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Fifth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur

Contents

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I. Introduction

1. At its sixty-seventh session (2015), the Commission decided to place the topic on its current programme of work and to appoint a Special Rapporteur.[1]

2. At its sixty-eighth session (2016), the Commission considered the first report of the Special Rapporteur[2] and decided to refer two draft conclusions to the Drafting Committee.[3] At its sixty-ninth session (2017), the Commission had before it the second report of the Special Rapporteur.[4] In his second report, the Special Rapporteur sought to identify the criteria for the identification of peremptory norms of general international law (*jus cogens*). The Commission decided to refer all six draft conclusions to the Drafting Committee.[5] The Commission also decided to change the name of the topic from "*Jus cogens*" to "Peremptory norms of general international law (*jus cogens*)."

3. At its seventieth session (2018), the Commission had before it the third report of the Special Rapporteur, which addressed the legal consequences of peremptory norms of general international law (*jus cogens*).[6] The Commission decided to refer 12 draft conclusions to the Drafting Committee.[7]

4. At its seventy-first session (2019), the Commission considered the fourth report of the Special Rapporteur dedicated to the illustrative list.[8] The Commission decided to refer one draft conclusion contained in the fourth report of the Special Rapporteur to the Drafting Committee on the understanding that the list contained in the draft conclusion would be moved to an annex and that it would be limited to those peremptory norms of general international law (*jus cogens*) that the Commission had previously referred to.[9]

5. During the seventy-first session, the Commission, having considered the report of the Drafting Committee, adopted the draft conclusions on peremptory norms of general international law (*jus cogens*) on first reading.[10] The Commission also decided, in accordance with articles 16 to 21 of its statute, to transmit the draft conclusions, through the Secretary-General, to States for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2020.[11] Owing to the coronavirus disease (COVID-19) pandemic and the postponement of its seventy-second session, the Commission decided to extend the deadline for the submission of comments by States to 30 June 2021.[12]

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[1] See Report of the Commission on the work of its sixty-seventh session, *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), para. 286.

[2] A/CN.4/693.

[3] *General Assembly*, *Seventy-first Session, Supplement No. 10* (A/71/10), para. 100.

[4] A/CN.4/706.

[5] See Report of the Commission on the work of its sixty-ninth session, *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), para. 146.

[6] A/CN.4/714 and Corr. 1.

[7] See Report of the Commission on the work of its seventieth session, *Official Records of the General Assembly, Seventy-third Session, Supplement No 10* (A/73/10), para. 96.

[8] A/CN.4/727.

[9] See Report of the Commission on the work of its seventy-first session, *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 56.

[10] *Ibid*., para. 52.

[11] *Ibid*., para. 54.

[12] See General Assembly resolution 75/135 of 15 December 2020, para. 5.

II. Purpose and approach of the fifth report

6. In keeping with the normal practice of the Commission, the purpose of the current report is, on the basis of comments made by States, to make proposals for the modification of the draft conclusions, where necessary. At the time of the finalization of the present report,[13] 23 written observations had been received.[14]

7. In addition to written observations, 52 States commented on the full set of draft conclusions adopted on first reading by the Commission.[15] Comments made at prior sessions of the General Assembly are not addressed in the present report for two reasons. First, those comments by States have already been referred to in the preceding reports of the Special Rapporteur. Second, and more importantly, those comments were not based on the final text adopted by the Commission since, prior to the seventy-first session, the Commission retained the draft conclusions in its Drafting Committee until a full set had been completed. While it is true that some States referred to the text adopted by the Drafting Committee at prior sessions of the General Assembly, those comments did not have the benefit of the commentaries. In summary, this means that 57 States have expressed their views on the set of draft conclusions adopted on first reading. If one takes into the account the positions presented by Sierra Leone on behalf of the African Group and by Norway on behalf of the Nordic countries, this means that 113 States have expressed their views on the topic, although, admittedly, not all of those statements were substantive in nature.

8. In keeping with the recent practice of the Commission, the present report gives equal weight to both the written comments and the oral statements delivered in the debate of the Sixth Committee. However, for the sake of efficiency, for States that

[13] The present report was finalized on 11 August 2021.

[14] The comments and observations received from States are available on the website of the International Law Commission (https://legal.un.org/ilc/guide/1_14.shtml) and will be reproduced in due course in document A/CN.4/748. Written comments were received from Australia, Austria, Belgium, Colombia, Cyprus, Czechia, El Salvador, France, Germany, Israel, Italy, Japan, the Netherlands, the Nordic countries (joint statement of Denmark, Finland, Iceland, Norway and Sweden), Portugal, the Russian Federation, Singapore, Slovenia, South Africa, Spain, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America. It should be noted that although the comments of Germany were received by the United Nations Secretariat before the requested date (30 June 2021) they were not received by the Special Rapporteur until 16 September 2021. Exceptionally, and due to the fact that the comments were received prior to the deadline, the Special Rapporteur has attempted to incorporate those views into the present report.

[15] Argentina (A/C.6/74/SR.24); Armenia (A/C.6/74/SR.26); Australia (A/C.6/74/SR.24); Austria (A/C.6/74/SR.23); Belarus (A/C.6/74/SR.24); Brazil (A/C.6/74/SR.24); Bulgaria (A/C.6/74/SR.26); Cameroon (A/C.6/74/SR.27); Chile (A/C.6/74/SR.26); China (A/C.6/74/SR.23); Croatia (A/C.6/74/SR.25); Cuba (A/C.6/74/SR.25); Cyprus (A/C.6/74/SR.27); Czechia (A/C.6/74/SR.23); Ecuador (A/C.6/74/SR.27); Egypt (A/C.6/74/SR.26); El Salvador (A/C.6/74/SR.25); Estonia (A/C.6/SR.26); France (A/C.6/74/SR.23); Germany (A/C.6/74/SR.25); Greece (A/C.6/74/SR.24); Honduras (A/C.6/74/SR.26); India (A/C.6/74/SR.26); Indonesia (A/C.6/74/SR.27); Iran (Islamic Republic of) (A/C.6/74/SR.27); Ireland (A/C.6/74/SR.24); Israel (A/C.6/74/SR.24); Italy (A/C.6/74/SR.24); Japan (A/C.6/74/SR.26); Malaysia (A/C.6/74/SR.26); Mexico (A/C.6/74/SR.25); Micronesia (Federated States of) (A/C.6/74/SR.24); Netherlands (A/C.6/74/SR.24); Nicaragua (A/C.6/74/SR.23); Norway (on behalf of the Nordic countries) (A/C.6/74/SR.23); Peru (A/C.6/74/SR.27); Philippines (A/C.6/74/SR.27); Poland (A/C.6/74/SR.23); Portugal (A/C.6/74/SR.25); Republic of Korea (A/C.6/74/SR.26); Romania (A/C.6/74/SR.23); Russian Federation (A/C.6/74/SR.26); Sierra Leone (A/C.6/74/SR.27); Sierra Leone (on behalf of the African Group) (A/C.6/74/SR.27); Singapore (A/C.6/74/SR.24); Slovakia (A/C.6/74/SR.24); South Africa (A/C.6/74/SR.27); Spain (A/C.6/74/SR.26); Sudan (A/C.6/74/SR.24); Switzerland (A/C.6/74/SR.25); Thailand (A/C.6/74/SR.24); Togo (A/C.6/74/SR.26); Turkey (A/C.6/74/SR.26); United Kingdom (A/C.6/74/SR.23); United States (A/C.6/74/SR.24); Uzbekistan (A/C.6/74/SR.26); and Viet Nam (A/C.6/74/SR.26).

have provided both written comments and oral statements in the General Assembly, only their written observations will be referred to in the report, save where necessary to provide context,[16] thus avoiding repetition while ensuring maximum breadth of coverage.

9. It is important to emphasize that, in the view of the Special Rapporteur, the function of the Commission on second reading is not merely to adopt the views of States (leaving aside the fact that States often hold different views). The function of the Commission, and thus the approach adopted in the present report, is to assess whether, on the basis of the comments received, any modification is warranted. This involves a qualitative analysis, requiring that many factors are taken into account. These include not only the number of States that make a particular recommendation (balanced of course by the number of States that do not make such a recommendation or that make a different recommendation), but also whether that recommendation is based on a new perspective or new information that the Commission had not considered on first reading. It is also important to emphasize that the vociferousness of language is not in any way a factor in the assessment of the comments and observations by States.

10. The Special Rapporteur also believes strongly in the equality of views of States, thus equal weight has been accorded to the views of all States, big or small, and all have been treated as "specially affected States".

11. In terms of approach, the report begins by describing the comments and observations by States under each draft conclusion, in turn. The descriptions are followed by assessments of the comments and observations, on the basis of which the Special Rapporteur has provided suggestions for any modification, if required.

12. The Special Rapporteur has noted many interesting and useful suggestions for amendments of commentaries. While some are noted in the present report, its purpose is not to address the commentaries. The report will therefore not propose any amendments to the commentaries. The Special Rapporteur does, however, intend to prepare an initial draft of commentaries with modifications, which will be transmitted to members of the Commission prior to the conclusion of the first part of the seventy-third session.

13. The report is organized as follows: the comments and observations received from States, including general and specific comments, as well as comments and observations by States and the recommendations of the Special Rapporteur, are considered in section III; the text of the draft conclusions adopted on first reading, with proposed modifications clearly indicated, are presented in section IV; a clean version of the text of the draft conclusions, with amendments proposed by the Special Rapporteur, is set out in section V; and a proposal of the Special Rapporteur for the final form of the Commission's work on peremptory norms of general international law (*jus cogens*), including a draft recommendation to be submitted to the General Assembly, is presented in section VI.

[16] In some instances, written comments from States were received after the conclusion of the writing of the present report; some comments of those States in the Sixth Committee may be included in the report.

III. Comments and observations received from States

A. General comments

1. State practice

14. A number of States have expressed the view that the draft conclusions are based more on doctrine and scholarship than on practice. The United States of America, for example, stated that, as a general matter "[t]here is little State practice related to peremptory norms of general international law",[17] noting that the commentary "cites no examples" and that it is "not aware of any examples of" any new rules of international law conflicting with existing *jus cogens* norms, and that the incidences of existing treaties violating later-emerging *jus cogens* are exceedingly rare. Its concrete recommendation to address this matter was for the Commission to identify clearly in the commentary where it is engaged in the process of progressive development. The Netherlands, also, while endorsing "the general approach of the" Commission on the topic, lamented the fact that the draft conclusions "rely more on judicial decisions and scholarly writings than on State practice". Similarly, Israel stated that it was concerned by the approach of the Special Rapporteur, which, notwithstanding the views of "various States" and "several members", had "relied greatly on theory and doctrine rather than on a thorough survey of State practice…".[18] Similarly, Malaysia, while applauding the quality of the reports of the Special Rapporteur, expressed the view that the conclusions proposed in those reports were based on doctrine and theory.[19] Like the United States, Turkey also expressed its reservation about the topic as a whole on the grounds that there was insufficient State practice and case law.[20] The statement of Cameroon, that the Commission should focus on State practice and *opinio juris* without suggesting that the draft conclusions did not reflect this, was a little more ambiguous.[21]

15. There are, in fact, two variations of the "lacking-in-State-practice" argument. The first is that, quite apart from the Commission's treatment of the subject, there simply isn't sufficient practice. Thus, the problem is not that the Commission has not used available State practice. Rather, the problem is that practice does not exist. Germany, for example, stated that it shared the views expressed by other States concerning "an insufficiency of substantial State practice on the topic…".[22] This is not a new issue. It was raised in the context of the long-term programme of work and by three States (France, the Netherlands and the United States) when this topic was first introduced. It has already been addressed in the first report of the Special Rapporteur.[23] At any rate, as will become evident in the present fifth report, there is enough practice and the commentaries of the Commission do rely on that practice.

16. The United Kingdom of Great Britain and Northern Ireland also made a point about the lack of State practice, but the implications of its point, as the Special Rapporteur understands it, are slightly different. It is thus worth considering it separately. The United Kingdom, like the United States, believes that there is a "lack

[17] United States, comments and observations by States (above note 14).

[18] Israel, comments and observations by States (above note 14). The observation continued: "In Israel's view, the lack of a rigorous analysis of relevant State practice risks undermining the accuracy and legal authority of various parts of this project". While, in general, the observations by Israel might suggest that this is widely held view, in fact, it is held by a minority of States and a minority of members of the Commission.

[19] Malaysia, A/C.6/74/SR.26, para. 102.

[20] Turkey, A/C.6/74/SR.26, para. 73.

[21] Cameroon, A/C.6/74/SR.27, para. 55.

[22] Germany, comments and observations by States (above note 14).

[23] A/CN.4/693, para. 14.

of practice relating to peremptory norms of general international law (*jus cogens*) both in the UK and internationally".[24] Yet, the United Kingdom stated that it has nonetheless supported the work of the Commission. Indeed, it stated that in preparing its commentaries the Commission should "take full account of the lack of practice" and that the commentaries "will be of particular importance given the lack of practice".[25] For the United Kingdom, this means that the Commission should proceed with "great care and attention".[26] The Special Rapporteur cannot disagree with the statement that the Commission should proceed with great care. For the reasons stated above, and those that follow, the Special Rapporteur does not agree with the point of departure, i.e., that there is no practice.

17. Like the United Kingdom, the Nordic countries, in their joint statement, also alluded to "relatively limited and varying State practice", which, in their view, called for "a cautious approach".[27] The Nordic countries thus called for the draft conclusions to be "closely aligned with established and well-founded interpretations".[28]

18. The second variation of this point is that there is available State practice but that the Commission[29] has chosen not to rely on this practice and instead has chosen to rely on doctrine and theory. This recurring criticism – emanating from the same very small minority of States – has no basis in reality at all. The commentaries are replete with examples of evidence of State practice, as has been understood in the work of the Commission.[30] Indeed, part of the problem is that very often States make this assertion without pointing to any specific provision, thereby making it rather difficult to respond effectively. Helpfully, in its general comments, the United States does provide *some* examples of what it means by lack of practice. The observation of the United States reads as follows:

> 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.[31]

19. This is helpful because it clarifies what, for some States, is understood as practice. The observations of the Netherlands might also be pointed out in this regard. The Netherlands is "critical because the draft conclusions and their commentaries rely more on *judicial decisions* and scholarly writings".[32] This suggests that these States have a rather narrow view of practice, wherein practice *must* consist of an act constituting a breach.[33] While the present report will address these points when it discusses the individual draft conclusions, it is sufficient, at this point, to highlight that the commentaries do, in fact, refer to a variety of forms of State practice for the

[24] United Kingdom, comments and observations by States (above note 14).
[25] *Ibid.*
[26] *Ibid.*
[27] Nordic countries, comments and observations by States (above note 14).
[28] *Ibid.*
[29] For Israel and Malaysia, it was not the choice of the Commission but of the Special Rapporteur.
[30] See Report of the Commission on the work of its seventieth session, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para.51, conclusion 6 on identification of subsequent agreements and subsequent practice (customary international law).
[31] United States, comments and observations by States (above note 14).
[32] Netherlands, comments and observations by States (above note 14): it is worth pointing out the expression of appreciation on the part of Argentina for the citation of case law from its jurisdiction as a form of practice (see A/C.6/74/SR.24, para. 7).
[33] This narrow approach to the materials that are relevant for the Commission's work might be contrasted by the view presented by Sierra Leone on behalf of the 53 States that make up the African Group (see A/C.6/74/SR.23, para. 36): "the process of progressive development and codification of international law must be all-embracing by including the consideration of texts of laws, State practice, precedents and doctrine".

propositions referred to by the United States, including declarations by States in various forums, decisions of national courts and treaty practice in the form, for example, of the rule in article 53 of the Vienna Convention on the Law of Treaties of 1969 (hereinafter referred to as the "Vienna Convention"). The Special Rapporteur thus does not agree with the proposition that the commentaries do not include sufficient practice.

