Comments of the United States
on the International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*) and Draft Annex, Provisionally Adopted by the Drafting Committee on First Reading

June 30, 2021

Introduction

The United States welcomes the opportunity to provide written comments[1] on the International Law Commission's (ILC) draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*) and Draft Annex ("draft conclusions"), and accompanying commentary, as adopted by the ILC on first reading in 2019.[2] This is an important topic and the United States recognizes both the complexity and potential value of the project. The United States extends its appreciation to the Special Rapporteur, Mr. Dire Tladi, for his contributions to the development of these draft conclusions, as well as to the other members of the ILC.

General Commentary

a. The "Conclusion" Format for this ILC Work Product

Since the turn of the millennium, the format of the ILC's work products has changed in a "clear and readily observable tendency."[3] Whereas previously the ILC primarily utilized the "draft articles" format for its work products, which the ILC recommended for a negotiated convention consistent with ILC Statute Article 23(c) and (d), the ILC now regularly employs "principles," "conclusions," "guidelines," "guides," and draft articles with a recommendation that the General Assembly "take note" of the ILC draft, rather than initiate negotiation on a convention. The intention of the ILC in choosing one work product format over another is not self-evident, and the ramifications of that choice can be equally vague.[4] As the United States observed in its statement at the meetings of the Sixth Committee in 2019,

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[1] UN Doc. A/74/10 at 142; *see also* Note Verbale LA/COD/67 (Sept. 22, 2020), extending the deadline for written comments to June 30, 2021.

[2] UN Doc. A/CN.4/727.

[3] Yejoon Rim, *Reflections on the Role of the International Law Commission in Consideration of the Final Form of its Work*, 10 ASIAN J. INT. L. 23, 30 (2020); *see also* Michael Wood, *The General Assembly and the International Law Commission: What Happens to the Commission's Work and Why?* in INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION: FESTSCHRIFT IN HONOUR OF GERHARD HAFNER 373 (Isabelle Buffard et al, eds., 2008); Sean D. Murphy, *Codification, Progressive Development, or Scholarly Analysis The Art of Packaging the ILC's Work Product*, in THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS: ESSAYS IN MEMORY OF SIR IAN BROWNLIE (Maurizio Ragazzi, ed., 2013); Kristina Daugirdas, *The International Law Commission Reinvents Itself?* AJIL Unbound 108 (2014): 79-82; Jacob Katz Cogan, *The Changing Form of the International Law Commission's Work*, in EVOLUTIONS IN THE LAW OF INTERNATIONAL ORGANIZATIONS (Roberto Virzo & Ivan Ingravallo, eds., 2015); Elena Baylis, *The International Law Commission's Soft Law Influence*, 13 FIU LAW REV. 1007 (2019).

[4] For this reason, at the Sixth Committee meetings in 2020, the United States urged the ILC to re-consider its approach to the format of its work products, including by creating an internal practice guide on the selection of work

> As the ILC has increasingly moved away from draft articles, its work products have been variously described as conclusions, principles or guidelines. It is not always clear what the difference is among these labels, particularly when some of these proposed conclusions, principles, and guidelines contain what appear to be suggestions for new, affirmative obligations of States, which would be more suitable for draft articles.... It would be useful to have more transparency as to what the ILC intends by fashioning conclusions, principles, and guidelines, and whether any distinctions should meaningfully be drawn between them. A Commission delineation on this issue may also help avoid confusion as to what status should be afforded to the ILC's work in the absence of a clear expression of State consent to codification.[5]

The draft conclusions on peremptory norms of general international law (*jus cogens*) exemplify the confusion created by the lack of clear direction and guidance on ILC work product format. The draft conclusions include numerous proposed elements that constitute progressive development of the law. Several of these elements, particularly in draft conclusions 19 and 21, are drafted in a manner suggesting that they reflect binding obligations on States. Yet these supposed obligations have no basis in customary international law or in an international agreement.[6]

The United States urges the Commission, when issuing documents that are not intended to be adopted formally by States, such as "conclusions," "principles," "guidelines," or "guides," to be mindful of the limitations of such documents. Such documents should strive to codify existing law; otherwise, in the absence of adoption by States, these documents create confusion as to what the law is, as opposed to what the law might be. The United States also urges the Commission to consider developing a practice guide on the formats of its work products, so as to create greater consistency and transparency with respect to future projects.

b. Lack of Relevant State Practice

There is little State practice related to peremptory norms of general international law, including with respect to conflicting treaties, customary international law, and acts of international organizations. The commentary cites no examples, and the United States is not aware of any examples, of new treaties, customary international law, or acts of international organizations that contradicted existing *jus cogens*, and incidences of existing treaties violating later-emerging *jus cogens* are exceedingly rare. Thus, draft conclusions 10-14 and 16, which address these circumstances, clearly represent ILC suggestions for the progressive development

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product format. *See* Statement of Julian Simcock, Deputy Legal Counselor, U.S. Mission to the United Nations, November 5, 2020.

[5] Statement of Marik A. String, Acting Legal Adviser, U.S. Department of State, October 29, 2019.

[6] The United States has raised similar concerns in its comments on the draft principles regarding protection of the atmosphere, as well as in its comments on the draft conclusions on customary international law. *See* Comments of the United States on the International Law Commission's Draft Guidelines to Provisional Application of Treaties, as adopted by the Commission on First Reading in 2018, December 15, 2019, available at https://legal.un.org/docs/?path=../ilc/sessions/72/pdfs/english/pat_usa.pdf&lang=E; Comments of the United States on the International Law Commission's Draft Guidelines on Protection of the Atmosphere, as adopted by the Commission on First Reading in 2018, December 15, 2019, available at https://legal.un.org/docs/?path=../ilc/sessions/72/pdfs/english/poa_usa.pdf&lang=E.

of international law. While progressive development recommendations do not have to reflect *lex lata*, they should generally draw on at least some State practice.[7] Although recommendations regarding progressive development may be appropriate in some Commission topics, we believe that they are not well-suited to this project. In any event, the United States urges the Commission to identify clearly in its commentary when it is codifying *lex lata*, and when it is proposing a progressive development in international law.

