

Translated from Spanish

Permanent Mission of Colombia to the United Nations

Comments of Colombia on the draft conclusions on peremptory norms of general international law (*jus cogens*)

In response to note LA/COD/67 from the Office of Legal Affairs concerning the draft conclusions on peremptory norms of general international law (*jus cogens*), adopted by the International Law Commission on first reading at its seventy-first session and transmitted, through the Secretary-General, to Governments, with the request that they submit their comments and observations by 30 June 2021, Colombia wishes to submit the following observations:

A. General comments

1. As part of the aforementioned discussions and efforts to recognize and study *jus cogens*, Colombia wishes to point out that the Commission's draft conclusions on peremptory norms of general international law (*jus cogens*) (hereinafter, the "draft conclusions") are an important work of consolidation for the crystallization of international law, since they define this typology of norms, the nature thereof and the criteria for their identification. The draft conclusions are also an important work for the systematization of this law, since it establishes the legal consequences arising under peremptory law. In the draft conclusions, the Commission focuses on addressing one of the main issues surrounding *jus cogens*: the indeterminacy of its content, owing to the absence of clear criteria for its identification in the international legal order.

2. Based on this understanding, a list of indicative draft conclusions concerning the identification of this set of norms, as well as the establishment of their legal consequences, facilitates the development of legal relations between States and international organizations.

3. In the draft conclusions, the Commission notes that *jus cogens* norms predominantly derive from customary sources, although they could also derive from treaties. As the Commission has already indicated, this would give treaties sufficient legal capacity to establish a peremptory norm of general international law.

B. Specific comments

4. In paragraph 2 of draft conclusion 7, the Commission says that acceptance and recognition by

a very large majority of States is required for the identification of a norm as being of peremptory character. Colombia would like further clarification as to what would be understood by a large majority of States. It suggests that the norm be more specific as to the number of States required to meet this requirement, and that a clearer determination be provided of the other criteria mentioned in the commentary: acceptance and recognition across regions, legal systems and cultures. It would be important to provide further elements of how many regions, legal systems and cultures are necessary to be considered representative and for their acceptance and recognition to allow for the identification of a norm as being of peremptory character.

5. Contradiction could also be perceived between paragraphs 1 and 2 of the draft conclusion, since paragraph 1 refers to recognition by the international community of States as a whole, while paragraph 2 refers to a very large majority of States. Although the Commission attempts to explain in its commentary that “as a whole” means a very large majority of States, as opposed to a “simple” majority, in order to imply that neither unanimity nor a purely numerical criterion is required, the concepts of “as a whole” and “very large majority” can create confusion.

6. It should be noted that the expression “as a whole” used in the English version of the draft conclusion implies the totality, while the expression “*en su conjunto*” used in the Spanish version does not necessarily have the character of indivisibility inherent in the concept of “as a whole”. It should be borne in mind that while this is the usual translation of the expression, as reflected in the Vienna Convention on the Law of Treaties, the concepts do not necessarily have the same connotations in the two languages.

7. It should also be noted that the formulation of paragraph 2 seems to contrast with that of the Vienna Convention on the Law of Treaties, which provides in its article 53 that “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole”, and does not allow for a more restrictive interpretation of a whole, such as a large majority.

8. Paragraph 2 of draft conclusion 8, which deals with evidence of acceptance and recognition of a norm as a *jus cogens* norm, contains a non-exhaustive list of forms of evidence. Colombia suggests that the Commission provide specific examples of the last two forms of evidence listed – resolutions adopted by an international organization or at an intergovernmental conference – by for example the international organizations or intergovernmental conferences whose resolutions could have this effect of evidence of acceptance and recognition. In particular, it should try to indicate any

decision of an international organization, including regional organizations or those involving a small number of States, could meet this standard of evidence.

9. Draft conclusion 10, which deals with treaties conflicting with a peremptory norm of general international law, reads as follows:

“Conclusion 10 - Treaties conflicting with a peremptory norm of general international law
(*jus cogens*)

1. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*). The provisions of such a treaty have no legal force.
2. If a new peremptory norm of general international law (*jus cogens*) emerges, any existing treaty which is in conflict with that norm becomes void and terminates. The parties to such a treaty are released from any obligation further to perform the treaty.”

10. It is clear that paragraph 1 of the draft conclusion is based on article 53 of the Vienna Convention, since it sets out the the legal consequences of the invalidity¹ of a treaty that conflicts with a norm of *jus cogens*. The main legal consequence, deriving from the character of the substantive criterion of validity of the peremptory norm, will be the invalidity of the treaty that conflicts with the norm. The consequence of the invalidity of the treaty will be that its provisions will lack “legal force”,² an expression which we understand to be taken from article 69, paragraph 1, of the Vienna Convention, according to which the provisions of a treaty that is invalid have no legal force.