20. Fortunately, the majority of States did not share the view that the commentaries are not supported by practice. While other States, such as Belarus,[34] El Salvador and the Sudan,[35] also recalled the importance of practice as the basis for the draft conclusions, they did not suggest that the work of the Commission was not based on State practice. Indeed, many States explicitly stated that they supported the approach of the Commission. Spain, for example, stated that it "commends the Commission and the Special Rapporteur for their efforts to base the draft conclusions and the commentaries thereto on practice, jurisprudence and doctrine on the topic".[36] South Africa, for example, stated that the "Commission has managed to deliver a well-balanced text of draft conclusions, supported by practice and judicial decisions of international courts and tribunals".[37] Cyprus also expressed its support for the work of the Commission.[38] Japan, for its part, having stressed the importance of achieving a balance between "theory and reality", expressed its support for the Commission's decision to be guided by the Vienna Convention, describing this decision as "sensible".[39]

21. The notion of balance between theory and practice is also reflected in the statement of Bulgaria, in which it "welcomed the constructive approach", which struck a "balance between State practice and theory".[40] Romania, having expressed its initial scepticism at the method of work on this topic (the practice, described above, of retaining the draft conclusions in the Drafting Committee), expressed pleasure that the conclusions and commentaries "were drafted in a well-balanced and careful manner and followed the Vienna Convention closely".[41] The comments of Ireland, that "articles 53 and 64 of the Vienna Convention on the Law of Treaties had been central to the Commission's consideration of the topic", may also be seen as support for the methodology of the Commission.[42] Thailand also "agreed with the general approach of using the definition of *jus cogens* in article 53" of the Vienna Convention.[43]

22. Thus, quite apart from being unfounded, the notion that the draft conclusions are not arrived at on the basis of generally accepted methodology, do not rely on practice and instead rely on theory and doctrine is not supported by the majority of States. Indeed, there are some States that criticized the Commission for relying too

[34] Belarus, A/C.6/74/SR.24, para. 81. The statement that the work of the Commission should be based on practice is preceded by a comment that Belarus "welcomed the version of the draft conclusions … which had become more balanced and substantive …" (para. 80).

[35] Sudan, A/C.6/74/SR.24, para. 48: it should be pointed out that this comment appears to be directed not at the current topic, but at the work of the Commission in general.

[36] Spain, comments and observations by States (above note 14). Spain did, however, criticize the Commission (and the Special Rapporteur), for not relying more on Spanish-language sources. While the Commission did rely on some Spanish-language sources, particularly, from Latin America, the criticism is of course a valid one and the Commission will be making a plea to Spanish-speaking members of the Commission to provide even more references.

[37] South Africa, comments and observations by States (above note 14).

[38] Cyprus, comments and observations by States (above note 14).

[39] Japan, comments and observations by States (above note 14).

[40] Bulgaria, A/C.6/74/SR.26, para. 105.

[41] Romania, A/C.6/74/SR.23, para. 75.

[42] Ireland, A/C.6/74/SR.24, para. 39.

[43] Thailand, A/C.6/74/SR.24, para. 107.

little on theory. Here the observations of Italy are particularly instructive. Italy bemoans the fact that the text of the draft conclusions adopted on first reading "partly lacks the theoretical depth to identify the main normative intricacies of the notion of *jus cogens*".[44] Similarly, Armenia implored the Commission to consider how the peremptory norms could be identified on the basis of a natural law theory.[45]

23. While the Special Rapporteur believes that work on this topic is, in fact, supported by State practice, he would also like to stress that he finds it curious that reliance on the jurisprudence of international courts, including the International Court of Justice, the principal judicial organ of the United Nations, is regarded by a few vociferous States with such disdain. He would point out that one of the most, if not the most, successful topics addressed by the Commission since the adoption of the 1966 articles on the law of treaties, i.e., the 2001 articles on responsibility of States for internationally wrongful acts,[46] relied significantly on the jurisprudence of international courts. Indeed, the foundational principle in that set of articles, namely article 1, relies wholly on international jurisprudence and scholarly writings.[47] Ditto for article 2.[48] This is also true of the topics adopted by the Commission over the course of the quinquennium. For example, the basic rule in the conclusions on identification of customary international law, conclusion 2, putting forward the two constituent elements, includes, in the commentaries thereto, *only* decisions of international courts.[49] Similarly, the commentaries on conclusion 5 do not reference any State practice.[50] The same is true of the Commission's conclusions on subsequent agreements and subsequent practice in relation to treaty interpretation.[51] For the Special Rapporteur, this is not a criticism of those works of the Commission. Quite to the contrary, it is a recognition of the fact that judgments of international courts, in particular the International Court of Justice, are seen as authoritative.

24. All these comments concerning State practice will, however, be borne in mind when the Special Rapporteur proposes modifications to the commentaries. The Special Rapporteur has noted, in particular, the plea by Spain for the inclusion of Spanish-language sources, which he will endeavour to provide and hopes that the Spanish-speaking members of the Commission will also provide. He expresses his particular appreciation to those States which, in their comments, have shared examples of their own State practice.[52]

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[44] Italy, comments and observations by States (above note 14).

[45] Armenia, A/C.6/74/SR.26, para. 65.

[46] Articles on responsibility of States for internationally wrongful acts, *Yearbook ....2001*, vol II (Part Two).

[47] *Ibid.*, art. 1 and the commentaries thereto.

[48] *Ibid.*, art. 2 and the commentaries thereto.

[49] See paras. (3) – (6) of the commentary to draft conclusion 2 on identification of customary international law, Report of the International Law Commission on the work of its seventieth session, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), sect. E.1.

[50] *Ibid.*, commentaries to conclusion 5.

[51] See draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, Report of the International Law Commission on the work of its seventieth session, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), sect. E.1. While it is possible to point to several conclusions, given the length and structure of that set of conclusions, the Special Rapporteur will refer only to several constituent parts of conclusion 2, which also puts forward the basic framework. The basic proposition (see para. 1 of conclusion 2) that the Vienna rules on interpretation of customary international law are supported *only* by decisions of international courts and tribunals and by academic literature (see para. (5) of the commentary to conclusion 2).

[52] The comments and observations by Switzerland, which contain footnote references to authorities, provide an example of this (above note 14).

2. Nature of the draft conclusions

25. Several States have queried the nature of the outcome of the Commission. In fact, this question is, in some respects, related to the question of State practice, and may even be seen as a third variation of that issue. In many ways this is a systemic issue, applicable to a number of topics. Although it is currently being considered within the Working Group on methods of work of the Commission, it would be inappropriate not to address these comments since they have been made by States in relation to this topic. Indeed, in this context, Singapore stated that it would be interested in the outcome of the Commission's discussion on the nomenclature of its work.[53]

26. The comments of the United States are an apposite starting point. The United States asserted that the draft conclusions "exemplify the confusion created by the lack of clear direction" on the different implications of the outputs of the Commission.[54] In the view of the United States, documents such as "conclusions", "principles", "guidelines" or "guides", because of their limitation, "should strive to codify existing law" and avoid stating what the law ought to be.[55] While this is a general statement aimed at the work of the Commission in general, in the context of this topic, the United States then says that the Commission should identify clearly in the commentary of the draft conclusions when it is codifying *lex lata*, and when it is proposing a progressive development of international law.[56]

27. France also raised this issue, noting, it seems with approval, that the commentary to draft conclusion 1 states that the text is "merely intended 'to provide guidance'", yet the draft conclusions contain "a number of prescriptive provisions".[57] In the light of this, France suggested that the Commission should, as much as possible, distinguish between what falls within the scope of codification and what would fall within a progressive development of international law.[58] Moreover, it suggested that, where possible, the Commission ought to distinguish those provisions that it considered rules establishing legal obligations from those that it would consider mere guidelines.[59] This sentiment was echoed by the United Kingdom.[60] Turkey, however, took the explicit view that the draft conclusions as a whole were a progressive development.[61]

28. Most States, however, did not question the status of the draft conclusions. Indeed, it could be inferred from the large number of States that expressed support for the general approach of the Commission that they believed that the draft conclusions, as adopted on first reading, were reflective of current international law. In fact, some States, such as Croatia, stated so explicitly.[62] Colombia, for example, viewed the draft conclusions as "an important work of consolidation for the crystallisation of international law".[63] Spain, in this respect, offered a rather nuanced view, noting that, by its nature, the text adopted by the Commission was not legally

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[53] Singapore, A/C.6/74/SR.24, para. 31. Although, Singapore presented written observations, it is appropriate to refer to this point, since it was a general comment directed at the work of the Commission as a whole.

[54] United States, comments and observations by States (above note 14).

[55] *Ibid.*

[56] *Ibid.*

[57] France, comments and observations by States (above note 14).

[58] *Ibid*.

[59] *Ibid*.

[60] United Kingdom, comments and observations by States (above note 14).

[61] Turkey, A/C.6/74/SR.26, para. 76.

[62] Croatia, A/C.6/74/SR.25, para. 55.

[63] Colombia, comments and observations by States (above note 14).

binding but that that did not prevent the text "from generating certain legal effects".[64] The draft conclusions, in the view of Spain, are neither binding nor intended to be a genuine interpretation of the Vienna Convention.[65] For this reason, in Spain's view, the current work does not fall squarely within what may be termed "codification by interpretation", which, as explained below, is a term that the Special Rapporteur believes to be an apt description. Italy described the current work as an example of "expository codification",[66] another term that the Special Rapporteur also finds to be attractive. Indeed, France, while commencing by raising questions about the nature of the work itself, suggested something similar to what the Special Rapporteur has in mind, namely that the draft conclusions "have a function of review and reformulation".[67]

29. Indeed, it is correct that the draft conclusions are not, in and of themselves, prescriptive. The text in which the draft conclusions are contained is not, itself, binding. The intention is, however, with some exceptions that will be addressed in the context of specific draft conclusions, to formulate the position under international law as it currently exists. The phrases "review and (re)formulation", as well "codification by interpretation" serve as useful descriptors. Like the previous draft conclusions adopted by the Commission,[68] the draft conclusions presented herein should be seen as restatements of the law intended to guide those that are called upon to identify norms of *jus cogens* and to apply the consequences of such norms. Given this, the Special Rapporteur will consider the commentaries of the previous two sets of draft conclusions to determine whether it is possible to clarify further what the draft conclusions aim to do.

3. Miscellaneous[69]

30. Some States commented on the working methods adopted by the Commission in this topic, i.e., the fact that the Commission retained the draft conclusions within the Drafting Committee until the end of the first reading.[70] Poland, for example, stated that the adoption of the draft conclusions on first reading was "a rather unexpected step" and that "no commentaries had been presented for States to comment on".[71] Slovakia, for its part, stated that despite "warning signs from many delegations … the

[64] Spain, comments and observations by States (above note 14).
[65] *Ibid.*
[66] Italy, comments and observations by States (above note 14).
[67] France, comments and observations by States (above note 14)
[68] See draft conclusions on identification of customary international law, Report of the International Law Commission on the work of its seventieth session, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), sect. V.E, and draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *ibid.*, sect. IV.E.
[69] There were some comments which were made as general comments, but which, in the view of the Special Rapporteur, are specific comments and will be addressed under specific provisions. For example, Israel's comments that the threshold for *jus cogens* should be higher than that for customary international law, concerns specific provisions and will be addressed there. Israel, comments and observations by States (above note 14).
[70] Although Romania alluded to this point, the Special Rapporteur did not include Romania in the number of States that have sought to relitigate the matter since it was referring to its past criticism and concludes that point by noting its pleasure at the outcome (A/C.6/74/SR.23, para. 75) ("Her delegation … had been critical of the methodology used to address [the topic], which had prevented the close involvement of States …[but] "was therefore pleased to note that the draft conclusions and the commentaries thereto were drafted in a well-balanced and careful manner … "). While Germany was one of the most vociferous holders of this position during the debate on the report of the Commission in the Sixth Committee, it did not repeat this position in its written observations (see Germany, A/C.6/74/SR.25).
[71] Poland, A/C.6/74/SR.23, para. 118.

Commission … had boldly proceeded to the adoption" of the draft conclusions on first reading, describing the approach as producing a "rushed outcome".[72] Israel stated that it "shares the concerns raised by a number of States" with regard to this procedural point.[73] The Special Rapporteur had already discussed this methodological point[74] and will not repeat those remarks here.

31. Belgium, noted in its comments that the commentaries did not provide enough concrete examples, whether from practice or of a hypothetical nature, to illustrate how the draft conclusions would function.[75] The Special Rapporteur will take this comment into account when revisiting the commentaries.

32. In its comments, Italy recommended that the title of the draft conclusions be reworded to better reflect their scope.[76] Italy suggested that the title be reformulated as "Draft conclusions on identification and legal consequences of peremptory norms". The Special Rapporteur has no objection to this amendment and invites members of the Commission to express views on this possible change.

33. France made some general comments about the French text,[77] which both the Commission and the Secretariat should take into account, not only in respect of the French text, but also those of the other official languages of the United Nations.

34. Finally, for the most part, States expressed support for the topic, the draft conclusions and the methodology employed by the Commission.[78] This included those, such as the Netherlands, which expressed concerns about some aspects.[79]

35. The Special Rapporteur notes with appreciation the formal corrections contained in the observations of Czechia and France, which will be relied upon in the finalization of the commentaries.[80]

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[72] Slovakia, A/C.6/74/SR.23, para. 85. Slovakia's comments were curious because, in fact, its comments on the substance of the text were, on balance, positive.

[73] Israel, comments and observations by States (above note 14).

[74] A/CN.4/727, paras. 1–6.

[75] Belgium, comments and observations by States (above note 14).

[76] Italy, comments and observations by States (above note 14).

[77] France, comments and observations by States (above note 14).

[78] See, e.g., China, A/C.6/74/SR.23, para. 52 ("…the draft conclusions adopted on first reading might serve as useful references for States and international institutions"); Nicaragua, A/C.6/74/SR.23, para. 71 ("in general terms, the draft conclusions on the topic … could serve as a practical guide for various persons involved in the application of international law"); Romania, A/C.6/74/SR.23, para. 75 ("was confident that the draft conclusions … would serve their intended purpose …[and] was pleased to note that the draft conclusions and the commentaries thereto were drafted in a well-balanced and careful manner …"); Belarus, A/C.6/74/SR.24, para. 80 ("welcomed the version of the draft conclusions adopted by the Commission … which had become more balanced and substantive that the previous versions"); Micronesia (Federated States of), A/C.6/74/SR.24, para. 98 ("the draft conclusions … made a major contribution to the study and implementation of international law); Croatia, A/C.6/74/SR.25, para. 55; Malaysia, A/C.6/74/SR.26, para. 102; Spain, comments and observations by States (above note 14); Portugal, comments and observations by States (above note 14), ("Portugal values this set of draft conclusions and draft annex and underlines the relevance of *jus cogens* and its central place in the general international legal architecture…..Portugal is pleased that the work of the Special Rapporteur and the Commission on this topic so far is not reduced to a simple repetition of what is provided under article 53 of the 1969 Vienna Convention …nor to the traditional discussions on *jus cogens*.").

[79] Netherlands, comments and observations by States (above note 14) ("The Kingdom of the Netherlands endorses the general approach of the ILC with respect to the topic ..."). See also Russian Federation, comments and observations by States (above note 14), expressing gratitude referring to the extensive work and expressing the view that the approach described in the commentary to the draft conclusions is correct and should be supported.

[80] Czechia, comments and observations by States (above note 14); France, comments and observations by States (above note 14).

B. Specific comments

Draft conclusion 1
Scope

The present draft conclusions concern the identification and legal consequences of peremptory norms of general international law (*jus cogens*).

1. Comments and observations by States

36. Very few comments were received on draft conclusion 1. Nicaragua, for example, noted simply that it agreed with the content of the commentary to draft conclusion 1.[81] France, however, referred to the fact that, at least in the French language, the concepts of identification and determination mean different things.[82] France suggested that, in the French text, the term "determination" should be preferred while in the English text, the commentaries should make explicit that the words "determination" and "identification" are used interchangeably, as was done in the draft conclusions on the identification of customary international law. France also took issue with an apparent suggestion, in the second paragraph, that a plurality of actors can determine the existence of peremptory norm.

37. On the second point, it is not at all clear to the Special Rapporteur that the quoted sentence makes any suggestion about who may or may not make determinations about the existence or non-existence of peremptory norms. Nonetheless, both questions concern the commentary and will be considered when the Special Rapporteur considers the modification of the commentaries.

38. In respect of regional *jus cogens*, referred to in the commentary to draft conclusion 1, several States made comments, but since none called for any change, either to the text of the draft conclusion or to the commentary, those comments will not be repeated herein.

2. Recommendations of the Special Rapporteur

39. On the basis of the above, no modifications are proposed for the text of draft conclusion 1.

Draft conclusion 2
Definition of a peremptory norm of general international law (*jus cogens*)

A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized 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.

1. Comments and observations by States

40. Draft conclusion 2, which is based wholly on article 53 of the Vienna Convention, sets forth the definition of peremptory norms of general international law (*jus cogens*). This provision was met with general support in the comments of those

[81] Nicaragua, A/C.6/74/SR.23, para. 71; see also United Kingdom, comments and observations by States (above note 14).

[82] France, comments and observations by States (above note 14).

