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

Statement of the Chairperson of the Drafting Committee

Mr. Ki-Gab Park

17 May 2022

Mr. Chairperson,

It is my pleasure, today, to introduce the first report of the Drafting Committee for the seventy-third session of the International Law Commission, which concerns the topic "peremptory norms of general international law (*jus cogens*)." The report, which is to be found in document A/CN.4/L.967, contains the texts and titles of the 23 draft conclusions, and annex, on the Identification and Legal Consequences of Peremptory Norms of General International Law (*jus cogens*) provisionally adopted by the Drafting Committee, and which the Drafting Committee recommends for adoption by the Commission on second reading.

Before commencing with the introduction of the Draft Conclusions, allow me to pay tribute to the Special Rapporteur, Mr. Dire Tladi, whose constructive approach, flexibility and patience facilitated the work of the Drafting Committee. I also thank the other members of the Committee for their active participation, significant contributions and efforts to reach an agreement on the text.

Furthermore, I wish to thank the Secretariat for its valuable assistance. As always, and on behalf of the Drafting Committee, I am pleased to extend my appreciation to the interpreters as well.

Mr. Chairperson,

The Drafting Committee held eight meetings on the topic, from 27 April to 9 May 2022. The members of the Drafting Committee also held informal consultations on the topic on two occasions. The Drafting Committee proceeded on the basis of the text proposed by the Special Rapporteur in his Fifth Report, which the Plenary at its 3570th meeting, held on 27 April 2022, referred to the Committee.

Title of the Draft Conclusions

Before commencing with a discussion of the text, permit me to point out that, as I indicated at the beginning of my statement, there has been a change made to the title of the draft conclusions. The Drafting Committee decided to recommend a change in the title to the **"Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law"**, which more closely delineates the scope and purpose of the draft conclusions. The Drafting Committee recalled that the proposal to change the title, which was based on a suggestion made by a State, had been generally supported during the Plenary debate.

Part One – Introduction

Let us now turn to Part One, entitled **"Introduction"**, which is comprised of three draft conclusions. The Drafting Committee retained the same title for the part as was adopted on first reading.

Draft conclusion 1

Mr. Chairperson,

Draft conclusion 1 deals with the scope of the entire set of draft conclusions. The Drafting Committee adopted the draft conclusion with no changes to the first reading text.

The title of draft conclusion 1 is **"[s]cope"**, which was the title adopted on first reading.

Draft conclusion 2 [3]

Mr. Chairperson,

Draft conclusion 2 [3] concerns the nature of a peremptory norm of general international law (*jus cogens*). The provision appeared as draft conclusion 3 in the first reading text. However, as I will explain shortly, the Drafting Committee decided to reverse the order of draft conclusions 2 [3] and 3 [2], as adopted on first reading. This established a more logical transition in the text by including the scope of the project in draft conclusion 1, followed by a description of the nature of peremptory norms of general international law (*jus cogens*) in draft conclusion 2 [3], and then their definition in draft conclusion 3 [2], which is now located immediately prior to draft conclusion 4 setting out the criteria for the identification of a peremptory norm of general international law (*jus cogens*).

The Drafting Committee considered various options for draft conclusion 2 [3]. Some members proposed the deletion of draft conclusion 2[3], as had been suggested by a few States. In their view, doing so would serve to forestall the impression that the draft conclusion in effect established further criteria in addition to those laid down in the "definition" in draft conclusion 3 [2]. However, the prevailing view within the Drafting Committee (as in the Plenary debate) was to retain the provision. Locating the draft conclusion prior to draft conclusion 3 [2] further served to clarify that draft conclusion 2 [3] did not establish additional elements for defining a peremptory norm of general international law (*jus cogens*).

Turning to the formulation of the draft conclusion, if you recall, a key question during the debate in the plenary concerned the protection of "fundamental values of the international community". The matter was debated in the Drafting Committee and the prevailing view was to retain the reference as being central to the concept of peremptory norms of general international law (*jus cogens*). The commentary will provide an additional explanation of such values.

The Drafting Committee, nonetheless, sought to address the concerns raised by some members during the plenary debate by attempting to bring greater clarity in the formulation of the provision. This was done by breaking the original formulation into two discreet sentences: the first one referring to the fundamental values of the international community, and the second referring to the qualities of universal applicability and hierarchical superiority in relation to other rules of international law.

There was some discussion in the Committee as to the inclusion of the term "hierarchically". The question was whether the concept actually complicated the understanding of the subject, and whether it was implied in the term "superior". Nonetheless, the Drafting Committee decided to retain the phrase "hierarchically superior" in recognition of the fact that it was commonly referred to as such, including in the various instruments cited in the commentary as well as in the comments received from States. The proposal made in the Drafting Committee also reversed the order of the formulation adopted on first reading by referring first to universal applicability and then to the superiority of such a norm in relation to others, as it would have to be applicable in order for the question of hierarchy to arise.

The Drafting Committee further considered proposals for modifying the title of the draft conclusion, including to "characteristics", "purpose" or "descriptions,", so as to further distinguish the provision from the following two draft conclusions. The Committee settled on simply deleting the word "general" in the first reading version of the title. Accordingly, the title of draft conclusion 2 [3] is now **"Nature of peremptory norms of general international law (*jus cogens*)"**.

Draft conclusion 3

Mr. Chairperson,

I will now turn to draft conclusion 3 [2], which concerns the definition of peremptory norms of general international law (*jus cogens*), and which tracks the text of Article 53 of the Vienna Convention on the Law of Treaties of 1969. No changes were made to the version adopted on first reading.

