

INTERNATIONAL LAW COMMISSION
Seventy-first session
Geneva, 29 April – 7 June and 8 July – 9 August 2019

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

Statement of the Chair of the Drafting Committee

Mr. Claudio Grossman Guiloff

31 May 2019

Mr. Chair,

It is my pleasure today to introduce the second report of the Drafting Committee for the present session, which addresses the topic “Peremptory norms of general international law (*jus cogens*)”.

The report, which is to be found in document A/CN.4/L.936 and was circulated to members by the Secretariat earlier this week, contains the texts and titles of the entire set of draft conclusions, adopted by the Drafting Committee on first reading.

Before addressing the details of the report, I wish to pay tribute to the Special Rapporteur, Mr. Dire Tladi, who once again demonstrated a constructive and innovative approach, which facilitated the work of the Drafting Committee. I also thank other members of the Committee for their active participation and significant contributions. In particular, I would like to express my gratitude to Mr. Rajput, who kindly accepted to chair a meeting of the Drafting Committee in my absence. Furthermore, I wish to thank the Secretariat for its invaluable assistance. As always, and on behalf of the Drafting Committee, I am pleased to extend my appreciation to the interpreters.

The Drafting Committee held 13 meetings from 30 April to 23 May 2019. The Drafting Committee commenced its work by addressing some work remaining from last year, namely the Special Rapporteur's proposals for draft conclusions 15 to 23 contained in his third report. This also included the consideration of a new proposal based on draft conclusion 10, paragraph 3, which had been held in abeyance at the last session. The Drafting Committee then continued to consider the Special Rapporteur's proposal for draft conclusion 24, as contained in his fourth report, which had been referred to the Drafting Committee on 16 May 2019. After the provisional adoption of those new draft conclusions, the Drafting Committee undertook a *toilette* of the entire set of draft conclusions.

As you will recall, it was decided, following a recommendation made by the Special Rapporteur in 2016, to keep the draft conclusions in the Drafting Committee until the full set had been adopted. While this is the first time that the draft conclusions are presented to the Commission for purposes of adoption, the Chairs of the Drafting Committee at previous sessions have presented the outcome of the work of the Drafting Committee on this topic in the form of oral interim reports. My statement today will focus only on the modifications made to draft conclusions previously provisionally adopted by the Drafting Committee, as well as on the new provisions adopted for the first time this year. I refer members to the oral interim reports of the Chair of the Drafting Committee at the three previous sessions, Mr Sturma, Mr. Rajput and Mr. Jalloh, for an explanation of those draft conclusions provisionally adopted by the Drafting Committee in 2016, 2017 and 2018.

I should also mention that the placement of several draft conclusions has been revisited during the *toilette*, thereby affecting the overall numbering. In the written text of my statement, when the number of a draft conclusion already provisionally adopted by the Drafting Committee at previous sessions is affected, the original number is indicated in square brackets in the title. Moreover, I should note that the Drafting Committee, following a proposal by the Special Rapporteur, decided to structure the draft conclusions in four parts and adopted corresponding titles.

Part One

Mr. Chair,

Please allow me to begin with Part One of the draft conclusions, which is entitled “Introduction”. It includes three introductory provisions on the scope of the draft conclusions as well as the definition and general nature of peremptory norms of general international law (*jus cogens*).

Draft conclusion 1

Mr. Chair,

In draft conclusion 1 on “Scope”, the term “legal effects” was replaced by “legal consequences”. After concluding the consideration of the entire set of draft conclusions, including those on international responsibility, the Drafting Committee decided to refer to “consequences” to ensure consistency with the rest of the draft conclusions.

Draft conclusions 2 [3(1)] and 3 [3(2)]

Mr. Chair,

Regarding the placement of the draft provisions in Part One, the Drafting Committee decided to position former draft conclusion 3 on the “Definition of a peremptory norm of general international law (*jus cogens*)” before former draft conclusion 2 on the “General nature of peremptory norms of general international law (*jus cogens*)”. This order follows the approach taken by the Commission on other topics in which definitions were placed after the provision on the scope.

Part Two

Mr. Chair,

Please allow me to turn to Part Two of the draft conclusions, which is entitled “Identification of peremptory norms of general international law (*jus cogens*)”. It consists of six draft conclusions that were provisionally adopted at previous sessions of the Commission. Those draft conclusions concern the criteria for identification and the bases for peremptory norms of general international law (*jus cogens*), acceptance and recognition, the international community of States as a whole, evidence of acceptance and recognition, and subsidiary means for the determination of the peremptory character of norms of general international law (*jus cogens*).

