15 July 2021

ILC draft conclusions on 'Peremptory norms of general international law (*jus cogens*)' – Israel's comments and observations

I. Introduction

1. In accordance with paragraph 54 of the Report of the International Law Commission on the work of its 71st Session (A/74/10), and the updated request for comments and observations (LA/COD/67), the State of Israel hereby submits its principal comments and observations on the draft conclusions on **'Peremptory norms of general international law (*jus cogens*)'** adopted by the International Law Commission (hereinafter: "ILC" or "the Commission") on first reading in 2019.

2. The State of Israel attaches importance to the Commission's work on this topic, which concerns a distinctive category of international law that has a unique role in safeguarding the most fundamental rules of the international community of States. Israel appreciates both the efforts of the Special Rapporteur, Mr. Dire Tladi, and the Commission's extensive deliberations on the basis of his reports.

3. Given its importance and inherent sensitivities, this topic must be handled with great care, and it is in this light that Israel wishes to make a number of observations and voice several of its misgivings. These concern both the methodology that underlines the draft conclusions as a whole, and the substance of several of the draft conclusions more specifically.

II. Comments as to methodology

4. The work on the topic thus far has shown that the methodology employed by the Special Rapporteur in his reports has been a matter of concern not only for various States, but also for several members of the Commission. Israel shares this concern. In particular, we would note that the Special Rapporteur has relied greatly on theory and doctrine rather than on a thorough survey of State practice, which, in our view, should be the primary focus in the present context. In Israel's view, the lack of a rigorous analysis of relevant State practice risks undermining the accuracy and legal authority of various parts of this project, and is especially striking considering the sensitive nature of the subject matter. We would add that recourse to the jurisprudence of international courts and tribunals, let alone scholarly work, does not make such an analysis unnecessary.

5. As Israel has stressed in its past statements on this topic, the threshold and process for the identification of *jus cogens* norms under international law must

be particularly demanding and rigorous. To preserve the effectiveness and acceptance of a hierarchy of norms in international law, the boundary that divides peremptory norms from other norms must be identified clearly. A less thorough and less legally meticulous approach may seem appealing to some, but it is in our view a recipe for politicization, confusion and disagreement, and, ultimately, for undermining the force and authority of peremptory norms themselves. It follows that the draft conclusions, and the work of the Commission on this topic more generally, should reflect the existing law as widely accepted, so as to enhance the credibility of the draft conclusions and facilitate their wide acceptance.

6. Israel recalls the Commission's work on the topic "Identification of customary international law". As a general observation, given the significance of *jus cogens* norms, the overall approach to the methodology for identifying them must be at least as rigorous as the methodology proposed by the Commission for identifying rules of customary international law. Several examples in that regard will be provided further below.

7. Second, Israel objects to the inclusion of a non-exhaustive list of norms that have previously been referred to by the Commission as having the status of *jus cogens*. At this point, it suffices to say that including a list of norms that have not been put to the tests suggested by the draft conclusions themselves, is difficult to justify.

8. Third, and closely related, Israel believes that the work on the topic of *jus cogens* should be confined to stating and clarifying international law as it currently stands. This is due to the importance of *jus cogens* norms and their implications, and the apparent divergent views among States on several issues discussed in the draft conclusions in which the Commission apparently makes proposals for progressive development of the law. If the Commission nevertheless decides to include such proposals, it should indicate so clearly. In this context, Israel notes that Part Three of the draft conclusions, in particular, which pertains to legal consequences of *jus cogens* norms, mainly reflects suggestions for the progressive development of international law, or for new law.

9. Fourth, we share the concerns raised by other States with regard to the procedure that was followed by the Commission in its work on this project. In contrast to the regular practice of the ILC, the draft conclusions adopted by the Drafting Committee were not considered by the plenary until the conclusion of the first reading of the entire set of draft conclusions. As a result, it was more difficult

for States to follow and comment on the work as it progressed. Israel calls upon the Commission not to deviate from its regular practice in this way in the future.

