

INTERNATIONAL LAW COMMISSION

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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**

**26 July 2018**

Mr. Chair,

It is my pleasure, today, to introduce the second oral interim report of the Drafting Committee on the topic “Peremptory norms of general international law (*jus cogens*)” during the seventieth session.

As you will recall, the Drafting Committee held three meetings during the first part of this session of the Commission in New York at which it adopted draft conclusions 8 and 9 concerning, respectively, evidence of acceptance and recognition, and subsidiary means for the determination of the peremptory character of norms of general international law. I presented an oral interim report on those two draft conclusions at the 3402<sup>nd</sup> meeting, on 14 May 2018. That informational report to the plenary can be found in the relevant section of the Commission’s website. It is also worth recalling that the prior draft conclusions, that is draft conclusions 1 and 3, were adopted at the sixty-eighth session, and draft conclusion 2 as well as draft conclusions 4 to 7 at the sixty-ninth session. I accordingly refer members to the oral interim reports of the respective Chairs of the Drafting Committees during those sessions.

During the second part of this session, here in Geneva, the Drafting Committee held a total of four meetings on 9, 10, 11 and 12 July 2018, respectively. The focus was on the consideration of the 14 new draft conclusions that the Special Rapporteur proposed in his third report. The Commission referred those draft conclusions to the Drafting Committee on 9 July 2018, together with the comments and drafting suggestions made in the Plenary, and on the understanding that the Drafting Committee would also work on the basis of the proposal of the

Special Rapporteur made the same day to reformulate draft conclusions 22 and 23 as a without a prejudice clause. Given the limited time allocated to it, the Drafting Committee was only able to consider and adopt draft conclusions 10 to 14, which I will describe in this oral interim report. Accordingly, the Drafting Committee will take up draft conclusions 15 to 23 at its seventy-first session. I urge the Chairperson of the Commission and the Bureau to factor sufficient time for this remaining part of our work on this topic when considering the programme for next year.

As noted in my first oral interim report, the draft conclusions for this topic remain in the Drafting Committee until the full set has been adopted. This would allow the Commission to be presented with a full set of draft conclusions before taking action. 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. Given the interim nature of the work, I reiterate that the text remains subject to change.

Before addressing the details of the draft conclusions, I wish to pay tribute to the Special Rapporteur, Mr. Dire Tladi, whose constructive approach, flexibility and mastery of the topic once again greatly facilitated the work of the Drafting Committee. I also thank other members of the Committee for their active participation and significant contribution. Furthermore, I wish to thank Secretariat for its invaluable assistance.

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### **Preliminary remarks**

Mr. Chair,

At the outset, please allow me to make two general remarks regarding the approach taken by the Drafting Committee. First, in view of the prevailing view in the plenary debate, the Drafting Committee sought to align the text of the draft conclusions proposed by the Special Rapporteur with that of the relevant provisions of the 1969 Vienna Convention on the Law of Treaties, to the extent possible. Nonetheless, given the non-binding nature of the draft conclusions, the Drafting Committee did, on occasion, diverge from the structure and language of the Vienna Convention where it considered that appropriate. This also enabled us to account for the specificities of the topic.

Second, during the plenary debate, it was also suggested that several of the draft conclusions proposed by the Special Rapporteur should refer to international organizations. The Drafting Committee decided to consider the implications of including international organizations

into its work on the topic at a later stage, once it has agreed on a set of draft conclusions as a whole. This is in keeping with the Special Rapporteur's proposal in the first report, to adopt a fluid approach to the adoption of draft conclusions on this topic.

