Ministero degli Affari Esteri
e della Cooperazione Internazionale

Observations of Italy to the ILC Conclusions on Peremptory Norms of General International Law (*Jus cogens*)

1. Italy would like to express its appreciation to the International Law Commission and to the Special Rapporteur, Mr. Dire Tladi, for the adoption of the **Draft Conclusions on Peremptory Norms of General International Law (jus cogens)** on first reading and its accompanying commentary.

2. Italy also appreciates the opportunity given to States to send comments and observations in the spirit of mutual constructive engagement between the ILC and UN Member States, especially in this critical phase leading to the final adoption of the draft conclusions. It is in that spirit, and without prejudice to additional comments Italy may wish to present at a later stage, that the following observations are submitted with regard to the draft conclusions and/or relative commentary that in Italy's view require a revision at second reading.

I. General observations

3. Italy attaches the greatest importance to the work of the ILC on the topic of *jus cogens*. It has been supportive of the categories of *jus cogens* norms and *erga omnes* obligations ever since their emergence in the 1960s and 1970s of last century. These are norms and obligations of international law, which do not only protect the subjective rights and legal interests of individual States, but they also protect the fundamental interests of the international community as a whole. *Jus cogens* in particular reflects the idea that certain fundamental norms of international law are hierarchically superior and do not allow derogation. Some of Italy's most eminent jurists – the then members of the ILC, Roberto Ago and Gaetano Arangio-Ruiz, precisely in the respective roles as ILC Special Rapporteurs on the law of State responsibility – provided seminal contributions to the elaboration of the significance of *jus cogens* norms and *erga omnes* obligations for the purpose of State responsibility, identifying key conceptual distinctions between ordinary violations of international law and serious violations of fundamental norms protecting the values of the international community as a whole.

4. During the debates held in the Sixth Committee in 2018 and 2019 Italy expressed some doubts on the type of exercise undertaken by the ILC. On the one hand, the Draft Conclusions are an example of "expository codification" of a practical nature, which partly lacks the theoretical depth to identify the main normative intricacies of the notion of *jus cogens*. The Draft

Conclusions do not aim at identifying the existing peremptory norms of general international law (in truth, not an impossible task given the latter's limited number) and their specific legal consequences, but they limit themselves to reiterate normative elements, which are already part of the law of treaties and of the law of international responsibility, and that have already been identified by the ILC itself in its previous works. As a result, the practical, added value of the Draft Conclusions within the present scope and in the present form is that they would bring under a single instrument a number of consolidated notions of international law, which should assist those called to apply international law in the identification of peremptory norms of general international law and in defining their legal consequences. On the other hand, the Draft Conclusions contain certain prescriptive provisions, including the procedural requirements on the invocation of *jus cogens* norms – namely Conclusion 21 –, which are difficult to reconcile with the stated purpose of "providing guidance to all those who may be called upon to determine the existence of peremptory norms of general international law […]" (…). Such procedural requirements could have been appropriate if the intention of the ILC (as done with previous works) was that of elaborating a set of Draft Articles with a view to preparing a sound legal basis for the future elaboration of a convention – but this is admittedly not the intention of the ILC in this case.

5. Italy would suggest that the ILC state clearly the nature and objectives of the project it aims at pursuing and that its methodology and conclusions are consistent with that statement.

6. Another general shortfall of the Draft Conclusions is the very limited room left for international organizations as distinct legal subjects endowed with a separate international legal personality, paradoxically in a historical juncture in which the phenomenon of international organization has become an important part of the international legal system. This is particularly stark in the part of the project dedicated to legal consequences of the violation of peremptory norms (Draft Conclusions 17 to 21). It is also surprising in light of the fact that ILC in 2011 adopted a full set of Draft Articles on the Responsibility of International Organizations, which regulate *inter alia* the specific consequences related to serious violations of peremptory norms and to violations of *erga omnes* obligations (Draft Articles 42 and 49 respectively). The Commission should incorporate in its current work those important provisions. If instead a choice is made not to do that, a clear explanation should be provided in the commentary and a non-prejudice clause should be inserted in the text of the Draft Conclusions (the only relevant non-prejudice provision is to be found at paragraph 11 of the commentary to Draft Conclusion 19 without explanation).