III. Comments regarding the degree to which the exceptional character and consequences of *jus cogens* norms are accurately encapsulated in the draft conclusions

10. Israel remains concerned that the exceptional character of *jus cogens* norms and the very high threshold that is required for their identification are not always accurately encapsulated in the draft conclusions. Several points stand out in particular, as elaborated below.

A. Draft conclusion 5(2) - Bases for peremptory norms of international law (*jus cogens*)

11. Current text: Draft conclusion 5(2) states that "treaty provisions and general principles of law may also serve as bases for peremptory norms of international law (*jus cogens*)".

12. Comment: With regards to treaty provisions and general principles of law, Israel notes that the suggestion that they may serve as bases for *jus cogens* norms is based entirely on scholarly writings, without providing support in State practice. With regards to general principles of law, Israel notes that the concept itself is ambiguous and is subject to a different study by the Commission, and its inclusion in the context of the draft conclusions was criticized even from within the Commission itself.

13. Suggested amendment: Israel suggests that draft conclusion 5(2) be limited to treaty provisions. The draft conclusion or the commentary thereto should clarify that a treaty provision could be considered a basis for peremptory norms only where that provision reflects acceptance and recognition of a given norm as peremptory by virtually all States.

B. Draft conclusion 6 - Acceptance and recognition

14. Current text: Draft conclusion 6 states that "[t]o identify a norm as a peremptory norm of general international law (*jus cogens*), there must be evidence that such a norm is accepted and recognized as one from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character."

15. Comment: Israel is concerned that the commentary to draft conclusion 6 does not adequately capture the requirement of 'acceptance and recognition', and therefore disregards the exceptional character of *jus cogens* norms and the very high threshold required for their identification.

16. In Israel's view, the words "accepted and recognized" require that States must have expressed unequivocal and affirmative support for the status of a particular norm as one of *jus cogens*. Acts or omissions which may be interpreted as implied acceptance or recognition, for example, do not suffice. This basic notion does not find sufficient expression in the commentary, which leaves quite vague this important matter; fails to refer consistently to acceptance *and* recognition (sometimes referring to recognition alone); and cites jurisprudence that does not always make things clearer.

17. Suggested amendment: In light of the above, the commentary should clearly reflect the very high threshold necessary for a determination that there exist acceptance and recognition.

C. Draft conclusion 7 - International community of States as a whole

18. Current text: Draft conclusion 7(2) states that "[a]cceptance and recognition by a very large majority of States is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*); acceptance and recognition by all States is not required."

19. Comment: The requirement that a norm be "accepted and recognized" by "the international community of States as a whole" sets yet another very high standard of State acceptance and recognition. However, this very high standard is not accurately reflected by the current language of draft conclusion 7(2), which refers simply to "a very large majority of States". Israel believes that the threshold entails virtually universal acceptance and recognition, a notion that regrettably seems to have been lost in the present draft text.

20. Suggested amendment: Israel suggests that draft conclusion 7(2) be reworded as follows:

    Acceptance and recognition by ~~a very large majority of States~~ *virtually all States* is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*); ~~acceptance and recognition by all States is not required."~~

D. Draft conclusion 8 - Evidence of acceptance and recognition

Draft conclusion 8(1)

21. Current text: Draft conclusion 8(1) states that "[e]vidence of acceptance and recognition that a norm of general international law is a peremptory norm (*jus cogens*) may take a wide range of forms".

22. Comment: Israel generally agrees with the statement that evidence of acceptance and recognition in this context may take a wide range of forms. Israel notes, in line with its comments to draft conclusion 6, that only forms of evidence which indicate active and affirmative expression of acceptance of recognition may be taken into account. Inaction or failure to react on behalf of the relevant State may not serve as a form of evidence of acceptance and recognition. This is because silence or failure to react by a relevant State may stem from diplomatic, political, strategic or other non-legal considerations, which do not reflect that State's legal view.

23. Suggested amendment: Israel suggests that the commentary clearly state that in the case of peremptory norms of general international law (*jus cogens*), inaction may in principle not be said to be evidence of acceptance and recognition.

