Revitalizing the International Law Discourse on the Prohibition of Maritime Piracy: Voices from International Law Commission's Work on Peremptory Norms of General International Law (*Jus Cogens*)

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The International Law Commission (ILC) is tasked with the codification and progressive development of international law. Recently, the ILC submitted to the United Nations General Assembly (UNGA) in its 73rd session 'Draft Conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)'. The report holds significance as the concept of the *jus cogens* has been shrouded in mystery since its inception in the Vienna Convention on the Law of Treaties (VCLT) in 1969. The Draft Conclusion 23 (non-exhaustive list) identifies eight norms (annex) fulfilling the requirement of *jus cogens*. The ILC clearly states that "…the inclusion of the list in the annex in no way precludes the existence of other norms that may have a peremptory character or the emergence of other norms in the future having that character."[1] Thus leaving space for the inclusion of fresh norms through subsequent studies. Nonetheless, the ILC provided the techniques to identify peremptory norms under Draft Conclusions 4 to 9. Through this article, the author argues that the prohibition of piracy has matured into a *jus cogens* norm. This is done by applying the techniques formulated by the ILC in its recent report. Although there are several writings on the prohibition of piracy as customary international law, it has received scant attention in the context of the *jus cogens*, and the author intends to fill this lacuna. This study assumes relevance as States increasingly adopt domestic legislation to combat piracy.

KEY WORDS
~Peremptory Norms,
~International Law Commission,
~Piracy,
~Vienna Convention on the Law of Treaties,
~United Nations General Assembly,
~Customary International Law.

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1 United Nations International Law Commission, Draft Conclusions. Identification and legal consequences of peremptory norms of general international law (jus cogens), 2022. Available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf, p.85, accessed on: 21 October 2022.

1. INTRODUCTION

Unlike municipal law, international law lacks proper sovereignty (Dawda, 2016; Heller, 2019). It functions through the interaction of States, international organisations and non-state actors (Kahraman, 2020; Klabbers, 2015). As Mohammed Bedjaoui, a distinguished scholar and former Judge of the International Court of Justice (ICJ), puts it, 'international law is more a law of coordination between individuals than a law of subordination as seen in municipal law (Bedjaoui, 1991)'. Some of the features that make international law distinct from municipal laws are a) the absence of a centralised and official law-maker, in a sense the law-maker and the subject are similar, b) law-making devoid of a hierarchical relationship to each other, c) absence of secondary rules, i.e., rules of change and adjudication or recognition which is the foundation of any autonomous legal system (La Torre, 2007). In the context of legal hierarchies, there can be several means by which hierarchy is interpreted; it could be in terms of source, norms or regimes. Although international law lacks a formal hierarchy, the hierarchy of norms appears to surface in the context of *jus cogens* (Besson, 2010). *Jus cogens,* which translates to 'compelling law', is the term given to norms of general international law that are superior in hierarchy from which no derogation is permitted under any circumstances (Wallace, 1992; Hossain, 2005). The norm of *jus cogens* binds subjects who have not agreed to them, even if they have made reservations. As posited by Mark W Janis, *jus cogens* is fundamental to public order and has the potency to invalidate contrary rules (Janis, 1998).

The concept of *jus cogens* emerged post World War II to infuse moral and ethical content in international law.[2] It further got an endorsement from the natural law proponents, who felt uncomfortable with the blanked sovereign authority vested with the States. Subsequently, it was codified in the Vienna Convention on the Law of Treaties, 1969 as:

'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and 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 (Vienna Convention on the Law of Treaties, 1969).'

Although consensus was reached in the codification of *jus cogens*, opaqueness existed in terms of methodology in the identification of peremptory norms (*jus cogens*) and the subsequent practices in the ICJ. The ILC needs to provide more clarity on its content and scope. The ILC's contribution stems from its recent study on Peremptory norms of general international law (*jus cogens*). The ILC has, in this recent work, identified a non-exhaustive list of eight norms as *jus cogens* and acknowledged the fact that 'the list is non-exhaustive not only in the sense that it does not purport to cover all peremptory norms of general international law (*jus cogens*) that may exist or that may emerge in the future, but also the sense that it does not reflect all the norms that have been referred to in some way by the Commission as having a peremptory character,'[3] thereby not ruling out the probability of emergence of fresh norms.[4]

The author has split this article into three sections. The first section provides a brief background on the work of the ILC on Peremptory norms of general international law (*jus cogens*), the second portion lays down the methodology adopted by the ILC in the identification of *jus cogens* norms, and in the third section, it is

2 See, Verdross, A. 1966. Jus Dispositivum and Jus Cogens in International Law, American Journal of International Law. Cambridge University Press, 60(1), pp.55-63. Available at: 10.2307/2196718.
3 United Nations, Treaty Series: Vienna Convention on the Law of Treaties (1969), 1155 pp. 331, Available at: https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf, accessed on: 26 October 2022.
4 Some of these norms identified by the ILC include- sovereign equality of States and prohibition of massive pollution of the atmosphere or of the seas.

argued that the crime of piracy has attained the status of peremptory norms (*jus cogens*) according to criteria developed by the ILC.