### **Draft conclusion 10**

Mr. Chair,

I now turn from our overarching approach to the topic to the more specific consideration of draft conclusions 10 to 14, which were provisionally adopted by the Drafting Committee at the present session. To begin with, I draw the Commission's attention to draft conclusion 10 concerning the legal consequences of conflict of treaties with peremptory norms of general international law (*jus cogens*). Paragraph 1 confirms that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*). While the Drafting Committee adopted that sentence, in the formulation proposed by the Special Rapporteur, it decided to adjust the second sentence to follow more closely article 69, paragraph 1, of the Vienna Convention, which states that "[t]he provisions of such a treaty have no legal force." The phrase "have no legal force" is broader than the formulation "does not create any rights or obligations", which was suggested by the Special Rapporteur. As the commentary will make clear, the use of such formulation solely serves as a means of defining what is meant by "void" in the first sentence. It is not intended to indicate that certain effects or consequences occur in advance of the fulfilment of procedural requirements necessary for establishing that a treaty is, in fact, void, which are set out in draft conclusion 14. Indeed, as the Special Rapporteur noted during the consideration of draft conclusion, the consequences of a treaty being void in draft conclusion 10 are equally dependent on the procedural requirements in draft conclusion 14.

Paragraph 2 of draft conclusion 10 concerns the situation in which an existing treaty becomes void and terminates owing to the emergence of a new peremptory norm of general international law (*jus cogens*). As a consequence, the parties to such a treaty are released from any obligation further to perform the treaty. While agreeing with the substance of the initial proposal by the Special Rapporteur, the Drafting Committee decided to further align the text with the relevant provisions of the Vienna Convention. The first sentence follows *verbatim* article 64 of the Vienna Convention, and the second sentence replicates article 71, paragraph 2 (a), of the Vienna Convention.

The Drafting Committee decided to hold paragraph 3 of draft conclusion 10, as proposed by the Special Rapporteur, in abeyance until a later stage, with a view to developing a separate

draft conclusion providing for a general rule on interpretation in a manner consistent with peremptory norms of general international law (*jus cogens*). Such a rule would apply to other sources of law and obligations.

The title of draft conclusion 10 is “[i]nvalidity and termination of treaties in conflict with a peremptory norm of general international law”. The proposal of the Special Rapporteur for the title of draft conclusion 10 was modified to take into account that the draft conclusion covers not only invalidity but also the termination of a treaty that is in conflict with a peremptory norm of general international law (*jus cogens*). The Drafting Committee discussed whether the term “invalidity” in the title should be replaced by a reference to “void” as reflected in the text of draft conclusion 10. Comparing corresponding terminology in other languages, the Drafting Committee decided not to draw a substantive distinction between the terms “void” and “invalid”. Instead, they are used interchangeably. The term “void” is employed in the text and the term “invalidity” in the title of draft conclusion 10, and in subsequent draft conclusions, where applicable.

### **Draft conclusion 11**

Mr. Chair,

Draft conclusion 11 concerns the possibility of separability of treaty provisions which are in conflict with a peremptory norm of general international law (*jus cogens*). It distinguishes between two scenarios, first, the status of a treaty, which at the time of its conclusion, conflicts with a peremptory norm; and second, the status of a treaty which becomes void due to the emergence of a new peremptory norm. The two scenarios are addressed in two separate paragraphs. Paragraph 1 confirms the general rule that a treaty is void in whole and no separation of the provisions of the treaty is permitted. The Special Rapporteur’s formulation of the paragraph was modified to track more closely the Vienna Convention and to make it consistent with draft conclusion 10 by replacing the term “invalid” with “void”. The first part of the paragraph draws from article 53 of the Vienna Convention, stating that “[a] treaty which, at the time of its conclusion, conflicts with a peremptory norm of general international law (*jus cogens*) is void in whole”. The second phrase follows the formulation in article 44, paragraph 5, of the Vienna

Convention, which explicitly refers to article 53 of the Vienna Convention in providing that “no separation of the provisions of the treaty is permitted”.

Paragraph 2 provides the exception to the general rule stated in paragraph 1. The chapeau is based on the original proposal of the Special Rapporteur, except for the replacement of the term “invalid” with “void”. Paragraph 2 provides that “[a] treaty which becomes void because of the emergence of a new peremptory norm of general international law (*jus cogens*) terminates in whole, unless” the cumulative conditions in subparagraphs (a) to (c) are fulfilled. The original proposals of the Special Rapporteur for subparagraphs (a) and (b) were adjusted to follow the formulation used in article 44, paragraph 3 (a) and (b), of the Vienna Convention. Subparagraph (a) requires that the provisions that are in conflict with a peremptory norm of general international law (*jus cogens*) are separable from the remainder of the treaty “with regard” to their application. Subparagraph (b) was revised and refined by adding the phrase “it appears from the treaty or is otherwise established that acceptance” of the “said” provisions. The original reference to “does not constitute an essential basis” was replaced by the words “was not an essential basis”. The phrase “of any party to be bound by the treaty as a whole” was inserted at the end.