Draft conclusion 8(2)

24. Current text: Draft conclusion 8(2) provides a non-exhaustive list of the forms of evidence of acceptance and recognition that a norm of general international law is a peremptory norm (*jus cogens*).

Resolutions of international organizations or intergovernmental conferences

25. Comment: With regard to resolutions of international organizations (such as UN General Assembly resolutions) or intergovernmental conferences, Israel is concerned with the apparent lack of sufficiently careful consideration of the issue. The commentary merely refers to such resolutions as "an obvious example" of materials expressing the views of States. In comparison, the Commission's draft conclusions on the topic "Identification of customary international law" provided significantly more detailed clarifications in the commentary as to when and how such resolutions may serve as evidence of customary international law. Israel believes that the commentary here, should similarly provide detailed clarifications. Israel would also note in this context, that the work of the ILC on customary international law did not refer to

resolutions of international organizations or intergovernmental conferences as such, but to the conduct of States in connection with such resolutions, as a form of evidence of customary international law. Therefore, Israel believes that the commentary should clarify that such resolutions may be taken into account as relevant practice only as part of a case-by-case scrutiny of the conduct of States.

26. Israel also believes that great caution is needed before assigning normative value to resolutions of international organizations. Indeed, as the International Court of Justice noted, "considerable care is required before inferring from votes cast on resolutions before political organs such as the General Assembly conclusions as to the existence or not of a legal dispute on some issue covered by a resolution … some resolutions contain a large number of different propositions; a State's vote on such resolutions cannot by itself be taken as indicative of the position of that State on each and every proposition within that resolution".[1]

27. As the Commission itself noted in the commentary to its work on customary international law, "this is due to the fact that such resolutions are normally not legally binding documents, and generally receive less legal review than, for example, treaty texts". Israel also accepts the Commission's observation that "the attitude of States towards a given resolution … expressed by vote or otherwise, is often motivated by political or other non-legal considerations".[2]

28. Among the factors to be examined are the particular content of the resolution, the debates and negotiations leading up to the adoption of the resolution (especially explanations of vote and similar statements given immediately before or after adoption), and the degree of support for the resolution.[3]

29. Suggested amendment: Israel suggests that draft conclusion 8(2) and the commentary thereto clearly reflect that resolutions of international organizations or intergovernmental conferences may not, in and of themselves, serve as indication for the legal positions of the involved States. Accordingly, the commentary should clarify that such resolutions, as well as States' votes in their context, cannot be automatically taken as evidence for the existence of a

[1] See *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment*, I.C.J. Reports 2016 (hereinafter: "the *Marshall Islands* case"), p. 833, para. 56.
[2] See *Draft conclusions on identification of customary international law, with commentaries*, A/73/10, 2018, pp. 147-149.
[3] In this regard, see the *Marshall Islands* case: "The wording of a resolution, and votes or patterns of voting on resolutions of the same subject-matter, may constitute relevant evidence of the existence of a legal dispute in some circumstances, particularly where statements were made by way of explanation of vote. …"

peremptory norm. Rather, as expressed by the ILC in the context of its work on customary international law, careful analysis of such resolutions and their related discussions may, depending on the context, be used to identify the legal positions of individual States on a case-by-case basis.

Decisions and judgments of national courts

30. Comment: The Commission's work on "Identification of customary international law" has already recognized that national courts "operate within a particular legal system, which may incorporate international law only in a particular way and to a limited extent", and that, therefore, "some caution is called for when seeking to rely on decisions of national courts as a subsidiary means for the determination of rules of customary international law".[4] This is all the more so as it is, in Israel's view, the executive branch that, in principle, reflects the official view of a State in international relations. The extent to which decisions of national courts as evidence of State practice should thus depend on the relevant legal system, and on the circumstances of the particular case.

31. In this context and more generally, higher national courts are more likely to have expertise in the interpretation and application of international law than lower ones – an important factor that must be kept in mind in the identification of *jus cogens* norms. The Commission itself recognized that "national courts may sometimes lack international law expertise and may have reached their decisions without the benefit of hearing argument advanced by States".[5] In light of the significance of identifying a norm as *jus cogens*, and the careful approach adopted by the ILC in its draft conclusions on "Identification of customary international law", Israel is of the view that decisions of national courts should be subject to a higher threshold than in the context of the determination of rules of customary international law.

