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**PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW
(*JUS COGENS*)**

Statement of the Chairman of the Drafting Committee

Mr. Aniruddha Rajput

26 July 2017

Mr. Chairperson,

It is my pleasure, today, to introduce the sixth report of the Drafting Committee for the sixty-ninth session of the International Law Commission, dealing with the topic “Peremptory norms of general international law (*jus cogens*)”.

The Drafting Committee had before it some work remaining from last year, namely the second paragraph in the Special Rapporteur’s proposal for draft conclusion 3. It also had before it draft conclusions 4 to 9, which were referred to it on 13 July 2017. The Drafting Committee held three meetings on the topic, on 13, 17 and 20 July 2017, respectively. It was able, within the time allocated to it, to complete the work left over from last year, and to consider the Special Rapporteur’s proposals for draft conclusions 4 to 8, referred this year. However, owing to lack of time, the consideration of the Special Rapporteur’s proposal for draft conclusion 9 was deferred to next year’s session of the Commission.

It should be recalled that, consistent with the approach taken last year, upon summing up this year’s debate on the topic in the Plenary, the Special Rapporteur recommended that the draft conclusions remain in the Drafting Committee until the full set has been adopted, so that the Commission will be presented with a full set of draft conclusions before taking action. My statement today is, accordingly, presented in the

form of an interim report, intended to provide the Commission with information on the progress made in the Drafting Committee so far.

A complete rolling text of the draft conclusions worked out thus far is annexed to this statement, for information purposes only. Given the interim nature of the work, the text is subject to change. Draft conclusions 1 and 3 [3(1)] were adopted last year. I accordingly refer members to the oral report of the Chairman of the Drafting Committee at last year's session, Mr. Sturma, for his introduction of both draft conclusions. I might point that, as I will explain in due course, what was adopted as draft conclusion 2 [3] last year, has now been renumbered as draft conclusion 3 [3 (1)].

Draft conclusion 2 [3(2)]

Mr. Chairperson,

I will start this year's interim report with draft conclusion 2 [3(2)], which was originally proposed by the Special Rapporteur as a second paragraph to his proposal for draft conclusion 3. Last year, the Drafting Committee was unable to consider the paragraph for lack of time. This year, the Drafting Committee initially set the paragraph aside for consideration as part of the work on the Special Rapporteur's proposal for draft conclusion 8.

The Drafting Committee subsequently considered a proposal for the inclusion of the provision in a new combined text for draft conclusions 6 and 8. A minority of the members continued to express doubts about the legal basis and purpose of the paragraph. Other suggestions included postponing the consideration of the provision, with a view to examining it in conjunction with either draft conclusion 7 on the international community as a whole, or draft conclusion 9 on evidence. Another proposal was to deal with the matter in a preamble to the entire set of draft conclusions.

Nonetheless, the prevailing view was that it should be retained in the text, as a self-standing provision. The view of the majority of members was that this was an important provision which provided a general orientation for the provisions that

followed. It was for this reason that the provision was placed before the provision on the definition of peremptory norms.

As regards the text, the provision largely follows the one proposed by the Special Rapporteur in his first report, with the technical modification to the use of the phrase “*jus cogens*”, so as to reflect the new title of the topic. The provision also now includes the phrase “reflect and protect”, to indicate the process of identification of peremptory norms, as well as their consequences.

A proposal was made in the Drafting Committee to already delineate sections within the overall text, so that draft conclusion 2 [3(2)] would be part of an introductory section. The Special Rapporteur indicated his intention to propose different sections once a full set of draft conclusions was adopted.

The title for draft conclusion 2 [3 (2)] is “[g]eneral nature of peremptory norms of general international law (*jus cogens*)”.

