

Comments and observations of the Australian Government

International Law Commission draft conclusions on peremptory norms of general international law (*jus cogens*)

1. The Australian Government (Australia) presents its compliments to the Secretary-General of the United Nations.
2. Australia thanks the International Law Commission (ILC) for its important work on the topic of peremptory norms of international law (*jus cogens*), and for providing a set of draft conclusions and accompanying commentary for States' consideration and comment. Australia would also like to express its appreciation to the Special Rapporteur, Mr Dire Tladi, for his extensive work on this topic.
3. Australia appreciates the Special Rapporteur and the ILC's diligent work in considering previous State comments submitted on this topic. In that regard, Australia welcomes the conclusion of the Special Rapporteur in his fourth report that it is not necessary to include a draft conclusion in relation to regional *jus cogens* norms noting that the notion of regional *jus cogens* norms does not find support in the practice of States.

Preliminary observations

4. Australia appreciates the importance of the ILC's work on this topic in providing clarity and guidance on identifying the peremptory character of norms of international law and their consequences and legal effects. Australia considers that it is essential that the draft conclusions and their commentaries provide guidance to States, national courts, international and regional courts, and other actors, who may be called upon to consider the existence of *jus cogens* norms and their legal consequences. It is imperative that such guidance accurately reflects international law, is grounded in the practice of States, and is practical. In that regard, Australia submits the following comments and observations on the draft conclusions, and their commentaries, which it considers would enhance the quality of the guidance provided. The specific draft conclusions referred to below are illustrative examples of these key practical and conceptual considerations and are not intended to be exhaustive. As such, this submission is without prejudice as to Australia's position on the remaining draft conclusions.
5. As an overarching comment, Australia respectfully requests that where draft conclusions are based on the ILC's Articles on State Responsibility for Internationally Wrongful Acts (articles on State Responsibility) or the *Vienna Convention on the Law of Treaties 1969* but differ in form, that the commentaries expressly outline the basis and reasons for the variation.¹

Draft Conclusion 5

6. In Australia's view, a treaty provision by itself is not capable of serving as a basis for peremptory norms of general international law, given a treaty is only binding on its parties. However, as noted in the commentaries, treaties may play a role in the emergence of a peremptory norm if a norm contained in the treaty codifies an existing norm of customary

¹ An example of where the commentaries can be further elaborated in this respect is the commentaries to Draft Conclusion 18.

international law, crystallises an emerging norm into customary international law or influences State practice such that it may become the basis for a *jus cogens* norm. Australia suggests that the manner in which treaties may form a basis for *jus cogens* norms be clarified in the text of draft conclusion 5(2). Australia also respectfully requests that further evidence of State practice be included in the commentaries to demonstrate the possibility that general principles of law could form the basis of *jus cogens* norms. At this stage, there is no evidence that a general principle of law has in fact served as the basis for a *jus cogens* norm.

Draft Conclusion 7

7. In Australia's view, the standard for the identification of *jus cogens* norms, that being of acceptance and recognition by the international community of States as a whole, should be maintained. Australia considers defining the international community as a whole as "a very large majority of States" as currently reflected in draft conclusion 7(2) has no basis in international law, risks diluting the standard of acceptance and recognition at international law, risks confusing the standard with the formation of customary international law and encourages identifying *jus cogens* norms through a mechanical exercise. Australia therefore urges that draft conclusion 7(2) be removed. Notwithstanding, Australia supports the commentaries that accompany paragraph 2 to the extent that it outlines that acceptance and recognition "as a whole" emphasises that it is States as a collective or community that must accept and recognise the non-derogability of a norm for it to be a *jus cogens* norm; that assessment does not involve a mechanical exercise; and that acceptance and recognition must be across regions, legal systems and cultures.