States that did refer to it.[83] Cuba stated that draft conclusion 2 should reflect the fact that acceptance and recognition was not just about the number of States, but should also seek to be as a representative as possible.[84] The Special Rapporteur agrees with the substance of the comment. This particular issue, however, is not addressed in draft conclusion 2 but in draft conclusion 7 and the commentaries thereto.

41. France noted that the French text departs from the provision in the Vienna Convention and proposed that it be modified to track exactly the French text of the Vienna Convention.[85] Although the Netherlands made some comments with respect to draft conclusion 2, it appears that those comments are more relevant to draft conclusion 3,[86] and will be addressed there.

2. Recommendations of the Special Rapporteur

42. In the light of the above, save for the amendment of the French text to track the Vienna Convention, no proposal for modification is presented.

Draft conclusion 3
General nature of peremptory norms of general international law (*jus cogens*)

Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable.

1. Comments and observations by States

43. Draft conclusion 3 invoked much interest, both within the Commission and beyond. Entitled "general nature of peremptory norms of general international law (*jus cogens*)", it provides that peremptory norms of general international law "reflect and protect fundamental values of the international community", that such norms "are hierarchically superior to other" norms and that they are "universally applicable." While most States in their comments expressed enthusiastic support for draft conclusion 3, a few States expressed strong opposition. There were also some suggestions for changes to the commentary. Given the importance of this provision and the strong sentiments it evoked, it is important to be especially comprehensive in addressing the comments and observations received from States on it.

44. France, in its comments, suggested the deletion of the reference to "fundamental values" in the draft conclusion.[87] First, according to France, this concept of fundamental values is not reflected in the Vienna Convention on the Law of Treaties. Second, France stated that the concept was "subject to various interpretations and controversies".[88] Third, in its view, from a methodological perspective, the

[83] See, e.g., Czechia, comments and observations by States (above note 14); United Kingdom, comments and observations by States (above note 14); Cyprus, comments and observations by States (above note 14); see, however, the comments of the United States, which, without either expressing support or rejection, states that "[i]n general, this conclusion reflects provisions in the Vienna Convention in the Law of Treaties".

[84] Cuba, A/C.6/74/SR.25, para. 17.

[85] France, comments and observations by States (above note 14).

[86] Netherlands, comments and observations by States (above note 14) ("With respect to the commentaries to draft conclusion 2, the Kingdom of the Netherlands would like to recommend the ILC to further elaborate on the fundamental values which serve as the basis for *jus cogens*, and which parts of these fundamental values are protected by peremptory norms.").

[87] France, comments and observations by States (above note 14).

[88] *Ibid.*

characterization of a norm as *jus cogens* was based on two criteria, non-derogability and generality.[89] Fourth, France stated that the introduction of this concept appeared to introduce a third substantive criterion.[90] In many ways, all of these issues are in fact a variation of one criticism: that this is an additional requirement not included in the Vienna Convention. Given the importance of these issues, the present report will respond to each in turn.

45. With respect to universal applicability, France directed its comments to a perceived contradiction in the commentaries. While paragraph (15) of the commentary to draft conclusion 3 states that peremptory norms "do not apply on a regional or bilateral basis", paragraph (7) of the commentary to draft conclusion 1 declares that "the topic is concerned only with norms of general international law" and does not address bilateral or regional norms. France suggests that the Commission should clarify whether the exclusion is because those norms fall outside the scope or whether it is because the Commission believes such norms do not exist. In the view of France, the notion of regional *jus cogens* would be dangerous for the unity of the international legal order.

46. The United States, in its comments, stated that the draft conclusion (as a whole), is unnecessary and "only serves to confuse the relatively clear standard in draft conclusion 2 and the criteria for the identification of *jus cogens* norms in draft conclusion 4".[91] Moreover, according to the United States, the draft conclusion provides an example of draft conclusions that are not grounded on a sufficient basis of State practice.[92] The United States also pointed out that it is not clear what is meant by the concept "fundamental values",[93] observing that while the phrase "appears to have been paraphrased from" *Siderman de Blake v. Republic of Argentina*,[94] the Commission's draft conclusion leaves out the word "taken" from "values taken to be", adding that, at any rate, *Siderman de Blake* itself does not clarify what is meant by the phrase.[95] The United States also expressed the view that the phrase "hierarchically superior" is redundant.[96]

47. For these reasons, the United States proposed the deletion of draft conclusion 3. If draft conclusion 3 were kept, the United States would propose the insertion of "of States as a whole", so that the provision refers to "fundamental values of the international community of States as a whole". Alternatively, the United States suggested that if the original language is kept, an explanation for the difference between that language and the language of draft conclusion 2, which refers to the "international community of States as a whole", should be included in the commentary.

48. The view that the draft conclusion 3 was unnecessary and unhelpful was also put forward by the United Kingdom.[97] In its view, the justification for draft conclusion 3 in the commentary is "unconvincing" and its rationale "controversial and essentially theoretical".[98] This is equivalent to the critique of the United States that there is

[89] *Ibid.*
[90] *Ibid.*
[91] United States, comments and observations by States (above note 14).
[92] *Ibid.*
[93] *Ibid.*
[94] *Siderman de Blake v. Republic of Argentina*, United States Court of Appeals, 965 F.2d 699 (9th Cir 1992), p. 715.
[95] United States, comments and observations by States (above note 14).
[96] *Ibid.*
[97] United Kingdom, comments and observations by States (above note 14).
[98] *Ibid.*

insufficient practice. This view was also expressed by the Netherlands, but only in respect of hierarchical superiority.

49. The United Kingdom also recalled that since the purpose of the draft conclusions was to set out the methodology relating to the identification and the legal consequences of *jus cogens* norms, the general nature of peremptory norms did not fit within the scope of the topic.[99] Like the United States, the United Kingdom stated that draft conclusion 3 complicated "the Commission's otherwise clear statements" in draft conclusions 2 and 4.[100] It expressed the view that there was a risk that the contents of draft conclusion 3 could be read as creating additional criteria.[101]

50. The Russian Federation also criticized draft conclusion 3,[102] suggesting that the characteristics stipulated therein were more descriptive than legal.[103] It warned that, as currently drafted, such criteria appeared to be viewed as additional criteria for the identification of *jus cogens*.[104] Moreover, in its view, the jurisprudence put forward by the Commission in support of the characteristics was not convincing.[105] It noted, in particular, that the reliance on the 1951 advisory opinion of the International Court of Justice,[106] was inappropriate since the Court was not, in that opinion, trying to define *jus cogens*.[107] In its view, States do not consider "references to moral law [as] a relevant legal characteristic of peremptory norms … ".[108] The Russian Federation also joined the United States in calling attention to the discrepancy between draft conclusion 3 (and draft conclusion 17) on the one hand and draft conclusions 2, 4 and 7 on the other, noting that while the latter referred to "the international community *of States* as a whole" the former only referred to "the international community as a whole".[109] Finally, like France, it expressed the view that the contents of draft conclusion 3 did not reflect the Vienna Convention. In the view of the Russian Federation, the characteristics should be viewed as "general objectives of peremptory norms of general international law (*jus cogens*), but not their relevant legal characteristics …".[110]

51. Out of the nearly 60 States that expressed their views on the topic, only the above-mentioned six States expressed negative sentiments with regard to draft conclusion 3.[111] Yet, quite apart from the fact that the position against draft conclusion

[99] *Ibid.*
[100] *Ibid.*
[101] *Ibid.*
[102] Russian Federation, comments and observations by States (above note 14). See also Germany, comments and observations by States (above note 14).
[103] Russian Federation, comments and observations by States (above note 14).
[104] *Ibid.*
[105] *Ibid.*
[106] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports* 1951.
[107] Russian Federation, comments and observations by States (above note 14).
[108] *Ibid*.
[109] *Ibid.*
[110] *Ibid.*
[111] To err on the side of caution, the Special Rapporteur also includes the Netherlands, even though it only criticized one element of draft conclusion 3, namely hierarchical superiority. In fact, to put the observations of the Netherlands into context, it is necessary to refer to Brölman, C.M.; van Alebeek, R; Den Dekker, Guido; van Ginkel, Bibi; van den Herik, L.J.; De Hoogh, André; Lammers, Johann; Ryngaert, Cedric; and Rosenboom, Annebeth, *Advisory report on the draft conclusions of the International Law Commission on peremptory norms of general international law*, Advisory Committee on Issues of Public International Law, Advisory report No. 37, Ministry of Foreign Affairs, Amsterdam, July 2020, which the Government of the Netherlands invited the Special Rapporteur to take note of in considering its observations. The advisory report states that Commission "believes that these essential characteristics do indeed reflect the general nature of peremptory norms … ". However, it continues to state they do require some additional comments.

3 is held by a very small minority of States, there are substantive problems with the arguments advanced. First the argument, advanced by the United Kingdom and the United States,[112] that there is insufficient practice to justify draft conclusion 3, is completely without merit. For example, contrary to the impression that *may be* created by the comments of the United States, that the "fundamental values" characteristic is based solely on *Siderman de Blake*, the commentaries are full of references to State practice and decisions of international courts and tribunals.[113] Similarly, there is also an abundance of materials reflecting State practice and international judicial practice supporting the element of hierarchical superiority.[114] Such examples would, in many other cases, be more than sufficient to serve as the basis of a draft conclusion or draft article of the Commission.

52. Second, with respect to comments by France and the Russian Federation that the elements of draft conclusion 3 do not correspond to the Vienna Convention, this is certainly true; the object of the work of the Commission was not to rewrite or to reformulate the Vienna Convention. To the extent that those elements were reflected in practice, as is suggested above, it was appropriate to include those terms whether they were in the Vienna Convention or not. The Vienna Convention constitutes a starting point for this topic, but not a cage within which the Commission is trapped. Third, to address the comments from France, the United Kingdom and the United States that the concept was controversial and subject to differing interpretation, this concern was not borne out in the comments received from the overwhelming majority of States, which, as will be described below, endorsed and welcomed the inclusion of draft conclusion 3.

53. Fourth, the view expressed by France that the characteristics of *jus cogens* were based on two criteria, i.e., generality and non-derogability, is based on a misunderstanding. Indeed, this critique corresponded, in an indirect way, to the criticism of the United Kingdom and the United States that the draft conclusion risks creating confusion concerning the criteria. Draft conclusion 3 does not, in any way, represent additional criteria. Thus, while the Special Rapporteur accepts the "two-criteria" statement of France – although it is not at all certain that the second criterion is properly described – he emphasizes that draft conclusion 3 does not affect the two-criteria requirement. Although he believes the commentaries are clear on that point, he will consider what adjustments to make to the commentaries in order to make this point even more clear: if he is unable to clarify this matter to his satisfaction, he will invite members to make suggestions to that end.

54. With respect to the suggestion by the Russian Federation and the United States that if draft conclusion 3 is retained the words "of States as a whole" should be inserted, the Special Rapporteur would note that the concept of "values of the international community" in draft conclusion 3 reflects something different, although related, from what is contained in draft conclusion 2, namely the "international community of States as whole". The values referred to in draft conclusion 3 are not solely those of States. However, since in identifying rules of international law we must look to the attitude of States, draft conclusion 2 and draft conclusion 4 on the identification of the rules must be based on the acceptance and recognition of the "international community of States as a whole". States, as the representatives of

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Thus, it appears that Commission, and therefore the Netherlands, in fact support draft conclusion 3 but believe there are issues that can be better or more thoroughly articulated in the commentaries.

[112] France did not raise this position as the basis for its critique.

[113] See Report of the Commission on the work of its seventy-first session, *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10); for examples of State practice, see footnotes 707–710 in the commentary to draft conclusion 3; for examples of international judicial practice, see footnotes 703–706 in the commentary to draft conclusion 3.

[114] *Ibid*., see footnotes 717–726 in the commentary to draft conclusion 3.

different communities across the globe, through their conduct, give legal form to the fundamental values of the international community. The Special Rapporteur notes that making the change proposed by the United States would in fact serve to increase the potential conflation of the criteria and the general subject. Moreover, delving into the differences between the two concepts ("international community" and "international community of States") in the commentaries would force the Commission to turn to theoretical escapades, which is precisely what the United States has warned against. Nonetheless, the Special Rapporteur will make some proposed changes to the commentaries in that direction.

55. With regard to the query of France concerning the apparent contradiction in respect of regional *jus cogens*, the Special Rapporteur emphasizes that not only is he sympathetic with the general point being made, but in fact agrees with the position of France that regional *jus cogens* is "incompatible with the definition of *jus cogens*" and "would be particularly dangerous for the unity of the international legal order".[115] The Special Rapporteur would thus not be averse to deleting the reference in paragraph (7) of the commentary to draft conclusion 1 referred to by France, thus making it clear that the Commission takes the position that regional *jus cogens* does not exist. That said, two points should be made. First, the text in question was the outcome of a compromise after a full debate.[116] Second, while the Special Rapporteur is sympathetic to the point made by France, he does not believe that the two paragraphs are contradictory. Paragraph (15) of the commentary to draft conclusion 3 is concerned with the universal applicability of peremptory norms of *general international law* (emphasis deliberate) while paragraph (7) of the commentary to draft conclusion 1 is concerned with *jus cogens* generally, i.e., not necessarily *of general international law*. For this reason, the Special Rapporteur will himself not make a proposal, but will not oppose modification to the commentaries in the direction suggested by France if proposed by members.

56. There were, of course, other criticisms which did not seem to be directed at the draft conclusion as such. For example, Poland criticized the reference to "hierarchical superiority" because neither the provision nor the commentary provided any exceptions to that superiority.[117] The Special Rapporteur is uncertain about the types of exceptions Poland was referring to, and so is unable to address this comment fully. If by this query, Poland was referring to, for example, the possibility that other rules (or obligations), such as obligations stemming from Security Council resolutions, are superior to *jus cogens*, then the Special Rapporteur disagrees with the sentiment and the issue is, in any event, addressed elsewhere in the draft conclusions (see draft conclusion 16). Similarly, the joint statement of the Nordic countries suggested that draft conclusion 3 could benefit from further clarification, noting in particular that where it is situated might create the impression that it serves as the basis for additional criteria.[118]

57. In general, States expressed overwhelming support for draft conclusion 3.[119] Many States that provided comments on other provisions were silent on draft

[115] See A/CN.4/727, para. 28 *et seq*.: the Special Rapporteur ventures to add that the majority of the members of the Commission also adopted that position.

[116] See in this respect the observations of Sierra Leone, A/C.6/74/SR.27, para. 9 ("It also noted the compromise outcome concerning the concept of regional *jus cogens* …").

[117] A/C.6/74/SR.23, para. 119.

[118] Nordic countries, comments and observations by States (above note 14).

[119] See however, the position of Italy, which cannot easily be placed as either supporting or opposed. While Italy, in its oral statement before the Sixth Committee (A/C.6/74/SR.24, para. 62), questioned the purpose of draft conclusion 3, it did not question, in its written comments, draft conclusion 3 and indeed lauded the role of great Italian jurists such as Roberto Ago and Gaetano Arangio-Ruiz in forging the conceptual distinctions between breaches of ordinary norms and those

conclusion 3, which can in most cases be taken as support or at least acceptance of its contents. But more than that, with respect to draft conclusion 3, many States decided to explicitly declare their support. Spain, for example, observed that notwithstanding "the doubts of a few States", it was clear that peremptory norms "reflect and protect the fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable".[120] Similarly, Cuba,[121] Cyprus,[122] Czechia,[123] Ecuador,[124] El Salvador,[125] Greece,[126] Ireland,[127] Micronesia (Federated States of),[128] Peru,[129] Portugal,[130] Sierra Leone,[131] Slovenia,[132] South Africa,[133] Switzerland[134] and Togo[135] expressed explicit support for draft conclusion 3. Portugal, in particular, not only expressed support for draft conclusion 3 but pre-empted the arguments advanced against it, noting that references in the draft conclusion "do not raise confusion nor generate new criteria for identifying a norm as *jus cogens*".

58. It should be noted, however, that even States that supported draft conclusion 3 had proposals for improvement. Belarus suggested textual changes,[136] including, in particular, the insertion of "universal human values", presumably to replace "universally applicable", or possibly as an additional characteristic. While the Special Rapporteur would not be opposed to the insertion, he fears that it may add more questions and unnecessarily complicate the text. It may be possible to explain in the commentaries that such phrases had also been used in other contexts. On a linguistic level, Switzerland proposed that the French be modified to refer to "*des valeurs fondamentales*", which it said, was more consistent with the English.[137]

59. Austria, for its part, while welcoming draft conclusion 3, requested that the Commission clarify the meaning of hierarchical superiority, noting that it may have two distinct meanings.[138] In its view, the concept "may imply that the existence and application of a higher ranking norm is a necessary condition for the creation of lower ranking norms" or alternatively "that the existence of a higher ranking norm leads to the derogation of lower ranking norms that are in conflict with the higher ranking norm".[139] Similarly, in its observations, the Netherlands pointed out that the role of fundamental values could be further clarified in the commentaries.[140] In particular, it appeared that the Netherlands was requesting the Commission to explain which

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of norms "protecting the values of the international community as a whole". See, Italy, comments and observations by States (above note 14).