As already described, the only change introduced was to locate the provision after draft conclusion 2 [3]. The Drafting Committee also considered whether to locate the draft conclusion in Part Two. However, the prevailing view was retain its present location within Part One so as to confirm its overall applicability to the entire set of draft conclusions.

The Drafting Committee retained the title of the first reading, which is **"[d]efinition of a peremptory norm of general international law (*jus cogens*)"**.

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Part Two – Identification of peremptory norms of general international law (*jus cogens*)

Let me now turn to Part Two - **"Identification of peremptory norms of general international law (*jus cogens*)"** - which sets out the methodology for identifying such norms. It is comprised of six draft conclusions. The text of the title of Part Two remains the same as that adopted on first reading.

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Draft conclusion 4

Mr. Chairperson,

Draft conclusion 4 concerns the criteria for the identification of a peremptory norm of general international law (*jus cogens*), namely, that it is a norm of general international law, and that it is accepted and recognized by the international community of States as a whole as a norm

from which no derogation is permitted and that can be modified only by a subsequent norm of general international law with the same character. There were no comments or proposals for modification. Accordingly, the Drafting Committee adopted the text of the draft conclusion in the version adopted on first reading.

The Drafting Committee also decided to retain the first reading version of the title of draft conclusion 4, namely **"[c]riteria for the identification of a peremptory norm of general international law (*jus cogens*)"**.

Draft conclusion 5

Mr. Chairperson,

I now turn to draft conclusion 5, which concerns the bases for peremptory norms of general international law (*jus cogens*). The purpose of the provision is to indicate that while customary international law is the most common basis of peremptory norms of general international law (*jus cogens*), as confirmed in the first paragraph, such norms can also be based on other sources, including treaty provisions and general principles of law, as indicated in the second paragraph.

Paragraph 1 of draft conclusion 5 was adopted without modification to the text adopted on first reading, using the term "basis". Indeed, I wish to note that, in light of the debate held in the Plenary, the Special Rapporteur proposed that the Drafting Committee revert to the term "basis", for the text and title of the draft conclusion, as had been adopted on first reading, instead of the term "sources", which he had proposed in the Fifth Report.

The Drafting Committee considered a suggestion to focus on customary international law as the primary source of peremptory norms of general international law (*jus cogens*) and to present the second paragraph as a without prejudice clause in relation to treaties and general principles of law. Such proposal did not prevail in the Drafting Committee as concerns were expressed that the introduction of a without prejudice clause would effectively exclude the possibility of treaties or general principles of law serving as the basis for peremptory norms of general international law (*jus cogens*) from the scope of the topic, which had not been the prevailing view in the Plenary.

As regards paragraph 2, the Drafting Committee considered alternatives such as replacing the term "treaty provisions" with "rules set forth in treaties", as had been resorted to in the Conclusions on the Identification of Customary International Law, to reflect the possibility that some rules in treaties could enjoy the status of customary international law and then acquire that of *jus cogens*. The Drafting Committee, however, preferred to retain the formulation "treaty provisions", as adopted on first reading, which, as had been explained in the corresponding commentary, was sufficiently broad to be interpreted as both "reflecting" or "serving" as a basis for a peremptory norm of general international law (*jus cogens*). Accordingly, the Drafting Committee maintained the first reading version of the second paragraph of draft conclusion 5, without change.

The title of draft conclusion 5 is **"[b]ases for peremptory norms of general international law (*jus cogens*)"**, as was adopted in the first reading.

Draft conclusion 6

Mr. Chairperson,

I now turn to draft conclusion 6, which deals with the criterion of acceptance and recognition of peremptory norms of general international law (*jus cogens*).

Paragraph 1 elaborates on the criterion of "acceptance and recognition" referred to in draft conclusion 4, subparagraph (b). The Drafting Committee initially proceeded on the basis of the Special Rapporteur's proposal, in his Fifth Report, to adopt the same text as that on first reading. However, the Committee preferred to streamline the text by replacing the original phrase "as a criterion for identifying a peremptory norm of general international law (*jus cogens*)" with an explicit cross-reference to draft conclusion 4, subparagraph (b). Doing so also allowed the Drafting Committee to replace the word "requirement" with "criterion". Paragraph 1, therefore, confirms that the acceptance and recognition of a norm as one enjoying a peremptory character is different from the elements to determine the existence of rules of general international law, even if a similar formulation was used.

The Drafting Committee considered other formulations to make the text clearer including indicating that the acceptance or recognition "are distinct from the conditions for the formation of rules of general international law", and even possibly reversing the order of the paragraphs. Nonetheless, as already indicated, the Drafting Committee considered that the text would be clearer if there was an express reference to draft conclusion 4, subparagraph (b). The Drafting Committee also decided to remove the quotation marks around the phrase "recognition and acceptance" at the beginning of paragraph 1, as had been included in the first reading text, as no longer being necessary in light of the express cross reference to draft conclusion 4.

Paragraph 2 concerns the evidence required to substantiate an assertion that a norm has achieved the necessary acceptance and recognition as a peremptory norm of general international law (*jus cogens*). The Drafting Committee accepted the Special Rapporteur's proposal, made in his Fifth Report, to include the reference to acceptance and recognition being "by the international community of States as a whole". It was understood that the need for evidence of acceptance of the peremptory character of a norm by the international community of States as a whole was not limited to the burden of proof in the context of dispute settlement, but rather that it was a broader requirement. The requirement of such evidence to assert the existence of a peremptory norm of general international law (*jus cogens*) is a key provision in the entire draft conclusions, and is related to draft conclusion 8 which provides the specific forms of evidence by which such acceptance is to be demonstrated. The Drafting Committee further aligned the formulation with that in draft conclusion 4, subparagraph (b), by replacing the phrase "as one from which" with "as a norm from which".