32. Therefore, with regards to decisions and judgments of national courts, Israel believes that they can be regarded as evidence of acceptance and recognition of *jus cogens* norms by a State, only in the case of final and definitive decisions of higher courts. In Israel's view, only such decisions should be considered

[4] ILC, "Draft conclusions on identification of customary international law and commentaries thereto", Report of the International Law Commission, Seventieth Session (30 April-1 June and 2 July-10 August 2018), U.N. Doc. A/73/10 (2018), p. 150.

[5] *Id.*

reflective of the view of the State in question.[6] Otherwise, a decision that is subject to further proceedings before a higher court may lead to a different result, thus changing the judicial view of the State in question.

33. Suggested amendment: Israel suggests that the commentary clarify the limited circumstances in which decisions of national courts may serve as evidence of acceptance and recognition of a norm of general international law as peremptory. In particular, Israel suggests that the commentary clearly state that the level of a court in the domestic judicial hierarchy should be taken into account.

Public statements made on behalf of States

34. Comment: The commentary does not provide any explanation for the term "public statements made on behalf of States". As there are different types of public statements, made by different actors, in different contexts, it is important that the commentary clarify that these considerations are relevant to assessing the weight of each statement.

35. Suggested amendment: Given the significance of *jus cogens* norms, it is important that the standard for assessing public statements on behalf of States is at least as high as the one used by the Commission in its work on customary international law. Therefore, Israel suggests that the commentary make clear that public statements made on behalf of states would be relevant in ascertaining *jus cogens* norms only in cases where the relevant statement was made by an authorized representative of the State concerned and made in an official capacity.

Government legal opinions and diplomatic correspondence

36. Comment: The commentary does not provide any State practice showing reliance on government legal opinions and diplomatic correspondence for ascertaining *jus cogens* norms. Unlike other forms noted in this draft conclusion, government legal opinions and diplomatic correspondence are more than likely intended to be confidential. Considering the need for a very high evidentiary threshold of evidence of acceptance and recognition, the standards for utilizing government legal opinions and diplomatic correspondence as evidence for their formation should be high.

[6] See Israel's comments and observations in that regard made in the context of the Commission's work on customary international law. See Identification of customary international law, Comments and observations received from Governments, A/CN.4/716, p. 25.

Suggested amendment: In light of the above, Israel recommends, for the sake of clarity, that the commentary state that government legal opinions and diplomatic correspondence may be taken into account, provided it is clear, in the circumstances, that they represent the authoritative view of the State. For example, if they are made publicly available as such by that State.

Administrative acts

37. Comment: The commentary does not provide a definition for this term, or any example of State practice in this context. The lack of explanation in the commentary regarding administrative acts makes it difficult to comment on which specific circumstances the commentary has in mind as relevant.

38. Suggested amendment: Israel suggests deleting the reference to administrative acts, or at least providing the necessary definition, as well as context, which would explain in which circumstances such acts could be evidence of *jus cogens*.

E. Draft conclusion 9 - Subsidiary means for the determination of the peremptory character of norms of general international law

39. Current text: Draft conclusion 9 lists subsidiary means for the determination of the peremptory character of *jus cogens* norms.

40. Comment: Israel notes that draft conclusion 9 is based on Article 38(1)(d) of the Statute of the International Court of Justice, which pertains to the sources of law to be applied by the Court. In this context, Israel would like to recall that the criteria for determining whether a norm is peremptory, depends on whether States have accepted and recognized a certain norm as such. The commentary correctly notes that the subsidiary means mentioned in draft conclusion 9 merely "facilitate the determination of whether there is acceptance and recognition by States but they themselves are not evidence of such acceptance and recognition".

41. Israel notes that the text of draft conclusion 9(2) lists "[t]he works of expert bodies established by States or international organizations" as subsidiary means. However, it is important to note that that Article 38(1)(d), as well as the Commission's draft conclusions on identification of customary international law, do not refer to the work of expert bodies. The commentary does not provide any indication or reference to relevant State practice that establishes such work of expert bodies as a subsidiary means. Accordingly, Israel is of the view that

this suggestion is not based on any established rule or practice, and objects to its inclusion.