2. INTERNATIONAL LAW COMMISSION: THROUGH THE YEARS

International law lacks a specific lawmaking institution, and the ILC intends to fill this vacuum (Ramcharan, 1977; Chen, 2021). Its mandate of codification and progressive development of international law flows from the 1947 United Nations General Assembly (UNGA) resolution (Franck, 2017) pursuant to Art. 13(1)(a) of the UN Charter, which reads as:

'The General Assembly shall initiate studies and make recommendations for the purpose of promoting international cooperation in the political field and encouraging the progressive development of international law and its codification (Charter of the United Nations and Statute of International Court of Justice, 1945).'

The ILC's codification work encompasses the creation of laws from the existing State practice, doctrines and principles. In limited cases, it drafts legal rules in the field of international law which are yet to be regulated and lack sufficient state practice (progressive development) (Alexander, 2021). The initial period of ILC's work mostly focused on the traditional topics that had extensive state practice like VCLT, State succession, State responsibility etc., however with the emergence of special regimes in international law, the ILC has looked into novel topics like crimes against humanity, protection of nationals abroad.[5] The Drafts are prepared by the ILC through the special rapporteur on the specific topics. The special rapporteur works in tandem with the States and takes into consideration the majority's observations (Azaria, 2020), as succinctly put by Yejoon Rim, 'when the draft is considered in the Sixth Committee, States might regard such non-binding forms attractive because they provide more flexibility in implementation' (Rim, 2020). Once the ILC prepares the draft, the UNGA conveys a conference of plenipotentiaries to conclude a convention. As rightly articulated by Pavel Struma, 'once the commission submits the final product to the UNGA, it is no longer the master of the product as it passes on to the hands of the States (Šturma, 2019).' The ILC working mechanism, including the recent shift from traditional to specialised fields, is also reflected in its recent work on *jus cogens*.

2.1. Background on ILC's Work on Peremptory Norms of General International Law (*jus cogens*)

As the topic of *jus cogens* was brought before the ILC, the special rapporteur emphasised the unique characteristic of *jus cogens*, a stark departure from the horizontal system of international law (Tladi, 2019).[6] Also, the special rapporteur was skeptical as to whether the topic would be taken forward by the ILC and planned to pen a book on the topic.[7] Notwithstanding the commission taking up the topic, the rapporteur was apprehensive that the States through the ILC, would dilute the topic. The initial resistance from the States (mostly European) resulted from the lack of State practice.[8] The first report, according to the special rapporteur, was a 'soft landing', as it detailed the history and State practice, the sole opposition (draft conclusion) was on *jus cogens* being regarded as a superior norm, universally accepted and protected the fundamental value of the

5 International Law Commission, Available at: https://legal.un.org/ilc/, accessed on: 27 October 2022.
6 Tladi, D., 2019. Codification, Progressive Development, New Law, Doctrine, and the Work of the International Law Commission on Peremptory Norms of General International Law (Jus Cogens): Personal Reflections of the Special Rapporteur 13 (2019) FIU Law Review, 13(6). Available at: https://dx.doi.org/10.25148/lawrev.13.6.13
7 Ibid 1142.
8 Ibid 1141.

international community this particular draft conclusion was vehemently opposed even by the members of the commission like Wood, Murphy, Nolte, Forteau, Gervogian and Huang.[9]

The ILC subsequently adopted the provision following the reconstitution of the commission in the year 2017.[10] The second report focused on the peremptoriness criteria and generated little controversy. The third report on the effect of *jus cogens* centred on its interaction with treaties, customary international law, unilateral declarations and decisions of international organisations.[11] The fourth report provided a non-exhaustive list of *jus cogens* norms, the list proposed by the ILC was premised on the existing state practice and its previous reports on other topics.[12] The final report laid down the views of the State and the observations of the special rapporteur on the same (Vöhringer, 2021). It could be argued that the ILC could have enhanced the list, however as the ILC puts it, 'an attempt to draw up a list would require delving into the substance of several topics (Tladi, 2019).' Although the ILC could have done more in terms of clarifying the normative content of *jus cogens*, its work was instrumental in injecting fresh perspectives on the topic, with regard to aspects that are uncodified (phrases) in VCLT like, a) hierarchical superior, b) fundamental values, c) universal applicability etc. In short, the special rapporteur attempted to balance the interests of the States without diluting the significance of the norm. Subsequently, the UNGA took note of the ILC to include the topic in the program of work and came up with draft conclusions on the identification and legal consequences of peremptory norms of general international law (*jus cogens*), together with commentaries.

3. METHODOLOGY IN IDENTIFICATION OF *JUS COGENS*: ILCS STANDPOINT

The ILC adopted, in its 73rd session in 2022, the Draft Conclusion on identification and legal consequences of peremptory norms of general international law (*jus cogens*).[13] As the draft indicates, it was confined to identification and legal consequences in accordance with the accepted methodology of the ILC. The draft assumes significance because to identify whether a norm of international law is a peremptory norm requires the application of the criteria developed in its draft conclusions. As a general rule, the ILC associated *jus cogens* to reflect the fundamental value of the international community and universally binding on all States, but this is an additional criterion in addition to criteria identified in part II of the draft, the relation between values and *jus cogens* was picked by the ILC through the decision of various judicial bodies and scholarly opinions.[14] In essence, the fundamental value and universal character of the norm offer the context in the assessment of evidence for the identification of peremptory norms of general international law.[15]

Part II of the ILC draft provides two criteria for the identification of *jus cogens*, i.e., a) 'norm of general international law and b) norm accepted and recognized by international community of States as a whole from which no derogation is permitted, which can only be modified by a subsequent norm of general international law of the same character'.[16] Both the requirements are to be read cumulatively and are necessary for establishing a peremptory norm. Further, the means (bases) to identify a norm of general international law is through the sources of international law, i.e., customary international law, treaties and general principles of law.

