Translated from Russian

Comments by the Russian Federation on the topic "Peremptory norms of general international law (*jus cogens*)"

The Russian Federation has the honour to submit its comments and observations on the draft conclusions on peremptory norms of general international law (*jus cogens*) adopted on first reading, in accordance with chapter V, paragraph 54, of the report of the International Law Commission on the work of its seventy-first session.

The Russian Federation would like to thank the Special Rapporteur, Mr. Tladi, and the Commission for the work done on the topic and for its study of a broad range of sources, and hopes that its comments will be helpful to the Commission in its future work on the topic.

In its commentary to draft conclusion 1, the Commission reasonably points out that the draft conclusions are aimed at providing practical guidance for determining the existence of peremptory norms of general international law (*jus cogens*) and their legal consequences and that the guidance is methodological in nature. This is the right approach, and it is deserving of support. Going beyond the indicated scope would be inappropriate.

The invalidating effect of peremptory norms of general international law (*jus cogens*) is not mentioned in either the definition of these norms or among the criteria for the identification of such norms listed in draft conclusion 4, thus depriving peremptory norms of general international law (*jus cogens*) of a unique trait that distinguishes them from other norms of general international law[1], for example, such as obligations *erga omnes.*

In draft conclusion 3, the general nature of peremptory norms of general international law (*jus cogens*) is described in terms of essential characteristics[2], associated, as indicated in the commentary to the draft conclusion, with such norms. These characteristics[3] are not of a legal

[1] In support of its thesis on the consequences of *jus cogens* norms for the existence of a conflicting rule of customary international law, the Commission quoted from the joint dissenting opinion of Judges Rozakis and Caflisch in the *Al-Adsani v. the United Kingdom* case, which states that "the basic characteristic of a *jus cogens* rule is that… it overrides any other rule which does not have the same status" (see paragraph (4) of the commentary to draft conclusion 14 on peremptory norms of general international law (*jus cogens*), Report of the International Law Commission on the work of its seventy-first session (2019)).

[2] See paragraph (1) of the commentary to draft conclusion 3 on peremptory norms of general international law (*jus cogens*), Report of the International Law Commission on the work of its seventy-first session (2019).

[3] These characteristics are that *jus cogens* norms "reflect and protect fundamental values of the international community", that they are "hierarchically superior" to other norms of international law and that they are "universally applicable".

nature and should not be accorded the status of additional criteria, of sorts, for the identification of peremptory norms of general international law (*jus cogens*), which they appear to have been accorded in the draft conclusions.

The jurisprudence cited by the Commission in support of its conclusions regarding the importance of these "characteristics" for the identification of peremptory norms is hardly convincing. In particular, the Commission points out that the International Court of Justice had linked the prohibition against genocide to fundamental values in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, in 1951.[4] It is important to recall that, in this Advisory Opinion, the Court had not sought to give a legal definition of peremptory norms of general international law (*jus cogens*), which emerged later as a separate legal category in the context of the 1969 Vienna Convention. Moreover, the States parties to the Vienna Convention did not use the characteristics in the legal definition of peremptory norms of general international law (*jus cogens*), despite this being an option.

In view of the above, it would appear that States did not consider references to moral law a relevant legal characteristic of peremptory norms of general international law (*jus cogens*).

Therefore, an analysis of the aforementioned statements by the Court would be more suitable for describing the general objectives of peremptory norms of general international law (*jus cogens*), but not their relevant legal characteristics, highlighted in draft conclusion 3.

In draft conclusion 5, the Commission is right to reverse its initial position that treaty provisions cannot form a basis for peremptory norms and may only "reflect a norm of general international law capable of rising to the level of an international legal norm". The Commission now states in the latest version of second paragraph of draft conclusion 5 that "[t]reaty provisions....may also serve as bases for peremptory norms of general international law (*jus cogens*)."

The surveyed State practice and jurisprudence shows that there are no fundamental differences in the ability of treaties and norms of customary international law to serve as bases for peremptory norms of general international law *(jus cogens)*. Nor are there grounds for equating treaty provisions with general principles of law in the context of this draft conclusion. The idea that

4 See paragraph (3) of the commentary to draft conclusion 3 on peremptory norms of general international law (*jus cogens*), Report of the International Law Commission on the work of its seventy-first session (2019).

general principles of law can serve as a potential basis for peremptory norms of international law *(jus cogens)* has not been sufficiently examined and is not supported by practice.