Other than a minor technical change to the title of draft conclusion 4, no changes were made to the texts and titles of draft conclusions 4 to 9. I might mention, for the record, that the Drafting Committee again discussed the phrase “very large majority” in paragraph 2 of draft conclusion 7, in particular whether it should be modified to “overwhelming majority” of States. The Drafting Committee decided to retain the phrase “very large majority” on the understanding that the preference of some members for “overwhelming majority” will be reflected in the commentaries. The Drafting Committee also considered splitting the paragraph into two separate sentences. In the end, the Drafting Committee opted for maintaining paragraph 2 of draft conclusion 7 as one single requirement.

Part Three

Mr. Chair,

I will now turn to Part Three of the draft conclusions. The title of Part Three is “Legal consequences of peremptory norms of general international law (*jus cogens*)”. It contains twelve draft conclusions. Following a proposal of the Special Rapporteur, the Drafting Committee considered having two separate parts on “Consequences of peremptory norms (*jus cogens*) for other rules of international law” and “Consequences of peremptory norms (*jus cogens*) in respect of State responsibility”. It was also suggested that one part should address the sources of international law in relation to peremptory norms of general international law (*jus cogens*) and the other part should concern State responsibility. In the end, the Drafting Committee decided to have one part on legal consequences of peremptory norms of general international law (*jus cogens*).

At this point, I would also like to note that the Drafting Committee had a discussion on whether or not include a provision on general principles of law conflicting with a peremptory norm of general international law (*jus cogens*). It will be recalled that following the debate in the plenary last year, the Special Rapporteur had expressed a willingness to consider including a provision that would complement the corresponding provisions on treaties, rules of customary international law, unilateral acts of States, and resolutions, decisions or other acts of international organizations. The Drafting Committee decided to recommend that the Commission considers the issue during the second reading, so as to take into account the work that will be undertaken in the topic “General principles of law”, which will commence at the present session.

Draft conclusions 10 to 13

Mr. Chair,

Draft conclusions 10, 11 and 12 were provisionally adopted by the Drafting Committee last year. During the *toilettage*, the Drafting Committee adjusted the titles of draft conclusions 10, 11 and 12 to read “Treaties conflicting with a peremptory norm of general international law (*jus cogens*)”, “Separability of treaty provisions conflicting with a peremptory norm of general international law (*jus cogens*)”, and “Consequences of the invalidity and termination of treaties conflicting with a peremptory norm of general international law (*jus cogens*)”, respectively. The changes were made to align the titles with those of the relevant provisions in the 1969 Vienna Convention on the Law of Treaties. Article 53 of the 1969 Vienna Convention, in particular, uses the phrase “Treaties conflicting” instead of “Treaties in conflict” with a peremptory norm of general international law (*jus cogens*), and also does not refer to the legal consequences resulting from such a conflict in the title.

Other than a minor technical change in paragraph 1, where the word “which” was replaced by “that”, the title and text of draft conclusion 13 remained the same as provisionally adopted at last year’s session.

Draft conclusion 14 [15]

Mr. Chair,

Draft conclusion 14 concerns the consequences of a conflict between a rule of customary international law and a peremptory norm of general international (*jus cogens*). The Drafting Committee discussed the draft conclusion, based on the proposal by the Special Rapporteur in his third report.

The first sentence of paragraph 1 provides 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*). The sentence mirrors the scenario in article 53 of the 1969 Vienna Convention on the Law of Treaties, as also reflected in draft conclusion 10, paragraph 1. The initial wording proposed by the Special Rapporteur was modified to follow more closely the language of the draft conclusions on the identification of customary international law. Accordingly, “a customary international law rule” was changed to “a rule of customary international law” and the phrase “does not arise” was replaced by “does not come into existence”.

The second sentence of paragraph 1 states the exception to the general rule stipulated in the first part of the paragraph. Several members expressed concerns that paragraph 1 would prevent the development of a new rule of customary international law of a peremptory character that could modify an existing peremptory norm of general international law (*jus cogens*). The Special Rapporteur noted that the emergence of a new rule of customary international law could only occur if such a rule were also of peremptory character in line with article 53 of the 1969 Vienna Convention. On that basis he proposed to address the concern by adding the phrase “unless the underlying rule itself attains the status of a peremptory norm of general international law (*jus cogens*)” to the first sentence of paragraph 1. The Drafting Committee then discussed how this proposal could be more closely aligned with the formulation of article 53 of the 1969 Vienna Convention by allowing for a modification of a peremptory norm of general international law (*jus cogens*) by “a subsequent norm of general international law having the same character” or by a rule that “is accepted and recognized as a peremptory norm of general international law (*jus cogens*)”. To avoid giving the impression that two conflicting peremptory norms of general international law (*jus cogens*) could coexist, it was also suggested that the possibility of a modification of a peremptory norm of general international law (*jus cogens*) through a new rule of customary international law should only be discussed in the commentary. The Drafting Committee settled on the “without prejudice” clause in the second sentence of paragraph 1 as a compromise between those different views.

