Translated from Spanish

Comments and observations of the Kingdom of Spain on the draft conclusions on peremptory norms of general international law (*jus cogens*) adopted by the International Law Commission

I. Introduction

1. At its 3472nd meeting, held on 31 May 2019, the International Law Commission adopted the draft conclusions on peremptory norms of general international law (*jus cogens*) on first reading, and at its 3499th to 3504th meetings, held on 5 to 7 August 2019, the Commission adopted the commentaries to the draft conclusions.

2. At its meeting held on 7 August 2019, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft conclusions and the commentaries thereto, through the Secretary-General, to Governments for comments and observations.

3. Spain congratulates the Commission and, in particular, Special Rapporteur Dare Tladi, for preparing the draft conclusions and the commentaries thereto on a topic that is of vital importance for public international law. The draft conclusions represent an output of great substantive interest, since they deal with the types of rules which, by their content, reflect and protect the fundamental values of the international community. Along with the other outputs of the Commission, they also contribute to the construction and refinement of international law as a legal system.

4. Spain commends the Commission and the Special Rapporteur for their efforts to base the draft conclusions and commentaries thereto on practice, jurisprudence and doctrine on the topic. Spain would also have liked, however, to see that the work included more frequent references to Spanish-language jurisprudence and doctrine. This is not a linguistic grievance, but a substantive one. The Commission should take into consideration the practices of different legal systems, and not be limited to just one or a few of them.

5. In making its comments and observations, Spain will focus on the nature of the draft conclusions (II), the identification of peremptory norms of general international law (III), the legal consequences (IV) and the desirability of including an illustrative list of *jus cogens* norms (V).

II. Observations and comments on the nature and scope of the draft conclusions

6. The draft conclusions on peremptory norms, like other texts prepared in recent years by the Commission, are not legally binding. This does not prevent such projects, however, from generating certain legal effects. At times, the phrase "codification by interpretation" has been used to explain the nature of the Commission's recent work on reservations, interpretation and provisional application of international treaties.

7. The Commission's works on *jus cogens* are broader in scope than the work on the interpretation of articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties. The draft conclusions contain not only definitions developed from article 53 or other previous works of the Commission, but also provisions with prescriptive wording.

8. The draft conclusions with prescriptive wording are, to a large extent, intended to be secondary norms on the identification and application of the primary norms of general international law that have a peremptory character.

9. The draft conclusions set out conventions of a different nature which would have to be the result of the consolidated practices of States; otherwise, they would not have normative authority.

10. Spain notes that, despite the doubts of a few States regarding the norms of *jus cogens* and the technical observations that may be made about the draft conclusions and the commentaries thereto, the works of the Commission stand as definitive proof of the recognition of the existence in current international law of norms that "reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable", and that have special legal consequences in the international legal system (draft conclusion 3).

11. Taking into consideration the definition of peremptory norms (draft conclusion 2), the general nature or character of such norms (draft conclusion 3) and the international community of States as a whole (draft conclusion 7), Spain understands that so-called regional *jus cogens* falls outside the material scope of these draft conclusions.

12. Spain acknowledges the Commission's and its Special Rapporteur's effort of systemic construction of the international legal order. The draft conclusions and the commentaries thereto may help to provide clarity and predictability to States and other international and national legal operators in identifying peremptory norms of general international law and in determining the legal consequences of *jus cogens*.

13. However, Spain does not consider the draft conclusions, in and of themselves, to be binding or to represent a genuine interpretation of the 1969 Vienna Convention on the Law of Treaties.

14. Spain understands that the draft conclusions are a starting point for a constructive dialogue on the fundamental concepts and the secondary rules for the identification and application of *jus cogens* norms. The effort of systemic construction will only be robust and have normative authority if it enjoys the necessary consensus of the international community of States. The normative authority of codification and progressive development works is not only a matter of legislative technique, but also depends on the degree and quality of participation and recognition by States.

15. The outcome of such constructive dialogue depends, first, on the possibilities for participation offered by the Commission throughout the process of elaboration of its proposals and texts. In the case of the draft conclusions, their joint adoption at one single session did not help to maintain a continuous two-way dialogue that would have facilitated the participation of States and the submission of comments and, ultimately, enhanced the technical quality of the draft conclusions.

16. The outcome of such a dialogue depends, second, on the broad participation of States, the incorporation of their observations and, above all, the recognition of their fundamental role in the process of identification and application of *jus cogens*.

17. Spain wishes to make the following observations and comments, in an effort to contribute constructively to said dialogue with the Commission:

III. Identification of *jus cogens* norms

A. On draft conclusion 5

Conclusion 5
Bases for peremptory norms of general international law (*jus cogens*)

1. Customary international law is the most common basis for peremptory norms of general international law (*jus cogens*).

2. Treaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*).

18. Spain has misgivings about the suitability and wording of draft conclusion 5.

19. First, it seems redundant and therefore unnecessary, since one of the criteria for identifying norms of *jus cogens* is the recognition of "a norm of general international law" (draft conclusion 4 (a)). For reasons of normative economy, it would be sufficient with this identification criterion to agree that a norm of *jus cogens* can only be identified from among existing norms of general international law.

20. As the Commission notes in paragraph (3) of its commentary to draft conclusion 4, there are two cumulative criteria that operate as "necessary conditions for the establishment of the peremptory character of a norm of general international law".[1] In paragraph (6) of the commentary, the Commission notes that the two cumulative criteria " imply a two-step approach to the identification".[2]

21. Accordingly, considering the prior existence of a norm of general international law as a necessary but not sufficient condition for the identification of a peremptory norm, draft conclusion 4 which has already been proposed by the Commission would suffice. With this option, the debate over the current wording of draft conclusion 5 would be avoided.

22. In the alternative, where draft conclusion 5 is retained, Spain has misgivings about the use of the term "bases" to refer to the normative procedures or processes that may give rise to a norm of general international law. It would have been preferable in this case to refer to "sources" of international law that may give rise to peremptory norms of general international law.

23. Paragraph (10) of the commentary to draft conclusion 5 should preferably be placed in the commentary to draft conclusion 6, because both draft conclusions deal with "acceptance and recognition" as a norm of general international law. Its most logical location would be after paragraph (1), before the current paragraph (2), of the commentary to draft conclusion 6.[3]

[1] *Supplement No. 10* (A/74/10), p.157.
[2] Ibid, p. 158.
[3] Ibid., p. 164.

B. On draft conclusion 7

Conclusion 7
International community of States as a whole

1. It is the acceptance and recognition by the international community of States as a whole that is relevant for the identification of peremptory norms of general international law (*jus cogens*).

2. Acceptance 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.
3. While the positions of other actors may be relevant in providing context and for assessing acceptance and recognition by the international community of States as a whole, these positions cannot, in and of themselves, form part of such acceptance and recognition.

24. This draft conclusion is concerned with two basic elements that make up the second criterion for the identification of *jus cogens*: who is competent to identify peremptory norms, and the necessary degree of acceptance and recognition.

25. Spain agrees with the Commission that "it is the acceptance and recognition by *the international community of States as a whole* that is relevant for the identification of peremptory norms of general international law" (draft conclusion 7, para. 1) (emphasis added). As the Commission itself noted in paragraph (2) of its commentary to the draft conclusion, "it is the position of States that is relevant and not that of other actors".[4]

26. More misgivings are raised by the wording of paragraph 2 of draft conclusion 7, which seeks to clarify the degree of acceptance and recognition and what is meant by the expression "international community of States as a whole". First, both in the said paragraph and in paragraph (5) of its commentary to the draft conclusion, the Commission cautions that the expression should not be interpreted as requiring "unanimous" acceptance and recognition. Spain shares this interpretation.

27. Second, the current wording, "acceptance and recognition by a very large majority of States is required", can be interpreted as an exclusively quantitative criterion. An alternative possibility could be to require acceptance and recognition *"por la generalidad de los estados" (by the generality of States)*. That expression (at least in Spanish) not only means a very large majority (quantitative criterion), but also requires geographical (regional groups) and situational representativeness, and does not imply unanimity. Even

[4]Ibid, pp. 165-166.

a more succinct wording might serve: "general, but not unanimous, acceptance and recognition by States is required".

28. Given the observations it has made on this draft conclusion, including that "the relevant criterion for identification and recognition requires acceptance and recognition by the generality of States of the international community", Spain suggests that paragraph 3 of draft conclusion 7 be either deleted, or transferred, with the consequent adaptation of its wording, to draft conclusion 9, which deals with subsidiary means. The Commission itself presented arguments to defend the change of location in paragraph (4) of its commentary to draft conclusion 7,[5] which should also be transferred to the commentary to draft conclusion 9.

C. On draft conclusion 8

Conclusion 8
Evidence of acceptance and recognition

1. Evidence of acceptance and recognition that a norm of general international law is a peremptory norm (*jus cogens*) may take a wide range of forms.

2. Such forms of evidence include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; legislative and administrative acts; decisions of national courts; treaty provisions; and resolutions adopted by an international organization or at an intergovernmental conference.