11. It should be borne in mind, therefore, that the fact that a treaty has been concluded does not necessarily mean that it has entered into force, as prescribed in articles 16 and 17 of the Vienna Convention. It is possible, therefore, for a treaty which, at the time of its conclusion, conflicts with a norm of *jus cogens* to be declared null and void without having even entered into force.

12. Colombia therefore suggests that the Commission examine the need to consider using another expression to refer to the consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law that would reflect the differences between the various stages which

¹ The meaning of invalidity as set out in the Vienna Convention and reproduced in the draft conclusions seems to be understood independently of the definitions of this concept in the various legal systems of States. Accordingly, the term would have a particular conventional connotation, the specific consequences of which are specified under the Vienna Convention and which, as will be seen, are reproduced in draft conclusions 11 and 12.

² According to the English version of the draft conclusions, provisions of the treaty that are found to be invalid because they conflict with a peremptory norm of general international law will not have “legal force”.

a treaty undergoes and the different meanings that exist between the concepts of conclusion and entry into force of a treaty. Similarly, the expression “legal effects”, which is also used throughout the Vienna Convention, particularly with regard to the regime of reservations, is indicative not only of the binding nature of a treaty but also of the range of legal possibilities as to its entry into force and its termination.

13. Paragraph 2 of the draft conclusion is based on article 64 of the Vienna Convention regarding the invalidity *ex nunc* of an existing treaty which conflicts with a new peremptory norm of international law, and the release of the parties from the obligation to continue to perform the treaty.

14. However, given the wording of the paragraph, two different legal consequences seem to be established for a treaty that is in conflict with the new norm of *jus cogens*: its invalidity or its termination. On the other hand, the Commission did not indicate clearly whether such consequences would arise from the moment that the procedural requirements under draft conclusion 21 are fulfilled, or from the moment that the peremptory norm of general international law is deemed to have emerged as a matter of law.

15. The Commission did, however, clarify the latter point in its commentary to draft conclusion 10, specifying that a treaty which is in conflict with the new norm of *jus cogens* “[...] becomes void at the emergence of the peremptory norm. The treaty becomes void from the moment the norm in question is recognized and accepted as one from which no derogation is permitted.”

16. It is desirable, however, to bring such clarity to the draft conclusion, which could be expressed as follows: “If a new peremptory norm of general international law (*jus cogens*) emerges, any existing treaty which is in conflict with that norm becomes void and terminates from the moment of the emergence of that new norm”. It is worth noting the difficulty of determining the exact moment when a new rule of general international law emerges, especially if it is from a customary source, which would constitute a practical challenge in determining the precise moment of invalidity and termination of a treaty.

17. It is therefore appropriate to ask about the differences in legal terms that would result from the invalidity and termination of a treaty on account of it being in conflict with a norm of *jus cogens*. While the Vienna Convention makes it clear, in its article 64, that any existing treaty which is in conflict with a norm of *jus cogens superveniens* becomes void and terminates, it appears that, in this context, the invalidity of a treaty would, to all intents and purposes, would implicitly result in its termination.

18. Colombia wishes to draw attention to the possible reach of the consequences of invalidity and termination of treaties, as determined in draft conclusion 10, in States that have dualist legal systems but that do not recognize domestically the direct effect of invalidation that *jus cogens* norms have on the legal acts of treaty incorporation. It would be advisable to expand on this point by adding a commentary to the draft conclusion that would refer to the reach of peremptory norms and to indicate whether States have a duty to confer a far-reaching status on such norms in their domestic legal systems.

19. Draft conclusion 11, concerning the separability of treaty provisions that are in conflict with a norm of *jus cogens*, reads as follows:

“Conclusion 11 - Separability of treaty provisions conflicting with a peremptory norm of
general international law (*jus cogens*)

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

2. A treaty which becomes void because of the emergence of a new peremptory norm of general international law (*jus cogens*) terminates in whole, unless:

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

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

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

20. In order to provide clarity to paragraph 1 of the draft conclusion, it would be appropriate to include a commentary that lays out the drafting history of the Vienna Convention, which led to the decision that a treaty would be void in whole if, at the time of its conclusion, it conflicted with a norm of *jus cogens*, or otherwise provides the reasons why that wording was chosen for the draft conclusion.

