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Change of Peremptory Norms of General International Law (*Jus Cogens*)

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1. Introduction

Thinking about the change of peremptory norms of general international law or *jus cogens* can prompt a certain uneasiness, which stems primarily from two statements that feature prominently in the *jus cogens* literature. While both are correct and meaningful, these two statements seem to be contradictory, if not paradoxical. On the one hand, scholars often assume that *jus cogens* is a class of norms characterized by a general ‘resistance to change’, ‘relative permanence’[1] or, by a particular stability and robustness. On the other hand, scholars also emphasize that peremptory norms, as the supposedly most important norms of international law, are based on the most uncertain or even

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[1] Hillgruber, ‘The Right of Third States to Take Countermeasures’, in C. Tomuschat and J.-M. Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (2005), 265, at 292; Linderfalk, ‘The Effect of *Jus Cogens* Norms’, 18 *European Journal of International Law* (2008) 853, at 868: ‘principle of relative permanence’; Payandeh, ‘Modification of Peremptory Norms of General International Law’, in D. Tladi (ed.), *Peremptory Norms of General International Law (Jus Cogens)* (2021), 92, at 127: ‘resilience to change’ as an ‘inherent characteristic of peremptory norms’.

'enigmatic' mechanism of norm change.[2] So the question is: How can *jus cogens* effectively resist change if the relevant rules of change are uncertain? – Or should it be the very uncertainty about how *jus cogens* can be changed that causes a hesitation to change it and thus provides for stability?

2. Relevance of the Question

This question is not at the centre of academic interest, and the International Law Commission's (ILC) Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of May 2022 do not address the modification of *jus cogens.*[3] Nevertheless, the question is of practical relevance. Some of the substantive (or primary) norms with *jus cogens* status are under pressure for change, not to mention exposed to 'norm erosion'. The annex to the ILC's Draft Conclusions provides for a non-exhaustive list of norms that the ILC has previously referred to as having that *jus cogens* status.[4]

This list includes the prohibition of torture, a norm that has been in danger of erosion in no small part because of actions by the United States. For example, so-called 'no-touch torture' was frequently employed during the 'War on Terror'.[5] The United States in particular has also engaged in a re-interpretation of the definition of torture. Attempts at this re-definition have aimed to raise the bar for what is considered torture, on the one hand,[6] and to add a 'specific intent' element, on the other,[7] which allows the United States to argue that torture to save human lives never constitutes torture in legal terms. A combination of amending the definition of torture and introducing a possible justification

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[2] I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed. 1984) 226: '[I]f […] the mystery of *jus cogens* remains a mystery, the process by which rules of *jus cogens* can be validly modified is even more enigmatic'; Paulus, '*Jus Cogens* in a Time of Hegemony and Fragmentation', 74 *Nordic Journal of International Law* (2005) 297, at 325; Kleinlein, 'Matters of Interpretation: How to Conceptualize and Evaluate Change of Norms and Values in the International Legal Order', in H. Krieger and A. Liese (eds), *Tracing Value Change in the International Legal Order* (2023), 64, at 72.

[3] International Law Commission, Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), with commentaries (2022), Official Records of the General Assembly, Seventy-third Session, Supplement No. 10, A/77/10, at 57 (draft conclusion 14, commentary, para. 7).

[4] International Law Commission, Peremptory norms of general international law (*jus cogens*), Texts of the draft conclusions and Annex adopted by the Drafting Committee on second reading, Identification and legal consequences of peremptory norms of general international law (*jus cogens*), 11 May 2022, A/CN.4/L.967, at 6 International Law Commission, *supra* note 3, at 85–89 (draft conclusion 23 and annex): prohibition of aggression, prohibition of genocide, prohibition of crimes against humanity, the basic rules of international humanitarian law, prohibition of racial discrimination and apartheid, prohibition of slavery, and prohibition of torture.

[5] Steiger, 'Ex Iniuria Ius Oritur? – Norm Change and Norm Erosion of the Prohibition of Torture', in H. Krieger and A. Liese (eds), *Tracing Value Change in the International Legal Order* (2023), 118, at 129.