29. The wording of paragraph (4) of the commentary to draft conclusion 8 should be qualified, in particular in the final phrase, where the Commission mentions the different functions of the same evidentiary materials for *jus cogens* and customary rules. Spain therefore suggests that the words "and recognize" be included in the final phrase, which would then read as follows: "while for the latter the materials are used to assess whether States accept *and recognize* the norm as a rule of customary international law".[6]

30. The proposed wording is more consistent with the nature of customary rules, with the process of their identification, and with the terminology used by the Commission in the works on identification of customary international law[7]and on *jus cogens*.

[5]Ibid, p. 167.
[6]Ibid., p. 167.
[7]See draft conclusions in General Assembly resolution 73/242 of 20 December 2018, annex.

D. On draft conclusion 9

Conclusion 9
Subsidiary means for the determination of the peremptory character of norms of general international law

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for determining the peremptory character of norms of general international law.

2. The works of expert bodies established by States or international organizations and the teachings of the most highly qualified publicists of the various nations may also serve as subsidiary means for determining the peremptory character of norms of general international law.

31. Spain wishes to make three comments on the content of this draft conclusion and three observations on the commentaries thereto.

32. As proposed above, in the event that the paragraph relating to the positions "of other actors" on acceptance and recognition by the international community of States as a whole (current 7.3) is retained, Spain suggests that it be moved and incorporated into draft conclusion 9, as a third paragraph, with a corresponding adaptation of its wording and the commentary thereto.

33. The second comment is intended to clarify the classification of decisions of international courts and tribunals as subsidiary means for the determination of the peremptory character of norms of general international law. First, as set out in draft conclusion 4, paragraph (b), and draft conclusion 7, the determination of such a peremptory character is a matter for the generality of the States of the international community. Second, it is useful to contextualize the relative value of certain decisions of courts and tribunals which sometimes classify norms as peremptory norms rather casually. A case in point is the judgment of 21 September 2005 of the Court of First Instance of the European Communities in the *Kadi* case (*Kadi I*) with regard to human rights norms, where the Court considered the right to be heard and the right to effective judicial review to be *jus cogens* norms.[8]

34. Third, recourse to "the teachings of the most highly qualified publicists of the various nations" is a formula which, much like Article 38 of the Statute of the International Court of Justice, is very limited. In contemporary international law, the

[8] See paras. 227-231, 278-285 and 288-290, as well as the judgment of 21 September 2005 of the same Court in *Yusuf and Al-Barakaat*, paras. 278-282, 333-340 and 343-345.

opinion of expert bodies has attained greater relevance than that of the most highly qualified publicists. It is true that the Commission notes in paragraph (6) of its commentary to draft conclusion 9 that "the work of expert bodies" not established by States or international organizations (with the Institute of International Law cited as an example) may "qualify as 'teachings of the most highly qualified publicists' under paragraph 2 of draft conclusion 9". Nonetheless, given the importance of determining the peremptory character of norms of general international law, it would be appropriate to cite them expressly in draft conclusion 9. For this reason, Spain suggests the following wording: "The work of expert bodies, whether or not established by States or international organizations, may also be a subsidiary means for the determination of the peremptory character of norms of general international law". By definition, the collective nature of peremptory norms requires that proposals on their determination also possess the same character.

35. Consequently, Spain agrees, first, that the fundamental importance of the decisions of the International Court of Justice in relation to other international tribunals is highlighted in paragraph 1. It therefore suggests refining the Spanish wording of paragraph (4) of the commentary, where the Commission refers to the Court as the principal judicial organ of the United Nations and the Spanish text uses the expression "*el principal órgano judicial de las Naciones Unidas*". That wording should be brought into line with the literal wording of Article 92 of the Charter of the United Nations, where the Court is referred to as "*el órgano judicial principal de las Naciones Unidas*".

36. Second, Spain agrees with the inclusion of the work of "expert bodies established by States or international organizations" as subsidiary means for the determination of the peremptory character of norms of general international law. However, it suggests that the relative importance of such work be qualified. International practice shows that some of that work is sometimes not sufficiently supported in State practice and in the practice of international courts and tribunals.

37. In order to help weigh the relative importance of the work of such expert bodies, Spain suggests that a remark similar to the one already included in paragraph 9 regarding the weight to be given to teachings[9] be included in the commentaries. In this regard, the Commission could introduce a caution on relative value in paragraph (6) of its

[9] *Supplement No. 10* (A/74/10), p. 174.

commentary by adding a sentence along the following lines: “It is important to note that the weight to be given to the work of expert bodies will vary to a large extent depending on the quality of the reasoning and its degree of support in State practice and in the decisions of courts and tribunals”.