Draft conclusion 3 [3(1)]

Mr. Chairperson,

As already indicated, the text of draft conclusion 3 [3(1)] was adopted last year, as draft conclusion 2 [3]. With the relocation of paragraph 2 of the Special Rapporteur’s proposal for draft conclusion 3 to a separate draft conclusion, the text adopted last year has been renumbered as draft conclusion 3 [3 (1)]. It now only contains one paragraph.

The Drafting Committee proceeded at this year’s session to adopt the title of the provision as “Definition of a peremptory norm of general international law (*jus cogens*)” which, except for the fact that it refers to “a” peremptory norm as opposed to “peremptory norms”, is in line with the Special Rapporteur’s proposed text. Despite a suggestion that the title be shortened to read only “Definition”, consensus was reached on the longer title: first, it satisfied the requirement for consistency with the terminology used in Article 53 of the Vienna Convention on the Law of Treaties, and second, it

followed the approach for draft conclusion 4 of the draft conclusions on “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”, adopted, on first reading, in 2016.

Draft conclusion 4

Mr. Chairperson,

Draft conclusion 4 was considered on the basis of a revised text presented by the Special Rapporteur. The revised text sought to address the suggestions made by a number of members that, in accordance with Article 53 of the Vienna Convention, the draft conclusion should not only refer, in subparagraph (b), to a peremptory norm being a norm from which no derogation is permitted, but also refer to the modification only by a subsequent norm of general international law having the same character. Hence, the element of modification was added in the Special Rapporteur’s revised proposal.

In the course of its discussion, the Drafting Committee considered several aspects, including replacing “must” with “is” in sub-paragraphs (a) and (b); and the necessity of ensuring consistency of usage throughout the draft conclusions of the term “a peremptory norm of general international law (*jus cogens*)”, thus introducing this wording to replace “a norm as one of *jus cogens*” in the chapeau of the revised draft conclusion.

The Drafting Committee also considered the advantages and disadvantages of the Special Rapporteur’s proposal to divide sub-paragraph (b) into two separate paragraphs, namely non-derogation in (i) and modification only by a subsequent peremptory norm of general international law in (ii). While such approach was viewed by some in the Drafting Committee as providing clarity by their distinct placement, and the proposal was made to list modification as a third criterion of identification under (c) – an approach considered to change the structure of Article 53 of the Vienna Convention by the Special Rapporteur – the Drafting Committee settled on keeping the two elements of derogation and modification in subparagraph (b). In line with Article 53 of the Vienna

Convention, the Drafting Committee confirmed that they were two aspects of the same criterion and their separation could lead to the false impression that two separate tests would have to be satisfied to fulfil the criteria for identifying a peremptory norm of general international law.

Following a suggestion to replace the word “show” with “ascertain” in the chapeau of the draft conclusion, in line with the Commission’s draft conclusion 2 in its draft conclusions on the “Identification of customary international law”, adopted, on first reading, in 2016, the Drafting Committee decided that “establish” was most apt for the present context. It similarly settled on “démontrer” in the French text although members noted a slight discrepancy between the two terms.

The Drafting Committee further decided to change “two criteria” to “the following criteria”, and “it must be” at the start of both sub-paragraphs (a) and (b) to “it is” in order to better reflect that they were the intrinsic characteristics of a peremptory norm of general international law (*jus cogens*).

The title of draft conclusion 4 is “[c]riteria for identification of a peremptory norm of general international law (*jus cogens*)”

Draft conclusion 5

Mr. Chairperson,

Turning to the consideration of draft conclusion 5, the Drafting Committee proceeded on the basis of the proposal by the Special Rapporteur in his second report, which was then revised on the basis of suggestions made in the Drafting Committee.

After lengthy consideration, the draft conclusion reflects the agreement reached by members of the Drafting Committee on various aspects of the initial and revised proposals. You will note that it includes two paragraphs where the initial proposal had four. The Drafting Committee took into account various concerns, including some expressed during the plenary debate, on the meaning of “general international law”, and

the propriety of adopting a three-tier structure that included not only customary international law and general principles of law but also treaties, when considering the sources of peremptory norms.