Paragraph 2 stipulates that a rule of customary international law not of a peremptory character ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international norm of general law (*jus cogens*). This paragraph reflects the scenario of article 64 of the 1969 Vienna Convention on the Law of Treaties, which is also incorporated in draft conclusion 10, paragraph 2. As in paragraph 1 of draft conclusion 14, “a customary international law rule” was changed to “a rule of customary international law”. The phrase “not of a *jus cogens*” character was replaced by “not of a peremptory character” on the understanding that the commentary would explain that “peremptory” means “*jus cogens*”. To indicate that not the entire rule of customary international law ceases to exist as a result of a conflict with a peremptory norm of general international law (*jus cogens*), the Drafting Committee added the phrase “to the extent that” to the text of the draft conclusion as suggested by the Special Rapporteur.

Paragraph 3 provides that the persistent objector rule does not apply to peremptory norms of general international law (*jus cogens*). The first part of the paragraph, as proposed by the Special Rapporteur, was deleted and the phrase “is not applicable” replaced by “does not

apply to peremptory norms of general international law (*jus cogens*)”. The Drafting Committee agreed that the commentary could discuss why the persistent objector rule does not apply with regard to peremptory norms of general international law (*jus cogens*), and address the situation in which a State is a persistent objector to a rule of customary international law that becomes a peremptory norm of general international law (*jus cogens*). While a view was expressed that “persistent objection” to a rule of customary international law should not be characterized as a “rule” or but rather as a “doctrine”, the Drafting Committee ultimately decided to retain the phrase “persistent objector rule”, which the Commission had also used in its work on the identification of customary international law. It was also suggested that the persistent objector rule concerned the formation of a peremptory norm of general international law (*jus cogens*) rather than its consequences, and accordingly could be located separately in an earlier part of the draft conclusions. The Drafting Committee, however, decided to retain its present location.

The title of draft conclusion 14 is “Rules of customary international law conflicting with a peremptory norm of general international law (*jus cogens*)”.

Draft conclusion 15 [16]

Mr. Chair,

Draft conclusion 15 addresses the consequences of a conflict between an obligation created by a unilateral act and a peremptory norm of general international (*jus cogens*). The Drafting Committee undertook its deliberations on the basis of the proposal by the Special Rapporteur, but then decided to add a second paragraph to align draft conclusion 15 with the structure of draft conclusions 10 and 14 concerning treaties and customary international law, respectively.

Paragraph 1 states that a unilateral act manifesting the intention to be bound under international law that would be in conflict with a peremptory norm of general international law (*jus cogens*) does not create such an obligation. Based on guiding principle 8 of the Commission’s 2006 guiding principles applicable to unilateral declarations of States capable of creating legal obligations, the Drafting Committee discussed whether draft conclusion 15 should be confined to “unilateral declarations”, but decided to retain the broader formulation “unilateral acts” initially proposed by the Special Rapporteur. As the draft conclusion makes clear, it is not the unilateral act that would be in conflict with the peremptory norm of general international law (*jus cogens*) but the obligation that would have been created but for the conflict. To underline that not all “unilateral acts” create obligations, the Special Rapporteur presented a

revised proposal limiting the scope of the draft conclusion to unilateral acts “manifesting the will to undertake obligations under international law”. Other members of the Drafting Committee proposed replacing this phrase with a more objective standard such as that of unilateral acts “capable of creating legal obligations” from the title of the 2006 guiding principles, or by adding that the unilateral act must be “publicly made”. The Committee settled on the formulation “a unilateral act manifesting the intention”, based on the 2006 guiding principles and the relevant case law of the International Court of Justice. It was agreed that the term “manifesting” implies “publicly made” and would ensure that the “intention to be bound by an obligation under international law” could be objectively ascertained.

Paragraph 2 concerns the situation where a unilateral act has already created an obligation that comes into conflict with a newly emerged peremptory norm of general international law (*jus cogens*). The text is based on a proposal by the Special Rapporteur, which largely follows the formulation of draft conclusion 14, paragraph 2, including the phrase “if and to the extent that”. It is understood that the obligation under international law that is in conflict with the peremptory norm of general international law (*jus cogens*) was created by a unilateral act under the conditions stated in paragraph 1 of draft conclusion 15.

