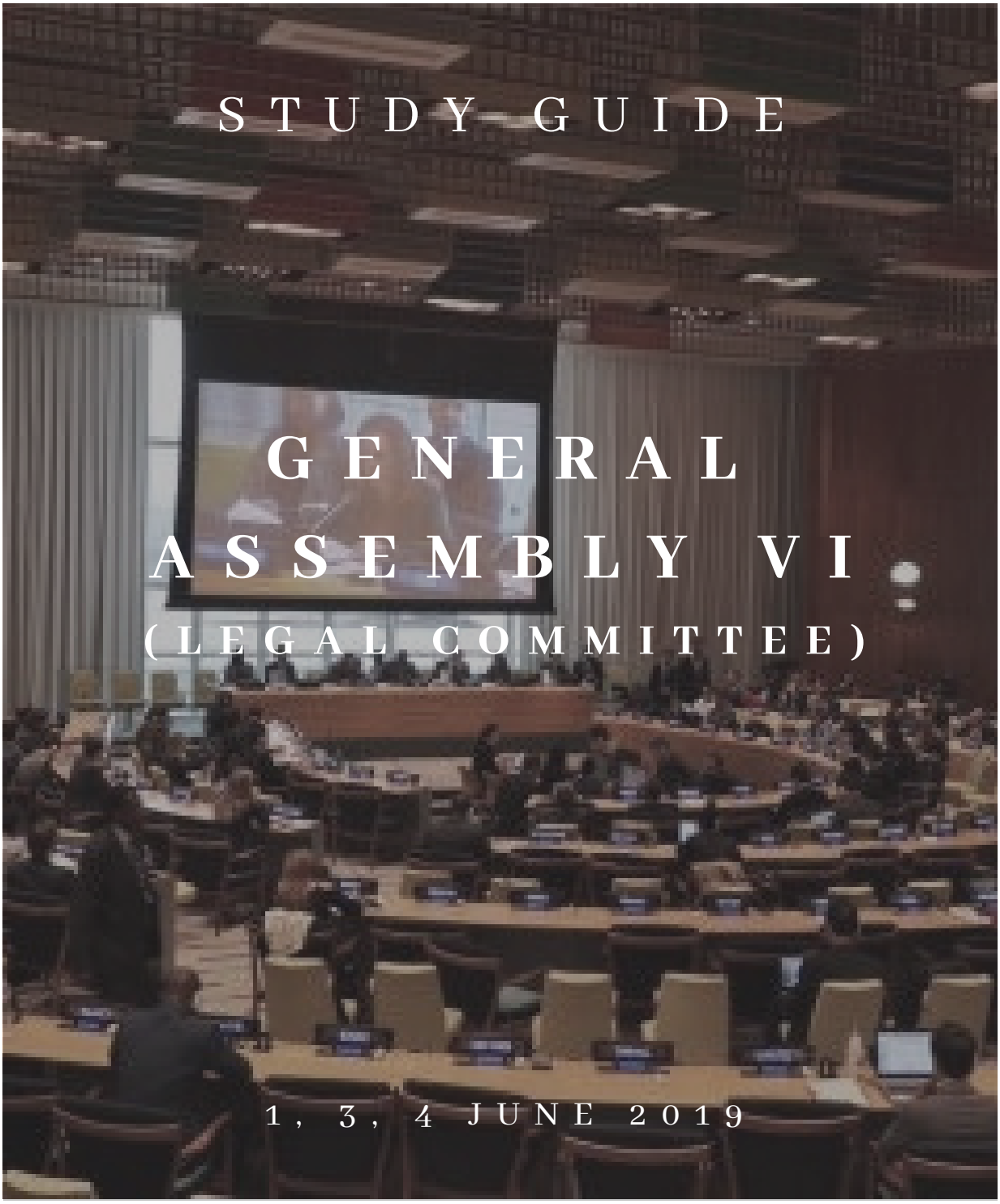
HCCRI VIII

AGAINST THE TIDE

HWA CHONG
CONFLICT RESOLUTION & INQUIRY



STUDY GUIDE

GENERAL ASSEMBLY VI

(LEGAL COMMITTEE)

1, 3, 4 JUNE 2019

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TOPIC 2: THE QUESTION OF IDENTIFYING THE PERSONHOOD OF INTERNATIONAL CORPORATIONS AND THEIR RESPONSIBILITIES TO INTERNATIONAL LAW **28**

Dais Introduction

Matilda Mag

Matilda can't wait to chair a council that best describes her. Ankle socks, blue Nanyang shorts during PE, and "sun-kissed", "chlorine-infected", "mixed-race" hair. At 18 years of age, she is so Legal.

Publicity stunts and gimmicky words aside, Matilda is genuinely pretty excited to chair this council! Her affinity for international law surfaced when she chaired HCCRI 2018, which led her to chair another legal-centric topic in UNASMUN 2018 and receive a $65 international law textbook from Amazon as her Christmas present. As her vested interest in international law blossomed, Matilda delegated in the ICJ at NTUMUN 2019 as well. Affectionately referred to as the ‘IL Goddess’ (and not-so-affectionately as the ‘IL thot’), she believes that the core of every global issue is legal in nature, and hopes to learn more about legal concepts in this year’s HCCRI.

Thong Cheng Han

Cheng Han is a 5th year humanities student and has stopped counting the number of conferences that he has attended since starting two years ago. He is currently interested in economics and part of Modern Dance and spends most of his time on them when not being bombarded with work. He hopes that this conference will be a meaningful experience for delegates and that they have as much fun reading up about the topic as he did!

Letter to Delegates

Dear Delegates,

Welcome to the Sixth Committee of the General Assembly!

As our most advanced committee, the Sixth Committee is the newest addition to the 8th Edition of HCCRI! This is part of our crucial paradigm shift to elevate rigour and alter academic perspectives of high school and pre-university conferences.

We will be discussing two topics: The Question of Codifying Sources of Jus Cogens Norms and The Question of Identifying the Personhood of International Corporations and their Responsibilities to International Law. As Singapore gradually becomes a key actor in issues of international law, HCCRI sees the principle imperative for delegates to think in the capacities of legal experts through understanding the mechanics of legal codification of international norms, and in doing so, meaningfully appreciate Singapore's often difficult but necessary positions.

This committee will be undoubtedly challenging, so do read all sections thoroughly — with extra attention to the 'Scope of Debate' and 'Questions a Resolution Must Answer' segments. We have provided definitions, guiding questions, reading lists, and some useful examples throughout the guide, which will aid in understanding of the legal terms. That said, we strongly encourage you to try your best and participate actively throughout the duration of the conference.

"Every accomplishment starts with the decision to try"
— John F. Kennedy

You may contact us at hccri2019+legal@gmail.com should you have further queries. We hope to guide you towards fruitful debate, and look forward to seeing you soon!

Best Regards,
Matilda and Cheng Han

The United Nations General Assembly Sixth Committee (Legal Committee)

The Sixth Committee of the United Nations General Assembly (UNGA) is the primary forum for legal questions in the United Nations (UN). As stated under Article 13 of the UN Charter, the committee serves to uphold the mandate of "promoting development of public international law and its codification".[1] International law, also known as the Law of Nations, is a specialized body of legal thinking. This pertains to the relations between nations, and reflects practice in matters such as treaty-making, the use of oceans, and the modalities of warfare.[2] While international law-making negotiations occur in different specialized UN bodies, those pertaining to general international law are discussed under the Sixth Committee.[3] All member states hold universal membership and are *de jure* members of the Sixth Committee.