The title of draft conclusion 6 is **"[a]cceptance and recognition"**, which remained unchanged from the first reading.

Draft conclusion 7

Mr. Chairperson,

Draft conclusion 7 concerns the role played by the international community of States as a whole in the acceptance and recognition of a norm as a peremptory norm of general international law (*jus cogens*), as well as the relevance of the positions of other actors.

Paragraph 1 of this draft conclusion establishes the basic rule that it is the acceptance and recognition by the international community of States as a whole which is relevant for the identification of peremptory norms of general international law (*jus cogens*). One issue confronted by the Drafting Committee was whether to retain the opening words "[i]t is" which was considered inelegant when rendered in some of the other official languages. The Drafting Committee, nonetheless, decided to retain the phrase since it was the most accurate way of drafting paragraph 1. The Drafting Committee also considered alternatives to the term "relevant", such as "pertinent", "essential", or "fundamental". However, the text of the paragraph was kept in the version adopted on first reading.

Paragraph 2 as adopted on first reading qualified the level of acceptance and recognition in paragraph 1 as being "by a very large majority of States". The Drafting Committee accepted the proposal of the Special Rapporteur, made in his Fifth Report, to add the phrase "and representative" so as to further qualify the majority needed to meet the requirement of acceptance and recognition. The commentary will expand on what is meant by representative, including across regions and legal systems. Another drafting option considered was to render the paragraph as "widespread and representative acceptance and recognition by States is required for the identification". However, the prevailing view in the Committee was that the phrase "widespread and representative" could cause unnecessary confusion since it was drawn from the Conclusions on the Identification of Customary International Law.

Paragraph 3 deals with the role played by the positions taken by other actors. It provides that while such positions of other actors may be relevant in providing context or in assessing the acceptance and recognition of peremptory norms of general international law (*jus cogens*) by the international community of States as a whole, such positions cannot, in and of themselves, form part of the acceptance and recognition required. As recommended by the Special Rapporteur, the Drafting Committee proceeded on the basis of the text adopted on first reading. One possibility considered was to delete the reference to "providing context" or to reformulate the phrase as "providing context for assessing" acceptance and recognition. The Drafting Committee decided to

retain the first reading formulation of referring to "providing context and for assessing". In its view removing the reference to "providing context", thereby leaving only "assessing", could be understood as the Commission having decided to enhance the role of the conduct of non-State actors. The sense was that some such actors merely provided context, while it was in the nature of the mandate of others, such as the International Committee of the Red Cross, that they played a role in the actual assessment of the existence of acceptance and recognition by the international community of States as a whole. As such, the Drafting Committee decided to retain the text as adopted on first reading, on the understanding that the commentary would explain the reference to the provision of context.

The title of draft conclusion 7 is **"[i]nternational community of States as a whole"**, which remained unchanged with respect to that adopted on first reading.

Draft conclusion 8

Mr. Chairperson,

Draft conclusion 8 concerns the evidence of acceptance and recognition of a norm as one with peremptory nature. Paragraph 1 confirms that such evidence may take a wide range of forms. No comments or proposals were made, and the Drafting Committee adopted the paragraph with the same text as has been adopted on first reading.

Paragraph 2 includes a list of forms of evidence of such acceptance and recognition. The Drafting Committee proceeded on the basis of a revised proposal submitted by the Special Rapporteur, which took into account the views expressed in the plenary debate. For example, the opening word "[s]uch", found in the first reading text, has been deleted by way of streamlining the text. While the paragraph largely tracks the text adopted on first reading, I wish to draw the attention of the Commission to two matters.

First, following a suggestion made during the Plenary debate, the Drafting Committee included a new reference to "constitutional provisions" in the list of forms of evidence. The Drafting Committee also considered other formulations, such as "constitutions" and

"constitutional acts", but settled for the phrase "constitutional provisions". Such formula was intended to capture the fact that a provision or provisions of a national constitution, as opposed to the entire constitution, might also provide evidence of acceptance and recognition of peremptory norms of general international law (*jus cogens*).

Second, the Drafting Committee considered the possibility of introducing a reference to the conduct of States in relation to resolutions adopted by international organizations or at an intergovernmental conference, which had been the approach taken in the Draft Conclusions on the Identification of Customary International Law. The view of the Drafting Committee was that it was important to also take into account such conduct of States, including statements made during the process of the adoption of a particular resolution, or votes for and against its adoption. The Drafting Committee considered various options for how best to capture the concept in the provision. Some proposals included adding the phrase "and conduct in relation to". In the end, the Drafting Committee adopted the proposal of the Special Rapporteur to include a more all-encompassing reference to State conduct (and not just that in the context of the adoption of resolutions) by means of adding a new phrase at the end "and other conduct of States". The meaning and scope of the phrase will be discussed in the commentary, which will also make the point that not all resolutions of international organizations and intergovernmental conferences can be analysed in a same way; some may have a more normative content than others, and may take different forms, such as declarations.

The title of draft conclusion 8 is **"[e]vidence of acceptance and recognition"** and remains unchanged from the first reading text.

Draft conclusion 9

Mr. Chairperson,

Draft conclusion 9, deals with subsidiary means for the determination of the peremptory character of norms of general international law, and is constituted of two paragraphs. The Drafting Committee proceeded on the basis of the text adopted on first reading for each paragraph.

Paragraph 1 deals with judicial decisions as subsidiary means, in line with Article 38(1)(d) of the Statute of the International Court of Justice. The Drafting Committee retained the orientation adopted on first reading, by which the primary focus is placed on the decisions of international courts and tribunals. While special mention is made of the decisions of the International Court of Justice, given the central role played by the International Court in the determination of the peremptory character of norms of general international law, it is understood that such reference does not exclude other international courts and tribunals that have referred to peremptory norms of general international law (*jus cogens*) in their case law, such as the International Criminal Tribunal for the former Yugoslavia, the European Court of Human Rights and the Inter-American Court of Human Rights.