38. Third, Spain believes that there is need to reformulate the Commission’s statement in paragraph (4) of its commentary to draft conclusion 9 that “while the Court has been reluctant to pronounce on peremptory norms, its jurisprudence has left a mark on the development both of the *general* concept of peremptory norms and of *particular* peremptory norms ...” (emphasis added). As the statement might lead to confusion, the Commission should revise it by deleting the reference to so-called *particular* peremptory norms.

IV. The legal consequences of peremptory norms

A. On draft conclusion 11

Conclusion 11

Separability of treaty provisions conflicting with a peremptory norm of general international law (jus cogens)

1. A treaty which, at the time of its conclusion, conflicts with a peremptory norm of general international law *(jus cogens*) is void in whole, and no separation of the provisions of the treaty is permitted.

2. A treaty which becomes void because of the emergence of a new peremptory norm of general international law (*jus cogens*) terminates in whole, unless:

(a) the provisions that are in conflict with a peremptory norm of general international law (*jus cogens*) are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of the said provisions was not an essential basis of the consent of any party to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

39. Draft conclusion 11 is a good example of what is referred to as codification by interpretation, which also raises some doubts. In this case, the articles interpreted are articles 44, 53 and 64 of the 1969 Vienna Convention on the Law of Treaties.

40. First, paragraph 1 sets out an interpretation of articles 53 and 44, paragraph 5, of the Vienna Convention, which prescribe the total invalidity of a treaty that conflicts with a peremptory norm and prohibit the separability of such a treaty.

41. Second, paragraph 2, which concerns cases of *jus cogens superveniens* and the consequent termination of the treaty as a whole, explicitly sets out the possibility of separability of the provisions of the treaty, which the Commission understands to be tacitly admitted in articles 44, paragraph 3, and 64 of the Vienna Convention and is therefore the result of the interpretation made by the Commission itself.

42. Spain shares this interpretation, which allows for the limitation of the effects of termination in cases of *jus cogens superveniens.*

43. Third, Spain believes that the possibility of separability of treaty provisions in this case is an exception to the general rule of invalidity and termination in whole. Accordingly, it would be useful to specify the requirement more clearly in draft conclusion 11, paragraph 2 (c), that "continued performance of the remainder of the treaty *would not be unjust*" (emphasis added).

44. The expression "would not be unjust" is indeterminate. Spain suggests that it be deleted and replaced with the following: "the continued performance of the remainder of the treaty does not adversely affect the interests of the parties to the treaty and the object and purpose of the treaty".

45. Alternatively, if the preference is to retain the current wording modelled on article 44, paragraph 3 (c), of the 1969 Vienna Convention on the Law of Treaties, the Commission could make such determination in the commentaries, to specify the benchmarks against which the justness or unjustness of separability would be assessed. They could include not only the interests of all States parties that might be affected by such separability, but also the object and purpose of the treaty, to the effect that separability of the treaty by some States does not prejudice its object and purpose, to the extent that they are not affected by the treaty's conflict with the peremptory norm.

B. On draft conclusion 13

Conclusion 13
Absence of effect of reservations to treaties on peremptory norms of general international law (*jus cogens*)

1. A reservation to a treaty provision that reflects a peremptory norm of general international law *(jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such.

2. A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens).*

46. As the Commission explicitly acknowledges in its commentary, both paragraphs are based on the guidelines in its Guide to Practice on Reservations to Treaties, adopted in 2013.[10]

47. However, the wording of paragraph 2 creates some room for ambiguity with regard to reservations made to "ordinary" treaty rules included in treaties containing some peremptory norm, as international practice shows in the case of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

48. Spain suggests retaining the wording formulated by Special Rapporteur Dare Tladi, in his third report: "a reservation that seeks to exclude or modify the legal effects of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*) is invalid".[11] This is a much clearer and simpler proposal.

C. **On draft conclusion 14**

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

1. A rule of customary international law does not come into existence if it conflicts with a peremptory norm of general international law (*jus cogens*). This is without prejudice to the possible modification of a peremptory norm of general international law *(jus cogens*) by a subsequent norm of general international law having the same character.

2. A rule of customary international law not of a peremptory character ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law (*jus cogens*).

[10] *Supplement No. 10* (A/66/10/Add.1); See also General Assembly resolution 68/111 of 16 December 2013.
[11] (A/CN.4/714) of 12 February 2018, para. 76 (b), p. 29.

3. The persistent objector rule does not apply to peremptory norms of general international law (*jus cogens*).

49. Spain is dissatisfied with the wording of draft conclusion 14, which is of vital importance for the development of international law as a legal system, since it seeks to regulate in a prescriptive manner the relationships between, and the legal effects and consequences of, the rules of "ordinary" customary international law and norms of *jus cogens.*

50. However, in draft conclusion 14, instead of being formulated in such terms, those relationships are formulated in terms of the "existence" of norms, thus producing unsatisfactory results.