[6] Dunne, ''The Rules of the Game are Changing': Fundamental Human Rights in Crisis After 9/11', 44 *International Politics* (2007) 269, at 276–282; see also Birdsall, 'But we don't call it 'torture'! Norm contestation during the US 'War on Terror'', 53 *International Politics* (2016) 176, at 181.

[7] Bybee, 'Memorandum for Alberto R. Gonzales Counsel to the President', in K. J. Greenberg and J. L. Dratel (eds), *The Torture Papers* (2005), 172, at 174.

for acts of cruel, inhuman or degrading treatment has also been undertaken by other states, inter alia by the United Kingdom and Israel.[8]

The ILC's non-exhaustive list also includes the prohibition of aggression. The point here is not to suggest that the prohibition of aggression is under normative pressure. However, there is a considerable scholarly debate – and debate amongst the members of the ILC – as to whether only the prohibition of aggression or the prohibition of the use of force as such is of a peremptory character. A vast majority of authors generally regard the prohibition of the use of force as such to be peremptory, while others advance the position that only the prohibition of aggression constitutes *jus cogens*.[9] If we subscribe to the view that the prohibition of the use of force as such is peremptory, which is indeed more plausible, we are faced with a second example of a peremptory norm that is under pressure to change, or more precisely, to be restricted. We have already seen notable efforts to limit the scope of the prohibition of force by extending the scope of self-defence to acts against non-state actors, by introducing humanitarian intervention as an additional exception, or by invoking the legality of forcible countermeasures in response to the use of weapons of mass destruction.[10]

3. Evolutive Nature and Relative Stability of Jus Cogens

A. Stability and Modes of Change

Indeed, peremptory norms are not immutable.[11] The evolutive nature of *jus cogens* is recognized in the Vienna Convention on the Law of Treaties (VCLT),[12] expressly stated by the ILC already in its work on the law of treaties and unanimously accepted, even though some doctrinal controversy regarding its source persists.[13] Article 53, Sentence 2 VCLT foresees the possibility of a modification of *jus cogens*. It reads:

> 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

[8] Liese, 'Exceptional Necessity: How Liberal Democracies Contest the Prohibition of Torture and Ill-Treatment when Countering Terrorism', 5 *Journal of International Law and International Relations* (2009) 17, at 27–32.
[9] Payandeh, *supra* note 1, at 109–110, with references; for the view that the entire UN Charter regime prohibiting the threat or use of force is peremptory, see, e.g., Corten and Koutroulis, 'The *Jus Cogens* Status of the Prohibition of the Use of Force', in D. Tladi (ed.), *Peremptory Norms of General International Law (Jus Cogens)* (2021), 629.
[10] Aust and Payandeh, 'Praxis und Protest im Völkerrecht', 73 *Juristenzeitung* (2018) 633.
[11] See, e.g. Kolb, *Peremptory International Law – Jus cogens* (2015), at 100.
[12] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.
[13] Lagerwall, 'Article 64 Convention of 1969', in O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties* (2011), 1455; on the modest role of *jus cogens* and the fragility of the core values underlying it, see also de Wet, 'Entrenching International Values Through Positive Law: The (Limited) Effect of Peremptory Norms', in H. Krieger and A. Liese (eds), Tracing Value Change in the International Legal Order (2023), 85.

from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Moreover, Article 64 VCLT on the consequences of the emergence of a new peremptory norm is also based on the idea that *jus cogens* is not immutable.

While *jus cogens* is thus in principle not immune to change, the claim that it is resistant to change or relatively permanent is also built on Article 53, Sentence 2 VCLT, according to which peremptory norms 'can be modified only by a subsequent norm of general international law having the same character'.

This special characteristic of *jus cogens*, however, provides the basis for resistance only towards certain modes of change, and not all possible modes. Norms of international law can be subject to both formal and informal norm changes. 'Formal' norm change is a matter of the doctrine of sources. In the doctrine of sources, change has its place in international treaty law (Article 38(1)*(a)* of the Statute of the International Court of Justice (ICJ Statute)[14] and the VCLT) and customary international law (Article 38(1)*(b)* ICJ Statute).[15] 'Informal' norm change happens through the shifting meaning of norm texts and is a matter of interpretation.[16] Article 53, Sentence 2 VCLT on the non-derogability of *jus cogens* has no direct implications for informal norm change by interpretation and does not make *jus cogens* immune to interpretive change. This is obviously relevant for *jus cogens* contained in a general multilateral treaty, but customary international law is also subject to interpretation.[17]

Accordingly, the claim that *jus cogens* is resistant to change, as far as it builds on Article 53, Sentence 2 VCLT and the special requirements for modification, only refers to a particular mode of change, namely formal modification.