The phrase “of a State” was included in paragraphs 1 and 2 of draft conclusion 15 on the understanding that the draft conclusion mainly concerned unilateral acts by States. In the discussion in the Drafting Committee, it was pointed out that the draft conclusion would be without prejudice to the conflict between obligations created by unilateral acts by non-state actors and a peremptory norm of general international law (*jus cogens*). The understanding in the Drafting Committee was that unilateral acts by international organizations would be covered by draft conclusion 16.

The title of draft conclusion 15 is “Obligations created by unilateral acts of States conflicting with a peremptory norm of general international law (*jus cogens*)”.

Draft conclusion 16 [17 (1)]

Mr. Chair,

Draft conclusion 16 addresses the conflict between obligations created by resolutions, decisions, or other acts of international organizations and a peremptory norm of general international law (*jus cogens*). The draft conclusion is based on paragraph 1 of the proposal presented by the Special Rapporteur in his third report. The content of paragraph 2 of draft

conclusion 16, as proposed by the Special Rapporteur, is covered by draft conclusion 20 on interpretation, which I will turn to in due course.

Draft conclusion 16 provides that 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 they conflict with a peremptory norm of general international law. Draft conclusion 16 has a dual function. On the one hand, it concerns the situation in which a resolution, decision or other act of an international organization would otherwise create obligations for its member States. On the other hand, it covers the same scenario as draft conclusion 15 in which an international organization intends to bind itself by means of a unilateral act.

The initial discussion in the Drafting Committee focused on whether the reference to the Security Council of the United Nations should be deleted from the text of the draft conclusion. Several members noted that decisions of the Security Council were implied in the phrase “binding decisions”, which covered decisions of various kinds of international organizations. It was also mentioned that an explicit reference to the Security Council could have a chilling effect on Security Council action. Others were of the view that the Security Council played a special role in the post-World War II international order, which warranted an explicit reference. It was also pointed out that conclusion (40) of the Commission’s report of the Study Group on Fragmentation of international law had addressed the possible conflict between peremptory norms of general international law (*jus cogens*) norms and Security Council decisions. As a compromise, it was proposed that the draft conclusion should refer to “all principal organs of the United Nations”. The Drafting Committee ultimately agreed to delete the reference to the Security Council without replacement. The commentary will make it clear that the reference to binding decisions in the draft conclusion includes that of the Security Council.

In addition to the deleting of the reference to the Security Council, the text of the Special Rapporteur’s proposal for draft conclusion 16 was reformulated to avoid the duplication of the term “binding” and to trace more closely the language of draft conclusion 15. During the *toiletage*, the words “be binding” were refined so as to read “have binding effect” in order to clarify that it is not the resolution itself that was the focus of the provision, but rather the provisions in the resolution conflicting with peremptory norms of general international law (*jus cogens*).

While the initial proposal of the Special Rapporteur only referred to “decisions” of international organizations, the Drafting Committee decided to make a broader reference to “resolutions, decisions or other acts of international organizations”, albeit in the singular, in line

with the definition of “rules of the organization” contained in article 2, subparagraph (b), of the articles on the responsibility of international organizations, adopted in 2011.

The term “otherwise” indicates that the conflict with the peremptory norm of general international law (*jus cogens*) deprives the resolution, decision or other act of the organization of its legal effect. This is confirmed by the remainder of the text, which following the formulation of draft conclusion 15 states that the resolution, decision or other act of an international organization “does not create obligations under international law if and to the extent that they conflict with a peremptory norm of general international law (*jus cogens*)”.

The title of draft conclusion 16 is “Obligations created by resolutions, decisions or other acts of international organizations conflicting with a peremptory norm of general international law (*jus cogens*)”. The Drafting Committee considered various formulations for the title, including referring to “binding” resolutions, decisions and other acts, but decided that such indication was not necessary in the title.

Draft conclusion 17 [18]

Mr. Chair,

Draft conclusion 17 concerns the relationship between *erga omnes* obligations and peremptory norms of general international law (*jus cogens*), including the invocation of international responsibility for a breach of a peremptory norm of general international law (*jus cogens*). While several members emphasized the importance of having a provision on the relationship between peremptory norms of general international law (*jus cogens*) and obligations *erga omnes*, others questioned the necessity to include such a provision in the draft conclusions at all. It was also pointed out that the relationship between *erga omnes* obligations and peremptory norms of general international law (*jus cogens*) was separate from questions of responsibility for breach of such norms. Based on the different views expressed in the Drafting Committee, the Special Rapporteur made a revised proposal, which formed the basis for paragraphs 1 and 2 of draft conclusion 17, separating the matter of the relationship between the two concepts from the question of the invocation of responsibility for breach.