42. Suggested amendment: Israel requests to delete the reference to the work of expert bodies from the draft conclusions. At most, the issue of expert bodies should be dealt with in the commentary, in line with the careful treatment that the work of international bodies engaged in the codification and development of international law received in the work of the Commission on "Identification of customary international law".[7]

E. **Draft conclusion 14 - Rules of customary international law conflicting with a peremptory norm of general international law (*jus cogens*)**

43. Current text: Draft conclusion 14(3) states that "[t]he persistent objector rule does not apply to peremptory norms of general international law (*jus cogens*)".

44. Comment: Israel notes that the existence of persistent objectors is highly relevant to whether a norm has been accepted and recognized by the international community of States as a whole. The commentary maintains that a *jus cogens* norm may develop notwithstanding a persistent objector as the acceptance and recognition required for the identification of such norms are those of "a very large majority of States" only. The statements in support of this assertion appear too broad and potentially confusing. In line with Israel's position in the context of its comments to draft conclusion 7(2), given that virtually universal acceptance and recognition are required for the formation of a *jus cogens* norm, it is highly questionable whether such norms could be developed and crystallized in the face of significant persistent objection.

45. Suggested amendment: In light of the above, Israel suggests to omit draft conclusion 14(3). In case the Commission wishes to maintain this draft conclusion, at the very least the commentary should reflect that there exists disagreement as to whether *jus cogens* norms could be developed and crystallized in the face of significant persistent objection.

[7] The Commission noted in the commentary to its draft conclusions on identification of customary international law, that the value of each output by an expert body "needs to be carefully assessed in the light of the mandate and expertise of the body concerned, the extent to which the output seeks to state existing law, the care and objectivity with which it works on a particular issue, the support a particular output enjoys within the body, and the reception of the output by States and others." See *supra* note 4, at p. 151.

IV. Codification of existing law vs. progressive development of the law

46. As stated above, Israel views with concern any attempts to attach to the violation of *jus cogens* norms consequences that go beyond the contours of the regime proposed in Article 53 of the Vienna Convention on the Law of Treaties. In this regard, Israel reiterates that Part Three of the draft conclusions, in particular, mainly comprises suggestions for the progressive development of the law, or for new law. If the Commission nevertheless decides to engage in such proposals, the Commission should clearly so indicate. Several points in that regard are provided below.

A. Draft conclusion 16 - Obligations created by resolutions, decisions or other acts of international organizations conflicting with a peremptory norm of general international law (*jus cogens*)

47. Current text: The commentary to draft conclusion 16 states that "[d]raft conclusion 16 is … meant to be broad, covering all resolutions, decisions and acts that would otherwise establish obligations under international law." The commentary specifically notes that draft conclusion 16 applies to resolutions of the United Nations Security Council, taken under chapter VII of the Charter of the United Nations.

48. Comment: Israel notes that article 53 of the Vienna Convention on the Law of Treaties deals only with the implications of *jus cogens* norms have on international treaties, and does not deal with resolutions of international organizations. Israel shares the concerns raised by a number of States that there is a significant lack of State practice demonstrating that a State may refuse to comply with a binding Security Council resolution based on an assertion of a breach of a *jus cogens* norm.

49. Suggested amendment: Accordingly, the commentary's reference to resolutions of the United Nations Security Council in this context cannot be regarded as reflecting existing law and should be omitted.

B. Draft conclusion 19 - Particular consequences of serious breaches of peremptory norms of general international law (*jus cogens*)

50. Current text: Draft conclusion 19 concerns "particular consequences of serious breaches of obligations arising under peremptory norms of general international law (*jus cogens*)".