B. Resistance to Formal Norm Change

The formal process of subsequent emergence of *jus cogens* and, accordingly, also the evolution or change of existing peremptory norms is a two-level process,[18] at least in theory. According to the wording of the Vienna Convention, a peremptory norm must first become general international law,

[14] Statute of the International Court of Justice, 26 June 1945, 15 UNCIO 355.
[15] Kleinlein, *supra* note 2, at 69–73.
[16] Kleinlein, *supra* note 2, at 73–81.
[17] Chasapis Tassinis, 'Customary International Law: Interpretation from Beginning to End', 31 *European Journal of International Law* (2020) 235; P. Merkouris, J. Kammerhofer and N. Arajärvi (eds), *The Theory, Practice, and Interpretation of Customary International Law* (2022); for a discussion, see Johnston, 'The Nature of Customary International Law and the Question of Change', 13 *ESIL Reflection* (2024, forthcoming).
[18] Kleinlein, '*Jus Cogens* as the 'Highest Law'? Peremptory Norms and Legal Hierarchies', 46 *Netherlands Yearbook of International Law* (2015) 173, at 195–196.

i.e., customary international law (as the most common basis for peremptory norms of general international law), a treaty provision, or a general principle of law pursuant to Article 38(1) ICJ Statute.[19] This is a matter of the doctrine of sources. In a second step, it can be elevated to *jus cogens* by the international community. Accordingly, a change of a peremptory norm brought about by the emergence of 'a subsequent norm […] having the same character'[20] presupposes a new rule or 'primary norm' of general international law plus an *opinio juris cogentis*,[21] which is necessary for establishing the special character of peremptory norms with all the consequences or 'secondary rules' attached to them in the law of treaties and beyond.[22]

In theory, the primary norm first comes into existence as an 'ordinary' norm of general international law. Up to this point, no qualified procedure applies. Viewed in isolation, this first step in the evolution of *jus cogens* through emerging subsequent *jus cogens,* is difficult because the emerging primary norm would have to develop in contradiction to existing *jus cogens*, which has derogatory power.

The ILC in its work on the law of treaties assumed that a change of *jus cogens* would most probably be effected through a general multilateral treaty.[23] And here the blurring of the distinction between the substantive norm and its peremptory status begins. If a large majority of states become parties to a treaty that provides law in conflict with previously existing rules of customary or conventional law even where these rules were of *jus cogens* character, then it must be assumed that the will of the states was to modify the old legal regime. Therefore, it has been argued in the literature that the stipulation of Article 53 VCLT that a norm of *jus cogens* must be modified only by another norm of the same character is 'a quite strict requirement, totally unrealistic and incompatible with the traditional and still valid patterns of the law-making process in the international order.'[24]

Modification of *jus cogens* can also occur as a result of subsequent custom. Indeed, the ILC now holds that modification of *jus cogens* is most likely to occur through the subsequent acceptance and recognition of an existing rule of customary international law as *jus cogens* or the emergence of a new rule of customary international law so accepted and recognized.[25] According to the ILC, there must

[19] International Law Commission, *supra* note 3, at 30 (draft conclusion 5).
[20] Article 53, Sentence 2 VCLT.
[21] Article 53, Sentence 2 VCLT: 'accepted and recognized by the international community of States as a whole as a norm'.
[22] Czapliński, '*Jus Cogens* and the Law of Treaties', in C. Tomuschat and J.-M. Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (2005), 83; Kleinlein, *supra* note 18, at 195, with further references.
[23] International Law Commission, Draft Articles on the Law of Treaties with commentaries, YbILC, 1966-II, at 248.
[24] C. L. Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (1976) 91.
[25] International Law Commission, *supra* note 3, at 57 (draft conclusion 14, commentary, para. 6).

