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Peremptory norms of general international law (*jus cogens*)

Comments and observations received from Governments

Contents

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I. Introduction

1. At its seventy-first session (2019), the International Law Commission adopted, on first reading, the draft conclusions on peremptory norms of general international law (*jus cogens*).[1] In accordance with articles 16 to 21 of its statute, the Commission decided to transmit the draft conclusions, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2020.[2] The Secretary-General circulated a note dated 17 September 2019 to Governments transmitting the draft conclusions on peremptory norms of general international law (*jus cogens*), with commentaries thereto, and inviting them to submit comments and observations in accordance with the request of the Commission.

2. In September 2020, it was decided to extend the deadline to 30 June 2021, in light of the General Assembly's decision (74/566) to postpone the seventy-second and seventy-third sessions of the Commission to 2021 and 2022, respectively. The Secretary-General circulated a note dated 22 September 2020 to Governments reiterating the invitation contained in the note of 17 September 2019 and informing Governments of the extension of the deadline. By its resolution 75/135 of 15 December 2020, the General Assembly drew the attention of Governments to the importance for the International Law Commission of having their comments and observations on the draft conclusions on peremptory norms of general international law (*jus cogens*) adopted on first reading by the Commission at its seventy-first session, and took note of the extension of the deadline to 30 June 2021 for Governments, to submit comments and observations to the Secretary-General.

3. As of 7 January 2022, written comments had been received from Australia (14 July 2021), Austria (25 May 2021), Belgium (29 June 2021), Colombia (30 June 2021), Cyprus (30 June 2021), the Czech Republic (21 January 2021), Denmark (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (28 June 2021), El Salvador (30 June 2021), France (30 June 2021),[3] Germany (28 June 2021), Israel (15 July 2021), Italy (23 June 2021), Japan (29 June 2021), the Netherlands (28 January 2021), Poland (18 August 2021), Portugal (12 July 2021), Russian Federation (4 August 2021), Singapore (14 July 2021), Slovenia (30 June 2021), South Africa (10 May 2021), Spain (7 July 2021), Switzerland (28 June 2021), the United Kingdom of Great Britain and Northern Ireland (30 June 2021), and the United States of America (30 June 2021).

4. The comments and observations received from Governments are reproduced in chapter II below. The comments and observations are organized thematically as follows: general comments and observations and specific comments on the draft conclusions.[4]

[1] Report of the International Law Commission on the work of its seventy-first session, *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 52.

[2] *Ibid*., para. 54.

[3] The present report reflects the summary of the submission by France. The full submission is available from the website of the International Law Commission at: https://legal.un.org/ilc/guide/1_14.shtml.

[4] In each of the chapters below, comments and observations received are arranged by States, which are listed in English alphabetical order.

II. Comments and observations received from Governments

A. General comments and observations

Australia

[Original: English]

Australia thanks the International Law Commission for its important work on the topic of peremptory norms of international law (*jus cogens*), and for providing a set of draft conclusions and accompanying commentary for States' consideration and comment. Australia would also like to express its appreciation to the Special Rapporteur, Mr. Dire Tladi, for his extensive work on this topic.

Australia appreciates the Special Rapporteur's and the Commission's diligent work in considering previous State comments submitted on this topic. In that regard, Australia welcomes the conclusion of the Special Rapporteur in his fourth report that it is not necessary to include a draft conclusion in relation to regional *jus cogens* norms, noting that the notion of regional *jus cogens* norms does not find support in the practice of States.

Preliminary observations

Australia appreciates the importance of the Commission's work on this topic in providing clarity and guidance on identifying the peremptory character of norms of international law and their consequences and legal effects. Australia considers that it is essential that the draft conclusions and their commentaries provide guidance to States, national courts, international and regional courts, and other actors, who may be called upon to consider the existence of *jus cogens* norms and their legal consequences. It is imperative that such guidance accurately reflects international law, is grounded in the practice of States and is practical. In that regard, Australia submits the following comments and observations on the draft conclusions, and their commentaries, which it considers would enhance the quality of the guidance provided. The specific draft conclusions referred to below are illustrative examples of these key practical and conceptual considerations and are not intended to be exhaustive. As such, this submission is without prejudice as to the position of Australia on the remaining draft conclusions.

As an overarching comment, Australia respectfully requests that where draft conclusions are based on the Commission's draft articles on the responsibility of States for internationally wrongful acts or the Vienna Convention on the Law of Treaties but differ in form, that the commentaries expressly outline the basis and reasons for the variation.[5]

Austria

[Original: English]

Austria welcomes the work of the International Law Commission on peremptory norms, one of the major pillars of international law. When, in the course of the elaboration of what became the Vienna Convention on the Law of Treaties, the Commission examined this subject for the first time, a major step was made to address a fundamental issue that affects the whole system of international law. Although some States had doubts as to the advisability of a reference to such norms in the context of the law of treaties, references to peremptory norms were ultimately accepted. The Commission had come to the conclusion that there were certain rules of international law from which derogations were not possible.

Austria understands from the title of the present topic, peremptory norms of general international law (*jus cogens*), and from draft conclusion 1 as well as from

[5] An example of where the commentaries can be further elaborated in this respect is the commentaries to draft conclusion 18.

the Commission's commentary on the respective draft conclusion (para. 7)[6] that the conclusions do not address norms of a purely regional character. As a consequence, Austria understands that the Commission leaves it open whether regional peremptory norms exist and may revert to this issue at a later stage.

Belgium

[Original: French]

Belgium would like to congratulate the International Law Commission, in particular the Special Rapporteur, Mr. Dire Tladi, for the work done on this topic.

…

General comments

For many of the draft conclusions, there are few concrete examples of application or practice. The Commission does not go into detail and limits itself to abstract formulations. Hypothetical examples are used to clarify matters only in a few exceptional cases, for example with regard to the impact of *jus cogens* on reservations to treaties (see the example of a discriminatory reservation to a treaty provision concerning the right to education in paragraph (4) of the commentary to draft conclusion 13). The Commission's work would be all the more useful if concrete examples of practical application were given elsewhere (for example in relation to draft conclusion 12, paragraph 2, concerning the consequences of the termination of treaties conflicting with a *jus cogens* norm on rights and situations created prior to termination).

…

Peremptory norms of general international law (jus cogens) and national public order

It might be desirable to examine the question of whether *jus cogens* should necessarily form part of public order within national legal systems. Clarifying this in the draft conclusions could make peremptory norms more effective in the context of cases brought before national courts.

Colombia

[Original: Spanish]

As part of the … discussions and efforts to recognize and study *jus cogens*, Colombia wishes to point out that the International Law Commission's draft conclusions on peremptory norms of general international law (*jus cogens*) are an important work of consolidation for the crystallization of international law, since they define this typology of norms, the nature thereof and the criteria for their identification. The draft conclusions are also an important work for the systematization of this law, since they establish the legal consequences arising under peremptory law. In the draft conclusions, the Commission focuses on addressing one of the main issues surrounding *jus cogens*: the indeterminacy of its content, owing to the absence of clear criteria for its identification in the international legal order.

Based on this understanding, a list of indicative draft conclusions concerning the identification of this set of norms, as well as the establishment of their legal consequences, facilitates the development of legal relations between States and international organizations.

In the draft conclusions, the Commission notes that *jus cogens* norms predominantly derive from customary sources, although they could also derive from

[6] A/74/10, p. 148.

treaties. As the Commission has already indicated, this would give treaties sufficient legal capacity to establish a peremptory norm of general international law.

Cyprus

[Original: English]

The Republic of Cyprus welcomes the work of the International Law Commission on peremptory norms of general international law *(jus cogens*) and the adoption of draft conclusions on first reading at the Commission's seventy-first session, and appreciates the opportunity to submit its comments and observations on the topic.

Taking into consideration the fundamental role of peremptory norms in the interpretation and application of international law, the Republic of Cyprus would like to express its support to the Commission's work on this topic and its commitment to the further development of the draft conclusions under discussion.

The Republic of Cyprus stresses the hierarchical superiority of peremptory norms compared to other rules of general international law, their non-derogable character and their universal application. Moreover, we strongly believe that we must uphold the current threshold with respect to the formation of peremptory norms, namely that they must be accepted and recognized by the international community of States as a whole. Lastly, the Republic of Cyprus stresses that treaties must be interpreted in a manner consistent with peremptory norms.

Czech Republic

[Original: English]

We commend the International Law Commission for its work on and the completion of the first reading of the draft conclusions and appreciate outstanding contribution of the Special Rapporteur, Mr. Dire Tladi, to the preparation of the draft conclusions.

We concur with the methodology of the Commission, which focuses on the structural aspects of peremptory norms of general international law and is consistent with the approach to peremptory norms applied in the course of the elaboration of the Vienna Convention on the Law of Treaties and in the Commission's work on other relevant topics.

We agree with the key elements of the definition of a peremptory norm in draft conclusion 2, which closely follows the language of article 53 of the Convention. We also concur with the characterization of peremptory norms of general international law as reflecting and protecting fundamental values of the international community, which are hierarchically superior to other rules of international law and universally applicable (draft conclusion 3). Both draft conclusions are closely interconnected and have to be read together.

Concerning the identification of peremptory norms, as well as their legal consequences in respect of other rules of international law, or in respect of their breach, the Czech Republic supports:

(*a*) the two-criteria requirement for (the two-step approach to) the identification of peremptory norms (draft conclusion 4) and the emphasis on evidence of their acceptance and recognition as peremptory norms (draft conclusion 6);

(*b*) underscoring the fact that it is only States whose acceptance and recognition is relevant for the identification of peremptory norms of general international law (draft conclusion 7);

(*c*) basic parameters of conclusions concerning legal consequences of peremptory norms of general international law in respect of treaties and reservations (draft conclusions 10–13) and other sources of international law (draft conclusions 14–16), conflicting with peremptory norms; and

(*d*) conclusions concerning legal consequences of these norms in the context of the law of the responsibility of States for internationally wrongful acts (draft conclusions 17–19).

Denmark (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries, Denmark, Finland, Iceland, Norway and Sweden, would like to thank the International Law Commission and the Special Rapporteur Mr. Dire Tladi for the excellent work conducted on this significant file. …

Peremptory norms of general international law is an important topic with potential significant effects, not only on the understanding of international law as a legal system, but also with possible practical effects, the extent of which remains, as of yet, unclear. As we have stated earlier, it is in our view a topic that does not easily lend itself to codification, considering the relatively limited and varying State practice. This calls for a cautious approach when moving forward.

Therefore, while the conclusions will undoubtedly be useful guidance for practitioners, we continue to hold the view that the topic of peremptory norms is best dealt with by the Commission through a conceptual and analytical approach rather than with a view to elaborating a new normative framework for States. In this context, we believe that the conclusions should be kept closely aligned with established and well-founded interpretations on the consequences and effects of *jus cogens* norms.

El Salvador

[Original: Spanish]

In that regard, the Republic of El Salvador thanks the International Law Commission for its valuable work and the Special Rapporteur, Mr. Dire Tladi, for his outstanding contribution, and wishes to make the following comments with regard to the draft conclusions.

With regard to the methodology for the present topic, it is important to bear in mind the comments and legislative, judicial or executive practices reported by States and international organizations, including regional integration organizations, and their respective courts or tribunals; it would be worth highlighting how, in the case law of such courts and tribunals, the peremptory nature of an international norm is identified or recognized in the context of the analysis and application of community law.

However, a cautious approach should be maintained with regard to regional *jus cogens* so as to ensure that it does not give rise to any uncertainty as to the universal applicability of *jus cogens* norms. The concept of *jus cogens* is based on the acceptance of fundamental and superior values within the international system. In that sense, *jus cogens* norms, the superior nature of which is broadly recognized in the practice of States, and the universal applicability of such norms, cover all the specialized branches of international law, including regional integration law. Thus, we consider that the acceptance of regional *jus cogens* can serve only as a means for identifying how the peremptory nature of certain international norms is recognized or addressed; moreover, regional norms cannot *per se* or in an isolated manner become universally applicable.

France

[Original: French]

France wishes to thank the International Law Commission for preparing and transmitting these draft conclusions and the commentaries thereto. France believes that the dialogue with the Commission on the topic of peremptory norms of general international law (*jus cogens*) is taking place in a context where public international

law is, in general, faced with issues of coherence and articulation which may affect its clarity and intelligibility.

In such a context, the full objective of the dialogue that has been initiated between the Commission and States on *jus cogens* must be to consolidate and strengthen international law by making it clearer and more intelligible, while ensuring legal certainty for all its actors. As the United Nations body charged with the codification and progressive development of international law, the Commission has an important leadership role to play in that regard.

It must be admitted that the manner in which *jus cogens* is invoked by certain courts, both domestic and international, reflects a development of the concept that goes beyond what was originally envisaged in articles 53 and 64 of the Vienna Convention on the Law of Treaties. The concept not only affects the foundations of the international legal order, from a theoretical point of view, but also has concrete and practical implications, particularly when it is taken up by national judges. It is therefore important, owing to the significant legal consequences that some intend to attach to *jus cogens*, that the concept be approached in a thorough, prudent and reasonable manner.

Germany

[Original: English]

Germany wishes to express appreciation for the work of the Special Rapporteur, Mr. Dire Tladi, and the International Law Commission as a whole on this highly relevant topic and commends the Commission on having adopted the draft conclusions on first reading. The issue of legal effects and consequences arising from peremptory norms of international law (*jus cogens*) is of paramount importance to the overall architecture of the system of international law. In the following, Germany would limit itself to some of the key points regarding this topic.

Germany appreciates the comprehensive and thorough work by the Special Rapporteur as well as his thoughtful study on the criteria and formation of *jus cogens* in his reports. Yet, Germany still shares concerns expressed by other States with a view to an insufficiency of substantial State practice on the topic and therefore in principle favours a more conservative approach. In this context, it is further submitted that the commentaries to the draft conclusions would benefit from a more detailed elaboration on specific examples of State practice, where relevant.

With respect to the distinction between the codification of existing law and its progressive development, Germany submits that further clarification would be helpful keeping in mind the potentially wide-ranging implications of the draft conclusions.

Israel

[Original: English]

The State of Israel attaches importance to the International Law Commission's work on this topic, which concerns a distinctive category of international law that has a unique role in safeguarding the most fundamental rules of the international community of States. Israel appreciates both the efforts of the Special Rapporteur, Mr. Dire Tladi, and the Commission's extensive deliberations on the basis of his reports.

Given its importance and inherent sensitivities, this topic must be handled with great care, and it is in this light that Israel wishes to make a number of observations and voice several of its misgivings. These concern both the methodology that underlines the draft conclusions as a whole, and the substance of several of the draft conclusions more specifically.

Comments as to methodology

The work on the topic thus far has shown that the methodology employed by the Special Rapporteur in his reports has been a matter of concern not only for various

States, but also for several members of the Commission. Israel shares this concern. In particular, we would note that the Special Rapporteur has relied greatly on theory and doctrine rather than on a thorough survey of State practice, which, in our view, should be the primary focus in the present context. In the view of Israel, the lack of a rigorous analysis of relevant State practice risks undermining the accuracy and legal authority of various parts of this project, and is especially striking considering the sensitive nature of the subject matter. We would add that recourse to the jurisprudence of international courts and tribunals, let alone scholarly work, does not make such an analysis unnecessary.

As Israel has stressed in its past statements on this topic, the threshold and process for the identification of *jus cogens* norms under international law must be particularly demanding and rigorous. To preserve the effectiveness and acceptance of a hierarchy of norms in international law, the boundary that divides peremptory norms from other norms must be identified clearly. A less thorough and less legally meticulous approach may seem appealing to some, but it is in our view a recipe for politicization, confusion and disagreement, and, ultimately, for undermining the force and authority of peremptory norms themselves. It follows that the draft conclusions, and the work of the Commission on this topic more generally, should reflect the existing law as widely accepted, so as to enhance the credibility of the draft conclusions and facilitate their wide acceptance.

Israel recalls the Commission's work on the topic "Identification of customary international law".[7] As a general observation, given the significance of *jus cogens* norms, the overall approach to the methodology for identifying them must be at least as rigorous as the methodology proposed by the Commission for identifying rules of customary international law. Several examples in that regard will be provided further below.

Second, Israel objects to the inclusion of a non-exhaustive list of norms that have previously been referred to by the Commission as having the status of *jus cogens*. At this point, it suffices to say that including a list of norms that have not been put to the tests suggested by the draft conclusions themselves, is difficult to justify.

Third, and closely related, Israel believes that the work on the topic of *jus cogens* should be confined to stating and clarifying international law as it currently stands. This is due to the importance of *jus cogens* norms and their implications, and the apparent divergent views among States on several issues discussed in the draft conclusions in which the Commission apparently makes proposals for progressive development of the law. If the Commission nevertheless decides to include such proposals, it should indicate so clearly. In this context, Israel notes that Part Three of the draft conclusions, in particular, which pertains to legal consequences of *jus cogens* norms, mainly reflects suggestions for the progressive development of international law, or for new law.

Fourth, we share the concerns raised by other States with regard to the procedure that was followed by the Commission in its work on this project. In contrast to the Commission's regular practice, the draft conclusions adopted by the Drafting Committee were not considered by the plenary until the conclusion of the first reading of the entire set of draft conclusions. As a result, it was more difficult for States to follow and comment on the work as it progressed. Israel calls upon the Commission not to deviate from its regular practice in this way in the future.

Comments regarding the degree to which the exceptional character and consequences of jus cogens norms are accurately encapsulated in the draft conclusions

Israel remains concerned that the exceptional character of *jus cogens* norms and the very high threshold that is required for their identification are not always

[7] See A/73/10, chapter V.

accurately encapsulated in the draft conclusions. Several points stand out in particular, as elaborated below.

[See comments on draft conclusions 5, 6, 7, 8, 9 and 14.]

Italy

[Original: English]

Italy would like to express its appreciation to the International Law Commission and to the Special Rapporteur, Mr. Dire Tladi, for the adoption of the draft conclusions on peremptory norms of general international law (*jus cogens*) on first reading and its accompanying commentary.

Italy also appreciates the opportunity given to States to send comments and observations in the spirit of mutual constructive engagement between the International Law Commission and United Nations Member States, especially in this critical phase leading to the final adoption of the draft conclusions. It is in that spirit, and without prejudice to additional comments that Italy may wish to present at a later stage, that the following observations are submitted with regard to the draft conclusions and/or relative commentary that, in the view of Italy, require a revision at second reading.

General observations

Italy attaches the greatest importance to the Commission's work on the topic of *jus cogens*. It has been supportive of the categories of *jus cogens* norms and *erga omnes* obligations ever since their emergence in the 1960s and 1970s. These are norms and obligations of international law that do not only protect the subjective rights and legal interests of individual States, but also protect the fundamental interests of the international community as a whole. *Jus cogens* in particular reflects the idea that certain fundamental norms of international law are hierarchically superior and do not allow derogation. Some of the most eminent jurists in Italy – the then-members of the International Law Commission, Mr. Roberto Ago and Mr. Gaetano Arangio-Ruiz, precisely in the respective roles as Special Rapporteurs on the law of State responsibility – provided seminal contributions to the elaboration of the significance of *jus cogens* norms and *erga omnes* obligations for the purpose of State responsibility, identifying key conceptual distinctions between ordinary violations of international law and serious violations of fundamental norms protecting the values of the international community as a whole.

During the debates held in the Sixth Committee in 2018 and 2019, Italy expressed some doubts on the type of exercise undertaken by the Commission. On the one hand, the draft conclusions are an example of "expository codification" of a practical nature, which partly lacks the theoretical depth to identify the main normative intricacies of the notion of *jus cogens*. The draft conclusions do not aim to identify the existing peremptory norms of general international law (in truth, not an impossible task given the latter's limited number) and their specific legal consequences, but they limit themselves to reiterate normative elements, which are already part of the law of treaties and of the law of international responsibility, and that have already been identified by the Commission itself in its previous works. As a result, the practical, added value of the draft conclusions within the present scope and in the present form is that they would bring under a single instrument a number of consolidated notions of international law, which should assist those called to apply international law in the identification of peremptory norms of general international law and in defining their legal consequences. On the other hand, the draft conclusions contain certain prescriptive provisions, including the procedural requirements on the invocation of *jus cogens* norms – namely draft conclusion 21 – which are difficult to reconcile with the stated purpose of "providing guidance to all those who may be called upon to determine the existence of peremptory norms of general international law". Such procedural requirements could have been appropriate if the Commission's intention (as done with previous works) was that of elaborating a set of draft articles

with a view to preparing a sound legal basis for the future elaboration of a convention – but this is admittedly not the Commission's intention in this case.

Italy would suggest that the Commission should state clearly the nature and objectives of the project it aims at pursuing and that its methodology and conclusions should be consistent with that statement.

Another general shortfall of the draft conclusions is the very limited room left for international organizations as distinct legal subjects endowed with a separate international legal personality, paradoxically in a historical juncture in which the phenomenon of international organization has become an important part of the international legal system. This is particularly stark in the part of the project dedicated to legal consequences of the violation of peremptory norms (draft conclusions 17 to 21). It is also surprising in light of the fact that in 2011 the Commission adopted a full set of draft articles on the responsibility of international organizations,[8] which regulate *inter alia* the specific consequences related to serious violations of peremptory norms and to violations of *erga omnes* obligations (draft articles 42 and 49, respectively). The Commission should incorporate in its current work those important provisions. If instead a choice is made not to do that, a clear explanation should be provided in the commentary and a "without prejudice" clause should be inserted in the text of the draft conclusions (the only relevant "without prejudice" provision is to be found in paragraph (11) of the commentary to draft conclusion 19 without explanation).

Finally, Italy would like to observe that the title of the text should better reflect its scope in accordance with draft conclusion 1 and namely, that "[t]he present draft conclusions concern the identification and legal consequences of peremptory norms of general international law (*jus cogens*)". Accordingly, a reformulation of the title to "draft conclusions on the identification and legal consequences of peremptory norms of general international law (*jus cogens*)" should be considered and would be in line with the practice followed in the recent project on the identification of customary international law (where the title closely reflects the scope of the project).

Japan

[Original: English]

Japan appreciates the efforts of the International Law Commission, in particular the Special Rapporteur, Mr. Dire Tladi, and is thankful for their devotion to the topic of peremptory norms of general international law (*jus cogens*). Japan attaches the utmost importance to promoting the rule of law in the international community, and the work of the Commission on this topic shows the development of the rule of law. On the other hand, given that the concept of *jus cogens* might incur an extraordinary legal effect in some aspects, every effort should be made to strike a balance between theory and reality. It should be stressed that the abusive invocation of *jus cogens* must be avoided. With these points in mind, Japan has the honour to submit its comments to the draft conclusions on *jus cogens* as follows.

General comments

The draft conclusions appear to clarify the methodology employed for the identification of *jus cogens* and their legal consequences (draft conclusion 1), relying on the wording of the Vienna Convention on the Law of Treaties. It also constructs its argument based on the previous products by the International Law Commission.

Employing the wordings and formulation of articles of the Vienna Convention on the Law of Treaties is sensible. States and international courts have applied the Convention for four decades.

[8] The draft articles on the responsibility of international organizations adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2011*, vol. II (Part Two), pp. 40 *et seq*., paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

If the Commission opts to rely, in general, on the articles of the Vienna Convention on the Law of Treaties, and if it decides to depart from the Convention in some parts, it should explain its rationale for doing so. This is not to say that the Commission should not deviate from the Convention. The Commission should consider different formulations for *jus cogens* if necessary, but should give a clear explanation in doing so.

At the same time, it should be noted that some issues addressed in the draft conclusions are related to the law of State responsibility and we ought to refer to the previous products of the Commission.

The Netherlands

[Original: English]

The Kingdom of the Netherlands would like to express its appreciation to the Special Rapporteur, Mr. Dire Tladi, as well as to the International Law Commission as a whole, for their work on the topic of peremptory norms of international law (*jus cogens*).

The Kingdom of the Netherlands has requested and received a report of the Advisory Committee on Public International Law on the draft conclusions on *jus cogens*. The Kingdom of the Netherlands would like to invite the Secretary-General and the International Law Commission to take note of this report, which is annexed to this letter.[9]

The Kingdom of the Netherlands endorses the Commission's general approach with respect to the topic, which focuses on the place of *jus cogens* within international law, and appreciates the Commission's efforts to provide States with guidance as to the identification of peremptory norms of international law and their legal consequences. The Kingdom of the Netherlands, however, remains critical because the draft conclusions and their commentaries rely more on judicial decisions and scholarly writings than on State practice. This will be elaborated further below.

Poland

[Original: English]

Practice of the International Law Commission

In line with the provisions of the Vienna Convention on the Law of Treaties, we consider that peremptory norms of general international law are of fundamental importance for the international legal order. This is the reason why, in our view, this topic requires particularly careful consideration to uphold the importance of these norms for international community and to avoid any possible confusion with respect to overly easy identification and subsequent application. Against this background, the adoption by the Commission on first reading of the draft conclusions on peremptory norms of general international law already in 2019 has been rather unexpected step. It is worth recalling that the Commission decided to work on this topic in 2015. Nevertheless, in the Commission's reports from 2016 to 2018 there was no information that the Commission adopted any of the draft conclusions proposed by the Special Rapporteur, nor was there any accepted commentary to the draft conclusions that could be subject to comments of States. As mentioned before, we would recommend this extraordinary method of work is not followed by the Commission in the future.

[9] The report of the Advisory Committee on Public International Law is on file with the Codification Division of the Office of Legal Affairs of the Secretariat and the full text is available from: www.advisorycommitteeinternationallaw.nl.

General perspective on peremptory norms of general international law

Poland supports the approach taken by the Commission to recognize as a starting point of considerations the provisions of the Vienna Convention on the Law of Treaties. With reference to discussions held during the sixty-seventh session of the Commission, Poland is of the view that the concept of regional *jus cogens* is in contravention, by definition, with the notion of norms *jus cogens* itself and therefore should not be accepted. It cannot be reconciled with paramount prerequisite of *jus cogens* norms that is acceptance and recognition by the international community of States as a whole.

Furthermore, Poland is of the view that all *jus cogens* norms generate obligations of *erga omnes* nature but this does not work in the other direction. Norms recognized as having an *erga omnes* validity set up undoubtedly important obligations but this importance does not determine that they have also *jus cogens* status. In general, we consider norm *jus cogens* as a special quality of particular norms and not as kind of specific, additional source of international law.

Referring to the issue of possibility of developing an illustrative list of norms that have acquired the status of *jus cogens*, we notice that the Commission in its report on fragmentation of international law has already indicated "the most frequently cited candidates for the status of *jus cogens*".[10] Reference to examples of these norms were also made in other past works of the Commission. In our view, the main added value of the Commission's endeavour in this regard would rather be explaining in more detail the criteria for identification of norms *jus cogens*, relations of these norms with other, particularly non-treaty, rules of international law and studying issues of effectiveness and enforcement of these norms.

Poland would like to draw attention to possible divergences between the Commission's draft conclusions in this respect and the International Court of Justice judgment in the case *Jurisdictional Immunities of the State*.[11] It should be noted that in paragraph 93 of that judgment, the International Court of Justice stated that there is no conflict between rules of *jus cogens* and the rules on State immunity as the latter are procedural in character. Nonetheless, neither the draft conclusions, nor the commentary thereto refer to or reflect such a legal solution. Conversely, when reading draft conclusion 3, the hierarchical superiority mentioned there does not find any exception and is not in any way limited or adjusted. As the "conclusions are aimed at providing guidance to all those who may be called upon to determine the existence of peremptory norms of general international law(*jus cogens*) and their legal consequences"[12] that is, *inter alia*, domestic courts, it would seem necessary that this issue be further addressed and clarified.

Portugal

[Original: English]

Portugal salutes and renews its tribute to the International Law Commission and the Special Rapporteur, Mr. Dire Tladi, for their work on this topic. The discussion on *jus cogens* contributes to upholding the stability of the international legal system. Adding clarity to the subject is instrumental in helping States to better identify peremptory norms of general international law and comply with them.

Portugal values this set of draft conclusions and the draft annex and underlines the relevance of *jus cogens* and its central place in the general international legal architecture.

[10] *Yearbook of the International Law Commission 2006*, vol. II (Part One) Addendum 2, p. 77, para. 374.

[11] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99.

[12] A/74/10, p. 147, para. (2) of the commentary to draft conclusion 1.

Portugal is pleased that the work of the Special Rapporteur and of the Commission on this topic so far is not reduced to a simple repetition of what is provided under article 53 of the Vienna Convention on the Law of Treaties nor to the traditional discussions on *jus cogens*.

Russian Federation

[Original: Russian]

The Russian Federation would like to thank the Special Rapporteur, Mr. Dire Tladi, and the International Law Commission for the work done on the topic and for its study of a broad range of sources, and hopes that its comments will be helpful to the Commission in its future work on the topic.

Singapore

[Original: English]

Singapore commends the Commission and the Special Rapporteur, Mr. Dire Tladi, for taking up the important task of clarifying the methodology for determining the existence and content of peremptory norms of general international law (*jus cogens*). Singapore gave views on this topic at the 2017, 2018 and 2019 sessions of the Sixth Committee.[13]

Slovenia

[Original: English]

The Republic of Slovenia expresses its appreciation to the members of the International Law Commission and the Special Rapporteur, Mr. Dire Tladi, for the work done on the topic in an attempt to clarify the definitions, general nature and methodology of identification of the peremptory norms of general international law (*jus cogens*) and the legal effects thereof.

South Africa

[Original: English]

We wish to pay special tribute to the Special Rapporteur, Mr. Dire Tladi, for the constructive way in which he led the Commission towards the successful adoption of the first reading text on this most difficult topic. Special words of congratulations are also due to the Chairperson of the Drafting Committee for the Commission's seventy-first session, Mr. Grossman Guiloff, as well as to the previous Chairpersons of the Drafting Committee, Mr. Šturma, Mr. Rajput and Mr. Jalloh, and to the International Law Commission as a whole, for their work on the topic of *jus cogens.*

South Africa is particularly pleased with the Commission's work on *jus cogens*, and we are convinced that the strengthening of *jus cogens* is of critical importance in light of the many challenges posed to the upholding of the rule of law internationally. The Commission has managed to deliver a well-balanced text of draft conclusions, supported by practice and judicial decisions of international courts and tribunals. While the draft conclusions avoid the philosophical debates of whether *jus cogens* is based on natural law or positive law, they strike a good balance between the values underpinning *jus cogens* and the need for some sort of recognition and acceptance by the international community. We generally support the draft conclusions.

[13] See the statements by the delegation of Singapore at the seventy-second, seventy-third and seventy-fourth sessions, respectively, of the Sixth Committee of the General Assembly, available from: www.un.org/en/ga/sixth/72/pdfs/statements/ilc/singapore_3.pdf (pp. 1–3); www.un.org/en/ga/sixth/73/pdfs/statements/ilc/singapore_2.pdf (p. 3); and www.un.org/en/ga/sixth/74/pdfs/statements/ilc/singapore_1.pdf (pp. 3–4).

Spain

[Original: Spanish]

Spain congratulates the International Law Commission and, in particular, the Special Rapporteur, Mr. Dire Tladi, for preparing the draft conclusions and the commentaries thereto on a topic that is of vital importance for public international law. The draft conclusions represent an output of great substantive interest, since they deal with the types of rules which, by their content, reflect and protect the fundamental values of the international community. Along with the other outputs of the Commission, they also contribute to the construction and refinement of international law as a legal system.

Spain commends the Commission and the Special Rapporteur for their efforts to base the draft conclusions and commentaries thereto on practice, jurisprudence and doctrine on the topic. Spain would also have liked, however, to see that the work included more frequent references to Spanish-language jurisprudence and doctrine. This is not a linguistic grievance, but a substantive one. The Commission should take into consideration the practices of different legal systems, and not be limited to just one or a few of them.

In making its comments and observations, Spain will focus on the nature of the draft conclusions, the identification of peremptory norms of general international law, the legal consequences and the desirability of including an illustrative list of *jus cogens* norms.

Observations and comments on the nature and scope of the draft conclusions

The draft conclusions on peremptory norms, like other texts prepared in recent years by the Commission, are not legally binding. This does not prevent such projects, however, from generating certain legal effects. At times, the phrase “codification by interpretation” has been used to explain the nature of the Commission’s recent work on reservations, on the interpretation and on the provisional application of international treaties.

The Commission’s works on *jus cogens* are broader in scope than the work on the interpretation of articles 53 and 64 of the Vienna Convention on the Law of Treaties. The draft conclusions contain not only definitions developed from article 53 or other previous works of the Commission, but also provisions with prescriptive wording.

The draft conclusions with prescriptive wording are, to a large extent, intended to be secondary norms on the identification and application of the primary norms of general international law that have a peremptory character.

The draft conclusions set out conventions of a different nature which would have to be the result of the consolidated practices of States; otherwise, they would not have normative authority.

Spain notes that, despite the doubts of a few States regarding the norms of *jus cogens* and the technical observations that may be made about the draft conclusions and the commentaries thereto, the works of the Commission stand as definitive proof of the recognition of the existence in current international law of norms that “reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable”, and that have special legal consequences in the international legal system (draft conclusion 3).

Taking into consideration the definition of a peremptory norm (draft conclusion 2), the general nature or character of such norms (draft conclusion 3) and the international community of States as a whole (draft conclusion 7), Spain understands that so-called “regional *jus cogens*” falls outside the material scope of these draft conclusions.

Spain acknowledges the Commission's and the Special Rapporteur's effort of systemic construction of the international legal order. The draft conclusions and the commentaries thereto may help to provide clarity and predictability to States and other international and national legal operators in identifying peremptory norms of general international law and in determining the legal consequences of *jus cogens*.

However, Spain does not consider the draft conclusions, in and of themselves, to be binding or to represent a genuine interpretation of the Vienna Convention on the Law of Treaties.

Spain understands that the draft conclusions are a starting point for a constructive dialogue on the fundamental concepts and the secondary rules for the identification and application of *jus cogens* norms. The effort of systemic construction will only be robust and have normative authority if it enjoys the necessary consensus of the international community of States. The normative authority of codification and progressive development works is not only a matter of legislative technique, but also depends on the degree and quality of participation and recognition by States.

The outcome of such constructive dialogue depends, first, on the possibilities for participation offered by the Commission throughout the process of elaboration of its proposals and texts. In the case of the draft conclusions, their joint adoption at one single session did not help to maintain a continuous two-way dialogue that would have facilitated the participation of States and the submission of comments and, ultimately, enhanced the technical quality of the draft conclusions.

The outcome of such a dialogue depends, second, on the broad participation of States, the incorporation of their observations and, above all, the recognition of their fundamental role in the process of identification and application of *jus cogens.*

Switzerland

[Original: French]

Switzerland takes note of the draft conclusions on peremptory norms of general international law (*jus cogens*), which the International Law Commission has adopted on first reading and disseminated for comments and observations.

Switzerland thanks the Commission for its work and for preparing the draft conclusions. Switzerland supports the general objective pursued by the Commission through its draft conclusions and the commentaries thereto. It welcomes any clarification of the nature and content of *jus cogens* norms aimed at strengthening international law and enhancing legal certainty for the entire international community.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom expresses its sincere appreciation to the Special Rapporteur, Mr. Dire Tladi, to the Drafting Committee and to the Commission as a whole, for their work on this important topic and the preparation of the draft conclusions and commentaries. The United Kingdom has the following comments and observations.

The United Kingdom welcomes the scope of the draft conclusions as set out in draft conclusion 1 and its accompanying commentary. As set out previously, it is the view of the United Kingdom that the topic of peremptory norms of general international law (*jus cogens*) should be confined to methodology, and should not attempt to identify individual *jus cogens* norms or their content.[14]

[14] See the statements by the delegation of the United Kingdom at the following sessions of the Sixth Committee of the General Assembly: seventieth session (www.un.org/en/ga/sixth/70/pdfs/statements/ilc/uk_1.pdf, pp. 3–4); seventy-first session (www.un.org/en/ga/sixth/71/pdfs/statements/ilc/uk_2.pdf, pp. 4–5); seventy-second session (www.un.org/en/ga/sixth/72/pdfs/

The United Kingdom stresses the lack of practice relating to peremptory norms of general international law (*jus cogens*) both in the United Kingdom and internationally. Against that backdrop, the United Kingdom has supported from the outset the Commission's work on this topic, and its preparation of the draft conclusions, as an opportunity to provide practical guidance and assistance to courts and practitioners of international law. Nevertheless, the United Kingdom has consistently urged the Commission to progress cautiously and to take full account of the lack of practice when proposing draft conclusions and when elaborating its commentaries. Indeed, this is a topic where the Commission's commentaries will be of particular importance given the lack of practice. They need to be drafted with great care and attention.

The United Kingdom notes that the draft conclusions cover a diverse range of sensitive issues, which do not in all respects reflect current law or practice. The United Kingdom encourages the Commission, in its further work on the draft conclusions, to clarify where it considers the draft conclusions codify existing law, where the Commission is suggesting the progressive development of law or new law, and where the intention of the Commission is solely to provide a recommendation to States. In this regard, the United Kingdom recalls its statements at the 2018 and 2019 debates on the reports of the Commission in which the United Kingdom highlighted the responsibility of the Commission to assist judges and practitioners by clarifying the legal force of their products.[15]

United States of America

[Original: English]

Introduction

This is an important topic and the United States recognizes both the complexity and potential value of the project. The United States extends its appreciation to the Special Rapporteur, Mr. Dire Tladi, for his contributions to the development of these draft conclusions, as well as to the other members of the International Law Commission.