A proposal was made to replace the term “unjust” in subparagraph (c) with the phrase “harmful to the fundamental values of the international community” to distinguish a conflict with a peremptory norm of general international law (*jus cogens*) from other grounds of invalidity or termination of a treaty. However, the Drafting Committee agreed that the term “unjust” did not relate to the underlying ground for invalidity but to the balance of rights and obligations created by the treaty, which should not be disturbed by separating only certain provisions from the treaty.

The title of draft conclusion 11 is “[s]eparability of treaty provisions in conflict with a peremptory norm of general international law (*jus cogens*)”. The Drafting Committee decided to replace the term “severability”, as was proposed by the Special Rapporteur, with “separability” in order to be consistent with the terminology of the Vienna Convention.

## **Draft conclusion 12**

Mr. Chair,

I now turn to draft conclusion 12, which deals with the “consequences of the invalidity and termination of a treaty which is in conflict with a peremptory norm of general international law (*jus cogens*)” for the parties to that treaty, as envisaged in draft conclusion 10.

Paragraph 1 deals with the scenario, referred to in paragraph 1 of draft conclusion 10, of the treaty being void as a result of conflict with a peremptory norm of general international law (*jus cogens*) at the time of the conclusion of the treaty. Two legal obligations are imposed on the Parties to the treaty in question, namely to: (a) eliminate as far as possible the consequences of any act performed in reliance on any conflicting treaty provision; and (b) to bring their mutual relations into conformity with the peremptory norm of general international law (*jus cogens*).

The formulation in paragraph 1 is based on the proposal by the Special Rapporteur but modified in order to bring it into line with article 71, paragraph 1 (a) and (b), of the Vienna Convention, as was suggested during the plenary debate. The Drafting Committee restructured the paragraph closer to that of article 71, paragraph 1. It also replaced the term “invalid” by “void” in the chapeau, inserted the qualifying phrase “as far as possible”, which was considered to be a particularly important clarification, into subparagraph (a), and added subparagraph (b). The Drafting Committee also considered proposals for simplifying the formulation of the chapeau, but settled for the current drafting.

Paragraph 2 deals with the scenario of the termination of an existing treaty on account of the emergence of a new peremptory norm of general international law (*jus cogens*). It maintains the basic rule aimed at preserving rights, obligations or legal situations created through the execution of the treaty prior to its termination. This is subject to the qualification that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law (*jus cogens*). While the first part of the paragraph is based on the formulation proposed by the Special Rapporteur, the second part, dealing with the qualification, tracks article 71, paragraph 2 (b), of the Vienna Convention.

The Drafting Committee considered a number of proposals for the title of draft conclusion 12, and settled for “[c]onsequences of the invalidity and termination of a treaty which conflicts with a peremptory norm of general international law (*jus cogens*)”. It refers in general terms to the consequences of invalid and terminated treaties. The words “invalidity and termination” reflect the two scenarios envisaged in the draft conclusion. More specific drafting was not accepted out of recognition that draft conclusion 12 did not address all the possible consequences (including, for example, those mentioned in draft conclusion 10, namely that the provisions of a void treaty have no legal force and that the parties to a treaty that becomes void are released from any obligation further to perform the treaty). I might mention that the Drafting Committee again faced the phenomenon of the interchangeable use of the words “void” and “invalidity”.

Accordingly, to avoid confusion, while the title refers to “invalidity”, the text in paragraph 1 uses “void”.

### **Draft conclusion 13**

Mr. Chair,

Draft conclusion 13 concerns the question of the effect of reservations to treaties on peremptory norms of general international law (*jus cogens*). Following a suggestion made in the plenary debate, the Drafting Committee aligned the text of the draft conclusion, as proposed by the Special Rapporteur, with that found in the Guide to Practice on Reservations to Treaties, adopted by the Commission in 2011.