The Drafting Committee considered the possibility, mentioned during the debate in plenary, of referring also to the decisions of national courts. One of the considerations was whether such reference was strictly necessary since such decisions were referred to in draft conclusion 8, paragraph 2. The prevailing view in the Drafting Committee was that a reference to the decisions of national courts in draft conclusion 9 would serve a different purpose: while in draft conclusion 8 the decisions of national courts are one of the forms of evidence of acceptance and recognition of a peremptory norm of general international law (*jus cogens*), in draft conclusion 9, judicial decisions, including the decisions of national courts, are a subsidiary means for determining the peremptory character of norms.

Having agreed in principle to the inclusion of the decisions of national courts, the Drafting Committee considered various options for capturing the concept in the text of the provision. Alternatives included tracking the formulation of Article 38(1)(d) of the Statute of the International Court of Justice, as well as referring more generally to "judicial decisions", which would encompass both decisions of international and national courts. In the end, the sense of the Drafting Committee was that it was best to retain a distinction between the decisions of international and national courts, with regard being had to the latter when appropriate. Accordingly, the Drafting Committee adopted a new sentence at the end of paragraph 1: "Regard may also be had, as appropriate, to decisions of national courts". The formulation of the new sentence is inspired by draft conclusion 13, paragraph 2, of the Conclusions on the Identification of Customary International Law, which refers to the decisions of national courts as being a subsidiary means for

the determination of rules of customary international law. The commentary will expand on the meaning and scope of the new sentence.

Paragraph 2 refers to the work of expert bodies as a subsidiary means for the determination of the peremptory character of norms of general international law (*jus cogens*). The Drafting Committee considered a proposal to change the word "works", which was considered unusual, but decided to retain it as being a sufficiently broad catch-all phrase for the range of types of outputs being envisaged. A further suggestion was to include a reference to "as appropriate" in paragraph 2, as had been done in paragraph 1. The prevailing view was that adding such qualifier was unnecessary in light of the phrase "may also" which had the same effect. The text of paragraph 2 was thus approved without changes to that adopted on first reading.

The title of draft conclusion 9 is **"[s]ubsidiary means for the determination of the peremptory character of norms of general international law"**, which is the same title adopted by the Drafting Committee on first reading.

Part Three – Legal consequences of peremptory norms of general international law (*jus cogens*)

Let me now turn to Part Three, entitled **"[l]egal consequences of peremptory norms of general international law (*jus cogens*)"**, which is the same title as that adopted on first reading. The Part is comprised of ten draft conclusions. As I will explain upon introducing Part Four, this is two draft conclusions less than what was included in Part Three on first reading.

Draft conclusion 10

Mr. Chairperson,

I will now turn to draft conclusion 10. The draft conclusion deals with the general rules applicable to a conflict between a treaty and a peremptory norm of general international law (*jus cogens*).

The first paragraph provides, in accordance with Article 53 of the Vienna Convention on the Law of Treaties of 1969, that a treaty will be void if at the time of its conclusion it conflicts with an existing peremptory norm of general international law (*jus cogens*). The text of the first paragraph was adopted without changes to the first reading version.

The second paragraph concerns the opposite scenario, namely of an existing treaty that conflicts with a new peremptory norm of general international law (*jus cogens*). I wish to recall that the formulation of the first sentence of the draft conclusion is based on Article 64 of the Vienna Convention of the Law of Treaties of 1969. The second sentence, in turn, is drawn from Article 71, paragraph (2)(a), of the Vienna Convention. The main issue confronting the Drafting Committee was the relationship between paragraph 2 of the present draft conclusion and paragraph 2 of draft conclusion 11, which envisages the possibility of the separability of the provisions of the treaty which are in conflict with the new peremptory norm of general international law (*jus cogens*). In order to further clarify the relationship between the two draft conclusions, the Drafting Committee, acting on the recommendation of the Special Rapporteur, added a new opening phrase "[s]ubject to paragraph 2 of draft conclusion 11".

The Drafting Committee maintained the title of the draft conclusion as adopted on first reading, namely **"[t]reaties conflicting with a peremptory norm of general international law (*jus cogens*)"**.

<u>Draft conclusion 11</u>

Mr. Chairperson,

As already mentioned, draft conclusion 11 regulates the question of the separability of treaty provisions that conflict with a peremptory norm of general international law (*jus cogens*).

Paragraph 1 contains the general rule that a treaty is void if at the time of its conclusion it conflicts with a peremptory norm of general international law (*jus cogens*). In such circumstance, no separation of the provisions of the treaty is allowed. Such outcome corresponds with the scenario envisaged in draft conclusion 10, paragraph 1. The Drafting Committee considered whether to refer to conflict with "an existing" peremptory norm of general international law (*jus cogens*), and whether it was strictly necessary to refer to the treaty being void "in whole". However, it decided to retain such latter reference in order to provide a clear contrast with the second paragraph. As such, the text of the first paragraph was adopted by the Drafting Committee without modifications from the text agreed to on first reading.