General commentary

a. The "conclusion" format for this International Law Commission work product

Since the turn of the millennium, the format of the Commission's work products has changed in a "clear and readily observable tendency".[16] Whereas previously the

statements/ilc/uk_3.pdf, pp. 2–7); seventy-third session (www.un.org/en/ga/sixth/73/pdfs/statements/ilc/uk_2.pdf, pp. 4–9); and seventy-fourth session (www.un.org/en/ga/sixth/74/pdfs/statements/ilc/uk_1.pdf, pp. 7–12). See also the comments and observations of the United Kingdom on the draft conclusions on peremptory norms of general international law (*jus cogens*) adopted by the Commission on first reading in 2019, in response to the Commission's requests for information contained in chapter III of its report on the work of its 70th session (A/73/10) (available from the Commission's website: https://legal.un.org/ilc/guide/gfra.shtml, *Peremptory norms of general international law (*jus cogens*)*, *Comments by Governments*).

[15] Available from: www.un.org/en/ga/sixth/73/pdfs/statements/ilc/uk_1.pdf and www.un.org/en/ga/sixth/74/pdfs/statements/ilc/uk_1.pdf.

[16] Y. Rim, "Reflections on the role of the International Law Commission in consideration of the final form of its work", *Asian Journal of International Law*, vol. 10 (2020), pp. 23–37. See also M. Wood, "The General Assembly and the International Law Commission: what happens to the Commission's work and why?", *in* I. Buffard, *et al.* (eds.), *International Law between Universalism and Fragmentation:* Festschrift *in Honour of Gerhard Hafner*, Leiden/Boston, Martinus Nijhoff, 2008, pp. 373–388; S. D. Murphy, "Codification, progressive development, or scholarly analysis? The art of packaging the ILC's work product", *in* M. Ragazzi (ed.), *The Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie*, Martinus Nijhoff, 2013; K. Daugirdas, "The International Law Commission reinvents itself?", *AJIL Unbound*, vol. 108 (2014), pp. 79–82; J. Katz Cogan, "The changing form of the International Law Commission's work", *in* R. Virzo and I. Ingravallo (eds.), *Evolutions in the Law of International Organizations*, Brill/Nijhoff, 2015; and E. Baylis, "The International Law Commission's soft law influence", *FIU Law Review*, vol. 13, No. 6 (2019), pp. 1007–1025.

Commission primarily utilized the "draft articles" format for its work products, which the Commission recommended for a negotiated convention consistent with its statute (art. 23 (*c*) and (*d*)), the Commission now regularly employs "principles", "conclusions", "guidelines", "guides" and draft articles with a recommendation that the General Assembly "take note" of the Commission's draft, rather than initiate negotiation on a convention. The Commission's intention in choosing one work product format over another is not self-evident, and the ramifications of that choice can be equally vague.[17] As the United States observed in its statement at the meetings of the Sixth Committee in 2019,

> [a]s the [International Law Commission] has increasingly moved away from draft articles, its work products have been variously described as conclusions, principles or guidelines. It is not always clear what the difference is among these labels, particularly when some of these proposed conclusions, principles, and guidelines contain what appear to be suggestions for new, affirmative obligations of States, which would be more suitable for draft articles. … It would be useful to have more transparency as to what the [Commission] intends by fashioning conclusions, principles, and guidelines, and whether any distinctions should meaningfully be drawn between them. A Commission delineation on this issue may also help avoid confusion as to what status should be afforded to the [Commission's] work in the absence of a clear expression of State consent to codification.[18]

The draft conclusions on peremptory norms of general international law (*jus cogens*) exemplify the confusion created by the lack of clear direction and guidance on the Commission's work product format. The draft conclusions include numerous proposed elements that constitute progressive development of the law. Several of these elements, particularly in draft conclusions 19 and 21, are drafted in a manner suggesting that they reflect binding obligations on States. Yet these supposed obligations have no basis in customary international law or in an international agreement.[19]

The United States urges the Commission, when issuing documents that are not intended to be adopted formally by States, such as "conclusions", "principles", "guidelines" or "guides", to be mindful of the limitations of such documents. Such documents should strive to codify existing law; otherwise, in the absence of adoption by States, these documents create confusion as to what the law is, as opposed to what the law might be. The United States also urges the Commission to consider developing a practice guide on the formats of its work products, so as to create greater consistency and transparency with respect to future projects.

b. Lack of relevant State practice

There is little State practice related to peremptory norms of general international law, including with respect to conflicting treaties, customary international law and acts of international organizations. The commentary cites no examples, and the United

[17] For this reason, at the meetings of the Sixth Committee in 2020, the United States urged the Commission to reconsider its approach to the format of its work products, including by creating an internal practice guide on the selection of work product format (see the statement by the delegation of the United States at the seventy-fifth session of the Sixth Committee of the General Assembly, available from: https://www.un.org/en/ga/sixth/75/pdfs/statements/ilc/13mtg_us.pdf (p. 2).

[18] Statement by the delegation of the United States at the seventy-fourth session of the Sixth Committee of the General Assembly, available from: www.un.org/en/ga/sixth/74/pdfs/statements/ilc/us_1.pdf (p. 5).

[19] The United States has raised similar concerns in its comments on the draft guidelines on the protection of the atmosphere, as well as in its comments on the draft conclusions on customary international law (see the written comments of 15 December 2019 of the United States on the draft guidelines to provisional application of treaties, as adopted by the Commission on first reading in 2018, available from: https://legal.un.org/ilc/guide/1_12.shtml; and on the International Law Commission's draft guidelines on the protection of the atmosphere, as adopted by the Commission on first reading in 2018, available from: https://legal.un.org/ilc/guide/8_8.shtml).

States is not aware of any examples, of new treaties, customary international law or acts of international organizations that contradict existing *jus cogens*, and incidences of existing treaties violating later-emerging *jus cogens* are exceedingly rare. Thus, draft conclusions 10 to 14 and 16, which address these circumstances, clearly represent the Commission's suggestions for the progressive development of international law. While recommendations for progressive development do not have to reflect *lex lata*, they should generally draw on at least some State practice.[20] Although recommendations regarding progressive development may be appropriate in some Commission topics, we believe that they are not well suited to this project. In any event, the United States urges the Commission to identify clearly in its commentary when it is codifying *lex lata* and when it is proposing a progressive development of international law.

B. Specific comments on the draft conclusions

1. Draft conclusion 1 – Scope

France

[Original: French]

With regard to the observations and comments on the draft conclusions transmitted by the Commission, France wonders, first of all, how the Commission envisages the status that should be conferred on the text. Although the Commission states in paragraph (2) of its commentary to draft conclusion 1 that the draft conclusions are intended merely to provide guidance, they do indeed contain a number of prescriptive provisions.

Russian Federation

[Original: Russian]

In its commentary to draft conclusion 1, the Commission reasonably points out that the draft conclusions are aimed at providing practical guidance for determining the existence of peremptory norms of general international law (*jus cogens*) and their legal consequences and that the guidance is methodological in nature. This is the right approach, and it is deserving of support. Going beyond the indicated scope would be inappropriate.

2. Draft conclusion 2 – Definition of a peremptory norm of general international law (*jus cogens*)

Cyprus

[Original: English]

The Republic of Cyprus shares the Commission's comments on the definition, general nature and criteria for the identification of peremptory norms of general international law (draft conclusions 2, 3 and 4). In particular, we support the view that, for a norm to be deemed a peremptory norm, it must be a norm of general international law protecting fundamental human values, "accepted and recognized by the international community of States as a whole as one from which no derogation is permitted", in line with article 53 of the Vienna Convention on the Law of Treaties (see more on the threshold for recognition below in our comment on draft conclusion 7). We underscore that peremptory norms are hierarchically superior to ordinary rules of international law, according to international and domestic case law, as well as State practice. Additionally, the Republic of Cyprus shares the view that peremptory norms

[20] See *Yearbook ... 1997*, vol. II (Part Two), pp. 71–72, para. 238 (*b*) (topics included in the Commission's long-term programme of work should "be sufficiently advanced in stage in terms of State practice to permit progressive development and codification").

are universally applicable, namely that they are binding on all subjects/users of international law, as elaborated in international and national jurisprudence.

Czech Republic

[Original: English]

[See comment under general comments and observations.]

The Netherlands

[Original: English]

With respect to the commentaries to draft conclusion 2, the Kingdom of the Netherlands would like to recommend the International Law Commission further elaborate on the fundamental values which serve as the basis for *jus cogens*, and which parts of these fundamental values are protected by peremptory norms. For instance, human dignity lies at the heart of the peremptory prohibition of torture. The prohibition of torture, however, does not protect human dignity in all its facets. The Kingdom of the Netherlands is convinced that more reflection on this point would lead to more insight on the origin of peremptory norms and may help with the identification (of the purpose) of these rules.

Portugal

[Original: English]

Draft conclusion 2 (Definition of a peremptory norm of general international law (*jus cogens*)) nearly replicates the definition of *jus cogens* contained in the Vienna Convention on the Law of Treaties and accurately enumerates the cumulative criteria for a norm to be granted the status of a peremptory norm of general international law. Consequently, Portugal is of the opinion that the references in draft conclusion 3 (General nature of peremptory norms of general international law (*jus cogens*)) as them being norms that (*a*) "reflect and protect fundamental values of the international community", (*b*) are "hierarchically superior to other rules of international law" and (*c*) are "universally applicable" do not raise confusion nor generate new criteria for identifying a norm as *jus cogens*. Instead, Portugal supports those references as a clarification of the general nature of *jus cogens* and as characteristics usually associated with these norms.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom notes with appreciation the definition of a peremptory norm of general international law (*jus cogens*) in draft conclusion 2, and endorses the statement in paragraph (2) of the accompanying commentary that "[i]t is therefore appropriate for these draft conclusions to rely on article 53 [of the Vienna Convention on the Law of Treaties] for the definition".

United States of America

[Original: English]

In general, this draft conclusion reflects provisions in the Vienna Convention on the Law of Treaties,[21] including the Convention's reference to the possibility of the modification of a *jus cogens* norm. Both the Convention and the present draft conclusions assume that a *jus cogens* norm can be modified in the future. Neither the Convention nor the present draft conclusions sufficiently address how an existing *jus cogens* norm can be modified by a subsequent treaty or rule of customary international

[21] Articles 32 and 53.

law when any such treaty or rule, according to these draft conclusions, would be void *ab initio*.[22]

3. Draft conclusion 3 – General nature of peremptory norms of general international law (*jus cogens*)

Austria

[Original: English]

Draft conclusion 3 states *inter alia* that peremptory norms of international law "are hierarchically superior to other rules of international law". Austria welcomes the recognition of a hierarchy of norms also in the field of international law. However, hierarchical superiority may have two possible meanings. It may imply that the existence and application of a higher-ranking norm is a necessary condition for the creation of lower ranking norms ("hierarchy of norm creation") or that the existence of a higher-ranking norm leads to the derogation of lower-ranking norms that are in conflict with the higher-ranking norm ("hierarchy of derogation"). In the present context, also in view of the wording of articles 53 and 64 of the Vienna Convention on the Law of Treaties ("is void", "becomes void"), we are obviously only dealing with a hierarchy of derogation. Thus, the International Law Commission's commentary to draft conclusion 3 (para. (12)) stating that "[t]he idea that peremptory norms of general international law (*jus cogens*) are universally applicable, like that of their hierarchical superiority, flows from non-derogability", should be clarified in this regard.

The function of peremptory norms was already examined by the Commission's Study Group on fragmentation of international law, as mentioned in the Commission's commentary to draft conclusion 2 (last footnote to paragraph (2)). After recognizing the variety of hierarchies, the Study Group's 2004 interim report stated that "[h]ierarchy should be treated as an aspect of legal reasoning within which it was common to use such techniques to set aside less important norms by reference to more important ones. This was what it meant to deal with such techniques as *conflict rules*. It was advisable not to overstretch the discussion on hierarchy but to limit it to its function in resolving conflicts of norms" (A/CN.4/L.663/Rev.1, para. 60).

In the context of the present draft conclusions, the hierarchical superiority of peremptory norms of international law is only referred to in draft conclusion 3 ("are hierarchically superior to other rules of international law"). The legal effects of hierarchical superiority are addressed in other draft conclusions, in particular in Part Three on the legal consequences of peremptory norms of general international law (*jus cogens*). The draft conclusions of Part Three envisage strict consequences: conflicting treaties are void (draft conclusion 10) and conflicting rules of customary international law do not come into existence (draft conclusion 14). These consequences follow the wording of articles 53 and 64 of the Vienna Convention on the Law of Treaties. It is the understanding of the Commission that such norms are void *ab initio* (see paragraph (4) of the Commission's commentary to draft conclusion 10). However, as the procedure recommended by the Commission in draft conclusion 21 shows, there is an element of temporary uncertainty until the conclusion of this procedure, which – notwithstanding the Commission's principled position of automatic voidness – contains elements of voidability.

Cyprus

[Original: English]

[See comment on draft conclusion 2.]

[22] See discussion of draft conclusion 14, below.

Denmark (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

We believe that further clarification of the draft conclusions pertaining to the identification of peremptory norms would be useful. This would help ensure accurate application of the norms of peremptory quality. An example of a draft conclusion that in our view would benefit from some further clarification is draft conclusion 3, which is situated in between draft conclusions containing the definition and identification of peremptory norms, respectively. We fear that the draft conclusion 3 could, because of its location in the text, be read as additional criteria for identification of such norms. However, we also note that paragraph (16) of the commentary to this draft conclusion also correctly states that "[t]he characteristics contained in draft conclusion 3 are themselves not criteria for the identification of peremptory norms of general international law (*jus cogens*)".

Germany

[Original: English]

With regard to the current wording of draft conclusion 3, Germany sees the risk that the wording "reflect and protect fundamental values of the international community" could be interpreted as an additional criterion for determining whether a specific peremptory norm of *jus cogens* exists or not. To avoid a conflict with the definition of *jus cogens* in article 53 of the Vienna Convention on the Law of Treaties, which contains no such reference to "fundamental values of the international community", it is suggested to remove the reference in the draft conclusion and to elaborate on this feature in the commentary only.

The Netherlands

[Original: English]

With respect to the hierarchical superior status of peremptory norms of general international law as reflected in draft conclusion 3, the Kingdom of the Netherlands is of the opinion that this is not sufficiently underpinned by examples of State practice in the commentaries thereto. Furthermore, draft conclusion 3 provides that peremptory norms of general international law are universally applicable. The Kingdom of the Netherlands would recommend the International Law Commission to elaborate in the commentaries on the applicability of *jus cogens* to the different subjects of international law. It is generally accepted that States are bound by *jus cogens.* However, it appears to be a relevant question whether peremptory norms are also applicable to individuals and/or to internationally operating enterprises. Moreover, the Kingdom of the Netherlands notes that the universal applicability of peremptory norms of international law is identified by international courts and tribunals as one of the criteria for the identification of *jus cogens*. The Kingdom of the Netherlands therefore suggests that the universal applicability of peremptory norms of international law should be added to the criteria for the identification of these rules as provided for in draft conclusion 4.

Poland

[Original: English]

[See comment under general comments and observations.]

Portugal

[Original: English]

[See comment on draft conclusion 2.]

Russian Federation

[Original: Russian]

In draft conclusion 3, the general nature of peremptory norms of general international law (*jus cogens*) is described in terms of essential characteristics,[23] associated, as indicated in the commentary to the draft conclusion, with such norms. These characteristics[24] are not of a legal nature and should not be accorded the status of additional criteria, of sorts, for the identification of peremptory norms of general international law (*jus cogens*), which they appear to have been accorded in the draft conclusions.

The jurisprudence cited by the International Law Commission in support of its conclusions regarding the importance of these "characteristics" for the identification of peremptory norms is hardly convincing. In particular, the Commission points out that the International Court of Justice had linked the prohibition against genocide to fundamental values in its 1951 advisory opinion on *Reservations to the Convention on Genocide*.[25] It is important to recall that, in this advisory opinion, the Court had not sought to give a legal definition of peremptory norms of general international law (*jus cogens*), which emerged later as a separate legal category in the context of the Vienna Convention on the Law of Treaties. Moreover, the States parties to that Convention did not use the characteristics in the legal definition of peremptory norms of general international law (*jus cogens*), despite this being an option.

In view of the above, it would appear that States did not consider references to moral law a relevant legal characteristic of peremptory norms of general international law (*jus cogens*).

Therefore, an analysis of the aforementioned statements by the Court would be more suitable for describing the general objectives of peremptory norms of general international law (*jus cogens*), but not their relevant legal characteristics, highlighted in draft conclusion 3.

Slovenia

[Original: English]

With regard to draft conclusion 3, the Republic of Slovenia supports the notion that peremptory norms reflect and protect fundamental values of the international community and are hierarchically superior to other rules in the sense that other rules of international law must be in accordance with the peremptory norms of general international law (*jus cogens*) in order to be or remain valid. In order to fulfil the function of reflecting and protecting the fundamental values of the international community, these norms must also be universally applicable.

South Africa

[Original: English]

We believe this is a very important draft conclusion which should be retained. We do think the commentaries can be strengthened to indicate more clearly the relationship between criteria and the characteristics. We agree that the characteristics can provide extra support but it should perhaps be made clear that this does not take away the need to show acceptance and recognition.

[23] See paragraph (1) of the commentary to draft conclusion 3, A/74/10, pp. 150–151.

[24] These characteristics are that *jus cogens* norms "reflect and protect fundamental values of the international community", that they are "hierarchically superior" to other norms of international law and that they are "universally applicable".

[25] *Advisory Opinion, I.C.J. Reports 1951*, p. 15. See paragraph (3) of the commentary to draft conclusion 3, A/74/10, p. 151.

Spain

[Original: Spanish]

[See comment under general comments and observations.]

Switzerland

[Original: French]

The essential characteristics associated with *jus cogens* norms, as set out in draft conclusion 3, reflect the Swiss understanding of the general nature of such norms. *Jus cogens* norms are so fundamental for the international community that they cannot be derogated from under any pretext. Switzerland has repeatedly affirmed their hierarchically superior character.[26] In that regard, *jus cogens* constitutes a material limit for treaties, pursuant to article 53 of the Vienna Convention on the Law of Treaties, and also for amendments to the Federal Constitution of the Swiss Confederation. Furthermore, Swiss practice accepts that *jus cogens* norms also take precedence over any conflicting rule arising from a resolution of an international organization.[27]

Swiss jurisprudence has upheld universal applicability, or the fact that *jus cogens* norms are binding on all subjects of international law.[28]

While there is no doubt that *jus cogens* norms are intended to reflect and protect the fundamental values of the international community, the French version should perhaps refer to *des valeurs fondamentales* rather than *les valeurs fondamentales*, in order to more closely reflect the English version.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom considers that it is neither necessary nor helpful to include draft conclusion 3 on the "general nature" of peremptory norms of general international law (*jus cogens*). The United Kingdom finds the Commission's commentary to this draft conclusion unconvincing. The rationale underpinning the concept of peremptory norms of general international law (*jus cogens*) is a controversial and essentially theoretical matter, which the United Kingdom considers unrealistic to capture accurately within the text of a conclusion. Moreover, the United Kingdom believes that the general nature of peremptory norms of general international law (*jus cogens*) does not need to be addressed in the draft conclusions: the purpose of the draft conclusions is to set out the methodology relating to the identification and the legal consequences of *jus cogens* norms.

On that basis, draft conclusion 3 cannot provide the clarity or assistance that would be helpful to States and practitioners. In the view of the United Kingdom, it complicates and obscures the Commission's otherwise clear statements of the

[26] See Federal Council of Switzerland: "La relation entre droit international et droit interne. Rapport du Conseil fédéral en réponse au postulat 07.3764 de la Commission des affaires juridiques du Conseil des *Etats* du 16 octobre 2007 et au postulat 08.3765 de la Commission des institutions politiques du Conseil national du 20 novembre 2008" [The relationship between international law and domestic law. Report of the Federal Council in response to postulate 07.3764 of the Commission for Legal Affairs of the Council of States of 16 October 2007 and to postulate 08.3765 of the Commission for Political Institutions of the National Council of 20 November 2008], 5 March 2010, FF 2010 2067, at p. 2086; and message concerning the initiative "Pour le renvoi effective des étrangers criminels (initiative de mise en œuvre) [For the effective removal of criminal aliens (implementation initiative)]", 20 November 2013, FF 2013 8493, at p. 8502.

[27] See Federal Council of Switzerland, "La relation entre droit international et droit interne … " (see footnote 26 above), p. 2086.

[28] See *Nada* v. *SECO, Case No. 1A 45/2007, Administrative Appeal Judgment, Decision of 14 November 2007*, Federal Supreme Court of Switzerland, BGE 133 II 450, at pp. 460–461, para. 7.

definition and criteria for identifying norms of *jus cogens* set out in draft conclusions 2 and 4, and should therefore be omitted from the draft conclusions. Notwithstanding the Commission's attempted explanation in paragraph (16) of the commentary, there is a risk that the descriptive elements in draft conclusion 3 could be read as creating additional requirements regarding the formation and identification of norms of *jus cogens*: for example, a State might seek to argue based on this draft conclusion that a norm did not have a peremptory character even if it met the test in article 53 of the Vienna Convention on the Law of Treaties, because, in the view of that State, the relevant norm did not reflect a "fundamental value of the international community". It is important that elements of the draft conclusions not detract from the meaning of peremptory norms of general international law (*jus cogens*) as set out in article 53 the Vienna Convention on the Law of Treaties and reflected in draft conclusion 2.

United States of America

[Original: English]

This conclusion describes "characteristics" of *jus cogens* norms beyond the Vienna Convention of the Law of Treaties definition reflected in draft conclusion 2. Draft conclusion 3 is unnecessary, and only serves to confuse the otherwise relatively clear standard in draft conclusion 2 and the criteria for identification of *jus cogens* norms in draft conclusion 4. The United States agrees with the view expressed by some Commission members that the "characteristics" described in draft conclusion 3 "have an insufficient basis in international law, unnecessarily conflate the identification and effects of these norms, and risk being viewed as additional criteria for determining whether a specific peremptory norm of general international law (*jus cogens*) exists".[29]

First, it is unclear whether and how States would determine what the "fundamental values of the international community" might be. The commentary cites several decisions of the International Court of Justice regarding genocide, which describe the *jus cogens* norm at issue as "obligations which protect essential humanitarian values" and a violation of the relevant *jus cogens* norm as one that "shocks the conscience of mankind".[30] Neither of these examples casts much light on what is intended by the broader term "fundamental values of the international community" adopted by the Commission. The phrase used in the draft conclusions appears to have been paraphrased from the United States Ninth Circuit Court opinion in *Siderman de Blake* v. *Argentina*, which described *jus cogens* norms as "derived from values taken to be fundamental by the international community".[31] The phrase "values taken to be" was omitted in the Commission's draft conclusions, but is important in the *Siderman de Blake* analysis. The "taken" aspect of *Siderman de Blake* is reflected not in draft conclusion 3, but rather in draft conclusion 4, which requires that the *jus cogens* norm be "accepted and recognized" as such. In any event, the decision in *Siderman de Blake* v. *Argentina* does not provide any clarity on the phrase "fundamental values of the international community" adopted by the Commission.

Second, the description of the *jus cogens* norm as "hierarchically superior" is redundant and has little or no practical benefit. Although various scholarly works describe this "hierarchy",[32] it is sufficient to describe *jus cogens* norms as

[29] A/74/10, p. 151, para. (1) of the commentary to draft conclusion 3.

[30] *Ibid.*, paras. (4) and (3), respectively, of the commentary to draft conclusion 3, citing, respectively, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at pp. 110–111; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 3, at p. 46; and *Reservations to the Convention on Genocide* (see footnote 25 above) p. 23.

[31] A/74/10, p. 152 (para. (5) of the commentary to draft conclusion 3), citing *Siderman de Blake* v. *Argentina*, 965 F.2d 699, United States Court of Appeals for the Ninth Circuit (9th Cir. 1992).

[32] See, for example, T. Weatherall, Jus Cogens*: International Law and Social Contract*, Cambridge University Press, 2015, pp. 158–160, and citations therein. See also A/74/10, pp. 154–155, paras. (9)–(10) of the commentary to draft conclusion 3 (citing court decisions referencing the

"peremptory", as those from which no derogation is permitted, and as those which are applicable *erga omnes* and as general international law. All of these more specific descriptions of *jus cogens* norms are well accepted.[33]

For the sake of clarity and economy, the United States proposes that conclusion 3 be deleted from the draft conclusions. To the extent that this conclusion remains, the United States notes that while draft conclusion 2 refers to the "international community of States as a whole", draft conclusion 3 refers to the "international community". For consistency, draft conclusion 3, if retained, should be changed to refer to the "international community of States as a whole" or, if the Commission intended some difference by its use of the phrase "international community", that difference should be clearly stated in the commentary.

4. Draft conclusion 4 – Criteria for the identification of a peremptory norm of general international law (*cogens*)

Cyprus

[Original: English]

[See comment on draft conclusion 2.]

Czech Republic

[Original: English]

[See comment under general comments and observations.]

Italy

[Original: English]

If the purpose of the draft conclusions is to "provide guidance" to those called to identify the existence and applicability of peremptory norms of general international law, draft conclusion 4 and its commentary would benefit from more precise drafting. In terms of terminology, if the choice is made to employ the term "criteria", other terms such as "conditions" should be avoided (in fact one wonders whether the two terms are to be considered synonymous). Moreover, the identification of a norm of general international law already requires the fulfillment of certain "criteria" and one wonders whether it is useful to describe "a two-step approach" in rigid terms (the steps to be taken seem more than two).

Finally, paragraph (2) of the commentary seems superfluous in that it specifies the meaning of the expression "it is necessary to establish" and that the relevant criteria "should not be assumed to exist". Such specifications are safe assumptions in a project devoted to the *identification* of peremptory rules of general international law. Deletion of the paragraph is recommended.

The Netherlands

[Original: English]

[See comment on draft conclusion 3.]

"hierarchical" nature of *jus cogens*). The phrase "hierarchically superior" is the sole legal or theoretical support provided in the commentary to draft conclusion 16, relating to acts of international organizations, including Security Council resolutions (see *ibid.*, p. 189, para. (4) of the commentary to draft conclusion 16). The concerns of the United States regarding draft conclusion 16 are addressed below.

[33] The United States does not have a strong objection to the phrase "universally applicable", but notes that it is redundant of the phrase "general international law" used elsewhere in the draft conclusions (defined as a law that "has equal force for all members of the international community"), as well as draft conclusion 17 addressing the *erga omnes* application of *jus cogens*.

Russian Federation

[Original: Russian]

The invalidating effect of peremptory norms of general international law (*jus cogens*) is not mentioned in either the definition of these norms or among the criteria for the identification of such norms listed in draft conclusion 4, thus depriving peremptory norms of general international law (*jus cogens*) of a unique trait that distinguishes them from other norms of general international law,[34] for example, obligations *erga omnes*.

United States of America

[Original: English]

As noted above, draft conclusion 3 is redundant with draft conclusion 4. The United States favours the deletion of draft conclusion 3, but the retention of draft conclusion 4 which, unlike draft conclusion 3, is reflective of article 53 of the Vienna Convention on the Law of Treaties. As noted with respect to draft conclusion 2, the International Law Commission has not sufficiently addressed, with respect to draft conclusion 4, how a *jus cogens* norm can be modified.[35]

5. Draft conclusion 5 – Bases for peremptory norms of general international law (*jus cogens*)

Australia

[Original: English]

In the view of Australia, a treaty provision by itself is not capable of serving as a basis for peremptory norms of general international law, given that a treaty is only binding on its parties. However, as noted in the commentaries, treaties may play a role in the emergence of a peremptory norm if a norm contained in the treaty codifies an existing norm of customary international law, crystallizes an emerging norm into customary international law or influences State practice such that it may become the basis for a *jus cogens* norm. Australia suggests that the manner in which treaties may form a basis for *jus cogens* norms be clarified in the text of draft conclusion 5, paragraph 2. Australia also respectfully requests that further evidence of State practice be included in the commentaries to demonstrate the possibility that general principles of law could form the basis of *jus cogens* norms. At this stage, there is no evidence that a general principle of law has in fact served as the basis for a *jus cogens* norm.

Austria

[Original: English]

As to draft conclusion 5, Austria supports the view that it would be preferable to refer to “sources” of peremptory norms of international law instead of “bases” for such norms, in conformity with the terminology normally used in connection with Article 38 of the Statute of the International Court of Justice.

[34] In support of its thesis on the consequences of *jus cogens* norms for the existence of a conflicting rule of customary international law, the Commission quoted from the joint dissenting opinion of Judges Rozakis and Caflisch in *Al-Adsani* v. *the United Kingdom*, which states that “the basic characteristic of a *jus cogens* rule is that … it overrides any other rule which does not have the same status” (see A/74/10, pp. 182–183, para. (4) of the commentary to draft conclusion 14, citing *Al-Adsani* v. *the United Kingdom, Application no. 35763/97, Judgment of 21 November 2001*, Grand Chamber, *European Court of Human Rights*, ECHR 2001-XI)).

[35] See the discussion of draft conclusion 14, below.

Belgium

[Original: French]

Draft conclusion 5, paragraph 2: Bases for peremptory norms of general international law (jus cogens)

Belgium recognizes that treaty provisions "may also serve as bases for peremptory norms of general international law (*jus cogens*)",[36] but only for the specific reasons set out in paragraph (9) of the commentary to the draft conclusion with reference to the *North Sea Continental Shelf* cases. To date, no exclusively treaty-based provision "[has] equal force for all members of the international community".[37] Even if such a provision existed, it would still need to have the peremptory character described in draft conclusion 2.

Czech Republic

[Original: English]

We note the commentary of the Commission according to which the words "basis" and "bases" used in the draft conclusion are to be understood flexibly and broadly. Nevertheless, we are of the opinion that the Commission could further clarify the different character of the bases, which "may give rise to the emergence of a peremptory norm of general international law" (paragraph (3) of the commentary to draft conclusion 5). In our view, customary international law norms are the primary means of formation of *jus cogens* norms, since its "general binding character makes it the most appropriate vehicle for peremptory norms".[38] Treaty provisions may serve as basis for peremptory norms only when and to the extent that they reflect peremptory norms of general (customary) international law, as explained in paragraph (9) of the commentary to draft conclusion 5, as well as in conclusion 11 of the Commission's 2018 draft conclusions on identification of customary international law.[39]

The Commission notes in its commentary that there is little practice in support of general principles of law as a basis for peremptory norms of general international law. The general principles of law are derived from national legal systems and are usually only viewed as a means to fill the gaps in the application of treaties and customary international law. We would appreciate more in-depth analysis of this problem by the Commission.

El Salvador

[Original: Spanish]

With regard to draft conclusion 5 (Bases for peremptory norms of general international law (*jus cogens*)), we support the inclusion of paragraph 2, in which reference is made to treaties and general principles of law. In that regard, it would be advisable for a link to be made, in the commentary to paragraph 2 of the draft conclusion, with the work on identifying general principles of law in the international legal system, in line with the methodology employed by the Special Rapporteur on general principles of law, Mr. Vázquez-Bermúdez, in his second, most recent, report

[36] A closer and more elegant French translation of the original English, "may also serve as bases for peremptory norms of general international law (*jus cogens*)", might be: *peuvent également servir de fondement aux normes impératives du droit international général (*jus cogens*)*. No changes are needed in the French version of paragraph 1.

[37] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/ Netherlands), Judgment, I.C.J. Reports 1969*, p. 3, at pp. 38–39, para. 63, cited by the Commission in paragraph (2) of the commentary to draft conclusion 5 as evidence of the meaning of the word "general" in the phrase "norms of general international law" (A/74/10, p. 159).

[38] M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden, Martinus Nijhoff Publishers, 2009, p. 670.

[39] A/73/10, pp. 143–146.

(A/CN.4/741), in which he distinguishes between principles identified in accordance with the practice and case law of States and principles widely recognized in treaties and other international instruments; this, again, is an example of the interrelationship between these sources of international law.

International law, in essence, is an interrelated system of legal norms by which States and other subjects of international law, such as international organizations, are bound. This interrelationship must also be highlighted in terms of the sources of such norms, which give rise to distinct effects. For example, the continuous and universal application of certain international treaties, even if they have not been ratified in accordance with the domestic legal procedures of States, may amount to or generate a customary norm, in the same way as an international custom may lead to the elaboration of a treaty and be legally incorporated into the treaty. Accordingly, and bearing in mind the nature of *jus cogens* norms, it is important to retain a reference to other sources, such as general principles of law, on which there is a high degree of consensus.

France

[Original: French]

In draft conclusion 5, use of the term "bases", which generates a number of ambiguities, should be reconsidered. France has taken note of the explanations provided by the Commission in paragraph (3) of its commentary to the draft conclusion that the term "bases" is meant to capture the "range of ways that various sources of international law may give rise to the emergence of a peremptory norm of general international law". In the opinion of France, the idea developed here refers to the sources that confer on certain norms the character of *jus cogens*. Hence, it may be legally more appropriate to use the term "sources" – instead of "bases" – to refer to the process by which a norm of international law acquires the character of *jus cogens*.

Germany

[Original: English]

Germany welcomes the general reasoning of draft conclusion 5 and concurs that customary international law – as opposed to treaty law or other sources – is the most common basis for peremptory norms of general international law (*jus cogens*). In particular, treaty provisions would only exceptionally serve as a basis for peremptory norms of general international law if and when they reflect a codification of customary international law. As to the question whether general principles of law could serve as a basis for *jus cogens*, the Commission itself points out that there is little practice in this regard. Germany shares this assessment and suggests including and elaborating further on this aspect in the commentary.

Israel

[Original: English]

With regard to treaty provisions and general principles of law, Israel notes that the suggestion that they may serve as bases for *jus cogens* norms is based entirely on scholarly writings, without providing support in State practice. With regard to general principles of law, Israel notes that the concept itself is ambiguous and is subject to a different study by the Commission, and its inclusion in the context of the draft conclusions was criticized even from within the Commission itself.

Israel suggests that draft conclusion 5, paragraph 2, be limited to treaty provisions. The draft conclusion or the commentary thereto should clarify that a treaty provision could be considered a basis for peremptory norms only where that provision reflects acceptance and recognition of a given norm as peremptory by virtually all States.

Italy

[Original: English]

The first observation Italy would like to make concerns the terms "basis" and "bases". In fact, what the International Law Commission identifies as "bases" of peremptory norms appear to be the sources established by Article 38, paragraph 1, of the Statute of the International Court of Justice. Paragraph (3) of the commentary to draft conclusion 5 states that the words "basis" and "bases" "are meant to capture the range of ways that various sources of international law may give rise to the emergence of a peremptory norm of general international law"; legally speaking, one may wonder to what extent "the range of ways" that "various sources of international law may give rise to the emergence of a peremptory norm" describes anything different from the concept of "source of a peremptory norm".

A second consideration is in order. According to draft conclusion 5, "[c]ustomary international law is the most common basis for peremptory norms of general international law (*jus cogens*)", but "[t]reaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*)". The commentary clarifies that customary international law is the ordinary "basis" of peremptory norms, but that exceptionally the latter norms may be derived from treaty provisions and general principles of law. Italy is of the view that such a distinction between customary international law, on the one hand, and treaty law and general principles of law, on the other hand, is hard to sustain and indeed confusing. In the last footnote to paragraph (9) of the commentary to draft conclusion 5, one finds of great use the quote from Mr. Roberto Ago who, during the 828th meeting of the International Law Commission in 1966, stated that "[e]ven if a rule of *jus cogens* had originated in a treaty, it was not from the treaty as such that it derived its character but from the fact that, even though derived from the treaty …, it was already a rule of general international law".[40] If one takes into consideration the prohibition of torture or the prohibition of genocide – two well-established peremptory norms of general international law – one can see that the relevant treaty provisions under the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, respectively, give expression to existing customary international law having acquired a *jus cogens* status. The only concrete example that the commentary provides of a *jus cogens* norm deriving from a treaty is the prohibition of the use of force under the Charter of the United Nations and yet, as the International Court of Justice famously stated in its 1986 judgment in *Military and Paramilitary Activities in and against Nicaragua*, that prohibition is also a fundamental norm of customary international law.[41] The fact that treaty provisions reflecting *jus cogens* norms are not themselves the source of the peremptory norm is indeed recognized by paragraph (2) of the commentary to draft conclusion 13 on the absence of effect of reservations to treaties on peremptory norms, where it is stated that the "[t]he phrase 'as such' is intended to indicate that *even when reflected in a treaty provision, a peremptory norm of general international law (*jus cogens*) retains its validity independent of the treaty provision*" (emphasis added). Finally, the commentary does not provide any example of peremptory norms deriving from general principles of law.

Given the above difficulties with the text of draft conclusion 5 and its commentary, Italy suggests that the draft conclusion be deleted. Also, given that the project does not seek to pursue a systemic legal understanding and regulation of peremptory norms of general international law, but it is mainly aimed at distilling a sound methodology to identify *jus cogens* norms, Italy is of the view that draft conclusion 8 on the forms of evidence of acceptance and recognition may be sufficient to "provid[e] guidance to all those who may be called upon to determine the existence of peremptory norms of general international law" (paragraph (2) of the commentary

[40] *Yearbook … 1966*, vol. I (Part One), p. 37, para. 15.

[41] *(Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 90, para. 190.

to draft conclusion 1); it notes that among those forms of evidence, treaty provisions are also enlisted. Moreover, a more precise definition of the criteria and of the "two-step approach" under the commentary to draft conclusion 4 could be instrumental to clarifying the relationship between the different sources of "general international law", without the need for a dedicated draft conclusion such as draft conclusion 5.