Paragraph 1 provides that peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*), in which all States have a legal interest. The Drafting Committee generally agreed that all peremptory norms of general international law (*jus cogens*) have an *erga omnes* character, but that not all *erga omnes* norms were also peremptory norms of general international law (*jus*

cogens). It was suggested to replace the verb “establish” with “constitute”, which was also used in the report of the Study Group on the Fragmentation of international law. In opting for the term “give rise to”, the Drafting Committee followed the language of the commentary to article 40 of the articles on the responsibility of States for internationally wrongful acts, adopted in 2001. The phrase “owed to the international community as a whole” before “obligations *erga omnes*” was added to follow article 48, paragraph 1 (b) of the 2001 articles on State responsibility, while retaining the Latin phrase for its explanatory value. The phrase “the breach of which concerns all States” was replaced by the broader formulation “in which all States have a legal interest”. It was also proposed that the paragraph should read “in the protection of which all State have a legal interest”, which would trace more closely the language of the International Court of Justice in the *Barcelona Traction* case. The Drafting Committee ultimately agreed that the commentary would explain that the notion of “legal interest” encompasses the protection of the legal norm as such, including rights and obligations. While the reference to “owed to the international community as a whole” implies the phrase “in which all State have a legal interest”, the phrase was kept as a bridge to paragraph 2 of draft conclusion 17.

Paragraph 2, in turn, deals with the question of invocation of responsibility for breach of *erga omnes* obligations arising from peremptory norms of general international law (*jus cogens*). The paragraph stipulates that any State is entitled to invoke the responsibility of another State for a breach of a peremptory norm of general international law (*jus cogens*) in accordance with the rules on the responsibility of States for internationally wrongful acts. During the discussion, it was clarified that the paragraph aimed at giving guidance for the specific case of the invocation of responsibility for a breach of a peremptory norm of general international law (*jus cogens*) by a State other than the injured State. The Drafting Committee added the phrase “in accordance with the rules on the responsibility of States for internationally wrongful acts”, in order to emphasize that draft conclusion 17 was not intended to deviate from the previous work of the Commission with regard to the distinction between different categories of injured States and States other than the injured State.

The title of draft conclusion 17 is “Peremptory norms of general international law (*jus cogens*) as obligations owed to the international community as a whole (obligations *erga omnes*)”.

Draft conclusion 18 [19(1)]

Mr. Chair,

Draft conclusion 18 provides that no circumstance precluding wrongfulness under the general rules on the responsibility of States for internationally wrongful acts may be invoked with regard to any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law (*jus cogens*). While the Drafting Committee generally followed the proposal of the Special Rapporteur, the text was modified to insert the phrase “under the rules on the responsibility of States for internationally wrongful acts”. In line with article 26 of the articles on the responsibility of States for internationally wrongful acts of 2001, this phrase is intended to make clear that the scope of the draft conclusion is limited to the circumstances precluding wrongfulness referred to in chapter V of Part One of those articles. To further align the language with article 26 of the 2001 articles on State responsibility, the phrase “an act” was substituted with “any act”. Drawing inspiration from article 27 of the 2001 articles on State responsibility, the Drafting Committee also replaced the term “advance” with “invoke”.

Following the proposal by the Special Rapporteur, the Drafting Committee decided to delete paragraph 2 of draft conclusion 18 contained in the third report of the Special Rapporteur, which dealt with the question of the emergence of a peremptory norm subsequent to the commission of the wrongful act. The matter will, instead, be discussed in the commentary to the draft conclusion.

The Drafting Committee modified the title of draft conclusion 18 by omitting the reference to “effects”, which had been suggested by the Special Rapporteur. The title of the provision is “Peremptory norms of general international law (*jus cogens*) and circumstances precluding wrongfulness”.

Draft conclusion 19 [20(1)(2), 21]

Mr. Chair,

Draft conclusion 19 concerns the particular consequences which arise out of a serious breach of a peremptory norm of general international law (*jus cogens*). The provision is based on the proposals of the Special Rapporteur for draft conclusions 20 and 21 in his third report. The Drafting Committee decided to merge the content of both draft conclusions into a single provision, corresponding to articles 40 and 41 of the 2001 articles on the responsibility of States for internationally wrongful acts in terms of substance and formulation.

In his third report, the Special Rapporteur had omitted the word “serious” in draft conclusion 21 concerning the duty not render assistance in the maintenance of, or recognise, situations created by breaches of peremptory norms of general international law (*jus cogens*).

At the request of the Special Rapporteur, the Drafting Committee began by debating whether the word should be retained in the provision. Those members seeking its deletion argued that it would be sending a wrong message to suggest that States were free to recognise situations created by breaches of peremptory norms of general international law (*jus cogens*) or to render assistance in the maintenance of such situations. However, the majority of the members favoured the retaining the word “serious” to be consistent with the 2001 articles on state responsibility. The Drafting Committee agreed to retain the word “serious” on the understanding that the contrary view would be highlighted in the commentaries.