51. The scenario in the first paragraph is one where a conflict is impossible, because if the customary rule does not come into existence, the normative conflict (conflict between norms) would not be possible.

52. Bearing in mind that the rules of customary international law are not the result of a formalized procedure but of a social process in which the two elements of international custom can be identified, Spain suggests that the paragraph be reworded to reflect that character. Accordingly, the first sentence of paragraph 1 could read as follows: "The process of formation of a customary rule will not be completed or crystallized if the result may conflict with a peremptory norm of general international law (*jus cogens*)".

53. Paragraph 2 addresses the situation of a rule of customary international law that conflicts with a peremptory norm, a situation which raises a central question regarding the structure of the international legal system, since it deals with the relationships between such rules and norms, the legal effects between them and their resulting legal consequences.

54. Paragraph 2 provides that in such cases, the customary rule, which does not have a peremptory character, "ceases to exist" if it conflicts with the peremptory norm.

55. First, all relationships between the two types of rules, including those of a normative conflict (conflict as understood by the Commission) are always between rules and norms that already exist and are in force.

56. Second, the legal effects of the relationships between the two types of rules and norms that are in normative conflict, based on one of the characteristics of norms of *jus*

cogens (draft conclusion 3) are determined by the fact that the latter "are hierarchically superior to other rules of international law".

57. Third, the legal consequences of the hierarchical superiority of peremptory norms should be identified more clearly. These legal consequences can be understood in two ways: first, as a derogating hierarchy over the customary rule, such that the legal consequence could be the invalidity of the customary rule as opposed to the peremptory norm; second, as a simple prevalence or preferential application of the peremptory norm which merely leaves the conflicting customary rule inapplicable.

58. Spain believes that the Commission should reword paragraph 2 and explain more clearly, either in the draft conclusion itself or in the commentary, the legal consequences of such conflict (normative conflict).

59. Paragraph 3 of draft conclusion 14 excludes the application of the persistent objector rule. However, Spain suggests that the Commission make it clearer in paragraph (12) of its commentary[12] that the persistent objector rule is a secondary rule relating to the scope of a customary international rule or to its opposability, but does not regulate either the identification or the creation or termination of the content of substantive primary rules. In short, the Commission should make it clear in the commentaries that the persistent objector rule is inapplicable to peremptory norms and therefore cannot limit the personal, material, temporal or any other scope of such norms.

C. On draft conclusion 15

Conclusion 15
Obligations created by unilateral acts of States conflicting with a peremptory norm of general international law (*jus cogens*)

1. A unilateral act of a State manifesting the intention to be bound by an obligation under international law that would be in conflict with a peremptory norm of general international law (*jus cogens*) does not create such an obligation.

2. An obligation under international law created by a unilateral act of a State ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law (*jus cogens*).

60. The wording of paragraph 1 is better suited to the dynamics of the relationship between an intended unilateral act and a peremptory norm as established in the previous

[12] *Supplement No. 10* (A/74/10), p. 186.

draft conclusion with respect to customary rules. Since the unilateral act is not yet in existence, its conflict with a norm of *jus cogens* would prevent the creation of the resulting legal obligation.

61. More issues are raised in the second paragraph, which again addresses the relationship between obligations created by unilateral acts in conflict with a peremptory norm in terms of existence.

62. Spain considers it more appropriate, as it indicated with regard to draft conclusion 14 on customary rules, to explain such relationships in terms of legal effects. In that connection, it suggests the use of terms already employed by the Commission in its guiding principles applicable to unilateral declarations of States capable of creating legal obligations, adopted in 2006.[13]

63. Accordingly, Spain suggests the following wording for the second paragraph: "An obligation under international law created by a unilateral act of a State *shall be void* if and to the extent that it conflicts with a new peremptory norm of general international law (*jus cogens*)" (emphasis added).

E. On draft conclusion 16

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

A resolution, decision or other act of an international organization that would otherwise have binding effect does not create obligations under international law if and to the extent that they conflict with a peremptory norm of general international law (*jus cogens*).

64. Spain has two observations about the draft conclusion: one on its wording and the other on the commentaries to the draft conclusion.

65. Spain suggests that the wording of the draft conclusion be clarified in order to distinguish between the normative provisions contained in the legal instrument (a resolution, decision or other act of an international organization) and the legal instrument itself. The draft conclusion could therefore be formulated as follows: "*A provision contained* in a resolution, decision or other act of an international organization that would otherwise have binding effect does not create obligations under international law if and

[13] *Supplement No. 10* (A/61/10), paras. 176–177.

to the extent that it conflicts with a peremptory norm of general international law (*jus cogens*)" (emphasis added).