Japan

[Original: English]

Paragraph 2 of draft conclusion 5 states that general principles of law may serve as bases for *jus cogens*. Japan has reservations about the possibility of general principles of law serving as bases for *jus cogens*. Paragraph (8) of the commentary to draft conclusion 5 refers to some scholarly writings in support of this idea but it also states the fact that some Commission members find insufficient support from either the position of States or international jurisprudence. Further explanation should be provided, including on the consistency with the Commission's ongoing work on the general principles of law, if the Commission wishes to maintain the current formulation of this paragraph.

The Netherlands

[Original: English]

As regards draft conclusion 5, the Kingdom of the Netherlands would like to reiterate its view that treaties cannot serve as an exclusive and independent basis for peremptory norms of general international law. Treaty provisions are only binding between the States parties to the particular treaty and, as such, a treaty does not create obligations for third parties. Furthermore, universal ratification of treaties is the exception rather than standard practice. Treaty provisions could, however, be a codification of customary international law. Hence, the Kingdom of the Netherlands is of the opinion that treaties are a secondary source of peremptory norms of international law. The Kingdom of the Netherlands further considers that general principles of law cannot serve as a basis for *jus cogens*. As opposed to peremptory norms of general international law, general principles of law provide States with a margin of discretion in the development of such principles into specific rights and obligations.

Russian Federation

[Original: Russian]

In draft conclusion 5, the Commission is right to reverse its initial position that treaty provisions cannot form a basis for peremptory norms and may only "reflect a norm of general international law capable of rising to the level of a *jus cogens* norm of general international law" (A/CN.4/706, para. 91). The Commission now states in the latest version of second paragraph of draft conclusion 5 that "[t]reaty provisions … may also serve as bases for peremptory norms of general international law (*jus cogens*)."

The surveyed State practice and jurisprudence shows that there are no fundamental differences in the ability of treaties and norms of customary international law to serve as bases for peremptory norms of general international law (*jus cogens*), nor are there grounds for equating treaty provisions with general principles of law in the context of this draft conclusion. The idea that general principles of law can serve as a potential basis for peremptory norms of international law (*jus cogens*) has not been sufficiently examined and is not supported by practice.

Slovenia

[Original: English]

The Republic of Slovenia cannot envisage a treaty norm that could evolve directly into a peremptory norm of general international law (*jus cogens*), without obtaining the status of customary international law norm first. It is therefore suggested that the words "most common" in the first paragraph of draft conclusion 5 be deleted. The Republic of Slovenia also suggests that the word "bases" be replaced with the word "sources" in both paragraphs of draft conclusion 5. That would align the wording of the paragraphs with the terminology usually associated with Article 38 of the Statute of the International Court of Justice on sources of international law and also more precisely address the status of a treaty provision and general principles of law in the formation of a peremptory norm of general international law (*jus cogens*). Treaty provisions and general principles of law can serve as sources of norms that acquire the status of peremptory norms of general international law (*jus cogens*) by way of acquiring customary law status first.

South Africa

[Original: English]

In our view, treaty rules do not constitute norms of general international law. However, as noted in the commentaries, they can reflect norms of general international law. This distinction appears somewhat lost in the draft conclusion and the commentaries thereto.

Spain

[Original: Spanish]

Spain has misgivings about the suitability and wording of draft conclusion 5.

First, it seems redundant and therefore unnecessary, since one of the criteria for identifying norms of *jus cogens* is the recognition of "a norm of general international law" (draft conclusion 4 (*a*)). For reasons of normative economy, it would be sufficient with this identification criterion to agree that a norm of *jus cogens* can only be identified from among existing norms of general international law.

As the Commission notes in paragraph (3) of its commentary to draft conclusion 4, there are two cumulative criteria that operate as "necessary conditions for the establishment of the peremptory character of a norm of general international law". In paragraph (6) of the same commentary, the Commission notes that the two cumulative criteria "imply a two-step approach to the identification".

Accordingly, considering the prior existence of a norm of general international law as a necessary but not sufficient condition for the identification of a peremptory norm, draft conclusion 4 which has already been proposed by the Commission would suffice. With this option, the debate over the current wording of draft conclusion 5 would be avoided.

In the alternative, where draft conclusion 5 is retained, Spain has misgivings about the use of the term "bases" to refer to the normative procedures or processes that may give rise to a norm of general international law. It would have been preferable in this case to refer to "sources" of international law that may give rise to peremptory norms of general international law.

Paragraph (10) of the commentary to draft conclusion 5 should preferably be placed in the commentary to draft conclusion 6, because both draft conclusions deal with "acceptance and recognition" as a norm of general international law. Its most logical location would be after paragraph (1), before the current paragraph (2), of the commentary to draft conclusion 6.

Switzerland

[Original: French]

With regard to draft conclusion 5, paragraph 2, Swiss practice accepts that a treaty provision stipulating that certain rights or obligations are non-derogable is an indicator of an absolute norm. Such indicators might include, for example, provisions prohibiting States parties from concluding contradictory treaties, prohibiting the suspension of certain treaty provisions owing to a state of emergency or prohibiting reservations.[42]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

In relation to draft conclusion 5 on the "bases for peremptory norms of general international law (*jus cogens*)", the United Kingdom notes the Commission's statement at paragraph (3) of the commentary that the term "basis" is to be understood flexibly and broadly, and is intended "to capture the range of ways that various sources of international law may give rise to the emergence of a [norm of *jus cogens*]". Given the requirement that a norm of *jus cogens* be, first, a norm of general international law, and, second, 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, the United Kingdom considers that it would be helpful for courts and practitioners if the Commission could further develop and expand its commentaries in relation to paragraph 2 of draft conclusion 5 as to the ways in which a treaty provision or general principle of international law may constitute a basis for the emergence of a norm of *jus cogens*.

United States of America

[Original: English]

This conclusion, like draft conclusion 3, is an unnecessary gloss on other draft conclusions that have greater support. It is largely redundant of draft conclusions 6 and 7, which specify precisely how a norm is "accepted and recognized" as a *jus cogens* norm (the criterion spelled out in draft conclusion 4).

Draft conclusion 5 is also unsupported. The United States is particularly concerned by the statement in draft conclusion 5, paragraph 2, that "general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*)". As recognized by at least some Commission members, there is no State practice or international jurisprudence to support this conclusion.[43] It seems unlikely that well-understood general principles of law – good faith, laches, *res judicata* and the like – provide a basis for peremptory norms of general international law. The draft conclusions seem to be advancing this proposition simply because general principles of law are one of the sources of international law, without reflection on whether it is in fact a source of *jus cogens*.

More generally, draft conclusion 5 seems to place treaties and general principles on equal footing with customary international law as bases for *jus cogens*, but it is well established that *jus cogens* is a species of customary international law. The same cannot be said of treaties and general principles. General principles in theory may influence the formation of customary international law, but that does not mean that general principles are themselves "bases" of peremptory norms in the same way as we would regard a rule of customary international law to form the basis of a *jus cogens* rule. To the extent that treaty provisions reflect *jus cogens*, this is because those treaty provisions have entered into customary international law that has been accepted and

[42] See *Nada* v. *SECO* (footnote 28 above), p. 461, para. 7.1.

[43] See A/74/10, p. 162, para. (8) of the commentary to draft conclusion 5.

recognized as *jus cogens* (for example, provisions of the Convention on the Prevention and Punishment of the Crime of Genocide).

The United States therefore proposes, for clarity and economy, that the entirety of draft conclusion 5, or at least draft conclusion 5, paragraph 2, be deleted.

6. Draft conclusion 6 – Acceptance and recognition

Czech Republic

[Original: English]

[See comment under general comments and observations.]

Israel

[Original: English]

Israel is concerned that the commentary to draft conclusion 6 does not adequately capture the requirement of "acceptance and recognition", and therefore disregards the exceptional character of *jus cogens* norms and the very high threshold required for their identification.

In the view of Israel, the words "accepted and recognized" require that States must have expressed unequivocal and affirmative support for the status of a particular norm as one of *jus cogens*. Acts or omissions which may be interpreted as implied acceptance or recognition, for example, do not suffice. This basic notion does not find sufficient expression in the commentary, which leaves quite vague this important matter, fails to refer consistently to acceptance *and* recognition (sometimes referring to recognition alone), and cites jurisprudence that does not always make things clearer.

In light of the above, the commentary should clearly reflect the very high threshold necessary for a determination that there exist acceptance and recognition.

Italy

[Original: English]

Italy sees the need for a specific provision related to the authentic meaning of "acceptance and recognition" in the context of identification of *jus cogens* norms. At the same time, it is of the view that paragraph 1 of the draft conclusion, specifying that the requirement of acceptance and recognition of peremptory norms of general international law "is distinct from acceptance and recognition as a norm of general international law", is unnecessary and potentially confusing. Paragraph (2) of the commentary states that the "acceptance and recognition" addressed in the draft conclusion "is not the same as, for example, acceptance as law (*opinio juris*), which is an element for the identification of customary international law". This statement seems tautological if one looks at the way draft conclusion 4 is drafted and at the "two-step approach" identified in paragraph (6) of the commentary to draft conclusion 4 according to which: "[f]irst, evidence that the norm in question is a norm of general international law is required", and "[s]econd, the norm must be shown to be accepted and recognized by the international community of States as a whole as having a peremptory character". Deletion of the paragraph is suggested.

Italy is also of the view that some of the language in the commentary departs from the methodological gist of the project and takes it to a quasi-judicial or quasi-arbitral dimension by setting burdens of proof in the identification of peremptory norms of general international law. For instance, paragraph (3) of the commentary to draft conclusion 6 states that "*in order to show* that a norm is a peremptory norm of general international law (*jus cogens*), *it is necessary to provide evidence* that the norm is accepted and recognized as having the qualities mentioned" (emphasis added); it continues by specifying, in paragraph (4) of the commentary, that "[t]he word 'evidence' is used to indicate *that it is not sufficient merely to assert* that a norm

is accepted and recognized by the international community of States as a whole as one from which no derogation is permitted. *It is necessary to substantiate such a claim by means of providing evidence*" (emphasis added). Italy submits that these parts of the commentary should be deleted or redrafted, as in the current form the commentary seems to suggest that any assertion – made for example in diplomatic correspondence between States – as to the *jus cogens* nature of a given norm would be devoid of legal value, if not accompanied by relevant evidence, thus undermining the role of *opinio juris* in this context.

Poland

[Original: English]

Poland supports draft conclusion 6, in particular insofar as it emphasizes the distinction between the acceptance and recognition of *jus cogens* norms, on the one hand, and acceptance and recognition of norms of general international law, on the other. However, in this context one cannot help but notice that such a conclusion does not seem to be reflected in the remainder of the Commission's project. In particular, the Commission, in draft conclusions 8 and 9, sets a threshold for acceptance and recognition of *jus cogens* norms on the same level as norms of general international law or even on a lower level. For example, in draft conclusion 9, paragraph 2, the Commission recognizes that expert bodies can serve as subsidiary means for determining the peremptory character of the norm despite the fact that in the draft conclusions on identification of customary international law,[44] prepared just recently, such entities were not mentioned at all.

Spain

[Original: Spanish]

[See comment on draft conclusion 5.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom agrees with the Commission's conclusion in paragraph 1 of draft conclusion 6 that "the requirement of 'acceptance and recognition' as a criterion for identifying a peremptory norm of general international law (*jus cogens*) is distinct from acceptance and recognition as a norm of general international law". The United Kingdom respectfully suggests that – in order to aid clarity – the Commission should include in paragraph 2 a reference to the important requirement that acceptance and recognition be by the "international community of States as a whole", which could then read as follows:

> "2. To identify a norm as a peremptory norm of general international law (*jus cogens*), there must be evidence that such a norm is accepted and recognized **by the international community of States as a whole** as one from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character." (suggested addition in bold)

United States of America

[Original: English]

The United States generally supports this draft conclusion, which addresses acceptance and recognition. However, the purpose of draft conclusion 6, paragraph 1, which states that the requirement of acceptance and recognition is of a different character in the context of *jus cogens* norms than in the context of other norms of general international law, is not obvious on its face. The commentary makes clear that

[44] A/73/10, chapter V.

this statement is meant to convey that for a norm to be *jus cogens*, States must accept and recognize the norm's peremptory nature. For clarity, the United States proposes that the Commission replace the current text of draft conclusion 6, paragraph 1, with this statement from paragraph (2) of its commentary: "Acceptance and recognition, as a criterion of peremptory norms of general international law (*jus cogens*), concerns the question whether the international community of States as a whole recognizes a rule of international law as having peremptory character." In the alternative, as this may be redundant of draft conclusion 4 (*b*), the Commission might consider deleting draft conclusion 6, paragraph 1, and preserving draft conclusion 6, paragraph 2 (addressing evidence of acceptance and recognition).

7. Draft conclusion 7 – International community of States as a whole

Australia

[Original: English]

In the view of Australia, the standard for the identification of *jus cogens* norms – acceptance and recognition by the international community of States as a whole – should be maintained. Australia considers that defining the international community as a whole as "a very large majority of States" as currently reflected in draft conclusion 7, paragraph 2, has no basis in international law, risks diluting the standard of acceptance and recognition at international law, risks confusing the standard with the formation of customary international law and encourages identifying *jus cogens* norms through a mechanical exercise. Australia therefore urges that draft conclusion 7, paragraph 2, be removed. Notwithstanding, Australia supports the commentaries that accompany paragraph 2 to the extent that they outline that acceptance and recognition "as a whole" emphasize that it is States as a collective or community that must accept and recognize the non-derogability of a norm for it to be a *jus cogens* norm; that assessment does not involve a mechanical exercise; and that acceptance and recognition must be across regions, legal systems and cultures.

Belgium

[Original: French]

Draft conclusion 7, paragraph 3: International community of States as a whole

Belgium welcomes and supports the addition of paragraph 3 of draft conclusion 7. The precision it adds is very balanced and is necessary to ensure the political legitimacy of the identification of peremptory norms.

Colombia

[Original: Spanish]

In paragraph 2 of draft conclusion 7, the Commission says that "[a]cceptance and recognition by a *very large majority* of States is required for the identification of a norm" as being of peremptory character (emphasis added). Colombia would like further clarification as to what would be understood by a "large majority of States". It suggests that the norm be more specific as to the number of States required to meet this requirement, and that a clearer determination be provided of the other criteria mentioned in the commentary: acceptance and recognition across regions, legal systems and cultures. It would be important to provide further elements of how many regions, legal systems and cultures are necessary to be considered representative and for their acceptance and recognition to allow for the identification of a norm as being of peremptory character.

Contradiction could also be perceived between paragraphs 1 and 2 of the draft conclusion, since paragraph 1 refers to "recognition by *the international community of States as a whole*" (emphasis added), while paragraph 2 refers to "a very large majority of States". Although the Commission attempts to explain in its commentary that "as a whole" means "a very large majority of States", as opposed to a "simple"

majority, in order to imply that neither unanimity nor a purely numerical criterion is required, the concepts of “as a whole” and “very large majority” can create confusion.

It should be noted that the expression “as a whole” used in the English version of the draft conclusion implies the totality, while the expression *en su conjunto* used in the Spanish version does not necessarily have the character of indivisibility inherent in the concept of “as a whole”. It should be borne in mind that while this is the usual translation of the expression, as reflected in the Vienna Convention on the Law of Treaties, the concepts do not necessarily have the same connotations in the two languages.

It should also be noted that the formulation of paragraph 2 seems to contrast with that of the Vienna Convention on the Law of Treaties, which provides in its article 53 that “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole”, and does not allow for a more restrictive interpretation of a whole, such as a “large majority”.

Cyprus

[Original: English]

With respect to draft conclusion 7 (International community of States as a whole), the Republic of Cyprus agrees that the main entities whose acceptance and recognition are relevant for the formation of peremptory norms of general international law are States, without disregarding the subsidiary role of other subjects/users of international law, such as international organizations. What is more, the Republic of Cyprus would like to emphasize its adherence to the position that for the surfacing of a peremptory norm of international law what is necessary is the “acceptance and recognition by the international community of States as a whole”, namely “a very large majority of States”, but not all States. Irrespective of the pivotal role of State consent in international law, we strongly believe that the threshold for acceptance and recognition should remain as it stands and not to be lowered. Given the importance of the fundamental values peremptory norms intend to safeguard, we need to ensure that a handful of States would not be able to stymie the emergence of a peremptory norm of international law.

Czech Republic

[Original: English]

[See comment under general comments and observations.]

Denmark (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

We believe that certain draft conclusions would benefit from a clear definition of scope regarding relevant actors. This is for example the case with the term “other actors” in draft conclusion 7, paragraph 3, where it would be particularly useful to be clear, considering the mentioning of the possibility of actors other than States and international organizations determining *jus cogens*. Paragraph (2) of commentary to draft conclusion 7 does in this regard rightly state that “it is the position of States that is relevant and not that of other actors”. Finally, the same need for clarity is in our view the case regarding draft conclusion 9, which states that “[t]he works of expert bodies established by States or international organizations and the teachings of the most highly qualified publicists of the various nations may also serve as subsidiary means for determining the peremptory character of norms of general international law”. In our view, the question of the role that these organs might have in determining *jus cogens* should be approached with caution, even if their role is subsidiary. We believe that it should be carefully considered whether the definition could be narrowed down in order to accurately include relevant bodies.

France

[Original: French]

Given the nature of *jus cogens* norms, it seems reasonable, in the view of France, to rule out the possibility of entities other than States (and, to a lesser extent, international organizations) having a role, even a subsidiary one, in the determination of such norms. Indeed, this is what the Commission suggested, and rightly so, in paragraph (2) of its commentary to the first paragraph of draft conclusion 7, when it noted that the paragraph "seeks to make clear that it is the position of States that is relevant and not that of other actors". Moreover, a qualitative logic reflecting, *inter alia*, the diversity of legal systems or geographical distribution should be added to the "quantitative" logic set out in draft conclusion 7. The practice of States that are particularly concerned is, *a fortiori*, fundamental and should be duly taken into account when considering whether the generality of a rule of *jus cogens* has been achieved.

Germany

[Original: English]

Germany welcomes the clarification in draft conclusion 7 that it is the acceptance and recognition by the international community of *States* as a whole which is relevant for the identification of peremptory norms, and that the positions of other actors may be relevant only for providing context or assessing the above-mentioned acceptance and recognition, but cannot form part of such acceptance and recognition in and of themselves. Germany strongly supports this approach taken by the Commission, in conformity with its draft conclusions on identification of customary international law,[45] especially in light of the serious implications of the consequences of a *jus cogens* norm. Therefore, the highest standards have to be applied when identifying such norms. As to draft conclusion 7, paragraph 2, and the reference to "[a]cceptance and recognition by a very large majority of States", Germany suggests further clarifying the interpretation of this criterion in the commentary. Germany submits that the term "very large majority" should be interpreted in line with the respective jurisprudence of the International Court of Justice as constituting an "overwhelming majority".

Israel

[Original: English]

The requirement that a norm be "accepted and recognized" by "the international community of States as a whole" sets yet another very high standard of State acceptance and recognition. However, this very high standard is not accurately reflected by the current language of draft conclusion 7, paragraph 2, which refers simply to "a very large majority of States". Israel believes that the threshold entails virtually universal acceptance and recognition, a notion that regrettably seems to have been lost in the present draft text.

Israel suggests that draft conclusion 7, paragraph 2, be reworded as follows:

"Acceptance and recognition by ~~a very large majority of States~~ **virtually all States** is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*)~~; acceptance and recognition by all States is not required~~."

[45] A/73/10, chapter V.

Italy

[Original: English]

Italy concurs with the Commission that unanimity in acceptance and recognition is not necessarily required for a norm of general international law to be considered as having a peremptory character.

It only suggests under paragraph 3 of draft conclusion 7 the addition of the term "subjects" ("other subjects and actors") to add legal precision and account for the specific position of international organizations possessing international legal personality and playing a subsidiary, and yet important, role in the assessment of the acceptance and recognition by the international community of States as a whole.

Japan

[Original: English]

Draft conclusion 7 rightly states that the acceptance and recognition by the international community of States as a whole are relevant for the identification of *jus cogens*. Draft conclusion 8 correctly states that the evidence of such acceptance and recognition may take a wide range of forms. Draft conclusion 9 further states that decisions of international courts and tribunals are subsidiary means for determining *jus cogens*.

While States are not the only subject of international law, they remain the main subject. Thus, paragraph (2) of the commentary to draft conclusion 7 is particularly appropriate.

Paragraph 2 of draft conclusion 7 states that "[a]cceptance and recognition by a very large majority of States is required for the identification of a norm" as *jus cogens*. It appears from paragraph (6) of the commentary to draft conclusion 7 that the Commission also considered other phrases such as an "overwhelming majority of States", "virtually all States", "substantially all States" or "the entire international community of States as a whole". The Vienna Convention on the Law of Treaties sets forth the requirement of *jus cogens* as "accepted and recognized by the international community of States as a whole". Whether such a requirement can be replaced by phrases raised in the draft conclusions and its commentary should be carefully considered.

The draft conclusions, in paragraph 3 of draft conclusion 14, state that the persistent objector rule does not apply to *jus cogens*, which means that the legal effect of *jus cogens* is extraordinary – extraordinary in the sense not only that it is a matter of hierarchy of norms, but also that once a specific norm emerges as *jus cogens*, its legal consequence would affect States which do not accept the rule in question. In this context, paragraph (11) of the commentary to draft conclusion 14 states: "to the extent that such persistent objection implies that the norm in question is not accepted and recognized by the international community of States as a whole as one from which no derogation is permitted, then a peremptory norm of general international law (*jus cogens*) might not arise". Japan recalls that the Vienna Convention on the Law of Treaties opted for the formulation "accepted and recognized by the international community of States as a whole", and thus the effect of persistent objections should not be denied even when very small in number. It is questionable whether the quantitative requirement of "acceptance and recognition by a very large majority of States" in paragraph 2 of draft conclusion 7 is appropriate. In this regard, draft conclusion 3 refers to "fundamental values of the international community". This element seems to be missing from the elements to be considered in the identification of *jus cogens*. The extraordinary legal effect above cannot be explained without referring to the necessity of protecting fundamental values of the international community. We would like to invite the Commission to further explore if the quantitative requirement should be supplemented by the qualitative element mentioned in draft conclusion 3.

The Netherlands

[Original: English]

The Kingdom of the Netherlands supports the formulation of draft conclusion 7. It is of the opinion that the acceptance and recognition by States is determinative for the identification of *jus cogens*. The opinions of other actors, such as international organizations, are relevant but not decisive.

Poland

[Original: English]

We find it quite controversial to insert into draft conclusion 7, paragraph 2, the notion "very large majority of States", whose acceptance and recognition is required for the identification of a certain norm as peremptory. It is our view that not only the number of States is significant, but also their representative character. We believe that the Commission could consider in this regard draft conclusion 8, paragraph 1, of the topic identification of customary international law,[46] as an important source of inspiration. In the commentary to this draft conclusion, it was indicated that it is important that such States are representative of the various geographical regions and/or various interests at stake. This logic, which applies to norms of customary law, could also be applied to peremptory norms of general international law. Such an understanding could translate into using the terminology like, for example, "an overwhelming and representative majority of States", instead of the current wording (referring to "a very large majority of States").

Portugal

[Original: English]

Considering the characteristic of *jus cogens* as universally applicable norms and the criteria of the acceptance and recognition by the international community of States as a whole for a norm to be deemed *jus cogens* (see draft conclusion 7 (International community of States as a whole)), Portugal takes this opportunity to recall its concerns regarding the identification of regional *jus cogens* and the need for a careful approach. Portugal argues that discussions on regional *jus cogens* should not impair the integrity of peremptory norms of general international law as norms that are universally recognizable and applicable. Such discussions should also not lead to a confusion between the concepts of *jus cogens* and regional customary law.

Therefore, Portugal is pleased that the Commission has reached a compromise solution regarding regional *jus cogens*. As the Special Rapporteur himself has concluded,[47] the notion of regional *jus cogens* does not find support in the practice of States. Thus, Portugal supports the decision of not including a draft conclusion on this matter and relying on the commentaries of the Commission.

Russian Federation

[Original: Russian]

The meaning and content of the expression "international community of States as a whole" in draft conclusion 7 remains unclear. The Commission has qualified it to mean "a very large majority of States". The Commission leans heavily in its justification of its choice of formulation on the explanation given by the Chairperson of the Drafting Committee at the United Nations Conference on the Law of Treaties.[48]

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[46] A/73/10, pp. 135 *et seq*.

[47] See the fourth report on peremptory norms of general international law (*jus cogens*) by the Special Rapporteur, Mr. Dire Tladi (A/CN.4/727), para. 47.

[48] See *Official Records of the United Nations Conference on the Law Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11), 80th meeting, para. 12. As the Commission points out, the Chairperson explained that the words "'as a whole' are meant to indicate that it was not

However, the reasoning given by the Commission in the commentary is insufficient to support a decision on one of the central aspects of this criterion for the identification of peremptory norms of general international law (*jus cogens*).[49]

The concluding paragraph of the commentary to draft conclusion 7 (para. (6)) also fails to add clarity, as it lists the various possible formulations that had been put forward in the Commission to reflect the level of State consent required for "acceptance and recognition" of the peremptory nature of a norm of general international law,[50] including: "overwhelming majority of States", "virtually all States", "substantially all States" and "the entire international community of States as a whole".

The Commission is justified in its view that determining which States accept and recognize the peremptory status of a norm is not "a mechanical exercise in which the number of States is to be counted", but rather "requires that the acceptance and recognition be across regions, legal systems and cultures" (para. (6) of the commentary to draft conclusion 7). However, if that is the case, then it remains unclear how State recognition of the peremptory status of a norm should be determined.

In this connection, it is not entirely clear why the Commission did not carefully examine the positions of States expressed in the Sixth Committee with respect to this draft conclusion.[51]

Based on the Commission's current understanding of what is meant by "international community of States as a whole", and the accompanying commentary and reasoning, the Russian Federation is not in a position to accept the possibility that the formation of the will or position of a group of States could result in the emergence of international legal obligations for States that are not members of that group.

Furthermore, it is notable that the draft conclusions feature various formulations in which the phrase "international community" is used. Whereas the term "international community of States as a whole" is used in draft conclusions 2, 4 and 7, the expression "values of the international community" is used in draft conclusion 3, while the expression "international community as a whole" appears in draft conclusion 17.

The term "international community of States as a whole" should be used consistently in the draft conclusions and in the commentaries thereto. Indeed, this is the term used in the definition of a peremptory norm of general international law (*jus cogens*) in article 53 of the Vienna Convention on the Law of Treaties.

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necessary for the peremptory nature of the norm in question 'to be accepted and recognized … by all States' and that it would be sufficient if 'a very large majority did so'" (A/74/10, pp. 167–168, para. (5) of the commentary to draft conclusion 7 on peremptory norms of general international law (*jus cogens*)).

[49] In this regard, the International Court of Justice, in its judgment in the *North Sea Continental Shelf* cases in 1969, stated that for a rule of general international law to form in a relatively short period of time, State practice needed to be "extensive and virtually uniform" (*North Sea Continental Shelf* (see footnote 37 above), p. 44, para. 74). The bar for the formation of a peremptory norm of general international law (*jus cogens*) should be at least as high. The formulation used by the Commission to define what is meant by "international community of States as a whole" does not reflect this, however.

[50] Similar references to the existence of other differences of opinion in the Commission can be found in the commentaries to other draft conclusions. For example, it is mentioned in paragraph (16) of the commentary to draft conclusion 3 on the general nature of *jus cogens* norms, which introduces additional characteristics of peremptory norms, that "[a] view was expressed in the Commission that the difference between 'criteria' and 'characteristics' is obscure, as is the proposition that such 'characteristics' provide supplementary evidence" (A/74/10, p. 157).

[51] A number of delegations disagreed with the Commission's definition of the concept "international community of States as a whole" or expressed the view that its content should be further analysed and clarified in the commentary (see, for example, statements by China, France, Israel, Germany, Thailand and the United Kingdom).

Singapore

[Original: English]

Our comment relates specifically to the second paragraph of draft conclusion 7, and its use of the phrase "very large majority" to draw out the meaning of the phrase "as a whole" in the Vienna Convention on the Law of Treaties. We see from paragraph (5) of the commentary that the phrase "very large majority" comes from the explanation of the Chairperson of the Drafting Committee during the United Nations Conference on the Law of Treaties.[52] Having carefully considered draft conclusion 7 in the light of the commentary thereto, we are not certain if transposing that explanation to draft conclusion 7 accurately conveys the meaning of "as a whole".

Singapore is sympathetic to the view recorded in the last sentence of paragraph (6) of the commentary. That view is that "in the light of importance of State consent and the extraordinarily strong legal effect of peremptory norms of general international law (*jus cogens*), the recognition and acceptance of the 'overwhelming majority of States', 'virtually all States', 'substantially all States' or 'the entire international community of States as a whole' was required". If the Commission decides to use one of these alternative formulations in place of "a very large majority of States", our own view is that the formulation "virtually all States" conveys the requisite quantitative meaning.

At the same time, in the present context, the phrase "as a whole" has qualitative as well as quantitative elements. Both the number of States (the quantitative element) and the collective dimension of acceptance and recognition (the qualitative element) are relevant. Elements of paragraphs (5) and (6) of the commentary are useful in this regard. Singapore therefore requests that the Commission consider incorporating the following into the text of draft conclusion 7, paragraph 2:

(*a*) from paragraph (5):

"it is States as a collective or community, that must accept and recognize the non-derogability of a norm for it to be a peremptory norm of general international law (*jus cogens*)"; and

(*b*) from paragraph (6):

"The acceptance and recognition by the international community of States as a whole requires that the acceptance and recognition be across regions, legal systems and cultures."

Slovenia

[Original: English]

The Republic of Slovenia supports the formulation of the draft conclusion 7. It is the opinion of States that is decisive for the determination of the peremptory character of a norm and this opinion does not need to be unanimous. If unanimity was required, it could lead to no norm ever being characterized as peremptory norm of general international law (*jus cogens*), with every State effectively having veto power on the issue. However, due to the consequences of the characterization of a norm as peremptory, the acceptance and recognition of a norm as a peremptory norm of general international law (*jus cogens*) has to be expressed by a very large majority of States.

[52] See *Official Records of the United Nations Conference on the Law Treaties, First Session …* (footnote 48 above), 80th meeting, para. 12.

Spain

[Original: Spanish]

This draft conclusion is concerned with two basic elements that make up the second criterion for the identification of *jus cogens*: who is competent to identify peremptory norms, and the necessary degree of acceptance and recognition.

Spain agrees with the Commission that "[i]t is the acceptance and recognition by *the international community of States* as a whole that is relevant for the identification of peremptory norms of general international law" (emphasis added) (draft conclusion 7, para. 1). As the Commission itself noted in paragraph (2) of its commentary to the draft conclusion, "it is the position of States that is relevant and not that of other actors".

More misgivings are raised by the wording of paragraph 2 of draft conclusion 7, which seeks to clarify the degree of acceptance and recognition and what is meant by the expression "international community of States as a whole". First, both in the said paragraph and in paragraph (5) of its commentary to the draft conclusion, the Commission cautions that the expression should not be interpreted as requiring unanimous acceptance and recognition. Spain shares this interpretation.

Second, the current wording, "[a]cceptance and recognition by a very large majority of States is required", can be interpreted as an exclusively quantitative criterion. An alternative possibility could be to require acceptance and recognition *por la generalidad de los estados* ("by the generality of States"). That expression (at least in Spanish) not only means a very large majority (quantitative criterion), but also requires geographical (regional groups) and situational representativeness, and does not imply unanimity. Even a more succinct wording might serve: "general, but not unanimous, acceptance and recognition by States is required".

Given the observations it has made on this draft conclusion, including that "the relevant criterion for identification and recognition requires acceptance and recognition by the generality of States of the international community", Spain suggests that paragraph 3 of draft conclusion 7 be either deleted, or moved, with the consequent adaptation of its wording, to draft conclusion 9, which deals with subsidiary means. The Commission itself presented arguments to defend the change of location in paragraph (4) of its commentary to draft conclusion 7, which should also be moved to the commentary to draft conclusion 9.

[See also comment under general comments and observations.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom appreciates the attention paid by the Commission to draft conclusion 7 and its efforts to clarify the meaning of "acceptance and recognition by the international community of States as a whole". The United Kingdom confirms its understanding that it is only the positions of States that are determinative as to the acceptance and recognition of the peremptory character of a norm of general international law.

The United Kingdom recalls the words of the International Court of Justice in the *North Sea Continental Shelf* cases that the practice underpinning the formation of a rule of customary international law must be "both extensive and virtually uniform":[53] the acceptance and recognition of the peremptory character of a norm of general international law must not be any less extensive or uniform, indeed it should be more so. The United Kingdom further underlines the requirement of "acceptance and recognition by the international community of States *as a whole*" (emphasis added) given the perception that norms of *jus cogens* are of a higher order amongst

[53] *North Sea Continental Shelf* (see footnote 37 above), p. 44, para. 74.

the rules of international law and given the potentially far-reaching legal consequences ascribed to norms of *jus cogens*.

The United Kingdom further emphasizes that demonstrating the requirement for acceptance and recognition by the international community of States as a whole is not just a question of numbers, but also requires acceptance and recognition by States across all geographic regions and legal systems, as well as in light of the various interests of States that may be particularly affected. In this regard, it is important to note that the persistent objection of certain States to a rule of customary international law while that rule was in the process of formation, particularly the persistent objection of a State which is specially affected by that rule, will be relevant to whether it is possible to conclude that the rule has been accepted and recognized by the international community of States as a whole as having a peremptory character.

The United Kingdom encourages the Commission to consider how it might further develop and refine draft conclusion 7 and its accompanying commentary to reflect these points. The United Kingdom notes in this connection that it would be better to omit paragraph 2 from the draft conclusion entirely rather than include a formulation which does not reflect the long-standing understanding and practice of States based on article 53 the Vienna Convention on the Law of Treaties.

The United Kingdom also questions whether it would be better to move paragraph 3 of draft conclusion 7 and incorporate it into draft conclusion 9. This would better reflect the scope of each draft conclusion: draft conclusion 7 concerns acceptance and recognition by the "international community of States as a whole" for which only the positions of States can be determinative, whereas draft conclusion 9 relates to the subsidiary means for the determination of the peremptory character of norms of general international law.

United States of America

[Original: English]

For purposes of these draft conclusions, it is sufficient to state that acceptance or rejection by the "international community of States as a whole" is necessary to establish *jus cogens*. This standard is accurately stated in draft conclusion 7, paragraph 1, and provides States with guidance on the appropriate standard, but also provides flexibility to conduct their assessment considering the "international community as a singular entity whose values and interests reflect holism rather than aggregation".[54] How the views of the "international community of States as a whole" might be determined should be decided on a case-by-case basis, based on the evidence addressed in draft conclusion 8.

If more detail is needed, the International Law Commission may begin with the well-accepted threshold for State practice sufficient to establish customary international law detailed by the International Court of Justice in the judgment for the *North Sea Continental Shelf* cases. That standard requires that State practice must be "extensive and virtually uniform" to support the identification of customary international law. As the Commission wrote in its 2018 commentary to the draft conclusions on identification of customary international law with respect to the "extensive and virtually uniform" requirements, "no absolute standard can be given for either requirement; the threshold that needs to be attained for each has to be assessed taking account of context".[55] Certainly, the standard for establishing *jus cogens* can be no less than what is required to establish customary international law.

The United States strenuously objects to defining the "international community of States as a whole" to mean "a very large majority of States," as currently reflected

[54] Weatherall, Jus Cogens*: International Law and Social Contract* (see footnote 32 above), p. 29.
[55] A/73/10, p. 136, para. (2) of the commentary to draft conclusion 8.

in draft conclusion 7, paragraph 2. Such a definition has several detrimental effects.[56] First, it undermines the well-accepted standard for customary international law established by the International Court of Justice in the *North Sea Continental Shelf* cases.[57] Second, it is inconsistent with the draft conclusions on identification of customary international law, which did not include a "very large majority" standard.[58] Third, the Commission's standard of "a very large majority of States" opens the possibility that a State, court or other assessor of *jus cogens* would define a norm as peremptory even where a significant number of States do not recognize it as such. The United States therefore urges that draft conclusion 7, paragraph 2, be deleted in its entirety.

With respect to draft conclusion 7, paragraph 3, the United States agrees that the positions of non-State actors do not form a part of the acceptance and recognition by the international community of States as a whole that is required for the formation of peremptory norms of general international law. However, the extent to which the positions of non-State actors may be "relevant in providing context" for assessing such recognition and acceptance is unclear. Before the Commission adopts such an assertion, States should have the opportunity to review and respond to a further explanation as to how and when the International Law Commission believes non-State entities are relevant in this context.

8. Draft conclusion 8 – Evidence of acceptance and recognition

Belgium

[Original: French]

Draft conclusion 8, paragraph 2: Evidence of acceptance and recognition

Belgium considers that, in order for "public statements made on behalf of States" delivered in the context of a contentious case or request for advisory opinion to constitute evidence of acceptance and recognition that a norm of general international law is a peremptory norm, they must, in principle, be made by the agent or co-agent of the State, not by counsel, witnesses or experts appointed by the State.

