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COMMENTS AND OBSERVATIONS OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

ON

THE DRAFT CONCLUSIONS ON PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (*JUS COGENS*) ADOPTED BY THE INTERNATIONAL LAW COMMISSION ON FIRST READING (REPORT OF THE INTERNATIONAL LAW COMMISSION, 71ST SESSION, A/74/10)

30 JUNE 2021

The United Kingdom ("UK") thanks the International Law Commission ("the Commission") for the opportunity to submit its written comments and observations on the draft

conclusions and commentaries on peremptory norms of general international law (*jus cogens*) adopted by the Commission on first reading in 2019, which are set out in Chapter V of the Report of the Commission at its 71st session (A/74/10) ("the Draft Conclusions"). The UK expresses its sincere appreciation to the Special Rapporteur, Mr Dire Tladi, to the Drafting Committee and to the Commission as a whole, for their work on this important topic and the preparation of the Draft Conclusions and commentaries. The UK has the following comments and observations:

1. The UK welcomes the scope of the Draft Conclusions as set out in draft Conclusion 1 and its accompanying commentary. As set out previously, it is the UK's view that the topic of peremptory norms of general international law (*jus cogens*) should be confined to methodology, and should not attempt to identify individual *jus cogens* norms or their content.[1]

2. The UK stresses the lack of practice relating to peremptory norms of general international law (*jus cogens*) both in the UK and internationally. Against that backdrop, the UK has supported from the outset the Commission's work on this topic, and its preparation of the Draft Conclusions, as an opportunity to provide practical guidance and assistance to courts and practitioners of international law. Nevertheless, the UK has consistently urged the Commission to progress cautiously and to take full account of the lack of practice when proposing draft conclusions and when elaborating its commentaries. Indeed, this is a topic where the Commission's commentaries will be of particular importance given the lack of practice. They need to be drafted with great care and attention.

3. The UK notes that the Draft Conclusions cover a diverse range of sensitive issues, which do not in all respects reflect current law or practice. The UK encourages the

[1] See the statements of the UK Legal Adviser on the topic of Peremptory Norms of General International Law (*jus cogens*) in: the 2015 debate on the report of the Commission (A/70/10); the 2016 debate on the report of the Commission (A/71/10); the 2017 debate on the report of the Commission (A/72/10); the 2018 debate on the report of the Commission (A/73/10); and the 2019 debate on the report of the Commission (A/74/10). See also the UK's comments on Section A: Peremptory Norms of General International Law (*jus cogens*) in response to the Commission's requests for information contained in Chapter III of its report of its 70th session (A/73/10).

Commission, in its further work on the Draft Conclusions, to clarify where it considers the Draft Conclusions codify existing law, where the Commission is suggesting the progressive development of law or new law, and where the intention of the Commission is solely to provide a recommendation to States. In this regard, the UK recalls its statements at the 2018 and 2019 debates on the reports of the Commission in which the UK highlighted the responsibility of the Commission to assist judges and practitioners by clarifying the legal force of their products.[2]

4. The UK notes with appreciation the definition of a peremptory norm of general international law (*jus cogens*) in draft Conclusion 2, and endorses the statement in paragraph (2) of the accompanying commentary that "*it is therefore appropriate for these draft conclusions to rely on article 53* [of the 1969 Vienna Convention on the Law of Treaties] *for the definition*".

5. However, the UK considers that it is neither necessary nor helpful to include draft Conclusion 3 on 'the general nature' of peremptory norms of general international law (*jus cogens*). The UK finds the Commission's commentary to this draft conclusion unconvincing. The rationale underpinning the concept of peremptory norms of general international law (*jus cogens*) is a controversial and essentially theoretical matter, which the UK considers unrealistic to capture accurately within the text of a conclusion. Moreover, the UK believes that the general nature of peremptory norms of general international law (*jus cogens*) does not need to be addressed in the Draft Conclusions: the purpose of the Draft Conclusions is to set out the methodology relating to the identification and the legal consequences of *jus cogens* norms.

6. On that basis, draft Conclusion 3 cannot provide the clarity or assistance that would be helpful to States and practitioners. In the UK's view, it complicates and obscures the Commission's otherwise clear statements of the definition and criteria for identifying norms of *jus cogens* set out in draft Conclusions 2 and 4, and should therefore be omitted from the Draft Conclusions. Notwithstanding the Commission's

[2] The statements are available online at: https://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/uk_1.pdf and https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/uk_1.pdf.

attempted explanation at paragraph (16) of the commentary, there is a risk that the descriptive elements in draft Conclusion 3 could be read as creating additional requirements regarding the formation and identification of norms of *jus cogens*: for example, a State might seek to argue based on this draft Conclusion that a norm did not have a peremptory character even if it met the test in Article 53 of the 1969 Vienna Convention on the Law of Treaties ("the VCLT"), because, in the view of that State, the relevant norm did not reflect a '*fundamental value of the international community*'. It is important that elements of the Draft Conclusions should not detract from the meaning of peremptory norms of general international law (*jus cogens*) as set out in Article 53 VCLT and reflected in draft Conclusion 2.