7. Finally, Italy would like to observe that the title of the text should better reflect its scope in accordance with Conclusion 1 and namely, that "[t]he present draft conclusions concern the identification and legal consequences of peremptory norms of general international law (*jus cogens*)". Accordingly a reformulation of the title in "draft conclusions on the identification and legal consequences of peremptory norms of general international law (*jus cogens*)" should be considered and would be in line with the practice followed in the recent project on the identification of customary international law (where the title closely reflects the scope of the project).

II. Draft Conclusion 4 – Criteria for the identification of a peremptory norm of general international law (*jus cogens*)

8. If the purpose of the Draft Conclusions is to "provide guidance" to those called to identify the existence and applicability of peremptory norms of general international law, Draft Conclusion 4 and its commentary would benefit from more precise drafting. In terms of terminology, if the choice is made to employ the term "criteria", other terms such as "conditions" should be avoided (in fact one wonders whether the two terms are to be considered synonymous). Moreover, the identification of a norm of general international law already requires the fulfillment of certain "criteria" and one wonders whether it is useful to describe "a two-step approach" in rigid terms (the steps to be made seem more than two).

9. Finally, paragraph 2) of the commentary seems superfluous in that it specifies the meaning of the expression "it is necessary to establish" and that the relevant criteria "should not be assumed to exist". Such specifications are safe assumptions in a project devoted to the *identification* of peremptory rules of general international law. Deletion of the paragraph is recommended.

III. Draft Conclusion 5 – Bases for peremptory norms of general international law (*jus cogens*)

10. The first observation Italy would like to make concerns the terms "*basis*" and "*bases*". In fact what the ILC identifies as "*bases*" of peremptory norms appear to be the "*sources*" established by Article 38, paragraph 1, of the ICJ Statute. The commentary states that the words "*basis*" and "*bases*" "are meant to capture the range of ways that various sources of international law may give rise to the emergence of a peremptory norm of general international law"; legally speaking, one may wonder to what extent "the range of ways" that "various sources of international law may give rise to the emergence of a peremptory norm" describes anything different from the concept of "source of a peremptory norm".

11. A second consideration is in order. According to Draft Conclusion 5 "customary international law is the most common basis for peremptory norms of general international law", but "[t]reaty provisions and general principles of law may also serve as bases for peremptory norms of general international law". The commentary clarifies that customary international law is the ordinary "basis" of peremptory norms, but that exceptionally the latter norms may be derived from treaty provisions and general principles of law. Italy is of the view that such distinction between customary international law, on the one hand, and treaty law and general principles of law, on the other hand, is hard to sustain and indeed confusing. At footnote 772 one finds of great use the quote from Prof. Roberto Ago, who during the 828th meeting of the ILC in 1966 stated that "[e]ven if a rule of *jus cogens* originated from a treaty, it was not from the treaty as such that it derived its character but from the fact that, even though derived from the treaty…, it was already a rule of general international law." If one takes into consideration the prohibition of torture or the prohibition of genocide – two well-established peremptory norms of general international law –, one can see that the relevant treaty provisions under the 1984 Convention against Torture and the 1948 Convention for the Prevention and Punishment of Genocide, respectively, give expression to existing customary international law having acquired a *jus cogens*

status. The only concrete example that the commentary provides of a *jus cogens* norm deriving from a treaty is the prohibition of the use of force under the UN Charter; and yet as the ICJ famously stated in its 1986 *Nicaragua* judgment that prohibition is also a fundamental norm of customary international law. The fact that treaty provisions reflecting *jus cogens* norms are not themselves the source of the peremptory norm is indeed recognized by the commentary to Draft Conclusion 13 on the absence of effect of reservations to treaties on peremptory norms, where it states that the "[t]he phrase 'as such' is intended to indicate that *even when reflected in a treaty provision, a peremptory norm of general international law (jus cogens) retains its validity independent of the treaty provision*" (emphasis added). Finally, the commentary does not provide any example of peremptory norms deriving from general principles of law.