[120] Spain, comments and observations by States (above note 14).

[121] Cuba, comments and observations by States (above note 14).

[122] Cyprus, comments and observations by States (above note 14).

[123] Czechia, comments and observations by States (above note 14).

[124] Ecuador, A/C.6/74/SR.27, para. 35.

[125] El Salvador, comments and observations by States (above note 14).

[126] Greece, A/C.6/74.SR.24, para. 36.

[127] Ireland, A/C.6/74/SR.24, para. 40.

[128] Micronesia (Federated States of), A/C.6/74/SR.24, para. 99.

[129] Peru, A/C.6/74/SR.27, para. 63.

[130] Portugal, comments and observations by States (above note 14).

[131] Sierra Leone, A/C.6/74/SR.24, para. 9.

[132] Slovenia, comments and observations by States (above note 14).

[133] South Africa, comments and observations by States (above note 14).

[134] Switzerland, comments and observations by States (above note 14). The Special Rapporteur is particularly grateful for the provision by the Swiss Government of additional State practice, which may be used to supplement the commentary to draft conclusion 3.

[135] Togo, A/C.6/74/SR.24, para. 27.

[136] Belarus, A/C.6/74/SR.24, para. 81.

[137] Switzerland, comments and observations by States (above note 14).

[138] Austria, comments and observations by States (above note 14).

[139] *Ibid.*

[140] Netherlands, comments and observations by States (above note 14).

fundamental values, and the specific aspects thereof, were connected to which norms of *jus cogens*.

60. South Africa called on the Commission to clarify that draft conclusion 3 did not take away the need to show acceptance and recognition, as required in draft conclusion 4.[141] Japan, however, requested the Commission to explore whether the characteristics in draft conclusion 3 could supplement the criteria in draft conclusion 4.[142] The sentiment was also expressed by Greece, which suggested that those characteristics "provided also a criterion for" the identification of *jus cogens* norms since, "given that, for a norm to be recognized as peremptory, it should be accepted and recognized by the international community of States as reflecting and protecting such [fundamental] values".[143]

61. The above suggestions for the commentaries will be considered by the Special Rapporteur on the basis of the debate on this report, and most importantly, in the light of any proposed amendments to the commentary.

2. Recommendations of the Special Rapporteur

62. On the basis of the above, the Special Rapporteur does not propose any changes to the text. However, the Special Rapporteur will not oppose any proposal to move draft conclusion 3 to come directly after draft conclusion 1 in order to avoid the perception that it forms part of the criteria.

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

To identify a peremptory norm of general international law (*jus cogens*), it is necessary to establish that the norm in question meets the following criteria:

(a) it is a norm of general international law; and

(b) it is accepted and recognized 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.

1. Comments and observations by States

63. Draft conclusion 4, which sets forth the criteria for the identification of peremptory norms, received general support from States. Support for the criteria identified in draft conclusion 4 was expressed by China,[144] Cyprus,[145] and Czechia.[146] The United Kingdom and the United States, in commenting on draft conclusion 3,[147] referred to the content of draft conclusion 4 as being "clear" – under the circumstances, this can probably be regarded as an expression of enthusiastic support.

64. Estonia did raise a drafting issue with respect to draft conclusion 4.[148] It stated that the phrase "it is necessary to establish" was unclear and that the attempt to clarify

[141] South Africa, comments and observations by States (above note 14).
[142] Japan, comments and observations by States (above note 14).
[143] Greece, A/C.6/74/SR.24, para. 36.
[144] China, A/C.6/74/SR.23, para. 52.
[145] Cyprus, comments and observations by States (above note 14).
[146] Czechia, comments and observations by States (above note 14).
[147] United Kingdom and United States, comments and observations by States (above note 14).
[148] Estonia, A/C.6/74/SR.26, para. 80.

the phrase in the commentary had not been successful. Italy expressed the view that paragraph (2) of the commentary to draft conclusion 4 was superfluous since the issues it addresses, namely the meaning of the phrases "it is necessary to establish" and "should not be assumed to exist" were "safe assumptions".[149] Clearly, based on the observations of Estonia, this was not the case, and it would be better to clarify this matter further, even at the risk of stating the obvious. Italy also recommended that if the Commission was intent on using the word "criteria", then other words such as "conditions" should be avoided.[150] All of these issues will no doubt be carefully considered by the Commission when it considers the commentaries.

65. Armenia, however, would prefer that the criteria in draft conclusion 4 be reformulated so that it is based, not on positive law, but on natural law.[151] It suggested, for example, that a cross-reference to draft conclusion 3 might contribute to that end. More narrowly, the Netherlands suggested only that the notion of universal applicability be included as an additional criterion for peremptoriness.[152] The Special Rapporteur is sympathetic to the view expressed by Armenia. Nonetheless, the Commission decided at the early stages of consideration of the topic to avoid the theoretical debates that have often dominated discussions on peremptory norms of general international law. With respect to the suggestion of the Netherlands, i.e., the inclusion of universal applicability *as a criterion*, was not without its difficulties. For one thing, because universal applicability was a consequence of *jus cogens*, it was difficult to see how it could also be a criterion without creating a circular logic. It would be different if the suggestion was to view "acceptance and recognition" that the norm was universally applicability or even "the belief that the norm was universally applicable".

66. Addressing the commentaries to draft conclusion 4, France suggested that the reference in paragraph (6) of the commentary to paragraph (5) to article 26 of the 2001 draft articles on the responsibility of States for internationally wrongful acts[153] contradicts the idea of a two-criteria approach.[154] In the view of the Special Rapporteur, however, the two-element criteria is clear, and there is nothing confusing about it. The first criterion is that a norm must be one of general international law. The fact that this criterion itself may be composed of several elements is neither here nor there and does not, at all, affect the two criteria-approach at all. Indeed, it is noteworthy that it was only France that raised this concern.

2. Recommendations of the Special Rapporteur

67. On the strength of the discussion above, the Special Rapporteur does not propose any amendments to the text of draft conclusion 4.

Draft 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*).

[149] Italy, comments and observations by States (above note 14).
[150] *Ibid.*; this point was also made by France, comments and observations by States (above note 14).
[151] Armenia, A/C.6/74/SR.26, para. 64.
[152] Netherlands, comments and observations by States (above note 14).
[153] See Report of the International Law Commission on its seventy-first session, *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. (6) of the commentary to draft conclusion 4 on peremptory norms of general international law (*jus cogens*).
[154] France, comments and observations by States (above note 14).

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

1. Comments and observations by States

68. Draft conclusion 5, which concerns the bases for peremptory norms of general international law, was not the subject of many comments from States. France, expressed "doubts as to the usefulness of draft conclusion 5".[155] According to France and Spain, the added value of draft article 5 is "limited" since draft conclusion 4 already sets out that a criterion for peremptoriness was whether the norm in question was part of general international law.[156] Similarly the United States suggested that the provision is largely redundant in the light of draft conclusions 6 and 7.[157] This position is hard to sustain. With respect to the position of the United States, in contrast to draft conclusions 6 and 7, which address what has been termed *opinio juris cogentis*, draft conclusion 5 addresses the first element, which does not at all concern "acceptance and recognition". The position of France is equally unsustainable. If draft conclusion 5 is redundant because the first criterion is mentioned in draft conclusion 4, then draft conclusions 6, 7, 8 and 9 would be redundant because the second criterion is also addressed in draft conclusion 4.

69. At a more substantive level, Belgium, France, Italy, Slovenia and Spain suggested that the word "basis" (plural "bases") be replaced by the word "source" (plural "sources").[158] The Special Rapporteur would point out that sources of international law are not sources of *jus cogens* norms. This construction would imply that a source of law (customary international law, for example) is a source of a rule of law (for example, the prohibition of the use of force). The better construction is to view the source of law (customary international law) as the underlying basis of the *jus cogens* rule. This is what is meant by the explanation in paragraph (3) of the commentary to draft conclusion 5 that the words "basis" and "bases" "are to be understood flexibly and broadly" as "the range of ways that various sources of international law may give rise to the emergence of a peremptory norm …". In addressing this matter, Italy suggested that such a description simply means "sources". In everyday usage, Italy is of course correct. The problem is, however, that in international law, and in law generally, the word "sources" has a particular meaning. Nonetheless, while the Special Rapporteur is not convinced that the reasons are strong, it also appears that the modification can be made without much harm, and the distinction between "sources" in the traditional sense, and "sources" used in the draft conclusion can be explained in the commentary.

70. Croatia, however, suggested that paragraph 2 of draft conclusion 5 should be reformulated to include the fact that treaty provisions and general principles of law, in addition to potentially forming bases for the development of peremptory norms, can also reflect them.[159] While the sentiment expressed in that suggestion is not incorrect, the Special Rapporteur does not support the proposed amendment for two

[155] France, comments and observations by States (above note 14).

[156] *Ibid.*; see also Spain, comments and observations by States (above note 14), noting that draft conclusion 5 "seems redundant and therefore unnecessary".

[157] United States, comments and observations by States (above note 14).

[158] Belgium, comments and observations by States (above note 14), France, comments and observations by States (above note 14); Italy, comments and observations by States (above note 14), and Slovenia, comments and observations by States (above note 14), Spain, comments and observations by States (above note 14). Both the United Kingdom, comments and observations by States (above note 14) and Czechia, comments and observations by States (above note 14) decided simply to take note, suggesting at least some level of discomfort.

[159] Croatia, A/C.6/74/SR.25, para. 55.

reasons. First, the notion that a source of international law can reflect a norm of *jus cogens* is also true of customary international law, yet it is not suggested that the change be made to paragraph 1 of the draft conclusion. Second, draft conclusion 5 is about the *basis* of *jus cogens* norms. It does not address all aspects of the relationship between sources of international law and *jus cogens*. The Special Rapporteur notes, however, that a reference to a source reflecting a *jus cogens* norm would be wholly appropriate if the intention were to show that the source itself cannot, as such, be a basis of the *jus cogens* norm. That was the spirit of the Special Rapporteur's proposal that a treaty may reflect norms of *jus cogens*.

71. This latter point is connected to that raised by France. France was critical of paragraph 2 of draft conclusion 5, which foresees that treaty norms, as such, can form the basis of *jus cogens*.[160] For similar reasons, Slovenia proposed that the words "most common" in paragraph 1 of draft conclusion 5 be deleted.[161] The Special Rapporteur cannot disagree with the views put forward by France and Slovenia. It was for this reason that the Special Rapporteur himself, in his second report, proposed a draft that suggested that a treaty rule could reflect a norm of general international law forming the basis of a *jus cogens* norm, but could not, as such, constitute the basis of peremptory norms.[162] This position was also expressed convincingly by Australia and Belgium in their written observations.[163] The Special Rapporteur continues to believe this to be the correct position. However, since the arguments presented by these States, with which the Special Rapporteur agrees, were made during the first reading and since most States have not suggested such changes, the Special Rapporteur cannot propose any amendments in that respect. Needless to say, the Special Rapporteur would support any such modification if proposed by members of the Commission and if such a proposal enjoys the support of other members.

72. Similarly, the United States criticized draft conclusion 5 for placing treaty rules and general principles of law "on an equal footing with customary international law".[164] The Special Rapporteur must point out that this is an inaccurate reflection of the draft conclusion. As explained in the commentary, the choice of the words "may also" in paragraph 2, is intended to indicate that while "it is not impossible" for these other sources to form the basis of peremptory norms, this was uncommon and, indeed, there was no practice to that effect.[165] If draft conclusion 5 is kept, the Special Rapporteur would be willing to make that even more explicit in the commentary. The Special Rapporteur has also taken note of the requests, including by Australia, Czechia and the United States, for the Commission to provide examples of practice

[160] See France, comments and observations of States (above note 14). See also, South Africa, comments and observations by States (above note 14), and Japan, comments and observations by States (above note 14); it appears that Japan is of the opinion that while it is appropriate to treat treaty rules as capable of forming the basis of *jus cogens*, it is less appropriate to treat general principles of law in that way.

[161] Slovenia, comments and observations by States (above note 14).

[162] A/CN.4/706, p. 45; para. 4 of proposed draft conclusion 5 provided that "[a] treaty rule may reflect a norm of general international law capable of rising to the level of a *jus cogens* norm of general international law".

[163] Australia, comments and observations by States (above note 14) ("..a treaty provision by itself is not capable of serving as a basis for peremptory norms of general international law, given [that] a treaty is only binding on its parties."); Belgium, comments and observations by States (above note 14) (treaties can serve as basis for *jus cogens* "but only for the specific reasons set out in out in paragraph (9) of the commentary to the draft" conclusion). Slovenia, comments and observations by States (above note 14), expressed a similar thought but also included general principles.

[164] United States, comments and observations by States (above note 14); see also Netherlands, comments and observations by States (above note 14).

[165] See Report of the International Law Commission on its seventy-first session, *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para (7) of the commentary to draft conclusion 5.

supporting the notion that general principles of law can form the basis of *jus cogens*.[166] The underlying sentiment of these observations is that there is no basis for the inclusion of general principles. The Russian Federation made a similar observation.[167] Of course, this matter was fully debated within the Commission. The Commission accepted that there was no practice for either treaty rules or general principles forming the basis of *jus cogens*, but that this did not exclude the possible role for both treaties and general principles in the emergence of norms of *jus cogens*.[168] It was for that reason that the Commission chose the words "may also", which is intended to underline that there is no practice while leaving open the possibility. The Special Rapporteur will provide some suggestions for making this point even more explicit in the commentary.

73. Conversely, Italy, the Russian Federation and Switzerland suggested that treaty rules should be treated in the same manner as customary international law.[169] However, there are several problems with this proposition. First, it is contrary to the practice outlined in the commentary to draft conclusion 5.[170] Second, the statement by Italy that the Convention for the Prevention and Punishment of Genocide and the Convention against Torture "give expression of existing customary international law having acquired a *jus cogens* status"[171] does not take the argument further. It is the customary international law status that forms the basis of the *jus cogens* norm, not the treaty norm.

74. While four States expressed support for the deletion of draft conclusion 5, many other States remained silent, suggesting that they did not find it problematic. Moreover, several States, including Belgium,[172] Croatia,[173] El Salvador,[174] Japan,[175] Slovenia[176] and South Africa,[177] explicitly spoke in favour of paragraph 2 of draft conclusion 5, including by suggesting possible modifications

[166] Australia, comments and observations by States (above note 14); Czechia, comments and observations by States (above note 14); United States, comments and observations by States (above note 14).

[167] Russian Federation, comments and observations by States (above note 14); see also Germany, comments and observations by States (above note 14).

[168] The approach adopted by the Commission, including the fact that there is no practice in support of the proposition, is summarized by the Special Rapporteur as follows: "Given the lack of practice and an apparent doctrinal difference of opinion within the Commission, the Commission adopts an ambivalent approach on whether treaty provisions and general principles of law can be the basis of peremptory norms. The language in the draft conclusion 'may also serve as bases for peremptory norms' leaves open the possibility that treaties and general principles of law may play *some* role in the identification of peremptory norms, without being definitive about the role.", see Tladi, Dire, "The International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*): Making Wine from Water or More Water than Wine" (June 2020), *Nordic Journal of International Law*, vol. 89, issue 2, para. 244, p. 263.

[169] Italy, comments and observations by States (above note 14); Switzerland, comments and observations by States (above note 14); and Russian Federation, comments and observations by States (above note 14).

[170] See Report of the International Law Commission on its seventy-first session, *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. (4) – (6) of the commentary to draft conclusion 5 on peremptory norms of general international law (*jus cogens*).

[171] Italy, comments and observations by States (above note 14).

[172] Belgium, comments and observations by States (above note 14).

[173] Croatia, A/C.6/74/SR.25, para. 55.

[174] El Salvador, comments and observations by States (above note 14).

[175] Japan, comments and observations by States (above note 14).

[176] Slovenia, comments and observations by States (above note 14).

[177] South Africa, comments and observations by States (above note 14).

2. Recommendations of the Special Rapporteur

75. On the basis of the above, the Special Rapporteur is willing to propose the replacement of the word "basis" with "source" and "bases" with "sources". Draft conclusion 5 would thus read as follows:

> **~~Bases~~Sources for peremptory norms of general international law (*jus cogens*)**
>
> 1. Customary international law is the most common ~~basis~~ source for peremptory norms of general international law (*jus cogens*).
>
> 2. Treaty provisions and general principles of law may also serve as ~~bases~~ sources for peremptory norms of general international law (*jus cogens*).