The meaning and content of the expression "international community of States as a whole" in draft conclusion 7 remains unclear. The Commission has qualified it to mean a "large majority of States". The Commission leans heavily in its justification of its choice of formulation on the explanation given by the Chairperson of the Drafting Committee at the United Nations Conference on the Law of Treaties.[5] However, the reasoning given by the Commission in the commentary is insufficient to support a decision on one of the central aspects of this criterion for the identification of peremptory norms of general international law (*jus cogens*).[6]

The concluding paragraph of the commentary to draft conclusion 7 also fails to add clarity, as it lists the various possible formulations that had been put forward in the Commission to reflect the level of State consent required for "acceptance and recognition" of the peremptory nature of a norm of general international law,[7] including: "overwhelming majority of States", "virtually all States", "substantially all States" and "the entire international community of States as a whole".

The Commission is justified in its view that determining which States accept and recognize the peremptory status of a norm is not "a mechanical exercise in which the number of States is to be counted", but rather "requires that the acceptance and recognition be across regions, legal systems and cultures".[8] However, if that is the case, then it remains unclear how State recognition of the peremptory status of a norm should be determined.

[5] As the Commission points out, the Chairperson explained that the words "as a whole" are meant to indicate that it is not necessary for the peremptory nature of the norm in question "to be accepted and recognized ... by all States" and that it would be sufficient if "a very large majority" did so (see paragraph (5) to the commentary to draft conclusion 7 on peremptory norms of general international law (*jus cogens*), Report of the International Law Commission on the work of its seventy-first session (2019)).

[6] In this regard, the International Court of Justice, in its judgment in the *North Sea Continental Shelf* cases in 1969, stated that for a rule of general international law to form in a relatively short period of time, State practice needed to be "extensive and virtually uniform" (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 43, para. 74). The bar for the formation of a peremptory norm of general international law (*jus cogens*) should be at least as high. The formulation used by the Commission to define what is meant by "international community of States as a whole" does not reflect this, however.

[7] Similar references to the existence of other differences of opinion in the Commission can be found in the commentaries to other draft conclusions. For example, it is mentioned in the commentary to draft conclusion 3 on the general nature of *jus cogens* norms, which introduces additional characteristics of peremptory norms, that "[a] view was expressed in the Commission that the difference between 'criteria' and 'characteristics' is obscure, as is the proposition that such 'characteristics' provide supplementary evidence".

[8] See paragraph (6) of the commentary to draft conclusion 7 on peremptory norms of general international law (*jus cogens*), Report of the International Law Commission on the work of its seventy-first session (2019).

In this connection, it is not entirely clear why the Commission did not carefully examine the positions of States expressed in the Sixth Committee with respect to this draft conclusion.[9]

Based on the Commission's current understanding of what is meant by "international community of States as a whole", and the accompanying commentary and reasoning, the Russian Federation is not in a position to accept the possibility that the formation of the will or position of a group of States could result in the emergence of international legal obligations for States that are not members of that group.

Furthermore, it is notable that the draft conclusions feature various formulations in which the phrase "international community" is used. Whereas the term "international community of States as a whole" is used in draft conclusions 2, 4 and 7, the expression "values of the international community" is used in draft conclusion 3, while the expression "international community as a whole" appears in draft conclusion 17.

The term "international community of States as a whole" should be used consistently in the draft conclusions and in the commentaries thereto. Indeed, this is the term used in the definition of a peremptory norm of general international law (*jus cogens*) in article 53 of the 1969 Vienna Convention.

With regard to draft conclusion 8, it should be noted that not all forms of evidence for the acceptance and recognition by States of the peremptory nature of an international legal norm carry the same weight for the identification of peremptory norms of general international law. Without implying any sort of hierarchy among the forms such evidence may take, priority should be given to the views and positions of States made known and documented in the international arena. For the purposes of identification of peremptory norms of general international law *(jus cogens)*, the conduct of States in respect of decisions taken by international organizations, not the decisions themselves, are the determining factor. The draft conclusion must explicitly reflect the key importance of the "conduct of States" in the context of the various forms of evidence for acceptance and recognition.

