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INTERNATIONAL LAW COMMISSION

Seventieth session

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

Statement of the Chairperson of the Drafting Committee

Oral interim report

Mr. Charles Chernor Jalloh

14 May 2018

Mr. Chair,

It is my pleasure, today, to introduce the first oral interim report of the Drafting Committee on the topic “Peremptory norms of general international law (*jus cogens*)”, during our historic seventieth session. In line with the Special Rapporteur’s recommendation, made in 2016, 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.

The Drafting Committee held three meetings on 2, 4 and 8 May 2018, respectively. The purpose of the Drafting Committee during this first part of the session of the Commission was to address some work remaining from last year (i.e. 2017), namely the Special Rapporteur’s proposal for draft conclusion 9, which was referred to the Drafting Committee last year. The Drafting Committee proceeded on the basis of the proposal as included in the Special Rapporteur’s second report, which it decided to split into two provisions that were adopted as draft conclusions 8 and 9.

A complete rolling text of the draft conclusions worked out thus far is annexed to this statement, for information purposes only, and will be made accessible on the Commission’s website with the text of this oral interim report. As you will recall, the Commission adopted draft conclusions 1 and 3 at its sixty-eighth session, and draft conclusion 2 as well as draft conclusions 4 to 7 at its sixty-ninth session. I accordingly refer members to the oral interim reports of the respective Chairs of the Drafting Committees during those sessions. Given the interim nature of the work, I reiterate that the text is subject to change.

Draft conclusion 8

Mr. Chair,

I will start with the substance of draft conclusion 8 [9 (1), (2)], which is based on paragraphs 1 and 2 of the proposal for draft conclusion 9 by the Special Rapporteur on “Evidence of acceptance” that a norm of general international law is a peremptory norm (*jus cogens*). As an introductory remark, I would like to point out that the Drafting Committee, in drafting both draft conclusions 8 and 9, decided to take into account the formulation of the relevant draft conclusions on the identification of customary international law.

Draft conclusion 8 [9 (1), (2)] concerns the different forms of evidence of acceptance and recognition that a norm of general international law is a peremptory norm (*jus cogens*). The text of draft conclusion 8, paragraph 1 [9(1)], essentially follows the wording of draft conclusion 10, paragraph 1, of the draft conclusions on the identification of customary international law, with the necessary modifications. Draft conclusion 8, paragraph 1 [9(1)], thus uses the simplified phrase “may take a wide range of forms” in lieu of the Special Rapporteur’s proposal “can be reflected in a variety of materials and can take various forms”. The term “peremptory norm” was added before “*jus cogens*” to reflect the full title of the topic, which the Drafting Committee has done in previous draft conclusions.

To take into account the relationship between draft conclusion 9, as initially envisaged by the Special Rapporteur, and the previous draft conclusions, several proposals were made to include the relevant text of draft conclusions 4, 6 and 7 into draft conclusion 8, paragraph 1 [9(1)]. It was also suggested to incorporate the whole text of draft conclusions 8 [9 (1), (2)] and 9 [9 (3), (4)] into draft conclusion 6 as a new paragraph 3. Alternatively, it was proposed to include explicit cross-references to the relevant previous draft conclusions into paragraph 1 of draft conclusion 8 [9(1)]. A majority was of the view that draft conclusions 4, 6 and 7 worked as a sequence leading up to draft conclusion 8 [9(1), (2)]. Accordingly, the reference to previous draft conclusions was understood to be implicit in draft conclusion 8 [9(1), (2)].

Paragraph 2 of draft conclusion 8 [9(2)] provides a non-exhaustive list of the possible forms of evidence of acceptance and recognition by States that a norm of general international law is a peremptory norm (*jus cogens*). The Drafting Committee focused on the relationship between that paragraph and the following paragraphs in the Special Rapporteur’s proposal for draft conclusion 9. To ensure the above-mentioned coherence with its work on customary

international law, the Drafting Committee decided to follow the language in draft conclusion 10, paragraph 2, of the draft conclusions on the identification of customary international law and to add “Such” in front of “forms of evidence” at the beginning of the paragraph. Moreover, the order of the forms of evidence of acceptance and recognition initially proposed by the Special Rapporteur was changed to that in the list in draft conclusion 10, paragraph 2, of the draft conclusions on the identification of customary international law. Any deviations from draft conclusion 10, paragraph 2, of the draft conclusions on the identification of customary international law will be explained in the commentary. In particular, the reference to “resolutions” is intended to include “conduct in connection with resolutions”, which was the language used in draft conclusion 10, paragraph 2, of the draft conclusions on the identification of customary international law. Some members of the Drafting Committee noted that national legislation and constitutions constituted important evidence for the recognition and acceptance of a norm as one having a peremptory character. Based on the formulation in draft conclusion 6, paragraph 2, of the draft conclusions on the identification of customary international law, the Drafting Committee decided to include “legislative and administrative acts” in the list of forms of evidence in draft conclusion 8, paragraph 2 [9(2)].

