Response of the Republic of Singapore to the International Law Commission's Request for Comments and Observations on the Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*)

Singapore is pleased to respond to the International Law Commission's request for comments and observations on the draft conclusions on peremptory norms of general international law (*jus cogens*) as adopted on first reading (2019), in Chap. V of the report of the Commission on the work of its 71st session (A/74/10).

2. Singapore commends the Commission and the Special Rapporteur Professor Dire Tladi for taking up this important task of clarifying the methodology for determining the existence and content of peremptory norms of general international law (*jus cogens*). Singapore gave views on this topic at the 2017, 2018, and 2019 sessions of the Sixth Committee.

3. We presently have comments on the following aspects of the draft conclusions and their annex as adopted on first reading:

(*a*) draft conclusion 7, paragraph 2, which 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*) …";

(*b*) draft conclusion 21; and

(*c*) draft conclusion 23 and the annex to the draft conclusions.

Our comments on each of these aspects will be provided in turn.

Draft conclusion 7 (International community of States as a whole)

4. Our comment relates specifically to the second paragraph of draft conclusion 7, and its use of the phrase "very large majority" to draw out the meaning of the 1969 Vienna Convention on the Law of Treaties phrase "as a whole". We see from paragraph (5) of the commentary that the phrase "very large majority" comes from the explanation of the Chairperson of the Drafting Committee during the UN Conference on the Law of Treaties. Having carefully

considered draft conclusion 7 in the light of the commentary thereto, we are not certain if transposing that explanation to draft conclusion 7 accurately conveys the meaning of "as a whole".

5. Singapore is sympathetic to the view recorded in the last sentence of paragraph (6) of the commentary. That view is that "in the light of importance of State consent and the extraordinarily strong legal effect of peremptory norms of general international law (*jus cogens*), the recognition and acceptance of the 'overwhelming majority of States', 'virtually all States', 'substantially all States' or 'the entire international community of States as a whole' was required." If the Commission decides to use one of these alternative formulations in place of "a very large majority of States", our own view is that the "virtually all States" formulation conveys the requisite quantitative meaning.

6. At the same time, in the present context, the phrase "as a whole" has qualitative as well as quantitative elements. Both the number of States (the quantitative element) and the collective dimension of acceptance and recognition (the qualitative element) are relevant. Elements of paragraphs (5) and (6) of the commentary are useful in this regard. Singapore therefore requests that the Commission consider incorporating the following into the text of draft conclusion 7, paragraph 2:

(*a*) from paragraph (5):

> "… it is States as a collective or community, that must accept and recognize the non-derogability of a norm for it to be a peremptory norm of general international law (*jus cogens*)."

(*b*) from paragraph (6):

> "The acceptance and recognition by the international community of States as a whole requires that the acceptance and recognition be across regions, legal systems and cultures."

Draft conclusion 21 (Procedural requirements)

7. Singapore has carefully considered the text of draft conclusion 21 as adopted on first reading, in the light of the commentary thereto. Singapore cannot support draft conclusion 21, for the following reasons.

8. First, we remain of the view that the draft conclusion is unnecessary because it overlaps significantly with the procedures already set out in articles 65 to 67 of the 1969 Vienna Convention on the Law of Treaties. We are not persuaded that the innovations in draft conclusion 21 necessarily take the progressive development of international law in the right direction. For example, it is not clear to us why draft conclusion 21 does not mirror the broad references to judicial settlement, arbitration and conciliation in the title of article 66 of the 1969 Vienna Convention, particularly in view of the active contemporary use of inter-State arbitration and conciliation procedures, as well as the possibility of resort to other international courts and tribunals. It is also not clear how the fourth paragraph of draft conclusion 21 would sit alongside the provisional measures practice of the International Court of Justice, which is fact-specific and thus may or may not permit the invoking State to proceed with the measure it has proposed during the course of the litigation. These significant departures from potentially applicable existing regimes mean that the "without prejudice" language of the fifth paragraph of draft conclusion 21 may confuse, rather than clarify.

9. Second, draft conclusion 21 is not appropriately placed in a set of draft *conclusions* dealing with the methodology for determining the existence and content of peremptory norms of general international law (*jus cogens*).

10. Singapore therefore requests that the Commission consider deleting draft conclusion 21.

Draft conclusion 23 (Non-exhaustive list) and Annex

11. Singapore appreciates the Commission's effort to develop draft conclusion 23 and the annex to the draft conclusions as a compromise solution to the dilemma described in paragraph (1) of the commentary to draft conclusion 23. However, Singapore continues to have serious concerns about draft conclusion 23 and the annex. Consequently, Singapore cannot support draft conclusion 23 and the annex as adopted on first reading.

12. First, not all users of the Commission's output may appreciate the significance of paragraphs (5) through (14) of the commentary to draft conclusion 23, the critical nuances with which each item in the non-exhaustive list in the annex must thus be read, and the very fact that the draft conclusions must be read with the commentaries. In this regard, the connection between the non-exhaustive list in the annex itself, and paragraphs (5) through (14) of the commentary to draft conclusion 23, which appear separately as part of the commentary to draft conclusion 23, is not altogether obvious.

13. Second, it is not clear to us whether the Commission considers that every item in the non-exhaustive list satisfies the methodology for determining the existence and content of peremptory norms of general international law (*jus cogens*) set out in the draft conclusions themselves. Paragraph (3) of the commentary to draft conclusion 23 suggests that this may not be the case.

14. If the Commission's intent is to provide a simple compilation of relevant references in the Commission's previous works, we suggest that it would not be appropriate to do so by way of draft conclusion 23 and the annex as presently drafted. Instead, the Commission may wish to consider listing the references now contained in footnotes 920 through 944, under a headnote incorporating the relevant explanatory elements from draft conclusion 23 and paragraphs (1)-(4) and (14) of its commentary. This separate explanation may be contained in an annex (or "appendix") to the draft conclusions but should not be presented as having the same normative footing as the draft conclusions themselves.

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