-20-00-en.pdf; ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Written Statement of the United Kingdom of Great Britain and Northern Ireland, 20 July 2023, p. 2, para. 4 and p. 34, paras 69 ff., ICJ Rep 2023, available at: https://www.icj-cij.org/sites/default/files/case-related/186/186-20230725-wri-15-00-en.pdf (all accessed 30 June 2025).

[38] The text of the so-called Oslo Accords is reproduced in UNSC, *Letter dated 8 April 1993 from the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council*, 11 October 1993, S/25560 and UNGA, *Letter dated 27 December 1995 from the Permanent Representatives of the Russian Federation and the United States of America to the United Nations addressed to the Secretary-General*, 5 May 1997, A/51/357.

[39] *See* ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, para. 102.

of the Advisory Opinion, the Oslo Accords are cited to emphasize that "Israel may not rely on the Oslo Accords to exercise its jurisdiction in the Occupied Palestinian Territory in a manner that is at variance with its obligations under the law of occupation",[40] and again to conclude that "these Accords do not permit Israel to annex parts of the Occupied Palestinian Territory in order to meet its security needs. Nor do they authorize Israel to maintain a permanent presence in the Occupied Palestinian Territory for such security needs."[41]

Although they are not explicitly mentioned, it can be assumed that the Court had the Oslo Accords in mind in the paragraph where it elaborated on the impact that violating the Palestinian people's right to self-determination had on the legality of the Israeli presence in the OPT. Noting that "occupation cannot be used in such a way as to leave indefinitely the occupied population in a state of suspension and uncertainty", the Court considered "that the existence of the Palestinian people's right to self-determination cannot be subject to conditions on the part of the occupying power, in view of its character as an inalienable right."[42]

It is difficult not to link this *inalienable* character of the right to self-determination to the previous assertion regarding its *peremptory* nature. Hence, one wonders what effects the combination of the two statements may have on the Oslo Accords. It can comfortably be excluded that the Court intended to hold that the Oslo Accords were contrary to the right to self-determination of Palestinian people and to draw the extreme consequence under Art. 53 VCLT, namely, the invalidity of the Accords.[43] A more plausible explanation would be to assume that the Court was instead inclined to make a moderate call to the need to interpret and apply the Oslo Accords in a manner consistent with the peremptory character to be reserved for the right to self-determination in the specific situation of the OPT. Noteworthily, such a conclusion would also be most in keeping with Conclusion 20 of the ILC draft on *jus cogens*, according to which "[w]here it appears that there may be a conflict between a peremptory norm of general international law (jus cogens) and another rule of international law, the latter has, as far as possible, to be interpreted and applied so as to be consistent with the former."[44]

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[40] *Ibidem*, para. 140.

[41] *Ibidem*, para. 263.

[42] *Ibidem*, para. 257.

[43] *See* GAOR, *Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens), Report of the International Law Commission, Seventy-third Session (18 April–3 June and 4 July–6 August 2022)*, Supplement No. 10 (A/77/10), p. 48, Conclusion 10 ("Treaties conflicting with a peremptory norm of general international law (*jus cogens*)").

[44] *See ibidem*, p. 79, Conclusion 20 ("Interpretation and application consistent with peremptory norms of general international law (*jus cogens*)"). Such a reading of the Court reasoning is upheld in the Declaration of Judge Tladi, *supra* note 30, para. 35.

3. PEREMPTORY NORMS "À LA CARTE"?

Finally, the statement contained in paragraph 233 of the 2024 Advisory Opinion may be interpreted to mean that, in an extreme case of prolonged foreign occupation, self-determination indicates a goal (i.e. the establishment of an independent state), the realisation of which cannot be delayed, hindered or made subject to conditions. This relevance of the ICJ's ruling has been endorsed by GA Resolution ES-10/24 of 18 September 2024, devoted to the follow-up of the 2024 Advisory Opinion. In its preamble the resolution unequivocally states that "[t]he Palestinian people is entitled to self-determination in accordance with the Charter of the United Nations, a right that constitutes a peremptory norm of international law in such a situation of foreign occupation, and that Israel, as the occupying Power, has the obligation not to impede the Palestinian people from exercising its right to self-determination, including its right to an independent and sovereign state, over the entirety of the Occupied Palestinian Territory".[45]

On the other hand, it is also true that, precisely because in paragraph 233 of the 2024 Advisory Opinion the peremptory effect is circumscribed to the very specific situation of foreign occupation leading to annexation, the *obiter dictum* of the Court runs the risk of envisaging a right to self-determination "à la carte". In other words, one may wonder whether, after the statement made in paragraph 233 of the 2024 Advisory Opinion, there is room for identifying a variable degree of peremptoriness for the right to self-determination.

One may note that, after all, such an outcome will not be so far from the one envisaged by the ILC itself with regard to the prohibition of the use of force. In fact, according to the non-exhaustive list annexed to the ILC Conclusions, only the "prohibition of aggression" is indicated as a candidate norm to be endowed with peremptory character.[46] This seems to suggest that less extreme forms of the use of force, not amounting to an act of aggression, would not fall under the purview of a *jus cogens* prohibition.[47] It can be added that, in the comments to the draft Conclusions, one of the very few states favourable to retaining the non-exhaustive

[45] *See* UNGA resolution of 18 September 2024, *Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, Doc. A/RES/ES-10/24 the seventh paragraph of the preamble, letter (f).