9 United Nations International Law Commission, Tladi and Dire David, First Report on jus cogens, ILC Report A/71/10, 9, 97–138, 2016.
10 United Nations International Law Commission, Tladi and Dire David, Second Report on jus cogens, ILC Report A_CN-4_706-EN, 2017.
11 Ibid; United Nations International Law Commission, Tladi and Dire David, Third Report on jus cogens, ILC Report A_CN-4_714-EN, 2018.
12 United Nations International Law Commission, Tladi and Dire David, Fourth Report on jus cogens, ILC Report A_CN.4_727-EN, 2019.
13 United Nations International Law Commission, Note 1.
14 Ibid 2.
15 Ibid 3.
16 Ibid 2.

As the ICJ opined in the *North Sea Continental Shelf*, 'norms of general international law must have equal force for all members of the international community'.[17] The practice of customary international law as a manifestation of general international law is reflected according to the ILC from State practice. This is further reflected in the jurisprudence of the Court, for instance, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, the Court recognised the prohibition of torture as "part of customary international law" that "has become a peremptory norm (*jus cogens*)".[18] In terms of the treaties reflecting a peremptory norm, the classic example is the prohibition on the use of force under the Charter of the United Nations (D'Alessandra, 2017). The other basis for the recognition of peremptory norms is acceptance and recognition, and this is an additional requirement above a norm possessing the character of general international law, i.e., whether a norm is accepted by the international community of states as a whole. This is a prerequisite for a norm to be elevated to the status of a peremptory norm.

Acceptance and recognition are required to be substantiated by sufficient evidence. Further, one of the additions of the ILC on the requirement of acceptance and recognition is that it is sufficient to have a substantial majority rather than the practice of all States. Moreover, the practice of States is the sole determining factor, while the practice of the other actors can provide the context and hence contribute to the assessment of acceptance and recognition of international community of States.[19] Also, any material capable of representing the views of the States would be relevant in the context of proving acceptance and recognition. As the ILC puts it, 'The phrase "and other conduct of State" is intended to be a "catch-all" phrase that caters for the possibility of other materials that, although not reflected in the list, reveal the positions of States'.[20] In addition to the State practice, according to the ILC, there are other subsidiary means to establish peremptory norms, i.e., decisions of the courts and tribunals, specifically the ICJ, and the teaching of highly qualified publicists.[21] For instance, the ICTY, in *Prosecutor v. Anto Furundzija*, asserted the peremptory norm nature of the prohibition of Torture, in doing so, the Court referred to the decisions of the European Court of Human Rights (ECtHR) among others.[22]

Hence, it could be inferred that the existence of a peremptory norm requires – a) The norm should be a norm of general international law (generally accepted by the international community) from which there shall not be any derogation, except when there is a subsequent norm of general international law, the basis for the norm of general international law is proven through customary international law, treaties and general principles of law, b) acceptance and recognition by the international community of States as a whole. A wide range of materials can be relied upon to prove States' acceptance and recognition of a specific norm in question, including the subsidiary means.

Despite the ILC travelling an extra mile beyond the confines of the VCLT, this was not done aggressively but conservatively in line with the ILC mandate of codification of international law. However, the ILC work provides the guide and methodology, as Laurin Cerha argues, '…it is questionable whether the design of some paragraphs did not come at the expense of too much clarity and coherence as well as leaving too much open terrain for contradicting argumentation (Cerha, 2022)'.[23] The ILC contributed a more precise systemisation of

17 North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, 3, 38–39, para. 63, Available at: https://www.icj-cij.org/en/case/52.
18 United Nations International Law Commission, Note 1, 33.
19 United Nations International Law Commission, Note 1, 40.
20 Ibid 41.
21 Ibid 43.
22 United Nations International Criminal Tribunal, Furundzija Case: The Judgement of the Trial Court, Anto Furundzija found guilty on both charges and sentenced to 10 years in prison. JL/PIU/372-E, 1998. Available at: https://www.icty.org/en/press/furundzija-case-judgement-trial-chamber-anto-furundzija-found-guilty-both-charges-and, accessed on: 29 October 2022.
23 Cerha, L. 2022. Peremptory norms of general international law (jus cogens) - An analysis of the practical merits of the International Law Commission's Draft Conclusions regarding the identification of peremptory norms of general international law. Available at: https://www.postgraduatecenter.at/fileadmin/user_upload/pgc/1_Weiterbildungsprogramme/International_Legal_Studies/Downloads/Student_Papers/Sem_Law_of_the_ILC_Research_Paper_Jus_Cogens_Laurin_Cerha_30_1_2022.pdf, accessed on: 25 October 2022.