The Special Rapporteur's proposal had included a paragraph 1, which had been included to make a linkage with draft conclusion 4, and to provide some clarity to the term "general international law." Different suggestions for the paragraph were considered, including deleting it or moving it to what became draft conclusion 3 [3(1)] on "definition" or draft conclusion 4 on "criteria for *jus cogens*". Eventually, the Drafting Committee decided to delete the paragraph, on the understanding that the Special Rapporteur would provide an explanation in the commentary as to what constitutes "general international law having a general scope of application".

Members agreed with the important position of customary international law in the formation of peremptory norms of general international law. During the discussion, some members expressed a preference for the word "source" over "basis" for the formation of *jus cogens* norms of international law. Nonetheless, the Drafting Committee adopted the word "basis", out of the concern that the word "source" was a term used in Article 38 (1) (c) of the Statute of the International Court of Justice, where no reference was made to peremptory norms of general international law. The accompanying commentary will indicate that the word "basis" is to be understood flexibly, so as to capture a range of ways in which the traditional sources of law might feed into the formation of *jus cogens* norms.

Paragraphs 3 and 4 of the initial proposal of the Special Rapporteur were the subject of substantial differences of views within the Drafting Committee. The text underwent multiple revisions, resulting in the merger of the two paragraphs. Furthermore, the Drafting Committee decided to invert the order, with the reference to treaty provisions coming before general principles of law. The Drafting Committee further refined the text to read "treaty provisions", which was deemed more appropriate than "provisions in multilateral treaties" as some members considered that peremptory norms of general international law (*jus cogens*) could also be located in bilateral treaties.

At the same time, it is worth clarifying that the merging of treaty provisions and general principles of law in a single paragraph was not meant to place them necessarily

at the same level. A clarification on the reasoning of the Drafting Committee on that aspect, as well as on the fact that the reference to general principles of law was to be understood within the meaning of Article 38, (1) (c) of the Statute of the International Court of Justice, would be provided in the commentary.

The title of the draft conclusion 5 is “Bases for peremptory norms of general international law (*jus cogens*)”.

Draft conclusion 6

Mr. Chairperson,

Draft conclusion 6 was considered on the basis of a revised proposal presented by the Special Rapporteur, and which took into account the suggestions to streamline the text of the draft conclusion. The revised proposal, *inter alia*, combined the Special Rapporteur’s proposals for draft conclusions 6 and 8. The basic thrust of the initial draft conclusion is retained in the revised provision; namely that the requirement of acceptance and recognition for peremptory norms is different from the acceptance as law for customary international law and recognition for the purpose of general principles of law.

Paragraph 1 is drawn primarily from the first sentence of the first paragraph of the Special Rapporteur’s initial proposal for draft conclusion 8. The text was aligned with the new formulation of the topic title, and the earlier reference to “as law for the purposes of identification of customary international law” was replaced by “and recognition as a norm of general international law”. This was done on the understanding that, in the commentary, a distinction would be introduced between the identification of peremptory norms of general international law and norms of general international law in general. The inverted commas around “acceptance and recognition” are meant to reflect the fact that the phrase is drawn from Article 53 of the Vienna Convention.

The purpose of paragraph 2, which is also drawn from paragraph 2 of the Special Rapporteur’s initial proposal for draft conclusion 8, is to indicate the evidence required to identify a norm as being a peremptory norm of general international law (*jus cogens*): that such a norm is accepted and recognized as one from which no derogation is permitted and which can only be modified by a subsequent norm of international law having the same character. The formulation was aligned with the final sentence of Article 53 of the Vienna Convention.

The title of draft conclusion 6 is “acceptance and recognition”.

Draft conclusion 7

Mr. Chairperson, draft conclusion 7 deals with the concept of “international community of States as a whole” for purposes of the identification of peremptory norms of general international law (*jus cogens*). The Drafting Committee worked on the basis of a revised version of the proposal of the Special Rapporteur.