12. Given the above difficulties with the text of Draft Conclusion 5 and its commentary, Italy suggests that the draft conclusion is deleted. Also, given that the project does not aim at pursuing a systemic legal understanding and regulation of peremptory norms of general international law, but it is mainly aimed at distilling a sound methodology to identify *jus cogens* norms, Italy is of the view that Draft Conclusion 8 on the "forms of evidence of acceptance and recognition" may be sufficient to "provid[e] guidance to all those who may be called upon to determine the existence of peremptory norms of general international law […]"; it notes that among those forms of evidence, treaty provisions are also enlisted. Moreover, a more precise definition of the criteria and of the s.c. "two-step approach" under the commentary to Draft Conclusion 4 could be instrumental to clarifying the relationship between the different sources of "general international law", without the need of a dedicated draft conclusion such as Draft Conclusion 5.

IV. Draft Conclusion 6 – Acceptance and recognition

13. Italy sees the need for a specific provision related to the authentic meaning of "acceptance and recognition" in the context of identification of *jus cogens* norms. At the same time, it is of the view that paragraph 1), specifying that the requirement of acceptance and recognition of peremptory norms of general international law "is distinct from acceptance and recognition as a norm of general international law", is unnecessary and potentially confusing. The commentary states that the "acceptance and recognition" addressed in the draft conclusion "is not the same as, for example, acceptance as law (*opinio juris*), which is an element for the identification of customary international law." This statement seems tautological if one looks at the way Draft Conclusion 4 is drafted and at the "two-step approach" identified in the commentary to Draft Conclusion 4 according to which "[f]irst, evidence that the norm in question is a norm of general international law is required" and "[s]econd, the norm must be shown to be accepted and recognized by the international community of States as a whole as having a peremptory character" (A/74/10, p. 158). Deletion of the paragraph is suggested.

14. Italy is also of the view that some of the language in the commentary departs from the methodological gist of the project and takes it to a quasi-judicial or quasi-arbitral dimension by setting burdens of proof in the identification of peremptory norms of general international law. For instance, the commentary states that "[…] *in order to show* that a norm is a peremptory norm of general international law (*jus cogens*), *it is necessary to provide evidence* that the norm is accepted and recognized as having the qualities mentioned" (emphasis added); it continues by

specifying that "[t]he word 'evidence' is used to indicate *that it is not sufficient merely to assert* that a norm is accepted and recognized by the international community of States as a whole as one from which no derogation is permitted. *It is necessary to substantiate such a claim by means of providing evidence*" (emphasis added, A/74/10, p. 181). Italy submits that these parts of the commentary should be deleted or redrafted, as in the current form the commentary seems to suggest that any assertion - made for example in diplomatic correspondence between States - as to the *jus cogens* nature of a given norm would be devoid of legal value, if not accompanied by relevant evidence, thus undermining the role of *opinio juris* in this context.

V. Draft Conclusion 7 – International Community of States as a Whole

15. Italy concurs with the Commission that unanimity in acceptance and recognition is not necessarily required for a norm of general international law to be considered as having a peremptory character.

16. It only suggests under paragraph 3) the addition of the term "subjects" ("other subjects and actors") to add legal precision and account for the specific position of international organizations possessing international legal personality and playing a subsidiary, and yet important role, in the assessment of the acceptance and recognition by the international community of States as a whole.