The Sixth Committee meets annually in conjunction with the annual session of the UNGA, assigned with a list of agenda items to be discussed upon. These include most notably, annual reports of the International Law Commission (ILC), the United Nations Commission on International Trade Law, and the Ad Hoc Committee established by Resolution 51/210 of 17 December 1996 on Terrorism.[4] The common practice involves the elaboration and recommendation of new treaties to states for ratification and accession. Following any formal negotiations of the proposals, recommendations are then submitted to the Plenary of the General Assembly for the final adoption. Alternatively, the Sixth Committee may refer cases to the ILC or construct a special subsidiary body for discussion purposes.[5]

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[1] UN Charter, Article 13.
[2] International Law: A Reconciliation, 95 AM. J. INT'L L. 757, 758–59 (2001)
[3] United Nations General Assembly Rules of Procedure, art. 98; Alan Boyle and Christine Chinkin, The Making of International Law (Oxford: Oxford University Press, 2007) pp. 116 – 117.
[4] United Nations General Assembly Rules of Procedure, arts. 105-106; Robbie Sabel, Procedures at International Conferences, 2nd ed. (Cambridge: Cambridge University Press, 2006) pp. 73-95.
[5] Herbert W. Briggs, The International Law Commission (Ithaca: Cornell University Press, 1965); Alan Boyle and Christine Chinkin, The Making of International Law (Oxford: Oxford University Press, 2007) p. 170.

Topic 1: The Question of Codifying Sources of Jus Cogens Norms

Introduction to Topic

Jus cogens norms are international norms in which no derogation in any form is permitted. This means that unlike ordinary customary law which requires consent and can be altered through treaties, *jus cogens* cannot be breached "through international treaties or local or special customs or even general customary rules not endowed with the same normative force".[6] By extension, any treaty conflicting with *jus cogens* will be considered void, as stated under Article 53 of the Vienna Convention on the Law of Treaties (VCLT).[7] That being said, the status of *jus cogens* is also beyond the nullity of a treaty — it can also delegitimize domestic laws, invalidate customary international law and deny recognition of entities that breach such peremptory norms.[8] As such, *jus cogens* holds a superior status in legal hierarchy, constituting *obligatio erga omnes*, which requires all states to adhere to these norms.

Jus cogens can be said to have been introduced into international law in Articles 53 and 64 of the 1969 VCLT, and repeated in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 26 January 1986 (VCLTIO).[9]Though not listed explicitly, it is generally accepted by the international community that these norms include prohibitions on enslaving, torture, wars of aggression, territorial aggrandizement, genocide and maritime piracy.[10] In the 21st Century, *jus cogens* have been appearing in judgements and advisory opinions of the International Court of Justice (ICJ), in general comments of the Human Rights Council and other international courts such as the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACHR).[11]

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[6] Prosecutor v. Furundzija, International Criminal Tribunal for the Former Yugoslavia, 2002, 121 International Law Reports 213 (2002).
[7] Vienna Convention on the Law of Treaties, Article 53, May 23, 1969, 1155 U.N.T.S 331, 8 International Legal Materials 679 (1969).
[8] Arbitration Commission on Yugoslavia, Pinion N. 10, 4 July 1992, reprinted in European Journal of International Law 4 (1993) 90: 'subject […] to compliance with the imperatives of general international law'
[9] L. A. Aleksidze, Legal Nature of Jus Cogens in Contemporary International Law, RCADI 1981, vol. 172.
[10] Marc Bossuyt en Jan Wouters (2005): Grondlijnen van internationaal recht, Intersentia, Antwerpen enz., p. 92.
[11] A. Orakhelashvili, Peremptory Norms in International Law, Oxford University Press, Oxford: 2006.

Noting that the VCLT notably does not elaborate on where these peremptory norms may be found, nor how they can be accurately identified, the codifiability of *jus cogens* was brought up by the ILC in 1963 and 2015.[12] However, no formal document to recognise *jus cogens* and its constituents have been established due to two main concerns. Opposition to codification were predominantly from states that acknowledged the existence of *jus cogens,* but were highly concerned with how international legal order could be upset if *jus cogens* could be easily invoked in order to nullify treaties, and with how these norms lack a clear process to be conclusively and exhaustively identified. Furthermore, the origins of *jus cogens* rooted in natural law adds in a relative moral value to the norm, which hinders any standard criteria put forward. The hierarchically superior nature of the norm also challenges reconciliation with classical international law, whereby customary laws hold no superiority to each other. Such issues challenge the possibility to achieve a universal legal code applicable to all states and individuals.

Beyond legal challenges, countries opposing the codification of *jus cogens* stated that the codified law would be too vague and rigid, alongside other political reasons as well. After the 1963 session of the ILC of Article 50, 43 out of 51 members have officially stated they favour the concept of *jus cogens*, most without any conditions.[13] However countries like Luxembourg, Chile, France, Japan, Sweden and Turkey provided negative views regarding identification and establishment of *jus cogens,* which will be exemplified later. Ultimately, legal codification is disputed given different outlooks on the inclusion of *jus cogens* by various states. It is imperative that delegates explore the key features of international law and disputes behind the recognition and establishment of *jus cogens*.

[12] ILC Report, A/70/10, 2015, chap. VI, paras. 55–107
[13] Algeria, Austria, Bolivia, Brazil, Bulgaria, Byelorussian S.S.R., Ceylon, Cyprus, Czechoslovakia, Ecuador, Ethiopia, Ghana, Greece, Guatemala, Hungary, India, Indonesia, Iraq, Israel, Italy, Mongolia, Morocco, Netherlands, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Rumania, Spain, Syria, Tanzania, Thailand, Tunisia, Ukrainian S.S.R., U.S.S.R., United Arab Republic, United Kingdom, United States, Uruguay, Venezuela and Yugoslavia

Key Definitions

These are additional key legal terms that delegates should note, in order to grasp the legal scope of the committee and topics.

Key Term	**Definition and Explanation**
Legal Codification	The process where 'rules of law are committed to written form',[14] involving collecting and arranging laws into a legal code.
Legal Code	It is a comprehensive and systematic written statement of laws.
Custom	It is defined as the repetition of permissible acts with the conviction that one is legally bound by them. The ICJ Statute defines customary international law as "evidence of a general practice accepted as law", under Article 38(1)(b). [15]
Declaratory	The act of recognition which signifies no more than the acceptance of an already-existing factual situation.[16]
Opinio Juris	The belief that an action was carried out as a legal obligation. It is a subjective element of custom as it refers to beliefs.[17]
Erga Omnes	This means "towards all" or "towards everyone", used as a legal term to describe obligations on states towards the international community of states.
Pacta sunt servanda	This principle implies that non-fulfillment of respective obligations is a breach of the pact. It is based upon the principle of good faith,

[14] Dhokalia, R. P. The Codification of Public International Law. Manchester, UK: Manchester University Press, 1970.
[15] "Statute of the International Court of Justice." International Court of Justice. Accessed December 29, 2018. https://www.icj-cij.org/en/statute.
[16] Encyclopaedia Britannica, *International Law:* Declaratory theory of recognition, https://www.britannica.com/topic/declaratory-theory-of-recognition.
[17] Bederman, David J., International Law Frameworks (New York, New York: Foundation Press, 2001) at 15-16.

	where a party to the treaty cannot invoke provisions of its domestic law to justify its failure to perform. Therefore entitles states to require that obligations be respected and to rely upon the obligations being respected.[18] The only limit to pacta sunt servanda is the peremptory norms of general international law known as "jus cogens" which means compelling law.
Onus probandi	The obligation to prove an assertion or allegation that one makes; the burden of proof.[19]
Ultra vires	It means "beyond the powers". If an act requires legal authority and it is done with such authority, it is deemed intra vires, "within the powers". If carried out without such authority, it is ultra vires. Acts that are intra vires may hence be termed "valid" and those ultra vires "invalid".[20]
Natural Law ius naturale, lex naturalis	A philosophy asserting that rights are by virtue of human nature, provided by a transcendent source or God. Given that rights are determined by nature, natural law is objective and universal.[21]
Positive Law ex posita, ius positivum	These are man-made laws that oblige an action. These laws are specifically enacted or adopted by proper authority for the government of an organized jural society."[22] Such a law is also time and space specific, consisting statutory law and case law.

[18] Black's Law Dictionary (8th ed. 2004)
[19] Criminal Law - Cases and Materials, 7th ed. 2012, Wolters Kluwer Law & Business; John Kaplan, Robert Weisberg, Guyora Binder, ISBN 978-1-4548-0698-1
[20] Francis Pileggi (4 September 2012). "Abolishment of Ultra Vires Doctrine with Exceptions". Retrieved 7 November 2017.
[21] Strauss, Leo (1968). "Natural Law". International Encyclopedia of the Social Sciences. Macmillan.
[22] Kelsen 2007, p. 392.

