Peremptory Norms (Jus Cogens) *in International Law* by Lauri Hannikainen (Finnish Lawyers' Publishing Company, Helsinki, 1988) pages V-XXXII, 1-727, bibliography 728-76, Index 777-81. Price US$118.00 (hardback) ISBN 951-640-394-8.

Will all peremptory norms please stand up and be counted? In this epic work covering some 800 pages and spanning several centuries, world orders and multilateral conventions, Hannikainen sets out to lift the veil on the mystery of the hitherto unknown *jus cogens* phenomenon. The purpose of this study, he states, is to 'clarify the criteria of peremptory norms and to apply those criteria with rigour so as determine which norms of international law can be held to be peremptory.'[1]

The application of the criteria of peremptory norms to the norms of international law in this study is presented within a framework of positive law doctrine — as Article 53 of the Vienna Convention of the Law of Treaties 1969 gives a legal definition of peremptory norms and norms which are accepted and recognized by the international community of States as a whole. However, a normative analysis is advanced in the analysis of the values, interests and motives of the international community with the advancement and development of peremptory norms.

The book is divided into three parts. Part I, entitled the 'Historical Development of International *Jus cogens*' begins with the Peace of Westphalia (1648) and continues through the two world wars, the conclusion of the Vienna Convention and up to the present day. Hannikainen observes that the existence of *jus cogens* has become firmly established in the period after the Vienna Convention: in the *opinio juris* of states, in two other conventions (the Third United Nations Conference on the Law of the Sea and the 1986 Vienna Convention on the Law of Treaties between States and International Organisations) and generally, in the attitude of states to also accept the operation of peremptory norms outside the law of treaties. But the issue of content has still not been clarified and as a result, says Hannikainen, *jus cogens* is not yet a viable or well functioning notion within international law.

Part II of the book is concerned with the preconditions for the existence of peremptory norms in present day international law. Chapter 5 examines in detail the 5 major criteria of peremptory norms as stipulated by the author:

1. A peremptory norm is a norm of general international law;
2. It must be 'accepted and recognized by the international community of states as a whole';[2]
3. No derogation is permitted;
4. A peremptory norm may only be modified by a new peremptory norm; and

[1] Hannikainen, L., *Peremptory Norms* (Jus Cogens) *In International Law* (1988) 19.
[2] Vienna Convention on the Law of Treaties 1966 art. 53.

5. Obligations under peremptory norms are owed by states to the international community of states.

Four are taken from article 53 of the Vienna Convention, the fifth Hannikainen derives from the purpose of *jus cogens* to protect the overriding interests of the international community of states.

It is with the first point that critics of *jus cogens* take issue, as they believe that even the most general rules still fall short of being universal, thereby denying the existence of peremptory norms. Hannikainen engages in a thoughtful analysis of whether 'general international law norms' can be 'universal', canvassing the difficulty of whether it can be said with precision that general international law imposes obligations on all states.

The second criterion raises the question, discussed by Hannikainen, of what is meant by 'the international community of states as a whole'? He notes that a considerable majority of writers have adopted the view of the International Law Commission that 'as a whole' means it would be sufficient that 'all the essential components of the international community recognize it. ... In practice ... *nearly all* States.'[3] But what is meant by 'all the essential components' of the international community? Sinclair has noted that the existence of differences in ideology, wealth and objectives amongst individual nation states are a barrier to the forming of an international community consensus on the content of *jus cogens*. Such disparities create a danger of principles being invoked as *jus cogens* to serve a 'particular ideological or economic goal'.[4] Weil has also noted the dangers inherent in the possibility that a number of states (not necessarily in the majority) may coerce others to 'accept the supernormativity of rules they were perhaps not even prepared to accept as ordinary norms.'[5]

Hannikainen concludes that the prevailing view is that the international community of States as a whole is empowered to impose a peremptory norm upon a small minority in order to ensure respect of 'the common good'. But he notes that not all sources of international law are suited to being 'direct decisive sources of peremptory norms'.[6] It is customary law, says Hannikainen, that is most suited to being a direct decisive source of peremptory norms; the passive attitude of states to customary law can be seen as acquiescence to the establishment of such norms and only sustained dissent may prevent the formation of a customary peremptory norm. But in urgent cases, the international community may assume the authority to require one or a few dissenters to observe the customary peremptory norm.

Chapter 6 is entitled 'The Capability of the International Community of States to React to Violations of Peremptory Norms'. Section A concerns the issue of *jus cogens* invalidity in the Vienna Convention. Hannikainen observes and comments on the significant serious procedural defect in Articles 65 and 66 of the Vienna Convention in which only the parties to a given treaty have the right to

3 Hannikainen, *op. cit.* n. 1, 211 (emphasis in original).
4 Sinclair, I. M., *The Vienna Convention on the Law of Treaties* (2nd ed. 1984) 223.
5 Weil, P., 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413, 427.
6 Hannikainen, *op. cit.* n. 1, 216.