VI. Draft Conclusion 8 – Evidence of acceptance and recognition

17. Italy suggests that the reference to "resolutions adopted by an international organization or at an intergovernmental conference" in paragraph 2) should be complemented by the reference to the "conduct of States in connection with resolutions adopted by an international organization or at an intergovernmental conference", which reflects the wording of Conclusion 10, paragraph 2, of the projection on the Identification of customary international law approved by the ILC in 2018. In Italy's view the above addition is necessary as oftentimes the resolutions as such are attributable to the international organization as a distinct legal subject and *per se* cannot constitute evidence of the "acceptance and recognition" by the member States of the relevant international organization.

VII. Draft Conclusion 9 – Subsidiary means for the determination of the peremptory character of norms of general international law

18. Italy finds the wording and legal contents of Draft Conclusion 9 persuasive. At the same time, it is of the view that the commentary should clarify that the draft conclusion is without prejudice to the specific, privileged role of the International Court of Justice with regard to the determination of peremptory norms in accordance with Article 66 of the Vienna Convention on the Law of the Treaties.

VIII. Draft Conclusion 14 – Rules of customary international law conflicting with a peremptory norm of general international law (*jus cogens*)

19. Draft Conclusion 14 is built on the idea that *jus cogens* norms are hierarchically superior to the *jus dispositivum*, whether deriving from a treaty provision or from a rule of customary international law. Italy fully endorses that idea. However, it is of the view that Draft Conclusion 14 (especially paragraph 1) and its commentary require further refinement.

20. Firstly, the provision in paragraph 1) according to which "[a] rule of customary international law does not come into existence if it conflicts with a peremptory norm of general international law" describes an impossible scenario of a conflict between a non-existent rule (of customary international law) and an existent peremptory norm. Either the rule of customary international law has come into existence and may conflict with a peremptory norm (a conflict which may produce legal consequences in terms of invalidity of the customary rule) or the rule has not come into existence thereby rendering any conflict with a peremptory norm impossible. *Tertium non datur*.

21. Secondly, except for the rare occasions of bilateral or regional customary rules, it is difficult to envisage how a customary rule may emerge if its content manifestly contradicts existing peremptory norms of general international law (any such emergence would put into serious question the existence itself of the peremptory norm according to the criteria identified in Draft Conclusion 4).

22. Thirdly, with regard to paragraph 7) of the commentary, given the essential content of customary rules, it is difficult to imagine how a "severability" scenario could be envisaged with regard to the only partial invalidation a rule of customary international law by the emergence of a subsequent peremptory norm. It is suggested that the Commission either provides some examples of State practice or deletes the relevant passage in the commentary altogether.

IX. 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*)

23. Draft Conclusion 16 is consistent with the idea of hierarchical superiority of *jus cogens* norms and, to that extent, Italy supports its insertion.

24. However, it is also of the view the Draft Conclusion should also contain, possibly in the text, a non-prejudice clause with regard to applicable procedures and mechanisms established under the laws of an international organization in order to review and challenge the acts of that international organization. In several international organizations, including regional organizations, the mere invocation and unilateral presentation of evidence with regard to an alleged conflict of an act of that international organization with a peremptory norm of general international law is not a sufficient ground to depart from an obligation imposed through that act, but certain procedural mechanisms have to be resorted to, including of a judicial nature, with a view to an impartial determination.

X. Draft Conclusion 17 – Peremptory norms of general international law (*jus cogens*) as obligations owed in the international community as a whole (*jus cogens*)

25. Italy welcomes the insertion of a specific conclusion recognizing the link between peremptory norms and *erga omnes* obligations. It notes that in paragraph 2) the commentary makes a brief reference to the recognition by the ILC itself in its previous work on State responsibility. In this respect, it would be advisable that the ILC makes reference in the commentary to the important reports elaborated by the Special Rapporteurs on State responsibility, ever since Prof. Roberto Ago elaborated the distinction between international delicts and international crimes in his 1976 reports. These resulted in the ILC adopting a set of draft articles at first reading in 1996, Art. 19 of which identified the concept of international crime of State with regard to the serious breach of *erga omnes* obligations. This reference is all the more important since (as the commentary explicitly recognizes) the International Court of Justice has applied the special consequences under Art. 41 of the ILC Articles on State Responsibility to violations of *erga omnes* obligations (case law cited in footnote 864 of the commentary).