Statutory Law	It is written law set down by a body of legislature or legislator.[23]
Universal Law	The set of principles and rules governing conduct which are most universal in their acceptability, their applicability and philosophical basis, and are therefore considered to be most legitimate. Akin to natural law, they are fundamental to the rule of law in the international community.
Common Law / Case Law	It is precedent and authority determined by previous court rulings, judicial decisions and legal findings or rulings. This allows the synthesis of principles in past cases, to evaluate the applicability of these principles to the current facts.[24] There could be a rebuttable presumption regarding common norms, and it is the duty of states to prove that they are not bound by such laws. In these cases, states are allowed to prove that they were never bound by the law or that it has altered its domestic policies to no longer be bound.[25]
Universal Jurisdiction	Defined as a legal principle 'allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim'.[26]

[23] Fundamental Law of Vatican City State, Art. 1 §1.
[24] Carpenter, Charles E. (1917). "Court Decisions and the Common Law". Columbia Law Review. 17 (7): 593–607.
[25] Black's Law Dictionary – Common law (10th ed.). 2014. p. 334.
[26] Kenneth C. Randall, 'Universal jurisdiction under international law', Texas Law Review, No. 66 (1988), pp. 785-8: International Law Association Committee on International Human Rights Law and Practice, 'Final Report on the Exercise of universal jurisdiction in respect of gross human rights offences', 2000, p. 2.

Background and History

International law establishes a normative framework for the conduct of interstate relations. It is based on the key assumptions that states matter, and all states are equal, which means that states have obligations, and by extension, the same set of obligations. It is crucial to note that international law holds two main features: it has no overriding authority to enforce the normative aspects in international law, and requires consensus of every state in order to bind countries by law. International law is derived from four sources as enshrined in Article 38(1) of the Statute of the International Court of Justice (ICJ), namely: treaties, customary international law, general principles of law and 'judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law'. As stated, *jus cogens* can be elevated from customary international law.

The Nature of *Jus Cogens*

Jus cogens was initially taken to be based on the concept of natural law, advocated by staunch believers of a higher being in the past. In the modern day, those who support the idea that *jus cogens* has its basis in natural law advocate that the concept of international rules which supersede state consent can only be explained through the natural law idea of superior law, which is based on morality and value.

General State Practice and Opinio Juris

These elements equate to the positivist view that international law only comes into existence through the consent of states. For a norm to be considered j*us cogens,* it needs to be a general state practice and it has to acquire *opinio juris.* This means that for a certain action to be elevated into customary international law, a substantial number of states have to be adopting the same action for a period of time. Beyond that, this action must be carried out with the belief that such a practice is required by international law and not done out of mere convenience or habit. In the *Belgium v. Senegal case*, when justifying its conclusion that the prohibition against torture is *jus cogens*, the ICJ noted that the prohibition was grounded on "widespread international practice and on the *opinio juris* of States", and even noting that it "appears in numerous international

instruments of universal application" and hence "been introduced into the domestic law of almost all states"[27]

[27] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012, I.C.J. Reports 2012, 422 at para.99.

Non-Derogability: Article 53 and 64 of the VCLT

As mentioned above, Article 53 of the VCLT states the non-derogability nature of *jus cogens:*
"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"28

While Article 53 implies the non-derogability nature of *jus cogens*, it also implies that countries can derogate *jus cogens* if the international community universally agrees that a norm has lost its peremptory character. How this is concluded is yet unclear. It is also important to assess if Article 53 simply contributed to developing international law, or taken to be a codification of *jus cogens*[29] — if it were to be the latter, this means that *jus cogens* is already considered as customary held in common by all peoples and nations, in "reasoned compliance with standards of international conduct", as *corpus iuris gentium.* In light of this feature of *jus cogens*, it has been thought that France's objection to signing the Vienna Convention on the Law of Treaties is due to the superior nature of the norm.

Article 64 of the VCLT is also indicative of the superior hierarchy of *jus cogen,* indicating that any rule conflicting with a norm of jus cogens will become *ipso facto* void.[30]
"If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."[31]

[28] Article 53 of the VCLT.
[29] M. Ragazzi, The Concept of International Obligations Erga Omnes, Oxford University Press, Oxford: 1997, p. 45.
[30] ILC, above n.2, at 240, para.4.
[31] Article 64 of the Vienna Convention on the Law of Treaties, 1969.

Essence of Civilization and Humanity

It can be summarized that *jus cogens* holds the following characteristics:[32]

1. Norm of general international law;
2. Norm from which no derogation is permitted;
3. Norm that is accepted and recognized by the international community of states as a whole as one from which no derogation is permitted;
4. Universally applicable;
5. Superior to other norms of international law;
6. Serves to protect fundamental values of the international community — described as international *ordre public* or public order.

The "fundamental values of the international community" protected by *jus cogens* are basic considerations of humanity as the essence of civilization. In the *Reservations to Genocide Convention Advisory Opinion*, the ICJ provided an the following description of the values characterizing *jus cogens* in the Convention on the Prevention and Punishment of the Crime of Genocide:

"The Convention was manifestly adopted for a purely humanitarian and civilizing purpose...to safeguard the very existence of certain human groups and...to confirm and endorse the most elementary principles of morality."[33]

Existence of *Jus Cogens*

During the sixty-seventh session of the ILC in 2015, it has been noted that since the adoption of the Vienna Convention, there have been 11 explicit references to *jus cogens* in majority judgements or orders of the ICJ.[34] All of such references have assumed the existence of *jus cogens* as part of modern international law. The examples below are some of the past references made to *jus cogens*.

[32] Seifi, above n.19, at 162.
[33] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951, ICJ Reports 1951, at 23.
[34] Cherif Bassiouni. 2011. Crimes Against Humanity: Historical Evolution and Contemporary Application. New York: Cambridge University Press, p. 266.

In the *Military and Paramilitary Activities (Nicaragua v. United States)* case, the ICJ noted that both states viewed the prohibition on the use of force as a *jus cogens* norm. The view of whether the prohibition on the use of force qualifies as *jus cogens* is somewhat uncertain but the ICJ does not dispute the existence of *jus cogens* itself.[35]

In the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ was shown to accept the idea of *jus cogens* as well.[36] Although it mentioned that there is "no need for the Court to pronounce on this matter", in explicitly explaining the character of *jus cogens*, the ICJ appears to accept it as part of international law.

In the *Case Concerning Armed Activities on the Territory of the Congo*, the ICJ not only referred to *jus cogens*, but identified the prohibition of genocide as "assuredly" having the character of *jus cogens*.[37] In the *Kayishema* case, the International Criminal Tribunal for Rwanda (ICTR) stated that "the [prohibition of the] crime of genocide is considered part of international customary law, and moreover, a norm of jus cogens".[38] The High Court of Kenya, in Kenya Section of the International Commission of Jurists v Attorney General, held that "the duty to prosecute international crimes has developed into *jus cogens* and customary international law".[39]

Therefore, it can be clearly seen that there is widespread acceptance of the concept and substance of jus cogens in judicial practice around the world. It was also found that states had referenced *jus cogens* in their statements before the UN Sixth Committee and the Security Council, as well as in resolutions of the UN General Assembly—particularly in reference to torture—and other assorted organs of the UN. To the Rapporteur's knowledge, there were no instances of States disputing the notion of *jus cogens* in international Courts or tribunals. This serves to reiterate the idea that *jus cogens*, despite its arbitrary and vague nature, is now an accepted part of the canon of international law.