Draft conclusion 6
Acceptance and recognition

1. 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.

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 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.

1. Comments and observations by States

76. Draft conclusion 6, which addresses what is meant by "acceptance and recognition", was the subject of only a few substantive comments from States. Italy expressed its support for the need for a draft conclusion on "'acceptance and recognition' in the context of identification of *jus cogens* norms".[178] Nonetheless it views paragraph 1 as "unnecessary and potentially confusing". Unfortunately, Italy does not really explain why or how this important provision is confusing.[179] At any rate, in the view of the Special Rapporteur it is exceedingly important to make the point set forth in paragraph 1, otherwise those called upon to determine whether a norm is *jus cogens* may simply assume that evidence of *opinio juris* is sufficient.

77. Relatedly, the United States suggested that the wording of paragraph 1 of draft conclusion 6 be amended to read:

> "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."[180]

78. This formulation is based on the final sentence of paragraph (2) of the commentary to draft conclusion 6. The Special Rapporteur is not opposed to this proposal since it clearly distinguishes *opinio juris* from "acceptance and recognition",

[178] Italy, comments and observations by States (above note 14).
[179] In its comments, Italy explains why the commentary is tautological, but this is a matter concerning the commentaries that can be reviewed when the Commission adopts the commentaries on second reading.
[180] United States, comments and observations by States (above note 14).

as understood in the draft conclusion. He fears, however, that it might affect the balance of the draft conclusion.

79. In addition to suggesting the deletion of paragraph 1, Italy suggested a deletion of text in the commentary that it believes makes the text less methodological and more quasi-judicial.[181] A similar suggestion was made by France in its observations.[182] The Special Rapporteur will take a closer look at this when revising the commentary. For now, it suffices to say that the Special Rapporteur agrees that the impression should not be created that "any assertion made … between States – as to the *jus cogens* nature of a given norm would be devoid of legal value, if not accompanied by relevant evidence".[183] Quite the contrary, any such assertion by a State would be evidence that *those* States accept and/or recognize the norm as *jus cogens*. If evidence can be provided of a similar inclination by "a large majority of States", that would indicate that the norm has attained peremptory status. To the extent that the commentary may be read to suggest otherwise, the Commission should of course reconsider this. The formulation in the commentary referred to by States is not concerned with the evidence. Rather, it is directed towards the decision-maker who has to weigh that evidence. It suggests to a judge, for example, that the mere fact that a litigant asserts peremptory status of a norm is insufficient to show the peremptory character of that norm. The assertion has to be accompanied by evidence, including in the form that Italy suggests our commentaries would regard to be "devoid of legal value".

80. The United Kingdom suggested that the phrase "by the international community of States as a whole" be inserted into paragraph 2. The Special Rapporteur has no difficulty with this suggestion.[184]

81. Estonia, while supporting draft conclusion 6,[185] suggested the insertion of the word "*opinio juris*" to the end of paragraph 1 of the draft conclusion.[186] While the Special Rapporteur is sympathetic with the suggestion, he fears that it may unnecessarily complicate matters since the phrase used in paragraph 1 is "general international law" not "customary international law".

82. Israel's concerns regarding draft conclusion 6 is connected to a broader concern touching on draft conclusions 6,7, 8 and 9.[187] The broader concern is that, given the significance and exceptional character of peremptory norms, the threshold for their identification should be "particularly demanding and rigorous". The Special Rapporteur agrees with this sentiment, but, as will be illustrated in the paragraphs that follow, does not agree with Israel's understanding of "particularly demanding and rigorous".

83. In relation to draft conclusion 6, Israel states that, in its view, "the words 'accepted and recognized' require that States must have expressed *unequivocal and affirmative support* for the status of a particular norm as one of *jus cogens*".[188] In its statement in the Sixth Committee, Israel explained that such a requirement of "unequivocal and affirmative support" was derived from article 53 of the Vienna Convention.[189] Yet article 53 of the Vienna Convention does not contain any reference

[181] Italy, comments and observations by States (above note 14).
[182] France, comments and observations by States (above note 14).
[183] Italy, comments and observations of States (above note 14).
[184] United Kingdom, comments and observations by States (above note 14).
[185] See also, for support, Slovakia, A/C.6/74/SR.23, para. 120.
[186] Estonia, A/C.6/74/SR.26, para. 81.
[187] Israel, comments and observations by States (above note 14).
[188] Emphasis added.
[189] Israel, A/C.6/74/SR.24, para. 17, ("Another concern was that draft conclusions adopted by the Commission on first reading did not always accurately reflect the exceptional character of *jus cogens* norms and the very high threshold for their identification, *as set out in article 53*. For example, *under the article,* acceptance – alone, which might suffice for the formation and

to unequivocal and/or affirmative or anything approximating those words. Given the apparent insistence, including in particular by Israel, that the work on this topic be based on State practice, it should be pointed out that there is no State practice that the Special Rapporteur is aware of, nor has any such State practice been referred to by the State of Israel justifying this particular standard.

2. Recommendation of the Special Rapporteur

84. On the basis of the comments above, the Special Rapporteur recommends the insertion of "international community of States as a whole" in paragraph 2, as proposed by the United Kingdom. Paragraph 2 of draft conclusion 6 would thus read as follows:

> 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.

Draft 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.

1. Comments and observations by States

85. Draft conclusion 7 seeks to describe what is meant by the "international community of States as a whole". While the draft conclusion found general support, there were some critical comments that should be addressed.

86. Colombia took the view that the Commission should clarify what is meant by "a very large majority".[190] It suggested that this should be clarified by being more specific "as to the number of States required to meet this requirement …".[191] However, for States, the numbers are not the most important issue. For Poland, "it was not only the sheer number of States but also their representative character that mattered".[192] For this reason, Poland suggested replacing the words "a very large majority" with "an overwhelming and representative majority of States".[193] The notion that the assessment for determining whether the international community of

identification of customary international law – was not sufficient; *unequivocal and affirmative* recognition of a norm as one having a *jus cogens* character was also required.") (emphasis added).

[190] Colombia, comments and observations by States (above note 14).

[191] *Ibid.*

[192] Poland, A/C.6/74/SR.23, para. 121.

[193] *Ibid.*

States accept and recognize the peremptory character of a norm is not just about numbers is also inherent in the observations of France.[194] Viet Nam similarly cautioned that the phrase "a very large majority" should "be carefully interpreted to ensure that the community of States as whole was represented … ".[195] The particular sensitivity of Viet Nam is based on the fear that "States with limited resources could be prevented from participating fully in the creation of"[196] *jus cogens* norms, a concern fully shared by the Special Rapporteur. The concern that the standard should not just be about numbers was mentioned by several other States.[197] In the context of the call for a more qualitative approach, Singapore suggested that the reference to "… acceptance and recognition be across regions, legal systems and cultures" currently in paragraph (6) of the commentaries to draft conclusion 7, be moved into the text of draft conclusion 7.[198] It also suggested that the formulation in paragraph (5) of the commentary to draft conclusion 7 be included in draft conclusion 7. The Russian Federation agreed with the Commission that the search for the acceptance and recognition of the "international community of States as a whole" cannot be "a mechanical exercise in which the number of States is to be counted".[199] In its view, there is a requirement that "acceptance and recognition be across regions, legal system and cultures".[200] Nonetheless, it stated that it remained unclear how "State recognition of the peremptory status of a norm should be determined".[201]

87. The Special Rapporteur agrees with the view that the standard is not just about sheer numbers, but also about representativeness (and other factors). This point is made in the commentary.[202] Nonetheless, if the point is not sufficiently clear, the Special Rapporteur will consider making modifications to the commentaries. The Special Rapporteur also agrees that the insertion of the word "representative" in the draft conclusion may be useful and may address many of the views expressed by States. The commentaries could then rely on the text proposed by Singapore, drawn from paragraph (6) of the commentaries, as adopted on first reading, to explain what is meant by "representative". The Special Rapporteur will not support moving those two paragraphs up into the text of the draft conclusion, not because the proposals are not good, but because the Drafting Committee has already considered both possibilities and, after careful consideration, decided to make those clarifications in the commentaries. The Special Rapporteur notes that, according to Spain, the current formulation (at least in the Spanish language version) already includes a sense of representativeness beyond just numbers.[203]

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[194] France, comments and observations by States (above note 14) ("De l'avis de la France, la détermination du caractère impératif d'une norme ne peut procéder d'une logique majoritaire, fût-elle qualifiée.").

[195] Viet Nam, A/C.6/74/SR.26, para. 52; see also Philippines, A/C.6/74/SR.27, para. 50.

[196] Viet Nam, A/C.6/74/SR.26, para. 52.

[197] See also United Kingdom, comments and observations by States (above note 14) ("The UK further emphasises that demonstrating the requirements 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 all geographic regions and legal systems …"); Spain, comments and observations by States (above note 14); Colombia, comments and observations by States (above note 14) ("It would be important to provide elements of how many major regions, legal systems and cultures are necessary ...".).

[198] Singapore, comments and observations by States (above note 14).

[199] Russian Federation, comments and observations by States (above note 14).

[200] *Ibid.*

[201] *Ibid.*

[202] See Report of the International Law Commission on its seventy-first session, *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. (6) of commentary to draft conclusion 7.

[203] Spain, comments and observations of States (above note 14) ("That expression (at least in Spanish) not only means a very large majority (quantitative criterion), but also requires

88. With respect to the comments by the Russian Federation and the reason it was not in a position to accept the formulation of the Commission, the Special Rapporteur would note that the view that the formulation implies that "the formation of the will or position of a group of States could result in the emergence of international legal obligations for States that are not members of that group"[204] raises a number of critical points. First, it should be recalled that the peremptory status of a norm does not, as such, establish "legal obligations". The legal obligations are established by the general norm on which the peremptory norm is based, e.g., customary international law. Second, this position lacks the necessary nuance. If by "a group of States" it is meant, *for the sake of argument*, 192 States, to the exclusion of, *again for the sake of example*, two States, then of course that should be sufficient to establish the peremptory character of a norm. However, if by "a group of States" it is meant, *yet again for the sake of argument*, three or four States, then of course this cannot be sufficient to establish the peremptory character of a norm and there is nothing in either the draft conclusion or the commentary that suggests otherwise.

89. The issue of the numerical value implied by "large majority" was raised by a number of States. Israel and Singapore, for example, suggested that the appropriate standard language in line with article 53 of the Vienna Convention should be "virtually all States".[205] The Special Rapporteur notes that it is not correct to say that article 53 of the Vienna Convention requires "virtual universal acceptance". In fact, the Convention is silent on the quantity of States required. Israel's comments on threshold are broader, but other aspects relate to draft conclusion 8 and will be discussed below.[206] The Russian Federation, without itself suggesting an alternative, stated that it is not satisfied with the Commission's explanation for selecting "a very large majority".[207] It directed its attention to paragraph (6) of the commentary to the draft conclusion, in which a number of options are provided, and suggested that the Commission should explain why, in the light of these options, it selected "a very large majority".[208] Armenia suggested, correctly in the view of the Special Rapporteur, that "a very large majority" is difficult to quantify.[209] Armenia thus suggested that the word "total acceptance" be used in the place of "a very large majority".[210] The Special Rapporteur cannot support such a proposal, which is at best obscure and at worst incorrect. Japan, for its part, expressed doubt as to whether the requirements in the Vienna Convention can be reduced to a quantity.[211] This position is probably correct, i.e., the Vienna Convention itself is silent on the matter.

90. The position of the United States is slightly more nuanced.[212] Rather than providing any standard in the draft conclusion itself, the United States proposed that the provision should simply set out that it is the acceptance and recognition of the

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geographical (regional groups) and situational representativeness, and does not imply unanimity.").

[204] Russian Federation, comments and observations by States (above note 14).

[205] Israel, comments and observations by States (above note 14); Singapore, comments and observations by States (above note 14).

[206] Israel, comments and observations by States (above note 14).

[207] Russian Federation, comments and observations by States (above note 14). In its view, it is insufficient to rely on the statement of the Chair of Drafting Committee of the Vienna Conference for this purpose.

[208] *Ibid.*

[209] But the Special Rapporteur, while agreeing with this, would recall that the purpose is not to quantify, because the process is much more complex.

[210] Armenia, A/C.6/74/SR.26, para. 66. The Special Rapporteur notes that Colombia suggested that "as a whole" means universal. The Special Rapporteur does not share in this interpretation of "as a whole".

[211] Japan, comments and observations by States (above note 14).

[212] For a similar viewpoint see Australia, comments and observations by States (above note 14).

international community of States as a whole that matters.[213] In its view, the reason for this is that the assessment is to be undertaken on a case-by-case basis. The Special Rapporteur agrees with the general position adopted by the United States but believes that the point has already been made in the commentary. However, if the suggestion of the United States, namely the deletion of paragraph 2, were to receive significant support in the Commission, the Special Rapporteur would stand ready to accept it, although reluctantly. That said, the Special Rapporteur does not accept the other reasons provided by the United States.[214] First, as is known, while it is true that the International Court of Justice in *North Sea Continental Shelf* cases referred to "virtually uniform" for the purposes of customary international law, it is also true that the Court has also described the test using different phrases, which could be interpreted in a variety of ways.[215] Moreover, the phrase "virtually uniform" in that passage refers not to quantity, i.e., how many States, but rather to the quality, i.e., the type of practice. In other words, it is not how many States participated in the practice, but rather whether the practice of those States that did participate, however many, was uniform. In fact, the quantitative element in the *North Sea Continental Shelf* cases is "extensive".[216] Second, while it is true that the Commission did not include the standard of a "very large majority" for its draft conclusion on customary international law, it included an arguably lower threshold, namely "sufficiently widespread" and "general",[217] which could, in theory, be even less than a simple majority. Finally, it is incorrect to suggest that "a very large majority" means that a norm not recognized by "a significant number of States" could be qualify as a *jus cogens* norm. As the observations of the United States correctly declare, the assessment is not solely about numbers and depends on the facts and circumstances of each norm. It would be unwise, in a report of the Special Rapporteur, to provide hypothetical examples for they will most certainly be quoted out of context.

91. The Special Rapporteur wishes to address an issue implicit in some observations on quantification. The observations of some States *may suggest* that the threshold for *jus cogens must necessarily* be quantitatively higher than that for customary international law.[218] This is a mistake. The standards for the identification of customary international law, on the one hand, and the standard for the identification of *jus cogens*, on the other, are different and are not comparable. There is a *qualitative* difference between these two processes. For customary international law, what is sought is the widespread opinion of States that a norm constitutes a rule of international law (*jus dispositivum*). For *jus cogens*, the search is for the (collective) opinion of States that a norm is not only a rule of customary international law (or

[213] United States, comments and observations by States (above note 14).

[214] *Ibid.*, "The United States strenuously objects to defining the 'international community of States as a whole' to mean 'a very large majority' …. Such a definition has several detrimental effects. 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. Second it is inconsistent with the CIL conclusions [conclusions on customary international law], which did not include a 'very large majority' standard. Third, the ILC's standard of 'very large majority' opens up 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." (footnotes omitted).

[215] *Fisheries Jurisdiction (United Kingdom v. Iceland)*, *Merits, Judgment, I.C.J. Reports 1974*, p. 3, para. 58 ("increasing and widespread"); *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 246, para. 111; *Maritime Delimitation and Territorial Questions (Qatar and Bahrain) Judgment, I.C.J. Reports 2001*, p. 40, para. 205 ("sufficiently widespread").

[216] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 3, para. 4.

[217] See conclusion 8 on the identification of customary international law (above note 30).

[218] See, e.g., Israel, A/C.6/74/SR.24, para. 17; see also United States, comments and observations by States (above note 14) ("Certainly, the standard for establishing *jus cogens* can be no less than what is required to establish customary international law.").

general international law), but is in fact, as a matter of general international law, one that may not be derogated from. The comparison between the quantitative threshold for customary international law and *jus cogens* should therefore be avoided.

92. Belarus agreed that it was "a very large majority" that mattered and not only a majority.[219] Other States, such as Cameroon, Cyprus, Japan, the Netherlands and Slovenia, also expressed support for the standard "a very large majority".[220] Spain expressed its agreement with the sentiment that the expression should not be interpreted as requiring "unanimous" acceptance and recognition.[221] While Germany supported the standard, it expressed satisfaction that the commentary explained that this means an "overwhelming majority".[222] Similarly, Estonia and Uzbekistan and suggested that the words "a very large majority" should be fleshed out, even if only in the commentary, in order to facilitate greater convergence.[223] These suggestions will most certainly be considered as the Commission reviews the commentaries.