Comments on the Draft Conclusions and accompanying commentary

Draft Conclusion 1 - Scope

The United States has no comments regarding draft conclusion 1.

Draft Conclusion 2 - Definition of a peremptory norm of general international law

In general, this conclusion reflects provisions in the Vienna Convention on the Law of Treaties (VCLT),[8] including the VCLT's reference to the possibility of the modification of a *jus cogens* norm. Both the VCLT and the present draft conclusions assume that a *jus cogens* norm can be modified in the future. Neither the VCLT nor the present draft conclusions sufficiently address how an existing *jus cogens* norm can be modified by a subsequent treaty or rule of customary international law when any such treaty or rule, according to these draft conclusions, would be void *ab initio*.[9]

Draft Conclusion 3 - General nature of peremptory norms of general international law

This conclusion describes "characteristics" of *jus cogens* norms beyond the VCLT definition reflected in draft conclusion 2. Draft conclusion 3 is unnecessary, and only serves to confuse the otherwise relatively clear standard in draft conclusion 2 and the criteria for identification of *jus cogens* norms in draft conclusion 4. The United States agrees with the view expressed by some ILC Members that the "characteristics" described in draft conclusion 3 "have an insufficient basis in international law, unnecessarily conflate the identification and effects of these norms, and risk being viewed as additional criteria for determining whether a specific peremptory norm of general international law (*jus cogens*) exists."[10]

First, it is unclear whether and how States would determine what the "fundamental values of the international community" might be. The commentary cites to several ICJ decisions regarding genocide, which describe the *jus cogens* norm at issue as "obligations which protect essential humanitarian values" and a violation of the relevant *jus cogens* norm as one that

[7] *See* Yearbook of the International Law Commission, Vol. II, Part 2, para. 238 (1997) (ILC topics should "be sufficiently advanced in stage in terms of State practice to permit progressive development and codification.")

[8] Vienna Convention on the Law of Treaties art. 32, opened for signature May 23, 1969, 1155 U.N.T.S. 331, Art. 53.

[9] *See* discussion of draft conclusion 14, *infra*.

[10] UN Doc. A/74/10 at 151.

"shocks the conscience of mankind."[11] Neither of these examples casts much light on what is intended by the broader term "fundamental values of the international community" adopted by the ILC. The phrase used in the draft conclusions appears to have been paraphrased from the U.S. Ninth Circuit opinion in *Siderman de Blake v. Argentina*, which described *jus cogens* norms as "derived from values taken to be fundamental by the international community."[12] The phrase "values taken to be" was omitted in the ILC's draft conclusions, but is important in the *Siderman de Blake* analysis. The "taken" aspect of *Siderman de Blake* is reflected not in draft conclusion 3, but rather in draft conclusion 4, which requires that the *jus cogens* norm be "accepted and recognized" as such. In any event, the decision in *Siderman de Blake* does not provide any clarity on the phrase "fundamental values of the international community" adopted by the ILC.

Second, the description of the *jus cogens* norm as "hierarchically superior" is redundant and has little or no practical benefit. Although various scholarly works describe this "hierarchy,"[13] it is sufficient to describe *jus cogens* norms as "peremptory," as those from which no derogation is permitted, and as those which are applicable *erga omnes* and as general international law. All of these more specific descriptions of *jus cogens* norms are well-accepted.[14]

For the sake of clarity and economy, the United States proposes that conclusion 3 be deleted from the draft conclusions. To the extent that this conclusion remains, the United States notes that while draft conclusion 2 refers to the "international community of States as a whole," draft conclusion 3 refers to the "international community." For consistency, draft conclusion 3, if retained, should be changed to refer to the "international community of States as a whole," or, if the ILC intended some difference by its use of the phrase "international community," that difference should be clearly stated in the commentary.

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[11] UN Doc. A/74/10 at 151, *citing Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion,* I.C.J. Reports 1951, 15, 23, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment,* I.C.J. Reports 2007, 43, 110–111, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment,* I.C.J. Reports 2015, 3, 46.

[12] UN Doc. A/74/10 at 152, *citing Siderman de Blake v. Republic of Argentina*, United States Court of Appeals, 965 F.2d 699, 715 (9th Cir 1992).

[13] *See, e.g.*, Thomas Weatherall, JUS COGENS: INTERNATIONAL LAW AND SOCIAL CONTRACT (CUP 2015) at 158-160, and citations therein. *See also* UN Doc. A/74/10 at 154-155 (citing court decisions referencing the "hierarchical" nature of *jus cogens*). The phrase "hierarchically superior" is the sole legal or theoretical support provided in the commentary to draft conclusion 16, relating to acts of international organizations, including Security Council resolutions. *See* A/74/10 at 189, paragraph 4. U.S. concerns regarding draft conclusion 16 are addressed *infra*.

[14] The United States does not have a strong objection to the phrase "universally applicable," but notes that it is redundant of the phrase "general international law" used elsewhere in the conclusions (defined as a law that "has equal force for all members of the international community"[14]), as well as conclusion 17 addressing the *erga omnes* application of *jus cogens*.