51. Comment: As noted by the commentary, this draft conclusion is based, to a great extent, on the Draft Articles on Responsibility of States for Internationally Wrongful Acts (the "Draft Articles on State Responsibility"), as well as on some advisory opinions of the International Court of Justice. As for the Draft Articles on State Responsibility, Israel reiterates its view, which is shared by other States, that not all of the Draft Articles on State Responsibility reflect customary international law. With regards to draft article 41(1) of the Draft Articles on State Responsibility, which serves as basis for draft conclusion 19(1) on *jus cogens*, the Commission has itself acknowledged in the commentary thereto that "it may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law". This remains true today. The commentary to the current draft conclusions on *jus cogens* does not provide sufficient (if any) evidence of development of State practice regarding the suggestion in draft article 41(1) of the Draft Articles on State Responsibility that would indicate a change in this position.[8] Therefore, Israel considers that the particular consequences referred to in draft conclusion 19 do not reflect existing international law.

52. As for the two advisory opinions that are cited in paragraph 2 of the commentary in support of draft conclusion 19, it should be recalled that in both opinions the Court did not explicitly identify a norm of *jus cogens*, but rather referred to the *erga omnes* character of the rules in question. Accordingly, these two advisory opinions cannot serve as a reliable source for establishing a duty of States to cooperate to bring a breach of *jus cogens* to an end.

53. Suggested amendment: Israel is thus of the view that draft conclusion 19 should be omitted from the Draft Conclusions. If it is not omitted, Israel suggests that the commentary at the very least make it clear that it does not reflect existing law.

C. Draft conclusion 21 - Procedural requirements

54. Current text: Draft conclusion 21 outlines a procedure for invalidating or terminating a rule of international law on the grounds that it conflicts with a peremptory norm of general international law.

[8] The commentary to the draft conclusions on *jus cogens* refers in this regard merely to one national court judgement, without mentioning that even in that single case, the State of that court, in the context of its statement in the Sixth Committee, viewed with concern the reliance of the draft conclusions on the Draft Articles on State Responsibility, and stated that the status of the Draft Articles on State Responsibility as customary international law is unsettled.

55. Comment: Draft conclusion 21, too, clearly does not reflect existing international law, and the procedure offered in it is novel. The commentary to draft conclusion 21 itself states that "not every aspect of the detailed procedure set forth in draft conclusion 21 constitutes customary international law."

56. Israel would like to recall that, as the commentary correctly highlights, the International Court of Justice determined that the mere fact that rights and obligations of a *jus cogens* character may be at issue in a dispute, would not give the Court jurisdiction to entertain that dispute.[9]

57. Suggested amendment: In line with its view that the draft conclusions should not go beyond reflecting the state of the law as it currently stands, Israel believes that draft conclusion 21 should be omitted from the draft conclusions. The inclusion of procedural provisions concerning dispute resolution is particularly inappropriate given that the draft conclusions are not intended to become a convention, as noted by the Special Rapporteur himself in his first report.[10]

58. If the draft conclusion is not omitted, the commentary should at least make it clear that the draft conclusion as a whole does not reflect current existing law.

59. For similar reasons, in line with its statement in the Sixth Committee in 2019, Israel continues to support the decision made by the Commission not to include draft conclusions that concern the exercise of domestic jurisdiction over offenses that may be prohibited by *jus cogens* norms, as well as not to address the question of immunities in this context.

V. Draft conclusion 23 - Inclusion of a non-exhaustive list of *jus cogens* norms as an annex to the draft conclusions

60. Current text: Draft conclusion 23 refers to a non-exhaustive list of norms that the Commission is said to have previously referred to as having the status of *jus cogens*. The list itself is attached as an annex to the draft conclusions.

[9] See *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, at p. 32: "The Court observes, however, as it has already had occasion to emphasize, that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things" (East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995, p. 102, para. 29), and that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute. The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties.")

[10] *See* First report on jus cogens by Dire Tladi, Special Rapporteur (A/CN.4/693), p. 45.