93. Cuba and the United Kingdom both recalled that draft conclusion 7 was correct to refer to the views of States and not of other non-State actors.[224] France, however, went further by suggesting that the possibility of actors other than States contributing at all to *jus cogens* norms should be ruled out.[225] This position does not seem reasonable, however, particularly given that it is oftentimes the views of non-State actors that galvanize the *opinio juris* of States. Moreover, as noted in the text, the views of other actors may also provide context. It thus is not correct to suggest that such views are completely irrelevant for the identification of *jus cogens*.

94. In this respect, it is worth noting the observation of Belgium that paragraph 3 of draft conclusion 7 is "very balanced".[226] For its part, Italy suggested that the word "subjects" be added to paragraph 3.[227] The Special Rapporteur thinks that this proposal might be a useful one.

95. The Special Rapporteur takes note of the suggestion by Spain and the United Kingdom to move paragraph 3 to draft conclusion 9.[228] The Special Rapporteur sees how that paragraph can fit comfortably in either draft conclusion 9 or draft conclusion 7. The Special Rapporteur will therefore not make any specific recommendation concerning that suggestion.[229]

[219] Belarus, A/C.6/74/SR.24, para. 82.

[220] Cameroon, A/C.6/74/SR.27, para. 57; Cyprus, A/C.6/74/SR.27; Japan, comments and observations by States (above note 14); Netherlands, comments and observations by States (above note 14); Slovenia, comments and observations by States (above note 14); see also Peru, A/C.6/74/SR.27, para. 63, although the point was made in passing in the context of the discussion on regional *jus cogens*.

[221] Spain, comments and observations by States (above note 14).

[222] Germany, comments and observations by States (above note 14).

[223] Estonia, A/C.6/74/SR.26, para. 81; Uzbekistan, A/C.6/74/SR.26, para. 34.

[224] See Cuba, A/C.6/74/SR.25, para. 18; United Kingdom, comments and observations by States (above note 14).

[225] France, comments and observations by States (above note 14).

[226] Belgium, comments and observations by States (above note 14).

[227] Italy, comments and observations by States (above note 14). This statement is supported by the observation in the joint statement of the Nordic countries that the phrase "other actors" needs to be clarified.

[228] Spain, comments and observations by States (above note 14); United Kingdom, comments and observations by States (above note 14).

[229] United Kingdom, comments and observations by States (above note 14).

2. Recommendations of the Special Rapporteur

96. On the basis of this discussion, the Special Rapporteur would make a number of recommendations. On paragraph 2, the Special Rapporteur would propose the insertion of the word "representative" to qualify the quantitative description. Second, although the Special Rapporteur will not propose amending the "a very large majority", he will not oppose its replacement by "overwhelming majority" if there is sufficient support for this proposition in the Commission. On paragraph 3, as noted above, while the Special Rapporteur does not think it is necessary, he will also not oppose the shifting of paragraph 3 to draft conclusion 9. The second paragraph of draft conclusion 7 would thus read as follows:

> 2. Acceptance and recognition by a very large and representative 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.

Draft 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.

1. Comments and observations by States

97. Draft conclusion 8 is concerned with evidence of acceptance and recognition of the peremptory character of a norm. Many States that commented on other parts of the text did not comment on draft conclusion 8, suggesting a level of comfort. Some States expressed their agreement with draft conclusion 8.[230]

98. The Russian Federation suggested, as a general matter and "without implying any sort of hierarchy", that "priority should be given to the views and positions of States made known and documented in the international arena".[231] In the view of the Special Rapporteur, there is no reason for this prioritization. Of course, in assessing the evidence, a decision-maker ought to take into account all factors and accord appropriate weight to various forms of evidence. However, there is no *a priori* reason to accord greater weight to particular evidence *because* it was expressed at an international forum.

99. Israel, Japan and the United Kingdom recommended that the phrase "conduct of States in connection with resolutions adopted by an international organization or at an intergovernmental conference" should replace "resolutions adopted by an international organization or at an intergovernmental conference" in order to ensure consistency with the draft conclusions on the identification of customary international

[230] El Salvador, comments and observations by States (above note 14); see also Cuba, A/C.6/74/SR.25, para. 19, stating that the list should not be regarded as a restrictive list.
[231] Russian Federation, comments and observations by States (above note 14).

law.[232] Similarly, Germany suggested "harmonizing draft conclusion 8 with" the draft conclusions on identification of customary international law because, in its view, "it is the conduct of States in connection with the adoption of such acts that constitute an important indicator of the acceptance and recognition of a norm of *jus cogens*".[233] The Special Rapporteur notes that the Drafting Committee considered this option and decided to refer simply to "resolutions". Italy made a similar suggestion based on the fear that otherwise this might include resolutions of an international organizations as such, rather than the conduct of the member States of said international organization.[234]

100. France, also supporting the language "conduct of States in connection with resolutions", stated that "la conduite des États par rapport à une résolution adoptée dans le cadre d'une organisation internationale est sans doute au moins aussi importante que le texte même de ladite résolution".[235] This statement seems to suggest that the text of the resolution itself is excluded from the scope of the phrase of "conduct in connection with resolutions". This is the understanding of the Special Rapporteur and the reason that the Drafting Committee opted for "resolutions" rather than "conduct in connection with". Indeed, the observations of the United States make this point clear. In the view of the United States, "the State practice associated" with resolutions "might constitute relevant evidence", but "the … resolutions as such are not evidence".[236] While, the observations of France, the United Kingdom and the United States rely on the draft conclusions on identification of customary international law, such observations seem to discount the fact that, contrary to the specific words of the United States,[237] those draft conclusions provide that "a resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law …".[238] Moreover, the phrase "conduct in connection with a resolution" may be appropriate for the identification of customary international law where practice is sought, but it is not appropriate for *jus cogens* where what is sought is not practice, but the attitude of States that a rule has the particular quality of peremptoriness (*opinio juris cogentis*). It is for this reason that the Special Rapporteur is not inclined to make the suggested change.

101. Some States, such as Colombia and El Salvador, have recommended that it should be clarified which international organization or intergovernmental conferences were referred to in the second paragraph of draft conclusion 8.[239] This may well be something that could be addressed in the commentary.

102. The United States has suggested that not all decisions of domestic courts constitute evidence of peremptoriness.[240] For this reason, it has suggested the

[232] Israel, comments and observations by States (above note 14); Japan, comments and observations by States (above note 14); United Kingdom, comments and observations by States (above note 14).

[233] Germany, comments and observations by States (above note 14).

[234] Italy, comments and observations by States (above note 14).

[235] France, comments and observations by States (above note 14): unofficial translation: "the conduct of States in relation to a resolution adopted within the framework of an international organization is undoubtedly at least as important as the actual text of the resolution".

[236] United States, comments and observations by States (above note 14).

[237] *Ibid.*

[238] See conclusion 12, para. 2, on identification of customary international law (above note 30).

[239] See Colombia, comments and observations by States (above note 14). See also El Salvador, comments and observations by States (above note 14).

[240] United States, comments and observations by States (above note 14). See also Armenia, A/C.6/74/SR.26, para. 67: "On draft conclusions 8 … and 9 … the phrase 'subsidiary means' inverted the process by which peremptory norms had been recognized in practice". This comment is explored further in relation to draft conclusion 9.

insertion of the word "relevant" to qualify "decisions of national courts". Yet presumably this applies to all materials listed in paragraph 2 of draft conclusion 8. Similarly, while the Special Rapporteur agrees with the United States that the level of the court in the domestic judicial hierarchy is an important factor, he does not believe, *as might be implied* by the observation of the United States, that decisions of lower courts are immaterial or irrelevant. The level may well affect the weight of their decisions, but decisions of lower courts remain relevant as evidence for the determination of acceptance and recognition. In similar vein, the Special Rapporteur agrees with the submission of France that a decision that is overturned on appeal may lose its relevance in the determination of the peremptory character of a norm.[241] However, in such cases, it would be important to ascertain the reasons why the lower court decision was overturned. If an earlier decision was overturned for reasons unrelated to the declarations of the peremptory character of a norm, it may still remain relevant. Israel has similarly suggested that caution should be exercised with respect to court decisions as State practice. In this respect, it has proposed a number of strict conditions that ought to be included in the commentaries as qualifiers to the court decision.[242] The Special Rapporteur does not see merit in these suggestions, but these can be discussed by the Commission when the commentaries are adopted.

103. Several States made other comments for modification of the commentary in respect of particular examples of evidence of acceptance and recognition. Belgium, while not questioning the text of draft conclusion 8, stated that in respect to public statements delivered in the context of court proceedings, the statement must be made by an agent or co-agent of the State, and not counsel, witnesses or experts, in order for the statement to be accepted as evidence of acceptance and recognition.[243] The Special Rapporteur accepts that statements made in court proceedings in general should be viewed with some caution, but does not believe that it is possible to establish, as a rule, the type of exclusionary principle laid down in the observations of Belgium. This general sentiment applies equally to other suggestions for the modification of commentaries in respect of public statements, government legal opinions and administrative acts.

104. Israel's comments, which as explained above, are part of an overall concern that the draft conclusions do not, in the elaboration of the methodology for the identification of norms, show a sufficiently high threshold to justify the exceptional nature of *jus cogens* norms. Again, in order to ensure that justice is done to this broader theme, those concerns are addressed separately. In the context of paragraph 1 of draft conclusion 8, Israel makes the following assertion:

> Inaction or failure to react on behalf of the relevant State may not serve as a form of evidence of acceptance and recognition. This is because silence or failure to react by a relevant State may stem from diplomatic, strategic or other non-legal considerations, which do not reflect that State's legal view.[244]

105. Again, the Special Rapporteur would recall Israel's main concern that the draft conclusions be based on State practice. Yet the Special Rapporteur is not aware of any State practice nor has the Israel referred to any such evidence, according to which failure to react *may not serve as evidence of acceptance and recognition*.[245] It is of course the case that silence must not easily be accepted as evidence, but it would be going too far to suggest that it may never serve as evidence of acceptance.

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[241] France, comments and observations by States (above note 14).

[242] Israel, comments and observations by States (above note 14).

[243] Belgium, comments and observations by States (above note 14).

[244] Israel, comments and observations of States (above note 14).

[245] It can, of course, not be discounted that there may be some obscure example, somewhere, of a State making this assertion, or something similar to it, but that in itself would not be sufficient.

2. Recommendations of the Special Rapporteur

106. On the basis of the above, the Special Rapporteur does not propose any modification of the text of draft conclusion 8. The commentaries will have to be carefully considered in the light of the comments and observations discussed above.

Draft 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.

1. Comments and observations by States

107. Draft conclusion 9 provides for subsidiary means for the determination of the peremptory character of norms of general international law. Like draft conclusion 8, while it was not the subject of comments from many States, some comments were received. Cuba expressed satisfaction with the fact that reference to decisions of international courts and tribunals and the work of expert bodies was described as being "subsidiary".[246] Armenia, on the other hand, suggested that the qualification of the decisions of courts as "subsidiary" may have "inverted the process by which peremptory norms had been recognized in practice. [since] [c]ourts, not States, had led the process …".[247] The Special Rapporteur is sympathetic with this position. Nonetheless, while in practice decisions of international courts play an incredibly important role, that practice does not change the fact that even as courts take the lead, their determinations remain subsidiary in the sense, first, that they should be based on the practice of States, and, second, if States disavow a determination that a norm is *jus cogens* by an international court, including that of the International Court of Justice, it could hardly be accepted that such a norm was *jus cogens*.

108. A different but related issue was raised by Spain, which suggested that in practice, the work of expert bodies, whether or not established by States, play a leading role and should be included explicitly in paragraph 2 of the draft conclusion.[248] The Special Rapporteur is less sympathetic with this suggestion. First, as noted in the comments, the commentaries already state that expert bodies not established by States may be regarded as teachings.[249] Second, and more important, there is no reason to highlight the products of those expert bodies in a way that might be suggested if they were explicitly provided for in the text. Finally, in contrast to the situation alluded to by Armenia above, there is not much support for the contention by Spain that expert bodies not established by States play a leading role in the determination of the peremptory status of particular norms.

[246] Cuba, A/C.6/74/SR.25, para. 20.
[247] Armenia, A/C.6/74/SR.26, para. 67.
[248] Spain, comments and observations by States (above note 14).
[249] *Ibid.*

109. The position of Spain can be contrasted with that of Germany. In Germany's view, there needs to be greater differentiation between expert bodies since there is a variety of expert bodies, with differing composition, mandates, relationships with States and so forth.[250] The Special Rapporteur agrees with this sentiment but believes this can be appropriately achieved in the commentaries.

110. The Russian Federation objected to the decision by the Commission to consider expert bodies as a subsidiary means for the determination of peremptory status.[251] It states that such decision is inconsistent with Article 38, paragraph 1 *(d)*, of the Statute of the International Court of Justice.[252] The Special Rapporteur disagrees strongly that the position in draft conclusion 9 is inconsistent with Article 38, paragraph 1 *(d)*, of the Statute of the Court. Quite apart from the fact that the Court itself, while making clear that it is not bound by the determinations of expert bodies, has relied on those determinations;[253] there is nothing in Article 38, paragraph 1 *(d)*, that excludes expert bodies.

2. Recommendations of the Special Rapporteur

111. On the basis of the above, the Special Rapporteur does not propose any modifications to the draft conclusion adopted on first reading.

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

1. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*). The provisions of such a treaty have no legal force.

2. If a new peremptory norm of general international law (*jus cogens*) emerges, any existing treaty which is in conflict with that norm becomes void and terminates. The parties to such a treaty are released from any obligation further to perform the treaty.

1. Comments and observations by States

112. Draft conclusion 10 concerns treaties conflicting with a peremptory norm of general international law. The rule contained in the draft conclusion is sourced from articles 53 and 64 of the Vienna Convention on the Law of Treaties. Most States chose not to comment at all on draft conclusion 10. Some States, including Chile, El Salvador, Estonia, Greece, Japan and the Netherlands, expressed agreement with draft conclusion 10 and its contents.[254] Colombia, while expressing overall support with

[250] Germany, comments and observations by States (above note 14).
[251] Russian Federation, comments and observations by States (above note 14).
[252] *Ibid*.
[253] See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), I.C.J. Judgment of 4 February 2021*, para. 100.
[254] Chile, A/C.6/74/SR.26; El Salvador, comments and observations by States (above note 14); Estonia, A/C.6/74/SR.26; Greece, A/C.6/74/SR.24, para. 40; Japan, comments and observations by States (above note 14); and Netherlands, comments and observations by States (above note 14). Although not specifically mentioning draft conclusion 10, Greece expressed support for the idea that conflict with *jus cogens* results in the invalidity of rules of international law, including treaties. Other States, such as Belarus and Belgium, while commenting on draft conclusion 10, focused their attention on separability. Those observations will thus be addressed in the context of draft conclusion 11.

the text, did suggest that the Commission consider whether there are different effects between situations when the treaty is negotiated but has not entered into force, on the one hand, and, on the other hand, when a treaty has entered into force.[255] The Special Rapporteur believes that the principle contained in article 53 of the Vienna Convention applies equally to all *concluded* treaties which conflict with a norm of *jus cogens*, whether they have entered into force or not.

113. France proposed that the formulation be simplified to reproduce, directly, articles 53 and 64 of the Vienna Convention.[256] It is worth pointing out that the Commission considered this option but decided to also include the consequence derived from article 71 of the Vienna Convention.

114. With respect to paragraph 2 of draft conclusion 10, Colombia raised a difficult question concerning when the effects of nullity are triggered.[257] Is it at the time the *jus cogens* norm emerges, or at the time the procedure in draft conclusion 21 is completed?[258] At a basic level, the answer must be that the invalidity, and the effects of invalidity, are not dependent on the procedures. Thus, as a matter of substantive law, if a treaty is objectively contrary to a [newly emerged?] norm of *jus cogens* [that emerges], the treaty becomes immediately invalid and the consequences enumerated in draft conclusion 12, namely termination and release from obligations, immediately come into effect. Yet, this does not mean that any State is free to make its own determination about when this objective situation has occurred. The purpose of draft conclusion 21 is thus precisely to prevent such auto-interpretation. At any rate, while the Special Rapporteur agrees with the general view of Colombia, namely that the consequences of nullity are triggered as soon as peremptory norm emerges. However, in the view of the Special Rapporteur, it is not necessary to spell this out in the text of the draft conclusion, and it is something that can be explained in the commentary.