Draft Conclusion 4 - Criteria for the identification of a peremptory norm of general international law (*jus cogens*)

As noted above, draft conclusion 3 is redundant with draft conclusion 4. The United States favors deletion of draft conclusion 3, but the retention of draft conclusion 4 which, unlike draft conclusion 3, is reflective of VCLT Article 53. As noted with respect to draft conclusion 2, the ILC has not sufficiently addressed with respect to draft conclusion 4 how a *jus cogens* norm can be modified.[15]

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

This conclusion, like draft conclusion 3, is an unnecessary gloss on other draft conclusions that have greater support. It is largely redundant of draft conclusions 6 and 7, which specify precisely how a norm is "accepted and recognized" as a *jus cogens* norm (the criterion spelled out in draft conclusion 4).

Draft conclusion 5 is also unsupported. The United States is particularly concerned by the statement in draft conclusion 5(2) that "general principles of law may also serve as bases for peremptory norms of general international law." As recognized by at least some ILC members, there is no State practice or international jurisprudence to support this conclusion.[16] It seems unlikely that well-understood general principles of law – good faith, laches, *res judicata*, and the like – provide a basis for peremptory norms of general international law. The draft conclusions seem to be advancing this proposition simply because general principles of law are one of the sources of international law, without reflection on whether it is in fact a source of *jus cogens*.

More generally, draft conclusion 5 seems to place treaties and general principles on equal footing with customary international law as bases for *jus cogens*, but it is well established that *jus cogens* is a species of customary international law. The same cannot be said of treaties and general principles. General principles in theory may influence the formation of customary international law, but that does not mean that general principles are themselves "bases" of peremptory norms in the same way as we would regard a rule of customary international law to form the basis of a *jus cogens* rule. To the extent that treaty provisions reflect *jus cogens*, this is because those treaty provisions have entered into customary international law that has been accepted and recognized as *jus cogens* (for example, provisions of the Genocide Convention).

The United States therefore proposes, for clarity and economy, that the entirety of draft conclusion 5, or at least draft conclusion 5(2), be deleted.

[15] *See* discussion of draft conclusion 14, *infra*.

[16] UN Doc. A/74/10 at 162.

Draft Conclusion 6 – Acceptance and Recognition

The United States generally supports this draft conclusion, which addresses acceptance and recognition. However, the purpose of draft conclusion 6(1), which states that the requirement of acceptance and recognition is of a different character in the context of *jus cogens* norms than in the context of other norms of general international law, is not obvious on its face. The commentary makes clear that this statement is meant to convey that for a norm to be *jus cogens*, states must accept and recognize the norm's peremptory nature. For clarity, the United States proposes that the ILC replace the current text of draft conclusion 6(1) with this statement from the commentary: "Acceptance and recognition, as a criterion of peremptory norms of general international law (*jus cogens*), concerns the question whether the international community of States as a whole recognizes a rule of international law as having peremptory character."[17] In the alternative, as this may be redundant of draft conclusion 4(b), the ILC might consider deleting draft conclusion 6(1), preserving draft conclusion 6(2) (addressing evidence of acceptance and recognition).

Draft Conclusion 7 – International community of States as a whole

For purposes of these draft conclusions, it is sufficient to state that acceptance or rejection by the "international community of States as a whole" is necessary to establish *jus cogens*. This standard is accurately stated in draft conclusion 7(1), and provides States with guidance on the appropriate standard, but also provides flexibility to conduct their assessment considering "the international community as a singular entity whose values and interests reflect holism rather than aggregation."[18] How the views of the "international community of States as a whole" might be determined should be decided on a case-by-case basis, based on the evidence addressed in draft conclusion 8.

If more detail is needed, the ILC may begin with the well-accepted threshold for State practice sufficient to establish customary international law detailed by the International Court of Justice in the judgment for the *North Sea Continental Shelf* cases.[19] That standard requires that State practice must be "extensive and virtually uniform" to support the identification of customary international law. As the ILC wrote in its 2018 commentary to the draft conclusions on identification of customary international law (CIL Conclusions) with respect to the "extensive and virtually uniform" requirements, "no absolute standard can be given for either requirement; the threshold that needs to be attained for each has to be assessed taking into account of context."[20] Certainly, the standard for establishing *jus cogens* can be no less than what is required to establish customary international law.

[17] UN Doc. A/74/10 at 164.

[18] Weatherall, *supra* n. 13, at 29.

[19] *North Sea Continental Shelf Cases*, Judgement, ICJ Reports 1969, 3, 43.

[20] UN Doc. A/73/10 at 136.

The United States strenuously objects to defining the "international community of States as a whole" to mean "a very large majority of States," as currently reflected in draft conclusion 7(2). Such a definition has several detrimental effects.[21] First, it undermines the well-accepted standard for customary international law established by the International Court of Justice in the *North Sea Continental Shelf* case.[22] Second, it is inconsistent with the CIL Conclusions, which did not include a "very large majority" standard.[23] Third, the ILC's standard of "a very large majority of States" opens the possibility that a State, court, or other assessor of *jus cogens* would define a norm as peremptory even where a significant number of States do not recognize it as such. The United States therefore urges that draft conclusion 7(2) be deleted in its entirety.

With respect to draft conclusion 7(3), the United States agrees that the positions of non-state actors do not form a part of the acceptance and recognition by the international community of States as a whole that is required for the formation of peremptory norms of general international law. However, the extent to which the positions of non-state actors may be "relevant in providing context" for assessing such recognition and acceptance is unclear. Before the ILC adopts such an assertion, States should have the opportunity to review and respond to a further explanation as to how and when the ILC believes non-state entities are relevant in this context.

Draft Conclusion 8 - Evidence of acceptance and recognition

The United States finds draft conclusion 8(1) acceptable and has no objection to most of draft conclusion 8(2). However, the United States does not agree that evidence of acceptance and recognition that a norm is peremptory includes resolutions adopted by an international organization or at an intergovernmental conference.