As I mentioned in the context of draft conclusion 10, paragraph 2, draft conclusion 11 addresses the possibility of separability of provisions of an existing treaty which conflicts with a new peremptory norm of general international law (*jus cogens*). The text of the paragraph is inspired by Article 44, paragraph 3, of the Vienna Convention on the Law of Treaties of 1969. The Drafting Committee considered several proposals to modify the chapeau of the paragraph, including reformulating it as "where particular provisions of a treaty come into conflict with a new peremptory norm of general international law (*jus cogens*) a party may invoke the termination solely of those provisions if", or by adding a final clause in paragraph two stating "in which case those provisions terminate but not the treaty as a whole". The problem such proposals sought to address was how best to convey the point that if the three conditions listed in the subparagraphs are met, then it would be the conflicting provisions that terminate, and not the treaty as a whole. The Drafting Committee subsequently adopted a new proposal by the Special Rapporteur, based on a similar proposal made in the Committee, to clarify the legal effect of the paragraph by reformulating the chapeau to read: "[a] treaty which is in conflict with a new peremptory norm of general international law (*jus cogens*) becomes void and terminates in whole, unless".

The title of draft conclusion 11 was adopted, without change to the first reading version, as **"[s]eparability of treaty provisions conflicting with a peremptory norm of general international law (*jus cogens*)"**.

Draft conclusion 12

Mr. Chairperson,

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

Paragraph 1 provides for the consequences of the invalidity of a treaty due to a conflict with peremptory norm of general international law (*jus cogens*) at the time of the treaty's conclusion. The paragraph was adopted without changes to the text adopted on first reading.

Paragraph 2 concerns the effects produced when a treaty becomes void and terminates due to the emergence of a new peremptory norm of general international law (*jus cogens*), based on the text of Article 71, paragraph (2)(b), of the Vienna Convention of the Law of Treaties of 1969. The Drafting Committee proceeded on the basis of the text adopted on first reading. The key issue it confronted arose from a proposal to add the phrase "of the parties" after "right, obligation or legal situation". The question was whether such inclusion, which constituted a departure from the formula of the Vienna Convention inadvertently narrowed the scope of the provision. The prevailing view was that the addition was a useful clarification because the paragraph was dealing with the law of treaties. At the same time, the commentary will explain that the new phrase "of the parties" also includes the rights and obligations of third parties arising as a consequence of the performance of the treaty.

The title of draft conclusion 12 is **"[c]onsequences of the invalidity and termination of treaties conflicting with a peremptory norm of general international law (*jus cogens*)"**, which is the same title as that adopted on first reading.

Draft conclusion 13

Mr. Chairperson,

I now turn to draft conclusion 13, which concerns the question of the legal effect of reservations to treaties on peremptory norms of general international law (*jus cogens*). The text of

this draft conclusion follows guideline 4.4.3 of the Guide to Practice on Reservations to Treaties, adopted in 2011.

The first paragraph provides that a reservation to a treaty provision reflecting a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of such norm, which will continue applying. The Drafting Committee considered a suggestion to replace the word "binding" with "peremptory", so as to indicate that the reservation would not affect the peremptory nature of the norm. However, the Committee opted to retain the reference to "binding", which more clearly captured the idea that even if a reservation was made in the circumstances envisaged in draft conclusion 13, such a reservation would also not affect the peremptory norm of general international law (*jus cogens*) outside the treaty. The Drafting Committee adopted the first reading formulation of the paragraph without change.

The second paragraph provides that a reservation cannot exclude or modify the legal effects of a treaty in a way contrary to such peremptory norm of general international law (*jus cogens*). The Special Rapporteur made no proposals for modification, and the text was adopted without change to the first reading text.

The title of draft conclusion 13 is **"[a]bsence of effect of reservations to treaties on peremptory norms of general international law (*jus cogens*)"**, as had been adopted on first reading.

Draft conclusion 14

Mr. Chairperson,

I now turn to draft conclusion 14, which deals with the possibility of a conflict between a peremptory norm of general international law (*jus cogens*) and a rule of customary international law.

Paragraph 1 deals with the scenario of a putative rule of customary international law whose emergence would be prevented as a consequence of its conflict with an existing peremptory norm of general international law (*jus cogens*). The Drafting Committee proceeded on the basis of the

proposal of the Special Rapporteur, made in his Fifth Report, to modify the first reading formulation of the phrase "if it conflicts" to "if it would come into conflict", as modified by the Special Rapporteur in the summation of the debate. The Drafting Committee accepted the new formulation which now reads "if it would conflict", which avoids having the words "come into" appear twice.

The Drafting Committee further discussed whether the formulation created the risk of freezing the modification or emergence of new peremptory norms of general international law (*jus cogens*). Some alternative formulations were considered, including indicating that a rule of customary international law contrary to a peremptory norm does not exist if it conflicts with the norm. Nonetheless, the Drafting Committee opted for retaining the formulation as presented in the report. In its view, the interplay between the two sentences in paragraph one was intended to address such concerns. The first sentence deals with the impossibility of the emergence of a new rule of customary international law that could contravene an existing peremptory norm of general international law (*jus cogens*). The commentary will emphasize that the use of the word "would" is meant to preclude the emergence of a new customary rule contrary to a peremptory norm of general international law (*jus cogens*). In turn, the second sentence of paragraph 1, which is formulated as a without prejudice clause, expressly addresses the situation where an emerging rule of customary international law that has a *jus cogens* character supersedes an earlier peremptory norm of general international law (*jus cogens*).

Paragraph 2 addresses the effect of an emerging peremptory norm of general international law (*jus cogens*) on an existing rule of customary international law, not itself enjoying a peremptory character. It was suggested that the phrase "not of a peremptory character" could be deleted. However, the Committee decided to retain it for the sake of clarity, so as to avoid overlap with paragraph 1. Furthermore, the Drafting Committee considered the possibility of dealing in the text with the question of the application of the *lex posterior* rule. However, the Committee decided not to do so on the understanding, which will be reflected in the commentary, that paragraph 2 does not, strictly speaking, deal with the question of modification of an existing rule of customary international law.