115. The United States proposed, in its comments, the deletion of draft conclusion 10 because, in its view, there is no State practice to support the contention contained therein.[259] Indeed, the United States proposes the deletion of all draft conclusions concerning invalidation of sources (draft conclusions 10 – 14 and 16).[260] It states, however, that if these draft conclusions were kept, then the Commission should state clearly that they are "proposals for the progressive development of international law."[261] The Special Rapporteur simply does not understand such proposition. It is not clear to the Special Rapporteur whether the United States, by this recommendation, seeks to suggest that under international law, as it currently stands, a treaty entered by two or more States for the commission of genocide is valid. To this recommendation, the Special Rapporteur can say, very few rules of international law are truly trite: this is one of them.

116. Likewise, the Special Rapporteur finds it difficult to understand or accept the statement of the United States that paragraph 2 of draft conclusion 10 is in conflict with paragraph 2 of draft conclusion 11. An appreciation and application of the most elementary principles of interpretation would make plain that this statement is simply wrong. Indeed, even in the absence of the application of these elementary principles of interpretation, the chapeau of paragraph 2 of draft conclusion 11 makes it clear that

[255] Colombia, comments and observations by States (above note 14).
[256] France, comments and observations by States (above note 14).
[257] Colombia, comments and observations by States (above note 14). A similar issue was raised by Egypt, A/C.6/74/SR.26, para. 5: ("It would be useful to consider how, when and by whom it could be declared that a new peremptory norm had emerged, bearing in mind that the emergence of such a norm was a cumulative process that could take decades.").
[258] Colombia, comments and observations by States (above note 14).
[259] United States, comments and observations by States (above note 14).
[260] *Ibid.*
[261] *Ibid.*

it is consistent with the first paragraph of the draft conclusion, the word "unless" signalling an exception to the general rule set forth in draft conclusion 10. The suggested insertion by the United States is made redundant by the word "unless" in draft conclusion 11.

117. The Special Rapporteur does agree, however, with the assertion of the United States that the word "emergence" in paragraph 2 of draft conclusion 11 refers to the "acceptance and recognition" of a norm as having a peremptory character. The Special Rapporteur will take this into account when reviewing the commentary.

118. In respect of paragraph 2 of draft conclusion 10, Belarus posed the question whether it was even possible for a norm of *jus cogens* that conflicted with an existing treaty to emerge, since *jus cogens* rules are often based on customary international law.[262] The Special Rapporteur does not see a difficulty. This is certainly the case in respect of bilateral treaties, but even in respect of multilateral treaties the possibility remains.

2. Recommendations of the Special Rapporteur

119. On the basis of the discussion above, the Special Rapporteur does not propose any modification to draft conclusion 10.

Draft 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.

1. Comments and observations by States

120. Draft conclusion 11 concerns the separability of treaty provisions affected by the operation of draft conclusion 10. In respect of this draft conclusion, while many States showed support, either by explicit statements made in that direction[263] or by simply not providing comments,[264] a number of States suggested that the rule that a

[262] Belarus, A/C.6/74/SR.24, para. 84.
[263] Egypt, A/C.6/74/SR.26, para. 4; Estonia, A/C.6/74/SR.26, para. 82; Spain, comments and observations by States (above note 14), described this particular provision as "codification by interpretation".
[264] Japan, comments and observations by States (above note 14).

treaty which, at the time of its conclusion, conflicted with a *jus cogens* was void in whole and not subject to separability should be reconsidered.

121. The issues raised by several States in respect of this draft conclusion, and the balance sought by the Commission, is aptly captured in the observations of the United Kingdom. It recalled the broad sentiment that invalidation of treaties on account of conflict with *jus cogens* had the potential to be "disruptive of good international relations in many cases if the whole of a treaty were to be rendered void …".[265] Yet, with respect to paragraph 1 of draft conclusion 11, the position of the United Kingdom appears to suggest that, given its consistency with the Vienna Convention, the first paragraph should be retained as is. The comment of the United Kingdom that a statement in paragraph (2) of the commentary to draft conclusion 11 be explained,[266] will be addressed when the commentary is considered. It might, however, already be recalled that since on second reading the Commission does not retain minority views, that sentence was unlikely to be retained. In short, the position of the United Kingdom could be interpreted as recognizing the value of separability but preferring to retain the approach of the Vienna Convention.

122. Some States have also noted the importance of the stability of treaty relations and for that reason suggested that the draft conclusion should also provide for the possibility of separability. Belarus, for example stated, albeit in relation to draft conclusion 10, that "[i]t would be preferable not to say that a treaty *as a whole* was void if it conflicted with a peremptory norm … ".[267] According to Belarus, this was "based on the importance on the importance of stability in treaty relations and on the recognition that when States entered into international treaties … " it was unlikely that they did so "with the intention of violating a peremptory norm…"[268] South Africa, for its part, stated that the Commission "has stuck too closely to the Vienna Convention", noting that there was "no reason, whether in practice or in logic, not to provide for separability where it is possible, even in relation to invalidity at the time of the conclusion of the treaty".[269] This view was also expressed by Austria, which, questioned "whether the strict adherence to the non-separability regime" for article 53-related … cases "is still the most suitable approach".[270] Extending the rule in paragraph 2 of draft conclusion 11 to paragraph 1 would, in the view of Austria, be consistent with the *favor contractus* principle. In addition to the reasons mentioned by other States, Belgium added that providing for the possibility of separability would also be justified by the fact that there was no practice to support the rule of non-separability.[271]

123. On the text of paragraph 2 of draft conclusion 11, Austria and Spain recommended that the word "unjust" be replaced, with Austria suggesting the following wording: "against the common interest of the parties".[272] While the Special Rapporteur is sympathetic with this view, he does believe that the word "unjust" may be broader than "against the interest of the parties" since it might also take into account other interests.

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[265] United Kingdom, comments and observations of States (above note 14).

[266] The phrase to which the United Kingdom refers reads: "[t]he view was expressed that there may be cases in which it would nevertheless be justified to separate different provisions of a treaty".

[267] Belarus, A/C.6/74/SR.24, para. 83 (emphasis added).

[268] *Ibid.*

[269] South Africa, comments and observations by States (above note 14).

[270] Austria, comments and observations by States (above note 14).

[271] Belgium, comments and observations by States (above note 14).

[272] Austria, comments and observations by States (above note 14); Spain, comments and observations of States (above note 14).

124. The United States, for its part, stated that draft conclusion 11 is unsupported by State practice and that the Vienna Convention is unclear on the issue.[273] Yet, the United States seemed to accept that the basic proposition contained in the first paragraph of draft conclusion 11 accurately reflects article 44, paragraph 5, of the Vienna Convention, which explicitly states that separation is not permitted.[274] With respect to subsequently emerging *jus cogens*, the United States claimed that the second paragraph "makes explicit what the VCLT could be read as assuming, but does not explicitly state".[275] The assertion by the United States that the contents of the second paragraph were not made explicit in the Vienna Convention is based on a misreading of the Vienna Convention. By focusing only on article 44, paragraph 5, of the Vienna Convention, the comment by the United States ignores that article 44, paragraph 3, makes this "assumption" explicit.

125. The Special Rapporteur is sympathetic to views of those who support separability in appropriate cases, even in the case of conflict with *jus cogens* at the time of conclusion of a treaty, and would support a proposal to that effect if made within the Commission. At the same time, the Special Rapporteur recognizes the difficulty of proposals that would deviate from the Vienna Convention when there is widespread support in both the Commission and the views of States.

126. On an unrelated matter, Estonia stated that "it was important to analyse the effects of the draft conclusions not only on States but also on international organizations."[276] Since draft conclusions 10 and 11 refer to "treaties" and "parties" broadly, the Special Rapporteur believes this position is addressed. Nonetheless, since this issue is also relevant to the provisions on responsibility under international law, the issue of international organizations will be addressed there.

2. Recommendations of the Special Rapporteur

127. In the light of the discussion above, the Special Rapporteur does not propose any modification to draft conclusion 11.

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

1. Parties to a treaty which is void as a result of being in conflict with a peremptory norm of general international law (*jus cogens*) at the time of the treaty's conclusion have a legal obligation to:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision of the treaty which conflicts with a peremptory norm of general international law (*jus cogens*); and

(b) bring their mutual relations into conformity with the peremptory norm of general international law (*jus cogens*).

2. The termination of a treaty on account of the emergence of a new peremptory norm of general international law (*jus cogens*) does not affect any right, obligation or legal situation created through the execution of the treaty prior to the termination of the treaty, provided that those rights, obligations or situations may thereafter be

[273] United States, comments and observations by States (above note 14).
[274] *Ibid.,* ("As Mark Villiger explains … 'no separation of the provisions of the treaty is permitted …'".).
[275] *Ibid.*
[276] Estonia, A/C.6/74/SR.26, para. 82.

maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law (*jus cogens*).

1. Comments and observations by States

128. Draft conclusion 12 spells out specific consequences flowing from the invalidation of treaties that are in conflict with a *jus cogens* norm. This provision was not the subject of much comment. This is probably because draft conclusion 12 follows very closely the provisions of article 71 of the Vienna Convention.[277] A number of States have described the general thrust of draft conclusion 12 in a manner that suggests overall support.[278]

129. There was a suggestion from Colombia, however, that the obligation of parties, set out in paragraph 1, subparagraph (b), i.e., to bring their mutual relations into conformity with the peremptory norm of general international law (*jus cogens*), be restricted to relations within the framework of the treaty. However, quite apart from the fact that this would involve a departure from the Vienna Convention, the problem is that performance of the treaty might result in the mutual relations between the parties outside the treaty context also being in conflict with *jus cogens*. The purpose of this provision is to also capture such circumstances, and it would seem contrary to the spirit of the law to suggest that such relations, even when in conflict with *jus cogens*, remain untouched by *jus cogens*.

130. Only the United States proposed the deletion of the draft conclusion. The United States, however, also proposed that if the Commission were to retain the provision, the words "of the parties" contained in article 71, subparagraph (2)(b), of the Vienna Convention should be inserted into paragraph 2 of draft conclusion 12.[279] The Special Rapporteur believes that the text is better without the phrase "of the parties". For example, the performance of a treaty, prior to invalidation, may benefit a third party. It is not clear why the rights acquired by such a third party in the performance of the treaty *while the treaty was valid* should be affected by the subsequent invalidation of the treaty if that benefit itself was not in conflict with *jus cogens*.

2. Recommendations of the Special Rapporteur

131. In the light of the discussion above, the Special Rapporteur does not propose any modification to draft conclusion 12.

Draft 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*).

[277] See, e.g., Netherlands, comments and observations by States (above note 14); Japan, comments and observations by States (above note 14).
[278] See, e.g., Colombia, comments and observations by States (above note 14).
[279] United States, comments and observations by States (above note 14).

1. Comments and observations by States

132. Draft conclusion 13 concerns the effects of *jus cogens* on reservations to treaties. Although not based on any provision of the Vienna Convention, draft conclusion 13 also did not attract much comment from States. Again, only the United States suggested the deletion of draft conclusion 13 for the same reason as it had suggested the deletion of draft conclusions 10 to 13.[280]

133. With respect to the first paragraph of draft conclusion 13, Colombia suggested that that case should be distinguished from circumstances in which a multilateral treaty itself establishes a norm of *jus cogens*.[281] The Special Rapporteur believes that both paragraphs of draft conclusion 13 apply irrespective of the source of law forming the basis of the peremptory norm.

134. Several States, however, questioned the first paragraph, which does not provide for the invalidity of a reservation that conflicts with a *jus cogens* but provides instead only that the *jus cogens* continues to apply as such. These States have suggested that the Commission ought to provide for the invalidity of such reservations. South Africa, for example, stated that the Commission "should reconsider this draft conclusion" because in its view, "reservations in conflict with peremptory norms should be declared invalid".[282] Poland and Romania expressed a similar view, noting that, presumably, such a reservation would be contrary to the object and purpose of the treaty.[283] While the Special Rapporteur agrees with this statement, the net result of it is that such a reservation would be invalid, not on account of the peremptory character of the norm, but rather on account of it being contrary to the object and purpose of the treaty.

135. As noted by South Africa, part of the reason for the Commission's decision is that declaring such reservations invalid might result in the imposition of jurisdiction of tribunals without the consent of a State.[284] To that end, South Africa has suggested that the remedy for this is a without prejudice clause to accompany draft conclusion 13. The Special Rapporteur would note, however, that another reason is the recognition that, even if contained in a treaty, the peremptory norm has a different basis, namely that of general international law. Thus, the reservation might affect the treaty rule, but it does not affect the peremptory norm itself. This point was made by the Netherlands; perhaps the Commission should consider also making it more explicit in the commentary.[285]

136. On paragraph 2, Austria and Spain, while agreeing with the content of paragraph 2, proposed that the Commission revert to the formulation initially proposed by the Special Rapporteur.[286] Needless to say, the Special Rapporteur agrees with Austria and Spain that a more direct formula expresses the consequences of such a reservation in a clearer manner. It is correct that the phrase "cannot exclude or modify" is rather obscure. While the Special Rapporteur agrees with the logic of Spain and Austria, given that they are the only two States that made this proposal, the Special Rapporteur

[280] United States, comments and observations by States(above note 14).
[281] Colombia, comments and observations by States(above note 14).
[282] South Africa, comments and observations by States (above note 14).
[283] Poland, A/C.6/74/SR.23, para. 122; Romania, A/C.6/74/SR.23, para. 76.
[284] South Africa, comments and observations by States (above note 14).
[285] Netherlands, comments and observations by States (above note 14).
[286] Austria, comments and observations by States (above note 14); Spain, comments and observations by States(above note 14). See third report of the Special Rapporteur (A/CN.4/714 and Corr.1, para. 76 (b)) ("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.").

will not propose the modification, but will support any proposal from members of the Commission to revert back to the original proposal of the Special Rapporteur.

137. France requested the Commission to clarify certain aspects of the commentaries. The Special Rapporteur has taken note of this suggestion.

2. Recommendations of the Special Rapporteur

138. On the basis of the above, the Special Rapporteur does not make any proposal for the modification of draft conclusion 13.

Draft 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*).

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

1. Comments and observations by States

139. Draft conclusion 14 concerns the consequences of peremptory norms for customary international law. Although there were many suggestions for reformulations, the draft conclusion received general support from member States. Belarus posed a question similar to the one it posed in connection with treaties, about how a peremptory norm that was inconsistent with customary international law could arise since it would require a general practice accepted as law.[287] Czechia, France, Italy, the Netherlands, Slovenia and the United States also posed a similar question.[288] The answer to the question is contained in the commentary to draft conclusion 14.[289] Nonetheless, since the question was posed by several States, the commentary may need to be further developed in order to respond to this query.

140. Estonia welcomed draft conclusion 14, paragraph 1.[290] However, it expressed the view that the Commission should clearly set out that the elements for customary international law were not sufficient for the establishment of peremptory norms. While the Special Rapporteur was of the view that the contents of draft conclusions

[287] Belarus, A/C.6/74/SR.24, para. 84.

[288] Czechia, comments and observations by States (above note 14); France, comments and observations of States (above note 14); Italy, comments and observations by States (above note 14); Netherlands, comments and observations by States (above note 14); United States, comments and observations by States (above note 14); see also United Kingdom, comments and observations by States (above note 14).

[289] See Report of the Commission on the work of its seventy-first session, *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 57, para. (6) to the commentary on conclusion 14 on peremptory norms.

[290] Estonia, A/C.6/74/SR.26, para. 83.

4, 5, 6, 7 and 8 made this clear, he was willing to consider how to strengthen this point in the commentary.

141. Italy, while endorsing the central thought presented in draft conclusion 14, believed that both the content of the draft conclusion and the accompanying commentary could be further refined.[291] In its view, the rule contained in the first paragraph contained what Italy described as an "impossible scenario" of a conflict between a peremptory norm and a non-existent rule of customary international law. France too describes this issue as one of "logic and coherence" and suggests that it is confused (or maybe that the Commission is confused).[292] This point was also made by the Russian Federation.[293] The Special Rapporteur will only point out that the language resorted to by the Commission was chosen precisely to avoid the suggestion that such a norm may arise in the first place. Nonetheless, the Special Rapporteur believes that Italy may have a point because the paragraph, having stated that the rule does not come into existence, then proceeds to say "*it*", which is a reference to a customary international law rule. One option to remedy the apparent contradiction would be to say "it *would* conflict with a peremptory norm". The use of the word "would" indicates that a customary international law rule has not, in fact, come into existence. This wording appears to be consistent with the proposal put forward by Spain for the reformulation of paragraph 1 of draft conclusion 14.[294]

142. The United States also identified a similar problem.[295] It proposed that, to resolve the contradiction, the phrase "does not come into existence" be replaced with the word "void". This is similar to what France would propose (nullity).[296] The Special Rapporteur would not have difficulty with this proposal, which would, as the United States noted, make it unnecessary to have the second paragraph. The problem, which is the reason why the Commission decided to use the phrase "does not arise", is that such a formulation may imply the existence of the customary international law in conflict with a *jus cogens* norm. Yet the view of the Commission is that widespread practice and *opinio juris* cannot create a rule of customary international law if such a putative rule would be contrary to a peremptory norm. Moreover, questions have been asked about whether customary international law rules can be said to be "void".