Colombia

[Original: Spanish]

Paragraph 2 of draft conclusion 8, which deals with evidence of acceptance and recognition of a norm as a *jus cogens* norm, contains a non-exhaustive list of forms of evidence. Colombia suggests that the Commission provide specific examples of the last two forms of evidence listed – resolutions adopted by an international organization or at an intergovernmental conference – by, for instance, the international organizations or intergovernmental conferences whose resolutions could have this effect of evidence of acceptance and recognition. In particular, it should try to indicate whether any decision of an international organization, including regional

[56] As noted by Thomas Weatherall in his treatise, the phrase "as a whole" was defined by the Chairperson of the Drafting Committee on the Vienna Convention on the Law of Treaties as "a very large majority" of States (Weatherall, Jus Cogens*: International Law and Social Contract* (see footnote 32 above), p. 28), but the Convention itself does not include this definition.

[57] The commentary to the current draft conclusions provides little support for deviating from the *North Sea Continental Shelf* standard. In fact, in the footnote to paragraph (5) of the commentary to draft conclusion 7, supporting the "very large majority" proposal, the standard is described as "overwhelming majority", a different and arguably higher standard. According to the commentary, some members of the Commission preferred the higher standard that acceptance and recognition be of the "overwhelming majority of States", "virtually all States" or "the entire international community as a whole" (see A/74/10, p. 168, para. (6) of the commentary to draft conclusion 7). Although the United States does not support any derivation from the *North Sea Continental Shelf* standard, all of these standards create a higher threshold than the "very large majority of States" standard currently in draft conclusion 7, paragraph 2.

[58] See, in particular, draft conclusion 8 (A/73/10, pp. 135–138).

organizations or those involving a small number of States, could meet this standard of evidence.

El Salvador

[Original: Spanish]

With regard to draft conclusion 8, paragraph 2, bearing in mind that the list of forms of evidence necessary to establish acceptance and recognition is not exhaustive, we recommend that resolutions adopted by a regional integration organization be included in the list. This reflects the fact that acceptance and recognition by the international community as a whole are taken into account when identifying *jus cogen*s; we believe that the special statements of regional integration organizations of States should also be included.

Germany

[Original: English]

Concerning draft conclusion 8, Germany would like to highlight the parallels with conclusion 10, paragraph 2, of the draft conclusions on identification of customary international law, which characterizes the "*conduct* in connection with resolutions adopted by an international organization or at an intergovernmental conference" (emphasis added) as a form of evidence for *opinio juris*.[59] In this regard, Germany suggests harmonizing draft conclusion 8 with the aforementioned work, as it is the conduct of States in connection with the adoption of such acts that constitute an important indicator of the acceptance and recognition of a norm of *jus cogens*.

Israel

[Original: English]

Draft conclusion 8, paragraph 1

Israel generally agrees with the statement that evidence of acceptance and recognition in this context may take a wide range of forms. Israel notes, in line with its comments on draft conclusion 6, that only forms of evidence which indicate active and affirmative expression of acceptance and recognition may be taken into account. Inaction or failure to react on behalf of the relevant State may not serve as a form of evidence of acceptance and recognition. This is because silence or failure to react by a relevant State may stem from diplomatic, political, strategic or other non-legal considerations, which do not reflect that State's legal view.

Israel suggests that the commentary clearly state that in the case of peremptory norms of general international law (*jus cogens*), inaction may in principle not be said to be evidence of acceptance and recognition.

Draft conclusion 8, paragraph 2

...

Resolutions of international organizations or intergovernmental conferences

With regard to resolutions of international organizations (such as United Nations General Assembly resolutions) or intergovernmental conferences, Israel is concerned with the apparent lack of sufficiently careful consideration of the issue. The commentary, in paragraph (5), merely refers to such resolutions as "an obvious example" of materials expressing the views of States. In comparison, the Commission's draft conclusions on the topic "Identification of customary international law" provided significantly more detailed clarifications in the commentary as to when and how such resolutions may serve as evidence of customary international law. Israel believes that the commentary here should similarly provide

[59] A/73/10, pp. 140–142.

detailed clarifications. Israel would also note in this context, that the work of the Commission on customary international law did not refer to resolutions of international organizations or intergovernmental conferences as such, but to the conduct of States in connection with such resolutions, as a form of evidence of customary international law. Therefore, Israel believes that the commentary should clarify that such resolutions may be taken into account as relevant practice only as part of a case-by-case scrutiny of the conduct of States.

Israel also believes that great caution is needed before assigning normative value to resolutions of international organizations. Indeed, as the International Court of Justice noted, "considerable care is required before inferring from votes cast on resolutions before political organs such as the General Assembly conclusions as to the existence or not of a legal dispute on some issue covered by a resolution. … [S]ome resolutions contain a large number of different propositions; a State's vote on such resolutions cannot by itself be taken as indicative of the position of that State on each and every proposition within that resolution".[60]

As the Commission itself noted in the commentary to its work on customary international law, this is due to the fact that such "resolutions are normally not legally binding documents, and generally receive less legal review than treaty texts".[61] Israel also accepts the Commission's observation that "the attitude of States towards a given resolution … expressed by vote or otherwise, is often motivated by political or other non-legal considerations".[62]

Among the factors to be examined are the particular content of the resolution, the debates and negotiations leading up to the adoption of the resolution (especially explanations of vote and similar statements given immediately before or after adoption), and the degree of support for the resolution.[63]

Israel suggests that draft conclusion 8, paragraph 2, and the commentary thereto clearly reflect that resolutions of international organizations or intergovernmental conferences may not, in and of themselves, serve as indication for the legal positions of the involved States. Accordingly, the commentary should clarify that such resolutions, as well as States' votes in their context, cannot be automatically taken as evidence for the existence of a peremptory norm. Rather, as expressed by the Commission in the context of its work on customary international law, careful analysis of such resolutions and their related discussions may, depending on the context, be used to identify the legal positions of individual States on a case-by-case basis.

Decisions and judgments of national courts

The Commission's draft conclusions on identification of customary international law has already recognized that "[n]ational courts operate within a particular legal system, which may incorporate international law only in a particular way and to a limited extent", and that, therefore, "[s]ome caution is called for when seeking to rely on decisions of national courts as a subsidiary means for the determination of rules of customary international law".[64] This is all the more so as it is, in the view of Israel, the executive branch that, in principle, reflects the official view of a State in international relations. The extent to which decisions of national

[60] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, at p. 855, para. 56.

[61] A/73/10, p. 147, para. (3) of the commentary to draft conclusion 12.

[62] *Ibid*., p. 148, para. (6) of the commentary to draft conclusion 12.

[63] In this regard, see *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race* … (footnote 60 above): "The wording of a resolution, and votes or patterns of voting on resolutions of the same subject-matter, may constitute relevant evidence of the existence of a legal dispute in some circumstances, particularly where statements were made by way of explanation of vote."

[64] A/73/10, p. 150, para. (7) of the commentary to draft conclusion 13.

courts as evidence of State practice should thus depend on the relevant legal system, and on the circumstances of the particular case.

In this context and more generally, higher national courts are more likely to have expertise in the interpretation and application of international law than lower ones – an important factor that must be kept in mind in the identification of *jus cogens* norms. The Commission itself recognized that "national courts may sometimes lack international law expertise and may have reached their decisions without the benefit of hearing argument advanced by States".[65] In light of the significance of identifying a norm as *jus cogens*, and the careful approach adopted by the Commission in its draft conclusions on identification of customary international law, Israel is of the view that decisions of national courts should be subject to a higher threshold than in the context of the determination of rules of customary international law.

Therefore, with regard to decisions and judgments of national courts, Israel believes that they can be regarded as evidence of acceptance and recognition of *jus cogens* norms by a State, only in the case of final and definitive decisions of higher courts. In the view of Israel, only such decisions should be considered reflective of the view of the State in question.[66] Otherwise, a decision that is subject to further proceedings before a higher court may lead to a different result, thus changing the judicial view of the State in question.

Israel suggests that the commentary clarify the limited circumstances in which decisions of national courts may serve as evidence of acceptance and recognition of a norm of general international law as peremptory. In particular, Israel suggests that the commentary clearly state that the level of a court in the domestic judicial hierarchy should be taken into account.

Public statements made on behalf of States

The commentary does not provide any explanation for the term "public statements made on behalf of States". As there are different types of public statements, made by different actors, in different contexts, it is important that the commentary clarify that these considerations are relevant to assessing the weight of each statement.

Given the significance of *jus cogens* norms, it is important that the standard for assessing public statements on behalf of States is at least as high as the one used by the Commission in its work on customary international law. Therefore, Israel suggests that the commentary make clear that public statements made on behalf of States would be relevant in ascertaining *jus cogens* norms only in cases where the relevant statement was made by an authorized representative of the State concerned and made in an official capacity.

Government legal opinions and diplomatic correspondence

The commentary does not provide any State practice showing reliance on government legal opinions and diplomatic correspondence for ascertaining *jus cogens* norms. Unlike other forms noted in this draft conclusion, government legal opinions and diplomatic correspondence are more than likely intended to be confidential. Considering the need for a very high evidentiary threshold of evidence of acceptance and recognition, the standards for utilizing government legal opinions and diplomatic correspondence as evidence for their formation should be high.

In light of the above, Israel recommends, for the sake of clarity, that the commentary state that government legal opinions and diplomatic correspondence may be taken into account, provided it is clear, in the circumstances, that they represent the authoritative view of the State, for example, if they are made publicly available as such by that State.

[65] *Ibid*.

[66] See the comments and observations of Israel in that regard made in the context of the Commission's work on identification of customary international law (A/CN.4/716, p. 25).

Administrative acts

The commentary does not provide a definition for this term, or any example of State practice in this context. The lack of explanation in the commentary regarding administrative acts makes it difficult to comment on which specific circumstances the commentary has in mind as relevant.

Israel suggests deleting the reference to administrative acts, or at least providing the necessary definition, as well as context, that would explain in which circumstances such acts could be evidence of *jus cogens*.

Italy

[Original: English]

Italy suggests that the reference to "resolutions adopted by an international organization or at an intergovernmental conference" in paragraph 2 of draft conclusion 8 should be complemented by the reference to the "conduct of States in connection with resolutions adopted by an international organization or at an intergovernmental conference", which reflects the wording of conclusion 10, paragraph 2, of the draft conclusions on identification of customary international law adopted on second reading by the Commission in 2018. In the view of Italy, the above addition is necessary as oftentimes the resolutions as such are attributable to the international organization as a distinct legal subject and *per se* cannot constitute evidence of the "acceptance and recognition" by the member States of the relevant international organization.

Japan

[Original: English]

Paragraph 2 of draft conclusion 8 refers to "resolutions adopted by an international organization or at an intergovernmental conference" as one of the forms of evidence of acceptance and recognition as *jus cogens*. Japan agrees in principle to paragraph (5) of the commentary, which states that resolutions adopted by States in international organizations or at intergovernmental conferences "are the result of processes capable of revealing the positions and views of States". Japan, however, remains very cautious in recognizing that such resolutions in general are evidence of acceptance and recognition as *jus cogens*. First, it is rare that an international organization is granted explicit or implied power to determine a norm as *jus cogens*. If an international organization lacks competence to determine certain norms as *jus cogens*, its resolutions should not be treated as evidence of *jus cogens*. Second, even when an international organization, such as the United Nations, has an exceptionally broad mandate which includes matters relating to *jus cogens*, it is common to determine a certain conduct as breaching international law without referring to *jus cogens*. Third, even if States' acceptance and recognition as *jus cogens* can be deduced from the conduct of States in an international organization or at an intergovernmental conference, such conduct does not necessarily take the form of resolutions. Hence, if any reference to resolutions is indispensable, it should rather be to "conduct of States in connection with resolutions adopted by an international organization or at an intergovernmental conference", as formulated in paragraph 2 of conclusion 10 of the Commission's draft conclusions on identification of customary international law.

If the Commission opts to refer to a role that can be played by such resolutions themselves, it would be worth considering the creation of a new draft conclusion with more detailed provisions and extensive commentaries thereto, as the Commission did in conclusion 12 of its draft conclusions on identification of customary international law. As is the case with customary international law, the evidentiary value of resolutions purporting to be declaratory of an existing *jus cogens* would be limited to the proof of the acceptance and recognition by those States who support them.

Last but not least, draft conclusion 8 deals with the evidence of acceptance and recognition as *jus cogens*. Japan takes note of the examples referred to in paragraph

2, but there may be a case where two or more pieces of evidence contradict each other. For example, a domestic court of a State might decide that a certain norm is *jus cogens* while the Government of that State affirms the opposite. Japan would like to invite the Commission to elaborate on the approach to addressing such contradictions.

[See also comment on draft conclusion 7.]

Poland

[Original: English]

Regarding draft conclusion 8, we have noticed that the forms of evidence of acceptance that a norm of general international law is a peremptory norm and the forms of *opinio juris* required for the emergence of customary norms are treated there as being equal. Such an approach could be misleading and hardly helpful. Therefore, we would like to encourage some reflection on whether this provision is necessary in light of the aim of the Commission in this regard, which is to specify the "contours, content and effects of *jus cogens*".[67]

[See comment on draft conclusion 6.]

Russian Federation

[Original: Russian]

With regard to draft conclusion 8, it should be noted that not all forms of evidence for the acceptance and recognition by States of the peremptory nature of an international legal norm carry the same weight for the identification of peremptory norms of general international law. Without implying any sort of hierarchy among the forms such evidence may take, priority should be given to the views and positions of States made known and documented in the international arena. For the purposes of identification of peremptory norms of general international law (*jus cogens*), the conduct of States in respect of decisions taken by international organizations, not the decisions themselves, are the determining factor. The draft conclusion must explicitly reflect the key importance of the "conduct of States" in the context of the various forms of evidence for acceptance and recognition.

South Africa

[Original: English]

We understand the Commission's need to follow closely on its work on customary international law. Yet, the exercise of determining acceptance and recognition is different from the exercising of determining practice for the purposes of customary international law. This distinction, which is made clearly in draft conclusion 6 and its commentaries, seems lost here. We suggest that the commentary make more clear that what is being sought is not the practice of States, but the collective acceptance and recognition which, though found in the same materials as those for practice, is different.

Spain

[Original: Spanish]

The wording of paragraph (4) of the commentary to draft conclusion 8 should be qualified, in particular in the final phrase, where the Commission mentions the different functions of the same evidentiary materials for *jus cogens* and customary rules. Spain therefore suggests that the words "and recognize" be included in the final phrase of paragraph (4) of the commentary, which would then read as follows: "while for the latter the materials are used to assess whether States accept **and recognize** the norm as a rule of customary international law".

[67] *Yearbook … 2014*, vol. II (Part Two) and corrigendum, annex, p. 175, para. 20.

The proposed wording is more consistent with the nature of customary rules, with the process of their identification and with the terminology used by the Commission in its draft conclusions on identification of customary international law and on *jus cogens*.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom notes the Commission's conclusion, as set out in draft conclusion 8, that the evidence of acceptance and recognition by a State may take a wide range of forms and that such evidence includes, but is not limited to, the examples of practice listed in paragraph 2 of that draft conclusion. The United Kingdom proposes that the words "conduct in connection with" be inserted before the reference to "resolutions adopted by an international organization or at an intergovernmental conference", so as to align the provision with conclusion 10 (Forms of evidence of acceptance as law (*opinio juris*)) of the draft conclusions on identification of customary international law, so that the paragraph would read:

> "2. Such forms of evidence include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; legislative and administrative acts; decisions of national courts; treaty provisions; and **conduct in connection with** resolutions adopted by an international organization or at an intergovernmental conference."

United States of America

[Original: English]

The United States finds draft conclusion 8, paragraph 1, acceptable and has no objection to most of draft conclusion 8, paragraph 2. However, the United States does not agree that evidence of acceptance and recognition that a norm is peremptory includes resolutions adopted by an international organization or at an intergovernmental conference.

The commentary does not address such resolutions, so we cannot determine the specific rationale for including them in draft conclusion 8, paragraph 2. The commentary generally cites, however, conclusion 10, paragraph 2, of the draft conclusions on identification of customary international law[68] as a source of the list in draft conclusion 8, paragraph 2. There is a crucial difference, however, between the list detailed in the draft conclusions on identification of customary international law, and the list in conclusion 8, paragraph 2, of the present draft conclusions. The final category of evidence listed in the draft conclusions on identification of customary international law is described as "*conduct in connection with* resolutions adopted by an international organization or at an intergovernmental conference" (emphasis added). This form of evidence makes sense in determining customary international law, including peremptory norms; the *conduct* of a State in the context of intergovernmental negotiations may constitute State practice.[69] But the resulting resolutions as such are not evidence of *opinio juris*; rather, it is the State practice associated with them that might constitute relevant evidence. Such resolutions are often adopted by consensus and are the result of political negotiations, and therefore may not reflect the legal views of all, or even a majority, of the States involved. Even for resolutions that are adopted by vote, States may have a variety of political and diplomatic reasons for voting for or against a resolution; such votes do not reflect

[68] A/73/10, pp. 140–142.

[69] Paragraph (5) of the commentary to draft conclusion 8 appears to recognize this omission, describing the last category of evidence of acceptance and recognition as follows: "States also routinely express their views about the peremptory character of particular norms through *public statements and statements* in international fora" (emphasis added) (A/74/10, p. 170). This description more accurately captures the "conduct" standard included in the draft conclusions on customary international law.

reliable State practice undertaken out of a sense of legal obligation.[70] To determine whether a principle articulated in a resolution is currently accepted and recognized as a peremptory norm, it would be necessary to look to other sources of evidence.

Furthermore, not all "decisions of national courts" are relevant to whether a particular norm is accepted as a peremptory norm of general international law. Whether a national court decision is material depends on the facts of the case and the level of the court in the domestic judicial hierarchy.

The United States therefore proposes that draft conclusion 8, paragraph 2, be amended as follows:

> "(2) Such forms of evidence include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; legislative and administrative acts; **relevant** decisions of national courts; treaty provisions; and **State conduct in connection with** resolutions adopted by an international organization or at an intergovernmental conference."

9. Draft conclusion 9 – Subsidiary means for the determination of the peremptory character of norms of general international law

Czech Republic

[Original: English]

As regards paragraph 2 of this draft conclusion, the Commission should explain why the "works of expert bodies established by States or international organizations" are specifically mentioned and highlighted in this provision. In its 2018 draft conclusions on identification of customary international law, the Commission mentioned the "output of international bodies engaged in the codification and development of international law" only in its commentary to the general term of "the teachings of the most highly qualified publicists",[71] without specifically including the "output" in the text of the conclusion itself.

Denmark (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

[See comment on draft conclusion 7.]

France

[Original: French]

The second paragraph of draft conclusion 9 may raise a number of doubts. It seems risky to classify expert bodies established by States or international organizations as a "subsidiary means" for the determination of *jus cogens* norms. While there is no doubt that the Commission, given its mandate from the General Assembly, its particularly rigorous working methods and the recognized quality of its experts, can lay claim to such classification (as it points out, rightly, in paragraph (8) of its commentary to the draft conclusion), the same is not necessarily true of all expert bodies. For example, both inside and outside the United Nations, certain expert bodies (which are not always composed of lawyers) adopt controversial findings, based on legal reasoning that is, to say the least, questionable. The question of the role, even if it is a subsidiary one, that these bodies might have in the determination of *jus cogens* should be approached with greater caution.

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[70] For more discussion of this issue, see the comments of the United States regarding the Commission's draft conclusions on identification of customary international law (5 January 2018), *Digest of United States Practice in International Law 2018*, Office of the Legal Adviser, United States Department of State, pp. 251–268, at p. 258.

[71] A/73/10, p. 151, para. (5) of the commentary to draft conclusion 14.

Germany

[Original: English]

As to draft conclusion 9 describing the role of the works of expert bodies established by States or international organizations as subsidiary means for determining *jus cogens*, Germany submits that a more differentiating approach seems preferable, taking into account, *inter alia*, the various existing expert bodies, their composition, mandate, acceptance by States or support in State practice of their work. Moreover, Germany recommends aligning draft conclusion 9 and its commentary with the Commission's draft conclusions on identification of customary international law. In the latter context, the Commission explained that the weight to be given to its determinations depended "on various factors, including sources relied upon by the Commission, the stage reached in its work and above all upon States' reception of its output".[72] It seems advisable to adopt the same approach in the case at hand.

Israel

[Original: English]

Israel notes that draft conclusion 9 is based on Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, which pertains to the sources of law to be applied by the Court. In this context, Israel would like to recall that the criteria for determining whether a norm is peremptory depends on whether States have accepted and recognized a certain norm as such. Paragraph (5) of the commentary correctly notes that the subsidiary means mentioned in draft conclusion 9 merely "facilitate the determination of whether there is acceptance and recognition by States but they themselves are not evidence of such acceptance and recognition".

Israel notes that the text of draft conclusion 9, paragraph 2, lists "[t]he works of expert bodies established by States or international organizations" as subsidiary means. However, it is important to note that that Article 38, paragraph 1 (*d*), as well as the Commission's draft conclusions on identification of customary international law, do not refer to the work of expert bodies. The commentary does not provide any indication or reference to relevant State practice that establishes such work of expert bodies as a subsidiary means. Accordingly, Israel is of the view that this suggestion is not based on any established rule or practice, and objects to its inclusion.

Israel requests the deletion of the reference to the work of expert bodies from the draft conclusions. At most, the issue of expert bodies should be dealt with in the commentary, in line with the careful treatment that the work of international bodies engaged in the codification and development of international law received in the work of the Commission on identification of customary international law.[73]

Italy

[Original: English]

Italy finds the wording and legal contents of draft conclusion 9 persuasive. At the same time, it is of the view that the commentary should clarify that the draft conclusion is without prejudice to the specific, privileged role of the International Court of Justice with regard to the determination of peremptory norms in accordance with article 66 of the Vienna Convention on the Law of the Treaties.

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[72] *Ibid.*, pp. 142–143, para. (2) of the commentary to Part Five of the draft conclusions.

[73] The Commission noted in the commentary to its draft conclusions on identification of customary international law that "[t]he value of each output [by an expert body] needs to be carefully assessed in the light of the mandate and expertise of the body concerned, the extent to which the output seeks to state existing law, the care and objectivity with which it works on a particular issue, the support a particular output enjoys within the body, and the reception of the output by States and others", *ibid.*, p. 151, para. (5) of the commentary to draft conclusion 14.

Japan

[Original: English]

Paragraph 2 of draft conclusion 9 refers to the works of expert bodies. While the Commission is tasked with the progressive development and codification of international law which includes *jus cogens*, the vast majority of other expert bodies do not possess explicit or implied power to determine *jus cogens*, and the draft conclusions on identification of customary international law do not refer to the works of expert bodies. Thus the formulation of this paragraph needs to be revised. For reference, conclusion 13 of the draft conclusions on subsequent agreements and subsequent practice[74] refers to expert treaty bodies, but with some caution. Taking into account the fact that the works of expert bodies are not referred to in the draft conclusions on identification of customary international law, we should be careful not to treat the works of expert bodies alongside decisions of international courts and tribunals as subsidiary means for the determination of *jus cogens*.

Commentary (6) of conclusion 9 of the present draft conclusions states that works of expert bodies without an intergovernmental mandate are not irrelevant in determining *jus cogens*. Similarly, the works of expert bodies created by States would not necessarily be irrelevant even if the reference to them was deleted from draft conclusion 9.

[See comment on draft conclusion 7.]

Poland

[Original: English]

[See comments on draft conclusion 6.]

Russian Federation

[Original: Russian]

The Commission's decision in draft conclusion 9 to view works of expert bodies established by States or international organizations as subsidiary means for determining the peremptory character of norms of general international law is objectionable. The decision is inconsistent with Article 38 of the Statute of the International Court of Justice, which is cited repeatedly by the Commission in its commentary to the draft conclusion.

Slovenia

[Original: English]

With regard to draft conclusion 9 on subsidiary means for the determination of the peremptory character of norms of general international law, the Republic of Slovenia would like to point out that in paragraph 2 the works of expert bodies established by States or international organizations are cited as additional to the teachings of the most highly qualified publicists. While recognizing the importance of these formations set up by States, they are predominantly filled with experts that are supposed to keep their independence. That means their opinions are not opinions of States but of independent experts. The Republic of Slovenia believes that the works of expert bodies are therefore included in the category of teachings of the most highly qualified publicists and need not be singled out in the text of the draft conclusion. Removing them would also align this paragraph more closely with the wording of Article 38 of the Statute of the International Court of Justice on sources of international law. The Republic of Slovenia does however support the inclusion of "works of expert bodies established by States" in the commentary to this draft conclusion.

[74] *Ibid.*, pp. 106–116.

Spain

[Original: Spanish]

Spain wishes to make three comments on the content of this draft conclusion and three observations on the commentaries thereto.

As proposed above, in the event that the paragraph relating to the positions "of other actors" on acceptance and recognition by the international community of States as a whole (current paragraph 3 of draft conclusion 7) is retained, Spain suggests that it be moved and incorporated into draft conclusion 9, as a third paragraph, with a corresponding adaptation of its wording and the commentary thereto.

The second comment is intended to clarify the classification of decisions of international courts and tribunals as subsidiary means for the determination of the peremptory character of norms of general international law. First, as set out in draft conclusion 4 (*b*) and draft conclusion 7, the determination of such a peremptory character is a matter for the generality of the States of the international community. Second, it is useful to contextualize the relative value of certain decisions of courts and tribunals which sometimes classify norms as peremptory norms rather casually. A case in point is the judgment in the *Kadi* case with regard to human rights norms, where the Court considered the right to be heard and the right to effective judicial review to be *jus cogens* norms.[75]

Third, recourse to "the teachings of the most highly qualified publicists of the various nations" is a formula which, much like Article 38 of the Statute of the International Court of Justice, is very limited. In contemporary international law, the opinion of expert bodies has attained greater relevance than that of the most highly qualified publicists. It is true that the Commission notes in paragraph (6) of its commentary to draft conclusion 9 that "the work of expert bodies" not established by States or international organizations (with the Institute of International Law cited as an example) may "qualify as 'teachings of the most highly qualified publicists' under paragraph 2 of draft conclusion 9". Nonetheless, given the importance of determining the peremptory character of norms of general international law, it would be appropriate to cite them expressly in draft conclusion 9. For this reason, Spain suggests the following wording: "The work of expert bodies, whether or not established by States or international organizations, may also be a subsidiary means for the determination of the peremptory character of norms of general international law." By definition, the collective nature of peremptory norms requires that proposals on their determination also possess the same character.

Consequently, Spain agrees, first, that the fundamental importance of the decisions of the International Court of Justice in relation to other international tribunals is highlighted in paragraph 1. It therefore suggests refining the Spanish wording of paragraph (4) of the commentary, where the Commission refers to the Court as the principal judicial organ of the United Nations and the Spanish text uses the expression *el principal órgano judicial de las Naciones Unidas*. That wording should be brought into line with the literal wording of Article 92 of the Charter of the United Nations, where the Court is referred to as *el órgano judicial principal de las Naciones Unidas*.

Second, Spain agrees with the inclusion of the work of "expert bodies established by States or international organizations" as subsidiary means for the

[75] *Kadi* v. *Council of the European Union and Commission of the European Communities, Case T-315-01, Judgment of 21 September 2005*, Court of First Instance (Second Chamber, Extended Composition), Court of Justice of the European Union, *European Court Reports 2005*, vol. II, p. 3649, at pp. 3724–3725, paras. 227–231, pp. 3738–3739, paras. 278–285, and p. 3740, paras. 288–290. See also the judgment of the same Court in *Yusuf and Al-Barakaat* v. *Council of the European Union and Commission of the European Communities, Case T-306/01, Judgment of 21 September 2005*, Court of First Instance (Second Chamber, Extended Composition), *ibid.*, p. 3544, at pp. 3626–3627, paras. 278–282, pp. 3641–3642, paras. 333–340, and pp. 3643–3644, paras. 343–345.

determination of the peremptory character of norms of general international law. However, it suggests that the relative importance of such work be qualified. International practice shows that some of that work is sometimes not sufficiently supported in State practice and in the practice of international courts and tribunals.

In order to help weigh the relative importance of the work of such expert bodies, Spain suggests that a remark similar to the one already included in paragraph (9) regarding the weight to be given to teachings[76] be included in the commentaries. In this regard, the Commission could introduce a caveat on relative value in paragraph (6) of its commentary by adding a sentence along the following lines: "It is important to note that the weight to be given to the work of expert bodies will vary to a large extent depending on the quality of the reasoning and its degree of support in State practice and in the decisions of courts and tribunals."

Third, Spain believes that there is need to reformulate the Commission's statement in paragraph (4) of its commentary to draft conclusion 9 that "while the Court has been reluctant to pronounce on peremptory norms, its jurisprudence has left a mark on the development both of the *general* concept of peremptory norms and of *particular* peremptory norms" (emphasis added). As the statement might lead to confusion, the Commission should revise it by deleting the reference to so-called "particular" peremptory norms.

[See also comment on draft conclusion 7.]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

[See comment on draft conclusion 7.]

United States of America

[Original: English]

The United States recognizes that the text of draft conclusion 9 mirrors Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, which details the means for determining the content of international law generally. In the specific context of customary international law, and especially *jus cogens*, the United States reiterates that what is necessary is an analysis of the practice and views of States.

10. Draft conclusion 10 – Treaties conflicting with a peremptory norm of general international law (*jus cogens*)

Austria

[Original: English]

[See comment on draft conclusion 3.]

Belgium

[Original: French]

The draft conclusions indicate that a treaty that conflicts with a *jus cogens* norm at the time of its conclusion is void in whole (see draft conclusion 10). In the case of a treaty that is in conflict with a *jus cogens* norm that emerges later, the Commission has taken the view that in some cases only the provision or provisions conflicting with the norm are void, not the treaty in whole. This approach reflects articles 53 and 64 of the Vienna Convention on the Law of Treaties. However, the concept of general invalidity in the first scenario (conflict with a *jus cogens* norm at the time of the conclusion of the treaty) was not uncontroversial when the Convention was being drafted, and the approach is sometimes challenged in doctrine. Moreover, there are no concrete precedents to support the approach. It is recognized at the end of

[76] A/74/10, p. 174.

paragraph (2) of the commentary to draft conclusion 11 that "[t]he view was expressed that there may be cases in which it would nevertheless be justified to separate different provisions of a treaty". Belgium therefore wonders whether draft conclusion 11, paragraph 1, should be formulated more cautiously (in particular in view of the lack of practice), for example by amending it slightly to read: "A treaty which, at the time of its conclusion, conflicts with a peremptory norm of general international law (*jus cogens*) is in principle void in whole."

Belgium wishes to recall that a claim that a treaty is invalid as a result of conflict with a *jus cogens* norm cannot have the effect of rendering a compromissory clause of the treaty inoperable, in particular when such a clause is being used to settle a dispute concerning the validity of the treaty.[77]

Colombia

[Original: Spanish]

It is clear that paragraph 1 of the draft conclusion is based on article 53 of the Vienna Convention on the Law of Treaties, since it sets out the legal consequences of the invalidity[78] of a treaty that conflicts with a norm of *jus cogens*. The main legal consequence, deriving from the character of the substantive criterion of validity of the peremptory norm, will be the invalidity of the treaty that conflicts with the norm. The consequence of the invalidity of the treaty will be that its provisions will lack "legal force", an expression which we understand to be taken from article 69, paragraph 1, of the Convention, according to which the provisions of a treaty that is invalid have no legal force.

It should be borne in mind, therefore, that the fact that a treaty has been concluded does not necessarily mean that it has entered into force, as prescribed in articles 16 and 17 of the Convention. It is possible, therefore, for a treaty which, at the time of its conclusion, conflicts with a norm of *jus cogens* to be declared null and void without having even entered into force.

Colombia therefore suggests that the Commission examine the need to use another expression to refer to the consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law that would reflect the differences between the various stages which a treaty undergoes and the different meanings that exist between the concepts of conclusion and entry into force of a treaty. Similarly, the expression "legal effects", which is also used throughout the Convention, particularly with regard to the regime of reservations, is indicative not only of the binding nature of a treaty but also of the range of legal possibilities as to its entry into force and its termination.

Paragraph 2 of the draft conclusion is based on article 64 of the Convention regarding the invalidity *ex nunc* of an existing treaty which conflicts with a new peremptory norm of international law, and the release of the parties from the obligation to continue to perform the treaty.

However, given the wording of the paragraph, two different legal consequences seem to be established for a treaty that is in conflict with the new norm of *jus cogens*: its invalidity or its termination. On the other hand, the Commission did not indicate clearly whether such consequences would arise from the moment that the procedural requirements under draft conclusion 21 are fulfilled, or from the moment that the peremptory norm of general international law is deemed to have emerged as a matter of law.

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[77] See *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 46, at pp. 53–54, para. 16 (*b*).

[78] The meaning of invalidity as set out in the Convention and reproduced in the draft conclusions seems to be understood independently of the definitions of this concept in the various legal systems of States. Accordingly, the term would have a particular conventional connotation, the specific consequences of which are specified in the Convention and which, as will be seen, are reproduced in draft conclusions 11 and 12.

The Commission did, however, clarify the latter point in paragraph (5) of its commentary to draft conclusion 10, specifying that a treaty which is in conflict with the new norm of *jus cogens* "*becomes* void at the emergence of the peremptory norm. The treaty becomes void from the moment the norm in question is recognized and accepted as one from which no derogation is permitted."

It is desirable, however, to bring such clarity to the draft conclusion, which could be expressed as follows: "If a new peremptory norm of general international law (*jus cogens*) emerges, any existing treaty which is in conflict with that norm becomes void and terminates from the moment of the emergence of that new norm." It is worth noting the difficulty of determining the exact moment when a new rule of general international law emerges, especially if it is from a customary source, which would constitute a practical challenge in determining the precise moment of invalidity and termination of a treaty.

It is therefore appropriate to ask about the differences in legal terms that would result from the invalidity and termination of a treaty on account of it being in conflict with a norm of *jus cogens*. While the Convention makes it clear, in its article 64, that any existing treaty which is in conflict with a norm of *jus cogens superveniens* becomes void and terminates, it appears that, in this context, the invalidity of a treaty would, for all intents and purposes, implicitly result in its termination.

Colombia wishes to draw attention to the possible reach of the consequences of invalidity and termination of treaties, as determined in draft conclusion 10, in States that have dualist legal systems but that do not recognize domestically the direct effect of invalidation that *jus cogens* norms have on the legal acts of treaty incorporation. It would be advisable to expand on this point by adding commentary to the draft conclusion that would refer to the reach of peremptory norms and to indicate whether States have a duty to confer a far-reaching status on such norms in their domestic legal systems.

Czech Republic

[Original: English]

[See comment under general comments and observations.]

El Salvador

[Original: Spanish]

With regard to draft conclusion 10, in particular the debate as to whether non-derogability is a criterion for the identification of a peremptory norm of general international law or whether it is a legal consequence of such a norm, my delegation considers useful the comments that were incorporated into articles 53 and 66 of the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

In its report on the work of its eighteenth session (1966), the Commission expressed the view that the form in which a general rule of international law had been adopted was not sufficient grounds for attributing to it the fundamental character of *jus cogens*; rather, it was the nature of the subject matter of the rule that made it possible to identify its *jus cogens* character.[79] The rule of non-derogability stipulated in article 53 of the Vienna Convention on the Law of Treaties is a result of the acceptance and recognition of the norm by the international community of States as a whole; thus, non-derogability is precisely a legal effect of *jus cogens* norms. We therefore consider it appropriate for the question to be addressed under draft conclusion 10.

[79] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 247–248, para. (2) of the commentary to draft article 50.

Japan

[Original: English]

Part Three of the draft conclusions and draft conclusion 22 deal with the legal consequences of *jus cogens*. As for the treaties, the draft conclusions by and large attempt to base its arguments on the Vienna Convention on the Law of Treaties. Some careful consideration is needed to address customary international law, unilateral acts and resolutions of international organizations.

Draft conclusion 10 distinguishes treaties that conflict with *jus cogens* at the time of their conclusion, and treaties that conflict with newly emerged *jus cogens* after their conclusion. Japan supports paragraph 2 of draft conclusion 10 and paragraph (5) of the commentary thereto, which clarify that, in case of conflict with newly emerged *jus cogens*, treaties only become void at the emergence of *jus cogens*. They follow article 71, paragraph 2 (*b*), of the Vienna Convention of the Law of Treaties, and maintain the right balance between the hierarchical superiority of *jus cogens* to other norms and legal stability. It seems highly sensible because, while the Convention generally does not distinguish treaties by their nature, legal stability would be seriously undermined if newly emerged *jus cogens* acquired retrospective power to overturn the consequences of existing treaties, in particular those with dispositive aspects. Hence, the formulation of the Convention should be maintained. The same consideration should apply to customary international law and unilateral acts of States.

Poland

[Original: English]

With respect to the issue of legal consequences of peremptory norms, we would recommend that the Commission consider introducing additional conclusion with respect to the relation between *jus cogens* and general principles of law (as it did with respect to other sources of international law).

Russian Federation

[Original: Russian]

In paragraph (1) of the commentary to draft conclusion 10, it would be appropriate to state explicitly that States should refrain from concluding international agreements that conflict with peremptory norms of general international law (*jus cogens*).

United States of America

[Original: English]

Draft conclusion 10 is the first in a series of draft conclusions addressing conflicts between various international law obligations and peremptory norms of general international law (draft conclusions 10 to 14 and 16). The United States reiterates at the outset that there is little or no State practice with respect to any of these provisions. The United States is therefore of the view that draft conclusions 10 to 14 and 16 should be deleted, for the reasons discussed above. If some or all of these draft conclusions remain, the Commission should clearly identify them as proposals for the progressive development of international law.