66. The observation about the commentaries, in particular paragraph (4) thereof,[14]concerns resolutions, decisions and binding acts of the Security Council. Spain supports the application of the international rule of law in the international community and, therefore, also the functioning of the Security Council.

67. Notwithstanding Article 103 of the Charter of the United Nations, Spain shares the Commission's defence and reasoning in said paragraph (4) on the hierarchical superiority of peremptory norms over such resolutions, decisions and binding acts of the Security Council.

68. However, Spain understands that the interpretation of Article 25 of the Charter and of the functions of the Security Council by the International Court of Justice in the *Lockerbie* case[15] and by the European Court of Human Rights in the *Al-Jedda*,[16]*Nada v. Switzerland* [17]and *Al-Dulimi* [18]cases can be used to defend the existence of a *juris tantum* presumption of compatibility between such binding resolutions and norms of *jus cogens.*

69. Although possible, it seems difficult that a Security Council resolution adopted by the required majority, and thus without a veto, could be contrary to a peremptory norm.

70. One of the legal implications of this observation is to clarify and defend the fact that the mere allegation of conflict with a peremptory norm is not sufficient for a unilateral refusal to comply with a binding Security Council resolution.

71. Spain suggests that this concern be accommodated with the addition of a second paragraph to the text of the draft conclusion or, preferably, to the corresponding commentaries.

[14]*Supplement No. 10* (A/74/10), p.189.
[15]I.C.J. Reports, 1992, para. 42.
[16]Judgment of 7 July 2011 in *Al-Jedda*, para. 102.
[17] Judgment of 12 September 2012 in *Nada v. Switzerland*, para. 170.
[18]Judgment of the Grand Chamber of the European Court of Human Rights, 21 June 2016, in *Al-Dulimi*, paras 138–142.

F. On draft conclusion 17

Conclusion 17
Peremptory norms of general international law (jus cogens) as obligations owed to the international community as a whole (*obligations erga omnes*)

1. Peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*), in which all States have a legal interest.

2. Any State is entitled to invoke the responsibility of another State for a breach of a peremptory norm of general international law (*jus cogens*), in accordance with the rules on the responsibility of States for internationally wrongful acts.

72. The object of draft conclusion 17 may be of vital importance for the systemic construction and conceptual refinement of the international legal order as a complex legal system: the relationships between peremptory norms of general international law (*jus cogens*) and obligations *erga omnes* and their legal consequences.

73. In the view of Spain, following its codification work on the international responsibility of States of 2001 and that on the international responsibility of international organizations of 2011 and some recent decisions of the International Court of Justice in the 2012 case of *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*[19] and the 2020 case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*,[20] the Commission had a good opportunity to further clarify the relationship between peremptory norms and obligations *erga omnes* and the legal consequences arising from that relationship.

74. Spain wishes to make the following comment about the wording of paragraph 1 of the draft conclusion and to suggest a reformulation. Obligations *erga omnes* are a type of collective obligations that are characterized as such because they protect general interests of the international community; they have an integral structure (they do not break down into bilateral components); they are universally applicable obligations; and they are obligations to the international community and as such, all States have a legal interest in complying with the norm from which they derive and in respect of the rights and obligations they create.

[19] Judgment of 20 July 2012, *I.C.J. Reports 2*012, para. 68.
[20] Order on provisional measures of 23 January 2020, *I.C.J. Reports 2*020, para. 41.

75. Consequently, the final phrase of paragraph 1, "... in which all States have a legal interest", could lead to confusion, since States, unless they are injured States, do not have an interest of their own, except that as members of the international community, they have a legal interest in the protection of the collective interest that they reflect and protect. Spain suggests that the final phrase be worded as follows: "... in which all States have a legal interest in ensuring that they are respected".

76. One of the specific consequences of this legal interest of all States is that every State has a right to invoke international responsibility as established in paragraph 2 of draft conclusion 17, which follows the provision of article 42 (for the injured State) and article 48, paragraph 1 (b), (for third States) of the articles on international responsibility of States.

G. On draft conclusion 19

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

1. States shall cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*).

2. No State shall recognize as lawful a situation created by a serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*), nor render aid or assistance in maintaining that situation.

3. A breach of an obligation arising under a peremptory norm of general international law (*jus cogens*) is serious if it involves a gross or systematic failure by the responsible State to fulfil that obligation.

4. This draft conclusion is without prejudice to the other consequences that a serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*) may entail under international law.