Paragraph 1 confirms that a reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which continues to apply as such. The Drafting Committee thought it useful to add the clarifying phrase “as such”, as found in guideline 4.3.3 of the Guide to Practice, in order to expressly confirm the continuing applicability of the peremptory norm in question outside the treaty context. While the Drafting Committee considered replacing the term “binding” with “peremptory” to emphasize the special nature of peremptory norms of general international norms (*jus cogens*), it was felt that the phrase “as such” captured that special nature. However, the phrase “between the reserving State or organization and other States or international organizations”, found in guideline 4.4.3, was not similarly transposed to draft conclusion 13, since peremptory norms of general international law (*jus cogens*) are binding in the relations between all States (and international organizations).

Paragraph 2 confirms that 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*). The Drafting Committee decided to adopt the paragraph with the formulation proposed by the Special Rapporteur, which replicated *verbatim* paragraph 2 of guideline 4.4.3 of the Guide to Practice. The phrase “in a manner” is to be understood as referring to the legal effect of the treaty and not to the act of exclusion or modification owing to conflict with a peremptory norm of general international law (*jus cogens*). Furthermore, the term “treaty” also includes the legal effect entailed by the phrase “certain provisions of the treaty”, as explained in the commentary to guideline 4.4.3 of the Guide to Practice.

A proposal was made to add a new paragraph 3 to draft conclusion 13, based on guideline 3.1.5.3 of the Guide to Practice, which would provide that the fact that a treaty provision reflects

a peremptory norm of general international law (*jus cogens*) does not in itself constitute an obstacle to the formulation of a reservation to other provisions of that treaty. The Drafting Committee agreed that the issue was implicitly covered by paragraph 1 of draft conclusion 13 and would be best addressed in the commentary thereto.

The title of draft conclusion 13 is “[a]bsence of effect of reservations to treaties on peremptory norms of general international law (*jus cogens*)”. The version proposed by the Special Rapporteur was modified to reflect the title of guideline 4.4.3 of the Guide to Practice with the addition of the phrase “of reservations to treaties”, which was considered a useful specification since the draft conclusions have a different scope to that of the Guide to Practice.

#### **Draft conclusion 14**

Mr. Chair,

Draft conclusion 14 deals with the procedural requirements applicable in a situation in which a State invokes a conflict with a peremptory norm of general international law (*jus cogens*) as a ground for the invalidity or termination of a rule of international law.

During the discussion in the Drafting Committee, it was emphasized that the consequences of invoking a conflict with peremptory norms of general international law (*jus cogens*) were far-reaching and could not follow automatically from the claim that such a conflict exists. As the consequences of such a conflict could affect the stability of treaty relations, a unilateral determination of the existence or not of such conflict by either the invoking State(s) or the objecting States(s) had to be avoided. There was a view that it might be better not to include a draft conclusion on procedure at all, *inter alia*, to avoid weakening the relevant procedures in the Vienna Convention.

Nonetheless, the prevailing view within the Drafting Committee was that the question of the applicable procedure was key to the work of the Commission on the topic. It should be recalled that the relevant provisions in the Vienna Convention constitute a package: on the one hand, States can invoke a conflict with a peremptory norm of general international law (*jus cogens*) as a ground for the invalidity or termination of a treaty; on the other hand, the Vienna Convention includes procedural safeguards to preserve the integrity of the treaty. In the end, the Drafting Committee decided to include a draft conclusion on the procedure for invocation. It was also felt that it was important also to solicit the comments of States on the appropriateness and content of such a provision.



The Drafting Committee adopted draft conclusion 14 on the basis of proposals inspired by the procedural requirements stipulated in articles 65 to 67 of the Vienna Convention. It should be recalled that, in its judgment in the *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia) case, the International Court of Justice noted that articles 65 and 67 reflect customary international law. Nonetheless, in light of the non-binding nature of the draft conclusions, the Drafting Committee replaced the compulsory formulation used in Vienna Convention (“shall”) which was a treaty context by recommendatory text (“is to” or “are to”) which is more reflective of the purpose of this topic.