21. Although it is clear that a treaty which, at the time of its conclusion, conflicts with a

peremptory norm of general international law would be invalid in whole, it is not clear from this paragraph whether such invalidity would apply from the moment of the conclusion of the instrument, or from the moment that the party invokes the procedure set out in draft conclusion 21. Although the Commission clarifies this matter in its respective commentaries, indicating that the invalidity would be *ab initio*, i.e., that it would be understood that the instrument did not exist as such in international law, it would be advisable that the moment of invalidity also be expressly specified in the wording of paragraph 1 of draft conclusion 11.

22. Draft conclusion 12, concerning the consequences of the invalidity and termination of treaties conflicting with a peremptory norm of general international law (*jus cogens*)), states as follows:

“Conclusion 12 - Consequences of the invalidity and termination of treaties conflicting with a peremptory norm of general international law (*jus cogens*)

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

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

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

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

23. In its commentary to the draft conclusion, the Commission points out that paragraph 1 (a), concerning the obligation of the parties to eliminate as far as possible the consequences of any act performed in reliance on any treaty provision that is in conflict with a norm of *jus cogens*, does not create an obligation of result but one of conduct. This clarification is essential, since treaties which, at the time of their conclusion, conflict with a norm of *jus cogens* are usually invalid *ex post facto*,

with the effect that they may encompass factual situations which, due to material impossibility, cannot be returned to their initial state by the parties to the instrument, despite their efforts to that end.

24. The Commission also makes it clear in paragraph 1 of the draft conclusion and the commentary thereto that the duty of the parties to seek to eliminate the consequences produced by the invalid treaty will only arise in respect of those provisions which are in conflict with the peremptory norm of general international law. Thus, while the whole treaty would be null and void, the duty of the parties to the treaty is restricted to eliminating the results of the provision or provisions that are in conflict with the norm of *jus cogens*.

25. Similarly, according to paragraph 1(b) of the draft conclusion, the parties to the invalid treaty have an obligation to bring their relations into conformity with the peremptory norm of general international law which the treaty violates. Based on its wording, the paragraph does not seem to be limited to the consequences of the invalidity of the treaty, but goes beyond the treaty itself by stating that the parties to the treaty in general have an obligation to bring their relations in conformity with the peremptory norm of general international law.

26. Based on this understanding, we wish to draw attention to the scope of the wording of the paragraph, which would refer in general to the relations between the parties to the treaty, and not strictly to the relations established under the instrument that is invalid on account of its being in conflict with the norm of *jus cogens*. Thus, in order to circumscribe the meaning of this consequence, the obligation of the parties could be redirected to the relations established under the treaty, as follows: “bring their mutual relations into conformity with the peremptory norm of general international law (*jus cogens*) in respect of the treaty which is void on account of its being in conflict with a peremptory norm of general international law (*jus cogens*)”.

27. The scope of the legal consequences described in this paragraph also need to be examined in relation to the question of the international responsibility of the parties to the treaty which conflicts with a norm of *jus cogens*. This would lead to the understanding that paragraph 1 would operate solely in the realm of the law of treaties, without regard to secondary rules of international law, such as the regime of international responsibility of States for internationally wrongful acts.

28. Draft conclusion 13 deals with the absence of effect of reservations to treaties on peremptory norms of general international law (*jus cogens*) and is worded as follows:

“Conclusion 13: Absence of effect of reservations to treaties on peremptory norms of general

international law (*jus cogens*)

1. A reservation to a treaty provision that reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such.
 2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*).”
29. This draft conclusion shows that the invalidating effect of *jus cogens* norms also extends to unilateral declarations of States that are contrary to such norms, including declarations in reservations to treaties. It is important to note, however, that the Commission says in its commentary that the draft conclusion is not intended to regulate reservations, which are already covered by section 2 of part II of the Vienna Convention.
30. It should also be noted that the draft conclusion is based on the definition of reservations set out in article 2, paragraph 1 (d), of the Convention, which includes interpretative declarations in this category by indicating that any unilateral statement made by a State whereby it purports to exclude or modify the legal effect of certain provisions of the treaty constitutes a reservation.
31. The Commission also clarified the meaning of the draft conclusion in its commentary by indicating that, while a reservation may exclude the application of a treaty provision, the norm of *jus cogens* on which that provision is based will not be affected and will continue to apply generally under international law, given its hierarchical superiority to other rules of international law and its universal application. Hence, the reservation and the *jus cogens* norm have a separate existence and the reservation does not have any potential to contradict the peremptory effect of the norm.
32. The foregoing should be differentiated from the case of a treaty which, by virtue of its content, scope and number of parties, has the potential to establish a *jus cogens* norm, where a reservation to the provision establishing such a norm may be indicative of its lack of general acceptance and recognition, as provided for in draft conclusions 2 and 4.
33. With regard to paragraph 2, it should be understood that the *jus cogens* provision must already exist at the time of the formulation of the reservation which brings the treaty provision into conflict with the *jus cogens* provision.
34. Paragraph 1 of draft conclusion 19 states that States shall cooperate to bring to an end any

serious breach by a State of its obligation arising under peremptory norms. Nonetheless, for Colombia, that wording is unclear and may imply that other breaches of a different nature should not be brought to an end or that they do not give rise to obligations for States.