Paragraph 3 addresses the non-applicability of the persistent objector rule to peremptory norms of general international law (*jus cogens*). The Drafting Committee retained the text as

adopted on first reading. In doing so, it considered a suggestion to explicitly confine the non-applicability of the persistent objector rule to "rules of customary international law that have the character of peremptory norms of general international law (*jus cogens*)". However, it was understood that the persistent objector rule could only arise in the context of the emergence of rules of customary international law. Accordingly, such clarification was unnecessary in the text of the provision itself. Instead, the commentary will confirm that the paragraph envisages the emergence of rules of customary international law enjoying the status of peremptory norms of general international law (*jus cogens*).

The title of draft conclusion 14 is **"[r]ules of customary international law conflicting with a peremptory norm of general international law (*jus cogens*)"**. The Drafting Committee considered whether the title captured the content of all three paragraphs, including in particular paragraph 3. An alternative considered was for it to read "rules of customary international law in relation with peremptory norms of general international law (*jus cogens*)". The Drafting Committee decided that such formulation would be too broad and, in the end, decided to keep the title of draft conclusion 14 as had been adopted on first reading.

Draft conclusions 15 and 16

Mr. Chairperson,

I now turn to draft conclusions 15 and 16.

The Drafting Committee adopted the texts and titles of both draft conclusions without modifications to the first reading texts. The title of draft conclusion 15 is **"[o]bligations created by unilateral acts of States conflicting with a peremptory norm of general international law (*jus cogens*)"**. The title of draft conclusion 16 is **"[o]bligations created by resolutions, decisions or other acts of international organizations conflicting with a peremptory norm of general international law (*jus cogens*)"**.

Draft conclusion 17

Mr. Chairperson,

I now turn to draft conclusion 17, which deals with the *erga omnes* character of the obligations derived from peremptory norms of general international law (*jus cogens*).

The first paragraph of the draft conclusion indicates that peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*). The formulation of the paragraph was modified from the first reading in order to clarify that it is an obligation "in relation to which" all States have a legal interest. The Drafting Committee adopted such reformulation in order to better convey the idea that the concept of "legal interest" could take multiple forms, such as the interest in the protection of a right, or in the compliance of an obligation, depending on the nature of the obligations derived from particular peremptory norms of general international law (*jus cogens*). The point will be further elaborated in the commentary, including by means of references to decisions of the International Court of Justice, in which it will be explained that sometimes the interest is not in the obligation or in the right, but in the protection of the right. As such, the phrase "in relation to" is intended to place the focus on the interest in the compliance by another State or in the protection of a right by that other State.

Paragraph 2 was adopted without modification to the first reading text. While the provision deals with the responsibility of States, the commentary will also address, in more general terms, the applicability of the entire set of the draft conclusions, including draft conclusion 17, to international organizations.

The title of draft conclusion 17 is **"[p]eremptory norms of general international law (*jus cogens*) as obligations owed to the international community as a whole (obligations *erga omnes*)"** and remains unchanged from that adopted on first reading.

Draft conclusion 18

Mr. Chairperson,

I now turn to draft conclusion 18, which deals with the inapplicability of circumstances precluding wrongfulness to an act of a State that is not in conformity with an obligation deriving from a peremptory norm of general international law (*jus cogens*). The title of draft conclusion 18 is **"[p]eremptory norms of general international law (*jus cogens*) and circumstances precluding wrongfulness"**. Both the title and the text of the provision were adopted on second reading without modifications or further comments from the Drafting Committee.

Draft conclusion 19

Mr. Chairperson,

I shall now turn to draft conclusion 19, which deals with the consequences of serious breaches of peremptory norms of general international law (*jus cogens*).

The first two paragraphs address the consequences of serious breaches of peremptory norms of general international law (*jus cogens*). The first paragraph confirms the duty of States to cooperate to bring to an end through lawful means any serious breach of an obligation arising under a peremptory norm of general international law (*jus cogens*). The second paragraph refers to the duty of non-recognition as lawful of a situation arising out of a serious breach of a peremptory norm of general international law (*jus cogens*). The key question confronted by the Drafting Committee was whether or not to continue to limit the provision to particular consequences of "serious" breaches of peremptory norms of general international law (*jus cogens*). Some members shared the view expressed by some States that all breaches of peremptory norms of general international law (*jus cogens*) were *prima facie* serious, and that the distinction between a serious and non-serious breach was not always evident. A further concern was that retaining the qualifier "serious" could be interpreted as recognizing a hierarchy of such norms.

Nonetheless, the Drafting Committee decided to retain the focus of draft conclusion 19 on "serious" breaches, in conformity with articles 40 and 41 of the Articles on the Responsibility of States for Internationally Wrongful Acts, of 2001. In its the view, while all breaches of peremptory norms of general international law (*jus cogens*) gave rise to consequences, such as the duties of cessation and reparation, certain specific obligations, such as those of cooperation among States to bring to an end the breach of a peremptory norm of general international law (*jus cogens*) and

the duty of non-recognition, applied only to certain types of breaches, namely those deemed to be "serious" under the terms of paragraph 3.

Paragraph 3, in turn defines what is meant by "serious" breaches under paragraphs 1 and 2. The text of the paragraph, which is likewise based on the criteria from the Articles on the Responsibility of States for Internationally Wrongful Acts of 2001, was adopted without change to the first reading text. It was understood in the Drafting Committee that while some individual breaches of a peremptory norm of general international law (*jus cogens*) could be considered severe, the resort to the qualifier "serious" was intended to avoid the need for a subjective evaluation of the severity of the breach. Instead, it served to provide a legal basis on which to distinguish breaches that do not necessarily require the cooperation of other States under paragraphs 1 and 2, from those that do. The commentary will elaborate on how such criteria should be interpreted, including the interlinkage with the interpretation of "gross" and "systematic" conduct.