The commentary does not address such resolutions, so we cannot determine the specific rationale for including them in draft conclusion 8(2). The commentary generally cites, however, to Conclusion 10(2) of the CIL Conclusions[24] as a source of the list in draft conclusion 8(2).[25] There is a crucial difference, however, between the list detailed in the CIL Conclusions,

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[21] As noted by Thomas Weatherall in his treatise, the phrase "as a whole" was defined by the chairman of the VCLT drafting committee as "a very large majority" of States (Weatherall, *supra n.* 13, at 28), but the VCLT itself does not include this definition.

[22] The commentary to the current draft conclusions provides little support for deviating from the *North Sea Continental Shelf* standard. In fact, in a footnote to the commentary supporting the "very large majority" proposal, the standard is described as "overwhelming majority," a different and arguably higher standard. According to the commentary, some ILC members preferred the higher standard that acceptance and recognition be of "the overwhelming majority of States," "virtually all States," or "the entire international community as a whole." A/74/10 at 168. Although the United States does not support any derivation from the *North Sea Continental Shelf* standard, all of these standards create a higher threshold than the "very large majority of States" standard currently in draft conclusion 7(2).

[23] ILC draft conclusions on identification of customary international law, conclusion 8.

[24] UN Doc. A/73/10 at 120.

[25] UN Doc. A/74/10 at 169.

and the list in draft conclusion 8(2) of the present draft conclusions. The final category of evidence listed in the CIL Conclusions is described as "**conduct in connection with** resolutions adopted by an international organization or at an intergovernmental conference." This form of evidence makes sense in determining CIL, including peremptory norms; the **conduct** of a State in the context of intergovernmental negotiations may constitute State practice.[26] But the resulting resolutions as such are not evidence of *opinio juris;* rather, it is the State practice associated with them that might constitute relevant evidence. Such resolutions are often adopted by consensus and are the result of political negotiations, and therefore may not reflect the legal views of all, or even a majority, of the States involved. Even for resolutions that are adopted by vote, States may have a variety of political and diplomatic reasons for voting for or against a resolution; such votes do not reflect reliable State practice undertaken out of a sense of legal obligation.[27] To determine whether a principle articulated in a resolution is currently accepted and recognized as a peremptory norm, it would be necessary to look to other sources of evidence.

Furthermore, not all "decisions of national courts" are relevant to whether a particular norm is accepted as a peremptory norm of general international law. Whether a national court decision is material depends on the facts of the case and the level of the court in the domestic judicial hierarchy.

The United States therefore proposes that draft conclusion 8(2) be amended as follows:

> (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; **relevant** decisions of national courts; treaty provisions; and **State conduct in connection with** resolutions adopted by an international organization or at an intergovernmental conference.

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

The United States recognizes that the text of draft conclusion 9 mirrors Article 38(1)(d) of the ICJ Statute, which details the means for determining the content of international law generally. In the specific context of customary international law, and especially *jus cogens*, the United States reiterates that what is necessary is an analysis of the practice and views of States.

[26] The commentary appears to recognize this omission, describing the last category of evidence of acceptance and recognition as follows: "States also routinely express their views about the peremptory character of particular norms through **public statements and statements** in international fora." UN Doc. A/74/10 at 170 (emphasis added). This description more accurately captures the "conduct" standard included in the CIL Conclusions.

[27] For more discussion of this issue, *see* Comments of the United States regarding the ILC Draft Conclusions on the Identification of Customary International Law (January 5, 2018), available at DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW (2019) at 258.

Draft Conclusion 10 - Treaties conflicting with a peremptory norm of general international law (*jus cogens*)

Draft conclusion 10 is the first in a series of draft conclusions addressing conflicts between various international law obligations and peremptory norms of general international law (draft conclusions 10-14, and 16). The United States reiterates at the outset that there is little or no State practice with respect to any of these provisions. The United States is therefore of the view that draft conclusions 10-14 and 16 should be deleted, for the reasons discussed above. If some or all of these conclusions remain, the ILC should clearly identify them as proposals for the progressive development of international law.

If draft conclusion 10 remains, the United States notes that the word "emerges" in draft conclusion 10(2), while drawn from the VCLT, does not reference the actual criteria for the establishment of a *jus cogens* norm detailed elsewhere in the draft conclusions: acceptance and recognition. The concept of "emergence" may therefore confuse the analysis of how *jus cogens* norms are formed. Specifically, the "emergence" concept may confuse the existence of a *jus cogens* norm with its content; while the "emergence" of a new *jus cogens* norm is an exceedingly rare occurrence, the precise content of *jus cogens* norms may shift more regularly and may be subject to debate. The United States requests that, if draft conclusion 10 remains, the commentary should make explicit that "emergence" refers to the "acceptance and recognition" standard used elsewhere in the conclusions.

Furthermore, this draft conclusion is inconsistent with draft conclusion 11. Draft conclusion 10(2) states that if a new *jus cogens* norm "emerges," an existing conflicting treaty is void and that the parties are "released" from all obligations under those treaties. Draft conclusion 11(2), on the other hand, makes clear that a treaty that is in conflict with a later-in-time *jus cogens* norm may survive, so long as the offending provision is separable from the remaining treaty.