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[35] ILC, above n.10, para.46.
[36] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, ICJ Reports 1996, 226.
[37] Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v Rwanda), Judgment of 3 February 2006
[38] Prosecutor v Kayishema et al. (ICTR-95-1), Trial Judgement, 21 May 1999 (ICTR), para.88.
[39] Kenya Section of the International Commission of Jurists v Attorney General & Another, Judgement of 28 November 2011 of the High Court of Kenya

Legal Codification of *Jus Cogens*

According to the Statutes of the ILC adopted in 1947, "codification" is defined as "a more precise formulation and systemisation of the law in those areas where there are rules, established by extensive practices of states, precedents and doctrines", otherwise the process of stating law in written form as a universal legal code. International law is largely codified by the International Law Commission (ILC), that the UN GA established in 1947.[40] However, according to Article 13, paragraph (1)(a), of the Charter of the United Nations, the General Assembly is also mandated to encourage the progressive development of international law and its codification.

Codification can alter the law itself, as transcribing the customs into written rules requires high levels of precision and systematisation. When substantial change occurs, it is termed as 'progressive development', defined as "the drafting of projects of Conventions on issues that are not yet governed by international law or on which the law is still not yet developed enough in practice of States". With regards to *jus cogens,* these norms are not exclusively catalogued or defined by any authority, and surface through past rulings and changing socio-political attitudes. For example, state sovereignty was first taken to be inalienable through the 1923 Wimbledon Case, and in the recent years, the idea of regional jus cogens based on regional custom has surfaced as well.

A poignant argument against codification of *jus cogens*, was made in 1969 at the Tenth Annual Session of Asian–African Legal Consultative Organization (AALCO). It was expressed that there seems to be no inconvenience were *jus cogens* not precisely defined or clearly fixed in advance in every imaginable case for every possible situation. The smaller and weaker nations would suffer, as indeed they have suffered, in the absence of law. The big powers have suffered considerably less in the period of relative lawlessness. Yet, like any other rules of international law in the age of its progressive development, there can be no static and inflexible rule, and opposing dynamism was seen to discourage orderly and progressive development. With regard to the question as to the existence of a concrete body or machinery by which to determine the scope and concept of *jus cogens*, it should be made plain that the transitional stage of international law

[40]Kozevnikov, F.I and E.C. Krivchikov, 1977. International Law Commission-its functions and activities, Juridicheskaya Literature, pp: 6-14.

no such body truly exists for the compulsory determination of any question or of any rule of international law.

Jus cogens norms, despite their seemingly vague and indistinct character and contentious inception, have become an important and largely uncontroversial aspect of international law. It was only in recent years where talks on codification resurfaced. Does that mean that international law is no longer deemed transitory and progressive?

Scope of Debate

The key contentions of this issue can be scoped into three main areas of debate:

1. The perspectives on *jus cogens* — Should *jus cogens* be codified?
2. The feasibility of various methods to codify *jus cogens* — How can *jus cogens* be codified?
3. The privileges and responsibilities arising from codification of *jus cogens* — What are the effects of codifying *jus cogens?*

State Perspectives on *Jus Cogens*

To understand whether states would codify *jus cogens* largely depends on their views with regards to *jus cogens* itself. Though *jus cogens* norms are hierarchically superior, certain states still chose to prioritise other principles of law instead due to political advancements and other national ideals. On the other hand, states that are strongly protected by international law are likely to be in full support of *jus cogens*, hence making it likelier that codification of *jus cogens* would be a goal they wish to achieve.

Jus Cogens as a Limitation on Sovereign Immunity

Strongly Westphalian states like China and Russia rejects the idea that *jus cogens* can supersede sovereign immunity. China has requested sovereign immunity for officials that are tried in the United States, even for alleged violations of jus cogens. This reflects their belief of sovereign equality under international law, where the decisions of foreign courts does not have any bearing on the decision of domestic court. Russia holds a similar view to China, jointly issuing the *Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law* to emphasize the importance of sovereignty and non-intervention. It should also be noted that in Russia and China, international law as a whole is discussed as if it were a Western tool for violating their sovereignty, especially so in Russia where strategic criticism of Western approaches to international law have been prominent in Russia's strategic documents.

Conversely, the United States and the United Kingdom have previously decided that the value of *jus cogens* overrides sovereign immunity, with the United Kingdom having revoked the immunity of officials before. However, this does not mean that the United States completely agrees with the

universal jurisdiction of *jus cogens.*[41] Italian courts are also in support of the idea of *jus cogens* based on its past actions. In the *Jurisdictional Immunities of States (Italy v. Germany),* case, Italy allowed citizens to bring claims against Germany for committing violations of IHL. The reasoning by the Italian Court was that the violations were of *jus cogens,* rendering Germany's claim of immunity invalid. This was referenced by the US's Fourth Court of Appeal in a similar case.

Jus Cogens as an Abstract Theory

The gap between legal expectations and legal reality is said to be wide, and the problem is whether the abstract theory of *jus cogens* can in fact be represented in reality. This also raises the question if any form of codification is reliable enough to transfer abstract concepts to enforceable legal obligations. In the Sixth Committee, France was particularly critical, suggesting that in consideration to the practices and opinions of states in forming *jus cogens*, the international community adopted "an overly theoretical or ideological approach" to *jus cogens*.[42] US also mentioned the lack of state practices relating to *jus cogens*, and that there were overlaps between the issue of *jus cogens* with the issue of Identification of Customary Law and Subsequent State Practice, risking inconsistency, inefficiency and confusion.

Establishing a Criteria for *Jus Cogens*

Creating a set list of *jus cogens* was a possibility given that the concept of *jus cogens* is recognized in the constitutions of several states. Some states believed that a 'global society required global norms', and that the states could contribute to the identification of *jus cogens* through, *inter alia*, the development of a list of peremptory norms even if they were merely indicative. Unlike when the 1969 Vienna Convention was adopted, a spread of legal materials existed in present day including work of the ILC, and global and regional judgements in courts and tribunals. States are able to draw on such materials in order to develop a concrete list of norms. Furthermore, the relatively limited number of *jus cogens* made it seem feasible to envisage a list. The United States defined *jus cogens* in the *Restatement on Foreign Relations of the United States* as inclusive of: the prohibitions against genocide; slavery or slave trade; murder or disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary

[41] Martti Koskenniemi, Hierarchy in International Law: A Sketch, 8 EUR. J. INT'L L. 566, 566 (1997).
[42] A/C.6/71/SR.20, para. 77.

detention; systematic racial discrimination; and "the principles of the United Nations Charter prohibiting the use of force."

Given that the ICJ has verified that there is no stipulation of how long a practice has to be in play to elevate it to the level of customary international law in the *North Sea Continental Shelf* judgement, stating that "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law", in a situation where a general practice is accepted as law[43], the flexibility to include evolving norms as *jus cogens* is hence accorded as well.

International body Norm	ILC 1966[94]	ILC 2001[95]	ILC 2006[96]	UN General Assembly	ICJ	ICTY	HRC[97]	ECtHR	IACHR	ECJ	arbitra-tion
Prohibition of aggression		x	x								
Prohibition on the use of force	x[98]				x[99]						
Right to self-determination		x	x								x (n)[100]
Permanent sovereignty over natural resources											x (n)[101]
Prohibition of genocide	x	x	x		x[102]	x[103]		x[104]			
Basic norms of humanitarian law			x		x[105]	x[106]	x				
Crimes against humanity		x						x (n)[107]			
Individual rights							x[108]				x[109]
Right to life							x				
Prohibition of torture		x	x	x[110]		x[111]	x	x[112]	x[113]		
Prohibition of slavery	x	x	x[114]						x[115]		
Principle of equality/ non-discrimination									x[116]		x[117]

Figure 1: Table summarizing the proposals of different norms as jus cogens put forward by various international organisations (non-exhaustive).44

[43] International Court of Justice, North Sea Continental Shelf (Federal Republic of Germany/Denmark), https://www.icj-cij.org/en/case/51/judgments
[44] F. Vanneste, General International Law Before Human Rights Courts: Assessing the Specialty Claim of International Human Rights Law, Antwerp-Oxford-Portland: 2010, pp. 419-436

Moral Paramountcy in Jus Cogens

The main obstacle to codification of *jus cogens* is the lack of clarity as to which norms constitute *jus cogens.* Countries have noted that the distinctive feature of *jus cogens* norms not simply in their hierarchical nature, but also more their special importance. *Jus cogens* carry a particular normative weight, that establishes a 'material hierarchy of norms'. Hence, *jus cogens* are believed to be extremely weighty because they enjoy moral paramountcy. States have acknowledged that these norms conform to the morals they uphold and thus are the bare minimum of responsibilities that states should hold themselves to in the international community. Codification of *jus cogens* would hence go against the classical notion of international law, where equally important rules of being given an inferior status. What then, can be a standard metric to weigh the importance of different laws against each other? The Luxembourg Government concluded that in the current state of international relations, it impossible to define in juridical terms what constitutes the substance of peremptory international law.