Paragraph 1 of draft conclusion 19 provides that States shall cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*). While the provision indicates that the obligation to cooperate is on States (as indicated in article 41 of the 2001 articles on State responsibility), the commentary will make clear that the obligation to cooperate also applies to international organizations as envisaged in the corresponding provision of the 2011 articles on the responsibility of international organizations. The phrase “obligation arising under” was added in order to align the text with that of article 40, paragraph 1, of the 2001 articles on State responsibility. The Drafting Committee decided to leave to the commentary the content of paragraph 3 of draft conclusion 20, as initially proposed by the Special Rapporteur, dealing with institutionalized cooperation mechanisms and *ad hoc* cooperative arrangements.

Paragraph 2 of draft conclusion 19 provides that no State shall recognize as lawful a situation created by a serious breach by a State of an obligation arising from a peremptory norm of general international law (*jus cogens*), nor render aid or assistance in maintaining that situation. While the Special Rapporteur had proposed two separate paragraphs in his initial proposal for draft conclusion 21, the Drafting Committee decided to replicate article 41, paragraph 2 of the 2001 articles on State responsibility, with the necessary modifications. It was also agreed that the commentary would clarify that non-recognition, as stipulated in paragraph 2, should not result in depriving the affected population of any advantages derived from international cooperation, as indicated by the International Court of Justice in its *Namibia* advisory opinion.

Paragraph 3 contains the definition of what constitutes a serious breach of a peremptory norm of general international law (*jus cogens*). It tracks in large part the formulation of article 40, paragraph 2, of the 2001 articles on State responsibility, namely, that such a breach of an obligation arising under a peremptory norm is serious if it “involves a gross or systematic failure by the responsible State to fulfil that obligation”.

The view of the Drafting Committee was that even when a breach of a peremptory norm of general international law does meet the threshold of “seriousness” under paragraph 3, the other legal consequences under the rules of State responsibility continue to apply.

The Drafting Committee also decided to add paragraph 4 to draft conclusion 19, which provides that the draft conclusion is without prejudice to the other consequences that a serious breach by a State of an obligation arising from a peremptory norm of general international law (*jus cogens*) may entail under international law. The text of paragraph 4 replicates the without prejudice clause in article 41, paragraph 3 of the 2001 articles on State responsibility, with the necessary modifications.

The title of draft conclusion 19 is “Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)”, and is based on the title of article 41 of the 2001 articles on State responsibility.

Draft conclusion 20 [10 (3), 17 (2)]

Mr. Chair,

Draft conclusion 20 relates to the consistent interpretation and application of other rules of international law with peremptory norms of general international law (*jus cogens*). Following the views expressed during the plenary debate at last year’s session, the Special Rapporteur proposed a separate draft conclusion on interpretation, based on his proposals for draft conclusion 10, paragraph 3, on the interpretation of treaties, and draft conclusion 17, paragraph 2, on the interpretation of resolutions of international organizations.

At the outset, the Drafting Committee discussed whether it was necessary to include a provision on interpretation in the draft conclusions at all. It was recalled that the requirement of interpretation leading to the harmonization of different rules of international law is envisaged in article 31, paragraph 3 (c) of the 1969 Vienna Convention on the Law of Treaties. The Drafting Committee also took into account the guidance in the commentary to article 26 of the 2001 articles on State responsibility that “peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts”. At the same time, the draft conclusion should not be understood as imposing a requirement that the interpreter undertake systematically an examination of the consistency between any rule of international law under consideration, and peremptory norms of general international law (*jus cogens*).

The first part of the sentence “[w]here it appears that there may be a conflict” indicates that the draft conclusion covers cases of an apparent conflict between a peremptory norm of general international law (*jus cogens*) and another rule of international law. In case of an actual conflict, the consequences set out in draft conclusions 10, 11, 12, 14, 15 or 16 would be triggered, depending on the nature of the other rule of international law concerned. The commentary would also explain the meaning of the word “appear”, which in this case did not refer to an “evident” conflict.

The phrase “as far as possible” suggests that there might be situations where it is indeed not possible to reconcile the rule of international law with a peremptory norm of general international law (*jus cogens*) by means of consistent interpretation. The term “the latter” implies that it is the other rule of international law that must be consistent with the peremptory norm of general international law (*jus cogens*), which, as stated in draft conclusion 3, is hierarchically superior.