the rules supported by State practice and rules.[24] This is also reflected in the words of the special rapporteur, Dire Tladi as, 'though certainly not earth-shattering, also clarify important aspects of the methodology to be applied when identifying peremptory norms, while leaving room for development where the practice is lacking (Tladi, 2020)'. Although the ILC work provided a systematised process of identification of peremptory norms, the States expressed interesting views on the draft for Australia, Germany and Belgium; Draft Conclusion 5 (2) suggested the manner in which treaties may be the basis for the formation of *jus cogens* needs clarification as treaties only bind the parties.[25] This was supplemented by a number of other States, like the Czech Republic, which considers that there is scant practice in support of general principles of law as a basis for peremptory norms of general international law.[26] Also, it favoured a higher threshold in terms of acceptance and recognition, i.e., 'international community of states as a whole'.[27]

Conversely, Cyprus favoured 'acceptance and recognition by the international community of States as a whole, namely a very large majority of States but not of all States.'[28] Third-world countries like El Salvador favoured the addition of treaties and general principles of law as the basis of the peremptory norm. It was also contended that the statements made in regional organisations be included in the list.[29]

4. PROHIBITION OF PIRACY UNDER INTERNATIONAL LAW

Approximately 80 per cent of the world trade happens by sea, representing approximately 93000 merchant vessels and 1.25 million seafarers (Kalogerakos, 2017).30 Maritime piracy is a pressing global issue (Haywood, 2012), and in recent times it has reemerged (Bowden, 2010). The cost of piracy is strongly felt, especially in the regions of the Straits of Malacca, the Gulf of Guinea, and Nigeria, in terms of ransom, insurance, naval forces, prosecutions, regional trade and foreign revenue (Tseng, P., Her, Z., and Pilcher, N., 2015).31 Most pirates intend to steal cash and cargo for resale and hold the master and crew as hostages for ransom (George, 2021). Throughout history, piracy has been shaped by the region's social, economic and cultural environment (Kraska, 2011).

One of the primary reasons for the rise in piracy, especially in the region of Somalia, is the lack of effective government; as Prof. James Kraska points out, 'the long-term solution is the establishment of law and order situation on the ground until then the concrete political and diplomatic commitment is the way forward' (Kraska, 2008). Some ways to tackle the menace of piracy are by building regional collaboration, major naval superpowers could build maritime security capacity, enabling the regions infiltrated with pirates to effectively implement the United Nations Security Council (UNSC) resolutions.

A regional framework focusing on a collaborative partnership to effectively implement maritime security would help. The Regional Agreement on Combating Piracy and Armed Robbery (ReCAAP) came into existence

24 Ibid.
25 Peremptory norms of general international law (jus cogens): Comments and observations received from Governments, Seventy-third session Geneva, 2022. Available at: https://legal.un.org/ilc/guide/1_14.shtml, accessed on: 1 November 2022.
26 Ibid.
27 Comments and observations of the Australian Government, International Law Commission draft conclusions on peremptory norms of general international law. Available at: https://legal.un.org/ilc/sessions/73/pdfs/english/jc_australia.pdf, accessed on: 28 October 2022.
28 Written comments by the Republic of Cyprus on the International Law Commission's draft conclusions on peremptory norms of general international law (jus cogens). Available at: https://legal.un.org/ilc/sessions/73/pdfs/english/jc_cyprus.pdf, accessed on 1 November 2022.
29 Permanent Mission of El Salvador to the United Nations, Report of the Republic of El Salvador, Draft conclusions on peremptory norms of general international law (jus cogens). Available at: https://legal.un.org/ilc/sessions/73/pdfs/english/jc_elsalvador.pdf, accessed on: 1 November 2022.
30 United Nations Conference on Trade and Development, Review of Maritime Transport: Navigating Story Waters. 2022. Available at: https://unctad.org/topic/transport-and-trade-logistics/review-of-maritime-transport, accessed on: 1 November 2022.
31 United Nations Office on Drugs and Crime, Pirates of the Gulf Guinea: A Cost Analysis for the Coastal States. 2021. Available at: https://www.unodc.org/unodc/en/frontpage/2021/December/unodc-and-partners-launch-the-report--pirates-of-the-gulf-guinea_-a-cost-analysis-for-coastal-states.html, accessed on: 2 November 2022.

precisely with this objective (Kyaw Hla, 2016).[32] The members of the ReCAAP work in tandem with international organisations to suppress piracy by information sharing and building capacity (Ho, 2009). The results of introducing the regional framework are profound, as piracy cases have slowly started to plummet (Amri, 2013). Seeking to follow in their footsteps, the International Maritime Organisation (IMO) sponsored a meeting in Tanzania and Djibouti to assist the States in the region of Horn of Africa in addressing the problem of maritime piracy (Khanna, 2019). Further, piracy is also a major concern for the ASEAN states; three major forums under ASEAN attempt to address piracy, i.e., ASEAN Maritime Forum (AMF), ASEAN Regional Forum Inter-Sessional Meeting (ARF-ISM) on Maritime Security, and Maritime Security Expert Working Group (MSEWG).[33]

Legally, the UNSC has affirmed the significance of the United Nations Convention on the Law of the Seas (UNCLOS) in curbing the activities of pirates, armed robbery and other activities in the ocean.[34] From Art. 100 to 107, the UNCLOS attempts to proscribe the conduct of piracy; UNCLOS defines piracy as an 'illegal act on the high seas or in any other place outside the jurisdiction of any State' and also obliges 'all States to cooperate to the fullest possible extent in the repression of piracy'.[35] Further, under UNCLOS, there are four elements to piracy: a) violence, detention or deprivation, b) Involving two ships, c) committed on high seas, and d) the vessel conducting piracy should be a private vessel.[36]