If draft conclusion 10 remains, the United States notes that the word “emerges” in draft conclusion 10, paragraph 2, while drawn from the Vienna Convention on the Law of Treaties, does not reference the actual criteria for the establishment of a *jus cogens* norm detailed elsewhere in the draft conclusions: acceptance and recognition. The concept of “emergence” may therefore confuse the analysis of how *jus cogens* norms are formed. Specifically, the “emergence” concept may confuse the existence of a *jus cogens* norm with its content; while the “emergence” of a new *jus cogens* norm is an exceedingly rare occurrence, the precise content of *jus cogens* norms may

shift more regularly and may be subject to debate. The United States requests that, if draft conclusion 10 remains, the commentary make explicit that "emergence" refers to the "acceptance and recognition" standard used elsewhere in the conclusions.

Furthermore, this draft conclusion is inconsistent with draft conclusion 11. Draft conclusion 10, paragraph 2, states that if a new *jus cogens* norm "emerges," an existing conflicting treaty is void and that the parties are "released" from all obligations under those treaties. Draft conclusion 11, paragraph 2, on the other hand, makes clear that a treaty that is in conflict with a later-in-time *jus cogens* norm may survive, so long as the offending provision is separable from the remaining treaty.

As discussed below, the United States has concerns about the content of draft conclusion 11. If draft conclusion 11 remains as drafted, draft conclusion 10, paragraph 2, should read: "If a new peremptory norm of general international law (*jus cogens*) emerges and is in conflict with an existing treaty, that treaty becomes void and terminates, **subject to the separability of the treaty provisions addressed in conclusion 11**. ~~The parties to such a treaty are released from any obligation further to perform the treaty.~~"

[See also comment under general comments and observations.]

11. Draft conclusion 11 – Separability of treaty provisions conflicting with a peremptory norm of general international law (*jus cogens*)

Austria

[Original: English]

As to the separability of treaty provisions in conflict with peremptory norms of international law, addressed in draft conclusion 11, Austria questions whether the strict adherence to the non-separability regime for treaties in conflict with *jus cogens* existing at the time of a treaty's conclusion is still the most suitable approach. While Austria is aware of the non-separability rule contained in article 44, paragraph 5, of the Vienna Convention on the Law of Treaties, restated in draft conclusion 11, paragraph 1, it suggests that – at least in certain cases – a more nuanced approach would be preferable to "sanction" treaty provisions that violate *jus cogens.* Avoiding the invalidity of the entire treaty would be in line with the *favor contractus* principle. Therefore, Austria supports an extension to the entire draft conclusion of the approach already envisaged in draft conclusion 11, paragraph 2, for *jus cogens* emerging after a treaty's conclusion, which, in determining the consequences, takes account of the separability of a provision, its qualification as an essential basis of the consent to be bound and the consideration whether continued performance "would not be unjust". Austria also supports the suggestion to continue the search for a more specific expression than the rather vague term "unjust", which belongs to legal philosophy rather than the terminology of positive law. A possible replacement could be that continued performance would not be "against the common interest of the parties".

Belgium

[Original: French]

[See comment on draft conclusion 10.]

Colombia

[Original: Spanish]

In order to provide clarity to paragraph 1 of the draft conclusion, it would be appropriate to include a commentary that lays out the drafting history of the Vienna Convention on the Law of Treaties, which led to the decision that a treaty would be void in whole if, at the time of its conclusion, it conflicted with a norm of *jus cogens*, or otherwise provides the reasons why that wording was chosen for the draft conclusion.

Although it is clear that a treaty which, at the time of its conclusion, conflicts with a peremptory norm of general international law would be invalid in whole, it is not clear from this paragraph whether such invalidity would apply from the moment of the conclusion of the instrument, or from the moment that the party invokes the procedure set out in draft conclusion 21. Although the Commission clarifies this matter in its respective commentaries, indicating that the invalidity would be *ab initio*, in other words, that it would be understood that the instrument did not exist as such in international law, it would be advisable that the moment of invalidity also be expressly specified in the wording of paragraph 1 of draft conclusion 11.

Czech Republic

[Original: English]

[See comment under general comments and observations.]

South Africa

[Original: English]

We agree with the views of some members of the Commission, notably former member and now-Judge of the International Court of Justice Georg Nolte, that the Commission has stuck too closely to the Vienna Convention on the Law of Treaties. There is no reason, whether in practice or in logic, not to provide for separability where it is possible, even in relation to invalidity at the time of the conclusion of the treaty.

Spain

[Original: Spanish]

Draft conclusion 11 is a good example of what is referred to as codification by interpretation, which also raises some doubts. In this case, the articles interpreted are articles 44, 53 and 64 of the Vienna Convention on the Law of Treaties.

First, paragraph 1 sets out an interpretation of article 44, paragraph 5, and article 53 of the Vienna Convention, which prescribe the total invalidity of a treaty that conflicts with a peremptory norm and prohibit the separability of such a treaty.

Second, paragraph 2, which concerns cases of *jus cogens superveniens* and the consequent termination of the treaty as a whole, explicitly sets out the possibility of separability of the provisions of the treaty, which the Commission understands to be tacitly admitted in article 44, paragraph 3, and article 64 of the Vienna Convention and is therefore the result of the interpretation made by the Commission itself.

Spain shares this interpretation, which allows for the limitation of the effects of termination in cases of *jus cogens superveniens*.

Third, Spain believes that the possibility of separability of treaty provisions in this case is an exception to the general rule of invalidity and termination in whole. Accordingly, it would be useful to specify the requirement more clearly in draft conclusion 11, paragraph 2 (*c*), that "continued performance of the remainder of the treaty *would not be unjust*" (emphasis added).

The expression "would not be unjust" is indeterminate. Spain suggests that paragraph 2 (*c*) be replaced with the following: "the continued performance of the remainder of the treaty does not adversely affect the interests of the parties to the treaty and the object and purpose of the treaty".

Alternatively, if the preference is to retain the current wording modelled on article 44, paragraph 3 (*c*), of the Vienna Convention on the Law of Treaties, the Commission could decide to specify, in the commentaries, the benchmarks against which the justness or unjustness of separability would be assessed. They could include not only the interests of all States parties that might be affected by such separability, but also the object and purpose of the treaty, to the effect that separability of the treaty

by some States does not prejudice its object and purpose, to the extent that they are not affected by the treaty's conflict with the peremptory norm.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

With reference to draft conclusion 11 on the separability of treaty provisions conflicting with a peremptory norm of general international law (*jus cogens*) and its commentary, the United Kingdom recalls its view that it would be "disruptive of good international relations in many cases if the whole of a treaty were to be rendered void merely because, on one interpretation, one of its provisions happened to conflict with a peremptory rule or norm of international law".[80] This is particularly important given that certain treaties might conflict only in a minor respect with an emerging peremptory norm of international law: separability is necessary for the predictability and continued effective conduct of international relations. The United Kingdom notes that the position proposed by the Commission in draft conclusion 11 reflects the framework under the Vienna Convention on the Law of Treaties in that it distinguishes between treaties that at the time of their conclusion conflict with a norm of *jus cogens* and treaties which only subsequently come into conflict with an emerging *jus cogens* norm. Paragraph 5 of article 44 the Convention expressly provides that no separation is permitted for treaties falling within article 53 – treaties which at the time of their conclusion conflict with a norm of *jus cogens* – whereas the provisions of article 44 concerning separability apply to treaties falling within article 64 – existing treaties which only subsequently come into conflict with an emerging *jus cogens* norm.

The United Kingdom notes the Commission's statement in paragraph (2) of the commentary to draft conclusion 11, in relation to treaties that at the time of their conclusion conflict with a norm of *jus cogens*, that "[t]he view was expressed that there may be cases in which it would nevertheless be justified to separate different provisions of a treaty". In light of the provisions of the Vienna Convention on the Law of Treaties, in particular paragraph 5 of article 44, the United Kingdom would be grateful if the Commission could further elaborate on that statement, including outlining the circumstances in which it considers it might be justified to separate different provisions of such a treaty.

United States of America

[Original: English]

Draft conclusion 11 is also unsupported by State practice. The commentary to draft conclusion 11, paragraph 2, cites the Vienna Convention on the Law of Treaties for the differential treatment offered to treaties that pre-date and post-date a *jus cogens* norm, but the Vienna Convention is unclear on this issue. Article 44, paragraph 5, of the Convention states that any treaty subject to article 53 is not subject to separability. Article 53, in turn, addresses a treaty that violates existing *jus cogens* at the time of the treaty's conclusion; such treaties are "void". This analysis is reflected in draft conclusion 10, paragraph 1 – a treaty is void in its entirety if any portion of it conflicts with *jus cogens*. As Mark Villiger explains in his commentary on the Vienna Convention on the Law of Treaties, "no separation of the provisions of the treaty is permitted" in such cases.[81]

[80] *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publication, Sales No.: E.68.V.7), 66th meeting, pp. 386–387, para. 5. This issue was also commented on by Sir Francis Vallat during the Second Session, see *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11/Add.1, United Nations publication, Sales No.: E.70.V.6), 16th plenary meeting, p. 75, paras. 26–27, and 19th plenary meeting, pp. 97–98, paras. 53–57.

[81] Villiger (see footnote 38 above), p. 568.

Draft conclusion 11, paragraph 2, on the other hand, makes explicit what the Vienna Convention on the Law of Treaties could be read as assuming, but does not explicitly state. With respect to *jus cogens* norms that are accepted and recognized after the treaty enters into force, article 64 of the Convention states that the "existing treaty which is in conflict with that norm becomes void and terminates". Article 64 does not expressly bar separability and the issue is not otherwise addressed in article 44, paragraph 5, and thus, according to Villiger, article 64 "envisages the separability of treaty provisions" for existing treaties that violate *jus cogens* norms.[82] Such an assumption, however, was not made clear in the Convention.

Given that there is no State practice in this area, we do not see any reason for the present draft conclusions to explicitly resolve this issue, particularly in a way that goes beyond the text of the Vienna Convention on the Law of Treaties. The United States therefore proposes that draft conclusion 11, paragraph 2, be deleted. If paragraph 2 of draft conclusion 11 remains, the United States proposes that, as with draft conclusion 10, "emergence" be specifically equated with the acceptance and recognition standard in the commentary.

[See also comments under general comments and observations and on draft conclusion 10.]

12. Draft conclusion 12 – Consequences of the invalidity and termination of treaties conflicting with a peremptory norm of general international law (*jus cogens*)

Colombia

[Original: Spanish]

In paragraph (4) of its commentary to draft conclusion 12, the Commission points out that paragraph 1 (*a*), concerning the obligation of the parties to "eliminate as far as possible the consequences of any act performed in reliance on any treaty provision that is in conflict with a norm of *jus cogens*", does not create an obligation of result but one of conduct. This clarification is essential, since treaties which, at the time of their conclusion, conflict with a norm of *jus cogens* are usually invalid *ex post facto*, with the effect that they may encompass factual situations which, due to material impossibility, cannot be returned to their initial state by the parties to the instrument, despite their efforts to that end.

The Commission also makes it clear in paragraph 1 of the draft conclusion and the commentary thereto that the duty of the parties to seek to eliminate the consequences produced by the invalid treaty will only arise in respect of those provisions which are in conflict with the peremptory norm of general international law. Thus, while the whole treaty would be null and void, the duty of the parties to the treaty is restricted to eliminating the results of the provision or provisions that are in conflict with the norm of *jus cogens*.

Similarly, according to paragraph 1 (*b*) of the draft conclusion, the parties to the invalid treaty have an obligation to bring their relations into conformity with the peremptory norm of general international law which the treaty violates. Based on its wording, the paragraph does not seem to be limited to the consequences of the invalidity of the treaty, but goes beyond the treaty itself by stating that the parties to the treaty in general have an obligation to bring their relations in conformity with the peremptory norm of general international law.

Based on this understanding, we wish to draw attention to the scope of the wording of the paragraph, which would refer in general to the relations between the parties to the treaty, and not strictly to the relations established under the instrument that is invalid on account of its being in conflict with the norm of *jus cogens*. Thus, in order to circumscribe the meaning of this consequence, the obligation of the parties could be redirected to the relations established under the treaty, by reformulating paragraph 1 (*b*) of draft conclusion 12 as follows: "bring their mutual relations into

[82] *Ibid.*, p. 794.

conformity with the peremptory norm of general international law (*jus cogens*) in respect of the treaty which is void on account of its being in conflict with a peremptory norm of general international law (*jus cogens*)".

The scope of the legal consequences described in this paragraph also needs to be examined in relation to the question of the international responsibility of the parties to the treaty which conflicts with a norm of *jus cogens*. This would lead to the understanding that paragraph 1 would operate solely in the realm of the law of treaties, without regard to secondary rules of international law, such as the regime of international responsibility of States for internationally wrongful acts.

Czech Republic

[Original: English]

[See comment under general comments and observations.]

Japan

[Original: English]

Draft conclusion 12 reproduces most of article 71 of the Vienna Convention on the Law of Treaties but not all. Paragraph 2 (*a*) of article 71 of the Convention ("releases the parties from any obligation further to perform the treaty") is moved to paragraph 2 of draft conclusion 10. While this seems to be appropriate in the sense that it clearly denies retrospective power to *jus cogens* as mentioned above, and is based on the Commission's understanding of the relation between articles 64 and 71 of the Vienna Convention on the Law of Treaties, the commentary should provide reasons for this reformulation.

[See also comment on draft conclusion 10.]

United States of America

[Original: English]

This draft conclusion is also not based on any State practice and should be deleted. To the extent the Commission is inclined to preserve this draft conclusion, the commentary should make clear that the word "emergence" is specifically equated with the acceptance and recognition standard.[83]

Furthermore, draft conclusion 12, paragraph 2, eliminates the phrase "of the parties" that appears in article 71, paragraph 2 (*b*), of the Vienna Convention on the Law of Treaties, which the draft conclusion otherwise mirrors. That paragraph of the Convention states that the termination of the treaty "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty". The commentary to the draft conclusions does not address the deletion of this phrase. In the absence of any State practice on this issue, to the extent that the Commission is inclined to deviate from the language of the Vienna Convention on the Law of Treaties – which represents the only significant statement made by States on the point – it should explain its reason for doing so.

The United States is also concerned about the use of the ambiguous phrase "legal situation". Recognizing that this phrase is sometimes used in international humanitarian law or, in a different context, in the Commission's draft articles on the responsibility of States for internationally wrongful acts,[84] it remains unclear what the

[83] If, contrary to the view of the United States, the Commission maintains the portions of draft conclusion 11 that reflect the unstated and unsupported assumption read into article 64 of the Vienna Convention on the Law of Treaties that a treaty is separable where it violates a later-emerging *jus cogens* norm, draft conclusion 12, paragraph 1, should be revised to read "Parties to a treaty which is void **in whole or in part** …".

[84] The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq*., paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

phrase “legal situation” means in this context, and how a “legal situation” is to be distinguished from a legal obligation or legal right. The word “situation” is used again in draft conclusion 19, paragraph 2; the concern of the United States applies to both draft conclusions, and we will discuss this concern in more detail with respect to that draft conclusion.

[See also comments under general comments and observations and on draft conclusion 10.]

13. Draft conclusion 13 – Absence of effect of reservations to treaties on peremptory norms of general international law (*jus cogens*)

Austria

[Original: English]

Draft conclusion 13, paragraph 2, according to which “[a] reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*)” corresponds to guideline 4.4.3, paragraph 2, of the Commission’s Guide to Practice on Reservations to Treaties.[85] Austria concurs with this idea which has played a particularly prominent role in the context of human rights treaties, for instance regarding reservations to the Convention against torture and other cruel, inhuman or degrading treatment or punishment. However, Austria would have preferred the wording proposed by the Special Rapporteur in paragraph 76 (*b*) of his third report (A/CN.4/714 and Corr.1), which reads: “a reservation that seeks to exclude or modify the legal effects of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*) is invalid”. This wording expresses more clearly the consequences of such a reservation for the applicability of the treaty to the reserving party.

Colombia

[Original: Spanish]

This draft conclusion shows that the invalidating effect of *jus cogens* norms also extends to unilateral declarations of States that are contrary to such norms, including declarations in reservations to treaties. It is important to note, however, that the Commission says in paragraph (1) of its commentary that the draft conclusion is not intended to regulate reservations, which are already covered by section 2 of Part II of the Vienna Convention on the Law of Treaties.

It should also be noted that the draft conclusion is based on the definition of reservations set out in article 2, paragraph 1 (*d*), of the Convention, which includes interpretative declarations in this category by indicating that any unilateral statement made by a State whereby it purports to exclude or modify the legal effect of certain provisions of the treaty constitutes a reservation.

The Commission also clarified the meaning of the draft conclusion in its commentary by indicating that, while a reservation may exclude the application of a treaty provision, the norm of *jus cogens* on which that provision is based will not be affected and will continue to apply generally under international law, given its hierarchical superiority to other rules of international law and its universal application. Hence, the reservation and the *jus cogens* norm have a separate existence and the reservation does not have any potential to contradict the peremptory effect of the norm.

The foregoing should be differentiated from the case of a treaty which, by virtue of its content, scope and number of parties, has the potential to establish a *jus cogens* norm, where a reservation to the provision establishing such a norm may be indicative

[85] “A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law” (*Yearbook … 2011*, vol. II (Part Three) and Corr.1–2, p. 294).

of its lack of general acceptance and recognition, as provided for in draft conclusions 2 and 4.

With regard to paragraph 2 of draft conclusion 13, it should be understood that the *jus cogens* provision must already exist at the time of the formulation of the reservation that brings the treaty provision into conflict with the *jus cogens* provision.

Czech Republic

[Original: English]

[See comment under general comments and observations.]

The Netherlands

[Original: English]

Whereas draft conclusions 10 to 12 follow the rules concerning legal consequences of *jus cogens* as provided for in the Vienna Convention on the Law of Treaties, this does not seem to be the case for draft conclusion 13. The Convention does not provide for a provision on the (im)possibility for States to make a reservation with regard to treaty provisions that are allegedly in violation of peremptory norms of general international law. In the absence of a general agreement that treaties could be an independent basis for *jus cogens* [see comment on draft conclusion 5], the Kingdom of the Netherlands would recommend that the Commission consider whether the consequence as reflected in draft conclusion 13 could be based on a conflict with a peremptory norm of customary international law rather than a peremptory norm of international treaty law. The formulation of draft conclusion 13 should reflect that making a reservation as well as raising an objection against the validity of a norm of *jus cogens* does not have an effect on the binding character of that particular norm.

Poland

[Original: English]

As regards draft conclusion 13, Poland does not see a legal possibility to make a reservation to a treaty provision that reflects a peremptory norm of general character. First, due to the fact that such a reservation would likely be contrary to the very object and purpose of the treaty and, second, because such a reservation can affect the binding nature of *jus cogens* norm.

South Africa

[Original: English]

We believe the Commission should reconsider this draft conclusion. In our view, reservations in conflict with peremptory norms should be declared invalid. We understand the reasoning of the Commission, and the fear that this may be read to impose the jurisdiction of a tribunal without a State's consent, but we are of the view that this can be addressed by a "without prejudice" clause.

Spain

[Original: Spanish]

As the Commission explicitly acknowledges in its commentary, both paragraphs are based on the guidelines in its Guide to Practice on Reservations to Treaties, adopted in 2013.[86]

[86] The guidelines constituting the Guide to Practice on Reservations to Treaties adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2011*, vol. II (Part Three) and Corr.1–2, pp. 23 *et seq*. See also General Assembly resolution 68/111 of 16 December 2013, annex.

However, the wording of paragraph 2 creates some room for ambiguity with regard to reservations made to "ordinary" treaty rules included in treaties containing some peremptory norm, as international practice shows in the case of the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment.

Spain suggests retaining the wording formulated by Special Rapporteur Dare Tladi, in paragraph 76 (*b*) of his third report (A/CN.4/714): "a reservation that seeks to exclude or modify the legal effects of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*) is invalid". This is a much clearer and simpler proposal.

United States of America

[Original: English]

Draft conclusion 13 is unsupported by State practice and should be deleted.

[See also comments under general comments and observations and on draft conclusion 10.]

14. Draft conclusion 14 – Rules of customary international law conflicting with a peremptory norm of general international law (*jus cogens*)

Austria

[Original: English]

[See comment on draft conclusion 3.]

Cyprus

[Original: English]

Bearing in mind that peremptory norms are hierarchically superior to ordinary rules of international law, universally applicable and non-derogable, the Republic of Cyprus supports the view that a State cannot be "persistent objector" to a peremptory norm (draft conclusion 14). Accepting the application of the "persistent objector" rule to peremptory norms would contradict and undermine the very essence of the latter concept and negate its constitutive elements.

Czech Republic

[Original: English]

The first sentence of paragraph 1 envisages a situation which is quite difficult to imagine in practice. It presupposes that, in parallel with an existing peremptory norm of general international law (accepted and recognized by the international community of States as a whole), an antithetical process could take place giving rise to a conflicting norm of the general international law conditioned by existence of *usus longaevus* and *opinio juris*. These two situations seem to be mutually exclusive and accordingly the hypothesis of paragraph 1 appears rather theoretical.

With respect to paragraph 2, we would appreciate it if the Commission could clarify, in the commentary, how the principle of separability, applicable in the context of the law of treaties (as reflected in draft conclusion 11, paragraph 2), is transposed and applied with respect to rules of customary international law. In the case of treaties, the principle of separability concerns the treaty (containing number of rules, norms or obligations) as a whole and is based on the presumption of the termination of the whole treaty, unless certain conditions of separability are met. In the case of a rule of customary international law, separability is applied with respect to a "rule" and without any specification of the conditions for such separability.

[See also comment under general comments and observations.]

France

[Original: French]

With regard to the consequences of *jus cogens* norms, the Commission states in the first paragraph of draft conclusion 14 that "[a] rule of customary international law does not come into existence if it conflicts with a peremptory norm of general international law (*jus cogens*)". However, the existence of a "conflict" necessarily implies the existence of the conflicting norms. If one of them does not exist, then there can be no conflict. It is indisputable that the existence of *jus cogens* has the effect of introducing a hierarchy of norms in international law. Yet, for a hierarchy to exist, there must be norms at the various levels of the legal order under consideration, and such norms must have a relationship of conformity from the lower level to the higher level. Reasoning in terms of the "non-existence" of conflicting norms, as the Commission suggests, means paradoxically erasing any idea of normative hierarchy.

Israel

[Original: English]

Israel notes that the existence of persistent objectors is highly relevant to whether a norm has been accepted and recognized by the international community of States as a whole. The commentary maintains that a *jus cogens* norm may develop notwithstanding a persistent objector, as the acceptance and recognition required for the identification of such norms are those of "a very large majority of States" only. The statements in support of this assertion appear too broad and potentially confusing. In line with the position of Israel in the context of its comments to draft conclusion 7, paragraph 2, given that virtually universal acceptance and recognition are required for the formation of a *jus cogens* norm, it is highly questionable whether such norms could be developed and crystallized in the face of significant persistent objection.

In light of the above, Israel suggests omitting draft conclusion 14, paragraph 3. In case the Commission wishes to maintain this draft conclusion, at the very least the commentary should reflect that there exists disagreement as to whether *jus cogens* norms could be developed and crystallized in the face of significant persistent objection.

Italy

[Original: English]

Draft conclusion 14 is built on the idea that *jus cogens* norms are hierarchically superior to the *jus dispositivum*, whether deriving from a treaty provision or from a rule of customary international law. Italy fully endorses that idea. However, it is of the view that draft conclusion 14 (especially paragraph 1) and its commentary require further refinement.

First, the provision in paragraph 1 according to which "[a] rule of customary international law does not come into existence if it conflicts with a peremptory norm of general international law (*jus cogens*)" describes an impossible scenario of a conflict between a non-existent rule (of customary international law) and an existent peremptory norm. Either the rule of customary international law has come into existence and may conflict with a peremptory norm (a conflict which may produce legal consequences in terms of invalidity of the customary rule) or the rule has not come into existence thereby rendering any conflict with a peremptory norm impossible. *Tertium non datur*.

Second, except for the rare occasions of bilateral or regional customary rules, it is difficult to envisage how a customary rule may emerge if its content manifestly contradicts existing peremptory norms of general international law (any such emergence would put into serious question the existence itself of the peremptory norm according to the criteria identified in draft conclusion 4).

Third, with regard to paragraph (7) of the commentary, given the essential content of customary rules, it is difficult to imagine how a "severability" scenario could be envisaged with regard to the only partial invalidation a rule of customary international law by the emergence of a subsequent peremptory norm. It is suggested that the Commission either provide some examples of State practice or delete the relevant passage in the commentary altogether.

Japan

[Original: English]

[See comment on draft conclusion 7.]

The Netherlands

[Original: English]

With respect to draft conclusion 14, paragraph 1, the Kingdom of the Netherlands finds it difficult to imagine how a peremptory norm of international law may be revised by a developing rule of customary international law. This would imply that the required State practice with respect to the developing rule of customary international law would derogate from an already existing norm of *jus cogens*. The only situation in which this would be different is when State practice with respect to a developing rule of customary international law would provide the already existing norm of *jus cogens* with a broader scope of application. In all other situations, the Kingdom of the Netherlands is of the opinion that such a development would imply a derogation from or a limitation of an already existing rule of *jus cogens*. The Kingdom of the Netherlands would therefore recommend that the Commission elaborate and describe this process of revision in the commentaries to draft conclusion 14. According to the Kingdom of the Netherlands, the same line of argumentation would apply to draft conclusion 14, paragraph 2, which provides that a rule of customary international law would no longer exist if this rule conflicts with a new rule of *jus cogens*. The Kingdom of the Netherlands finds it difficult to understand how this would happen without the particular rule of customary international law being revised.

Draft conclusion 14, paragraph 3, states that "[t]he persistent objector rule does not apply to peremptory norms of general international law (*jus cogens*)". The Kingdom of the Netherlands, however, considers that persistent objection by one State or a group of States does actually play a role in the process of the development of a rule of customary international law on the basis of which a rule of *jus cogens* may come into existence. In this context, according to the Kingdom of the Netherlands, three situations may be distinguished. First, a rule of customary international law comes into existence which, over time, becomes a peremptory norm of general international law without any State or group of States persistently objecting to this development. Second, a rule of customary international law comes into existence without one State or a group of States persistently objecting to this rule. Subsequently, in the context of the process of evolution of the rule of customary international law into a rule *of jus cogens*, one or more States persistently object to this development. Third, there may be a rule of customary international law in existence against which one or more States have persistently objected. As a consequence, these States are not bound by this rule. Subsequently, these same States also persistently object against the development of this rule into *jus cogens*. The Kingdom of the Netherlands invites the Commission to consider, in the commentaries to draft conclusion 14, the question of whether, notwithstanding the persistent objection of one or more States against the development of *jus cogens*, as described in the second and the third situations, a rule of *jus cogens* can still come into existence and, if so, whether this rule of *jus cogens* is also applicable to the State or States that have persistently objected.

Russian Federation

[Original: Russian]

There is room for improvement in the first part of paragraph 1 of draft conclusion 14, which states that "[a] rule of customary international law does not come into existence if it conflicts with a peremptory norm of general international law (*jus cogens*)". It is not possible for something that has not yet come into existence to conflict with something else. In that connection, it may be appropriate to consider alternative wording that would affirm that the practice of States that conflicts with an existing peremptory norm of general international law (*jus cogens*) may not give rise to a norm of customary international law.

Paragraph 3 of draft conclusion 14 is open to debate. It is difficult to accept the Commission's opening argument in paragraph (9) of its commentary that "[t]he rule that persistent objection does not apply to peremptory norms of general international law (*jus cogens*) flows from both the universal application and hierarchical superiority of peremptory norms of general international law as reflected in draft conclusion 3". The argument that the persistent objector rule does not apply to peremptory norms of international law (*jus cogens*) must, at a minimum, be based on the fundamental characteristics of such norms deriving from article 53 of the Vienna Convention on the Law of Treaties.

The wording of the persistent objector rule should be balanced and take into account that it essentially requires a deviation from the principle according to which no obligations of States can arise without their consent. Paragraph (11) of the commentary to this draft conclusion is of the utmost importance here. This paragraph asks the important question of whether objections may affect the test of acceptance and recognition of a rule of general international law (*jus cogens*) as such a rule.

In view of the above, the Commission would do well to revisit paragraph 3 of draft conclusion 14 and consider a formulation that distinguishes between the non-applicability of the persistent objector rule to an existing peremptory norm of general international law (*jus cogens*) and the ability of this rule, provided there is a sufficient number of objections by States, to prevent the emergence or formation of a peremptory norm of general international law (*jus cogens*).

Slovenia

[Original: English]

With respect to draft conclusion 14, the Republic of Slovenia would appreciate some additional clarification on paragraph 1 on the process of modification of a peremptory norm of general international law (*jus cogens*). As provided under draft conclusion 5, the position of the Republic of Slovenia is that peremptory norm of general international law (*jus cogens*) can only arise from a norm of customary international law. Since the first sentence of draft conclusion 14 stipulates that a rule of customary international law cannot come into existence if it conflicts with a peremptory norm of general international law (*jus cogens*), it is unclear how a peremptory norm can be modified by a subsequent norm of general international law having the same character in any way, except to make an existing rule broader.

Spain

[Original: Spanish]

Spain is dissatisfied with the wording of draft conclusion 14, which is of vital importance for the development of international law as a legal system, since it seeks to regulate in a prescriptive manner the relationships between, and the legal effects and consequences of, the rules of "ordinary" customary international law and norms of *jus cogens*.

However, in draft conclusion 14, instead of being formulated in such terms, those relationships are formulated in terms of the "existence" of norms, thus producing unsatisfactory results.

The scenario in the first paragraph is one where a conflict is impossible, because if the customary rule does not come into existence, the normative conflict (conflict between norms) would not be possible.

Bearing in mind that the rules of customary international law are not the result of a formalized procedure but of a social process in which the two elements of international custom can be identified, Spain suggests that the paragraph be reworded to reflect that character. Accordingly, the first sentence of paragraph 1 could read as follows: "The process of formation of a customary rule will not be completed or crystallized if the result may conflict with a peremptory norm of general international law (*jus cogens*)."

Paragraph 2 addresses the situation of a rule of customary international law that conflicts with a peremptory norm, a situation which raises a central question regarding the structure of the international legal system, since it deals with the relationships between such rules and norms, the legal effects between them and their resulting legal consequences.

Paragraph 2 provides that in such cases, the customary rule, which does not have a peremptory character, "ceases to exist" if it conflicts with the peremptory norm.

First, all relationships between the two types of rules, including those of a normative conflict (conflict as understood by the Commission) are always between rules and norms that already exist and are in force.

Second, the legal effects of the relationships between the two types of rules and norms that are in normative conflict, based on one of the characteristics of norms of *jus cogens* (draft conclusion 3) are determined by the fact that the latter "are hierarchically superior to other rules of international law".

Third, the legal consequences of the hierarchical superiority of peremptory norms should be identified more clearly. These legal consequences can be understood in two ways: first, as a derogating hierarchy over the customary rule, such that the legal consequence could be the invalidity of the customary rule as opposed to the peremptory norm; second, as a simple prevalence or preferential application of the peremptory norm which merely leaves the conflicting customary rule inapplicable.

Spain believes that the Commission should reword paragraph 2 and explain more clearly, either in the draft conclusion itself or in the commentary, the legal consequences of such conflict (normative conflict).

Paragraph 3 of draft conclusion 14 excludes the application of the persistent objector rule. However, Spain suggests that the Commission make it clearer in paragraph (12) of its commentary that the persistent objector rule is a secondary rule relating to the scope of a customary international rule or to its opposability, but does not regulate either the identification or the creation or termination of the content of substantive primary rules. In short, the Commission should make it clear in the commentaries that the persistent objector rule is inapplicable to peremptory norms and therefore cannot limit the personal, material, temporal or any other scope of such norms.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom notes that the Commission, in paragraph 1 of draft conclusion 14, preserves the possibility that a norm of *jus cogens* may be modified by a subsequent norm having the same peremptory character, and would welcome the Commission's clarification, perhaps in the commentaries, as to how such a subsequent norm may develop and eventually modify the existing norm given the legal

consequences ascribed to peremptory norms of general international law (*jus cogens*) in Part Three of the draft conclusions.

As noted above in relation to draft conclusion 7, the persistent objection of certain States to a rule of customary international law while that rule is in the process of formation is relevant to whether it is possible to conclude that the rule has been accepted and recognized by the international community of States as a whole as having a peremptory character. The United Kingdom has previously raised concerns about paragraph 3 of draft conclusion 14.[87] The United Kingdom continues to question whether the status of a persistent objector should be automatically denied if a rule of customary international law were to become a peremptory norm of general international law (*jus cogens*); there is no relevant State practice to support such a contention. In light of the requirement for acceptance and recognition by the international community of States as a whole, the United Kingdom remains unconvinced that it would even be possible for a norm of *jus cogens* to develop where there is a clear persistent objection or objections from States, especially those States who are specially affected. Therefore, the United Kingdom considers that it would be better to omit paragraph 3 from the draft conclusion and instead explore in the accompanying commentary the arguments in favour and against the relevance of persistent objection to the acceptance and recognition of a norm of *jus cogens*.

[See also comment on draft conclusion 7.]

United States of America

[Original: English]

The lack of State practice supporting the provisions in this "conflicts" section of the draft conclusions is starkest in draft conclusion 14. The commentary does not cite any examples of customary international law that has conflicted with *jus cogens*. Nor is such a problem likely to arise, given the "extensive and virtually uniform"[88] State practice undertaken out of a sense of legal obligation that is required for customary international law. If State practice is "extensive and virtually uniform" so as to support one rule of customary international law, it is difficult to imagine how State practice would also support a contrary rule of *jus cogens*. Thus, draft conclusion 14 is unnecessary and should be deleted.

If draft conclusion 14 remains, assuming *arguendo* that somehow a rule of customary international law could conflict with a peremptory rule of general international law, it is also inconsistent with the well-accepted standard for the formation of customary international law. The only criteria to establish a rule of customary international law are State practice and *opinio juris*; conflict with other laws does not prevent the "existence" of a norm of customary international law. Draft conclusion 14, paragraph 1, nonetheless asserts for the first time that "[a] rule of customary international law does not come into existence" if it conflicts with a *jus cogens* norm. It would be more accurate for draft conclusion 14, paragraph 1, to state: "A rule of customary international law ~~does not come into existence~~ **is void** if it conflicts with a peremptory norm of general international law (*jus cogens*)." The use of the word "void" would be in keeping with draft conclusion 10, regarding the effect of *jus cogens* norms on treaties.

If the suggestion by the United States for draft conclusion 14, paragraph 1 is accepted, then draft conclusion 14, paragraph 2, would no longer be necessary. The "void" rule would apply both to customary international law that conflicts with a pre-existing *jus cogens* norm, and customary international law that conflicts with a new *jus cogens* norm. To the extent that draft conclusion 14, paragraph 2, remains, it is unclear on what basis customary international law that conflicts with a later

[87] See the statement by the delegation of the United Kingdom at the seventy-third session of the Sixth Committee of the General Assembly, available from: www.un.org/en/ga/sixth/73/pdfs/statements/ilc/uk_2.pdf (annex, para. 3).

[88] See *North Sea Continental Shelf* (footnote 37 above), p. 44, para. 74.

"emerging" *jus cogens* norm could be severable, as indicated by the phrase "if and to the extent."

Draft conclusion 14, paragraph 1, also indicates that the rule established therein is "without prejudice to the possible modification of a peremptory norm of general international law (*jus cogens*) by a subsequent norm of general international law having the same character". As indicated above with respect to draft conclusion 2, this assertion necessarily raises the question of how, if a conflicting customary international law norm "does not come into existence" or is otherwise void *ab initio*, a *jus cogens* norm may be modified by a subsequent norm of general international law having the same character. By the Commission's logic, the subsequent norm, to the extent it conflicts with the pre-existing *jus cogens* norm, may never come into existence sufficient to modify the pre-existing *jus cogens* norm. Further consideration of this complicated question is warranted, as there is significant disagreement among international legal scholars as to whether and how a *jus cogens* norm may be modified.[89]

Finally, with respect to draft conclusion 14, paragraph 3, the United States agrees that the persistent objector rule may not prevent the application of a *jus cogens* norm once that norm has been accepted and recognized consistent with draft conclusions 4 and 6. However, the existence of persistent objectors is highly relevant to whether the norm has been accepted and recognized by the international community of States as a whole. The fact that the persistent objector rule may not apply after the *jus cogens* norm has been accepted and recognized – thus binding States to a norm to which they may have previously objected – underscores the need for the Commission to revise draft conclusion 7 as discussed above.

[See also comments under general comments and observations and on draft conclusion 10.]

15. Draft conclusion 15 – Obligations created by unilateral acts of States conflicting with a peremptory norm of general international law (*jus cogens*)

Czech Republic

[Original: English]

As regards paragraph 2 of this draft conclusion, see the commentary to draft conclusion 14, paragraph 2, *mutatis mutandis* (the application of the principle of separability with respect to an obligation created by unilateral acts of States).

[See also comment under general comments and observations.]

Spain

[Original: Spanish]

The wording of paragraph 1 of draft conclusion 15 is better suited to the dynamics of the relationship between an intended unilateral act and a peremptory norm as established in the previous draft conclusion with respect to customary rules. Since the unilateral act is not yet in existence, its conflict with a norm of *jus cogens* would prevent the creation of the resulting legal obligation.