XI. Draft Conclusion 18 – Peremptory norms of general international law (*jus cogens*) and circumstances precluding wrongfulness

26. Draft Conclusion 18 *per se* is unproblematic as it is fully in line with Article 26 of the ILC Articles on State Responsibility.

27. However, it does not address, not even in its commentary, the thorny issue of the relationship between self-defense, which is a circumstance precluding wrongfulness in accordance with Article 21 of the ILC Articles on State Responsibility, and the prohibition on the use of force, which in the past has been considered by the ILC as a peremptory norm of general international law. The problem hinges on the relationship between the *jus ad bellum* primary rules and the secondary rules of State responsibility. Despite the identification by the ILC in its annex of the "prohibition of aggression" as a peremptory norm of general international law – a restrictive choice which excludes from scope of the peremptory norm other uses of force not in conformity with Article 2, paragraph 4, of the UN Charter and that is not free from difficulties -, the issue remains outstanding and it would require a proper treatment, at least in the commentary, in order to avoid confusion.

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

28. Draft Conclusion 19 is drafted in conformity with Article 41 of the ILC Articles on State Responsibility, therefore Italy finds it acceptable. With regard to the commentary, Italy would like to raise the following points.

29. Firstly, Italy sees the need for the ILC to clarify its reference to the ICJ advisory opinions on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. In fact both advisory opinions grounded the identification of legal

consequences for third parties on the *erga omnes* nature of the obligations breached, rather than the peremptory nature of the corresponding norm and/or the serious violation of those obligations/norms. This clarification is particularly pressing given that in paragraph 1 the ILC states that the Draft Conclusion "does [not] address the consequences of breaches of peremptory norms that are not serious in nature" and in paragraph 9) it states that the "[t]he obligations in draft conclusion 19 apply only to serious breaches of peremptory norms of general international law (*jus cogens*)". The ILC may be of the view that, given the factual and legal circumstances, the reluctance of the Court to employ the normative category of *jus cogens* and the strict interconnection between *erga omnes* obligations and *jus cogens* norms, the ICJ, in those two advisory opinions, had indeed identified a serious violation of a peremptory norm (without explicitly stating that). And yet, if that is the case, the point should be clarified in the commentary.

30. Secondly, paragraph 3) of the commentary does not seem to reflect the balance reached by the ILC in 2001 with the incorporation of Article 54 in the Articles on State Responsibility. Instead it seems to suggest that collective countermeasures taken to react to serious violations of peremptory norms with a view to pursuing an interest of the international community should not be considered as falling under this provision. This suggestion is not justified in the light of the abundance of practice of the last twenty years stemming from States and international organizations alike. A more balanced drafting of paragraph 3) would be welcome and the second sentence of the same paragraph (which is misleading in the current form) should be deleted.

31. Thirdly, in line with what has already been submitted (*supra*, General observations), with regard to the place of international organizations in the present project, paragraph 11 of the commentary should be deleted.

32. Finally, Italy would like to point out that in paragraph 2 of the commentary the Commission makes reference to the "adoption of its articles on the law of treaties". As confirmed by footnote 878, reference should instead be made to the articles on State responsibility.

XIII. Draft Conclusion 21 – Procedural requirements

32. In light of the consideration that the Draft Conclusions are admittedly not meant to be transformed in an international legally-binding instrument at a later stage, the need for such provision can be seriously questioned. It is also unclear how the proposed procedure would interact with the dispute settlement provisions contained in the Vienna Convention on the Law of Treaties. Moreover, the notions of "a State" and of "States concerned" under paragraph 1) are confusing as they seem to suggest that there is only "one State" entitled to invoke the ground of invalidity and that there may be States which are not "concerned" by the invocation of a violation of *jus cogens* norm as a ground for invalidity of a rule of international law: given that the obligations deriving from peremptory norms are *erga omnes* obligations, "all States" should be entitled to invoke the violation and "all States" should be notified of the claim. That, in turn, poses the question of the position of non-States parties to a relevant treaty, which would be entitled to object (a right not contemplated under the relevant provisions of the Vienna Convention on the Law of Treaties).