As discussed below, the United States has concerns about the content of draft conclusion 11. If draft conclusion 11 remains as drafted, draft conclusion 10(2) should read "If a new peremptory norm of general international law (*jus cogens*) emerges and is in conflict with an existing treaty, that treaty becomes void and terminates, **subject to the separability of the treaty provisions addressed in Conclusion 11**. ~~The parties to such a treaty are released from any obligation further to perform the treaty.~~"

Draft Conclusion 11 - Separability of treaty provisions conflicting with a peremptory norm of general international law (*jus cogens*)

Draft conclusion 11 is also unsupported by State practice. The commentary for draft conclusion 11(2) cites to the VCLT for the differential treatment offered to treaties that pre-date and post-date a *jus cogens* norm, but the VCLT is unclear on this issue.[28] VCLT Article 44(5) states that any treaty subject to Article 53 is not subject to separability. Article 53, in turn, addresses a treaty that violates existing *jus cogens* at the time of the treaty's conclusion; such treaties are "void." This analysis is reflected in draft conclusion 10(1) – a treaty is void in its

[28] UN Doc. A/74/10 at 178.

entirety if any portion of it conflicts with *jus cogens*. As Mark Villiger explains in his commentary on the VCLT, "no separation of the provisions of the treaty is permitted" in such cases.[29]

Conclusion 11(2), on the other hand, makes explicit what the VCLT could be read as assuming, but does not explicitly state. With respect to *jus cogens* norms that are accepted and recognized after the treaty enters into force, VCLT Article 64 states that the "existing treaty which is in conflict with that norm becomes void and terminates." Article 64 does not expressly bar separability and the issue is not otherwise addressed in Article 44(5), and thus, according to Villiger, VCLT Article 64 "envisages the separability of treaty provisions" for existing treaties that violate *jus cogens* norms.[30] Such an assumption, however, was not made clear in the VCLT.

Given that there is no State practice in this area, we do not see any reason for the present draft conclusions to explicitly resolve this issue, particularly in a way that goes beyond the text of the VCLT. The United States therefore proposes that draft conclusion 11(2) be deleted. If draft conclusion 11(2) remains, the United States proposes that, as with draft conclusion 10, "emergence" be specifically equated with the acceptance and recognition standard in the commentary.

Draft Conclusion 12 - Consequences of the invalidity and termination of treaties conflicting with a peremptory norm of general international law (*jus cogens*)

This draft conclusion is also not based on any State practice and should be deleted. To the extent the ILC is inclined to preserve this conclusion, the commentary should make clear that the word "emergence" is specifically equated with the acceptance and recognition standard.[31]

Furthermore, draft conclusion 12(2) eliminates the phrase "of the parties" that appears in VCLT Article 71(2)(b), which the draft conclusion otherwise mirrors. The VCLT states that the termination of the treaty "does not affect any right, obligation or legal situation **of the parties** created through the execution of the treaty…." The commentary to the draft conclusions does not address the deletion of this phrase. In the absence of any State practice on this issue, to the extent that the ILC is inclined to deviate from the VCLT's language – which represents the only significant statement made by States on the point – it should explain its reason for doing so.

The United States is also concerned about the use of the ambiguous phrase "legal situation." Recognizing that this phrase is sometimes used in international humanitarian law or, in a different context, the ILC draft articles on State responsibility, it remains unclear what the phrase "legal situation" means in this context, and how a "legal situation" is to be distinguished from a legal obligation or legal right. The word "situation" is used again in draft conclusion 19;

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[29] Mark E. Villiger, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (Brill, 2008) at 568.

[30] *Id.*

[31] If, contrary to the U.S. view, the ILC maintains the portions of draft conclusion 11 that reflect the unstated and unsupported assumption read into VCLT Article 64 that a treaty is separable where it violates a later-emerging *jus cogens* norm, draft conclusion 12(1) should be revised to read "Parties to a treaty which is void **in whole or in part**…"

the U.S. concern applies to both draft conclusions, and we will discuss this concern in more detail with respect to that conclusion.

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

Draft conclusion 13 is unsupported by State practice and should be deleted.

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

The lack of State practice supporting the provisions in this "conflicts" section of the draft conclusions is most stark in draft conclusion 14. The commentary does not cite any examples of customary international law that has conflicted with *jus cogens*. Nor is such a problem likely to arise, given the "extensive and virtually uniform" State practice undertaken out of a sense of legal obligation that is required for customary international law. If State practice is "extensive and virtually uniform" so as to support one rule of customary international law, it is difficult to imagine how State practice would also support a contrary rule of *jus cogens*. Thus, draft conclusion 14 is unnecessary and should be deleted.

If draft conclusion 14 remains, assuming *arguendo* that somehow a rule of customary international law could conflict with a peremptory rule of general international law, it is also inconsistent with the well-accepted standard for the formation of customary international law. The only criteria to establish a rule of customary international law are State practice and *opinio juris*; conflict with other laws does not prevent the "existence" of a norm of customary international law. Draft conclusion 14(1) nonetheless asserts for the first time that "a rule of customary international law does not come into existence" if it conflicts with a *jus cogens* norm. It would be more accurate for draft conclusion 14(1) to state that "A rule of customary international law ~~does not come into existence~~ **is void** if it conflicts with a peremptory norm of general international law (*jus cogens*)". The use of the word "void" would be in keeping with draft conclusion 10, regarding the effect of *jus cogens* norms on treaties.

If the U.S. suggestion for draft conclusion 14(1) is accepted, then draft conclusion 14(2) is no longer necessary. The "void" rule would apply both to customary international law that conflicts with a pre-existing *jus cogens* norm, and customary international law that conflicts with a new *jus cogens* norm. To the extent that draft conclusion 14(2) remains, it is unclear on what basis customary international law that conflicts with a later "emerging" *jus cogens* norm could be severable, as indicated by the phrase "if and to the extent."