More issues are raised in the second paragraph, which again addresses the relationship between obligations created by unilateral acts in conflict with a peremptory norm in terms of existence.

Spain considers it more appropriate, as it indicated with regard to draft conclusion 14 on rules of customary international law, to explain such relationships in terms of legal effects. In that connection, it suggests the use of terms already

[89] See discussions in A. Orakhelashvili, *Peremptory Norms in International Law*, Oxford University Press, 2006, pp. 128–130; G. J. H. van Hoof, *Rethinking the Sources of International Law*, Deventer, Kluwer, 1983, pp. 166–167; and R. Kolb, *Peremptory International Law* – Jus Cogens*: a General Inventory*, Oxford, Hart Publishing, 2015, pp. 101–102.

employed by the Commission in its guiding principles applicable to unilateral declarations of States capable of creating legal obligations, adopted in 2006.[90]

Accordingly, Spain suggests the following wording for the second paragraph: "An obligation under international law created by a unilateral act of a State *shall be void* if and to the extent that it conflicts with a new peremptory norm of general international law (*jus cogens*)" (emphasis added).

United States of America

[Original: English]

This draft conclusion raises the same concern as draft conclusions 11 and 14, namely that there is differential treatment under the Commission's draft conclusions for a new unilateral act of State that conflicts with existing *jus cogens* norms, as opposed to an existing unilateral act that conflicts with a new *jus cogens* norm. This difference, like in draft conclusion 14, is manifest in the phrase "if and to the extent" which appears in draft conclusion 15, paragraph 2, but not in draft conclusion 15, paragraph 1. It is unclear on what basis a unilateral act of a State that conflicts with a later "emerging" *jus cogens* norm could be severable.

16. Draft conclusion 16 – Obligations created by resolutions, decisions or other acts of international organizations conflicting with a peremptory norm of general international law (*jus cogens*)

Australia

[Original: English]

In the view of Australia, further consideration in the commentaries is needed on how draft conclusion 16 interacts with resolutions by the United Nations Security Council, noting the issues identified in paragraph (4) of the commentaries, relating to Article 103 of the Charter of the United Nations, its subsequent interpretation and the lack of State practice in this area. Further consideration should also be given to the interaction of draft conclusions 16 and 21 for Security Council resolutions, decisions or acts. The position of Australia is that States should not be able to unilaterally assert that a Security Council resolution breaches a *jus cogens* norm, and for that unilateral assertion to provide a justification for a State's non-compliance with the resolution.

Austria

[Original: English]

In the understanding of Austria, the first part of the wording of draft conclusion 16, referring to "[a] resolution, decision or other act of an international organization that would otherwise have binding effect", applies to all international organizations and their organs, including the United Nations Security Council. Austria supports strict adherence to the rule of law also in the context of the Security Council. It cannot be excluded that Security Council resolutions might in some cases lead to a potential conflict with *jus cogens*. In this context, Austria would like to point out, once again, that the final report of the Austrian initiative (2004 to 2008) on the United Nations Security Council and the rule of law[91] concluded that the Security Council does not operate free of legal constraint, which means that the Council's powers are subject to the Charter of the United Nations and norms of *jus cogens*.

Austria welcomes the reluctance of the Commission to address the applicability of immunity *ratione materiae* for offences prohibited by *jus cogens* in the present context, as this issue is currently under examination by the Commission under the topic "Immunity of State officials from foreign criminal jurisdiction". Not dealing

[90] A/61/10, pp. 367 *et seq.*, paras. 176–177.

[91] *The UN Security Council and the Rule of Law: the Role of the Security Council in Strengthening a Rules-based International System, Final Report and Recommendations from the Austrian Initiative, 2004–2008* (A/63/69-S/2008/270, annex), paras. 29, 37 and 49.

with this issue in the present context helps to avoid potential inconsistencies and duplications.

Belgium

[Original: French]

Belgium welcomes the Commission's explicit confirmation that resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations may not violate peremptory norms of general international law (*jus cogens*).

Belgium understands the phrase "does not create obligations under international law" in draft conclusion 16 to mean also that an act of an international organization that would otherwise have binding effect does not have such effect in itself. In other words, if an act of an international organization conflicts with *jus cogens*, it cannot create obligations within the organization's own legal order, if such an order exists for the organization and its members apart from international law.

Cyprus

[Original: English]

In light of the hierarchical superiority of peremptory norms, the Republic of Cyprus shares the view that peremptory norms prevail over resolutions, decisions or other acts of international organizations (draft conclusion 16). What is also important is that the scope of draft conclusion 16 is broad enough to encompass acts of the Security Council. This point highlights the significance of peremptory norms and the fundamental values reflected therein as even the acts of the primary organ of the United Nations give way to such rules.

Czech Republic

[Original: English]

See the commentary to draft conclusion 14, paragraph 2, *mutatis mutandis* (the application of the principle of separability with respect to an obligation created by resolutions, decisions or other acts of international organizations).

[See also comment under general comments and observations.]

France

[Original: French]

France is concerned that draft conclusion 16 could be interpreted in such a way as to allow a State to unilaterally withdraw from a resolution of the Security Council, adopted under Chapter VII of the Charter of the United Nations, on the ground that, in its view, the resolution is inconsistent with a norm of *jus cogens*. Paragraphs (2) and (4) of the commentary to the draft conclusion are not reassuring and do not provide any guarantees in that regard.

Germany

[Original: English]

As to draft conclusion 16 providing that resolutions, decisions or other acts of international organizations do not create obligations under international law if and to the extent that they conflict with a peremptory norm of *jus cogens*, Germany shares the concerns expressed by States that there is little State practice in support of this conclusion. Furthermore, the draft conclusion in its current wording might imply a risk of abuse by unilaterally disregarding binding Security Council decisions on its basis. This could undermine the authority of the Security Council acting under Chapter VII of the Charter of the United Nations and potentially jeopardize the overall effectiveness of Security Council action. Germany submits that further elaboration on

the relation between this draft conclusion and Articles 25 and 103 of the Charter of the United Nations would be advisable.

Israel

[Original: English]

Codification of existing law versus progressive development of the law

As stated above, Israel views with concern any attempts to attach to the violation of *jus cogens* norms consequences that go beyond the contours of the regime proposed in article 53 of the Vienna Convention on the Law of Treaties. In this regard, Israel reiterates that Part Three of the draft conclusions, in particular, mainly comprises suggestions for the progressive development of the law, or for new law. If the Commission nevertheless decides to engage in such proposals, the Commission should clearly so indicate. Several points in that regard are provided below.

Draft conclusion 16

Paragraph (2) of the commentary to draft conclusion 16 states that "[d]raft conclusion 16 is … meant to be broad, covering all resolutions, decisions and acts that would otherwise establish obligations under international law". The commentary specifically notes that draft conclusion 16 applies to resolutions of the Security Council, taken under Chapter VII of the Charter of the United Nations.

Israel notes that article 53 of the Vienna Convention on the Law of Treaties deals only with the implications of *jus cogens* norms on international treaties, and does not deal with resolutions of international organizations. Israel shares the concerns raised by a number of States that there is a significant lack of State practice demonstrating that a State may refuse to comply with a binding Security Council resolution based on an assertion of a breach of a *jus cogens* norm.

Accordingly, the commentary's reference to Security Council resolutions in this context cannot be regarded as reflecting existing law and should be omitted.

[See also comments on draft conclusions 19, 21 and 23.]

Italy

[Original: English]

Draft conclusion 16 is consistent with the idea of hierarchical superiority of *jus cogens* norms and, to that extent, Italy supports its insertion.

However, it is also of the view the draft conclusion should also contain, possibly in the text, a "without prejudice" clause with regard to applicable procedures and mechanisms established under the laws of an international organization in order to review and challenge the acts of that international organization. In several international organizations, including regional organizations, the mere invocation and unilateral presentation of evidence with regard to an alleged conflict of an act of that international organization with a peremptory norm of general international law is not a sufficient ground to depart from an obligation imposed through that act, but certain procedural mechanisms have to be resorted to, including of a judicial nature, with a view to an impartial determination.

The Netherlands

[Original: English]

With respect to draft conclusions 10 to 21, which concern the legal consequences of peremptory norms of general international law, the Kingdom of the Netherlands would like to recommend that the Commission specifically address – in its commentaries to these draft conclusions, and in particular with regard to draft conclusion 16 – the question of when a conflict of norms of international law exists. In addressing this question, the Commission could also make use of case law of

international courts and tribunals, for example, the judgment of the International Court of Justice in *Jurisdictional Immunities of the State*.[92] This will contribute to the goals of this project, namely providing practical guidelines to States for the identification of *jus cogens*.

Russian Federation

[Original: Russian]

The Russian Federation does not believe that draft conclusion 16 can be applied to resolutions of the United Nations Security Council. The Russian delegation, speaking in the Sixth Committee, has noted that discussions on the issue of Security Council resolutions being consistent with peremptory norms of general international law (*jus cogens*), among others, are theoretical in nature and are not based on practice. Pronouncements by the Commission that are not supported by contemporary international law, such as the ones contained in the commentary to draft conclusion 16, could seriously undermine the work of a body that bears primary responsibility for the maintenance of international peace and security.

In view of the foregoing, no mention should be made of Security Council resolutions in the commentary to draft resolution 16.

Furthermore, it would be advisable to add a provision to the draft conclusions, analogous to the one included in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[93] stating that the draft conclusions and the commentaries thereto shall not prejudice the provisions of the Charter of the United Nations, cast doubt on their contents or change the approaches to the interpretation thereof.

Such a provision would reflect the obligations of States under Article 103 of the Charter of the United Nations.

Slovenia

[Original: English]

The Republic of Slovenia supports the wording of draft conclusion 16, since the rules that obtain the status of peremptory norms of general international law (*jus cogens*) reflect and protect the most fundamental values of the international community and are therefore binding on all international organizations and their organs. That is even more important when these organs are mandated to maintain international peace and security, such as the United Nations Security Council. The Security Council operates in the most sensitive situations, where there is a possibility of conflict with peremptory norms of general international law (*jus cogens*) and should remain mindful to adhere to the rule of law, especially peremptory norms.

South Africa

[Original: English]

In our view, the decisions/resolutions of the United Nations Security Council should be explicitly mentioned in the text of draft conclusion 16. As noted by some members of the Commission, the Security Council is particularly relevant here because of its decisions also enjoy a measure of hierarchical superiority. It is thus relevant to point out that the priority enjoyed by its decisions by virtue of Article 103 of the Charter of the United Nations is limited by *jus cogens*.

We fully understand the fear that this might lead to undermining the Security Council. For that reason, we would suggest that a clause be inserted noting that the

[92] *(Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99.
[93] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

application of this rule is subject to the dispute settlement procedure in draft conclusion 21. This point might also be further emphasized in the commentary.

Spain

[Original: Spanish]

Spain has two observations about the draft conclusion: one on its wording and the other on the commentaries to the draft conclusion.

Spain suggests that the wording of the draft conclusion be clarified in order to distinguish between the normative provisions contained in the legal instrument (a resolution, decision or other act of an international organization) and the legal instrument itself. The draft conclusion could therefore be formulated as follows: "A *provision contained* in a resolution, decision or other act of an international organization that would otherwise have binding effect does not create obligations under international law if and to the extent that it conflicts with a peremptory norm of general international law (*jus cogens*)" (emphasis added).

The observation about the commentaries, in particular paragraph (4) thereof, concerns resolutions, decisions and binding acts of the Security Council. Spain supports the application of the international rule of law in the international community and, therefore, also the functioning of the Security Council.

Notwithstanding Article 103 of the Charter of the United Nations, Spain shares the Commission's defence and reasoning in said paragraph (4) on the hierarchical superiority of peremptory norms over such resolutions, decisions and binding acts of the Security Council.

However, Spain understands that the interpretation of Article 25 of the Charter of the United Nations and of the functions of the Security Council by the International Court of Justice in the *Lockerbie case*[94] and by the European Court of Human Rights in the *Al-Jedda* v. *the United Kingdom*,[95] *Nada* v. *Switzerland*[96] and *Al-Dulimi and Montana Management Inc. v. Switzerland*[97] cases can be used to defend the existence of a *juris tantum* presumption of compatibility between such binding resolutions and norms of *jus cogens*.

Although possible, it seems difficult that a Security Council resolution adopted by the required majority, and thus without a veto, could be contrary to a peremptory norm.

One of the legal implications of this observation is to clarify and defend the fact that the mere allegation of conflict with a peremptory norm is not sufficient for a unilateral refusal to comply with a binding Security Council resolution.

Spain suggests that this concern be accommodated with the addition of a second paragraph to the text of the draft conclusion or, preferably, to the corresponding commentaries.

Switzerland

[Original: French]

Draft conclusion 16, according to which decisions of international organizations that would otherwise have binding effect do not create obligations under international

[94] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 114, at p. 126, para. 42.

[95] *Application no. 27021/08, Judgment of 7 July 2011*, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions 2011*, para. 102.

[96] *Application no. 10593/08, Judgment of 12 September 2012*, Grand Chamber, European Court of Human Rights, *Reports of Judgments and Decisions 2012*, at para. 170.

[97] *Application no. 5809/08, Judgment of 21 June 2016*, Grand Chamber, European Court of Human Rights, paras 138–142.

law that are in conflict with a peremptory norm, is in line with the Swiss understanding of *jus cogens*. This legal consequence follows naturally from the hierarchical superiority of *jus cogens* norms set out in draft conclusion 3. The relevant case law of the Federal Supreme Court of Switzerland confirms that decisions of international organizations are binding on Switzerland insofar as they do not violate peremptory norms of international law (*jus cogens*).[98]

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom cannot accept draft conclusion 16, on the relationship between *jus cogens* and binding resolutions of international organizations. In particular, there is not sufficient State practice to support the contention that a State can refuse to comply with a binding resolution of the United Nations Security Council based on an assertion of a breach of a norm of *jus cogens*. This is a controversial matter among States and writers alike, as the Commission's commentary acknowledges. The United Kingdom further notes that the Security Council has never contravened a norm of *jus cogens* in its resolutions.

There is a clear danger that this draft conclusion could be used to weaken respect for Security Council resolutions, thereby reducing their effectiveness. This would have serious practical ramifications for international peace and security. To ensure the effective operation of the United Nations' collective security system, it is essential that all Member States of the United Nations fully respect Security Council resolutions and do not question them unilaterally.

Therefore, the United Kingdom urges the Commission to further consider the scope of draft conclusion 16, to ensure that binding resolutions of the Security Council are excluded from the scope of that draft conclusion.

United States of America

[Original: English]

The United States maintains its objection, raised before the Sixth Committee in the general debate on the International Law Commission in both 2018 and 2019, to draft conclusion 16.[99] To the best of its knowledge, no recognized international organization has issued a resolution, made a decision or acted in a way that is contrary to a peremptory norm of general international law. Similar to draft conclusion 14,[100] it is highly unlikely that there would be a sufficient number of supportive member States to secure adoption of a resolution or other binding decision that would be contrary to a peremptory norm of general international law.

Moreover, draft conclusion 16 and its commentary risk undermining the authority of the United Nations Security Council and the binding nature of Security Council resolutions issued under Chapter VII of the Charter of the United Nations.[101] Paragraph (4) of the commentary states expressly that draft conclusion 16 would apply to binding Security Council resolutions. This statement could invite States, irrespective of Article 103 of the Charter of the United Nations, to disregard or challenge binding Security Council resolutions by relying on *jus cogens* claims, even disputed or unsupported claims. Given the lack of agreement on what constitutes *jus cogens* norms, such challenges are a real possibility and could impede the Security Council's efforts to address threats to international peace and security. Primary responsibility under the Charter of the United Nations for the maintenance of

[98] See *Nada* v. *SECO* (footnote 28 above), p. 458, para. 5.4, and pp. 460–461, para. 7.

[99] See the statements by the delegation of the United States at the seventy-third and seventy-fourth sessions, respectively, of the Sixth Committee of the General Assembly, available from: www.un.org/en/ga/sixth/73/pdfs/statements/ilc/us.pdf (p. 14) and www.un.org/en/ga/sixth/74/pdfs/statements/ilc/us_1.pdf (p. 3).

[100] See the comments regarding draft conclusion 14.

[101] See A/74/10, p. 188, para. (2) of the commentary to draft conclusion 16.

international peace and security lies with the Security Council,[102] and yet draft conclusion 16 and its commentary suggest there is a basis for States to take or refrain from taking actions mandated by the Security Council (and thereby binding on United Nations Member States) to address situations it has determined pose a threat to that peace and security.

Given the unlikelihood that the Security Council would issue a resolution or take any other decision contrary to a *jus cogens* norm, there is no reason to jeopardize the authority or effectiveness of its resolutions by including draft conclusion 16. In light of this risk, coupled with the lack of any demonstrable need to address this hypothetical, the United States is strongly of the view that draft conclusion 16 must be deleted.[103]

[See also comments under general comments and observations and on draft conclusion 10.]

17. Draft conclusion 17 – Peremptory norms of general international law (*jus cogens*) as obligations owed to the international community as a whole (obligations *erga omnes*)

Czech Republic

[Original: English]

[See comment under general comments and observations.]

Japan

[Original: English]

Paragraph 2 of draft conclusion 17 seems to replicate article 48 of the draft articles on the responsibility of States for internationally wrongful acts,[104] but only in part. While paragraph (6) of the commentary to the draft conclusion provides supplementary explanation based on article 48, Japan considers it necessary for the Commission to examine whether there has been any development of State practice in this regard.

[See also comment on draft conclusion 10.]

Italy

[Original: English]

Italy welcomes the insertion of a specific conclusion recognizing the link between peremptory norms and *erga omnes* obligations. It notes that in paragraph (2) of the commentary, a brief reference is made to the recognition by the Commission itself in its previous work on State responsibility. In this respect, it would be advisable that the Commission make reference in the commentary to the important reports elaborated by the Special Rapporteurs on State responsibility, ever since Mr. Roberto Ago elaborated the distinction between international delicts and international crimes in his 1976 reports.[105] These resulted in the Commission adopting a set of draft articles

[102] See Article 24, paragraph 1, of the Charter of the United Nations.

[103] Draft conclusion 16 is also inconsistent with draft conclusions 11, 14 and 15. The earlier conclusions differentiate between acts that conflict with existing *jus cogens* norms (which are void in their entirety) and existing acts which conflict with new *jus cogens* norms (which are void "if and to the extent" there is a conflict and are subject to separability). Draft conclusion 16 makes no such differentiation for binding resolutions of international organizations, instead stating that all such acts are void "if and to the extent" they conflict with a *jus cogens* norm, regardless of whether the resolution is passed before or after the *jus cogens* norm is recognized and accepted by the international community of States as a whole. There is no obvious rationale for the differences between the draft conclusions in this regard. This inconsistency underlines why the Commission should adhere only to State practice in this area.

[104] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 126–128.

[105] *Yearbook ... 1976*, vol. II (Part One), document A/CN.4/291 and Add.1–2.

at first reading in 1996,[106] article 19 of which identified the concept of international crime of State with regard to the serious breach of *erga omnes* obligations. This reference is all the more important since (as the commentary explicitly recognizes) the International Court of Justice has applied the special consequences under article 41 of the Commission's draft articles on the responsibility of States for internationally wrongful acts to violations of *erga omnes* obligations (see the case law cited in the second footnote to paragraph (2) of the commentary to draft conclusion 17).

Russian Federation

[Original: Russian]

In paragraph (3) of its commentary to draft conclusion 17, the Commission states that "[a]lthough all peremptory norms of general international law (*jus cogens*) give rise to obligations *erga omnes*, it is widely considered that not all obligations *erga omnes* arise from peremptory norms of general international law (*jus cogens*)".

This proposition should be examined more thoroughly and should be made explicitly clear in the draft conclusion itself.

The second paragraph of draft conclusion 17 stipulates that responsibility for a breach of a peremptory norm of general international law (*jus cogens*) is invoked in accordance with the rules on the responsibility of States for internationally wrongful acts. The Commission makes reference in its commentary to a draft article on the responsibility of States for internationally wrongful acts as a whole and for breaches of *erga omnes* obligations. This leaves the matter of consequences for breach of peremptory norms of general international law (*jus cogens*) essentially unexplored.

Spain

[Original: Spanish]

The object of draft conclusion 17 may be of vital importance for the systemic construction and conceptual refinement of the international legal order as a complex legal system: the relationships between peremptory norms of general international law (*jus cogens*) and obligations *erga omnes* and their legal consequences.

In the view of Spain, following its codification work on the responsibility of States for internationally wrongful acts of 2001[107] and that on the international responsibility of international organizations of 2011[108] and some recent decisions of the International Court of Justice in the 2012 case of *Questions relating to the Obligation to Prosecute or Extradite*[109] and the 2020 case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*,[110] the Commission had a good opportunity to further clarify the relationship between peremptory norms and obligations *erga omnes* and the legal consequences arising from that relationship.

Spain wishes to make the following comment about the wording of paragraph 1 of the draft conclusion and to suggest a reformulation. Obligations *erga omnes* are a type of collective obligations that are characterized as such because they protect general interests of the international community; they have an integral structure (they do not break down into bilateral components); they are universally applicable obligations; and they are obligations to the international community and as such, all

[106] *Yearbook … 1996*, vol. II (Part Two), pp. 58 *et seq*., paras. 65–66.

[107] The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq*., paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

[108] The draft articles on the responsibility of international organizations adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2011*, vol. II (Part Two), pp. 40 *et seq*., paras. 87–88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

[109] *(Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at p. 449, para. 68.

[110] *Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 3, at p. 17, para. 41.

States have a legal interest in complying with the norms from which they derive and in respect of the rights and obligations they create.

Consequently, the final phrase of paragraph 1, "in which all States have a legal interest", could lead to confusion, since States, unless they are injured States, do not have an interest of their own, except that as members of the international community, they have a legal interest in the protection of the collective interest that they reflect and protect. Spain suggests that the final phrase be worded as follows: "in which all States have a legal interest in ensuring that they are respected".

One of the specific consequences of this legal interest of all States is that every State has a right to invoke international responsibility as established in paragraph 2 of draft conclusion 17, which follows the provision of article 42 (for the injured State) and article 48, paragraph 1 (*b*), (for third States) of the draft articles on the responsibility of States for internationally wrongful acts.

Switzerland

[Original: French]

Switzerland suggests that the French version of draft conclusion 17, paragraph 1, be reworded, since the literal translation, *dans lesquelles tous les États ont un intérêt juridique*, does not seem appropriate in French. It should be made clear that States have a legal interest in respect for *jus cogens* norms, and that those norms give rise to obligations *erga omnes* by virtue of their fundamental and peremptory character.

United States of America

[Original: English]

Draft conclusion 17, paragraph 1, refers to obligations to the "international community as a whole". The United States recognizes that this term was used by the International Court of Justice in *Barcelona Traction*, in reference to obligations *erga omnes*.[111] In the context of the draft conclusions, however, it is unclear whether this phrase is intended to refer to the "international community of States as a whole" referenced in draft conclusion 2, the "international community" referenced in draft conclusion 3 or some other body. The United States therefore requests more explanation from the Commission as to what is intended by the term "international community as a whole" in draft conclusion 17.

The United States is also concerned about the phrase "in accordance with the rules on the responsibility of States for internationally wrongful acts", in draft conclusion 17, paragraph 2, and its accompanying commentary. The commentary points only to articles 42 and 48 of the draft articles on the responsibility of States for internationally wrongful acts for invocation of State responsibility by any State for the violation of an obligation *erga omnes*.[112] But since those draft articles are not binding and States may have differing views as to the applicability of particular articles, it is inappropriate to address them in the commentary as the "rules" referenced in draft conclusion 17, paragraph 2. The commentary should therefore be adjusted to make clear that the draft articles on the responsibility of States for internationally wrongful acts are not necessarily the "rules" referenced in draft conclusion 17, as they remain drafts that have not yet become subject to State agreement.

[111] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3.
[112] A/74/10, pp. 192–193, para. (6) of the commentary to draft conclusion 17.

18. Draft conclusion 18 – Peremptory norms of general international law (*jus cogens*) and circumstances precluding wrongfulness

Belgium

[Original: French]

This draft conclusion confirms that grounds precluding wrongfulness, such as consent or necessity, may not be invoked to justify a violation of a peremptory norm of general international law (*jus cogens*). The commentary could clarify that this principle does not prevent "consent" from playing a role in the interpretation of certain *jus cogens* rules. The commentary to draft conclusion 18 could refer to the following passage from the commentary to the Commission's draft articles on the responsibility of States for internationally wrongful acts: "But in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose. Determining in which circumstances consent has been validly given is again a matter for other rules of international law and not for the secondary rules of State responsibility."[113]

Czech Republic

[Original: English]

[See comment under general comments and observations.]

Italy

[Original: English]

Draft conclusion 18 *per se* is unproblematic as it is fully in line with article 26 of the Commission's draft articles on the responsibility of States for internationally wrongful acts.

However, it does not address, not even in its commentary, the thorny issue of the relationship between self-defense, which is a circumstance precluding wrongfulness in accordance with article 21 of the draft articles, and the prohibition on the use of force, which in the past has been considered by the Commission as a peremptory norm of general international law. The problem hinges on the relationship between the *jus ad bellum* primary rules and the secondary rules of State responsibility. Despite the identification by the Commission of the "prohibition of aggression" in the annex to the draft conclusions as a peremptory norm of general international law – a restrictive choice which excludes from scope of the peremptory norm other uses of force not in conformity with Article 2, paragraph 4, of the Charter of the United Nations and that is not free from difficulties – the issue remains outstanding and it would require proper treatment, at least in the commentary, in order to avoid confusion.

United States of America

[Original: English]

This draft conclusion is based on article 26 of the draft articles on the responsibility of States for internationally wrongful acts. As explained in the commentary to those draft articles, "a genocide cannot justify a counter-genocide".[114] The United States agrees fully with this proposition.

Draft conclusion 18 presents, however, the same concern as draft conclusion 17, in referring to "rules on the responsibility of States". For the same reasons noted above, the United States requests that the commentary be adjusted to make clear that

[113] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 85, para. (6) of the commentary to draft article 26.

[114] *Ibid*., para. (4) of the commentary to draft article 26.

the draft articles on the responsibility of States for internationally wrongful acts are not necessarily the "rules" referenced in draft conclusion 17, as they are not subject to State agreement. In the alternative, the Commission could adhere more closely to the language in article 26 of the draft articles. Draft conclusion 18 could thus be redrafted to provide that no circumstance "precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law".

19. Draft conclusion 19 – Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)

Australia

[Original: English]

In relation to draft conclusion 19, Australia requests that the commentaries identify further State practice and accompanying *opinio juris* that the obligation to cooperate to bring to an end through lawful means any serious breach of a *jus cogens* norm has now attained the status of a rule of customary international law.

Further guidance and State practice in the commentaries on the source, scope and content of the obligations identified in draft conclusion 19 and commentaries is also requested (beyond noting that it is based on article 41, paragraph 1, of the draft articles on the responsibility of States for internationally wrongful acts), including the obligation not to render aid or assistance and the duty of international organizations to exercise discretion in a manner that is intended "to bring to an end serious breaches of peremptory norms of general international law (*jus cogens*)".[115] Australia also invites the Commission to consider whether there have been further developments since its work on the draft articles on the responsibility of States for internationally wrongful acts on what obligations of cooperation, non-recognition and non-assistance apply to States in relation to a breach of *a jus cogens* norm which does not meet the threshold of seriousness in draft conclusion 19, paragraph 3.

Colombia

[Original: Spanish]

Paragraph 1 of draft conclusion 19 declares that States shall cooperate to bring to an end any serious breach by a State of its obligation arising under peremptory norms. Nonetheless, for Colombia, that wording is unclear and may imply that other breaches of a different nature should not be brought to an end or that they do not give rise to obligations for States.

For this reason, Colombia suggests that the wording of the paragraph be reviewed to ensure that there will also be consequences for any breach of obligations arising under a peremptory norm, with special emphasis on serious breaches.

Although the Commission says in its commentary that the draft conclusion does not address consequences of breaches of peremptory norms that are not serious in nature, it should make it clear that there will also be consequences for breaches that do not meet the threshold of being serious, in the light of the criteria for establishing the type of breach specified in paragraph 3.

Colombia also suggests that further clarification be provided as to the criteria for defining what constitutes a serious breach beyond what is stated in paragraph 3 of the draft conclusion, where a serious breach is defined as one that "involves a gross or systematic failure by the responsible State to fulfil that obligation". However, in its commentary, the Commission does not provide further clarification as to when a State commits such breach.

On this point, it would be important to state clearly whether there will be different consequences depending on the type of peremptory norm breached and

[115] A/74/10, p. 196, para. (5) of the commentary to draft conclusion 19.

whether this will involve the activation of differentiated cooperation frameworks. This reasoning could be inferred from the commentary to the draft conclusion, without any justification as to why.

Cyprus

[Original: English]

The Republic of Cyprus attaches great importance to the consequences of serious breaches of peremptory norms (draft conclusion 19). In this respect, we would like to recommend that the draft conclusions extend beyond the Vienna Convention on the Law of Treaties so as to include the responsibility of States for internationally wrongful acts. Again, having in mind the fundamental values that peremptory norms protect, the Republic of Cyprus underlines the customary obligation to cooperate to bring to an end serious breaches of obligations stemming from such rules. In a similar vein, States are also obliged to make efforts individually to end any unlawful results deriving from a violation of peremptory norms. In addition, States are under an obligation to refrain from assisting and/or recognizing as lawful a situation occurring from a breach of peremptory norms. The customary character of the duties of cooperation, non-recognition and non-assistance entails that States must perform those duties regardless of the existence of a judicial or political decision (for example, a Security Council resolution) calling on them to do so.

Czech Republic

[Original: English]

[See comment under general comments and observations.]

Israel

[Original: English]

As noted by the commentary, this draft conclusion is based, to a great extent, on the draft articles on the responsibility of States for internationally wrongful acts, as well as on some advisory opinions of the International Court of Justice. As for the draft articles, Israel reiterates its view, which is shared by other States, that not all of the draft articles reflect customary international law. With regards to draft article 41, paragraph 1, of the draft articles on the responsibility of States for internationally wrongful acts, which serves as the basis for draft conclusion 19, paragraph 1, on *jus cogens*, the Commission has itself acknowledged in the commentary thereto that "[i]t may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law".[116] This remains true today. The commentary to the current draft conclusions on *jus cogens* does not provide sufficient (if any) evidence of development of State practice regarding the suggestion in article 41, paragraph 1, of the draft articles on the responsibility of States for internationally wrongful acts that would indicate a change in this position.[117] Therefore, Israel considers that the particular consequences referred to in draft conclusion 19 do not reflect existing international law.

As for the two advisory opinions that are cited in paragraph (2) of the commentary in support of draft conclusion 19, it should be recalled that in both opinions the Court did not explicitly identify a norm of *jus cogens*, but rather referred to the *erga omnes* character of the rules in question. Accordingly, these two advisory

[116] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 114, para. (3) of the commentary to draft article 41.

[117] The commentary to the draft conclusions on *jus cogens* refers in this regard merely to one national court judgment, without mentioning that even in that single case, the State of that court, in the context of its statement in the Sixth Committee, viewed with concern the reliance of the draft conclusions on the draft articles on the responsibility of States for internationally wrongful acts, and stated that the status of the draft articles as customary international law is unsettled.

opinions cannot serve as a reliable source for establishing a duty of States to cooperate to bring a breach of *jus cogens* to an end.

Israel is thus of the view that draft conclusion 19 should be omitted from the draft conclusions. If it is not omitted, Israel suggests that the commentary at the very least make it clear that it does not reflect existing law.

Italy

[Original: English]

Draft conclusion 19 is drafted in conformity with article 41 of the draft articles on the responsibility of States for internationally wrongful acts, and therefore Italy finds it acceptable. With regard to the commentary, Italy would like to raise the following points.

First, Italy sees the need for the Commission to clarify its reference to the advisory opinions of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[118] and the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.[119] In fact, both advisory opinions grounded the identification of legal consequences for third parties on the *erga omnes* nature of the obligations breached, rather than on the peremptory nature of the corresponding norm and/or the serious violation of those obligations/norms. This clarification is particularly pressing given that in paragraph (1) of the commentary to draft conclusion 19, the Commission states that it "does [not] address the consequences of breaches of peremptory norms that are not serious in nature" and in paragraph (9) of the commentary, the Commission states that the "[t]he obligations in draft conclusion 19 apply only to serious breaches of peremptory norms of general international law (*jus cogens*)". The Commission may be of the view that, given the factual and legal circumstances, the reluctance of the Court to employ the normative category of *jus cogens* and the strict interconnection between *erga omnes* obligations and *jus cogens* norms, the International Court of Justice, in those two advisory opinions, had indeed identified a serious violation of a peremptory norm (without explicitly stating that). And yet, if that is the case, the point should be clarified in the commentary.

Second, paragraph (3) of the commentary does not seem to reflect the balance reached by the Commission in 2001 with the incorporation of article 54 in the draft articles on the responsibility of States for internationally wrongful acts. Instead, it seems to suggest that collective countermeasures taken to react to serious violations of peremptory norms with a view to pursuing an interest of the international community should not be considered as falling under this provision. This suggestion is not justified in the light of the abundance of practice of the last twenty years stemming from States and international organizations alike. A more balanced drafting of paragraph (3) of the commentary would be welcome and the second sentence of the same paragraph (which is misleading in the current form) should be deleted.

Third, in line with what has already been submitted (see the general observations above), with regard to the place of international organizations in the present draft conclusions, paragraph (11) of the commentary should be deleted.

Finally, Italy would like to point out that in paragraph (2) of the commentary, the Commission makes reference to the "adoption of its articles on the law of treaties". As confirmed by the second footnote to the paragraph, reference should instead be made to the draft articles on the responsibility of States for internationally wrongful acts.

[118] *Advisory Opinion, I.C.J. Reports 2004*, p. 136.
[119] *Advisory Opinion, I.C.J. Reports 2019*, p. 95.

Japan

[Original: English]

Draft conclusion 19 states that States shall cooperate to bring to an end any serious breach of *jus cogens*, and that no State shall recognize as lawful a situation created by a serious breach of *jus cogens*. While Japan notes that this draft conclusion is based on article 41 of the draft articles on the responsibility of States for internationally wrongful acts, practice after the adoption of the draft articles should be examined with a view to ascertaining whether draft article 41 has been accepted by States. In this regard, first, it is doubtful whether some cases cited in the commentary support draft conclusion 19. For example, in the advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the International Court of Justice stated that all Member States are under an obligation to cooperate with the United Nations in order to complete decolonization, without referring to *jus cogens*. Similarly, according to the advisory opinion of *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, "all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall",[120] but there was no explicit reference to *jus cogens*. The obligation not to recognize the illegal situation seems to have been discussed primarily in the context of territorial acquisition resulting from the threat or use of force. If the Commission considers that these obligations to cooperate and of non-recognition derive from *jus cogens* in general, and not from particular norms of international law, Japan invites the Commission to provide further evidence for such an understanding. Second, most of the conclusions in Part Three deal with the hierarchical relations between other norms and *jus cogens*. Draft conclusion 19 is the only conclusion concerning legal consequences pertaining to the obligations of other States (States that are not breaching *jus cogens*). As such, draft conclusion 19 may invite a question of whether obligations of "cooperation to bring to an end" and of non-recognition are the only consequences for other States.

As the Commission may be aware, there are ongoing discussions within the United Nations about restrictions on the use of the veto in certain circumstances, and the obligation to cooperate to bring an end to a serious breach of an obligation arising under *jus cogens* should include the obligation to refrain from using the veto when a serious breach of *jus cogens* obligations is at stake.

[See also comment on draft conclusion 10.]

The Netherlands

[Original: English]

With respect to draft conclusion 19, the Kingdom of the Netherlands notes that the Commission considers that the obligation of States to cooperate to bring a violation of a peremptory norm to an end is a rule of customary international law. The Kingdom of the Netherlands would recommend that the Commission expand the commentaries with examples of State practice as regards the customary international law status of this rule, in addition to the examples of judgments and advisory opinions of international courts and tribunals. Furthermore, the Commission indicates that States do not necessarily have to take these collective measures within the framework of an international organization. The Kingdom of the Netherlands would like to request the Commission to clarify, in the commentaries to draft conclusion 19, whether this is a developing or an already existing rule of international law. Moreover, the Kingdom of the Netherlands notes that twenty years have passed since the Commission concluded in its work in 2001 on the draft articles on the responsibility of States for internationally wrongful acts, and that, at that time, State practice was not yet sufficiently developed in regard of the question whether States that are not affected by a particular breach of international law are entitled to take countermeasures.

[120] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* … (see footnote 118 above), p. 200, para. 159.

According to the Kingdom of the Netherlands, subsequent developments warrant that the Commission resume its research on this point. The Kingdom of the Netherlands would in particular be interested in obtaining specific guidance with respect to the scope of the obligation for States not to recognize as lawful a situation created by a serious breach of an obligation arising under a peremptory norm of general international law and the obligation not to render aid or assistance in maintaining that situation, as outlined in draft conclusion 19, paragraph 2.

Poland

[Original: English]

Finally, on draft conclusion 19, we would like to draw the Commission's attention to the consistent position that has been presented by the Republic Poland with regard to the Commission's reports, on the need for greater scrutiny of the duty of non-recognition. In this respect, the draft conclusion and its commentary repeat to a large extent the Commission's commentary from 2001, despite the new significant practice in this regard such as the General Assembly resolutions on Crimea or the decision of European Court of Human Rights concerning the scope of the exception to the duty of non-recognition. Moreover, the idea that only a serious breach of a *jus cogens* norm implies the duty of non-recognition requires further consideration. In particular, question arises whether there can be only a "simple" breach of a *jus cogens* norm which does not imply an obligation of non-recognition.