be indeed, at the point of the emergence of a peremptory norm, a practice accepted as law *(opinio juris)* and which the international community of states as a whole 'at the same time' accepts and recognizes as having peremptory character.[26] This process, in which a new practice possibly sows the seeds of a new peremptory norm that replaces the old one, is accompanied by a great deal of legal uncertainty. Given the high evidentiary burden,[27] some scholars even consider modification through custom 'hardly conceivable'.[28]

Regarding resistance to change through subsequent customary international law, however, it is doubtful to what extent the special status of *jus cogens* norms requires a higher threshold of state participation for the attainment of this rank and thus for the emergence of a subsequent peremptory norm as opposed to the creation and modification of 'ordinary' international rules.[29] Statements at the Vienna Conference highlight that acceptance by a very large majority of states would suffice to establish the peremptory character of a norm.[30] The wording of Article 53 VCLT and the understanding of state parties at the time reflects an unstable compromise found during the Cold War. Therefore, some uncertainty persists with regard to the emergence and change of *jus cogens* in times of a changing geopolitical situation. Indeed, the supposedly most important norms are based on the most uncertain mechanism of norm change.[31] The recent work of the ILC could not provide clarification in this respect. In its draft conclusion 7, paragraph 2 on *jus cogens*, the ILC now states:

> 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.[32]

According to the ILC's commentary, determining whether there was a very large majority of states accepting and recognizing the peremptory status of a norm was not a 'mechanical exercise in which the number of States is to be counted'. The acceptance and recognition by the international community

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[26] *Ibid.*, at 57–58 (draft conclusion 14, commentary, para. 7).
[27] Kolb, *supra* note 11, 102, with further references.
[28] A. Orakhelashvili, *Peremptory Norms in International Law* (2006), at 130; T. Ruys, *'Armed Attack' and Article 51 of the UN Charter*: *Evolutions in Customary Law and Practice* (2010), at 28.
[29] Paulus, *supra* note 2, at 302–303.
[30] Iraqi Chairman of the Drafting Committee Yasseen, United Nations Conference on the Law of Treaties, First Session, 26 March–24 May 1968, Official Records, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, A/CONF.39/11, at 472, para. 12; United Nations Conference on the Law of Treaties, Second session, 9 April–22 May 1969, Official Records, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, A/CONF.39/11/Add.1, at 102, para. 22: 'absence of dissent by any important element of the international community'; see Gaja, 'The Protection of General Interests in the International Community', 364 *Recueil des Cours* (2012) 9, at 56–57.
[31] Paulus, *supra* note 2, at 325.
[32] International Law Commission, *supra* note 3, at 37.

of states as a whole requires that 'the acceptance and recognition be across regions, legal systems and cultures'.[33]

In its work on the identification of customary international law, the ILC had concluded that 'practice [as a constituent element of customary international law] must be general, meaning that it must be sufficiently widespread and representative, as well as consistent'.[34] According to the ILC, it is clear that universal participation is not required. However, the participating states should include those that had an opportunity or possibility of applying the alleged rule. It was important that such states were representative, which needed to be assessed in light of all the circumstances, including the various interests at stake and/or the various geographical regions. In assessing generality, an indispensable factor to be taken into account was the extent to which those states that were particularly involved in the relevant activity or were most likely to be concerned with the alleged rule ('specially affected states') had participated in the practice.[35] Comparing the threshold of state participation for the creation and modification of 'ordinary' rules of customary international law and for the attainment of the special status as *jus cogens* in the work of the ILC, the only categorical difference is the need for the participation of specially affected states. With regard to the fundamental norms of *jus cogens,* this is certainly not an issue.

The ILC also holds in draft conclusion 14, paragraph 1:

> A rule of customary international law does not come into existence if it would conflict with an existing peremptory norm of general international law (*jus cogens*). This is without prejudice to the possible modification of a peremptory norm of general international law (*jus cogens*) by a subsequent norm of general international law having the same character.[36]

Indeed, the existence of a peremptory norm will already deter the emergence of customary obligations to violate them. General state practice will normally not follow a path that leads to patterns contradicting ideas of moral paramountcy. According to the ILC, *jus cogens* norms 'reflect and protect

[33] International Law Commission, *supra* note 3, at 40.
[34] International Law Commission, Draft conclusions on the identification of customary international law, Official Records of the General Assembly, Seventy-third Session, Supplement No. 10, A/73/10, at 120 (draft conclusion 8).
[35] *Ibid.*, at 136, with references.
[36] International Law Commission, *supra* note 3, at 55.