61. Comment: Israel joins numerous other States in objecting to the inclusion of any list of substantive norms of *jus cogens* in a project which the Commission itself described as dedicated solely to the methodology of identifying such norms. The decision of the Commission to include the list is indeed surprising in light of the commentary to draft conclusion 1 (Scope), which clearly states that "[t]he draft conclusions are … not concerned with the determination of the content of the peremptory norms themselves". The commentary to draft conclusion 22 similarly states that "the present draft conclusions are not intended to address the content of individual peremptory norms of general international law (*jus cogens*)." It is also noteworthy that a similar path was not taken in the context of the Commission's recent work on the topic 'Identification of customary international law', and in its current work on the topic 'General principles of law'.[11]

62. **First, the fact that the Commission arguably recognized certain norms in the past as *jus cogens* does not of itself guarantee that these norms would be recognized as *jus cogens* if the methodology currently suggested by the draft conclusions would be applied to them**. In fact, most references by the Commission to *jus cogens* in the past were not substantiated by the kind of inquiry mandated by the draft conclusions themselves.

63. If the Commission were in fact interested in using its own past propositions to demonstrate that certain norms have a peremptory character, it should have, at the very least, inquired whether (and shown that) these propositions were well-founded and based on a coherent methodology, as noted above. This is significant, particularly in light of the commentary to draft conclusion 1 (Scope), which clearly states that "[t]he process of identifying whether a norm of international law is peremptory or not requires the application of the criteria developed in these draft conclusions." In the absence of such an analysis, the list cannot be treated as indicative of *jus cogens* norms.

64. Moreover, several of the rules included in the list raise significant doubts. For instance, when addressing the right to self-determination in paragraph 12 of the commentary to draft conclusion 23, the Commission refers to several examples in which it supposedly already recognized this right as a *jus cogens* norm in the past. Yet, if one looks at some of the examples mentioned in the commentary to substantiate this apparent recognition, a different picture emerges. In some examples, the Commission examined the possibility of referring to the right to

[11] *See* First report on general principles of law by Special Rapporteur Marcelo Vázquez-Bermúdez (A/CN.4/732), p. 10.

self-determination as an example of *jus cogens* norms without reaching a definitive conclusion.[12] In other citations, the Commission actually stated specifically that it is better not to identify specific *jus cogens* norms, but rather to leave the full content of the rule of *jus cogens* to be worked out in State practice and in the jurisprudence of international tribunals.[13] In yet another example cited in the commentary, the Commission conflated the term *jus cogens* with the term *erga omnes*, relying in its analysis on sources which referred to the right to self-determination as *erga omnes* rather than *jus cogens*.[14] None of the sources cited in the commentary included a thorough methodological examination justifying the conclusion that the right to self-determination satisfied the *jus cogens* threshold.

65. **Second, Israel does not agree that all of the norms listed in the annex are of *jus cogens* character, and is of the view that the list is likely to generate significant disagreement among States and dilute the concept of *jus cogens* norms and its legal authority**. For example, the concept of "basic rules of international humanitarian law", which is included in the list, is not only far too vague, but paragraph 8 of the commentary to draft conclusion 23, which addresses these rules, fails to demonstrate that they are in fact *jus cogens* norms. The commentary mentions three sources that refer to the basic rules of international humanitarian law: (1) the Commission's commentary to Draft Article 40 of the Draft Articles on State Responsibility; (2) the conclusions of the Study Group on fragmentation of international law; and (3) the report of the Study Group on fragmentation of international law. Yet, none of these references provides sufficient evidence to demonstrate that the basic rules of international humanitarian law—whatever they are precisely—meet the standards codified in Article 53 of the Vienna Convention on the Law of Treaties and indeed endorsed by the draft conclusions themselves. For instance, the commentary to Draft Article 40 of the Draft Articles on State Responsibility refers to the *Nuclear Weapons* advisory opinion, in which the Court opined that certain "fundamental rules are to be observed by all States whether or not they

[12] *See* Conclusion 33 of the Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law (A/61/10), p. 419.

[13] See, for example, paragraph 3 of the commentary to draft article 50 of the Draft Articles on the Law of Treaties, where the Commission explicitly decided against suggesting specific examples of *jus cogens* norms in the Draft Articles on the Law of Treaties. The reason for the Commission's decision not do so was that suggesting examples would require the Commission to engage "in a prolonged study of matters which fall outside the scope" of its work on the Draft Articles on the Law of Treaties. Indeed, the Commission itself explicitly recognized that suggesting that a norm is peremptory requires a rigorous methodology, and cannot be a result of unsubstantiated assertions.