77. Spain recognizes that draft conclusion 19 closely tracks the wording of articles 40 and 41 of the Commission's 2001 articles on international responsibility of States for internationally wrongful acts, which the International Court of Justice had interpreted and applied in some of its recent judgments.

78. The draft conclusion deals with the particular consequences of serious breaches of peremptory norms. Some of the particular consequences are those set out in article 41

of the articles on international responsibility of States and those that may arise under the "without prejudice clause" of paragraph 3 (incorporated here into paragraph 4). In any case, it is clear that this is a draft conclusion on particular consequences.

79. This makes paragraph 3, which deals with the definition of the quantitative element of the breach of a peremptory norm (seriousness), less coherent. Paragraph 3 basically reproduces article 40, paragraph 2, of the articles on international responsibility of States. In other words, it helps to clarify the notion of a serious breach of peremptory norms, but does not provide for or regulate any legal consequence.

80. Accordingly, Spain recommends, for reasons of legislative technique, that paragraph 3 be deleted or that its contents be incorporated into the commentary.

H. On draft conclusion 21

Conclusion 21
Procedural requirements

1. A State which invokes a peremptory norm of general international law (*jus cogens*) as a ground for the invalidity or termination of a rule of international law is to notify other States concerned of its claim. The notification is to be in writing and is to indicate the measure proposed to be taken with respect to the rule of international law in question.

2. If none of the other States concerned raises an objection within a period which, except in cases of special urgency, shall not be less than three months, the invoking State may carry out the measure which it has proposed.

3. If any State concerned raises an objection, then the States concerned are to seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. If no solution is reached within a period of twelve months, and the objecting State or States concerned offer to submit the matter to the International Court of Justice, the invoking State may not carry out the measure which it has proposed until the dispute is resolved.

5. This draft conclusion is without prejudice to the procedural requirements set forth in the Vienna Convention on the Law of Treaties, the relevant rules concerning the jurisdiction of the International Court of Justice, or other applicable dispute settlement provisions agreed by the States concerned.

81. Draft conclusion 21 is procedural in nature and raises a particular concern. Spain has a general observation and a more specific comment on the draft conclusion.

82. The general observation relates to the legal status of the draft conclusions, which are not intended to serve as a draft international treaty on the topic. Rather, as the

Commission itself has reiterated, the draft conclusions have a methodological function to assist States, international and domestic courts and tribunals in the process of identification of peremptory norms and the determination of the legal consequences of such norms. The specific legal status of each of the draft conclusions will depend on its content, its wording and the normative authority it enjoys among States.

83. The procedural nature of draft conclusion 21 therefore differs from that of the other draft conclusions. Its content (paragraphs 1 to 3) closely tracks the provisions of articles 65 to 67 of the 1969 Vienna Convention on the Law of Treaties or, through a "without prejudice" clause (paragraph 5), refers to the relevant rules concerning "the jurisdiction of the International Court of Justice, or other applicable dispute settlement provisions agreed by the States concerned".

84. Spain therefore suggests that draft conclusion 21 be deleted.

85. However, it wishes to take this opportunity in particular to comment on paragraph 4, which has the greatest added value. Spain understands the purpose of the paragraph, but suggests that it be worded more clearly, at least in paragraph (8) of the commentary.[21] Paragraph 4 provides that if no solution is reached within a period of twelve months, and "the objecting State or States concerned offer to submit the matter to the International Court of Justice, the invoking State may not carry out the measure which it has proposed until the dispute is resolved." Spain understands that the idea is one of encouragement and recommendation to States that they submit their disputes to the International Court of Justice, but, as the Court itself has stated repeatedly and unequivocally, the mere invocation of the breach of a peremptory norm "cannot of itself provide a basis for the jurisdiction of the Court".[22] This means that paragraph 4 cannot be interpreted as a provision that attributes compulsory jurisdiction to the Court in such cases.

[21] *Supplement No. 10* (A/74/10), p. 202.

[22] *Armed Activities in the Territory of the Congo Case (New Application*: 2002), *I.C.J. Reports 20*06, para. 64.

V. Non-exhaustive list of norms of *jus cogens*

Conclusion 23
Non-exhaustive list

Without prejudice to the existence or subsequent emergence of other peremptory norms of general international law (*jus cogens*), a non-exhaustive list of norms that the International Law Commission has previously referred to as having that status is to be found in the annex to the present draft conclusions.

Annex

(a) The prohibition of aggression;

(b) The prohibition of genocide;

(c) The prohibition of crimes against humanity;

(d) The basic rules of international humanitarian law;

(e) The prohibition of racial discrimination and apartheid;

(f) The prohibition of slavery;

(g) The prohibition of torture;

(h) The right of self-determination.