Russian Federation

[Original: Russian]

The contents of draft conclusion 19 and the nature of the obligations it imposes on States would be more appropriate in the context of draft articles rather than draft conclusions, which are intended to provide methodological guidance for the topic at hand.

Spain

[Original: Spanish]

Spain recognizes that draft conclusion 19 closely tracks the wording of articles 40 and 41 of the Commission's 2001 draft articles on the responsibility of States for internationally wrongful acts, which the International Court of Justice had interpreted and applied in some of its recent judgments.

The draft conclusion deals with the particular consequences of serious breaches of peremptory norms. Some of the particular consequences are those set out in article 41 of the draft articles on the responsibility of States for internationally wrongful acts and those that may arise under the "without prejudice clause" of paragraph 3 (incorporated here into paragraph 4). In any case, it is clear that this is a draft conclusion on particular consequences.

This makes paragraph 3, which deals with the definition of the quantitative element of the breach of a peremptory norm (seriousness), less coherent. Paragraph 3 basically reproduces article 40, paragraph 2, of the draft articles on the responsibility of States for internationally wrongful acts. In other words, it helps to clarify the notion of a serious breach of peremptory norms, but does not provide for or regulate any legal consequence.

Accordingly, Spain recommends, for reasons of legislative technique, that paragraph 3 be deleted or that its contents be incorporated into the commentary.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom notes that in preparing draft conclusion 19, the Commission has relied on its 2001 draft articles on the responsibility of States for internationally wrongful acts, not all of which represent existing law, and some of which present problems of practical implementation. The United Kingdom recalls the comments and observations that it made in relation to those draft articles during their preparation.[121] Debate continues regarding what constitutes a "serious breach" or a "gross or systematic failure" to fulfil an obligation, and consequently the lack of clarity regarding the meaning of those terms will inevitably affect the utility of the draft conclusions. The United Kingdom also affirms the importance of ensuring flexibility to respond to breaches of norms of *jus cogens* in light of the nature of the breach and the circumstances of each State concerned: not all States would be affected in the same way or to the same extent by a serious breach of a norm of *jus cogens*, nor, more importantly, would all States be in an equal position to take steps to bring to an end such a serious breach. Therefore, the United Kingdom encourages the Commission to acknowledge the unsettled status of these provisions in the draft conclusions.

United States of America

[Original: English]

The United States strongly objects to draft conclusion 19.[122]

Draft conclusion 19 is framed in binding terms ("States shall cooperate…"), more appropriate for a draft article rather than a draft conclusion.[123] The violation of a *jus cogens* norm may result in the responsibility of a State for an internationally wrongful act; however, there is no basis to assert that there is a binding obligation on non-breaching States to address the wrongful act, as there is neither a relevant rule of customary international law nor express agreement of States to accept such an obligation. The supposed obligations listed in the draft articles on the responsibility of States for internationally wrongful acts do not reflect customary international law; indeed, the United States and other States expressed strong disagreement with their inclusion in the draft articles.[124] The draft articles were not adopted as a treaty or convention. While *jus cogens* norms themselves may apply *erga omnes*, there is no *erga omnes* obligation on non-breaching States to remedy the breach. There is thus no basis for listing these supposed obligations in binding terms in these draft conclusions.

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[121] See *Yearbook … 2001*, vol. II (Part One), document A/CN.4/515 and Add.1–3.

[122] Article 19, paragraph 1, delineates between "serious" breaches of *jus cogens* norms and other breaches of *jus cogens* norms, consistent with the draft articles on the responsibility of States for internationally wrongful acts (A/74/10, pp. 197–198, para. (9) of the commentary to draft conclusion 19). *Jus cogens* norms are of such a character that any breach should be considered "serious". Creating a division in the draft conclusions between "serious" and non-"serious" breaches sets up a dichotomy through which offending States may seek to excuse or downplay their non-"serious" breaches of *jus cogens* norms, while injured States may seek to describe every breach as "serious". The United States argued for deleting the entirety of chapter III, on serious breaches of peremptory norms of general international law, from the draft articles on the responsibility of States for internationally wrongful acts, in part due to disagreement with the dichotomy between "serious" and non-serious breaches of *jus cogens* (see *Yearbook … 2001*, vol. II (Part One), document A/CN.4/515 and Add.1–3, pp. 69–70).

[123] This language is taken almost verbatim from article 41, paragraph 1, of the draft articles on the responsibility of States for internationally wrongful acts, where the binding language carries some logic, as the draft articles may have been formally adopted by States as obligations. The United States does not view draft article 41, paragraph 1, as reflecting customary international law. The assertion of a supposedly binding obligation where none exists is particularly inappropriate in a draft "conclusion," as opposed to a draft article submitted for consideration by States for a treaty. See comment under general comments and observations.

[124] See *Yearbook … 2001*, vol. II (Part One), document A/CN.4/515 and Add.1–3, pp. 69–70.

The commentary to draft conclusion 19, paragraph 1, relies heavily on the International Court of Justice advisory opinions on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. Each of these opinions referred to third-State obligations arising in relation to breach of an obligation *erga omnes*, but neither referred to such obligations in relation to a *jus cogens* norm. The Commission cannot rely on these cases to support an assertion that there now exist new obligations on non-breaching States to act on breaches of obligations *erga omnes* arising from peremptory norms. Other relevant legal sources – for example, the Convention on the Prevention and Punishment of the Crime of Genocide – lack any language committing States to counteract violations of *jus cogens* norms committed by another State.

Finally, the United States is concerned about the use of the word "situation" in draft conclusion 19, paragraph 2. We recognize that this subpart is taken *verbatim* from article 41, paragraph 2, of the draft articles on the responsibility of States for internationally wrongful acts, which provides that no State should recognize as lawful a situation created by a serious breach of a *jus cogens* norm, nor render aid or assistance in maintaining that situation. The intention of the use of "situation" is not otherwise described in the commentary. Applying the plain meaning of the word "situation", draft conclusion 19, paragraph 2, is incorrect as a matter of law and practice, and could serve to undermine certain elements of international humanitarian law. States do recognize certain legal "situations" that are arguably created by a violation of a supposed *jus cogens* norm. For example, the Commission identifies, in the annex to the draft conclusions, "[t]he prohibition of aggression" as a *jus cogens* norm.[125] Often, when an act of aggression has taken place, it is followed by an armed conflict or an occupation. While those resulting situations may have resulted from illegal behaviour, the State that committed the aggression must still adhere to the legal obligations that apply to parties to armed conflict or occupying Powers. Although States may claim that the act of aggression that gave rise to the "situation" of armed conflict or occupation was a *jus cogens* violation, and therefore unlawful, they should also rightly recognize that the resulting "situation" continues to have the legal status of armed conflict (so that the parties' obligations under international humanitarian law applies), or occupation (so that the law of occupation applies), consistent with those relevant bodies of international law.

For the above reasons, the United States is strongly of the view that draft conclusion 19 must be deleted in its entirety.

[See also comment under general comments and observations.]

20. Draft conclusion 21 – Procedural requirements

Australia

[Original: English]

Australia respectfully submits that draft conclusion 21 is unhelpful and unnecessary for the Commission's work on *jus cogens* norms and that it should be removed. The draft conclusions are not designed to be adopted by States in the form of a treaty, whereas the effect of draft conclusion 21 would be to impose obligations on States beyond those that exist as a consequence of *jus cogens* norms. Australia also submits that draft conclusion 21 may cause confusion for inter-State relations. For example, it is unclear what the outcome would be if the relevant parties fail to reach a solution within twelve months and do not agree to submit the matter to the International Court of Justice. Further, the commentaries provide no guidance on the application of draft conclusion 21 to circumstances covered by draft conclusions 14 to 16 where a rule of customary international law, unilateral act of a State or a resolution, decision or act of an international organization conflicts with a *jus cogens* norm.

[125] A/74/10, p. 208.

Austria

[Original: English]

[See comment on draft conclusion 3.]

Colombia

[Original: Spanish]

In paragraph 1 of draft conclusion 21, the Commission should be more specific about the measures proposed to be taken with regard to the rule of international law in respect of which a peremptory norm was invoked as a ground for invalidity or termination. Colombia recommends that the phrase "in accordance with public international law" be added to the second sentence of the paragraph after the word "measure", in order to establish the nature of the measure that may be taken. The sentence would then read as follows: "The notification is to be in writing and is to indicate the measure **in accordance with public international law** proposed to be taken with respect to the rule of international law in question."

Paragraph 4 of the draft conclusion gives the objecting State or States concerned the option to offer to submit the matter to the International Court of Justice if, within a period of 12 months, no solution is reached as to the invalidity or termination of a rule of international law by reason of a peremptory norm. In this regard, it should be recalled that only States that have accepted the Court's jurisdiction under certain conditions may be parties to the legal dispute, as established in paragraph 5 of the draft conclusion, or may resort to or be brought before that dispute settlement body. The Commission should also bear in mind that, as the International Court of Justice is not the only dispute settlement mechanism, it could be restrictive to leave the Court as the final mechanism for the settlement of any dispute, especially given the understanding that there is no hierarchy among the methods of dispute settlement established in the Charter of the United Nations.

It should also bear in mind that States have full autonomy to choose their peaceful methods of dispute settlement, including those specified in Article 33 of the Charter of the United Nations. Although paragraph 3 is clear in this regard, paragraph 4 seems to give pride of place to the International Court of Justice and to encourage States to resort to the Court's jurisdiction when the dispute is not resolved within 12 months. Although submission of a dispute to the Court is formulated as being conditional on the willingness of the objecting State or the States concerned, the issued raised above should be taken into consideration.

The Commission should also bear in mind that the rule of international law under dispute may be enshrined in treaties, which generally have their own dispute settlement provisions, thus making it necessary to harmonize the dispute settlement provisions contained in treaties with the procedural requirements of draft conclusion 21.

Czech Republic

[Original: English]

According to the commentary to the draft conclusion, suggested procedural requirements apply to treaties as well as to other international obligations deriving from other sources of international law. While the law of treaties contains detailed substantive and procedural rules on the invalidity and termination of treaties, other sources of international law lack such rules. It is not clear which cases of application of *jus cogens* norms in respect of other rules of international law (customary international law, unilateral acts of States, decisions and other acts of international organizations) would trigger the application of the procedure envisaged in draft conclusion 21. For example, would the application of a peremptory norm of general international law in the proceeding before a national court, invalidating (according to the decision of the court in question) a rule of "ordinary" customary international law, call for the application of the procedure under draft conclusion 21? Furthermore, what

should be the criteria for the determination of the "States concerned" which are to be notified of the claim concerning the application of a peremptory norm of general international law in respect of other sources of international law? (In case of treaties, the party invoking a relevant claim under article 65 of the Vienna Convention on the Law of Treaties notifies all other parties of the treaty.) Further clarification of these issues seems necessary.

The Commission further states that not every aspect of the detailed procedure in the draft conclusion constitutes customary international law. The Commission should, in its commentary, further explain, emphasize and specify that relevant aspects and provisions of the draft conclusion represent only recommended practice, not customary international law.

Finally, the Czech Republic would like to point to the incorrect information concerning the Czech Republic contained in the last footnote to paragraph (3) of the commentary to draft conclusion 21. Czechoslovakia acceded to the Vienna Convention on the Law of Treaties on 29 July 1987, with a reservation to article 66 (*a*) concerning the submission of disputes to the International Court of Justice. However, on 19 October 1990, Czechoslovakia notified the Secretary-General of its decision to withdraw the reservation made upon accession with respect to article 66 of the Convention. In 1993, the Czech Republic succeeded to the rights and obligation of former Czechoslovakia under the Convention. Therefore, the Czech Republic accepts the jurisdiction of the International Court of Justice under article 66 and should be deleted from the list of States seeking to exclude the application of this provision.

El Salvador

[Original: Spanish]

With regard to draft conclusion 21 (Procedural requirements), we believe that paragraph 4, which provides for the possibility of the objecting State or States concerned offering to submit the matter to the International Court of Justice, should be redrafted in line with the commentary to the draft conclusion. In other words, although it is stated in the commentary that the aforementioned reference can never serve as a basis for establishing the jurisdiction of the International Court of Justice, we believe that, in order to reflect that actual intention, the wording could be harmonized with that of article 66 of the Vienna Convention on the Law of Treaties, leaving open to States the option, if they do not submit the matter to the International Court of Justice, of submitting the dispute, by common consent, to arbitration or to a dispute settlement mechanism similar to the Conciliation Commission referred to in the annex to the Convention.

France

[Original: French]

Draft conclusion 21 also gives rise to a number of reservations. The very presence of a "procedural" draft conclusion in the text transmitted by the Commission raises questions about the status of the text. Such a draft conclusion would undoubtedly have a place in a draft treaty instrument (as suggested by the Commission when it wrote, in its paragraph (2) of the commentary to draft conclusion 21, "that detailed dispute resolution provisions are embedded in treaties and do not operate as a matter of customary international law"). However, in the view of France, the 23 draft conclusions and their annex should not be adopted in the form of an international treaty.

Germany

[Original: English]

Regarding draft conclusion 21, which sets out the procedure for the invocation of the invalidity or termination of a rule of international law by reason of being in

conflict with *jus cogens*, Germany suggests removing this draft conclusion. First, the Commission itself found that detailed dispute resolution provisions did not operate as a matter of customary international law, but were embedded in treaties and bound treaty parties only. Second, the commentary rightly points out that not every aspect of the detailed procedure set forth in the draft conclusion constitutes customary international law.

Israel

[Original: English]

Draft conclusion 21, too, clearly does not reflect existing international law, and the procedure offered in it is novel. The commentary to draft conclusion 21 itself, in its paragraph (4), states that "[n]ot every aspect of the detailed procedure set forth in draft conclusion 21 constitutes customary international law".

Israel would like to recall that, as the commentary correctly highlights, the International Court of Justice determined that the mere fact that rights and obligations of a *jus cogens* character may be at issue in a dispute, would not give the Court jurisdiction to entertain that dispute.[126]

In line with its view that the draft conclusions should not go beyond reflecting the state of the law as it currently stands, Israel believes that draft conclusion 21 should be omitted from the draft conclusions. The inclusion of procedural provisions concerning dispute resolution is particularly inappropriate given that the draft conclusions are not intended to become a convention, as noted by the Special Rapporteur himself in his first report.[127]

If the draft conclusion is not omitted, the commentary should at least make it clear that the draft conclusion *as a whole* does not reflect current existing law.

For similar reasons, in line with its statement in the Sixth Committee in 2019, Israel continues to support the decision made by the Commission not to include draft conclusions that concern the exercise of domestic jurisdiction over offenses that may be prohibited by *jus cogens* norms, as well as the Commission's decision not to address the question of immunities in this context.

Italy

[Original: English]

In light of the consideration that the draft conclusions are admittedly not meant to be transformed into an international legally-binding instrument at a later stage, the need for such provision can be seriously questioned. It is also unclear how the proposed procedure would interact with the dispute settlement provisions contained in the Vienna Convention on the Law of Treaties. Moreover, the notions of "a State" and of "States concerned" under paragraph 1 are confusing as they seem to suggest that there is only "one State" entitled to invoke the ground of invalidity and that there may be States which are not "concerned" by the invocation of a violation of *jus cogens* norm as a ground for invalidity of a rule of international law: given that the obligations

[126] See *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, at pp. 31–32, para. 64: "The Court observes, however, as it has already had occasion to emphasize, that 'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things' (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29), and that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute. The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties."

[127] See A/CN.4/693, para. 73.

deriving from peremptory norms are *erga omnes* obligations, "all States" should be entitled to invoke the violation and "all States" should be notified of the claim. That, in turn, poses the question of the position of States not parties to a relevant treaty, which would be entitled to object (a right not contemplated under the relevant provisions of the Vienna Convention on the Law of Treaties).

Italy sees draft conclusion 21 as unnecessary for the purpose of the current project and potentially problematic, especially in its relation to the Vienna Convention on the Law of Treaties. Therefore, Italy suggests its deletion.

[See also comment under general comments and observations.]

Japan

[Original: English]

While acknowledging the importance of dispute settlement mechanisms regarding the identification and application of *jus cogens*, it is still questionable whether the draft conclusions should include procedural requirements. Parties to the Vienna Convention on the Law of Treaties consented to a certain procedure of dispute settlement concerning treaties. As correctly admitted in the commentary to paragraphs 2 and 4 of draft conclusion 21, it is doubtful whether such procedural requirements exist as a matter of customary international law, and whether such requirements can be applied in cases where *jus cogens* conflicts with treaties, customary international law and unilateral acts. Reference to the three-month notification is stipulated in article 65 of the Vienna Convention on the Law of Treaties concerning invalidity, termination, withdrawal and suspension of a treaty. Additional proof is needed to state that the same requirement is binding on non-parties to the Convention when the State concerned contends that a particular customary international law conflicts with *jus cogens*.

Article 66 of the Convention states that any one of the parties to a dispute concerning the application or the interpretation of articles 53 and 64 may submit it to the International Court of Justice unless the parties agree to submit the dispute to arbitration. It can be said that paragraph 4 of draft conclusion 21 in effect obliges States to submit such disputes to the International Court of Justice, since otherwise the invoking State can carry out the measure it proposed.

Rules concerning dispute settlement mechanisms are important to prevent abusive invocation of *jus cogens*. Japan upholds the rule of law and views that the dispute settlement mechanism plays an important role, and hence has been accepting the compulsory jurisdiction of the International Court of Justice since 1958. Japan also takes note that arbitration has proved to be an effective method of dispute settlement. Paragraph 5 of draft conclusion 21 might be intended to preserve consistency with the Vienna Convention on the Law of Treaties. Whether a reference to arbitration should be included in this draft conclusion needs further consideration.

Poland

[Original: English]

With respect to draft conclusion 21 related to the settlement of disputes, Poland is of the view that there is no need for such a provision. As recently confirmed by the International Court of Justice in its judgment in the case of the *Obligation to Negotiate Access to the Pacific Ocean*,[128] States are free to choose the appropriate procedure for the resolution of their disputes.

[128] *(Bolivia* v. *Chile), Judgment, I.C.J. Reports 2018*, p. 507.

Russian Federation

[Original: Russian]

Draft conclusion 21 on procedural requirements is a source of serious concern. In view of the scope of work on this topic, as originally described and delimited, there is no need for provisions relating to a mechanism for the settlement of disputes to be included in the draft conclusions. This element is not appropriate in the context of draft conclusions.

The wording of article 65 of the Vienna Convention on the Law of Treaties does not need to be supplemented by the proposed additions. There is, in fact, no practical need to stipulate that such a procedure be followed in respect of rules of customary international law. It is particularly troubling that it follows from draft conclusion 16 and the commentary thereto that the proposed procedural requirements would be applicable also to binding Security Council resolutions. The Commission should reconsider the inclusion of a mechanism that specifically allows for such resolutions to be challenged on any grounds, which could have serious consequences for international security.

Similarly, the contents of draft conclusion 21 do not reflect *lex lata* and do not contribute to the formation of *lex ferenda*.

[See also comment on draft conclusion 23.]

Singapore

[Original: English]

Singapore has carefully considered the text of draft conclusion 21 as adopted on first reading, in the light of the commentary thereto. Singapore cannot support draft conclusion 21, for the following reasons.

First, we remain of the view that the draft conclusion is unnecessary because it overlaps significantly with the procedures already set out in articles 65 to 67 of the Vienna Convention on the Law of Treaties. We are not persuaded that the innovations in draft conclusion 21 necessarily take the progressive development of international law in the right direction. For example, it is not clear to us why draft conclusion 21 does not mirror the broad references to judicial settlement, arbitration and conciliation in the title of article 66 of the Vienna Convention on the Law of Treaties, particularly in view of the active contemporary use of inter-State arbitration and conciliation procedures, as well as the possibility of resort to other international courts and tribunals. It is also not clear how the fourth paragraph of draft conclusion 21 would sit alongside the provisional measures practice of the International Court of Justice, which is fact-specific and thus may or may not permit the invoking State to proceed with the measure it has proposed during the course of the litigation. These significant departures from potentially applicable existing regimes mean that the “without prejudice” language of the fifth paragraph of draft conclusion 21 may confuse, rather than clarify.

Second, draft conclusion 21 is not appropriately placed in a set of draft conclusions dealing with the methodology for determining the existence and content of peremptory norms of general international law (*jus cogens*).

Singapore therefore requests that the Commission consider deleting draft conclusion 21.

Slovenia

[Original: English]

The Republic of Slovenia appreciates the effort that the Commission has put into establishing a mechanism in draft conclusion 21 that in general follows the procedure under articles 65 to 67 of the Vienna Convention on the Law of Treaties, yet takes into account the reservations that many States have lodged with regard to

the jurisdiction of the International Court of Justice, while still protecting legal certainty and providing the possibility to "cure" a potential situation where a rule would be in conflict with a peremptory norm of general international law (*jus cogens*).

Spain

[Original: Spanish]

Draft conclusion 21 is procedural in nature and raises a particular concern. Spain has a general observation and a more specific comment on the draft conclusion.

The general observation relates to the legal status of the draft conclusions, which are not intended to serve as a draft international treaty on the topic. Rather, as the Commission itself has reiterated, the draft conclusions have a methodological function to assist States, international and domestic courts and tribunals in the process of identification of peremptory norms and the determination of the legal consequences of such norms. The specific legal status of each of the draft conclusions will depend on its content, its wording and the normative authority it enjoys among States.

The procedural nature of draft conclusion 21 therefore differs from that of the other draft conclusions. Its content (paragraphs 1 to 3) closely tracks the provisions of articles 65 to 67 of the Vienna Convention on the Law of Treaties or, through a "without prejudice" clause (paragraph 5), refers to the relevant rules concerning "the jurisdiction of the International Court of Justice, or other applicable dispute settlement provisions agreed by the States concerned".

Spain therefore suggests that draft conclusion 21 be deleted.

However, it wishes to take this opportunity in particular to comment on paragraph 4, which has the greatest added value. Spain understands the purpose of the paragraph, but suggests that it be worded more clearly, at least in paragraph (8) of the commentary. Paragraph 4 provides that if no solution is reached within a period of twelve months, and "the objecting State or States concerned offer to submit the matter to the International Court of Justice, the invoking State may not carry out the measure which it has proposed until the dispute is resolved". Spain understands that the idea is one of encouragement and recommendation to States that they submit their disputes to the International Court of Justice, but, as the Court itself has stated repeatedly and unequivocally, the mere invocation of the breach of a peremptory norm "cannot of itself provide a basis for the jurisdiction of the Court".[129] This means that paragraph 4 cannot be interpreted as a provision that attributes compulsory jurisdiction to the Court in such cases.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom notes the Commission's explanation for the inclusion of a detailed procedural provision in the draft conclusions, and commends its intention to promote the stability of international relations and guard against the unsubstantiated unilateral invocation of *jus cogens* as a means to circumvent international obligations. The United Kingdom also notes, however, the Commission's acknowledgement that draft conclusion 21 as a whole does not reflect customary international law. In that light, the United Kingdom encourages the Commission to consider whether there are changes that might better reflect the status of this provision as a recommended procedure, for example omitting the word "requirements" from its heading and moving it to a new Part Four focused on procedure, thereby distinguishing it from Part Three, which focuses on the legal consequences of peremptory norms of general international law (*jus cogens*).

[129] See *Armed Activities in the Territory of the Congo Case (New Application: 2002) …* (footnote 126 above), pp. 31–32, para. 64.

The United Kingdom would also welcome clarification from the Commission as to how it envisages draft conclusion 21 might work in practice. For example, how might a State invoking a norm of *jus cogens* ascertain which "other States concerned" to notify of its claim, particularly if it is assumed that a norm of *jus cogens* imposes obligations *erga omnes* (namely to the international community of States as a whole)? Second, given the non-binding nature of these draft conclusions, how would the practical implementation of paragraph 4 interact with the principle, which the United Kingdom affirms, that no State may be required to submit to the jurisdiction of an international court or tribunal without its consent? The United Kingdom would also encourage the Commission to ensure that its proposals for this draft conclusion are consistent with existing provisions of law relating to the invocation of *jus cogens* norms, such as article 65 of the Vienna Convention on the Law of Treaties.

United States of America

[Original: English]

Draft conclusion 21 should be deleted. There is no need for "procedural requirements" in a set of draft conclusions, as opposed to draft articles. For example, there are no procedural requirements in the draft conclusions on identification of customary international law even where, for example, the draft conclusions discuss a State's invocation of the persistent objector doctrine.[130]

Furthermore, draft conclusion 21 is written in ostensibly binding terms (for example, paragraph 1 ("is to notify"); paragraph 3 ("are to seek"); and paragraph 4 ("may not carry out the measure")). As discussed with respect to draft conclusion 19 above, such language may be appropriate in a set of draft articles that could be formally adopted by States, but there is no basis for asserting in a draft conclusion that States have obligations that are not clearly derived from pre-existing treaty obligations or customary international law.

The commentary extensively cites dispute resolution provisions in the Vienna Convention on the Law of Treaties,[131] but this reliance is clearly misplaced, as the Convention is an agreement by which States agreed to certain procedures for disputes under that specific treaty. The dispute resolution provisions in the Convention are not customary international law applying to *jus cogens* disputes, as the commentary to the draft conclusions itself recognizes.[132] Thus, there is no basis to include a dispute resolution clause cast in obligatory language in the draft conclusions.[133]

Finally, the United States asserts that it is inappropriate to suggest in draft conclusion 21, paragraph 4, and the accompanying commentary that the International Court of Justice is the preferred venue for resolution of disputes involving *jus cogens*, over all other possible means of inter-State dispute settlement. Although many States may decide to submit bilateral disputes to the International Court of Justice in cases for which that Court has jurisdiction,[134] as a matter of principle it is not the role of the

[130] See A/73/10, draft conclusion 15, pp. 152–154.

[131] A/74/10, pp. 200–201.

[132] "Not every aspect of the detailed procedure set forth in draft conclusion 21 constitutes customary international law" (*ibid*., p. 201, para. (4) of the commentary to draft conclusion 21). As the last footnote to paragraph (3) of the commentary to the draft conclusion makes clear, the dispute resolution provisions in the Vienna Convention on the Law of Treaties do not constitute customary international law, as 23 of the 116 States parties to the Vienna Convention on the Law of Treaties have made reservations to the dispute resolution framework.

[133] In paragraph (4) of the commentary, it is claimed that in drafting conclusion 21, "the Commission had to ensure, on the one hand, that it did not purport to impose treaty rules on States that are not bound by such rules while, on the other hand, ensuring that the concerns regarding the need to avoid unilateral invalidation of rules was taken account of" (*ibid.*, p. 201). The United States respectfully submits that the easiest way to achieve both ends is to omit any dispute resolution provisions altogether, as they are unnecessary in this document.

[134] In fact, in 1969, the United States stated its view that the International Court of Justice should be the preferred venue for resolving claims involving *jus cogens* (see the statement of the United States Legal Adviser *in* M. M. Whiteman (ed.), *Digest of International Law*, vol. 14, Washington D.C., United States Government Printing Office, 1970, at p. 278).

International Law Commission to make non-legal recommendations to States regarding the most appropriate venue for the peaceful resolution of disputes.[135]

[See also comment under general comments and observations.]

21. Draft conclusion 22 – Without prejudice to consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail

Italy

[Original: English]

[See comment on draft conclusion 23.]

Japan

[Original: English]

Although draft conclusion 22 is placed under Part Four (General provisions), it deals with the legal consequences of *jus cogens* as a "without prejudice" clause and paragraph (4) of its commentary states that the possible consequences for immunity and the jurisdiction of national courts are not addressed in the draft conclusions as they are consequences related to specific *jus cogens*. However, the reason why the Commission characterizes legal consequences of *jus cogens* on procedural rules such as State immunity as specific rather than general is not sufficiently substantiated. For example, the International Court of Justice fairly stated in the case of *Jurisdictional Immunities of the State* that there exists no conflict between *jus cogens* and the rule of customary law which requires one State to accord immunity to another.[136] This statement seems generic in nature and applicable to *jus cogens* in general, and its importance should not be underestimated.

In this connection, considerations on procedural rules such as State immunity should be examined before making any determination on merits. It would, therefore, be illogical if the availability of such procedural rules were dependent on substantive rules including *jus cogens*. It follows that a breach of substantive norms including *jus cogens* cannot be determined before making a determination based on procedural rules, and thus, *a priori*, does not entail any legal consequence on such procedural rules as State immunity.

Japan therefore would like to invite the Commission to elaborate its position on the relationship between *jus cogens* and procedural rules.

[See also comment on draft conclusion 10.]

The Netherlands

[Original: English]

The Kingdom of the Netherlands would also appreciate it if the Commission could, in its commentaries to draft conclusion 22, elaborate on why certain legal consequences only apply to specific rules of *jus cogens* and not to all rules of *jus cogens.*

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[135] Similarly, in paragraph (4) of the commentary to draft conclusion 19, the Commission provides its view that "the collective system of the United Nations is the preferred framework for cooperative action" to address breaches of *jus cogens* norms (A/74/10, p. 195). As a general matter, the mode of international cooperation States might engage in the face of a *jus cogens* norm violation is a matter of policy and diplomacy, and is therefore inappropriate for a work product of the International Law Commission.

[136] *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* ... (see footnote 11 above), p. 140, para. 93.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom notes the "without prejudice" clause in draft conclusion 22 that has replaced the initial proposals relating to the possible consequences of *jus cogens* on immunities. So far as it goes, this development is welcome, though the United Kingdom maintains that it would be better simply to drop the provision. In particular, the United Kingdom questions the emphasis in the commentary on immunities: customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused nor the peremptory character of the rule which it is alleged to have violated. Moreover, the United Kingdom recalls the judgment of the International Court of Justice in *Jurisdictional Immunities of the State* where the Court found that immunities were a question of jurisdiction, whereas the question whether there has been a breach of *jus cogens* was one of substance.[137]

22. Draft conclusion 23 – Non-exhaustive list

Australia

[Original: English]

Finally, Australia remains doubtful of the utility of the non-exhaustive list referred to in draft conclusion 23 and annexed to the draft conclusions. Australia submits that the annex and accompanying commentaries undermine the methodological approach to identifying *jus cogens* norms which the draft conclusions seek to achieve. The annex and its commentaries do not provide guidance on the process by which a norm on the non-exhaustive list has been accepted and recognized as having peremptory character, or what effect has been recognized or treatment has been given by a State, States or international court or tribunal as a result of its peremptory character.

Instead, as currently drafted, Australia respectfully submits the methodology adopted by the Commission calls into question the status as peremptory of certain norms on the non-exhaustive list. For example, while the non-exhaustive list is purported to draw upon norms to which the Commission has previously referred, the commentaries rely significantly upon the draft conclusions of the Study Group on fragmentation of international law,[138] rather than on the work of the Commission as a whole.[139] Further, the extent to which the Commission, or Study Group of the Commission, refers to a norm in the annex as having the status of a peremptory norm varies. By way of further example, the "basic rules of international humanitarian law" is not a well-established or commonly accepted term, as demonstrated by the use of several other formulations in the Special Rapporteur's fourth report, including "principles of humanitarian law", "principles of international humanitarian law" and "prohibition of war crimes" (A/CN.4/727, para. 116).

Australia respectfully suggests that the annex be removed and that the Commission alternatively address in the commentaries a limited number of established *jus cogens* norms using the methodological approach established by the draft conclusions. Australia considers that such work would provide more useful guidance to States, national courts, international and regional courts, and other actors, who may be called upon to determine the existence of *jus cogens* norms and their legal consequences.

[137] *Ibid.*

[138] *Yearbook … 2006*, vol. II (Part Two), pp. 177 *et seq.*, para. 251.

[139] See A/74/10, pp. 205–206, paras. (5)–(9) of the commentaries to draft conclusion 23.

Austria

[Original: English]

Austria welcomes draft conclusion 23 concerning the non-exhaustive list of *jus cogens* norms in the annex to the draft conclusions. It reiterates its view that such a list is a helpful addition to the work of the Commission on *jus cogens* norms and also makes the previous work of the Commission on this subject more accessible. However, concerning the annex, Austria wishes to make the following statements.

First, as to the "prohibition of aggression", listed as the first example of *jus cogens* norms in the annex, it is doubtful whether this wording comprises all aspects of the general prohibition of the use of force contained in Article 2, paragraph 4, of the Charter of the United Nations. As paragraph (5) of the commentary to draft conclusion 23 indicates, the Commission had taken an inclusive view in 1966 when it referred to the "law of the Charter [of the United Nations] concerning the prohibition of the use of force" as *jus cogens*.[140] Although the commentary seems to suggest a broader scope, the wording now chosen for the annex, "prohibition of aggression", does not exclude an interpretation that would restrict the *jus cogens* norm to the narrower scope of General Assembly resolution 3314 (XXIX) of 14 December 1974 on the definition of aggression, which does not encompass the mere threat of force. Therefore, it would be consistent to replace "prohibition of aggression" by "prohibition of the use of force".

Second, the reference to "basic rules of international humanitarian law" as a *jus cogens* norm is not sufficiently precise. The references in the commentary to the draft articles on the responsibility of States for internationally wrongful acts and to the draft conclusions of the Study Group on the fragmentation of international law, which mention the "prohibition of hostilities directed at civilian populations"[141] as an example of basic rules of international humanitarian law, are insufficient. It merits further study of what specific norms of international humanitarian law are considered to be such "basic rules", which might encompass for instance the "Martens Clause" and the principles and rules on distinction, proportionality, military necessity and precaution in attack as well as the protection of persons *hors de combat*.

Third, while Austria understands that the annex is not meant to be exhaustive, it would invite the Commission to make further attempts to include in it at least all the norms it had identified as *jus cogens* in its previous work.

Belgium

[Original: French]

Belgium welcomes the inclusion of a list of peremptory norms of general international law (*jus cogens*) and the Commission's clarification that the list is not exhaustive.

Colombia

[Original: Spanish]

The annex contains a non-exhaustive list of eight peremptory norms. However, although the Commission makes it clear in its commentary that these are norms that it had previously referred to as having a peremptory character, the list does not include all the norms that the Commission had previously referred to as having such character. Colombia therefore suggests that the Commission specify the criteria it used for including some norms in the list and not others.[142]

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[140] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, p. 247, para. (1) of the commentary to draft article 50.

[141] *Yearbook … 2006*, vol. II (Part One) Addendum 2, p. 77, para. 374.

[142] In its commentary, the Commission states clearly that the list is "non-exhaustive in the sense that, in addition to the norms listed in the annex, the Commission has also referred previously to

In addition, even if it is clear that the draft conclusions seek to establish a methodological approach to peremptory norms, and not to determine their content, presenting this list without specifying the objective for such presentation or the reasons for choosing the non-exhaustive list of eight identified in the annex could undermine, for example, the process of identification described in the text of the draft conclusions, unless the process that led to their characterization is explained in detail.

The prohibition of aggression is included in paragraph (*a*) of the annex as a peremptory norm. It should be pointed out that the prohibition of aggression should be distinguished from the principle of individual or collective self-defence, which is recognized in Article 51 of the Charter of the United Nations as a right, and which may in turn give rise to regional arrangements, as set forth in Articles 52 to 54 of the Charter of the United Nations.

Czech Republic

[Original: English]

The Czech Republic maintains doubts concerning the inclusion of the list of examples of peremptory norms in the annex. On the one hand, we appreciate and regard as useful the commentary to draft conclusion 23 containing comprehensive and detailed references to peremptory norms of general international law identified by the Commission in its previous work on other topics. On the other hand, the list contained in the draft annex seems to be rather simplistic (the description of the relevant peremptory norms sometimes does not reflect differing formulations of the norms in the previous work of the Commission), unclear and undefined.

Therefore, we suggest retaining the text of the commentary to draft conclusion 23 and deleting the draft annex. (The list of peremptory norms identified by the Commission in its previous work on other topics could be included in one of the paragraphs of the commentary to draft conclusion 23.) The text of draft conclusion 23 should be amended accordingly.

Denmark (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries continue to have reservations against the non-exhaustive list of *jus cogens* norms in the annex to the draft conclusions, as stated during previous Sixth Committee meetings. We note that, according to draft conclusion 23, the list is "[w]ithout prejudice to the existence or subsequent emergence of other peremptory norms of general international law (*jus cogens*)". However, we believe that such a list, even if non-exhaustive, could risk preventing the emergence of State practice and *opinio juris* in support of other norms.

France

[Original: French]

France urges that the indicative list of *jus cogens* norms be removed from the draft conclusions.

Germany

[Original: English]

Germany takes positive note of the "without prejudice" clause in draft conclusion 23 and the non-exhaustive list of norms previously referred to by the Commission as having peremptory character. Concerns remain that the adoption of an

other norms as having peremptory character. The annex should therefore not be seen as excluding the peremptory character of these other norms" (A/74/10, p. 204, para. (2) of the commentary to draft conclusion 23).

enumerative list of specific *jus cogens* norms might lead to wrong conclusions and bears the risk of establishing a *status quo* that might impede the evolution of *jus cogens* in the future. Germany remains to be convinced of the added value of this draft conclusion. The Commission itself states in paragraph (1) of its commentary to draft conclusion 23 that the elaboration of a non-exhausting list fell beyond the scope of the exercise of elaborating draft conclusions on the identification and legal consequences of *jus cogens*. In addition, even an explicitly non-exhaustive list implies the risk of being applied as exhaustive in practice or as a codification of existing *jus cogens* norms. Therefore, Germany believes that the list should be removed.