Paragraph 1 transposes the notification requirement found in article 65, paragraph 1, of the Vienna Convention to the claim of a possible conflict with a peremptory norm of general international law (*jus cogens*). The Drafting Committee discussed limiting the paragraph to the termination and invalidity of treaties. Another possibility considered was to refer to all rules of international law, while explicitly singling out treaties, in recognition of the fact that the most likely invocation of invalidity or termination on account of a conflict with a peremptory norm of general international law (*jus cogens*) might be in the context of treaty-based rules. The Drafting Committee also considered making a specific reference to binding decisions of international organisations. The Drafting Committee settled for an even broader reference to “a rule of international law”, without specifying the source of the rule in question, on the understanding that the commentary will clarify that such reference covers treaties and other sources of international law, including unilateral acts and binding decisions by international organizations.

As a consequence of adopting such broader scope, the Drafting Committee opted for the phrase “States concerned”, which is also used in the followed paragraphs, instead of “States” or “parties”, which are references typically more specific to treaties. I wish to place it on the record that concerns were expressed with regard to the practical implementation of such a broad approach. While the notification of the other parties to a treaty could be effected through the depositary of that treaty, the notification of the invalidity or termination of other rules of international law, potentially to the entire international community of States, posed practical difficulties, particularly for smaller States. To address such concerns, it was suggested that such notification could be made through the Secretary-General of the United Nations.

The second sentence of paragraph 1 combines the procedural requirements in the second sentence of article 65, paragraph 1, with that in article 67, paragraph 1, of the Vienna Convention. The Drafting Committee was of the view that while notification in writing was not strictly necessary, in the case of a claim of a conflict of a rule of international law with a peremptory

norm of general international law (*jus cogens*), a notification in writing would nonetheless provide greater legal certainty.

Paragraph 2 of draft conclusion 14 is based on article 65, paragraph 2, of the Vienna Convention. Following the notification by a State claiming the invalidity or termination of a rule of international law as a result of a conflict with a peremptory norm of general international law (*jus cogens*), other States are to be given a reasonable period within which to reply. In line with article 65, paragraph 2, the Drafting Committee considered that three months constitute a reasonable minimum period.

Paragraph 3 of draft conclusion 14 provides the next step in the envisaged procedure, by which, if an objection is lodged, under paragraph 2, then the States concerned should seek to resolve the dispute by any of the means indicated in Article 33 of the Charter of the United Nations. The reference to the means indicated in Article 33 includes the possibility of submitting the dispute to arbitration, as envisaged in the original proposal by the Special Rapporteur for draft conclusion 14, paragraph 1, as well as in article 66, subparagraph (a), of the Vienna Convention. There was a view in the Drafting Committee, however, that arbitration, due to its *ad hoc* nature, might not be a suitable forum to resolve a dispute involving peremptory norms of general international law (*jus cogens*). Furthermore, the possibility of submitting the dispute to arbitration under article 66, subparagraph (a), of the Vienna Convention was subject to a 12-month period, which could result in different time limitations being applicable to parties and non-parties to the Vienna Convention.

Paragraph 4, which was inspired by article 66, subparagraph (a), of the Vienna Convention, lays down the next step of the suggested procedure. It would be triggered where the resort to means of settlement in paragraph 3 does not result in a solution within a period of twelve months. In such circumstance, the objecting State or States concerned may offer to submit the matter to the International Court of Justice, and until the dispute is resolved the invoking State would not be able carry out the measure which it has proposed. The Drafting Committee was of the view that linking the resolution of the dispute to the offer of judicial settlement, and acceptance of the jurisdiction of the International Court of Justice, would demonstrate the good faith basis of the claim and the corresponding objection. The sense of the Drafting Committee was that the formulation of the paragraph resolved the problem that not all States are subject to the compulsory jurisdiction of the International Court of Justice.