Tension between Jus Cogens and Universal Norms

A related important concept is that of obligations *erga omnes*, which is often drawn in relation to *jus cogens*. In the 1970 Barcelona Traction case, the ICJ provided a scope to obligations *erga omnes* in its judgements, which included particularly serious breaches of international law like aggression, genocide and slavery.[45] Other obligations also include the principle of self-determination in the *Case Concerning East Timor and the Advisory Opinion* on the *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, alongside the prohibition of the use of torture in the *Furundzija case*.

Delegates might realise that such *erga omnes* obligations cohere with the *jus cogens* norms stated above. Although *erga omnes* obligations are highly similar to *jus cogens*, there is a distinction between the two. The ILC has clarified that the *erga omnes* obligations are characterized by its scope of applicability and focuses on obligations that can be deemed as a global common. *Jus cogens* deals with the issue of hierarchy of certain norms over others. *Erga omnes* are obligations whose breach concerns the international community as a whole, with every state being able to

[45] Barcelona Traction, Light and Power Company, Limited, Judgment, 5 February 1970, ICJ Reports (1970) 3, at 32, para.33-34.

invoke the responsibility of the state violating such obligations. The right of innocent passage under the Law of the Sea, and other rules concerning the basic rights of the human person and global common are *erga omnes* obligations and not *jus cogens.* The category of obligations *erga omnes* is always broader than that of jus cogens norms and hence, while all obligations by *jus cogens* norms have a character of obligations *erga omnes*, an obligation *erga omnes* does not necessarily hold the power of *jus cogens* to invalidate conflicting treaties. However, given that *jus cogens* are to be respected as a global common as well, what gives *jus cogens* a higher value than *erga omnes* obligations to be given a special status of non-derogability? What materials show that a norm has acquired peremptory status, and what should be the content of the relevant materials?

Assimilating Jus Cogens with Conventional Customary Law

China stated in the 56th Annual Session of AALCO that it is too premature at this stage to list the rules of *jus cogens*. The more recommendable approach would be to collect and study state practice in this regard, and on that basis, clarify the specific criteria of *jus cogens* and then consider the necessity of a list as such. This is to adopt the usual process of identifying a customary law. However, showing a general, consistent, uninterrupted practice that lasts for some time can prove to be extremely difficult, if possible at all. The position held by the ICJ in the Nicaraguan case of 1986, which accepts, as a basis of custom, a practice that is not absolutely consistent is not particularly helpful.

Persistent Objector in Jus Cogens

Yet, treating peremptory norms as traditionally understood norms of customary law raises an immediate question about the permissibility of having a persistent objector at the stage of formation of a norm. The persistent objector rule applies when a state has objected to a rule of customary international law while that rule was in the process of formation, rendering the rule inapplicable to the state so long as it maintains its objection. The objection must be clearly expressed and maintained persistently, while being made known to other states.[46] In the process of codification, delegates need to determine if the the concept of persistent objectors exists within the realm of *jus cogens.* It is clear that without universal accord or consensus on the peremptory

[46] Article 15[16] of the Draft Articles on Customary International Law, provisionally adopted by the Drafting Committee at the Sixty-Eighth Session of the ILC, A/ CN.4/L.872

character of a norm it cannot be considered jus cogens. However, from a practical perspective,can there be such a process as persistent objection to a norm attaining the status of *jus cogens* given that the persistent objector rule is widely accepted and practiced by countries?

Regional Jus Cogens as Particular Customary International Law

On the topic of state practice, the concept of regional *jus cogens* has been raised to be codified as well. These are peremptory norms that only applies to a limited number of states, as long as there is a general practice among the select states to determine the existence and content of a rule of customary international law. For example, the Brezhnev Doctrine operating in the regional grouping of socialist countries and the prohibition against juvenile execution in the Organization of American States (OAS) can be seen as a recent historical examples of possible regional *jus cogens* in action. This could reinforce the idea that regional jus cogens norms can serve a practical purpose within a specific time-period. However, the important question to ask is whether it is meaningful for there to be *jus cogens* norms which only applies to certain states, and would these regional norms be merely a only a concretization of general law. Would a peremptory norm still be peremptory if only some states are bound by it but not all states?

Effective Law-Making of *Jus* Cogens

Decision-Making Bodies in the Codification of Jus Cogens

From the perspective of the criteria used to distinguish *jus cogens,* it is important to ask what are the practical and institutional conditions for its application. Who decides, and on what basis, that a norm has been accepted and recognized by the international community of states as a whole, and that such a norm is of fundamental importance to that community?

1. General Assembly

A more important role could be played by universal international organizations, such as resolutions of the General Assembly. Although the Assembly does not have executive powers, it is a body where all Members are represented (in practice hence it is a universal international community of states).

Codification Under the 2001 Draft Articles on State Responsibility

The Law of State Responsibility holds states accountable for breaches of international obligations, and codifies internationally wrongful acts—which are breaches of international obligations alongside consequences that follow. However, the articles do not define the substantive content of international obligations, but instead enumerate the method by which accountability and consequences and reparations can be made for the breaches of international obligations. It is a possibility whereby *jus cogens* norms can be listed and explicitly assimilated under the set of international obligations stated, given that *jus cogens* norms are closely related to *erga omnes* obligations as stated above. If the breach of obligations under *jus cogens* norms occur, it will naturally incur the most serious consequences.

Harmonisation with Existing Treaties and Laws

1. Security Council Resolutions and Jus Cogens

Under the VCLT, invalidity as an effect of *jus cogens* is restricted to treaties. However, as stated in the Bosnia Genocide case stated, 'considering that a Security Council resolution may even require participation in genocide... its unacceptability is apparent', it seems accepted that binding legal acts of international organizations like resolutions of the Security Council are also void if they are in conflict with *jus cogens* despite Article 103 in the UN Charter stating that 'in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'[47] This means that *jus cogens* are hierarchically superior and therefore trumps a Chapter VII Resolution, otherwise they would be deemed *ultra vires*. Furthermore, Under Article 24(2) UN Charter, the Security Council 'shall act in accordance with the Purposes and Principles of the United Nations'. Based on that, this includes observance of *jus cogens*.

2. UN Charter and Jus Cogens

Given that the Vienna Convention was signed after the UN Charter came into existence, the rules of *jus cogens* that are recognised in Article 53 of the Vienna Convention may not apply to the UN Charter. Some countries still uphold the belief that based on Article 103 of the UN Charter which states that "in the event of a conflict between the obligations of the Members of the United Nations

[47] Article 103 of the UN Charter, accessed at: http://legal.un.org/repertory/art103.shtml

under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail", *jus cogens* should not have legal privilege to overwrite UNSC resolutions during codification.

Effects of Codifying *Jus Cogens*

Potentially Increasing Certainty of Jus Cogens

In general, codification is viewed positively, as it increases the certainty of international law, as well as its development, coherence and sophistication. In this sense, the codification preserves customs which are the primary sources of international law and unifies the laws of the world which means that the rules of international law become more universally adopted. It is largely believed that codification is the first step to achieving peace in the international community as it clearly elucidates the standards of conduct that nations need to uphold and hold states accountable for any violations of these standards of conduct.