33. Italy sees Draft Conclusion 21 unnecessary for the purpose of the current project and potentially problematic, especially in its relation to the Vienna Convention on the Law of Treaties. Therefore it suggests its deletion.

XIV. Draft Conclusion 22 - Without prejudice to consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail; and Draft Conclusion 23 – Non-exhaustive list (with related annex)

34. Draft Conclusion 22 provides for a non-prejudice clause related the consequences that "specific peremptory norms…may otherwise entail". Draft Conclusion 23 refers to the annex containing "a non-exhaustive list" of norms that the ILC has found to have a peremptory character in its previous work. These are: the prohibition of aggression; the prohibition of genocide; the prohibition of crimes against humanity; the basic rules of international humanitarian law; the prohibition of racial discrimination and apartheid; the prohibition of slavery; the prohibition of torture; the right of self-determination.

35. Italy is of the view that the two conclusions and the annex should be read and commented in conjunction. As the commentary to both Draft Conclusions 22 and 23 clearly states "the present draft conclusions are not intended to address the content of individual peremptory norms" (commentary to Draft Conclusion 22, para. 2); and they "do not seek to elaborate a list of peremptory norms of general international law (commentary to Conclusion 23, para. 1), since "[t]o elaborate a list of peremptory norms of general international law (*jus cogens*), including a non-exhaustive list, would require a detailed and rigorous study of many potential norms […]" (*ivi*). However, "[a]lthough the identification of specific norms that have a peremptory character falls beyond the scope of the present draft conclusions, the Commission has decided to include in an annex a non-exhaustive list of norms previous referred to by the Commission as having peremptory character." (*ibidem*, para. 2). In this respect, Italy would like to make the following observations.

36. The ILC had the possibility of taking two alternative routes. In a project focused on peremptory norms of general international law, it could have made the choice to identify, on the basis of the very criteria it has established, those norms that currently fulfill those criteria and the consequences (including the special consequences) flowing from a violation of those norms (not an impossible task). A more comprehensive and far-reaching project would have also given the opportunity to the ILC to deal with some of the most relevant and contentious issues on the legal effects of *jus cogens* norms related to the prohibition of crimes against humanity and to international humanitarian law on the rules on State immunity (a topic only evoked in paragraph 4 of the commentary to Draft Conclusion 22 and to which Italy attaches the greatest importance). However, it has decided to take a different route, namely to distill a number of secondary rules related to the identification of peremptory norms and their general legal consequences. If the choice made is the latter, the ILC should fully adhere to its methodology and not venture in the presentation of a list based on its own previous works, many of which date back several decades ago. After all, those making use of the draft conclusions will have the possibility of resorting to the commentary in order to identify potential peremptory norms of general international law.

37. If that notwithstanding the intention of the ILC is to maintain a list (whether as a Draft Conclusion or as an annex), Italy reiterates the view expressed during the 2019 debate in the Sixth Committee that such a list should benefit from a more extensive analysis of international jurisprudence, beyond the mere – sometime selective - restatement of what has been found by the ILC in previous works dating back as far as the 1970s. Rather than elaborating a non-exhaustive list of what the ILC has determined to be rules of *jus cogens*, Italy would see value in the elaboration of a list that the ILC today sees as containing rules of *jus cogens* on the basis of the criteria it has established. The relevant provision should clearly state that the list is without prejudice to future developments of international law.

XV. Concluding remarks

38. In conclusion, Italy reiterates its appreciation for the work of the ILC on peremptory norms of general international law. It is convinced that a continued, substantial dialogue between the ILC and States is conducive to effective outcomes in the work of the Commission. It looks forward to continuing its engagement with the project as one of the most important endeavors in which the ILC has recently embarked.