Comments by the Government of Japan to the ILC's Draft Conclusions on Peremptory Norms of General International Law

25 of June, 2021

Japan appreciates the efforts of the Commission, in particular the Special Rapporteur, Professor Dire Tladi, and is thankful for their devotion to the topic of peremptory norms of general international law (hereinafter referred to as "*jus cogens*"). Japan attaches the utmost importance to promoting the rule of law in the international community, and the work of the ILC on this topic shows the development of the rule of law. On the other hand, given that the concept of *jus cogens* might incur an extraordinary legal effect in some aspects, every effort should be made to strike a balance between theory and reality. It should be stressed that the abusive invocation of *jus cogens* must be avoided. With these points in mind, Japan has the honour to submit its comments to the Draft conclusions on *jus cogens* as follows.

（General comments）

- The Draft conclusions appear to clarify the methodology employed for the identification of *jus cogens* and their legal consequences (conclusion 1), relying on the wording of the Vienna Convention on the Law of Treaties (VCLT). It also constructs its argument based on the previous products by the ILC.
- Employing the wordings and formulation of articles of the VCLT is sensible. States and international courts have applied the VCLT for four decades.
- If the ILC opts to rely, in general, on the articles of the VCLT, and if it decides to depart from the VCLT in some parts, it should explain its rationale for doing so. This is not to say that the ILC should not deviate from the VCLT. The ILC should consider different formulations for *jus cogens* if necessary, but should give a clear explanation in doing so.
- At the same time, it should be noted that some issues addressed in the Draft conclusions are related to the law of State responsibility and we ought to refer to the previous products of the ILC.

（Specific comments）

1. Identification of *jus cogens*

Conclusion 5

- Paragraph 2 of conclusion 5 states that general principles of law may serve as bases for *jus cogens*. Japan has reservations about the possibility of general principles of law serving as bases for *jus cogens*. Paragraph (8) of the commentary refers to some scholarly writings in support of this idea but it also states the fact that some ILC members find insufficient support from either the position of States or international jurisprudence. Further explanation should be provided, including on the consistency with the Commission's ongoing work on the general principles of law, if the ILC wishes to maintain the current formulation of this paragraph.

Conclusion 7, 8, 9 and 14

- Conclusion 7 rightly states that the acceptance and recognition by the international community of States as a whole are relevant for the identification of *jus cogens*. Conclusion 8 correctly states that the evidence of such acceptance and recognition may take a wide range of forms. Conclusion 9 further states that decisions of international courts and tribunals are subsidiary means for determining *jus cogens*.
- While States are not the only subject of international law, they remain the main subject. Thus, commentary (2) of conclusion 7 is particularly appropriate.
- Paragraph 2 of conclusion 7 states that acceptance and recognition by a very large majority of States is required for the identification of a norm as *jus cogens*. It appears from commentary (6) that the ILC also considered other phrases such as an "overwhelming majority of States", "virtually all States", "substantially all States" or "the entire international community of States as a whole." The VCLT sets forth the requirement of *jus cogens* as "accepted and recognized by the international community of States as a whole." Whether such a requirement can be replaced by phrases raised in the Draft conclusions and its commentary should be carefully considered.
- The Draft conclusions, in paragraph 3 of conclusion 14, state that the persistent objector rule does not apply to *jus cogens*, which means that the legal effect of *jus cogens* is extraordinary – extraordinary in the sense not only that it is a matter of

hierarchy of norms but that once a specific norm emerges as *jus cogens*, its legal consequence would affect States which do not accept the rule in question. In this context, commentary (11) of conclusion 14 states: "to the extent that such persistent objection implies that the norm in question is not accepted and recognized by the international community of States as a whole as one from which no derogation is permitted, then a peremptory norm of general international law (*jus cogens*) might not arise." Japan recalls that the VCLT opted for the formulation "accepted and recognized by the international community of States as a whole", and thus the effect of persistent objections should not be denied even when very small in number. It is questionable whether the quantitative requirement of "acceptance and recognition by a very large majority of States" in paragraph 2 of conclusion 7 is appropriate. In this regard, conclusion 3 refers to "fundamental values of the international community". This element seems missing from the elements to be considered in the identification of *jus cogens*. The extraordinary legal effect above cannot be explained without referring to the necessity of protecting fundamental values of the international community. We would like to invite the Commission to further explore if the quantitative requirement should be supplemented by the qualitative element mentioned in conclusion 3.

Conclusion 8

➢ Paragraph 2 of conclusion 8 refers to "resolutions adopted by an international organization or at an intergovernmental conference" as one of the forms of evidence of acceptance and recognition as *jus cogens*. Japan agrees in principle to the commentary (5) stating that resolutions adopted by States in international organizations or at intergovernmental conferences are the result of processes capable of revealing the positions and views of States. Japan, however, remains very cautious in recognizing that such resolutions in general are evidence of acceptance and recognition as *jus cogens*. Firstly, it is rare that an international organization is rendered with explicit or implied power to determine a norm as *jus cogens*. If an international organization lacks competence to determine certain norms as *jus cogens*, its resolutions should not be treated as evidence of *jus cogens*. Secondly, even when an international organization, such as the UN, has an exceptionally broad mandate which includes matters relating to *jus cogens*, it is common to determine a

certain conduct as breaching international law without referring to *jus cogens*. Thirdly, even if States' acceptance and recognition as *jus cogens* can be deduced from the conduct of States in an international organization or intergovernmental conference, such conduct does not necessarily take the form of resolutions. Hence, if any reference to resolutions is indispensable, it should rather be "conduct of States in connection with resolutions adopted by an international organization or at an intergovernmental conference", as formulated in paragraph 2 of conclusion 10 in the ILC's Draft conclusions on Identification of Customary International Law.