fundamental values of the international community'.[37] Thus, when a peremptory norm 'occupies the field', a contrary obligation can hardly develop under another norm.[38]

As said, the second sentence of Article 53, Sentence 2 VCLT defines a peremptory norm of general international law as 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'.[39] Accordingly, the creation of the special status of a norm as *jus cogens* does not depend on a consistent state practice but only on acceptance and recognition that a norm of general international law is peremptory (*opinio juris cogentis*). State practice is irrelevant for establishing the peremptory status of a certain norm.[40] This is in contrast to the creation of customary international law as such.[41] In its draft conclusion 8, the ILC lists as possible

> [f]orms of evidence [of acceptance and recognition that a norm of general international law is a peremptory norm (*jus cogens*)] […] public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; constitutional provisions; legislative and administrative acts; decisions of national courts; treaty provisions; resolutions adopted by an international organization or at an intergovernmental conference; and other conduct of States.[42]

Accordingly, the ILC lists elements of practice ('conduct of states') as a form of evidence of *opinio juris cogentis*, thus moving its establishment closer to the establishing *opinio juris*. Indeed, these forms of evidence are similar to those provided for the identification of customary international law, which concerns forms of evidence of acceptance as law (*opinio juris*).[43] In any case, it is not clear whether a focus on 'acceptance and recognition' (Article 53, Sentence 2 VCLT) instead of 'evidence of a general practice accepted as law' (Article 38(1)*(b)* ICJ Statute) leads to more or less stability, if not of the respective primary or substantive norm then of its peremptory status. At least, one can say that renouncing the element of state practice increases the influence of states with reduced capacities to

[37] *Ibid.*, at 1 (Conclusion 2).
[38] Vidmar, 'Rethinking *Jus Cogens* After *Germany* v. *Italy*', 60 *Netherlands International Law Review* (2013) 1, at 15.
[39] Italics my own.
[40] Kleinlein, *supra* note 2, at 72–73.
[41] For a special emphasis on the practice-based nature of customary international law, see Johnston, *supra* note 17.
[42] International Law Commission, *supra* note 3, at 40.
[43] International Law Commission, *supra* note 3, at 41.

impact the relative practice and also decreases the influence of powerful individual states or groups of states.[44]

Apart from modification through a subsequently emerging peremptory norm on the same topic with a different content, there is also the possibility that states withdraw their *opinio juris cogentis* without building a new peremptory norm at the same time. In such a case of norm extinction, the requirements for a *jus cogens* norm posed by the definition of Article 53 VCLT would no longer be fulfilled and the norm would simply cease to exist as one of *jus cogens*. This would be a further mode of formal norm change, which is probably not to be excluded by Article 53, Sentence 2 VCLT. 'Modified' in Article 53, Sentence 2 VCLT could therefore be understood narrowly to encompass only 'change' in the proper sense of that word, but not 'extinguish' or 'cease to exist'.[45] Here again, the reason why we can still claim that peremptory norms have a strong resistance to change is that *jus cogens* norms 'reflect and protect fundamental values of the international community'.[46]

4. Presumption Against Change?

Based on the above considerations, it is plausible to establish at least a presumption against change that comes with the peremptory status of a norm. This presumption against change applies to both formal change (as a matter of the doctrine of sources) and informal change (as a matter of interpretation). Related claims have already been made by other scholars who write that 'the acceptance of change of a peremptory norm cannot be assumed lightly'[47] or that 'peremptory norms require a conservative approach to interpretation'.[48]

However, it is unclear on what exactly this assumption against change is based. The resilience to change inherent in the concept of *jus cogens* is less a foundation for a presumption against change than a slightly less sophisticated restatement. Fried van Hoof wrote that the fundamental rule of *pacta sunt servanda* applies a fortiori to *jus cogens*.[49] But *pacta sunt servanda* is not a satisfying answer either. In the end, the core of the argument should be that rules of *jus cogens* lay down the most basic norms of a society and that therefore drastic reversals of existing peremptory rules cannot be expected