Draft conclusion 14(1) also indicates that the rule established therein 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." As indicated above with respect to draft conclusion 2, this assertion necessarily raises the question of how, if a conflicting customary international law norm "does not come into existence" or is otherwise void *ab initio*, a *jus cogens* norm may be modified by a subsequent norm of general international law having the same character. By the Commission's logic, the subsequent norm, to the extent it conflicts with the pre-existing *jus cogens* norm, may never come into existence

sufficient to modify the pre-existing *jus cogens* norm. Further consideration of this complicated question is warranted, as there is significant disagreement among international legal scholars as to whether and how a *jus cogens* norm may be modified.[32]

Finally, with respect to draft conclusion 14(3), the United States agrees that the persistent objector rule may not prevent the application of a *jus cogens* norm once that norm has been accepted and recognized consistent with draft conclusions 4 and 6. However, the existence of persistent objectors is highly relevant to whether the norm has been accepted and recognized by the international community of States as a whole. The fact that the persistent objector rule may not apply after the *jus cogens* norm has been accepted and recognized – thus binding States to a norm to which they may have previously objected – underscores the need for the ILC to revise draft conclusion 7 as discussed above.

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

This draft conclusion raises the same concern as draft conclusions 11 and 14, namely that there is differential treatment under the ILC draft conclusions for a new unilateral act of State that conflicts with existing *jus cogens* norms, as opposed to an existing unilateral act that conflicts with a new *jus cogens* norm. This difference, like in draft conclusion 14, is manifest in the phrase "if and to the extent" which appears in draft conclusion 15(2), but not draft conclusion 15(1). It is unclear on what basis a unilateral act of a State that conflicts with a later "emerging" *jus cogens* norm could be severable.

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

The United States maintains its objection, raised before the Sixth Committee in the general debate on the International Law Commission in both 2018 and 2019, to draft conclusion 16.[33] To the best of the United States' knowledge, no recognized international organization has issued a resolution, made a decision, or acted in a way that is contrary to a peremptory norm of general international law. Similar to draft conclusion 14,[34] it is highly unlikely that there would be a sufficient number of supportive member states to secure adoption of a resolution or other binding decision that would be contrary to a peremptory norm of general international law.

Moreover, draft conclusion 16 and its commentary risk undermining the authority of the United Nations Security Council (UNSC) and the binding nature of UNSC resolutions issued

[32] *See discussions in* Alexander Orakhelashvili, PEREMPTORY NORMS IN INTERNATIONAL LAW (2008) at 128-130; G.J.H. van Hoof, RETHINKING THE SOURCES OF INTERNATIONAL LAW (1983) at 166-67 (1983); Robert Kolb, PEREMPTORY INTERNATIONAL LAW – JUS COGENS: A GENERAL INVENTORY (2015) at 101-102.

[33] Statement of Jennifer Newstead, Legal Adviser, U.S. Department of State, October 31, 2018; Statement of Marik A. String, Acting Legal Adviser, U.S. Department of State, October 29, 2019.

[34] *See* comments regarding draft conclusion 14, *supra*.

under Chapter VII of the UN Charter.[35] The commentary states expressly that draft conclusion 16 would apply to binding UNSC resolutions. This statement could invite States, irrespective of Article 103 of the UN Charter, to disregard or challenge binding UNSC resolutions by relying on *jus cogens* claims, even disputed or unsupported claims. Given the lack of agreement on what constitutes *jus cogens* norms, such challenges are a real possibility and could impede the Council's efforts to address threats to international peace and security. Primary responsibility under the UN Charter for the maintenance of international peace and security lies with the UNSC,[36] and yet draft conclusion 16 and its commentary suggest there is a basis for States to take or refrain from taking actions mandated by the Council (and thereby binding on UN Member States) to address situations it has determined pose a threat to that peace and security.

Given the unlikelihood that the UNSC would issue a resolution or take any other decision contrary to a *jus cogens* norm, there is no reason to jeopardize the authority or effectiveness of UNSC resolutions by including draft conclusion 16. In light of this risk, coupled with the lack of any demonstrable need to address this hypothetical, the United States is strongly of the view that draft conclusion 16 must be deleted.[37]

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

Draft conclusion 17(1) refers to obligations to the "international community as a whole." The United States recognizes that this term was used by the International Court of Justice in *Barcelona Traction*, in reference to obligations *erga omnes*.[38] In the context of the draft conclusions, however, it is unclear whether this phrase is intended to refer to the "international community of States as a whole" referenced in draft conclusion 2, the "international community" referenced in draft conclusion 3, or some other body. The United States therefore requests more explanation from the ILC as to what is intended by the term "international community as a whole" in draft conclusion 17.

The United States is also concerned about the phrase "in accordance with the rules on the responsibility of States for internationally wrongful acts," in draft conclusion 17(2) and its accompanying commentary. The commentary points only to articles 42 and 48 of the draft articles on State responsibility for invocation of State responsibility by any State for the violation

[35] *See* UN Doc. A/74/10 at 188.

[36] UN Charter Art. 24(1).

[37] Draft conclusion 16 is also inconsistent with draft conclusions 11, 14, and 15. The earlier conclusions differentiate between acts that conflict with existing *jus cogens* norms (which are void in their entirety) and existing acts which conflict with new *jus cogens* norms (which are void "if and to the extent" there is a conflict and are subject to separability). Conclusion 16 makes no such differentiation for binding resolutions of international organizations, instead stating that all such acts are void "if and to the extent" they conflict with a *jus cogens* norm, regardless of whether the resolution is passed before or after the *jus cogens* norm is recognized and accepted by the international community of States as a whole. There is no obvious rationale for the differences between the draft conclusions in this regard. This inconsistency underlines why the ILC should adhere only to State practice in this area.

[38] *Case Concerning Barcelona Traction, Light and Power Company Ltd.*, 1970 ICJ Reports 1.

of an obligation *erga omnes*.[39] But since the draft articles on State responsibility are not binding and States may have differing views as to the applicability of particular articles, it is inappropriate to address them in the commentary as the "rules" referenced in draft conclusion 17(2). The commentary should therefore be adjusted to make clear that the draft articles on State responsibility are not necessarily the "rules" referenced in draft conclusion 17, as they remain drafts that have not yet become subject to State agreement.