86. Lastly, Spain wishes to make some observations and comments on the non-exhaustive list of *jus cogens* norms and their inclusion in the draft conclusions, with a final recommendation.

87. The Commission itself, in its commentary to draft conclusion 23, introduced some caveats regarding the nature, selection and scope of the illustrative list.[23] It pointed out that the list is methodological in nature and that it does "not seek to elaborate a list of peremptory norms of general international law (*jus cogens*)" (paragraph (1)). It also points out that the list is non-exhaustive for two reasons: first, there are or may be other norms of *jus cogen*s beyond those listed; second, in addition to the norms listed, the Commission has also referred previously to other norms as having peremptory character (paragraph (2)). The Commission has also included some caveats concerning the scope of the norms included: "the formulation of each norm is based on a formulation previously used by the

[23] *Supplement No. 10* (A/74/10), p. 204.

Commission"; and "there has been no attempt to define the scope, content or application of the norms identified". This is therefore a purely exploratory list.

88. In the light of the above, Spain has some misgivings about the added value of such a list and the suitability of its inclusion in the draft conclusions. Such a list raises concerns about the inclusion of peremptory norms; the scope and content of the norms included; the function that such a list may have in the processes of acceptance and recognition of the peremptory character of certain norms; and the role of the Commission in the process of identification of the criterion for the acceptance and recognition of the peremptory character by the international community of States as a whole.

89. First, the annex to draft conclusion 23, which contains a non-exhaustive list of peremptory norms to which the Commission had previously referred as having peremptory character, raises doubts as to the selection of such norms. The Commission itself recognizes not only that other peremptory norms may exist, but also that it had previously referred to some norms as *jus cogens* norms, and yet did not include them in the list.

90. Second, inclusion in the non-exhaustive list does not reduce the uncertainties that may exist as to the scope and content of some of the peremptory norms listed. Three of those norms suffice as examples: the prohibition of aggression, the basic rules of international humanitarian law, and the prohibition of torture.

91. The Commission has used the expression "prohibition of aggression". The inclusion of that norm in the list creates uncertainty about at least two aspects of its scope and content. First, with regard to the scope of the norm, the question is whether it covers only the narrow content of the concept of "aggression", as presented by the General Assembly in its resolution 3314 (XIX) of 1974, or whether it has a broader scope, as suggested by the Commission and the International Court of Justice. The Commission referred previously to that norm in its commentary to the former article 50 of the draft articles on the law of treaties as follows: "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*".[24] Likewise, in the *Nicaragua* case, the International Court of Justice said that States frequently mention the principle of the

[24] *Yearbook of the International Law Commission Yearbook 1966*, vol. II, p. 247, para. (1) of the commentary.

prohibition of the use of force enunciated in Article 2, paragraph 4, of the Charter as a fundamental principle of public international law.[25]

92. Second, the inclusion of such a norm also leaves unaddressed the doubts as to the legal relationship and status of aggression or, more broadly, the prohibition of the use of force, and self-defence. Thus, the Commission does not clarify whether such a relationship can be explained either in terms of a general rule and an exception (self-defence), or a general rule and a circumstance precluding wrongfulness, or both with the ensuing legal consequences.

93. The reference in the annex to "the basic rules of international humanitarian law" also does not significantly improve the existing uncertainty about the scope of that expression. The use of the generic plural, in that context, does not help to identify with certainty which specific rules of international humanitarian law have a peremptory character.

94. As for the prohibition of torture, its inclusion in this exploratory list raises serious doubts in the light of the most recent international practice.

95. Third, Spain also has doubts about the usefulness of the non-exhaustive list in the processes of acceptance and recognition of the peremptory character of some rules of general international law. The effect of the inclusion of some rules in such a list or their exclusion from such a list is not always necessarily positive. It may sometimes give rise to observations, comments, positions or manifestations to the contrary by States, whose impact on the process of acceptance and recognition of the peremptory character of a rule of general international law may not always facilitate its identification as a norm of *jus cogens*.

96. Lastly, the non-exhaustive list proposed by the Commission could create confusion as to who plays the key role in the acceptance and recognition of the peremptory character of some rules of general international law. As stated in draft conclusions 4 (b) and 7, it is the international community of States as a whole that "accepts and recognizes" the peremptory character of the norm. The relevant criterion for identification therefore requires general, though not unanimous, acceptance and recognition by the international community of States as a whole. The Commission, as an

[25] *ICJ Reports 1986*, para. 190.

expert body, constitutes a subsidiary means for determining the peremptory character (draft conclusion 9), but the key role is played by States.

97. Consequently, since the non-exhaustive list of peremptory norms included in the draft conclusions has more disadvantages than advantages, Spain recommends its deletion.