Anything falling beyond the definitional scope of piracy is categorised as 'armed robbery', i.e., acts committed in the territorial seas, where the littoral States could exercise sovereignty and sovereign rights (Petrig, 2011). Warships, Government Ships and Aircrafts are excluded from the purview of UNCLOS. As S. Kaye puts it, 'Warships, government ships and government aircrafts are treated the same as private ships if it commits acts mentioned in article 101 as a result of mutiny and taken control of the ship or aircraft (Stuart, 2011).' In addition to UNCLOS, the SUA Convention is trigged to combat piracy; the convention came into force after the infamous *Achille Lauro* incident (Honniball, 2015), wherein Art. 101 of UNCLOS was unsuccessfully invoked because of the 'private end requirement' for proving piracy. As Ahmad Amri succinctly puts it, 'the SUA Convention filled the gap in UNCLOS that limits illegal acts of piracy which require the two ships involvement as well as it should occur on high seas or other areas beyond the national jurisdiction (Amri, 2014).' Further, the SUA Convention provides the additional mechanism for extradition and punishing the offender; Art. 10 (1) provides for extraditing or prosecuting the offenders for committing one or more crimes listed in Art. 3 of the Convention.[37]

It can be observed that, despite regional efforts, international legal frameworks including a slew of UNCLOS provisions aimed at combating piracy, the result is underwhelming. The UNCLOS provides a narrow definition of piracy, and the SUA Convention and its protocol aimed to fill this void suffers from a lack of approval from States like Indonesia and Malaysia.[38] The regional framework seems to be a mere rhetoric platform; hence, a comprehensive technical means is required to combat piracy (Barrios, 2005). There are scholarly contributions in the above-mentioned aspects; the author would take forward the discourse by arguing that the prohibition of the crime of piracy is a *jus cogens* norm through the ILC's methodology.

4.1. Prohibition of Piracy as *Jus Cogens* norm

[32] About ReCAAP Information Sharing Centre. Available at: https://www.recaap.org/about_ReCAAP-ISC, accessed on: 3 November 2022.
[33] Amr, A., 2016. Available at: https://ro.uow.edu.au/cgi/viewcontent.cgi?article=5890&context=theses, pp.94, accessed on: 3 November 2022.
[34] United Nations Convention of the Law of the Sea, adopted on 10 December 1982, entered into force on 16 November 1994, Available at: https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280043ad5, accessed on: 4 November 2022.
[35] Ibid.
[36] United Nations Oceans and Law of the Sea, Legal Framework for the Repression of Piracy Under UNCLOS, 2010, Available at: https://www.un.org/depts/los/piracy/piracy_legal_framework.htm, accessed on: 5 November 2022.
37 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, https://treaties.un.org/doc/db/terrorism/conv8-english.pdf, accessed on: 6 November 2022.
38 Ibid.

The ILC provided a host of criteria for a norm to be elevated to *jus cogens*. It is argued that the prohibition of piracy fulfils these requirements.

4.1.1. Fundamental Value of International Community

There is an apparent gap between rhetoric and reality regarding the crime of piracy (Smith, 2013). The gap is courtesy of the political nature of international law. However, the purpose of this piece is to strengthen this rhetoric; the political aspect falls out of the reach and scope of this paper. The prohibition of piracy reflects the fundamental value of the international community. The negative impact of piracy is felt by the international community as a whole (Dutton, 2010). Apart from the preventive measures taken to combat piracy, naval operations are also carried out. Efforts to combat piracy are witnessed in the context of the Somalian pirates through the UNSC resolutions; for instance, the UNSC Resolution 1816 authorises States to enter the Somalian waters and to use force. The UNSC, although not representing the collective will of the States, plays a major role in the maintenance of international peace and security. Therefore, as rightly put by Lawrence Azubuike, 'where a State has demonstrably failed, the international community, through the United Nations Security Council, should be bold to declare it as such with the result that the normal attributes of a State may temporarily be denied (Azubuike, 2009).' Alongside the measures adopted by the UNSC, the UNGA can play an active role in peacebuilding tasks in vulnerable areas. The UNGA has further highlighted the importance of international and regional cooperation in tackling maritime piracy and also stressed the importance of information sharing. The UNGA Resolution 63/111 opines, '[r]ecognizes the crucial role of international cooperation at the global, regional, subregional and bilateral levels in combating, in accordance with international law, threats to maritime security, including piracy, armed robbery at sea…' (Gottlieb, 2014). The International Maritime Organisation (IMO), responsible for regulating fishing and a specialised agency of the UN, circulated the anti-piracy guidelines to both the government and industry in the 1990s and, beginning in early 2001, adopted the code of practice in investigating piracy, which culminated in the creation of CGPCS (Danielle, 2013).