- ➢ If the ILC opts to refer to a role that can be played by such resolutions themselves, it would be worth considering the creation of a new conclusion with more detailed provisions and extensive commentaries thereto, as the Commission did in conclusion 12 of the Draft conclusions on Identification of Customary International Law. As is the case with customary international law, the evidentiary value of resolutions purporting to be declaratory of an existing *jus cogens* would be limited to the proof of the acceptance and recognition by those States who support them.
- ➢ Last but not least, conclusion 8 deals with the evidence of acceptance and recognition as *jus cogens*. Japan takes note of the examples referred to in paragraph 2, but there may be a case where two or more evidences contradict each other. For example, a domestic court of a State might decide that a certain norm is *jus cogens* while the government of that State affirms the opposite. Japan would like to invite the Commission to elaborate on the approach to address such contradictions.

Conclusion 9

- ➢ Paragraph 2 of conclusion 9 refers to the works of expert bodies. While the ILC is tasked with the progressive development and codification of international law which includes *jus cogens*, the vast majority of other expert bodies do not possess explicit or implied power to determine *jus cogens*, and the Draft conclusions on Identification of Customary International Law do not refer to the works of expert bodies. Thus the formulation of this paragraph needs to be revised. For reference, conclusion 13 of the Draft conclusions on Subsequent Agreements and Subsequent Practice refers to expert treaty bodies, but with some caution. Taking into account the fact that the works of expert bodies are not referred to in the Draft conclusions on Identification of Customary International Law, we should be careful not to treat the works of expert

bodies alongside decisions of international courts and tribunals as subsidiary means for the determination of *jus cogens*.

➢ Commentary (6) of conclusion 9 of the present Draft conclusions states that works of expert bodies without an intergovernmental mandate are not irrelevant in determining *jus cogens*. Similarly, the works of expert bodies created by States would not necessarily be irrelevant even if the reference to them was deleted from conclusion 9.

Conclusion 23 and the annex

➢ Conclusion 23 and the annex contain a non-exhaustive list of *jus cogens*. It is likely that norms on the list in the final product of the ILC will be regarded as *jus cogens* without their precise scope being clearly defined. Therefore, while taking note of the affirmation of the ILC that the present Draft conclusions are methodological in nature (commentary (1) of conclusion 23), if the ILC finds it appropriate to annex any list of *jus cogens* to the Draft conclusions, Japan considers it necessary for the Commission to make further effort in elaborating on the following points in the commentary: (i) criterion by which these norms are chosen from among the norms which the ILC has previously referred to as *jus cogens*; (ii) reasons for which it chose a particular wording for some norms; and (iii) the precise scope of each norm on the list. In doing so, the ILC should clarify how norms which are not in the prohibitive form, such as (d) and (h) in the Annex, give rise to peremptory norms in concrete terms. Even prohibitive norms, for example prohibition of genocide and other crimes, have various aspects, including the prohibition of these crimes by States and the obligation to prevent these crimes by non-State actors.

2. Legal consequence of *jus cogens*

➢ Part Three of the Draft conclusions and conclusion 22 deal with the legal consequences of *jus cogens*. As for the treaties, the Draft conclusions by and large attempts to base its arguments on the VCLT. Some careful consideration is needed to address customary international law, unilateral acts and resolutions of international organizations.

Conclusion 10

➢ Conclusion 10 distinguishes treaties that conflict with *jus cogens* at the time of their conclusion, and treaties that conflict with newly emerged *jus cogens* after their conclusion. Japan supports paragraph 2 and commentary (5) in clarifying that, in case of conflict with newly emerged *jus cogens*, treaties only become void at the emergence of *jus cogens*. They follow paragraph 2(b), article 71 of the VCLT, and maintain the right balance between the hierarchical superiority of *jus cogens* to other norms and legal stability. It seems highly sensible because, while the VCLT generally does not distinguish treaties by their nature, legal stability would be seriously undermined if newly emerged *jus cogens* acquired retrospective power to overturn the consequences of existing treaties, in particular those with dispositive aspects. Hence, the formulation of the VCLT should be maintained. The same consideration should apply to customary international law and unilateral acts of States.

Conclusion 12

➢ Conclusion 12 reproduces most of article 71 of the VCLT but not all. Paragraph 2(a) of article 71 of the VCLT ("releases the parties from any obligation further to perform the treaty") is moved to paragraph 2 of conclusion 10. While this seems to be appropriate in the sense that it clearly denies retrospective power to *jus cogens* as mentioned above, and based on the ILC's understanding of the relation between article 64 and article 71 of the VCLT, the commentary should provide reasons for this reformulation.