35. For this reason, Colombia suggests that the wording of the paragraph be reviewed to ensure that there will also be consequences for any breach of obligations arising under a peremptory norm, with special emphasis on serious breaches.

36. Although the Commission says in its commentary that the draft conclusion does not address consequences of breaches of peremptory norms that are not serious in nature, it should make it clear that there will also be consequences for breaches that do not meet the threshold of being serious, in the light of the criteria for establishing the type of breach specified in paragraph 3.

37. Colombia also suggests that further clarification be provided as to the criteria for defining what constitutes a serious breach beyond what is stated in paragraph 3 of the draft conclusion, where a serious breach is defined as one that “ involves a gross or systematic failure by the responsible State to fulfil that obligation”. However, in its commentary, the Commission does not provide further clarification as to when a State commits such breach.

38. On this point, it would be important to state clearly whether there will be different consequences depending on the type of peremptory norm breached and whether this will involve the activation of differentiated cooperation frameworks. This reasoning could be inferred from the commentary to the draft conclusion, without any justification as to why.

39. In paragraph 1 of draft conclusion 21, the Commission should be more specific about the measures proposed to be taken with regard to the rule of international law in respect of which a peremptory norm was invoked as a ground for invalidity or termination. Colombia recommends that the phrase “in accordance with public international law” be added to the second sentence of the paragraph after the word “measure”, in order to establish the nature of the measure that may be taken. The sentence would then read as follows: “The notification is to be in writing and is to indicate the measure [in accordance with public international law] proposed to be taken with respect to the rule of international law in question”.

40. Paragraph 4 of the draft conclusion gives the objecting State or States concerned the option to offer to submit the matter to the International Court of Justice if, within a period of 12 months, no solution is reached as to the invalidity or termination of a rule of international law by reason of a

peremptory norm. In this regard, it should be recalled that only States that have accepted the Court's jurisdiction under certain conditions may be parties to the legal dispute, as established in paragraph 5 of the draft conclusion, or may resort to or be brought before that dispute settlement body. The Commission should also bear in mind that, as the International Court of Justice is not the only dispute settlement mechanism, it could be restrictive to leave the Court as the final mechanism for the settlement of any dispute, especially given the understanding that there is no hierarchy among the methods of dispute settlement established in the Charter of the United Nations.

41. It should also bear in mind that States have full autonomy to choose their peaceful methods of dispute settlement, including those specified in Article 33 of the Charter. Although paragraph 3 is clear in this regard, paragraph 4 seems to give pride of place to the International Court of Justice and to encourage States to resort to the Court's jurisdiction when the dispute is not resolved within 12 months. Although submission of a dispute to the Court is formulated as being conditional on the willingness of the objecting State or the States concerned, the issues raised above should be taken into consideration.

42. The Commission should also bear in mind that the rule of international law under dispute may be enshrined in treaties, which generally have their own dispute settlement provisions, thus making it necessary to harmonize the dispute settlement provisions contained in treaties with the procedural requirements of draft conclusion 21.

C. Comments on the annex to the draft conclusions

43. The annex contains a non-exhaustive list of eight peremptory norms. However, although the Commission makes it clear in its commentary that these are norms that it had previously referred to as having a peremptory character, the list does not include all the norms that the Commission had previously referred to as having such character. Colombia therefore suggests that the Commission specify the criteria it used for including some norms in the list and not others.³

44. In addition, even if it is clear that the draft conclusion seeks to establish a methodological approach to peremptory norms, and not to determine their content, presenting this list without

³ In its commentary, the Commission states clearly that the list is "non-exhaustive in the sense that, in addition to the norms listed in the annex, the Commission has also referred previously to other norms as having peremptory character. The annex should therefore not be seen as excluding the peremptory character of these other norms". Report of the International Law Commission (A/74/10) Chapter V, p. 204.

specifying the objective for such presentation or the reasons for choosing the non-exhaustive list of eight identified in the annex could undermine, for example, the process of identification described in the text of the draft conclusion, unless the process that led to their characterization is explained in detail.

45. Aggression is included in paragraph (a) of the annex as a peremptory norm. It should be pointed out that the prohibition of aggression should be distinguished from the principle individual or collective self-defence, which is recognized in Article 51 of the Charter as a right, and which may in turn give rise to regional arrangements, as set forth in Articles 52 to 54 of the Charter.