The Commission's decision in draft conclusion 9 to view works of expert bodies established by States or international organizations as subsidiary means for determining the peremptory character of norms of general international law is objectionable. The decision is inconsistent with

[9] A number of delegations disagreed with the Commission's definition of the concept "international community of States as a whole" or expressed the view that its content should be further analysed and clarified in the commentary (see, for example, statements by China, France, Israel, Germany, United Kingdom and Thailand).

Article 38 of the Statute of the International Court of Justice, which is cited repeatedly by the Commission in its commentary to the draft conclusion.

In paragraph (1) of the commentary to draft conclusion 10, it would be appropriate to state explicitly that States should refrain from concluding international agreements that conflict with peremptory norms of general international law *(jus cogens)*.

There is room for improvement in the first part of paragraph (1) of draft conclusion 14, which states that "a rule of customary international law does not come into existence if it conflicts with a peremptory norm of general international law (*jus cogens)*". It is not possible for something that has not yet come into existence to conflict with something else. In that connection, it may be appropriate to consider alternative wording that would affirm that the practice of States that conflicts with an existing peremptory norm of general international law (*jus cogens*) may not give rise to a norm of customary international law.

Paragraph (3) of draft conclusion 14 is open to debate. It is difficult to accept the Commission's opening argument that "[t]he rule that persistent objection does not apply to peremptory norms of general international law (*jus cogens*) flows from both the universal application and hierarchical superiority of peremptory norms of general international law as reflected in draft conclusion 3".[10] The argument that the persistent objector rule does not apply to peremptory norms of international law *(jus cogens)* must, at a minimum, be based on the fundamental characteristics of such norms deriving from article 53 of the 1969 Vienna Convention.

The wording of the persistent objector rule should be balanced and take into account that it essentially requires a deviation from the principle according to which no obligations of States can arise without their consent. Paragraph (11) of the commentary to this draft conclusion here is of the utmost importance. This paragraph asks the important question of whether objections may affect the test of acceptance and recognition of a rule of general international law (*jus cogens)* as such a rule.

In view of the above, the Commission would do well to revisit the third paragraph of draft conclusion 14 and consider a formulation that distinguishes between the non-applicability of the persistent objector rule to an existing peremptory norm of general international law (*jus cogens*) and the ability of this rule, provided there is a sufficient number of objections by States, to prevent the emergence / formation of a peremptory norm of general international law (*jus cogens*).

[10] See paragraph (9) of the commentary to draft conclusion 14 on peremptory norms of general international law (*jus cogens*), Report of the International Law Commission on the work of its seventy-first session (2019).

The Russian Federation does not believe that draft conclusion 16 can be applied to resolutions of the United Nations Security Council. The Russian delegation, speaking in the Sixth Committee, had noted that discussions on the issue of Security Council resolutions being consistent with peremptory norms of general international law (*jus cogens)*, among others, are theoretical in nature and are not based on practice. Pronouncements by the Commission that are not supported by contemporary international law, such as the ones contained in the commentary to draft conclusion 16, could seriously undermine the work of a body that bears primary responsibility for the maintenance of international peace and security.

In view of the foregoing, no mention should be made of Security Council resolutions in the commentary to draft resolution 16.

Furthermore, it would be advisable to add a provision to the draft conclusions, analogous to the one included in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, stating that the draft conclusions and the commentaries thereto shall not prejudice the provisions of the Charter of the United Nations, cast doubt on their contents or change the approaches to the interpretation thereof.

Such a provision would reflect the obligations of States under Article 103 of the Charter.

In its commentary to draft conclusion 17, the Commission states that "[a]lthough all peremptory norms of general international law (*jus cogens*) give rise to obligations *erga omnes*, it is widely considered that not all obligations *erga omnes* arise from peremptory norms of general international law (*jus cogens*)".[11]

This proposition should be examined more thoroughly and should be made explicitly clear in the draft conclusion itself.