Rigidity and Ambiguity

Codified laws are rigid, especially for something as absolute and non-derogable as *jus cogens.* This allows for little leeway when interpreting the law and carrying out actions accordingly. At the same time, such a move away from individuality and might negatively impact the customs and traditions which differ from region to region. Countries in different regions can then no longer alter customary law according to the practice of their specific region. Furthermore, codification can result in vague documents, allowing countries to take advantage of the lack in specificity and thus manoeuvre around it to subvert responsibilities in international law. Countries will then need to constantly review these codified laws to patch up any loopholes as well as changing the laws to keep up with the evolving situation of the international community. For example, Turkey commented that the examples cited to prove the existence of *jus cogens w*ere not compatible with reality, and the lack of a definition makes it it possible for every nation to interpret jus cogens to fit its own needs.[48] Chile characterized the attempt to define *jus cogens* as 'an invitation to arbitrariness'.

[48] 0 1963 I.I.C. Yearbook (I) 214, 705th meeting, par. 70

Case Study: Human Rights

One of the most prominent areas where the idea of *jus cogens* is involved is human rights. For instance, principles such as the right to life and the prohibition of slavery are examples of some of the human rights norms and customary law that have become *jus cogens*.

Multilateral treaties have are on way to determine the existence of *jus cogens* and many of them do indeed contain peremptory norms within them. Some norms of human rights have emerged through such multilateral treaties, some examples include: the prohibition of genocide,[49] the prohibition of torture,[50] and the right to self determination, based on various international treaties and "a series of General Assembly resolutions and state practice of decolonization".[51]

The ICJ's advisory opinion on the rules of humanitarian law which apply to armed conflicts highlight how fundamental they are. "Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law".[52] However, even such norms have not been codified in written form, although it is universally accepted by states.

[49] Article 1 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.
[50] Articles 2 and 3 of the Convention Against Torture and other Cruel and Inhuman or Degrading Treatment or Punishment.
[51] F.F. Martin, et.al, op. cit., p. 35.
[52] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, para. 79.

Guiding Questions

1. What is your country's perspective and past experience with *jus cogens?*
2. What is your country's political interests and how does codifying *jus cogens* interfere with them?
3. What is your country's view on international law in general?

You may wish to look at past case commentaries from your country as well as official statements provided in the Sixth Committee and the International Law Commission (ILC).

Questions A Resolution Must Answer

1. Should *jus cogens* norms be codified into an illustrative list?
    a. If so, what is the nature of this list and on what grounds is it applied on?
    b. How will it ensure the flexibility of the list to evolve with the changing needs of international law and yet not be entirely arbitrary?
2. What should be the criteria to establish the recognition of *jus cogens* norms?
    a. Should the criteria be based upon the general practice and preference of states, or based on the moral value of recognising certain norms as *jus cogens*?
    b. Should *jus cogens* veer away from the traditional notion of universality, ie. is there a possibility of different types of *jus cogens*, namely regional *jus cogens*?
3. Given the superior hierarchical status of *jus cogens* norms, should *jus cogens* norms enjoy the principle of non-derogability beyond treaties, namely General Assembly and Security Council resolutions?

Recommended Reading List

1. Defining the Imprecise Contours of Jus Cogens in International Law — Kennedy Gastorn
2. The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences? — Ulf Linderfalk
3. State responsibility and jus cogens — Weatherall, T
4. Jus Cogens in Contemporary International Law — Cezary Mik
5. The Creation of Jus Cogens – Making Sense of Article 53 of the Vienna Convention — Ulf Linderfalk

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Topic 2: The Question of Identifying the Personhood of International Corporations and their Responsibilities to International Law

Introduction

Each year, thousands are victims to corporate negligence. In 2010 alone, 55,324 people in the United States lost their lives due to diseases and occupational hazards which could have been prevented by corporations. Internationally, multinational corporations also construct their facilities to areas that are not regulated by agencies such as the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA) and the Occupational Safety and Health Administration (OSHA). Hence, it is estimated that globally, the number of workplace deaths and injuries far surpasses the statistic in the United States. If one were to take into account the underdeveloped nations that do not have well-established regulatory systems to monitor corporations operating inside their borders, the number of fatalities easily doubles. It must thus be questioned if corporations are responsible for such realities. In order to then hold them accountable, these corporations are required to be recognised as legal persons to be held responsible to international law. Presently, there has been cases such as the United States Supreme Court case Santa Clara County v. Southern Pacific Railroad, where corporations were granted almost the same rights under the Fourteenth Amendment as a natural person. This expands upon corporations' rights and establishes corporate personhood, assuming the idea that corporations hold international legal personality. With international legal personality, corporations are entitled to both rights as well as obligations under international law. While the notion of corporate personhood is held by the United States, United Kingdom and Canada, it is important to note that not every country has adopted this concept extensively even in domestic law, seen by the fact that there is currently no law which explicitly charges corporations with corporate manslaughter or homicide.

Therefore, delegates are required to examine the personhood of corporations and the rights and responsibilities that follow. Firstly, how do we determine whether or not international corporations has international legal personality, and the source of this international personality. Secondly, what should be the responsibilities and obligations of corporations that is in tandem with the extent of personhood.

Key Definitions

Key Terms	Definitions and Explanations
International Legal Personality	This refers to entities (human and non-human) that have been given rights and have obligations under international law.[1]
Personhood	Someone or something that has legal personhood is recognised under the law as possessing certain privileges. This means they can act in legal capacities such as signing treaties under their name (in the case of international law) or suing and being sued.
Ultra vires	Directly translated, it means "beyond the powers". It is used to describe actions carried out by governments or corporation that exceed those that have been conferred onto them by laws or corporate charters.[2]

[1] US Legal, Inc. "International Legal Personality Law and Legal Definition." Fraud Law and Legal Definition | USLegal, Inc. Accessed January 01, 2019. https://definitions.uslegal.com/i/international-legal-personality/.
[2] Litvin, Michael. "Ultra Vires." LII / Legal Information Institute. June 13, 2015. Accessed January 01, 2019. https://www.law.cornell.edu/wex/ultra_vires.

Background and History

This section first covers key concepts in identifying personhood, namely determination of subjects of international law and international legal personality. This is followed by key concepts of responsibilities to international law.

Personhood and Legal Persons

Legal personality in international law is similar to that in municipal law. Municipal law needs to determine who has what rights and what kind of legal consequences their actions have, and in the process of doing so accord them with legal personality. This means that with legal personality, they have rights and obligations, can act in certain legal ways — such as being allowed to enter a contract or the ability to commit tort, and can be legally punished. Corporations are currently given legal personality under municipal law.

Corporations did not initially enjoy legal personhood under international law as states were the sole subjects of international law. However, in the nineteenth century, international organisations began to emerge and they complicated the situation. The ICJ *Reparation for Injuries*[3] advisory opinion details four elements of international legal personality for non-state actors: an independent or autonomous existence; the ability to possess international rights and obligation; actual possession of those rights and obligations; and the ability to enforce rights on an international plane.[4] There was also the shift from consensus based function of the international community towards favouring bilateral treaties and reliance on diplomacy to create cooperation. This is concretised in the Congress of Vienna (1814-15), which claimed it was the era of international conferences and international treaties.

[3] The main question for this case was the ability of the UN to present an international claim for reparations for injuries suffered by members of an organisation while in service. It was sparked off when the Swedish Count and the UN Mediator for Palestine was killed by terrorists. The end result was that it was possible because the UN had its own international legal personality.

[4] "International Legal Personality of Corporations: How Investment Law Answers the Supreme Court Question in Jesner." Just Security. March 09, 2018. Accessed January 01, 2019. Accessed at: https://www.justsecurity.org/45543/international-legal-personality-corporations-investment-law-answers-supreme-court-question-jesner/.

International Legal Personality

However, the differences between international law and municipal law gives rise to dispute regarding the international personhood of corporations. Firstly, there are largely three main characteristics that are associated with international legal personality: *jus tractatuum* (or the ability to make treaties), *jus legationis* (or the right to receive and send out diplomatic envoys, and, by extension, form relations with other international actors), and the right to present claims based on international responsibilities.[5]

The first two characteristics carry with them the implicit ability to create the law as they are simply a state's actions on the international stage and thus can give rise to customary international law. As states are the main international persons, it is accepted that states have legal personality that have the power to create laws. Contention arises when the issue of whether such a power is inherent to international legal personality or if there should be a category of international persons that do not have this power. Secondly, there is no centralised law of persons in international law. The ILC has not codified the law of personality and no treaty nor established rules of customary law cover it.