Paragraph 4 is a without prejudice clause to other consequences that a breach of an obligation arising out of a peremptory norm of general international law (*jus cogens*) may entail. The text, as adopted on first reading, referred to the consequences of "serious" breaches. However, while, as just described, the Drafting Committee opted for retaining the word "serious" in paragraphs 1 to 3, it decided to delete the same qualifier in paragraph 4. Such development arose out of a new proposal by the Special Rapporteur to replace the paragraph entirely with a general saving clause, to be included as a second paragraph of draft conclusion 22, by which it would be clarified that the draft conclusions did not address the consequences arising from other breaches of peremptory norms of general international law (*jus cogens*). The prevailing view in the Drafting Committee was that the new paragraph in draft conclusion 22 was unnecessary and that the idea could be conveyed by adopting a broader understanding of paragraph 4 of draft conclusion 19, referring to the other consequences of all breaches of peremptory norms of general international law (*jus cogens*) and not just of "serious" breaches.

Based on such understanding, the Drafting Committee further decided to replace "a breach" with "any breach", since as just explained, while paragraphs 1 and 2 reflect the particular consequences and duties of cooperation and non-recognition for all States, the fourth paragraph serves as a reminder that the general rules on the consequences of breaches of an obligation apply

to all breaches of peremptory norms of general international law (*jus cogens*), even if not considered "serious" in the sense of paragraph 3 of this draft conclusion.

The title of draft conclusion 19 is **"[p]articular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)".** The Drafting Committee also considered other possible formulations including deleting the reference to "particular", in light of the broad scope of paragraph 4. Nonetheless, the Committee was unable to agree on a different title and decided to retain the formulation as was adopted on first reading.

Part Four – General provisions

Mr. Chairperson,

Let us now turn to Part Four - **"General provisions"** – which is the same title as adopted on first reading and which sets out a sequence of four draft conclusions, which I will introduce in due course. Before doing so, I wish to make two points. First, the Drafting Committee considered the question of which provisions were best located in Part Four. If you recall, on first reading, only draft conclusions 22 (the general without prejudice clause) and 23 (the non-exhaustive list) were included in Part Four. During the second reading, the Drafting Committee decided to also move draft conclusions 20 (on interpretation and application) and 21 (concerning the recommended procedure) into Part Four, which was considered to be a more suitable location, given their general nature, than Part Three which is concerned with aspects of the legal consequences of peremptory norms of general international law (*jus cogens*).

Secondly, I wish to record the fact that the Special Rapporteur had initially proposed a different ordering of the draft conclusions in Part Four, with what is now draft conclusion 21 (on recommended procedure) appearing after what is now draft conclusion 22, the without prejudice clause. As I will discuss shortly, in the context of draft conclusion 20, the Drafting Committee preferred to revert to the order as adopted on first reading.

Draft conclusion 20

Mr. Chairperson,

I now turn to draft conclusion 20, which deals with the interpretation and application of other norms in case of a possible conflict with a peremptory norm of general international law (*jus cogens*). The Drafting Committee adopted the text of draft conclusion 20 without change to the first reading version.

As already mentioned, the Drafting Committee decided to locate the draft conclusion at the beginning of Part Four, followed by that on the recommended procedure. Such placement of both draft conclusions in the same part of the text was intended to convey the general preference to first seek to avoid a potential conflict by applying the rule of interpretation, before resorting to the recommended procedure.

The title of draft conclusion 20 is "[i]nterpretation and application consistent with peremptory norms of general international law (*jus cogens*)". The Drafting Committee considered other alternatives, including "interpretation and application to be consistent with" and "interpretation of peremptory norms of general international law (*jus cogens*)". However, the Drafting Committee concluded that the existing formulation clearly described the content of the draft conclusion and, accordingly, proceeded to adopt the title without modification to the first reading version.

Draft conclusion 21

Mr. Chairperson,

I now turn to draft conclusion 21, which deals with the recommended procedure in the case of a conflict between a rule of international law and a peremptory norm of general international law (*jus cogens*).

First, I wish to make a general comment. While the Special Rapporteur had proposed in his Fifth Report to also refer in the text to "other entities" in addition to "other States", he presented

a revised proposal without such reference. The commentary will clarify that the draft conclusion applies also to other actors, including international organizations.

Paragraph 1 sets forth the recommended practice of notification by the State invoking a peremptory norm as a ground for the invalidity or termination of a rule of international law. The text of the provision largely tracks that of the first reading, with the exception that the prior opening phrase "[i]t is recommended that" was no longer necessary in light of the new title for the provision. The Drafting Committee considered alternative ways of referring to the States that had to be notified when following the recommended procedure. In the case of a peremptory norm of general international law (*jus cogens*) contained in a treaty, the States concerned would be the parties to the treaty. This would not be the case where the norm is based on a rule of customary international law or a general principle of law. The Drafting Committee considered alternatives such as referring to "notifying all States", "other States", or "all other States". However, such broad formulations entailed practical difficulties when coming to implementation. Instead, the prevailing sense was that referring to the States "concerned" was more appropriate, and the term was kept as proposed by the Special Rapporteur.

Another point discussed regarding paragraph 1 was the reference to the invalidity or termination of "a rule" conflicting with a peremptory norm of general international law (*jus cogens*). The issue was whether, in case of conflict, what would be void or terminated would not be a rule, but rather the treaty conflicting with the peremptory norm. The understanding in the Drafting Committee was that the use of the term "rule" was intended to be broad enough to encompass, for example, a treaty and the peremptory norm of general international law (*jus cogens*) contained therein.

Paragraph 2 is largely the same as that adopted on first reading, with some minor refinements.