[44] Payandeh, *supra* note 1, at 125; referring to Corten, 'The Controversies Over the Customary Prohibition on the Use of Force', 16 *European Journal of International Law* (2005) 803, at 810–811.
[45] F. van Hoof, *Rethinking the Sources of International Law* (1983), at 166; Kolb, *supra* note 11, at 103: 'Parallelism of form […] is not perfect in all cases.'; but see S. Kadelbach, *Zwingendes Völkerrecht* (1992), at 207: this mode of change contradicts the clear wording of Article 53 VCLT.
[46] International Law Commission, *supra* note 3, at 18 (Conclusion 2).
[47] Payandeh, *supra* note 1, at 126–127; van Hoof, *supra* note 45, at 166–167.
[48] O'Connell, 'Self-defence, pernicious doctrines, peremptory norms', in M. E. O'Connell, C. J. Tams and D. Tladi (eds), *Self-Defence against Non-State Actors* (2019), 174, at 244, 253; Payandeh, *supra* note 1, at 128.
[49] van Hoof, *supra* note 45, at 166–167.

frequently and/or rapidly.[50] Accordingly, this presumption against change has less to do with the non-derogability of peremptory norms (i.e. their technical status) than with their fundamental character (i.e. their substance).

In this regard, we can also draw parallels to another presumption about *jus cogens*, which refers to its interpretation and application. In draft conclusion 20, the ILC holds:

> Where 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 is, as far as possible, to be interpreted and applied so as to be consistent with the former.[51]

This implies some sort of a presumption against conflict with *jus cogens*, and this is complemented by a presumption against change, which is based on the same reasons.

However, while peremptory norms of general international law 'reflect and protect fundamental values of the international community',[52] it is still fair to say that it seems to be the spirit behind the letter of Article 53 VCLT that the norms of *jus cogens* are not necessarily, or exclusively, the basic constitutive norms of the international legal system.[53] Based on the formal definition of Article 53 VCLT, *jus cogens* norms rather appear to be those rules that the international community considers as having the *jus cogens* function even if they serve purposes limited in time and of no fundamental value for the social order in the strict sense of the term.[54] While the integration of *jus cogens* into the VCLT was certainly of highly symbolic value for the transformation of international law from an inter-state order to a value order, this transformation was not supposed to betray the value of the legal form. *Jus cogens* is therefore characterized by a tension between value and form,[55] which also compromises the presumption against change, at least as far as the (theoretical) case of peremptory norms that are purely non-derogable and without fundamental value is concerned.

Another question that would be worth discussing in more depth is how a presumption against change and distribution of burdens of argumentation defined by this presumption can operate in practice. What would it mean to hold, for example, that the more an interpretation deviates from a (more or less)

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[50] *Ibid.*
[51] International Law Commission, *supra* note 3, at 79.
[52] *Ibid.*, at 1 (Conclusion 2).
[53] For *jus cogens* as a legal technique, see Kolb, *Théorie du ius cogens international* (2001); Kolb, *supra* note 11.
[54] Rozakis, *supra* note 22, at 87.
[55] Kleinlein, '*Jus Cogens* Re-examined: Value Formalism in International Law', 28 *European Journal of International Law* (2017) 295, at 297–298.

established understanding of the content of a peremptory norm, the higher the requirements for the acceptance of such a modified understanding?[56]

5. Conclusion

In any case, a presumption against change, based on the substantive content of peremptory norms, with its admitted vagueness but, nevertheless, normative force, is a suitable doctrinal category to accommodate both the resistance to change of peremptory rules and the uncertainty about the relevant rules of change.

The threshold for a formal modification of *jus cogens qua jus cogens* is high, but not categorically different from the threshold for a modification of 'ordinary' general international law. A shift from 'general practice accepted as law' (Article 38(1)*(b)* ICJ Statute) to 'acceptance and recognition' (Article 53, Sentence 2 VCLT) does not seem to be categorical either. However, the high threshold is consistent with a presumption against both formal and informal norm change. Both the doctrinal foundations of this presumption against change and how related burdens of argumentation operate in practice deserve further investigation.

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[56] Ruys, *supra* note 26, at 29: '… the guiding principle must be that the more we move up the interpretive continuum towards overt modification, the higher the evidentiary standard that must be reached in terms of State practice and *opinio iuris*'; Payandeh, *supra* note 1, at 128.