Indicia of International Legal Personality

There are two theories that explain why the ICJ concluded that organisations are an international person, albeit not to the equal level of a state or possessing the same level of rights and privileges.[6] Firstly, it is the will of the founders that determines whether an international organisation possesses international legal personality. This means that under international law that is built on the will of the states, there is the possibility that these states can give organisations legal personality. More consequential is how organisations formed by specific states interact with third parties that refuse to acknowledge personality could reflect upon the possibility that it is merely a hollow concept.

Alternatively, the Court in *Reparation for Injuries* viewed that organisations can receive legal personality without recognition by any party so as long as they meet a criteria. The criteria for this is then: it has to be a permanent association of states, organisations, with lawful objects,

[5] e P. M. Dupuy, Droit international public, Paris 2010, at 198
[6] Further: Amerasinghe (2nd edn, 2005) 79-91; Akande(2010) 252, 256-7.

equipped with organs; a distinction in terms of legal powers and purpose, between the organisation and its member states; and the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states.

Regarding the first criteria, the Commonwealth of Nations was initially[7] an organisation that lacked the organs and objects necessary for legal personality. Thus a multilateral convention may be institutionalised to a certain degree with provisions for regular conferences while not involving any separate personality. Conversely, combined state agencies, like an arbitral tribunal, may possess restricted capacities and limited independence but acknowledged as a separate legal person. This is applicable to subsidiary organs of organisations, for example the United Nations Conference on Trade and Development (UNCTAD) and the High Commissioner for Refugees.

Secondly, organisations that have enough independence and power to intervene in the affairs of member states, the arrangement may be similar to a federal union. The European Union is sometimes claimed to be one as it only has as much power as the member states give it.

Lastly, while an organisation with legal personality is often created via treaties, the source can be the resolution of a conference or uniform practice. The basis for the United Nations Industrial Development Organisation (UNIDO) comes from General Assembly resolutions; whereas the Organisation of the Petroleum Exporting Countries (OPEC) gain their personality through government consensus during international conferences.

To conclude, there is no legal and administrative process comparable to the municipal concept of incorporation in international law. As there is no codified system for recognising and registering organisations as international legal persons, functionality determines whether they have it.

Objective Personality

A corporation has objective legal personality when it has legal personality in relation to non-member States, or in other words, non-member states have to recognise and respect the international corporation or organisation.[8] The possibility of an organisation having such a

[7] It is now regarded as a distinct legal entity, though it lacks a constitution.
[8] International Legal Personality. PDF.

personality was initially brought up in the so-called reparations case before the ICJ. This is important as international corporations are a big part of the international community and they will become more involved in conflicts and lawsuits. States that do not want to get involved then deny the corporation's objective legal personality. Going back to the reparations case, the ICJ decided on the ability of the UN to present a claim against a non-member State. Bringing this back to the issue of corporations, the question is then whether states can bring claims against corporations that are not member of the UN.

International Corporations

State-owned Corporations

Generally, corporations owned by countries do not subject the state to international responsibility due to the principle of corporate separation. However, according to Art. 8 of the International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts 'the conduct of a person or group of persons shall be considered as an act of a State under international law if the person or group of persons is in fact acting on instructions of, or under the direction and control of, that State in carrying out the conduct'. Which means that states may then be held accountable for failing to uphold the responsibilities that it has.

Corporations may also then claim sovereign immunity, and it is often inapplicable to corporations which are supposed to be exclusive from the states. However, the case for sovereign immunity can be made when these corporations carry out activities while pursuing sovereign authority and do it in situations where states are often protected from. This is reiterated in the United Kingdom's 1978 State Immunity Act.

Historical Development of Corporate Obligations

There have been huge efforts to developing rules to protect and promote foreign investment by individuals and corporations. It was a safeguard against things state power that could cause investors to lose their investments such as in the case of the Suez Canal Crisis. This was especially in countries that newly gained their independence as these governments often had state-centric policies that negatively affected corporations. They followed the Soviet Union's model of disregarding contractual obligations or private property rights when they were trying to develop their countries. However, the major investment opportunities and potential these countries had

resulted in Western governments creating bilateral investment protection and promotion treaties. These treaties in essence provide investors with a reasonably stable and predictable investment environment and the protective standards included in them also reflect the investors' expectations.

Reasons for International Corporate Responsibility Expectations

As all investment activities will either be to the improvement or detriment of the host country's society, investors thus became concerned over the social impact of their investments - if the society of the host country suffers, so will the security and long term stability of its investments.[9] However, the more widely accepted view, which associates multinational enterprises as the primary source of foreign investments, believe that the corporate obligations came from the perception that corporate responsibility has been loss due to globalisation. These corporations have a moral responsibility to the host countries where they operate in as a certain form of "social contract" where they have access to resources and profits in exchange for ensuring fundamental and universal human rights are adhered to. Thus, international corporate responsibility is merely the extension of standards that used to be domestically regulated by governments to the international stage.

Non-governmental organisations (NGOs) campaigning for increased level of regulation of international corporations have moved things forward with regards to the environment and social development, the latter largely in the form of human rights. For instance, they highlighted that the Multilateral Agreement on Investment (MAI) failed to state any social responsibility of MNEs and protected the investors too much. The MAI did indeed provide corporations with rights of non-discriminatory entry and the right to bring disputes to international arbitrat, away from the host countries' jurisdiction. Another example of NGOs campaign for corporate social responsibility would be the campaign for justice for the victims of the Bhopal accident.[10] Hence, it can be seen how far ranging the expectations of corporate responsibility are and how the push for it in international law stem from the attempt to ensure balance between their responsibilities and the development of these corporations.

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[9] Muchlinski, Peter. International Corporate Social Responsibility and International Law. PDF. London: University of London.
[10] The Bhopal accident took place in 1984 where 30 tons of a highly toxic gas was released from a pesticide company (Union Carbon) in India. Approximately 600, 000 people were exposed to the gas and the government estimates 16 000 people were killed over the years as a result.

International Law of Responsibility

The law of responsibility defines the circumstances under which a state is considered to have violated its international obligations as well as the available defences that a state has in response.[11] It also describes the penalties that will be inflicted upon the violating state, including reparations of the damaged caused. This law was codified by the ILC in 2001 under the Articles on the Responsibility of States for Internationally Wrongful Acts. Therefore, the question is what the law of responsibility for corporations is.

Control of Acts of Organizations by Countries

In response to the campaigns for greater social responsibility, countries have begun taking up "soft law" instruments such as the *Organisation for Economic Cooperation and Development's* (OECD) 2000 Guidelines for Multinational Enterprises and the *International Labour Organisation's* (ILO) Tripartite Declaration of PRinciples on Multinational Enterprises and Social Policy.[12] Furthermore, there are also cases where the issues of accountability of corporations under international human rights rules before national tribunals of the United States, which also include developing a civil law standard to allocate liability of human rights violations on corporations. However, only one binding convention regarding corporate responsibility has been adopted - OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

More recently the UN Special Representative on the Issue of Human Rights and Transnational Corporations and other Business Enterprises ('The UN Special Representative') asserted in his Report to the UN Human Rights Council of April 2008 that 'international law provides that States have a duty to protect against human rights abuses by non-State actors, including by business, affecting persons within their territory or jurisdiction' (at para. 18). Their duties include: creating a culture that respects human rights, finding a balance between corporations' needs and the countries' obligations to human rights in the course of international investment arbitration. He

[11] "Obo." State Responsibility in International Law - International Law - Oxford Bibliographies. March 21, 2019. Accessed April 12, 2019. http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0031.xml.
[12] Muchlinski, Peter. *Corporations in International Law*. PDF. Max Planck Encyclopedia of Public International Law.

also re-emphasized in 2009 the states' duty to protect international human rights and stated that there is the possibility of "responsible contracting" where the obligation to protect human rights is included in the contracts of corporations.