The efforts of the international community to stem the acts of piracy were also evident in the Gulf of Guinea, where States were committed to tackling piracy in the region through regional measures, measures such as joint patrolling, use of satellite technologies in tracking the consignment of stolen oil and petroleum products, the collective measures resulted in the significant drop in the incidents of piracy, in the region of Gulf Guinea, just three ships were attached compared to 26 in 2019 (AFP, 2023). As Judge Tullio Treves argues, 'Pirates seemed to have ceased to be a general menace to the international community justifying the traditional qualification of *hostis humani generis* (Treves, 2009)'. Apart from the collective measure, the international community's proactiveness in prosecuting pirates is reflected by the fact that the crime is regarded as a 'universal crime (Anyanova, 2022),' i.e., courts of every State can exercise jurisdiction. In *United States v. Brig Malek Adhel*,[39] the U.S Court regarded piracy as an enemy of mankind over which States can effectively exercise jurisdiction.[40] Further, the UNCLOS, to which 160 States are signatories, defines and outlaws' piracy alongside the SUA Convention. Some scholars have also argued for the codification of piracy under the International Criminal Court (ICC); accordingly, the addition of piracy under the ICC could end impunity for perpetrators of serious crimes (O'Brien, 2014). Prohibition of piracy concerns the interest of UNSC, UNGA, States and IMO, thus unequivocally reflecting the international community's interest.

4.1.2. Prohibition of Piracy as Norm of General International Law

39 U.S. Supreme Court. Judgement of the Court, 43 U.S. 2 How. 210 210 (1844).
40 Ibid.

Norms of general international have an equal force on all members of international law, and[41] these norms are identified through the sources of international law (Statute of the International Court of Justice), i.e., customary international law, treaties and general principles of law. Customary international law reflects State practice and opinio juris, it is argued that the prohibition of piracy, in essence, is a customary international law thus reflecting a norm of general international law. As Murphy puts it, 'one of the ways to think about *jus* cogens is customary international law plus (Murphy, 2006).' Also, as opined by Professor Orakhelashvili, 'many norms of *jus cogens* fail to satisfy the requirement of State practice requirement of custom-generation process' (Orakhelashvili, 2009). Despite this, because of the campaigns by powerful States, they have accepted the prohibition of piracy as a *jus cogens* norm (Mulligan, 2017).

The definition of piracy under UNCLOS merely codifies pre-existing customary international law (Gardner, 2012). The U.S recognises several provisions under UNCLOS as a codification of customary international law; the executive has repeatedly asserted that Article 101 codifies piracy *jus gentium*, although the U.S has not codified UNCLOS, it has repeatedly augmented its customary rule status.[42] In the case of *United States v Ali*,[43] it was held that anyone who aids, abets and facilitates is a pirate himself under customary international law. In *Sosa v. Alvarez-Machain* (2004), Breyer J argued that there is an international consensus for condemning crimes of Torture, Genocide and Piracy.[44] Furthermore, Judge Moore in The 'Lotus' (*France v Turkey)* case states: 'Though statutes may provide for its [piracy] punishment, it is an offence against the law of nations; and as the scene of the pirate's operations is the high seas, which it is not the right or the duty of any nation to police, he is denied the protection of the flag he may carry, and is treated as an outlaw, as the enemy of mankind— Hostis humani generis —whom any nation may in the interest of all capture and punish (Kulyk, 2016).' The codification of the crime of piracy began in the early 20th century with the Council of League of Nations preparing a list of topics deemed desirable for codification, including piracy. However, it was dropped because piracy was no longer considered a pressing issue for the international community. However, the Harvard Research Group in the 1930s drafted the 'Harvard Draft', the draft's provisions, as opined by Markiyan Z. Kulyk, were based on comprehensive research on national legislation and customary international law.[45] The 'Harvard Draft' is pivotal as the ILC borrowed significantly during the preparatory stages as to the basis of the piracy 'Articles', which later became the Convention on the High Seas 1958.[46]

Under international law, piracy is the first crime recognised by international law (Dinstein, 2012). As Guilfoyle states, 'through customary or conventional rule, have given comprehensive permission in advance to foreign States' assertion of law enforcement jurisdiction over their vessels, resulting in the absence of any flag State immunity from boarding'; he offers this as an alternative reasoning for States exercising universal jurisdiction.[47] It is contended that the prohibition of piracy is a norm of general international law; this is identified through the sources of international law. Undeniably, the prohibition of piracy reflects customary international law. In terms of treaties, the UNCLOS is ratified by 168 State parties; although the United States is not party to UNCLOS, it acknowledged its customary nature (Burgess, 2006). As it is understood, pirates are treated as

41 North Sea Continental Shelf Cases (Federal Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) Judgement of 20 February 1969, p.39 Available at: https://www.icj-cij.org/sites/default/files/case-related/52/052-19690220-JUD-01-00-EN.pdf, accessed on: 4 December 2022.
42 U.S. has already committed to UNCLOS framework in Arctic by signing 2008 Illulissat Declaration but will remain outside of conversation until party to UNCLOS. Available at: https://www.unclosdebate.org/evidence/14/us-has-already-committed-unclos-framework-arctic-signing-2008-illulissat-declaration, accessed on: 5 December 2022.
43 US Supreme Court, Judgement of the Court, Case 405 U.S. App. D.C. 279, 718 F.3d 929.
44 US Supreme Court, Judgement of the Court, Case No. 12-976, Available at: https://www.ohchr.org/sites/default/files/Documents/Issues/SRTorture/AmicusVancevRumsfeld.pdf, accessed on: 28 December 2022.
45 Ibid.
46 Ibid.
47 Geneva Academy of International Humanitarian, Law and Human Rights, Counterpiracy under International Law, 2012, Available at: https://geneva-academy.ch/research/our-clusters/digitalization-and-new-technologies/detail/18-counterpiracy-under-international-law, accessed on: 29 November 2022.