I turn now to paragraph 3, which constitutes a merger of what were paragraphs 3 and 4, as adopted on first reading. The paragraph addresses the situation where one of the concerned States objects to the measure within the time period stipulated in paragraph 2. The opening phrase was further streamlined to read "[i]f, however, any State concerned raises an objection, the States concerned", so as to align the text more closely with Article 65, paragraph 3, of the Vienna Convention on the Law of Treaties of 1969.

Acting on the proposal by the Special Rapporteur, the Drafting Committee included the phrase "or to some other procedure entailing binding decisions" in addition to the submission of the matter to the International Court of Justice. The view of the Drafting Committee was that non-binding or alternative dispute settlement mechanisms could be covered by the formulation of the first sentence in the paragraph, which refers to "the means indicated in Article 33" of the Charter of the United Nations . Accordingly, the paragraph envisages a sequence of the alternative means to resolve a potential dispute, moving from non-binding to binding.

Paragraph 4, which was paragraph 5 in the first reading text, is a without prejudice clause relating to other dispute settlement provisions amongst the States concerned. It is based on the first reading formulation with some refinements proposed by the Special Rapporteur. The Drafting Committee agreed with the sequence of three elements included therein. The proposal of the Special Rapporteur had referred to the "jurisdiction and procedure of the International Court of Justice". However, the Drafting Committee was of the view that the reference to "procedure" did not add clarity. Some alternatives were considered, including referring to "the relevant rules concerning the International Court of Justice". The Drafting Committee finally opted for removing the words "and procedures" so as to refer only to the jurisdiction of the court. Nonetheless, the reference to "relevant rules concerning the jurisdiction" should be understood broadly as encompassing all the rules applicable to the International Court of Justice, not only those at the jurisdictional phase of a proceeding.

I wish to recall for the record that, in his Fifth Report, the Special Rapporteur had proposed the inclusion of an additional paragraph containing a saving clause relating to other dispute settlement mechanisms applicable in the relations between the parties. Such clause did not feature in the Special Rapporteur's revised proposal, submitted in the Drafting Committee, as a consequence of the views expressed during the Plenary debate that the clause was strictly speaking not necessary.

The Special Rapporteur had proposed in his fifth report to modify title of Draft Conclusion 22 from "[p]rocedural requirements" to read **"[r]ecommended procedure"**. The Drafting Committee concurred and adopted the revised title as proposed by the Special Rapporteur.

Draft conclusion 22

Mr. Chairperson,

I now turn to draft conclusion 22, which is a without prejudice clause relating to the consequences that a specific peremptory norm of general international law (*jus cogens*) may otherwise entail under international law.

The Drafting Committee adopted the first reading text without modification. Nonetheless, I wish to recall my introduction of draft conclusion 19, in which I recorded the fact that the Special Rapporteur had proposed the inclusion of a second paragraph containing a saving clause relating to the consequences arising from breaches of peremptory norms of general international law (*jus cogens*) other than "serious" breaches. As already indicated, the Drafting Committee did not accept the proposal, as it considered the idea to have been sufficiently captured in paragraph 4 of draft conclusion 19, following the deletion of the word "serious".

The title of draft conclusion 22 is **"[w]ithout prejudice to consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail"**. The Drafting Committee considered other, shorter, alternatives, including merely referring to "consequences of specific peremptory norms of general international law (*jus cogens*)". However such formulation was considered imprecise as it suggested that the draft conclusion would address consequences, which was not the case. Thus, the Committee decided to maintain the text of the title as adopted on first reading.

Draft conclusion 23 and annex

Mr. Chairperson,

I now turn to draft conclusion 23 and the annex, which includes a non-exhaustive list of peremptory norms of general international law (*jus cogens*) that have been identified by the Commission in its previous work. The choice before the Drafting Committee was either: (1) to

retain draft conclusion 23, the annex and corresponding commentary with only minor changes, or (2) to delete draft conclusion 23 and the annex in its entirety (as well as the corresponding commentary). The sense in the Drafting Committee was that any attempt at a *via media* by which either the list in the annex, or the commentary, would be further expanded or elaborated would essentially imply, at the present stage, the deletion of draft conclusion 23 and the annex.

Some members spoke in favour of the deletion of the draft conclusion and the annex. One suggestion was to move the list in the annex into the commentary and to include the explanation of how the Commission reached such a list, consistent with the manner in which certain peremptory norms of general international law (*jus cogens*) had been referred to in the commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, of 2001. Other members were of the view that even if the scope of the present project was not, strictly speaking, the identification of peremptory norms, it could not be denied that the Commission had identified and listed some such norms in its previous work, and that there were States that had, in fact, welcomed the inclusion of the annex in the first reading text.

The prevailing view within the Drafting Committee was to maintain the text as adopted on first reading, on the understanding that the commentary will more clearly explain that the list corresponds to peremptory norms of general international law (*jus cogens*) that had been identified by the Commission in its previous work. The commentary will also clarify that the list does not correspond to a new or separate exercise of identification following the methodology from the draft conclusions, and that it is without prejudice of other peremptory norms being identified in other contexts or in the future.

The title of draft conclusion 23 is **"[n]on-exhaustive list"**. The Drafting Committee considered alternatives titles, including "non-exhaustive list of *jus cogens* norms identified by the International Law Commission". However, such a title was considered to be too long. In the end, the Drafting Committee decided to keep the title as adopted on first reading.

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Mr. Chairperson,

This concludes my introduction of the first report of the Drafting Committee for this session. As I indicated at the beginning of my statement, the Drafting Committee recommends that the Commission adopt the Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), as contained in the report of the Drafting Committee.

I thank you for your kind attention.

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