Regarding the reference to decisions of national courts in paragraph 2, the question arose whether “decisions of international courts and tribunals” should also be included in paragraph 2. After some discussion, the Drafting Committee decided to place paragraphs 3 and 4, as originally proposed by the Special Rapporteur, into a new draft conclusion to reflect the distinct roles that the decisions of national courts, on the one hand, and those of international courts and tribunals, on the other hand, played in serving as evidence for the acceptance and recognition that a norm of general international law is a peremptory norm (*jus cogens*). Draft conclusion 8, paragraph 2 [9(2)], read in light of draft conclusion 7, concerned evidence of acceptance and recognition by States, including when acting through national courts as their organs. In contrast, the decisions of international courts and tribunals served as subsidiary means for the determination of rules of international law on the basis of assessments of the evidence in paragraph 2 of draft conclusion 8. The approach of treating the decisions of national courts, as forms of evidence, separately from those of international courts and tribunals, as subsidiary means, was also consistent with the draft conclusions on the identification of customary international law.

The title of draft conclusion 8 [9(1), (2)] is “Evidence of acceptance and recognition” as originally proposed by the Special Rapporteur.

Draft conclusion 9

Mr. Chair,

I now turn to draft conclusion 9, as provisionally adopted by the Drafting Committee. As already mentioned, the draft conclusion deals with subsidiary means for the determination of the peremptory character of norms of general international law (*jus cogens*). The Drafting Committee proceeded on the basis of a revised proposal by the Special Rapporteur, which was based on his original proposal for paragraphs 3 and 4 of draft conclusion 9 and took into account suggestions made in the Drafting Committee.

The revised proposal followed the text of draft conclusion 13, paragraph 1, of the draft conclusions on the identification of customary international law. The Drafting Committee did not accept a proposal to include the qualifier “Judicial” in front of “decisions” because decisions other than “judicial decisions” might be relevant for determining the peremptory character of norms of general international law (*jus cogens*). A proposal was made to replace the term “determining” with “identifying”. However, the Drafting Committee decided to keep the term “determining” as proposed by the Special Rapporteur, as it is consistent with the formulation used in Article 38, paragraph 1 (d), of the Statute of the International Court of Justice as well as draft conclusion 13, paragraph 1, of the draft conclusions on the identification of customary international law.

Draft conclusion 9, paragraph 2 [9(4)], deals with the works of expert bodies and the teachings of the most highly qualified publicists as subsidiary means for the determination of the peremptory character of a norm of general international law (*jus cogens*). The Drafting Committee discussed, *inter alia*, whether the work of the International Law Commission should be explicitly mentioned in the text of the draft conclusion. It was noted that it was worthwhile mentioning the Commission explicitly because of the significant contribution made by the Commission to the emergence and development of peremptory norms of general international law (*jus cogens*) and in light of its mandate and its interaction with States in the process of codification and progressive development. However, the Drafting Committee agreed to delete any explicit reference to its work because this was not in line with its usual practice. It will be explained, in the commentary, that the Commission, as an expert body, has played a significant role in the emergence and development of peremptory norms of general international law (*jus cogens*).

The term “works” is intended to cover the process as well as the conclusive outcome of the consideration of peremptory norms of general international law (*jus cogens*) by expert bodies. Alternative terms discussed were “pronouncements”, “determinations”, “views” or “assessments” by expert bodies. The Drafting Committee also deliberated whether the works of expert bodies

should be placed in a separate paragraph from the teachings of the most highly qualified publicists of various nations, as the latter were explicitly mentioned in Article 38, paragraph 1 (d), of the Statute of the International Court of Justice. Concerns were voiced that doing so could be interpreted as establishing a hierarchy between those subsidiary means for determining the peremptory character of norms of general international law (*jus cogens*).

The phrase “expert bodies established by States or international organizations” in draft conclusion 9, paragraph 2 [9(4)], is based on a revised proposal by the Special Rapporteur and several modifications made during the discussion. The phrase is understood to include organs established by international organizations and subsidiary bodies such as the International Law Commission as well as treaty bodies. The term “expert bodies” without any further qualification, as initially proposed by the Special Rapporteur, was considered too broad because it could be understood as including private organizations without an intergovernmental mandate. The phrase “recognized expert bodies established by States” was also considered. The Drafting Committee took the view that the phrase “expert bodies established by States” would have the effect of excluding expert bodies established by international organizations.

The title of draft conclusion 9 [9(3), (4)] is “Subsidiary means for the determination of the peremptory character of norms of general international law (*jus cogens*)”.

Mr. Chair,

Before concluding my report today, I wish to pay tribute to the Special Rapporteur, Mr. Dire Tladi, whose deep expertise and 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 on this topic. I also thank the Secretariat for its valuable assistance.

This concludes my introduction of the oral interim report of the Drafting Committee for the first part of the seventieth session. It is anticipated that the Drafting Committee will revert to the topic during the second part of the session to consider any draft conclusions referred to it on the basis of the third report of the Special Rapporteur. 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*)

Rolling text

Titles and texts of draft conclusions 1, 2 [3(2)], 3 [3(1)], 4, 5, 6 [6, 8], 7, 8 [9(1), (2)], and 9(1), (2) [9(3), (4)] provisionally adopted by the Drafting Committee at the sixty-eighth, sixty-ninth and seventieth sessions (thus far)

Draft conclusion 1

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)]

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:

- (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 [6,8]

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.

Draft conclusion 8 [9(1), (2)]
Evidence of acceptance and recognition

1. Evidence of acceptance and recognition that a norm of general international law is a peremptory norm (*jus cogens*) may take a wide range of forms.
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 resolutions adopted by an international organization or at an intergovernmental conference.

Draft conclusion 9 [9(3), (4)]
Subsidiary means for the determination of the peremptory character of
norms of general international law (*jus cogens*)

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for determining the peremptory character of norms of general international law (*jus cogens*).
 2. The 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 (*jus cogens*).
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