[14] See, for example, paragraph 5 of the commentary to draft article 40 of the Draft Articles on State Responsibility, which refers, *inter alia*, to the *East Timor case*. However, it is important to note that International Court of Justice did not refer in that case to the right to self-determination as a *jus cogens* norm.

have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law". The commentary to Draft Article 40 states that "[i]n the light of the description by ICJ of the basic rules of international humanitarian law applicable in armed conflict as "intransgressible" in character, it would also seem justified to treat these as peremptory. Yet, this interpretation is by no means obvious. The Court referred therein to "a great many rules of humanitarian law", language that seems incommensurate with the existing notion of a limited corpus of *jus cogens* norms.

66. Moreover, a few paragraphs after the one cited by the Commission, the Court explicitly addresses the question of the *jus cogens* status of international humanitarian law rules, and states clearly that there is "no need for the Court to pronounce on this matter". This clearly reflects that the word "intransgressible" used by Court was not intended to refer to *jus cogens*. This comment also applies to the similarly questionable interpretation of the *Nuclear Weapons* Advisory Opinion in paragraph 5 of the commentary to draft conclusion 5(1).

67. The conclusions and the report of the Study Group on fragmentation of international law likewise do not demonstrate that the basic rules of international humanitarian law are *jus cogens* norms. Both of these texts note that in its commentary to draft article 40 of the Draft Articles on State Responsibility, the Commission referred to the basic rules of international humanitarian law as an example of *jus cogens* norms. Yet, as we have shown above, the commentary to draft article 40 *does not* actually provide sufficient evidence to demonstrate that the basic rules of international humanitarian law are indeed of that quality.

68. Israel would also note that the absence of a clear definition and precise content for each of the norms listed creates ambiguity and confusion and makes it extremely difficult to assess or apply these norms. For example, paragraph 8 of the commentary to draft conclusion 23 fails to clarify what the "basic rules of international humanitarian law" are. The commentary itself notes that the conclusions of the Study Group on fragmentation of international law referred in this context to "basic rules of international humanitarian law applicable in armed conflict", while the report of the Study Group on fragmentation of international law referred generally to "the prohibition of hostilities directed at civilian population." None of these references provides a clear definition of the term "basic rules of international humanitarian law".

69. With regards to the right to self-determination, while Israel recognizes that self-determination is undoubtedly a significant right under international law, even

the Commission itself acknowledged that its exact content is a complex matter.[15] With regards to its status as a peremptory norm, Israel believes it is highly questionable whether the right to self-determination meets the standards for being recognized as a *jus cogens* norm. Indeed, in the *Chagos* advisory opinion, the International Court of Justice itself appears to have deliberately refrained from referring to the right to self-determination as a *jus cogens* norm.[16]

70. Suggested amendment: Israel shares the view, along with a considerable number of other States, that the draft conclusions should not include a list of *jus cogens* norms, whether illustrative or otherwise. This position is in line with our more general stance that work on the topic of *jus cogens* should be confined to stating and clarifying international law as it currently stands on the basis of a rigorous methodology grounded in State practice. Only by doing so can the draft conclusions earn for themselves wide acceptance and credibility. It is hoped that this and other changes will therefore be made at the second reading stage.

[15] Fourth report on Peremptory norms of general international law (*jus cogens*) by Special Rapporteur Dire Tladi (A/CN.4/727), p. 52: "[T]he discussion above has not attempted to solve the more complex problem of what constitutes the right to self-determination, i.e., whether the right applies only in the context of decolonization and whether the circumstances in which the right applies would permit external self-determination (secession) and, if so, under what circumstances."

[16] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95, at 219 (Sep. Op. Judge Cançado Trindade); 260 (Joint Dec. Judges Cançado Trindade and Robinson); 283 (Sep. Op. Judge Sebutinde); 308 (Sep. Op. Judge Robinson).