7. In relation to draft Conclusion 5 on the 'bases for peremptory norms of general international law (*jus cogens*)', the UK notes the Commission's statement at paragraph (3) of the commentary that the term "*basis*" is to be understood flexibly and broadly, and is intended to capture the range of ways that various sources of international law may give rise to the emergence of a norm of *jus cogens*. Given the requirement that a norm of *jus cogens* be, first, a norm of general international law, and, second, accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character, the UK considers that it would be helpful for courts and practitioners if the Commission could further develop and expand its commentaries in relation to paragraph 2 of draft Conclusion 5 as to the ways in which a treaty provision or general principle of international law may constitute a basis for the emergence of a norm of *jus cogens*.

8. The UK agrees with the Commission's conclusion in paragraph 1 of draft Conclusion 6 that the requirement of "*acceptance and recognition*" as a criterion for identifying a peremptory norm of general international law (*jus cogens*) is distinct from acceptance and recognition as a norm of general international law. The UK respectfully suggests that – in order to aid clarity – the Commission should include in

paragraph 2 a reference to the important requirement that acceptance and recognition be by the "*international community of States as a whole*":

> "2. *To identify a norm as a peremptory norm of general international law (*jus cogens*), there must be evidence that such a norm is accepted and recognized* ***by the international community of States as a whole*** *as one from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character.*" (suggested addition in bold)

9. The UK appreciates the attention paid by the Commission to draft Conclusion 7 and its efforts to clarify the meaning of "*acceptance and recognition by the international community of States as a whole*". The UK confirms its understanding that it is only the positions of States that are determinative as to the acceptance and recognition of the peremptory character of a norm of general international law.

10. The UK recalls the words of the International Court of Justice in the *North Sea Continental Shelf* cases that the practice underpinning the formation of a rule of customary international law must be "*both extensive and virtually uniform*"[3]: the acceptance and recognition of the peremptory character of a norm of general international law must not be any less extensive or uniform, indeed it should be more so. The UK further underlines the requirement of "*acceptance and recognition by the international community of States* ***as a whole***" (emphasis added) given the perception that norms of *jus cogens* are of a higher order amongst the rules of international law and given the potentially far-reaching legal consequences ascribed to norms of *jus cogens*.

11. The UK further emphasises that demonstrating the requirement for acceptance and recognition by the international community of States as a whole is not just a question of numbers, but also requires acceptance and recognition by States across

[3] *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p.3.

all geographic regions and legal systems, as well as in light of the various interests of States that may be particularly affected. In this regard, it is important to note that the persistent objection of certain States to a rule of customary international law while that rule was in the process of formation, particularly the persistent objection of a State which is specially affected by that rule, will be relevant to whether it is possible to conclude that the rule has been accepted and recognised by the international community of States as a whole as having a peremptory character.

12. The UK encourages the Commission to consider how it might further develop and refine draft Conclusion 7 and its accompanying commentary to reflect these points. The UK notes in this connection that it would be better to omit paragraph 2 from the draft Conclusion entirely rather than include a formulation which does not reflect the long-standing understanding and practice of States based on Article 53 VCLT.

13. The UK also questions whether it would be better to move paragraph 3 of draft Conclusion 7 and incorporate it into draft Conclusion 9. This would better reflect the scope of each conclusion: draft Conclusion 7 concerns acceptance and recognition by the 'international community of States as a whole' for which only the positions of States can be determinative, whereas draft Conclusion 9 relates to the 'subsidiary means for the determination of the peremptory character of norms of general international law (*jus cogens*)'.