enemies of mankind and subject to universal jurisdiction of any State. International law provides the tool to prosecute the pirates, but States still have to rely on their internal law to determine the punishment (Treves, 2009). The U.S and the United Kingdom have transferred the captured pirates in the Gulf of Aden to Kenya for trial. According to Taylor G. Stout, States view piracy as a breach of *jus cogens* (Stout, 2011). Therefore, it is evident that the prohibition of piracy is customary international law, and the UNCLOS legitimises the prohibition coupled with a host of UNSC resolutions. Also, the UNGA, comprising all the members of the UN through Resolution 64/71, opines, 'States to take appropriate steps under their national law to facilitate the apprehension and prosecution of those who are alleged to have committed acts of piracy.' Since establishing the UNGA, over eighteen thousand resolutions have passed condemning piracy (Mesquita, 2023). Moreover, the prohibition of piracy is reflected in terms of acceptance and recognition of States; the element of acceptance and recognition has to be objectively proven through evidence. Additionally, the practice has to flow from the States, as highlighted in the case of *Prosecutor v. Katanga; the* ICC believed that the peremptory norm of general international law (*jus cogens*) requires recognition by States.[48]

Domestic legislation can be considered as evidence of acceptance and recognition. Moreover, domestic legislation is critical in effectively prosecuting piracy (Gardner, 2012). The precise manner of implementation is set out in the IMO Assembly resolutions, both substantive and procedural, i.e., criminalisation of piracy, exercising jurisdiction over acts of piracy, detention and arrest, international cooperation and trial.[49] In order to promote effective implementation, the UN-DOALOS, together with IMO and UNODC, has been compiling national legislation on piracy. It is clear from the UN-DOALOS that 34 States have passed specific national legislation to curb piracy.[50] Apart from State practice, other actors can determine the context and contribute to the assessment of acceptance and recognition of the international community of States as a whole. In this regard, the practice of international organisation can play a significant role, as the ILC Draft Conclusions 9 on peremptory norm of general international law articulates, 'form of evidence include…resolutions adopted by an international organisation or at an intergovernmental conference; and other conduct of States'[51] In the case of *Questions Relating to the Obligation to Prosecute or Extradite*, the ICJ relied on a diverse range of material to prove the *jus cogens* nature of prohibition of Torture.[52]

International organisations have passed a plethora of resolutions condemning piracy. Since 2008, there have been eighteen UNSC Resolutions, and Resolution 1851 specifically invited all States to conclude agreements with countries willing to take the custody of pirates.[53] In 2021, the UNSC unanimously adopted Resolution 2608, renewing authorising naval forces fighting piracy off the coast of Somalia (ISS Africa, 2023). The latest UNSC Resolution 2634 (2022) emphasised the criminalisation of piracy by strengthening the domestic framework and international cooperation at the regional and sub-regional level, urging the international community's support to develop and implement a harmonised framework to prevent and repress piracy.[54] The UNGA Resolution also reflects international communities efforts to curb piracy; resolution 63/111, titled 'Oceans and the law of the sea', categorically highlights the critical role of international cooperation in combatting in

48 International Criminal Court, Judgement of the Court, Case No. ICC-01/04-01/07-34-05-tENg para. 30. Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF, accessed on: 2 December 2022.
49 Maritime Security and Piracy, Available at: https://www.imo.org/en/ourwork/security/pages/maritimesecurity.aspx, accessed on: 30 November 2022.
50 Maritime Space: Maritime Zones and Maritime Delimitation. Available at: https://www.un.org/depts/los/LEGISLATIONANDTREATIES/piracylegislation.htm, accessed on: 30 November 2022).
51 United Nations International Law Commission, Draft Conclusions on Identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries, 2022, pp.43. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_14_2022.pdf, accessed on: 20 December 2022.
52 Questions Relating To The Obligation To Prosecute Or Extradite (Belgium v. Senegal). Available at: https://www.icj-cij.org/public/files/case-related/144/144-20120720-JUD-01-00-EN.pdf, accessed on: 21 December 2022.
53 United Nations Security Council, Resolution 1851 (2008) adopted on 16 December 2008. Available at: https://home.treasury.gov/system/files/126/1851.pdf, accessed on: 15 December 2022.
54 United Nations Security Council, Resolution 2634, 2022. https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D274E9C8CD3CF6E4FF96FF9%7D/S_RES_2634.pdf, accessed on: 7 January 2023.

accordance with international law piracy at sea through mechanisms like sharing of information, capacity building and enhancing national legislations (Tarassenko, 2013). In addition to the practice of international organisations, the subsidiary means for determining *jus cogens* flows from the ICJ, domestic court, tribunals, work of expert bodies (including ILC), and teachings of the most highly qualified publicists of the various nations. As highlighted previously in terms of judicial activism, some scholars have suggested the inclusion of piracy under the jurisdiction of the ICC; the reason for this suggestion is because of its customary international law nature and universal jurisdiction (Dutton, 2010), as observed in the case of *United States v Smith*, 'common law recognises piracy not just against its own municipal code but offence against the law of nations.'[55] Further, federal courts of the United States have referred to piracy as arising from *jus cogens*.[56] The ILC also articulates the *jus cogens* nature of piracy; this was particularly evident during the drafting of the VCLT; additionally, the courts in Kenya[57], Australia[58], Netherlands[59] and Seychelles[60] have acknowledged the *jus cogens* nature of the prohibition of piracy.