Case Study: International Investment Law

Free trade agreements (FTAs) and Bilateral Investment Treaties (BITs) are the two main issues that make up international investment law. These treaties gives corporations operating in foreign countries protections under international law like the guarantee of the international minimum standard. They also include clauses that prevent host states from violating the contracts with corporations, allowing corporations to bring claims against such governments through platforms such as the World Bank's International Centre for the Settlement of Investment Disputes (ICSID). Governments cannot prevent corporations from raising these claims or construing arguments that set expansive arbitral precedents, making their role in such arbitration merely passive. Going by the reasoning from the ICJ's *Reparation Case* again, corporations under international investment law do indeed have international legal personality that is separate and distinct from other international actors as they are allowed to bring claims against states.

Supporters of this aspect of international law, which gives corporations legal personality, maintain that it brings a smorgasbord of benefits as it reflects widely held principles. It protects things like property rights and the rights to due process of corporations, both of which are extremely important. In fact parts of investment treaty already hold corporations in their capability as international persons to uphold human rights as they are encompassed within international investment law. Conversely, detractors have often pointed out that BITs and FTAs empower corporations to such a great extent that they are free to ignore the domestic jurisdiction of the host country's courts.

<u>The Problems of Corporate Personhood in International Investment Law</u>

The two camps are roughly split down the middle - with half believing that corporations should have legal personality which would protect them from unequal treatment by host countries' governments that are interested in preventing political participation of foreign corporations; and human rights advocacy groups that believe corporations should only have legal personality when it comes to placing obligations on them.

Some scholars have begun suggesting that investor state arbitration creates a new subject in international law altogether, which have legal implications. As corporations are subjects of international law on their own, their home country no longer has power over them on the

international stage. This means that corporations can choose to waive their rights to file a claim and ignore their home country's wishes to press charges in order to achieve a certain precedent or as a form of attack against another country. Furthermore, it may also cause implicit limits on state-to-state dispute settlement provisions. For instance, interstate arbitral decisions cannot legally bind corporations into something as they are subjects of international law.

Obligations of Corporations with Personhood

With personhood and being subjects of international law, some propose that the Articles of State Responsibility are not applicable as they solely govern the relationships of states. There is some evidence that this view is adopted and applied - for instance the arbitrators noted that Argentina could not resort to the defence of necessity because defense could not be applied towards a non-state party in *BG v. Argentina.* Corporations could, as a result, get much more protection than states. On the other hand, the normal rules of international persons should apply to corporations in the same way they apply to the traditional subjects of international law. However, without a clear international standpoint agreement on this, others have also suggested to extrapolate corporate responsibility through national laws. Such a move would enjoy the added legitimacy of having the backing of states, who are still considered the most qualified law-makers.

Case Studies: Human Rights

Corporations have come under scrutiny and pressure to prevent any abuse of human rights. Largely, discussions regarding human rights and corporations highlight that international law has articulated the important norms. International law also assumes two things regarding corporations: that there are specific human rights norms that non-state actors are bound by; and universally accepted human rights norms apply directly to States as well as non-state actors, including MNCs as it is a *jus cogens* norm. The first of which is true, with certain norms that can be directed only at corporations; however, the latter is the responsibility of states and not MNCs to ensure.

This trend is evident as in 2011, the UN Human Rights Council adopted the *UN Guiding Principles on Business and Human Rights 2011,* reiterating that states had to monitor and ensure that their corporations did not commit any violation of human rights as well as reinforcing the responsibility of corporations to respect human rights and prevent any violation of it through negligence. States and corporations would also be required to pay compensation to the victims of any such abuses. Countries like the UK further support this notion by enacting laws to regulate corporations' actions - for example, it introduced the Modern Slavery Act which required any company that had an annual turnover of US$43 million or more to submit annual reports of its measures to prevent slavery in its supply chain.

International investment law (IIL) also provides corporations with international rights and responsibilities. Many bilateral and multilateral investment treaties, investor-state contracts, and customary international law confer these rights onto corporations. Some of these rights include the right to transfer profits out of the host country and the "fair and equitable treatment standard", which protects procedural rights.

Past cases under IIL suggest that corporations possess certain enforceable obligations. The tribunal in *Urbaser v. Argentina* concluded that corporations can be liable for obstructing the realisation of human rights. The UN Guiding Principles on Business and Human Rights buttresses the conclusion. Furthermore, Morocco and Nigeria also signed a bilateral investment treaty requiring corporations to "uphold human rights in the host state" and "not to manage or operate

the investments in a manner that circumvents the host states' international human rights, environmental, or labour obligations".

However, even with numerous actions which support corporations having responsibilities under international law, there still lacks a universal consensus on whether corporations should be held responsible for human rights and the extent of regulation. For example, the US and Japan, countries that host powerful multinational corporations, voted against UNHCR resolution A/HRC/26/L.22/Rev.1 that proposed the creation of an intergovernmental group that aimed to establish "an international legally binding instrument to regulate, in international human rights law, the activities of Transnational Corporations and Other Business Enterprises". Furthermore, the fact of the matter is that more than half of corporations do not fulfil their responsibilities to safeguard against human rights which the UN laid out.

Scope of Debate

International Legal Personality of International Corporations

Human Rights of Corporations

The Strasbourg Court has ruled that corporations in fact do have rights as article 1 of Protocol 1 indicates a right to property for "every natural or legal person".[13] In the United States, corporations have the same amount of protections under the constitution as humans do and the European Court of Human Rights have assumed that such rights inherently exist.[14]

Source of Corporations' Legal Personality

As mentioned earlier, there a numerous conflicting views on where corporations derive their legal personality from. Delegates have to reconcile the differences between those advocating for allowing only explicit recognition by countries to grant international corporations legal personality and those believing that functionality suffices to determine legal personality.

Implications on International Law

Delegates should consider how international law will accommodate corporations as an international person. This includes important issues such as state-corporation arbitration and the ability of corporations to bring claims against a state, and the protection of the rights of corporations.

Rights and Privileges of International Corporations

Delegates should determine the level of rights and privileges that these corporations have in international law, noting that most of the rights under consideration are usually accorded to states. Some of the things that should be considered are: the ability of corporations to make treaties, their capacity to espouse international claims, whether they can stand before international tribunals, and their capacity to own property.

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[13] Ucl. "Human Rights and Corporations – Where Are We Now?" UCL Faculty of Laws. December 05, 2017. Accessed April 28, 2019. https://www.ucl.ac.uk/laws/events/2017/dec/human-rights-and-corporations-where-are-we-now.
[14] Scolnicov, and Anat. "Lifelike and Lifeless in Law: Do Corporations Have Human Rights?" SSRN. May 23, 2013. Accessed April 28, 2019. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2268537.

Relations of International Corporations

This specifically refers to the ability of international corporations to form relations with other actors on the international stage as this ability is largely accorded to states, where the can form working relations with other states. Therefore, delegates should try and determine how would international corporations' ability in this regard be affected.

Responsibilities of International Corporations to International Law

If corporations are given rights and privileges under international law, they are then expected to have a certain level of responsibility. Delegates should come up with general principles to guide countries on what responsibilities corporations should have under international law and can come up with specific duties of corporations. For example, delegates can consider to what extent are corporations responsible for protecting human rights in the countries they are based in.

For example, the International Minimum Standard refers to the baseline standard of treatment regarding the treatment of foreign nationals.[15] It consists of things like the right to life, liberty, free access to the courts, the protection of property and non-discrimination. What is does is then protect investments, both foreign and domestic, to guarantee fair treatment that is in line with the principles expounded in customary international law. Corporations are entitled to uphold such legal responsibilities.

[15] US Legal, Inc. "International Minimum Standard Law and Legal Definition." International Minimum Standard Law and Legal Definition | USLegal, Inc. Accessed April 12, 2019. https://definitions.uslegal.com/i/international-minimum-standard/.

Questions A Resolution Must Answer

1. Do corporations have international legal personality and how important is it that they are accorded it? How can we determine this?
2. How will the responsibilities that corporations have under international law change given the nature of personhood accorded to them?
3. What should be an appropriate set of privileges and responsibilities that international corporations should have?
4. How should such responsibilities be harmonised and concretised universally?

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