Nonetheless, the Drafting Committee acknowledged that a claim of invalidity or termination because of a conflict with a peremptory norm of general international law (*jus cogens*) does not *per se* establish the jurisdiction of the International Court of Justice, or of any other

international court or dispute settlement procedure. The Drafting Committee was also confronted with the problem of the possible conflict with the procedures already established in the Vienna Convention. To address such concerns, a without prejudice clause was inserted in paragraph 5, in order to preserve the procedural requirements set forth in the Vienna Convention on the Law of Treaties, the relevant rules concerning the jurisdiction of the International Court of Justice and other applicable dispute settlement provisions agreed by the States concerned. The latter reference is intended to cover other dispute settlement agreements applicable between the States concerned, such as optional clauses or multilateral treaties establishing relevant procedures.

The Drafting Committee agreed that the placement of draft conclusion 14, in the set of draft conclusions, would be finalised at a later stage, owing, *inter alia*, to the fact that the scope of the provision is no longer limited to treaty rules, as I have already discussed.

The title of draft conclusion 14 is “[p]rocedural requirements”.

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Mr. Chair,

This concludes my introduction of the second oral interim report of the Drafting Committee on the topic of “Peremptory norms of general international law (*jus cogens*)” for the seventieth session. As mentioned in my introduction, the Drafting Committee will consider draft conclusions 15 to 23 at the seventy-first session of the Commission. I wish to reiterate 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.

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## 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)], 9 [9(3), (4)], 10 [10(1), (2)], 11, 12, 13 and 14 provisionally adopted by the Drafting Committee at the sixty-eighth, sixty-ninth and seventieth sessions**

#### **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*).

**Draft conclusion 10 [10 (1), (2)]**

**Invalidity and termination of treaties in conflict with a peremptory norm of general international law (*jus cogens*)**

1. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*). The provisions of such a treaty have no legal force.
2. 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. The parties to such a treaty are released from any obligation further to perform the treaty.

**Draft conclusion 11**

**Separability of treaty provisions in conflict with a peremptory norm of general international law (*jus cogens*)**

1. A treaty which, at the time of its conclusion, conflicts with a peremptory norm of general international law (*jus cogens*) is void in whole, and no separation of the provisions of the treaty is permitted.
2. A treaty which becomes void because of the emergence of a new peremptory norm of general international law (*jus cogens*) terminates in whole, unless:

(a) the provisions that are in conflict with a peremptory norm of general international law (*jus cogens*) are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of the said provisions was not an essential basis of the consent of any party to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

### **Draft conclusion 12**

#### **Consequences of the invalidity and termination of a treaty which conflicts with a peremptory norm of general international law (*jus cogens*)**

1. Parties to a treaty which is void as a result of being in conflict with a peremptory norm of general international law (*jus cogens*) at the time of the treaty's conclusion have a legal obligation to:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision of the treaty which conflicts with a peremptory norm of general international law (*jus cogens*); and

(b) bring their mutual relations into conformity with the peremptory norm of general international law (*jus cogens*).

2. The termination of a treaty on account of the emergence of a new peremptory norm of general international law (*jus cogens*) does not affect any right, obligation or legal situation created through the execution of the treaty prior to the termination of the treaty, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law (*jus cogens*).

### **Draft conclusion 13**

#### **Absence of effect of reservations to treaties on peremptory norms of general international law (*jus cogens*)**

1. A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such.

2. 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*).

### **Draft conclusion 14<sup>1</sup>**

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<sup>1</sup> The location of draft conclusion 14, within the draft conclusions, will be determined at a later stage.

### **Procedural requirements**

1. A State which invokes a peremptory norm of general international law (*jus cogens*) as a ground for the invalidity or termination of a rule of international law is to notify other States concerned of its claim. The notification is to be in writing and is to indicate the measure proposed to be taken with respect to the rule of international law in question.
  2. If none of the other States concerned raises an objection within a period which, except in cases of special urgency, shall not be less than three months, the invoking State may carry out the measure which it has proposed.
  3. If any State concerned raises an objection, then the States concerned are to seek a solution through the means indicated in Article 33 of the Charter of the United Nations.
  4. 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.
  5. This draft conclusion is without prejudice to the procedural requirements set forth in the Vienna Convention on the Law of Treaties, the relevant rules concerning the jurisdiction of the International Court of Justice and other applicable dispute settlement provisions agreed by the States concerned.
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