The phrase “interpreted and applied” in the second part of the draft conclusion anticipates the possibility that a rule of international law may be consistent with a peremptory norm of general international law (*jus cogens*) on its face, but that a conflict may arise in the application of that rule. Several members of the Drafting Committee were of the view that interpretation and application were different concepts and that the draft conclusion should be limited to interpretation. It was also pointed out that previous draft conclusions addressed the situation in which the application of a rule of international law might lead to a possible conflict with a peremptory norm of general international law (*jus cogens*). The Drafting Committee agreed to include the phrase “and applied” on the understanding that the commentary will clarify that the interpretation and application of a rule are interrelated but separate concepts. The commentary will also explain the relationship between draft conclusion 20 and other relevant draft conclusions, in particular draft conclusion 21.

The title of draft conclusion 20 is “Interpretation and application consistent with peremptory norms of general international law (*jus cogens*)”.

Draft conclusion 21 [14]

Mr. Chair,

Draft conclusion 21, proposing several procedural requirements for the invocation of a peremptory norm of general international law (*jus cogens*) as a ground for invalidity or

termination of a rule of international law, was provisionally adopted at last year's session as draft conclusion 14. I refer the Commission to the statement by Mr. Jalloh, made at last year's session, explaining the provision.

This year, the Drafting Committee decided to relocate the provision to the end of Part Three, as draft conclusion 21, since the provision did not only cover treaties but also the situation of a conflict between a peremptory norm of general international law (*jus cogens*) and other rules and obligations under international law, as envisaged in draft conclusions 14, 15 and 16. A minor technical amendment was made in paragraph 5, where the word "and" was replaced by "or" so as to clearly indicate that the options envisaged therein are alternatives. It was also agreed that the expression "relevant rules" in paragraph 5 is understood to cover also obligations.

Part Four

Mr. Chair,

I will now turn to Part Four of the draft conclusions, which is entitled "General provisions". It contains two "without prejudice" clauses, which were both adopted by the Drafting Committee at the present session.

Draft conclusion 22 [22, 23]

Mr. Chair,

Draft conclusion 22 stipulates that the draft conclusions are without prejudice to particular consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail under international law. The draft conclusion reflects the compromise proposed by the Special Rapporteur during the summing up of the debate on his third debate, in terms of which draft conclusions 22 and 23, as proposed in the third report, would be referred to the Drafting Committee on the understanding that they would be replaced by a single without prejudice clause.

In considering the new proposal of the Special Rapporteur for draft conclusion 22, the Drafting Committee opted for the word "specific" before "peremptory norms" because the term "particular" had been used in the title of draft conclusion 19 and in the conclusions on the identification of customary international law to contrast "particular" with "general customary international law". The term "otherwise" was inserted in the second line to make it clear that the

provision covers consequences of peremptory norms of general international law (*jus cogens*) other than those provided for in the present draft conclusions. The phrase “entail under international law” was introduced to track the formulation of article 41, paragraph 3 of the 2001 articles on States responsibility, and which is also reflected in draft conclusion 19, paragraph 4. The verb “may” was chosen so as to avoid prejudging the occurrence and nature of such specific consequences.

The commentary will explain that these draft conclusions do not intend to address the consequences of specific norms of general international law (*jus cogens*) given the general nature of the draft conclusions. The commentary will also note that there are differing views on the consequences of peremptory norms of general international law (*jus cogens*) with regard to immunities.

The title of draft conclusion 22 is “Without prejudice to consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail”. While the Drafting Committee considered shorter titles such as “Without prejudice clause”, “Other consequences of specific peremptory norms” and “Other possible consequences of specific peremptory norms”, the longer title was considered to most appropriately reflect the content of the draft conclusion.

Draft conclusion 23 [24]

Mr. Chair,

Draft conclusion 23 is based on the Special Rapporteur’s proposal to include a non-exhaustive list of peremptory norms of general international law (*jus cogens*) in the draft conclusions. The Plenary referred the proposal to the Drafting Committee at this year’s session on the premise that the draft conclusion would be limited to those norms that the Commission had referred to in its previous work, and that the list of norms would be reflected in an annex. This approach follows the model of article 7 of the articles on the effects of armed conflict on treaties and the corresponding annex. On that basis, the Special Rapporteur presented a revised proposal, including an annex, to the Drafting Committee.