Draft Conclusion 18 - Peremptory norms of general international law (*jus cogens*) and circumstances precluding wrongfulness

This draft conclusion is based on Article 26 of the draft articles on State responsibility. As explained in the commentary on the draft articles on State responsibility, "a genocide cannot justify a counter-genocide."[40] The United States agrees fully with this proposition.

Draft conclusion 18 presents, however, the same concern as draft conclusion 17, in referring to "rules on the responsibility of States." For the same reasons noted above, the United States requests that the commentary be adjusted to make clear that the draft articles on State responsibility are not necessarily the "rules" referenced in draft conclusion 17, as they are not subject to State agreement. In the alternative, the ILC could adhere more closely to the language in Article 26 of the draft articles on State responsibility. Draft conclusion 18 could thus be re-drafted to provide that no circumstance "precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law."

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

The United States strongly objects to draft conclusion 19.[41]

Draft conclusion 19 is framed in binding terms ("States shall cooperate…"), more appropriate for a draft article rather than a draft conclusion.[42] The violation of a *jus cogens*

[39] UN Doc. A/74/10 at 192.

[40] Draft articles on the responsibility of States for internationally wrongful acts, with commentary, UN Doc. A/56/10, at 85.

[41] Article 19(1) delineates between "serious" breaches of *jus cogens* norms and other breaches of *jus cogens* norms, consistent with the draft articles on State responsibility. UN Doc. A/74/10 at 197. *Jus cogens* norms are of such a character than any breach should be considered "serious." Creating a division in the draft conclusions between "serious" and non-"serious" breaches sets up a dichotomy through which offending States may seek to excuse or downplay their non-"serious" breaches of *jus cogens* norms, while injured States may seek to describe every breach as "serious." The United States argued for deleting the entirety of Chapter III, on serious breaches of peremptory norms of general international law, from the draft articles on State responsibility, in part due to disagreement with the dichotomy between "serious" and non-serious breaches of *jus cogens*. *See* UN Doc. A/CN/4/515 at 69-71..

[42] This language is taken almost verbatim from Article 41(1) of the draft articles on State responsibility, where the binding language carries some logic, as the draft articles may have been formally adopted by States as obligations. The United States does not view Article 41(1) of the draft articles on State responsibility as reflecting customary international law. The assertion of a supposedly binding obligation where none exists is particularly inappropriate in a draft "conclusion," as opposed to a draft article submitted for consideration by States for a treaty. *See* ___, *supra*.

norm may result in the responsibility of a State for an internationally wrongful act; however, there is no basis to assert that there is a binding obligation on non-breaching States to address the wrongful act, as there is neither a relevant rule of customary international law nor express agreement of States to accept such an obligation. The supposed obligations listed in the draft articles on State responsibility do not reflect customary international law; indeed, the United States and other States expressed strong disagreement with their inclusion in the draft articles on State responsibility.[43] The draft articles on State responsibility were not adopted as a treaty or convention. While *jus cogens* norms themselves may apply *erga omnes*, there is no *erga omnes* obligation on non-breaching States to remedy the breach. There is thus no basis for listing these supposed obligations in binding terms in these draft conclusions.

The commentary on draft conclusion 19(1) relies heavily on the ICJ advisory opinions in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[44] and in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.[45] Each of these opinions referred to third-State obligations arising in relation to breach of an obligation *erga omnes*, but neither referred to such obligations in relation to a *jus cogens* norm. The ILC cannot rely on these cases to support an assertion that there now exist new obligations on non-breaching States to act on breaches of obligations *erga omnes* arising from peremptory norms. Other relevant legal sources – for example, the Genocide Convention – lack any language committing States to counteract violations of *jus cogens* norms committed by another State.

Finally, the United States is concerned about the use of the word "situation" in draft conclusion 19(2). We recognize that this subpart is taken verbatim from Article 41(2) of the draft articles on State responsibility, which provides that no State should recognize as lawful a situation created by a serious breach of a *jus cogens* norm, nor render aid or assistance in maintaining that situation. The intention of the use of "situation" is not otherwise described in the commentary. Applying the plain meaning of the word "situation," draft conclusion 19(2) is incorrect as a matter of law and practice, and could serve to undermine certain elements of international humanitarian law. States do recognize certain legal "situations" that are arguably created by a violation of a supposed *jus cogens* norm. For example, the ILC identifies, in the Annex to the draft conclusions, "the prohibition of aggression" as a *jus cogens* norm.[46] Often, when an act of aggression has taken place, it is followed by an armed conflict or an occupation. While those resulting situations may have resulted from illegal behavior, the state that committed the aggression must still adhere to their legal obligations that apply to parties to armed conflict or occupying powers. Although States may claim that the act of aggression that gave rise to the "situation" of armed conflict or occupation was a *jus cogens* violation, and therefore unlawful, they should also rightly recognize the resulting "situation" continues to have the legal status of armed conflict (so that the parties' obligations under international humanitarian law applies), or

[43] *See* UN Doc. A/CN/4/515 at 69-71.

[44] ICJ Reports 2004, 136.

[45] ICJ GL No. 169, para. 180 (2019).

[46] UN Doc. A/74/10 at 208.

occupation (so that the law of occupation applies), consistent with those relevant bodies of international law.

For the above reasons, the United States is strongly of the view that draft conclusion 19 must be deleted in its entirety.

Draft Conclusion 20 - Interpretation and application consistent with peremptory norms of general international law (*jus cogens*)

The United States has no comments regarding draft conclusion 20.