14. The UK notes the Commission's conclusion, as set out in draft Conclusion 8, that the evidence of acceptance and recognition by a State may take a wide range of forms and that such evidence includes, but is not limited to, the examples of practice listed in paragraph 2 of that draft Conclusion. The UK proposes that the words 'conduct in connection with' be inserted before the reference to "*resolutions adopted by an international organisation or at an intergovernmental conference*", so as to align the provision with Conclusion 10 - forms of evidence of acceptance as law (*opinio juris*) - of the draft conclusions on identification of customary international law adopted by the Commission at its 70th session (A/73/10):

"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* ***conduct in connection with*** *resolutions adopted by an international organization or at an intergovernmental conference.*" (suggested addition in bold)

15. With reference to draft Conclusion 11 on the separability of treaty provisions conflicting with a peremptory norm of general international law (*jus cogens*) and its commentary, the UK recalls its view that it would be "*disruptive of good international relations in many cases if the whole of a treaty were to be rendered void merely because, on one interpretation, one of its provisions happened to conflict with a peremptory rule or norm of international law*".[4] This is particularly important given that certain treaties might conflict only in a minor respect with an emerging peremptory norm of international law: separability is necessary for the predictability and continued effective conduct of international relations. The UK notes that the position proposed by the Commission in draft Conclusion 11 reflects the VCLT framework in that it distinguishes between treaties that at the time of their conclusion conflict with a norm of *jus cogens* and treaties which only subsequently come into conflict with an emerging *jus cogens* norm. Paragraph 5 of Article 44 VCLT expressly provides that no separation is permitted for treaties falling within Article 53, i.e. treaties which at the time of their conclusion conflict with a norm of *jus cogens*, whereas the provisions of Article 44 concerning separability apply to treaties falling within Article 64, i.e. existing treaties which only subsequently come into conflict with an emerging *jus cogens* norm.

16. The UK notes the Commission's statement in paragraph (2) of the commentary in relation to treaties that at the time of their conclusion conflict with a norm of *jus*

[4] The report of the First Session of the Conference is available at: http://legal.un.org/docs/?path=../diplomaticconferences/1968_lot/docs/english/sess_1.pdf&lang=EF (see pages 386-7). This issue was also commented on by Sir Francis Vallat in the Second Session, see in particular pages 75 and 98 of the report of the Second Session available at: http://legal.un.org/docs/?path=../diplomaticconferences/1968_lot/docs/english/sess_2.pdf&lang=EF.

cogens that "*[t]he view was expressed that there may be cases in which it would nevertheless be justified to separate different provisions of a treaty*". In light of the provisions of the VCLT, in particular paragraph 5 of Article 44, the UK would be grateful if the Commission could further elaborate on that statement, including outlining the circumstances in which it considers it might be justified to separate different provisions of such a treaty.

17. The UK notes that the Commission, at paragraph 1 of draft Conclusion 14, preserves the possibility that a norm of *jus cogens* may be modified by a subsequent norm having the same peremptory character, and would welcome the Commission's clarification, perhaps in the commentaries, as to how such a subsequent norm may develop and eventually modify the existing norm given the legal consequences ascribed to peremptory norms of general international law (*jus cogens*) in Part 3 of the Draft Conclusions.

18. As noted above in relation to draft Conclusion 7, the persistent objection of certain States to a rule of customary international law while that rule is in the process of formation is relevant to whether it is possible to conclude that the rule has been accepted and recognised by the international community of States as a whole as having a peremptory character. The UK has previously raised concerns about paragraph 3 of draft Conclusion 14.[5] The UK continues to question whether the status of a persistent objector should be automatically denied if a rule of customary international law were to become a peremptory norm of general international law (*jus cogens*); there is no relevant State practice to support such a contention. In light of the requirement for acceptance and recognition by the international community of States as a whole, the UK remains unconvinced that it would even be possible for a norm of *jus cogens* to develop where there is a clear persistent objection or objections from States, especially those States who are specially affected. Therefore, the UK considers that it would be better to omit paragraph 3 from the draft Conclusion and instead explore in the accompanying commentary the arguments in

[5] See the statement of the UK Legal Adviser on the topic of Peremptory Norms of General International Law (*jus cogens*) in the 2018 debate on the report of the Commission (A/73/10).

favour and against the relevance of persistent objection to the acceptance and recognition of a norm of *jus cogens*.

19. The UK cannot accept draft Conclusion 16, on the relationship between *jus cogens* and binding resolutions of international organisations. In particular, there is not sufficient State practice to support the contention that a State can refuse to comply with a binding resolution of the United Nations Security Council based on an assertion of a breach of a norm of *jus cogens*. This is a controversial matter among States and writers alike, as the Commission's commentary acknowledges. The UK further notes that the Security Council has never contravened a norm of *jus cogens* in its resolutions.

20. There is a clear danger that this Conclusion could be used to weaken respect for resolutions of the Security Council, thereby reducing their effectiveness. This would have serious practical ramifications for international peace and security. To ensure the effective operation of the United Nations' collective security system, it is essential that all Member States of the United Nations fully respect resolutions of the Security Council and do not question them unilaterally.

21. Therefore, the UK urges the Commission to further consider the scope of draft Conclusion 16, to ensure that binding resolutions of the United Nations Security Council are excluded from the scope of that Conclusion.