Israel

[Original: English]

Israel joins numerous other States in objecting to the inclusion of any list of substantive norms of *jus cogens* in a project which the Commission itself described as dedicated solely to the methodology of identifying such norms. The decision of the Commission to include the list is indeed surprising in light of paragraph (4) of the commentary to draft conclusion 1 (Scope), which clearly states that "[t]he draft conclusions are … not concerned with the determination of the content of the peremptory norms themselves". Paragraph (2) of the commentary to draft conclusion 22 similarly states that "the present draft conclusions are not intended to address the content of individual peremptory norms of general international law (*jus cogens*)". It is also noteworthy that a similar path was not taken in the context of the Commission's recent work on the topic "Identification of customary international law", and in its current work on the topic "General principles of law".[143]

First, the fact that the Commission arguably recognized certain norms in the past as *jus cogens* does not of itself guarantee that these norms would be recognized as *jus cogens* if the methodology currently suggested by the draft conclusions were applied to them. In fact, most references by the Commission to *jus cogens* in the past were not substantiated by the kind of inquiry mandated by the draft conclusions themselves.

If the Commission were in fact interested in using its own past propositions to demonstrate that certain norms have a peremptory character, it should have, at the very least, inquired whether (and shown that) these propositions were well founded and based on a coherent methodology, as noted above. This is significant, particularly in light of paragraph (4) of the commentary to draft conclusion 1 (Scope), which clearly states that "[t]he process of identifying whether a norm of international law is peremptory or not requires the application of the criteria developed in these draft conclusions". In the absence of such an analysis, the list cannot be treated as indicative of *jus cogens* norms.

Moreover, several of the rules included in the list raise significant doubts. For instance, when addressing the right to self-determination in paragraph (12) of the commentary to draft conclusion 23, the Commission refers to several examples in which it supposedly already recognized this right as a *jus cogens* norm in the past. Yet, if one looks at some of the examples mentioned in the commentary to substantiate this apparent recognition, a different picture emerges. In some examples, the Commission examined the possibility of referring to the right to self-determination as an example of *jus cogens* norms without reaching a definitive conclusion.[144] In other citations, the Commission actually stated specifically that it is better not to identify specific *jus cogens* norms, but rather to leave the full content of the rule of *jus cogens* to be worked out in State practice and in the jurisprudence of international tribunals.[145]

[143] See the first report on general principles of law by Special Rapporteur Marcelo Vázquez-Bermúdez (A/CN.4/732), p. 10.

[144] See conclusion (33) of the draft conclusions of the Study Group on the fragmentation of international law, *Yearbook … 2006*, vol. II (Part Two), p. 182.

[145] See, for example, paragraph (3) of the commentary to article 50 of the draft articles on the law of treaties, where the Commission explicitly decided against suggesting specific examples of *jus cogens* norms in the draft articles. The reason for the Commission's decision not do so was that

In yet another example cited in the commentary, the Commission conflated the term *jus cogens* with the term *erga omnes*, relying in its analysis on sources which referred to the right to self-determination as *erga omnes* rather than *jus cogens*.[146] None of the sources cited in the commentary included a thorough methodological examination justifying the conclusion that the right to self-determination satisfied the *jus cogens* threshold.

Second, Israel does not agree that all of the norms listed in the annex are of *jus cogens* character, and is of the view that the list is likely to generate significant disagreement among States and dilute the concept of *jus cogens* norms and its legal authority. For example, the concept of "basic rules of international humanitarian law", which is included in the list, is not only far too vague, but paragraph (8) of the commentary to draft conclusion 23, which addresses these rules, fails to demonstrate that they are in fact *jus cogens* norms. The commentary mentions three sources that refer to the basic rules of international humanitarian law: (*a*) the Commission's commentary to article 40 of the draft articles on the responsibility of States for internationally wrongful acts; (*b*) the conclusions of the Study Group on the fragmentation of international law;[147] and (*c*) the report of the Study Group on the fragmentation of international law.[148] Yet, none of these references provides sufficient evidence to demonstrate that the basic rules of international humanitarian law – whatever they are precisely – meet the standards codified in article 53 of the Vienna Convention on the Law of Treaties and indeed endorsed by the draft conclusions themselves. For instance, the commentary to article 40 of the draft articles on the responsibility of States for internationally wrongful acts refers to the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, in which the Court opined that certain "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".[149] The commentary to draft article 40 states that "[i]n the light of the description by the [International Court of Justice] of the basic rules of international humanitarian law applicable in armed conflict as 'intransgressible' in character, it would also seem justified to treat these as peremptory".[150] Yet, this interpretation is by no means obvious. The Court referred therein to "a great many rules of humanitarian law",[151] language that seems incommensurate with the existing notion of a limited corpus of *jus cogens* norms.

Moreover, a few paragraphs after the one cited by the Commission, the Court explicitly addresses the question of the *jus cogens* status of international humanitarian law rules, and states clearly that there is "no need for the Court to pronounce on this matter".[152] This clearly reflects that the word "intransgressible" used by Court was *not* intended to refer to *jus cogens*. This comment also applies to the similarly questionable interpretation of the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* in paragraph (5) of the commentary to draft conclusion 5, paragraph 1.

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suggesting examples would require the Commission to engage "in a prolonged study of matters which fall outside the scope" of its work on the draft articles. Indeed, the Commission itself explicitly recognized that suggesting that a norm is peremptory requires a rigorous methodology, and cannot be a result of unsubstantiated assertions (*Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, p. 248).

[146] See, for example, paragraph (5) of the commentary to article 40 of the draft articles on the responsibility of States for internationally wrongful acts, which refers, *inter alia*, to the *East Timor case* (*Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 113). However, it is important to note that International Court of Justice did not refer in that case to the right to self-determination as a *jus cogens* norm.

[147] *Yearbook … 2006*, vol. II (Part Two), pp. 177 *et seq.*, para. 251.

[148] *Ibid.*, vol. II (Part One) Addendum 2.

[149] *Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 257, para. 79.

[150] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 113, para. (5) of the commentary to draft article 40.

[151] *Legality of the Threat or Use of Nuclear Weapons …* (see footnote 149 above), p. 257, para. 79.

[152] *Ibid.*, p. 258, para. 83.

The draft conclusions and the report of the Study Group on the fragmentation of international law likewise do not demonstrate that the basic rules of international humanitarian law are *jus cogens* norms. Both of these texts note that, in its commentary to article 40 of the draft articles on the responsibility of States for internationally wrongful acts, the Commission referred to the basic rules of international humanitarian law as an example of *jus cogens* norms. Yet, as we have shown above, the commentary to draft article 40 *does not* actually provide sufficient evidence to demonstrate that the basic rules of international humanitarian law are indeed of that quality.

Israel would also note that the absence of a clear definition and precise content for each of the norms listed creates ambiguity and confusion and makes it extremely difficult to assess or apply these norms. For example, paragraph (8) of the commentary to draft conclusion 23 fails to clarify what the "basic rules of international humanitarian law" are. The commentary itself notes that the draft conclusions of the Study Group on the fragmentation of international law referred in this context to "basic rules of international humanitarian law applicable in armed conflict",[153] while the report of the Study Group on the fragmentation of international law referred generally to "the prohibition of hostilities directed at civilian populations".[154] None of these references provides a clear definition of the term "basic rules of international humanitarian law".

With regards to the right to self-determination, while Israel recognizes that self-determination is undoubtedly a significant right under international law, even the Commission itself acknowledged that its exact content is a complex matter.[155] With regards to its status as a peremptory norm, Israel believes it is highly questionable whether the right to self-determination meets the standards for being recognized as a *jus cogens* norm. Indeed, in the advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the International Court of Justice itself appears to have deliberately refrained from referring to the right to self-determination as a *jus cogens* norm.[156]

Israel shares the view, along with a considerable number of other States, that the draft conclusions should not include a list of *jus cogens* norms, whether illustrative or otherwise. This position is in line with our more general stance that work on the topic *of jus cogens* should be confined to stating and clarifying international law as it currently stands on the basis of a rigorous methodology grounded in State practice. Only by doing so can the draft conclusions earn for themselves wide acceptance and credibility. It is hoped that this and other changes will therefore be made at the second reading stage.

Italy

[Original: English]

Draft conclusion 22 provides for a "without prejudice" clause related the consequences that "specific peremptory norms … may otherwise entail". Draft conclusion 23 refers to the annex containing "a non-exhaustive list of norms" that the International Law Commission has found to have a peremptory character in its previous work. These are: the prohibition of aggression; the prohibition of genocide;

[153] *Yearbook … 2006*, vol. II (Part Two), p. 182, draft conclusion (33).

[154] *Ibid.*, vol. II (Part One) Addendum 2, p. 77, para. 374.

[155] See the fourth report on peremptory norms of general international law (*jus cogens*) by the Special Rapporteur, Mr. Dire Tladi (A/CN.4/727), para. 115: "[T]he discussion above has not attempted to solve the more complex problem of what constitutes the right to self-determination, i.e., whether the right applies only in the context of decolonization and whether the circumstances in which the right applies would permit external self-determination (secession) and, if so, under what circumstances."

[156] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* … (see footnote 119 above), p. 219 (Separate Opinion of Judge Cançado Trindade); p. 260 (Joint Declaration of Judges Cançado Trindade and Robinson); p. 283 (Separate Opinion of Judge Sebutinde); and p. 308 (Separate Opinion of Judge Robinson).

the prohibition of crimes against humanity; the basic rules of international humanitarian law; the prohibition of racial discrimination and apartheid; the prohibition of slavery; the prohibition of torture; and the right of self-determination.

Italy is of the view that the two draft conclusions and the annex should be read and commented in conjunction. As the commentary to both draft conclusions 22 and 23 clearly states, "the present draft conclusions are not intended to address the content of individual peremptory norms" (para. (2) of the commentary to draft conclusion 22), and they "do not seek to elaborate a list of peremptory norms of general international law, since "[t]o elaborate a list of peremptory norms of general international law (*jus cogens*), including a non-exhaustive list, would require a detailed and rigorous study of many potential norms" (para. (1) of the commentary to draft conclusion 23). However, "[a]lthough the identification of specific norms that have a peremptory character falls beyond the scope of the present draft conclusions, the Commission has decided to include in an annex a non-exhaustive list of norms previous referred to by the Commission as having peremptory character" (para. (2) of the commentary to draft conclusion 23). In this respect, Italy would like to make the following observations.

The Commission had the possibility of taking two alternative routes. In a project focused on peremptory norms of general international law, it could have made the choice to identify, on the basis of the very criteria it has established, those norms that currently fulfill those criteria and the consequences (including the special consequences) flowing from a violation of those norms – not an impossible task. A more comprehensive and far-reaching project would have also given the opportunity to the Commission to deal with some of the most relevant and contentious issues on the legal effects of *jus cogens* norms related to the prohibition of crimes against humanity and to international humanitarian law on the rules on State immunity (a topic only evoked in paragraph (4) of the commentary to draft conclusion 22 and to which Italy attaches the greatest importance). However, it has decided to take a different route, namely to distill a number of secondary rules related to the identification of peremptory norms and their general legal consequences. If the choice made is the latter, the Commission should fully adhere to its methodology and not venture in the presentation of a list based on its own previous works, many of which date back several decades. After all, those making use of the draft conclusions will have the possibility of resorting to the commentary in order to identify potential peremptory norms of general international law.

If, that notwithstanding, the intention of the Commission is to maintain a list (whether as a draft conclusion or as an annex), Italy reiterates its view expressed during the 2019 debate in the Sixth Committee that such a list should benefit from a more extensive analysis of international jurisprudence, beyond the mere – sometimes selective – restatement of what has been found by the Commission in previous works dating back as far as the 1970s. Rather than elaborating a non-exhaustive list of what the Commission has determined to be rules of *jus cogens*, Italy would see value in the elaboration of a list that the Commission today sees as containing rules of *jus cogens* on the basis of the criteria it has established. The relevant provision should clearly state that the list is without prejudice to future developments of international law.

Japan

[Original: English]

Draft conclusion 23 and the annex contain a non-exhaustive list of *jus cogens*. It is likely that norms on the list in the final product of the Commission will be regarded as *jus cogens* without their precise scope being clearly defined. Therefore, while taking note of the affirmation of the Commission that "the present draft conclusions are methodological in nature" (para. (1) of the commentary to draft conclusion 23), if the Commission finds it appropriate to annex any list of *jus cogens* to the draft conclusions, Japan considers it necessary for the Commission to make further effort in elaborating on the following points in the commentary: (*a*) the

criterion by which these norms are chosen from among the norms which the Commission has previously referred to as *jus cogens*; (*b*) the reasons for which it chose a particular wording for some norms; and (*c*) the precise scope of each norm on the list. In doing so, the Commission should clarify how norms which are not in the prohibitive form, such as (*d*) and (*h*) in the annex, give rise to peremptory norms in concrete terms. Even prohibitive norms, for example, the prohibition of genocide and other crimes, have various aspects, including the prohibition of these crimes by States and the obligation to prevent these crimes by non-State actors.

The Netherlands

[Original: English]

Lastly, the Kingdom of the Netherlands wishes to reiterate its view that it sees no added value in a list of rules of *jus cogens* in an annex to the draft conclusions. It is for individual States to express their views on which norms have obtained the status of *jus cogens* and it is for international courts and tribunals to determine which international rules have obtained the status of *jus cogens*. Because of its static character, a list does not contribute to the development of international law. According to the Kingdom of the Netherlands, the Commission should, where relevant, refer in the commentaries to the draft conclusions to examples of State practice and judgments and advisory opinions of international courts and tribunals as regards the identification of particular peremptory norms of general international law.

Portugal

[Original: English]

Regarding draft conclusion 23 (Non-exhaustive list) and the draft annex, as often noted at the Sixth Committee, Portugal would support an illustrative list of *jus cogens* norms, as was the proposal of the Special Rapporteur in his fourth report (A/CN.4/727, para. 137), and as the Commission had considered doing on a previous occasion, during its adoption of the 1966 draft articles on the law of treaties.

Still, Portugal salutes the effort made by the Commission, in draft conclusion 23, to provide the non-exhaustive list contained in the annex to the draft conclusions and looks forward to such a list remaining in the final outcome of the work of the Commission in this topic.

Although Portugal understands the reasons behind the pragmatic method used for constituting the non-exhaustive list – referring to some of the norms that have been referred to as *jus cogens* by the Commission in the past – it would appreciate a concise study as to the current status as *jus cogens* of the norms contained therewith. Portugal suggests that such an assessment yet be conducted by the Commission before the draft annex is finalized.

Furthermore, the non-exhaustive list seems too condensed, as there are other widely recognized *jus cogens* norms that could have been listed. Indeed, and in support of the progressive development of international law, Portugal regrets that the list is not more ambitious – both in number and in content – regarding norms identified as *jus cogens* by the Commission during its consideration of other topics (for instance, the law of treaties and the responsibility of States for internationally wrongful acts, or the prohibition of piracy). In this regard, Portugal would welcome, for example, a reference to peremptory environmental norms, such as the obligation to protect the environment, as *jus cogens*.

Russian Federation

[Original: Russian]

The contents of draft conclusion 23 and the commentary thereto are also problematic. The Commission’s justifications for including the “illustrative” list of norms are unconvincing and contradictory.

In paragraph (1) of its commentary to draft conclusion 23, the Commission states that "[t]o elaborate a list of peremptory norms of general international law (*jus cogens*), including a non-exhaustive list, would require a detailed and rigorous study of many potential norms to determine, first, which of those potential norms meet the criteria set out in Part Two of the present draft conclusions and, second, which of the norms that meet the criteria ought to be included in a non-exhaustive list". The Commission determined that "[s]uch an exercise falls beyond the scope of the exercise of elaborating draft conclusions on the identification and legal consequences of peremptory norms of general international law (*jus cogens*)".

Nevertheless, the Commission noted that it "has decided to include in an annex a non-exhaustive list of norms previously referred to by the Commission as having peremptory character" (para. (2) of the commentary to draft conclusion 23).

This decision was made despite the fact that the majority of the norms included in the list had not been previously studied by the Commission or analysed with regard to their peremptory nature. The simple mention of norms that may have peremptory status in the Commission's commentaries to its various drafts is not sufficient grounds for including them in the list. In fact, the Commission acknowledges that it is providing the list without having undertaken a "detailed and rigorous study" of potential norms. Yet, there are no limits on the amount of time the Commission can spend on the draft conclusions. It should, therefore, undertake such a study, if it believes that it is important to provide States with such a list.

Furthermore, the Commission noted in its commentary that the non-exhaustive list does not contain all the norms to which it has referred previously as having peremptory character and that the formulations used and included in the illustrative list may differ from the formulations used by the Commission in its previous works.

These arguments seem to be at odds with one another.

For example, in light of the commentary, it is unclear why the Commission did not include in the list the prohibition against the use of force, as set out in the Charter of the United Nations, despite having stated in paragraph (1) of its commentary to article 50 of the draft articles on the law of treaties that it is a conspicuous example of a norm of international law having *jus cogens* character,[157] or why it omitted a detailed analysis of the peremptory character of the fundamental principles and norms enshrined in the Charter of the United Nations. These omissions are regrettable.

The inclusion of the aforementioned list in an annex to the draft conclusions is unwise and adds no value. As stated at the outset, the draft conclusions were intended to be methodological in nature and the Commission's main objective was to establish a process for the identification of peremptory norms of general international law (*jus cogens*). The elaboration of this list by the Commission could have far-reaching consequences and could negate the rest of its work on the topic. It is easy to imagine that the draft conclusions will be used to confirm whether a norm included in the list has peremptory character or whether a norm not included in the list lacks it, even though the matter was never studied by the Commission.

In view of the above, the Russian Federation supports the removal of draft conclusions 21 and 23 from the draft conclusions.

Singapore

[Original: English]

Singapore appreciates the Commission's effort to develop draft conclusion 23 and the annex to the draft conclusions as a compromise solution to the dilemma described in paragraph (1) of the commentary to draft conclusion 23. However, Singapore continues to have serious concerns about draft conclusion 23 and the draft

[157] *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, p. 247.

annex. Consequently, Singapore cannot support draft conclusion 23 and the draft annex as adopted on first reading.

First, not all users of the Commission's output may appreciate the significance of paragraphs (5) through (14) of the commentary to draft conclusion 23, the critical nuances with which each item in the non-exhaustive list in the draft annex must thus be read, and the very fact that the draft conclusions must be read with the commentaries. In this regard, the connection between the non-exhaustive list in the draft annex itself and paragraphs (5) through (14) of the commentary to draft conclusion 23, which appear separately as part of the commentary to draft conclusion 23, is not altogether obvious.

Second, it is not clear to us whether the Commission considers that every item in the non-exhaustive list satisfies the methodology for determining the existence and content of peremptory norms of general international law (*jus cogens*) set out in the draft conclusions themselves. Paragraph (3) of the commentary to draft conclusion 23 suggests that this may not be the case.

If the Commission's intent is to provide a simple compilation of relevant references in the Commission's previous works, we suggest that it would not be appropriate to do so by way of draft conclusion 23 and the draft annex as presently written. Instead, the Commission may wish to consider listing the references now contained in the footnotes to paragraphs (5) to (13) of the commentary under a headnote incorporating the relevant explanatory elements from draft conclusion 23 and paragraphs (1) to (4) and (14) of its commentary. This separate explanation may be contained in an annex (or "appendix") to the draft conclusions but should not be presented as having the same normative footing as the draft conclusions themselves.

Slovenia

[Original: English]

The Republic of Slovenia welcomes draft conclusion 23 and the inclusion of the non-exhaustive list of norms that have been previously identified as peremptory norms of general international law (*jus cogens*) in the draft annex. Regarding item (*a*) of the annex (prohibition of aggression), the Republic of Slovenia is of the opinion that the term is outdated and it can limit the provision to the definition of aggression in General Assembly resolution 3314 (XXIX) of 14 December 1974. The Republic of Slovenia would prefer wording more in line with the provision of Article 2, paragraph 4, of the Charter of the United Nations on the prohibition of threat or use of force in any manner inconsistent with the Charter of the United Nations. On item (*d*) of the draft annex (basic rules of international humanitarian law), the Republic of Slovenia would appreciate a more comprehensive commentary, since the rules of international humanitarian law are a wider category of rules and not all of them have been identified as peremptory norms of general international law (*jus cogens*).

The Republic of Slovenia would also suggest that the Commission re-examine its previous work for instances where it identified provisions as peremptory norms of general international law (*jus cogens*) and add them to the list.

South Africa

[Original: English]

Lastly, although limited, we support the contents of draft conclusion 23. We understand the need for an expanded list but also understand, as the Commission has stated, that this would change the nature of the project.

Spain

[Original: Spanish]

Spain wishes to make some observations and comments on the non-exhaustive list of *jus cogens* norms and their inclusion in the draft conclusions, with a final recommendation.

The Commission itself, in the first three paragraphs of its commentary to draft conclusion 23, introduced some caveats regarding the nature, selection and scope of the illustrative list. It pointed out that the list is methodological in nature and that it does "not seek to elaborate a list of peremptory norms of general international law (*jus cogens*)" (para. (1) of the commentary). It also points out that the list is non-exhaustive for two reasons: first, there are or may be other norms of *jus cogens* beyond those listed; and second, in addition to the norms listed, the Commission has also referred previously to other norms as having peremptory character (para. (2)). The Commission has also provided some caveats concerning the scope of the norms included: "the formulation of each norm is based on a formulation previously used by the Commission" and "there has been no attempt to define the scope, content or application of the norms identified" (para. (3)). This is therefore a purely exploratory list.

In the light of the above, Spain has some misgivings about the added value of such a list and the suitability of its inclusion in the draft conclusions. Such a list raises concerns about the inclusion of peremptory norms; the scope and content of the norms included; the function that such a list may have in the processes of acceptance and recognition of the peremptory character of certain norms; and the role of the Commission in the process of identification of the criterion for the acceptance and recognition of the peremptory character by the international community of States as a whole.

First, the draft annex, which contains a non-exhaustive list of peremptory norms to which the Commission had previously referred as having peremptory character, raises doubts as to the selection of such norms. The Commission itself recognizes not only that other peremptory norms may exist, but also that it had previously referred to some norms as *jus cogens* norms, and yet did not include them in the list.

Second, inclusion in the non-exhaustive list does not reduce the uncertainties that may exist as to the scope and content of some of the peremptory norms listed. Three of those norms suffice as examples: the prohibition of aggression, the basic rules of international humanitarian law and the prohibition of torture.

The Commission has used the expression "prohibition of aggression". The inclusion of that norm in the list creates uncertainty about at least two aspects of its scope and content. First, with regard to the scope of the norm, the question is whether it covers only the narrow content of the concept of "aggression", as presented by the General Assembly in its resolution 3314 (XXIX) of 14 December 1974, or whether it has a broader scope, as suggested by the Commission and the International Court of Justice. The Commission referred previously to that norm in its commentary to former article 50 of the draft articles on the law of treaties as follows: "the law of the Charter [of the United Nations] concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*".[158] Likewise, in the *Military and Paramilitary Activities in and against Nicaragua* case, the International Court of Justice said that States frequently mention the principle of the prohibition of the use of force enunciated in Article 2, paragraph 4, of the Charter of the United Nations as a fundamental principle of public international law.[159]

[158] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, p. 247, para. (1) of the commentary to draft article 50.

[159] *(Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 90, para. 190.

Second, the inclusion of such a norm also leaves unaddressed the doubts as to the legal relationship and status of aggression or, more broadly, the prohibition of the use of force, and self-defence. Thus, the Commission does not clarify whether such a relationship can be explained either in terms of a general rule and an exception (self-defence), or a general rule and a circumstance precluding wrongfulness, or both with the ensuing legal consequences.

The reference in item (*d*) of the draft annex to "[t]he basic rules of international humanitarian law" also does not significantly improve the existing uncertainty about the scope of that expression. The use of the generic plural, in that context, does not help to identify with certainty which specific rules of international humanitarian law have a peremptory character.

As for the prohibition of torture, its inclusion in this exploratory list raises serious doubts in the light of the most recent international practice.

Third, Spain also has doubts about the usefulness of the non-exhaustive list in the processes of acceptance and recognition of the peremptory character of some rules of general international law. The effect of the inclusion of some rules in such a list or their exclusion from such a list is not always necessarily positive. It may sometimes give rise to observations, comments, positions or manifestations to the contrary by States, whose impact on the process of acceptance and recognition of the peremptory character of a rule of general international law may not always facilitate its identification as a norm of *jus cogens*.

Lastly, the non-exhaustive list proposed by the Commission could create confusion as to who plays the key role in the acceptance and recognition of the peremptory character of some rules of general international law. As stated in draft conclusions 4 (*b*) and 7, it is the international community of States as a whole that "accepts and recognizes" the peremptory character of the norm. The relevant criterion for identification therefore requires general, though not unanimous, acceptance and recognition by the international community of States as a whole. The Commission, as an expert body, constitutes a subsidiary means for determining the peremptory character (see draft conclusion 9), but the key role is played by States.

Consequently, since the non-exhaustive list of peremptory norms included in the draft conclusions has more disadvantages than advantages, Spain recommends its deletion.

Switzerland

[Original: French]

Switzerland welcomes the creative solution found by the Special Rapporteur with regard to draft conclusion 23 and the annex to the draft conclusions. Switzerland appreciates the inclusion of a general provision, in draft conclusion 23, to the effect that the non-exhaustive list does not preclude a broader understanding of *jus cogens*. It wishes to reaffirm that the non-exhaustive list of peremptory norms of general international law (*jus cogens*) is useful. Switzerland proposes that the existence of abundant State practice relating to a broader understanding be mentioned in the commentary.

The norms included in the annex are of fundamental importance to the international community and to Switzerland.

Switzerland strongly supports the inclusion of the fundamental rules of international humanitarian law in the non-exhaustive list of *jus cogens* norms. A considerable number of rules of international humanitarian law are of a fundamental

character. This position is supported by the jurisprudence of international[160] and national courts,[161] and is also reflected in the practice of Switzerland.[162]

There is a difference in the terminology used in the French version of the annex (*règles fondamentales du droit international humanitaire*) and the English version ("basic rules of international humanitarian law"). Switzerland is of the view that the wording in the English version is too restrictive and encourages the Commission to address the difference by amending the English to read "fundamental rules of international humanitarian law". This wording is the most closely aligned with the jurisprudence of the International Court of Justice, which the Commission uses as the grounds for defining the fundamental rules of international humanitarian law as peremptory norms of general international law.[163]

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[160] For example, in the *Kupreškić* case, the Trial Chamber of the International Tribunal for the Former Yugoslavia stated that "most norms of international humanitarian law, in particular those prohibiting war crimes … are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character" (*Prosecutor* v. *Zoran Kupreškić* et al.*, Case No. IT-95-16-T, Judgment of 14 January 2000*, Trial Chamber, International Tribunal for the Former Yugoslavia, para. 520 (available from the Tribunal's website: www.icty.org)). In the *Tadić* case, the Appeals Chamber of the Tribunal, when determining the applicable rules of international law, held that the Tribunal was able to apply any treaty which was "not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law" (*Prosecutor* v. *Duško Tadić a/k/a "Dule", Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995*, Appeals Chamber, International Tribunal for the Former Yugoslavia, para. 143 (available from the Tribunal's website: www.icty.org)). See also *Legality of the Threat or Use of Nuclear Weapons …* (footnote 149 above), p. 257, para. 79 ("a great many rules of humanitarian law applicable in armed conflict … constitute intransgressible principles of international customary law").

[161] In the "*Agent Orange" Product Liability Litigation* case, a United States district court held that the rules against torture, war crimes and genocide were *jus cogens* (In re *"Agent Orange" Product Liability Litigation*, *Judgment of 28 March 2005*, United States District Court for the Eastern District of New York, 597 F.Supp 740 (E.D.N.Y. 1984), para. 274). Furthermore, the Supreme Court of Argentina has held that the prohibition of war crimes, and the non-applicability of any statute of limitations to such crimes, were *jus cogens* (*Arancibia Clavel, Enrique Lautaro s/ homicidio calificado y asociación ilícita y otros, Case No. 259, Judgment of 24 August 2004*, Supreme Court of Argentina). The Constitutional Court of Colombia has also held that rules of humanitarian law "are binding on States and all parties in armed conflict, even if they have not approved the respective treaties, because [of their] peremptoriness" (*Judgment No. C-225/95*, Constitutional Court of Colombia). The Federal Criminal Court of Switzerland has held that the prohibition of war crimes is part of *jus cogens* (*A.* v. *Confederation, Case No. BB 2011.140, Judgment of 25 July 2012*, Federal Criminal Court, paras. 5.3.5 and 5.4.3).

[162] See *A.* v. *Confederation* (footnote 161 above), paras. 5.3.5 and 5.4.3; and Federal Council of Switzerland: "Clarifier la relation entre le droit international et le droit interne: Rapport du Conseil fédéral en exécution du postulat 13.3805" [Clarifying the relationship between international law and domestic law: Report of the Federal Council in execution of postulate 13.3805], 12 June 2015, p. 13; message concerning the initiative "Pour le renvoi effectif des étrangers criminels (initiative de mise en œuvre)" … (see footnote 26 above), p. 8502; "Rapport additionnel du Conseil fédéral au rapport du 5 mars 2010 sur la relation entre droit international et droit interne" [Additional report of the Federal Council to the report of 5 March 2010 on the relationship between international law and domestic law], 30 March 2011, FF 2011 3401, p. 3412; "La relation entre droit international et droit interne … " … (footnote 26 above), pp. 2086 and 2116; message concerning the popular initiative "Contre la construction de minarets" [Against the construction of minarets], 27 August 2008, FF 2008 6923, at pp. 6929–6930; "Message relatif à la modification de lois fédérales en vue de la mise en oeuvre du Statut de Rome de la Cour penal internationale" [Message concerning the amendment of federal laws with a view to the implementation of the Rome Statute of the International Criminal Court], 23 April 2008, FF 2008 3461, at p. 3474; and "Message relatif à une nouvelle constitution fédérale" [Message concerning a new federal Constitution], 20 November 1996, FF 1997 I 1, at pp. 369 and 454.

[163] See *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 113, para. (5) of the commentary to article 40 of the draft articles on the responsibility of States for internationally wrongful acts, referring to *Legality of the Threat or Use of Nuclear Weapons …* (see footnote 149 above), p. 257, para. 79, where the Court states that "[i]t is undoubtedly because *a great many rules of humanitarian law* applicable in armed conflict *are so fundamental* to the respect of the human person and 'elementary considerations of humanity' as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (*I.C.J. Reports 1949*, p. 22), that the Hague and Geneva

Switzerland has a certain amount of practice on *jus cogens*. The mandatory provisions of international law limit the revision of the Federal Constitution, as expressly provided for in article 139, paragraph 3, article 193, paragraph 4, and article 194, paragraph 2, of the Constitution.[164] It should be noted that the concept of "mandatory provisions of international law" in Swiss national law is broader than the concept enshrined in article 53 of the Vienna Convention on the Law of Treaties. The Swiss understanding encompasses also other norms of international law, including certain guarantees enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms (article 2, paragraph 1; article 3; article 4, paragraph 1; and article 7) and, in some cases, guarantees of the International Covenant on Civil and Political Rights that must be respected during states of emergency.[165] Consequently, the Swiss understanding of *jus cogens* goes beyond the list in the annex to the draft conclusions.

Switzerland is of the view that, at the very least, the core human rights, with the status of customary law, are part of *jus cogens*. Switzerland has also considered the following principles to be part of *jus cogens*:[166]

(*a*) The principle of the sovereign equality of States;

(*b*) The prohibition of collective punishment;[167]

(*c*) The principle of personal and individual criminal responsibility;

(*d*) The prohibition of the use of force (Article 2, paragraph 4, of the Charter of the United Nations);

(*e*) The principle of *non-refoulement*;

(*f*) The protection against the arbitrary infliction of death;[168]

(*g*) The protection against arbitrary detention; and

(*h*) The principle of *nulla poena sine lege*.

Switzerland therefore encourages the Commission to analyse State practice carefully.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom recalls that the criteria articulated in draft conclusion 4 for the identification of a peremptory norm of general international law (*jus cogens*) are stringent and require the peremptory character of the norm to be accepted and recognized by the international community of States as a whole. Therefore, it is important that, if a non-exhaustive list were to be annexed to the draft conclusions, the examples included in that list clearly fulfil the relevant criteria. The United

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Conventions have enjoyed a broad accession. 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" (emphasis added).

[164] Federal Constitution of the Swiss Confederation, RS 101.

[165] See Federal Council of Switzerland: "La relation entre droit international et droit interne … " … (footnote 26 above), pp. 2115 *et seq.*; and message concerning the initiative "Pour le renvoi effectif des étrangers criminels (initiative de mise en œuvre)" … (footnote 26 above), pp. 8503 *et seq.*.

[166] See Federal Council of Switzerland: message concerning the popular initiative "Contre la construction de minarets" … (footnote 162 above), pp. 6929 *et seq.*; "Message relatif à une nouvelle constitution fédérale" … (footnote 162 above), p. 369; "La relation entre droit international et droit interne … " … (footnote 26 above), pp. 2115 *et seq.*; and message concerning the initiative "Pour le renvoi effectif des étrangers criminels (initiative de mise en œuvre)" … (footnote 26 above), pp. 8501 *et seq*.

[167] See Human Rights Committee, General comment No. 29 on article 4 (of the International Covenant on Civil and Political Rights), para. 11.

[168] See African Commission on Human and Peoples' rights, General comment No. 3 on the African Charter on Human and Peoples' Rights: The right to life (article 4), para. (5).

Kingdom agrees that the draft conclusions are not the appropriate place to explore or seek to identify the content of particular norms of *jus cogens*; there remains a serious question as to the utility of the proposed non-exhaustive list annexed to draft conclusion 23 and whether it is possible to state with confidence that the relevant norms as formulated by the Commission clearly fulfil the criteria.[169] As set out in the annex to the statement by the United Kingdom[170] in the 2019 debate on the Commission's report, it is clear from the accompanying commentaries that the prior work by the Commission on this matter was often cursory in nature; at times did not directly declare norms to be *jus cogens*; was sometimes inconsistent in the formulation of the same norm; and at times was not the work of the Commission as a whole.

The United Kingdom still considers that a list is not essential to this topic and is now firmly of the view that it should be not be included in the draft conclusions, which has been the approach adopted in other topics.

United States of America

[Original: English]

The United States reiterates its previously noted concerns about the non-exhaustive list proposed by draft conclusion 23 and the accompanying draft annex and is of the view that both should be deleted.[171]

First, the methodology used to compile the list is inconsistent with the recognized standard for determining the existence of a *jus cogens* norm. This concern is particularly serious given that many may simply consult the list and conclude that particular acts do or do not violate *jus cogens* norms. The criterion for inclusion on the annexed list is only that the Commission has previously referred to a norm as one of peremptory character. The list is nonetheless presented in draft conclusion 23 as being "[w]ithout prejudice to the existence or subsequent emergence of other peremptory norms", which can be read as presupposing that the norms on the list have been properly included as peremptory norms. There is no analysis in the present draft conclusions as to whether any of these norms in fact meets the standard for *jus cogens* and, as discussed below, there are serious questions about whether some of them do.

Inevitably, questions will arise about why certain norms are included in this list and some, like piracy, are not, and whether the earlier documents of the Commission on which the draft conclusions rely accurately identified *jus cogens* norms. Certainly, some of the items in this list are *jus cogens* norms, including most prominently the prohibition of genocide. We are not convinced, however, that other specific items on the list either should be included or are accurately described. For example, while the United States recognizes the right to self-determination, we question whether this right constitutes a *jus cogens* norm. The Commission itself has been inconsistent with respect to this conclusion, which is reflected in its lack of methodology when considering the status of the right to self-determination in prior projects. In this context, we note that, in discussing the status of the right to self-determination, the commentary obscures the distinction between peremptory norms and obligations *erga*

[169] In this regard, the United Kingdom notes that the International Court of Justice has never expressly found that the right to self-determination is a norm of *jus cogens*. It has been a conscious decision of the Court not to ascribe a peremptory character to the right, notwithstanding its importance as an "essential [principle] of contemporary international law" (*East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90, at p. 102, para. 29).

[170] See the statement by the delegation of the United Kingdom at the seventy-fourth session of the Sixth Committee of the General Assembly, available from: www.un.org/en/ga/sixth/74/pdfs/statements/ilc/uk_1.pdf (annex).

[171] See the statement by the delegation of the United States at the seventy-fourth session of the Sixth Committee of the General Assembly, available from: www.un.org/en/ga/sixth/74/pdfs/statements/ilc/us_1.pdf (p. 5).

omnes.[172] While peremptory norms give rise to obligations *erga omnes*, the reverse is not always the case and cannot be assumed with respect to the right to self-determination. Other items on the list may very well constitute peremptory norms, but are ill defined in the draft annex and the commentaries to the draft conclusions. As an example, we would point to the inclusion of what is described as "[t]he basic rules of international humanitarian law". Even if one were to accept that some international humanitarian law rules are *jus cogens* norms, there is considerable uncertainty as to which are peremptory and which are not. The report suggests that some future project may resolve which specific rules of international humanitarian law are peremptory, but the need for future work only underscores why this broad category should not be included in the annex at this time.

[172] See A/74/10, p. 207. Notably, the various International Court of Justice decisions referring to the *erga omnes* character of obligations arising from the right to self-determination have never referred to the right to self-determination as a *jus cogens* norm.