During the early 1960s, several members of the ILC pointed out that the emergence of rules of the peremptory norm is not a recent phenomenon, but it has a long-standing character. Some of these norms include, amongst others, the prohibition of piracy (Hossain, 2005). The ILC provided examples for the norms of *jus cogens*, including piracy, wherein every State is called upon to cooperate to suppress the crime. However, the ILC did not provide a list of such norms because- a) It could lead to misunderstanding regarding other cases not specifically mentioned in the article, b) Even if the ILC drew an exhaustive list of norms, it requires prolonged study, which fell outside the scope of the present articles.[61] Additionally, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) identifies prohibition of piracy as *jus cogens*, as the ILC puts it: '…a treaty contemplating or conniving at the commission of such acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate … treaties violating human rights, the equality of States or the principle of self-determination were mentioned as other possible examples'.[62]

Emphasis is also on the teaching of the highly qualified publicist as it is a subsidiary means for proving the peremptory character of norms of general international law.[63] One of the earliest attempts to lay down the list of peremptory norms was by Marjorie M. Whiteman, who highlighted around twenty norms having the *jus cogens* features, one of which was the prohibition of piracy; he went on to add that by 2000 AD, international law will make considerable progress in the direction of expanding *jus cogens* norms (Schwarzenberger, 1965). Tina Garmon argues, 'as a *jus cogens* crime, piracy is punishable by all nations, wherever the culprits may be found, without regard to where the offence occurred (Garmon, 2003).' Several scholars have asserted the *jus cogens* nature of the prohibition of piracy, thereby asserting its fundamental nature (Noyes, 1990). Karen Parker

55 United States Supreme Court, Judgement of the Court, Case: 18 U.S. (5 Wheat.) 153, 1820. Available at: https://supreme.justia.com/cases/federal/us/18/153/, accessed on: 21 January 2023.
56 United States Court of Appeal, Judgement of the Court, Case: 725 F.3d 940, 943, 2013. Available at: https://caselaw.findlaw.com/us-9th-circuit/1632126.html, accessed on: 20 December 2022; United States Supreme Court, Judgement of the Court, Case: 680 F.3d 446, 454, 2012. Available at https://supreme.justia.com/cases/federal/us/332/581/, accessed on: 24 December 2022.
57 Kenya High Court, Judgement of the Court, Case: CR 72/2011, 5-6, 2011. Available at: https://lawcanvas.in/doc/judgement/03200048399, accessed on: 17 December 2022.
58 Australia High Court, Judgement of the Court, Case: HCA 39, para. 111, 2010. Available at: https://www.hcourt.gov.au/assets/library/hcabulletin/HighCourtBulletin2021_June.docx, accessed on: 4 January 2022.
59 Rotterdam District Court, Judgement of the Court, Case: CR 10/600012-09, 2-3, 2010.
60 Seychelles Supreme Court, Judgement of the Court, Case: CR 51/2009, paras. 61, 71, 2010. Available at: https://seylii.org/sc/judgment/supreme-court/2010/81, accessed on: 28 November 2022.
61 United Nations International Law Commission, Draft Articles on the Law of Treaties with commentaries, 1966. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf, accessed on: 30 November 2022.
62 United Nations International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001. Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, accessed on: 15 January 2023.
63 United Nations International Law Commission, Draft Conclusions on Identification and legal consequences of peremptory norms of general international law 43, 2022. Available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf, accessed on: 17 January 2023.

argues that the oldest recognised *jus cogens* norm is the prohibition of piracy (Parker, 1989). Former Judge of ICJ Lachs posits that *jus cogens* evolved to address the special gravity of piracy and slavery.[64] Albeit the teachings of the most highly qualified publicists are a subsidiary means of ascertaining the context of a peremptory norm, there appears to be a wide consensus amongst the scholars on the *jus cogens* nature of the prohibition of piracy.

5. CONCLUSION

The ILC's work is extensively relied upon by the State, international organisations and Courts. The recent work of the ILC on *jus cogens* provides methodological inputs on the identification of *jus cogens*. Despite the ILC identifying eight norms in its draft conclusions, several other norms of international law would fit into the *jus cogens* narrative. However, very limited study has been done on these norms. This study highlighted how the prohibition of piracy falls under the bracket of *jus cogens*; this is further backed by State practice, decisions of the court, and resolutions of international organisations. The recent study of the ILC on *jus cogens* can pave the way for expanding the list of *jus cogen*s norms.

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64 United Nations, Report of the International Law Commission on the work of its Fifteenth Session (A/5509) 391, 399, 1968, https://legal.un.org/ilc/documentation/english/reports/a_cn4_163.pdf, accessed on: 19 January 2022.

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