Paragraph 1 largely tracks the initial proposal of the Special Rapporteur, with the exception that the second sentence, which referred to the “attitude” of states, a word that was criticized during the Plenary debate, has been deleted.

Paragraphs 2 and 3 of the Special Rapporteur’s initial proposal have been inverted, so that paragraphs 1 and 2 together deal with the question of the majority of States required for the identification of a norm as a peremptory norm of general international law (*jus cogens*), while paragraph 3 deals with the positions of other actors.

Paragraph 2 largely tracks the formulation initially proposed by the Special Rapporteur. The Drafting Committee accepted the suggestion, made during the Plenary debate, that the text be amended to reflect the reference (employed by the Chairperson of the Drafting Committee at the Vienna Conference, Mr. Yasseen) to a “very large majority of States” being required for the identification of a norm as a peremptory norm. The commentary will explain that the reference is not necessarily to a numerical

consideration, but would also involve a qualitative assessment. The Drafting Committee considered a proposal to delete the concluding clause “acceptance and recognition by all States is not required”, as being repetitive. However, on balance it decided to retain the text as being a useful clarification.

Paragraph 3 is a streamlined version of the Special Rapporteur’s proposal for paragraph 2. Some of the drafting refinements introduced included: replacing the word “attitudes”, which was considered too vague, with “positions”; replacing “actors other than States” by “other actors”; and including the reference to the role of other actors in “providing context”. Notwithstanding such amendments, the basic position of the provision, namely that the positions of other actors cannot, in and of themselves, form a part of such acceptance and recognition, was retained.

The title of draft conclusion 7 is “[i]nternational community of States as a whole”.

Mr. Chairperson,

Before concluding my report today, I wish to pay tribute to the Special Rapporteur, Mr. Dire Tladi, whose knowledge of the subject, guidance and cooperation greatly facilitated the work of the Drafting Committee. I also wish to thank the members of the Drafting Committee for their active participation and valuable contribution to the work undertaken this year. I also thank the Secretariat for its valuable assistance.

This concludes my introduction of the sixth report of the Drafting Committee for the sixty-ninth session. I wish to confirm that the Commission is not, at this stage, being requested to act on the draft conclusions, as this report has been presented for information purposes only.

Thank you.

Annex

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

Titles and texts of draft conclusions 1, 2 [3(2)], 3 [3(1)], 4, 5, 6 and 7 provisionally adopted by the Drafting Committee at the sixty-eighth and sixty-ninth sessions

Draft conclusion 1¹ **Scope**

The present draft conclusions concern the identification and legal effects of peremptory norms of general international law (*jus cogens*).

Draft conclusion 2 [3(2)]

General nature of peremptory norms of general international law (*jus cogens*)

Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable.

Draft conclusion 3 [3 (1)]²

Definition of a peremptory norm of general international law (*jus cogens*)

A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

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

To identify a peremptory norm of general international law (*jus cogens*), it is necessary to establish that the norm in question meets the following criteria:

¹ Adopted at the sixty-eighth session of the Commission

² Adopted at the sixty-eighth session of the Commission

- (a) it is a norm of general international law; and
- (b) it is accepted and recognised 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.

Draft conclusion 5

Bases for peremptory norms of general international law (*jus cogens*)

1. Customary international law is the most common basis for peremptory norms of general international law (*jus cogens*).
2. Treaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*).

Draft conclusion 6

Acceptance and recognition

1. 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.
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 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.

Draft conclusion 7

International community of States as a whole

1. It 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 (*jus cogens*).

2. Acceptance and recognition by a very large majority of States is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*); acceptance and recognition by all States is not required.
3. While the positions of other actors may be relevant in providing context and for assessing acceptance and recognition by the international community of States as a whole, these positions cannot, in and of themselves, form a part of such acceptance and recognition.