Draft Conclusion 21 – Procedural Requirements

Draft conclusion 21 should be deleted. There is no need for "procedural requirements" in a set of draft conclusions, as opposed to draft articles. For example, there are no procedural requirements in the CIL Conclusions even where, for example, the draft conclusions discuss a State's invocation of the persistent objector doctrine.[47]

Furthermore, draft conclusion 21 is written in ostensibly binding terms (e.g., draft conclusion 21(1) ("is to notify"); 21(3) ("are to seek"); and 21(4) ("may not carry out the measure")). As discussed with respect to draft conclusion 19 above, such language may be appropriate in a set of draft articles that could be formally adopted by States, but there is no basis for asserting in a draft conclusion that States have obligations that are not clearly derived from pre-existing treaty obligations or customary international law.

The commentary cites extensively to dispute resolution provisions in the VCLT,[48] but this reliance is clearly misplaced, as the VCLT is an agreement by which States agreed to certain procedures for disputes under that specific treaty. The dispute resolution provisions in the VCLT are not customary international law applying to *jus cogens* disputes, as the commentary to the draft conclusions itself recognizes.[49] Thus, there is no basis to include a dispute resolution clause cast in obligatory language in the draft conclusions.[50]

Finally, the United States asserts that it is inappropriate to suggest in draft conclusion 21(4) and accompanying commentary that the ICJ is the preferred venue for resolution of disputes involving *jus cogens,* over all other possible means of interstate dispute settlement. Although many States may decide to submit bilateral disputes to the ICJ in cases for which that

[47] UN Doc. A/73/10, conclusion 15.

[48] UN Doc. A/74/10 at 200-201.

[49] UN Doc. A/74/10 at 201 ("[n]ot every aspect of the detailed procedure set forth in draft conclusion 21 constitutes customary international law."). As commentary footnote 914 makes clear, the dispute resolution provisions in the VCLT do not constitute customary international law, as 23 of the 116 VCLT States-Parties have made reservations to the dispute resolution framework.

[50] In the commentary, it is claimed that in drafting conclusion 21, "the Commission had to ensure, on the one hand, that it did not purport to impose treaty rules on States that are not bound by such rules while, on the other hand, ensuring that the concerns regarding the need to avoid unilateral invalidation of rules was taken account of." UN Doc. A/74/10 at 201. The United States respectfully submits that the easiest way to achieve both ends is to omit any dispute resolution provisions altogether, as they are unnecessary in this document.

court has jurisdiction,[51] as a matter of principle it is not the role of the ILC to make non-legal recommendations to States regarding the most appropriate venue for the peaceful resolution of disputes.[52]

Draft Conclusion 22 - Without prejudice to consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail)

The United States has no comments regarding draft conclusion 22.

Draft Conclusion 23 and Annex – Non-exhaustive list

The United States reiterates its previously noted concerns about the non-exhaustive list proposed by draft conclusion 23 and the accompanying annex and is of the view that both should be deleted.[53]

First, the methodology used to compile the list is inconsistent with the recognized standard for determining the existence of a *jus cogens* norm. This concern is particularly serious given that many may simply consult the list going forward to conclude that particular acts do or do not violate *jus cogens* norms. The criterion for inclusion on the annexed list is only that the ILC has previously referred to a norm as one of peremptory character. The list is nonetheless presented as being "without prejudice to the existence or subsequent emergence of other peremptory norms," which can be read as presupposing that the norms on the list have been properly included as peremptory norms. There is no analysis in the present draft conclusions as to whether any of these norms in fact meets the standard for *jus cogens* and, as discussed below, there are serious questions about whether some of them do.

Inevitably, questions will arise about why certain norms are included in this list and some, like piracy, are not, and whether the earlier ILC documents on which the draft conclusions rely accurately identified the *jus cogens* norms. Certainly, some of the items in this list are *jus cogens* norms, including most prominently the prohibition of genocide. We are not convinced, however, that other specific items on the list either should be included or are accurately described. For example, while the United States recognizes the right to self-determination, we question whether this right constitutes a *jus cogens* norm. The ILC itself has been inconsistent with respect to this conclusion, which is reflected in its lack of methodology when considering the status of the right to self-determination in prior projects. In this context, we note that, in discussing the status of the right to self-determination, the commentary obscures the distinction

[51] In fact, in 1969, the United States stated its view that the ICJ should be the preferred venue for resolving claims involving *jus cogens*. *See* Statement of Legal Adviser John Reese Stevenson, Digest of International Law Vol. 14, at 278.

[52] Similarly, in paragraph 4 of the commentary to draft conclusion 19, the ILC provides its view that "the collective system of the United Nations is the preferred framework for cooperative action" to address breaches of *jus cogens* norms. UN Doc. A/74/10 at 195-196. As a general matter, the mode of international cooperation States might engage in the face of a *jus cogens* norm violation is a matter of policy and diplomacy, and is therefore inappropriate for an ILC work product.

[53] Statement of Marik A. String, Acting Legal Adviser, U.S. Department of State, October 29, 2019.

between peremptory norms and obligations *erga omnes*.[54] While peremptory norms give rise to obligations *erga omnes*, the reverse is not always the case and cannot be assumed with respect to the right to self-determination. Other items on the list may very well constitute peremptory norms, but are ill-defined in the annex and commentaries. As an example, we would point to the inclusion of what is described as "the basic rules of international humanitarian law." Even if one were to accept that some IHL rules are *jus cogens* norms, there is considerable uncertainty as to which are peremptory and which are not. The report suggests that some future project may resolve which specific rules of international humanitarian law are peremptory, but the need for future work only underscores why this broad category should not be included in the annex at this time.

[54] UN Doc. A/74/10 at 207. Notably, the various ICJ decisions referring to the *erga omnes* character of obligations arising from the right to self-determination have never referred to the right to self-determination as a *jus cogens* norm.