[46] *See* GAOR, *Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens)*, *Report of the International Law Commission, Seventy-third Session (18 April–3 June and 4 July–6 August 2022)*, Supplement No. 10 (A/77/10), pp. 85 and 89, Conclusion 23 ("Non exhaustive list") and Annex.

[47] For an overview of the scholarship's debate on this issue, *see* A. de Hoogh, *Jus Cogens and the Use of Armed Force*, in: M. Weller (ed.), *The Oxford Handbook on the Use of Force in International Law*, Oxford University Press, Oxford: 2015, pp. 1161–1186.

list has underscored that the ILC's choice would unduly restrict the scope of the *jus cogens* norm prohibiting the use of force.[48]

A likely effect could be replicated for self-determination if one follows the perspective presented in paragraph 233 of the 2024 Advisory Opinion. Take for example the case of a people subject to a local government practicing a policy of systematic racial discrimination or apartheid, i.e. one not "representing the whole people belonging to the territory without distinction as to race, creed or colour".[49] If one follows the terms of the GA Declaration of Principles on Friendly Relations, in such a situation the right to self-determination would be deemed to apply. At the same time, under the proviso of paragraph 233 of the 2024 Advisory Opinion, insofar as the relevant context is not identifiable with an extreme case of foreign occupation leading to annexation, the right to self-determination would not be considered peremptory. Would it then follow that the exercise of the right to self-determination of the people unduly discriminated against and oppressed can be legitimately delayed or subject to conditions? Or – in a different vein – that the secondary consequences typically connected to the breach of *jus cogens* rules (i.e. the obligation of all states to not recognise as legal the situation created by the racist government and to not render aid and assistance in maintaining that situation)[50] would not apply? A shortcut for avoiding such a paradoxical outcome is provided in the Declaration of Judge Tladi, who suggested that the narrow reading delivered in paragraph 233 was without prejudice to the peremptory status of other elements of the right to self-determination that may become relevant in situations other than the one at stake in the 2024 Advisory Opinion.[51] It is clear that, in terms of legal certainty, to make the scope of a *jus cogens* rule dependent on the circumstances of each individual case would be a rather unpredictable solution.[52] To say the least, this would

[48] *See* UNGA, *Peremptory Norms of General International Law (jus cogens): Comments and Observations Received from Governments*, 9 March 2022, A/CN.4/748, p. 100, the comment of Austria.

[49] *See* UNGA resolution of 24 October 1970, *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, A/RES/2625(XXV), Annex.

[50] *See* Art. 41 of the ILC Articles on State Responsibility, as well as Conclusion 19 of the ILC Conclusions on *jus cogens*, *supra* note 13.

[51] *Cf.* Declaration of Judge Tladi, *supra* note 30, para. 14: "This qualifier 'in cases of foreign occupation such as the present case' is rather unclear, but I understand it to mean that the element of the right of self-determination impeded by the ongoing foreign occupation by Israel, is assuredly a peremptory norm of international law. This statement would be without prejudice to the peremptory status of other elements of the right of self-determination (which were not at issue in the present case). In the same way, stating that the (narrower) prohibition of aggression is a peremptory norm does not necessarily mean that the broader prohibition on the use of force is itself not peremptory."

[52] *Cf.* the Declaration of Judge Xue, *supra* note 30, para. 5: "I am of the opinion that the peremptory character of the right of self-determination of the Palestinian people rests on [a] solid basis of international law, rather than the special circumstances of Israel's occupation."

be at variance with the qualities of universality and hierarchical superiority that the ILC itself has indicated among the basic characteristics of peremptory norms.[53]

CONCLUDING REMARKS

In a recent essay published in the *liber amicorum* for Professor Władysław Czapliński, my co-author and I proposed a tentative investigation into the divisive potential of *jus cogens* in international law. Following the analysis, we argued that the notion of *jus cogens* is currently largely accepted by states and international law scholars of different traditions, and concluded that "the notion of *jus cogens* is today much less divisive that in the past."[54] Admittedly, that research was mainly focussed on certain "structural" characteristics of *jus cogens* and deliberately omitted the question of identifying the material content of peremptory rules. The review carried out in the current paper suggests that not only may the conceptualisation of *jus cogens* prove controversial, but the issue of establishing its material scope is also far from settled. In particular, the interpretation of paragraph 233 of the ICJ's Advisory Opinion of 19 July 2024, which affirms the peremptory character of self-determination while at the same time suggesting a narrow reading of its scope, seems destined to bolster the old debates about the divisive scope of *jus cogens* within the international legal community.

[53] *Cf.* GAOR, *Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens)*, *Report of the International Law Commission, Seventy-third Session (18 April–3 June and 4 July–6 August 2022)*, Supplement No. 10 (A/77/10), Conclusion 2.

[54] *See* Arcari, Bonafé, *supra* note 4, p. 54.