invoke the invalidity of that treaty on the grounds of its conflict with a peremptory norm. As he observes, this is in direct conflict with the purpose of *jus cogens* to protect the overriding interests of the international community as a whole. Section B deals with the main forms of reaction by the international community of States to alleged violations of peremptory norms. Of the various forms of reaction, Hannikainen notes that condemnation of unlawfulness is the most common reaction of the international community. Declarations of invalidity and non-recognition have also occurred in certain instances. However, most declarations deal with invalidity of titles and acts based on those titles — very few statements concern the invalidity of treaties *per se*. Enforcement and punitive action is the form of reaction least undertaken by the international community, which has not responded with any consistency in this area. Section C concerns the capability of international machinery to react to violations of peremptory norms. In view of the strictness of the criteria of peremptory norms, together with the deficiencies in international legal, judicial and enforcement systems, Hannikainen states that international law can only support a limited number of peremptory norms. But whilst there is inconsistency in international reaction to violation of peremptory norms, this does not of itself negate the value and existence of peremptory norms in international law because 'law is inevitably applied in the context of a political process'.[7]

In Section D of the chapter, Hannikainen considers what kinds of acts are prohibited by peremptory norms in present day international law. He concludes that there is an obligation to refrain from rendering at least *direct* and *deliberate* assistance to any state or entity to enable that party to commit a violation of a peremptory norm. Third party states are under an obligation not to extend recognition to instruments which conflict with peremptory norms. But the obligation to combat violations of peremptory norms by positive action would appear to be limited. Every state has a general obligation to take action to prevent violations of international law within its jurisdiction. On a universal level, the emphasis is on cooperation in protection of vital interests of the international community of states. As Hannikainen observes, the problem with states taking 'positive action' on their own initiative and decision is that 'such action may be taken on the basis of subjective, politically motivated interpretations of the situation'.[8]

Part III of the book addresses the issue of which norms in present day international law are peremptory. Hannikainen examines a selection of five categories of norms for detailed examination and identifies a number of peremptory norms within these categories. The categories he examines are the use or threat of force between states (Chapter 8), the self-determination of peoples (Chapter 9), human rights (Chapter 10), international areas beyond the limit of national jurisdiction (Chapter 11), and armed conflicts (Chapter 12). These final chapters contain a thorough and detailed analysis of the application of the criteria of peremptory norms as set out by Hannikainen, in these areas. Hannikainen's

[7] *Ibid.* 311.
[8] *Ibid.* 314.

selection of categories is determined by the norms for which he believes there is substantial evidence that they possess peremptory status. He concludes that the common heritage of mankind principle is a norm with peremptory obligations and that *jus cogens* protects the international status of the high seas, air space, sea bed and outer space by prohibiting their subjection to the sovereignty of international states. Although peremptory norms exist within the area of the law of armed conflicts, there are, however, serious gaps relating to modern weaponry, particularly the aspects of 'excessive, unnecessary suffering'[9] and the protection of civilian populations and protection of the environment.

Within the analysis of the self-determination norms, Hannikainen concludes that the obligation of States not to exploit the natural resources of dependent territories to the detriment of the people of these territories is a peremptory norm, and he discusses the question of Namibian uranium. Australia's conclusion of the Timor Gap Treaty with Indonesia to exploit the resources of the Timor Gap region immediately springs to mind here. And one is also reminded of the frustrating inadequacies of Article 65 and 66 of the Vienna Convention, as mentioned earlier, which means that even if the treaty is held to be in conflict with the peremptory norm of self-determination, it can be revoked on that basis only by Australia and Indonesia.

Hannikainen notes that the United Nations did not condemn the exploitation by Morocco and Mauritania of the natural resources of Western Sahara. He notes that in the case of Western Sahara 'the exploitation may be regarded as less "shocking" than for example in the case of Namibia, because the exploitation is not by an industrial state *vis-à-vis* an underdeveloped territory but an underdeveloped state *vis-à-vis* an underdeveloped territory.'[10] Yet surely aggression and exploitation are not lessened merely by the identity or affiliation of the perpetrators.

This reviewer takes issue with Hannikainen's view that self-determination of East Timor may be viewed in some sense as '*marginal*'[11] because of its geographical position. 'Indonesia's action appears to have had some legal basis because of the geographical position of East Timor within the Indonesian archipelago'.[12] Hannikainen's interpretation of the East Timor situation would appear to involve a lenient view of Indonesia's action. Perhaps this is a consequence of the tyranny of distance confronting the author.

Hannikainen concludes that at present, given international community response, the peremptory norm of self-determination may comprise only obligations with regard to a colonial type domination but not with regard to annexure by neighbouring territories with ethnic and cultural similarities. This highlights a major problem of the operation of peremptory norms in international law today: despite alleged universality in application, the operation of peremptory norms is constrained and manipulated by political considerations. Other major problems in the viability of *jus cogens* today have been the inactivity of the international

[9] *Ibid.* 715.
[10] *Ibid.* 421.
[11] *Ibid.* 423.
[12] *Ibid.*

community in expressly stating which norms it considers to be peremptory and also the capability of the international community (given present machinery) to react to violation of peremptory norms. Perhaps the most fundamental criterion of peremptory norms is the element added specifically by Hannikainen: that peremptory obligations are owed by all states to the international community of states. Only then can such norms be truly peremptory.

This book is a valuable contribution to this area of international law and is strongly recommended.

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