The first part of draft conclusion 23 states that the list included in the annex to the draft conclusions is “[w]ithout prejudice to the existence or subsequent emergence of other peremptory norms of general international law (*jus cogens*)”. In his revised proposal, the Special Rapporteur included the phrase “future emergence” to address concerns expressed in the plenary and in the Drafting Committee that the inclusion of a list of peremptory norms of

general international law (*jus cogens*) in the draft conclusions could prejudice the development of new norms with that status. The Drafting Committee replaced the term “future” with “subsequent”, underlining that new peremptory norms of general international law (*jus cogens*) might emerge after the formulation of the non-exhaustive list in the annex. It was reiterated in the Drafting Committee that the identification of such additional norms was beyond the scope of the work of the Commission on the topic which was methodological in nature and would require separate consideration.

The phrase “a non-exhaustive list of norms that the Commission has previously referred to as having that status” underpins that the scope of the draft conclusion is limited to references by the Commission and was not based on a substantive discussion of the content of the norms being listed. Accordingly, the term “referred to” is a factual statement indicating that the Commission has made reference to the norms contained in the annex in its previous work. The commentary to the annex will indicate the relevant references in the Commission’s previous work. While the Special Rapporteur’s revised proposal for draft conclusion 23 had referred to norms “having attained” the status of peremptory norms of general international law (*jus cogens*), such reference was deleted. The formulation “is to be found in the annex to the present draft conclusions” replicates the wording of article 7 of the articles on the effects of armed conflict on treaties.

The title of draft conclusion 23 is “Non-exhaustive list”, which has a dual meaning. It leaves open the possibility of the existence of peremptory norms of general international law (*jus cogens*) not referred to by the Commission in its prior work. It also confirms that the list does not necessarily include all such norms referred to by the Commission in the past.

Annex

Mr. Chair,

The list contained in the annex reflects the norms proposed by the Special Rapporteur for draft conclusion 24 in his fourth report, as being the norms previously referred to by the Commission. The Special Rapporteur presented a revised proposal which include amendments reflecting the comments and suggestions made during the plenary debate. However, as will be described shortly, in some cases the Drafting Committee preferred his initial formulation. The Drafting Committee accepted the suggestion to change the order of norms, so as to place the “basic principles of international humanitarian law” close to the prohibition of genocide and the prohibition of crimes against humanity. At the same time, it was understood in the Drafting

Committee that the list did not reflect a hierarchy of peremptory norms of general international law (*jus cogens*).

In line with the understanding that the list should reflect those norms previously referred to by the Commission, the discussion in the Drafting Committee focused on the formulation of the norms. It accepted the formulation proposed by the Special Rapporteur, in his revised proposal, of all except three norms for which the Commission has resorted to different formulations in its previous work.

The first was the prohibition of aggression, to which the Special Rapporteur had, in his fourth report, proposed adding the phrase “or aggressive force”. The revised proposal contained only the “prohibition of aggression”. Some members noted that the prohibition of aggression could be reformulated more broadly as “the law of the Charter concerning the law of the use of force”. The Drafting Committee kept the formulation “prohibition of aggression” based on its most recent relevant reference in the 2001 articles on State responsibility.

Furthermore, while the Special Rapporteur had proposed to reformulate the “basic rules of international humanitarian law” as “the prohibition of war crimes”, based on comments made during the plenary debate, the Drafting Committee reverted to his initial proposal, which corresponds to previous references by the Commission. Likewise, following on the debate in the plenary, the Special Rapporteur in his revised proposal included only “the prohibition of apartheid”, omitting the words “racial discrimination”. The Drafting Committee, however, decided to retain the reference to “the prohibition of racial discrimination and apartheid”, as was made by the Special Rapporteur’s proposal in his third report, albeit in reverse order. Again, this was done in order to align the formulation with that previously used by the Commission.

During the discussion of the norms contained in the annex, several members reiterated their respective views, as expressed during the plenary debate, that the list should include other norms. It was suggested, for example, that the fundamental principles contained in the Charter of the United Nations should be included at the beginning of the list of norms listed in the annex. Some members advanced different proposals, which included the principle of sovereign equality of States, the principle of non-intervention, the principle of the peaceful settlement of international disputes and the principle of *pacta sunt servanda*. Reference was also made to the prohibition of piracy, and to the Commission’s previous work on article 19 of the articles on State responsibility on first reading, in 1996, which had included the “serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas”.

In accordance with the compromise approach reached at the conclusion of the plenary debate, and reflected in draft conclusion 23, the Drafting Committee decided to limit the list to those norms that the Commission had most clearly designated as peremptory norms of general international law (*jus cogens*) in the past. In this context, it should be recalled that draft conclusion 23 is “without prejudice” to other possible peremptory norms of general international law (*jus cogens*).

Mr. Chair,

This concludes my introduction of the second report of the Drafting Committee for this session. It is my sincere hope that the Commission will adopt the draft conclusions and draft annex on the topic “Peremptory norms of general international law (*jus cogens*)” on first reading.

Thank you.