22. The UK notes that in preparing draft Conclusion 19 the Commission has relied on the 2001 articles on State responsibility,[6] not all of which represent existing law, and some of which present problems of practical implementation. The UK recalls the comments and observations that it made in relation to those Draft Articles during their preparation.[7] Debate continues regarding what constitutes a "*serious breach*" or a "*gross and systematic failure*" to fulfil an obligation, and consequently the lack

[6] Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its 53rd session in 2001 (A/56/10).
[7] For example, Document A/CN.4/515 and Add.1-3 'Comments and observations received from Governments'.

of clarity regarding the meaning of those terms will inevitably affect the utility of the Draft Conclusions. The UK also affirms the importance of ensuring flexibility to respond to breaches of norms of *jus cogens* in light of the nature of the breach and the circumstances of each State concerned: not all States would be affected in the same way or to the same extent by a serious breach of a norm of *jus cogens*, nor, more importantly, would all States be in an equal position to take steps to bring to an end such a serious breach. Therefore, the UK encourages the Commission to acknowledge the unsettled status of these provisions in the Draft Conclusions.

23. The UK notes the Commission's explanation for the inclusion of a detailed procedural provision in the Draft Conclusions, and commends its intention to promote the stability of international relations and guard against the unsubstantiated unilateral invocation of *jus cogens* as a means to circumvent international obligations. The UK also notes, however, the Commission's acknowledgement that draft Conclusion 21 as a whole does not reflect customary international law. In that light, the UK encourages the Commission to consider whether there are changes that might better reflect the status of this provision as a recommended procedure, for example omitting the word '*requirement*' from its heading and moving it to a new Part 4 focused on procedure, thereby distinguishing it from Part 3 which focuses on the legal consequences of peremptory norms of general international law (*jus cogens*).

24. The UK would also welcome clarification from the Commission as to how it envisages draft Conclusion 21 might work in practice. For example, how might a State invoking a norm of *jus cogens* ascertain which "*other States concerned*" to notify of its claim, particularly if it is assumed that a norm of *jus cogens* imposes obligations *erga omnes* (namely to the international community of States as a whole)? Secondly, given the non-binding nature of these Draft Conclusions, how would the practical implementation of paragraph 4 interact with the principle, which the UK affirms, that no State may be required to submit to the jurisdiction of an international court or tribunal without its consent? The UK would also encourage the Commission to ensure that its proposals for this draft Conclusion are consistent with existing

provisions of law relating to the invocation of *jus cogens* norms, such as Article 65 VCLT.

25. The UK notes the 'without prejudice' clause at draft Conclusion 22 which has replaced the initial proposals relating to the possible consequences of *jus cogens* on immunities. So far as it goes, this development is welcome, though the UK maintains that it would be better simply to drop the provision. In particular, the UK questions the emphasis in the commentary on immunities: customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused nor the peremptory character of the rule which it is alleged to have violated. Moreover, the UK recalls the judgment of the International Court of Justice in *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* where the Court found that immunities were a question of jurisdiction, whereas the question whether there has been a breach of *jus cogens* is one of substance.[8]

26. The UK recalls that the criteria articulated in draft Conclusion 4 for the identification of a peremptory norm of general international law (*jus cogens*) are stringent and require the peremptory character of the norm to be accepted and recognised by the international community of States as a whole. Therefore, it is important that, if a non-exhaustive list were to be annexed to the Draft Conclusions, the examples included in that list should clearly fulfil the relevant criteria. The UK agrees that the Draft Conclusions are not the appropriate place to explore or seek to identify the content of particular norms of *jus cogens*; there remains a serious question as to the utility of the proposed non-exhaustive list annexed to draft Conclusion 23 and whether it is possible to state with confidence that the relevant norms as formulated by the Commission clearly fulfil the criteria.[9] As set out in the annex to the UK statement in the 2019 debate on the Commission's report, it is clear from the

[8] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening),* Judgment, I.C.J. Reports 2012, p.99.

[9] In this regard, the UK notes that the International Court of Justice has never expressly found that the right to self-determination is a norm of *jus cogens*. It has been a conscious decision of the Court not to ascribe a peremptory character to the right, notwithstanding its importance as an "*essential principle of contemporary international law*" (*East Timor (Portugal v Australia),* Judgment, I.C.J. Reports 1995, p.90, at [29]).

accompanying commentaries that the prior work by the Commission on this matter was often cursory in nature; at times did not directly declare norms to be *jus cogens*; was sometimes inconsistent in the formulation of the same norm; and at times was not the work of the Commission as a whole.

27. The UK still considers that a list is not essential to this topic and is now firmly of the view that it should be not be included in the Draft Conclusions, which has been the approach adopted in other topics.