Draft Conclusion 16

8. In Australia's view further consideration in the commentaries is needed on how draft conclusion 16 interacts with resolutions by the United Nations Security Council (UNSC), noting the issues identified in the commentaries relating to Article 103 of the Charter of the United Nations,² its subsequent interpretation and the lack of State practice in this area. Further consideration should also be given to the interaction of draft conclusions 16 and 21 for UNSC resolutions, decisions or acts. Australia's position is that States should not be able to unilaterally assert that a UNSC resolution breaches a *jus cogens* norm, and for that unilateral assertion to provide a justification for a State's non-compliance with the resolution.

Draft Conclusion 19

9. In relation to draft conclusion 19, Australia requests that the commentaries identify further State practice and accompanying *opinio juris* that the obligation to cooperate to bring to an end through lawful means any serious breach of a *jus cogens* norm has now attained the status of a rule of customary international law.
10. Further guidance and State practice in the commentaries on the source, scope and content of the obligations identified in draft conclusion 19 and commentaries is also requested (beyond noting that it is based on article 41(1) of the articles on State Responsibility), including the obligation to not render aid or assistance and the duty of international organisations to exercise discretion in a manner that is intended to bring to an end serious breaches of

² Commentaries to Draft Conclusion 16, paragraph 4.

peremptory norms of general international law.³ Australia also invites the ILC to consider whether there have been further developments since its work on the articles on State Responsibility on what obligations of cooperation, of non-recognition and non-assistance apply to States in relation to a breach of a *jus cogens* norm which does not meet the threshold of seriousness in draft conclusion 19(3).

Draft Conclusion 21

11. Australia respectfully submits that draft conclusion 21 is unhelpful and unnecessary for the ILC's work on *jus cogens* norms and that it should be removed. The draft conclusions are not designed to be adopted by States in the form of a treaty, whereas the effect of draft conclusion 21 would be to impose obligations on States beyond those that exist as a consequence of *jus cogens* norms. Australia also submits that draft conclusion 21 may cause confusion for inter-State relations. For example, it is unclear what the outcome would be if the relevant Parties fail to reach a solution within twelve months and do not agree to submit the matter to the International Court of Justice. Further, the commentaries provide no guidance on the application of draft conclusion 21 to circumstances covered by draft conclusions 14 to 16 where a rule of customary international law, unilateral act of a State or a resolution, decision or act of an international organisation conflicts with a *jus cogens* norm.

Draft Conclusion 23 and Annex

12. Finally, Australia remains doubtful of the utility of the non-exhaustive list referred to in draft conclusion 23 and annexed to the draft conclusions. Australia submits that the Annex and accompanying commentaries undermine the methodological approach to identifying *jus cogens* norms which the draft conclusions seek to achieve. The Annex and commentaries do not provide guidance on the process by which a norm on the non-exhaustive list has been accepted and recognised as having peremptory character, or what effect has been recognised or treatment has been given by a State, States or international court or tribunal as a result of its peremptory character.
13. Instead, as currently drafted, Australia respectfully submits the methodology adopted by the ILC calls into question the status as peremptory of certain norms on the non-exhaustive list. For example, while the non-exhaustive list is purported to draw upon norms to which the ILC has previously referred, the commentaries rely significantly upon the Study Group on fragmentation of international law, rather than the work of the ILC as a whole.⁴ Further, the extent to which the Commission, or Study Group of the Commission, refers to a norm in the Annex as having the status of a peremptory norm varies. By way of further example, the 'basic rules of international humanitarian law' is not a well-established or commonly accepted term, demonstrated by the use of several other formulations in the Special Rapporteur's fourth report, including principles of humanitarian law, principles of international humanitarian law and prohibition of war crimes.
14. Australia respectfully suggests that the Annex be removed and the ILC alternatively addresses in the commentaries a limited number of established *jus cogens* norms using the methodological approach established by the draft conclusions. Australia considers that such work would provide more useful guidance to States, national courts, international and

³ Draft conclusion 19, paragraph 5.

⁴ Commentaries to draft conclusion 23, paragraphs 5-9.

regional courts, and other actors, who may be called upon to determine the existence of *jus cogens* norms and their legal consequences.

15. Australia reiterates its support for the work of the ILC and avails itself of this opportunity to renew to the ILC the assurances of its highest consideration.