Conclusion 17

➢ Paragraph 2 of conclusion 17 seems to replicate article 48 of the Articles on Responsibility of States for Internationally Wrongful Acts, but in part. While the commentary (6) provides supplementary explanation based on article 48, Japan considers it necessary for the ILC to examine whether there has been any development of State practice in this regard.

Conclusion 19

➢ Conclusion 19 states that States shall cooperate to bring to an end any serious breach of *jus cogens*, and that no State shall recognize as lawful a situation created by a serious breach of *jus cogens*. While Japan notes that this conclusion is based on

article 41 of the Articles on Responsibility of States for Internationally Wrongful Acts, practice after the adoption of the Articles should be examined with a view to ascertaining whether article 41 has been accepted by States. In this regard, firstly, it is doubtful whether some cases illustrated in the commentary support conclusion 19. For example, in the advisory opinion of *Legal Consequences of the Separation of the Chagos Archipelago*, the ICJ stated that all Member States are under an obligation to co-operate with the United Nations in order to complete the decolonization, without referring to *jus cogens*. Similarly, the advisory opinion of *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, stated that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall, but there was no explicit reference to *jus cogens*. The obligation not to recognize the illegal situation seems to have been discussed primarily in the context of territorial acquisition resulting from the threat or use of force. If the ILC considers that these obligations to cooperate and of non-recognition derive from *jus cogens* in general, and not from particular norms of international law, Japan invites the ILC to provide further evidence for such an understanding. Secondly, most of the conclusions in Part Three deal with the hierarchical relations between other norms and *jus cogens*. Conclusion 19 is the only conclusion concerning legal consequences pertaining to the obligations of other States (States that are not breaching *jus cogens*). As such, conclusion 19 may invite a question of whether obligations of "cooperation to bring to an end" and of non-recognition are the only consequences for other States.

➢ As the Commission may be aware, there are ongoing discussions within the UN about restrictions on the use of the veto in certain circumstances, and the obligation to cooperate to bring an end to a serious breach of an obligation arising under jus cogens should include the obligation to refrain from using the veto when a serious breach of jus cogens obligations is at stake.

Conclusion 22

➢ Although conclusion 22 is placed under Part Four (General provisions), it deals with the legal consequences of *jus cogens* as a "without prejudice" clause and its commentary (4) states that the possible consequences for immunity and the jurisdiction of national courts are not addressed in the present Draft conclusions as

they are consequences related to specific *jus cogens*. However, the reason why the ILC characterizes legal consequences of *jus cogens* on procedural rules such as State immunity as specific rather than general is not sufficiently substantiated. For example, the ICJ fairly stated in the case of *Jurisdictional Immunities of the State* that there exists no conflict between *jus cogens* and the rule of customary law which requires one State to accord immunity to another. This statement seems generic in nature and applicable to *jus cogens* in general, and its importance should not be underestimated.

- ➢ In this connection, considerations on procedural rules such as State immunity should be examined before determining on merits. It would, therefore, be illogical if the availability of such procedural rules were dependent on substantive rules including *jus cogens*. It follows that a breach of substantive norms including *jus cogens* cannot be determined before judging on procedural rules, and thus, *a priori*, does not entail any legal consequence on such procedural rules as State immunity.
- ➢ Japan therefore would like to invite the ILC to elaborate its position on the relationship between *jus cogens* and procedural rules.

3. Procedural requirements

Conclusion 21

- ➢ While acknowledging the importance of dispute settlement mechanisms regarding the identification and application of *jus cogens*, it is still questionable whether the Draft conclusions should include procedural requirements. Parties of the VCLT consented to a certain procedure of dispute settlement concerning treaties. As correctly admitted in the commentary to paragraphs 2 and 4 of conclusion 21, it is doubtful whether such procedural requirements exist as a matter of customary international law, and whether such requirements can be applied in cases where *jus cogens* conflicts with treaties, customary international law and unilateral acts. Reference to the three months notification is stipulated in article 65 of the VCLT concerning invalidity, termination, withdrawal and suspension of a treaty. Additional proof is needed to state that the same requirement is binding to non-Parties of the VCLT when the State concerned contends that a particular customary international law conflicts with *jus cogens*.
- ➢ Article 66 of the VCLT states that any one of the parties to a dispute concerning the

application or the interpretation of articles 53 and 64 may submit it to the International Court of Justice (ICJ) unless the parties agree to submit the dispute to arbitration. It can be said that paragraph 4 of conclusion 21 in effect obliges States to submit such disputes to the ICJ, since otherwise the invoking State can carry out the measure it proposed.

- Rules concerning dispute settlement mechanisms are important to prevent abusive invocation of *jus cogens*. Japan upholds the rule of law and views that the dispute settlement mechanism plays an important role, and hence has been accepting the compulsory jurisdiction of the ICJ since 1958. Japan also takes note that arbitration has proved to be an effective method of dispute settlement. Paragraph 5 of conclusion 21 might be intended to preserve consistency with the VCLT. Whether a reference to arbitration should be included in this conclusion needs further consideration.

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