The second paragraph of draft conclusion 17 stipulates that responsibility for a breach of a peremptory norm of general international law (*jus cogens*) is invoked in accordance with the rules on the responsibility of States for internationally wrongful acts. The Commission makes reference in its commentary to an article on responsibility of States for internationally wrongful acts as a whole and for breaches of *erga omnes* obligations. This leaves the matter of consequences for breach of peremptory norms of general international law (*jus cogens)* essentially unexplored.

[11] See paragraph (3) of the commentary to draft conclusion 17 on peremptory norms of general international law (*jus cogens*), Report of the International Law Commission on the work of its seventy-first session (2019).

The contents of draft conclusion 19 and the nature of the obligations it imposes on States would be more appropriate in the context of draft articles rather than draft conclusions, which are intended to provide methodological guidance for the topic at hand.

Draft conclusion 21 on procedural requirements is a source of serious concern. In view of the scope of work on this topic, as originally described and delimited, there is no need for provisions relating to a mechanism for the settlement of disputes to be included in the draft conclusions. This element is not appropriate in the context of draft conclusions.

The wording of article 65 of the 1969 Vienna Convention does not need to be supplemented by the proposed additions. There is, in fact, no practical need to stipulate such a procedure to be followed in respect of customary rules of international law. It is particularly troubling that it follows from draft conclusion 16 and the commentary thereto that the proposed procedural requirements would be applicable also to binding Security Council resolutions. The Commission should reconsider the inclusion of a mechanism that specifically allows for such resolutions to be challenged on any grounds, which could have serious consequences for international security.

Similarly, the contents of draft conclusion 21 do not reflect *lex lata* and do not contribute to the formation of *lex ferenda.*

The contents of draft conclusion 23 and the commentary thereto are also problematic. The Commission's justifications for including the "illustrative" list of norms are unconvincing and contradictory.

In the commentary to draft conclusion 23, the Commission states that "[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 to determine, first, which of those potential norms meet the criteria set out in Part II of the present draft conclusions and, second, which of the norms that meet the criteria ought to be included in a non-exhaustive list". The Commission determined that "such an exercise falls beyond the scope of the exercise of elaborating draft conclusions on the identification and legal consequences of peremptory norms of general international law (*jus cogens*)".

Nevertheless, the Commission noted that it "has decided to include in an annex a non-exhaustive list of norms previously referred to by the Commission as having peremptory character".[12]

This decision was made despite the fact that the majority of the norms included in the list had not been previously studied by the Commission or analysed with regard to their peremptory nature. The simple mention of norms that may have peremptory status in the Commission's commentaries to its various drafts is not sufficient grounds for including them in the list. In fact, the Commission acknowledges that it is providing the list without having undertaken a "detailed and rigorous study" of potential norms. Yet, there are no limits on the amount of time the Commission can spent on the draft conclusions. It should, therefore, undertake such a study, if it believes that it is important to provide States with such a list.

Furthermore, the Commission noted in its commentary that the non-exhaustive list does not contain all the norms to which it has referred previously as having peremptory character and that the formulations used and included in the illustrative list may differ from the formulations used by the Commission in its previous works.

These arguments seem to be at odds with one another.

For example, in light of the commentary, it is unclear why the Commission did not include in the list the prohibition against the use of force, as set out in the Charter of the United Nations, despite having stated in paragraph (1) of its commentary to article 50 of the draft articles on the law of treaties that it is a conspicuous example of a norm of international law having *jus cogens* character, or why it omitted a detailed analysis of the peremptory character of the fundamental principles and norms enshrined in the Charter. These omissions are regrettable.

The inclusion of the aforementioned list in an annex to the draft conclusions is unwise and adds no value. As stated at the outset, the draft conclusions were intended to be methodological in nature and the Commission's main objective was to establish a process for the identification of peremptory norms of general international law (*jus cogens*). The elaboration of this list by the Commission could have far-reaching consequences and could negate the rest of its work on the topic. It is easy to imagine that the draft conclusions will be used to confirm whether a norm

[12] See paragraphs (1) and (2) of the commentary to draft conclusion 23 on peremptory norms of general international law (*jus cogens*), Report of the International Law Commission on the work of its seventy-first session (2019).

included in the list has peremptory character or whether a norm not included in the list lacks it, even though the matter was never studied by the Commission.

In view of the above, the Russian Federation supports the removal of draft conclusions 21 and 23 from the draft conclusions.