143. France disagreed with the proposition of the Commission. In its view, in the event that there is a general practice accepted as law (which practice is contrary to *jus cogens*), a customary international law rule would arise causing a conflict between the two norms and bringing into the play the rules of normative hierarchy.[297] The Commission debated this issue at length and decided that a rule of customary international law did not arise. Moreover, although there are proposals for modifications, most States seem to be content with the general approach put forward the Commission.

144. Italy also proposed the deletion of paragraph (7) of the commentary, which explains the inclusion of the phrase "if and to the extent" in paragraph 1 of the draft conclusion.[298] The Special Rapporteur believes it is useful to explain the phrase "if

[291] Italy, comments and observations by States (above note 14).
[292] France, comments and observations by States (above note 14).
[293] Russian Federation, comments and observations by States (above note 14).
[294] Spain, comments and observations by States (above note 14) ("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*).".
[295] United States, comments and observations by States (above note 14).
[296] France, comments and observations by States (above note 14).
[297] *Ibid.*
[298] Italy, comments and observations by States (above note 14).

and to the extent". Nonetheless, this is an issue that can be considered when the Commission adopts the commentaries.

145. Cyprus and Greece confirmed their concurrence with the view that the persistent objector rule does not apply to peremptory norms of general international law, in line with paragraph 3.[299] While France and the United States agreed that the persistent objector doctrine would not apply to a peremptory norm, they maintained that the persistent objection would be relevant as to whether a peremptory norm can emerge in the first place.[300] The Special Rapporteur agrees with this assertion but believes that it is already reflected in the commentaries.[301] The United Kingdom is the only State to question the rule that the persistent objector doctrine does not apply to peremptory norms.[302] Japan, while agreeing with paragraph 3 of the draft conclusion, suggested that the proper explanation for the non-applicability of the persistent objector rule to peremptory norms is the character of the norms as reflecting fundamental values.[303] It therefore suggested that this quality be integrated into the commentaries to draft conclusion 3.

146. Israel also proposed the deletion of paragraph 3 but for reasons different from those offered by the United Kingdom. In Israel's view, a peremptory norm could never arise in the face of persistent objection since for a *jus cogens* norm to exist, there has to be virtually universal acceptance and recognition of the norm.[304] Similarly, the Russian Federation suggested that the Commission should re-evaluate paragraph 3 in order to fully account for the fact that persistent objection might prevent the emergence of a *jus cogens* norm.[305] If by this, the Russian Federation meant to suggest that persistent objection from several States could, depending on the circumstances, prevent the attainment of "a very large majority", then the suggestion is one that should be carefully considered when the commentaries are adopted on second reading. With respect to Israel's argument, two points can be made. First, Israel's contention is based on the application of the erroneous standard of "virtually universal", which was discussed in connection with draft conclusion 7. Second, even assuming that the standard of "virtually universal" is correct, virtually universal is not the same as universal, such that a *jus cogens* norm could arise in the face of a persistent objection from a State.[306]

2. Recommendations of the Special Rapporteur

147. On the basis of the above, the Special Rapporteur recommends that the Commission provide further explanation in the commentary on how new peremptory norms of general international law can emerge in the face of contrary customary international law. In addition, the Special Rapporteur proposes a modification to the first sentence of the first paragraph, so that the first paragraph would read as follows:

> 1. A rule of customary international law does not come into existence if it would come into conflict with an existing peremptory norm of general international law (*jus cogens*). ~~A rule of customary international law does not~~

[299] Cyprus, comments and observations by States (above note 14); Greece, A/C.6/74/SR.24, para. 37.
[300] France, comments and observations of States (above note 14); United States, comments and observations by States (above note 14).
[301] See Report of the Commission on the work of its seventy-first session, *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 57, para. (11) of the commentary to conclusion 14 on peremptory norms.
[302] United Kingdom, comments and observations by States (above note 14).
[303] Japan, comments and observations by States (above note 14).
[304] Israel, comments and observations by States (above note 14).
[305] Russian Federation, comments and observations by States (above note 14).
[306] Israel, comments and observations by States (above note 14).

~~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.

Draft 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*).

1. Comments and observations by States

148. Draft conclusion 15 concerns the consequences of peremptory norms on unilateral acts. This draft conclusion was not the subject of major controversy. While some States expressly supported draft conclusion 15,[307] most States chose not to comment on it at all.

149. While Spain supported the formulation of the first paragraph of the draft conclusion, it suggested that the rule could be better captured by reference to "legal effects".[308] On this basis, Spain proposed that the second paragraph of draft conclusion 15 be redrafted to read:

> 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*).[309]

150. As with the customary international law provisions, the Commission considered following the "void" or "invalid" approach but decided that it was better to retain the idea that an obligation was not created (or ceased to exist in the case of paragraph 2). While the Special Rapporteur does not believe that the proposal of Spain is objectionable, given that the formulation was already considered and that most States are content with draft conclusion 15, it is better not to reopen that debate.

151. Czechia, as with its comments on draft conclusion 14, sought explanation concerning the possibility of separability.[310] This issue was also raised by the United States.[311] It can be addressed in the commentary. France, for its part, wondered how the content of draft conclusion 15 related to the rule that the persistent objector doctrine does not apply in respect of *jus cogens*.[312] The Special Rapporteur cannot find any obvious connection between draft conclusion 15 and the persistent objector doctrine.

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[307] See, e.g., Cuba, A/C.6/74/SR.25, para. 21; see also France, comments and observations by States (above note 14).
[308] Spain, comments and observations by States (above note 14).
[309] Emphasis added by Spain.
[310] Czechia, comments and observations by States (above note 14); see also Russian Federation, comments and observations by States (above note 14).
[311] Russian Federation, comments and observations by States (above note 14); United States, comments and observations by States (above note 14).
[312] France, comments and observations by States (above note 14).

2. Recommendations of the Special Rapporteur

152. On the basis of the above, the Special Rapporteur does not believe it is necessary to make any modifications to draft conclusion 15.

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*)

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*).

1. Comments and observations by States

153. Draft conclusion 16 concerns the consequences of peremptory norms on decisions of international organizations. Many States provided comments on this draft conclusion, with most States expressing strong support, while other States expressed grave concern. All in all, a very large majority of States supported the conclusion while only a few States opposed it.[313] There are, however, nuances that ought to be considered. In particular, some of the States that expressed support for draft conclusion 16 also lamented the fact that decisions of the Security Council were not explicitly mentioned in the text of draft conclusion 16, while other States that can be said not to support draft conclusion 16 would be willing to accept it but had concerns about the mention of the Security Council in the commentary.

154. Only two States explicitly opposed draft conclusion 16 as such. The United States objected to draft conclusion 16 on the basis that there is no practice to support its inclusion.[314] It also stated that it was highly unlikely that an organ of an international organization could adopt a resolution that was contrary to a peremptory norm of general international law.[315] France also believed that draft conclusion 16 should be deleted or significantly redrafted. In its view the provision "*as it stands* risks seriously undermining the authority of the Security Council ...".[316] For this purpose, France proposed that the text of the draft conclusion or the commentaries, explicitly exclude resolutions of the Security Council.[317] Similarly, the United Kingdom stated that it "cannot accept draft conclusion 16", because of the reference to Security Council resolutions in the commentaries.[318] Indeed the recommendation of the United Kingdom was that the scope of the draft conclusion should be reconsidered so as to exclude explicitly the Security Council.

[313] For examples of explicit support for draft conclusion 16, see: Belgium, comments and observations by States (above note 14). Brazil, A/C.6/74/SR.24, para. 94; Cuba, A/C.6/74/SR.25, para. 21; Slovenia, comments and observations by States (above note 14); Spain, comments and observations by States (above note 14); Switzerland, comments and observations by States (above note 14).

[314] United States, comments and observations by States (above note 14) ("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.").

[315] United States, comments and observations by States (above note 14).

[316] France, comments and observations by States (above note 14).

[317] *Ibid.*

[318] United Kingdom, comments and observations by States (above note 14).

155. China, in its comments on draft conclusion 16, did not actually address the text of the draft conclusion itself, save to describe its content. The criticism of China was that it was "inappropriate to make an explicit reference to the relationship between Security Council resolutions and *jus cogens* in the commentaries."[319] In its view, it was "simply inconceivable that such resolutions would conflict with *jus cogens*".[320] It expressed the fear that the explicit reference to the Security Council, even if only in the commentary, "would likely lead to the use of *jus cogens* as a pretext to evade the obligation to implement those resolutions or to challenge their authority".[321] Thus, China recommended the deletion of the reference to the Security Council in the commentaries.[322] The Russian Federation, similarly, objected to the mention of the Security Council in the commentaries to draft conclusion 16.[323] It stated that it did "not believe that draft conclusion 16 can be applied to resolutions of the United Nations Security Council".[324] In its view, the Commission should rather state that the draft conclusions were without prejudice to the provisions of the Charter of the United Nations in accordance with its Article 103.[325] The United States, in addition to objecting to the draft conclusion as such, also questioned the reference in the commentaries to the Security Council, noting that it risked "undermining the authority of the United Nation Security Council (UNSC) and the binding nature of the UNSC resolutions issued under Chapter VII … ".[326] By the same token, the United Kingdom stated that the reference to the Security Council created "a clear danger that this conclusion could be used to weaken respect for resolutions of the Security Council, thereby reducing their effectiveness".[327] For Israel, there is no practice supporting the notion in the commentaries that the resolutions of the United Nations Security Council are subject to *jus cogens*.[328] For this reason, Israel suggests the deletion of that reference in the commentaries.

156. Although not objecting to draft conclusion 16, Germany stated that it shares "the concerns expressed by States that there is a little practice in support of this conclusion".[329] It also repeated the refrain that draft conclusion 16 potentially undermines the effectiveness of the Security Council.[330] Interestingly Germany suggests that, presumably in the commentaries, the Commission provides greater elaboration on the relationship between the draft conclusion and Articles 25 and 103 of the Charter of the United Nations. This is interesting because, given the views already expressed in the commentaries, this would entail giving greater prominence to the relationship between draft conclusion 16 and acts of the Security Council. The Special Rapporteur is certainly willing to do this.

157. Most States, however, supported draft conclusion 16. Nonetheless, among those States that supported the draft conclusion, several States expressed dissatisfaction that the Security Council had not been explicitly included in the text of the draft conclusion. Brazil, for example, stated that it "would have preferred to see an explicit reference to Security Council decisions" in the text of the draft conclusion.[331] In its

[319] China, A/C.6/74/SR.23, para. 54.
[320] *Ibid.*
[321] *Ibid.*
[322] *Ibid.*
[323] Russian Federation, comments and observations by States (above note 14).
[324] *Ibid.*
[325] *Ibid.*
[326] United States, comments and observations by States (above note 14). See also Russian Federation, comments and observations by States (above note 14).
[327] United Kingdom, comments and observations by States (above note 14).
[328] Israel, comments and observations by States (above note 14).
[329] Germany, comments and observations by States (above note 14).
[330] *Ibid.*
[331] Brazil, A/C.6/74/SR.24, para. 94.

view, the Commission should not shy away from "recognizing that the Security Council was also bound by *jus cogens* norms".[332] Similarly Togo expressed the view that draft conclusion 16 should explicitly mention the Security Council.[333] The Islamic Republic of Iran, having explained why, in its view, Security Council resolutions were subject to *jus cogens*, expressed its regret that the proposal of the Special Rapporteur for the explicit reference to the Security Council had not been retained by the Commission.[334] Similarly, South Africa believed that the Security Council should be explicitly mentioned.[335]

158. The theme running through the views of those States that did not want to see an explicit reference to the Security Council, either in the text of the conclusion or in the commentary was that it could be used to undermine the authority of Security Council resolutions through unilateral invocation. To that end, Italy suggested the inclusion of a non-prejudice clause with regard to applicable procedures and mechanisms established under the laws of an international organization.[336] Spain similarly expressed the view that it would be useful to clarify that this does not mean that a State can decide to unilaterally refuse to comply with a binding Security Council resolution.[337] South Africa made a similar suggestion, namely, to include a clause that the application of draft conclusion 16 be made subject to the dispute settlement procedure in draft conclusion 21.[338] The Special Rapporteur understands that this insertion would be made together with an explicit mention of Security Council resolutions in the text itself. At any rate, the Special Rapporteur believes that this position, which is correct, applies to equally to treaties, rules of customary international law and unilateral acts.

159. The Special Rapporteur has decided to be rather comprehensive in the description of these views of States because of the sensitivity of the topic. It seems to the Special Rapporteur that this discrepancy of views indicates that the compromise on the text reached by the Commission on first reading was a good one.

160. In addition to the comments about the implications of draft conclusion 16 vis-à-vis Security Council resolutions, France also suggested that the Commission should consider extending the scope of draft conclusion to non-binding decisions since those could also have normative value.[339] This is something that could be addressed in the commentaries. Similarly, the comment by Czechia concerning the separability of decisions of international organizations will also be addressed in the commentaries.[340]

161. In terms of drafting, Spain proposed that the Commission make a clear distinction between the normative provisions contained in a legal instrument and the instrument itself.[341] The Special Rapporteur notes that the Commission took this issue into account. In part, the words "to extent that it is in conflict with a peremptory norm" is intended to address this issue by acknowledging that there is a distinction between the provision which is in conflict with the *jus cogens* norm and the text as a whole.

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[332] *Ibid.*
[333] Togo, A/C.6/74/SR.26, para. 27.
[334] Iran (Islamic Republic of), A/C.6/74/SR.27, para. 27.
[335] South Africa, comments and observations by States (above note 14).
[336] Italy, comments and observations by States (above note 14).
[337] Spain, comments and observations by States (above note 14).
[338] South Africa, comments and observations by States (above note 14).
[339] France, comments and observations by States (above note 14).
[340] Czechia, comments and observations by States (above note 14).
[341] Spain, comments and observations by States (above note 14) ("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.").

2. Recommendations of the Special Rapporteur

162. On the basis of this discussion, the Special Rapporteur proposes that the text of the draft conclusion remain the same. The Special Rapporteur would also, exceptionally, make the following recommendations concerning the commentaries:

(a) the explicit reference to resolutions, decisions or acts of the Security Council be retained in the commentary;

(b) that the commentary find a clear way to make explicit that the provision was not intended to permit unilateral invocation to avoid obligations under Security Council resolutions.

Draft 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.

1. Comments and observations by States

163. Draft conclusion 17 is the first provision of a group of draft conclusions concerning *jus cogens* and State responsibility. It concerns, in general terms, the relationship between the concepts of *erga omnes* obligations and peremptory norms. This draft conclusion was not the subject of much comment by States in their written comments and observations, which may be taken to mean that they were at least content with the content of draft conclusion 17.[342]

164. France suggested that, in line with the jurisprudence of the International Court of Justice, the first paragraph of draft conclusion 17 might clarify that all States have an interest in the protection of the rights or norms or in their respect.[343]

165. In a related comment, Spain, while supporting draft conclusion 17, suggested that the phrase "in which all States have a legal interest" could be misleading and could suggest that all States were injured.[344] Instead Spain suggested that better language would be "… in which all States have a legal interest in ensuring that they are respected". The Special Rapporteur agrees with the sentiment of Spain but takes the view that the drafting is heavy and creates some problems. For example, the word "ensure" might suggest a duty of result rather than conduct.

166. A related suggestion is that of Switzerland which noted that the French version of the first paragraph did not seem appropriate. Switzerland suggested that it should be made clear that States have a legal interest in respecting the norms of *jus cogens* which create obligations *erga omnes*.[345]

[342] For an example of explicit expressions of support, see Armenia, A/C.6/74/SR.26, para. 68; Estonia, A/C.6/74/SR.26, para. 83; Micronesia (Federated States of), A/C.6/74/SR.24, para. 100.
[343] France, comments and observations by States (above note 14).
[344] Spain, comments and observations by States (above note 14).
[345] Switzerland, comments and observations by States (above note 14).

167. The Special Rapporteur believes that all of these suggestions have great merit. Nevertheless, he is of the view that they can be captured in the commentary. The problem, in the view of the Special Rapporteur, was that each of these formulations identified different "legal interests". As is clear from the statement of the Chair of the Drafting Committee, the Commission considered all of these formulations, i.e., whether the interests were connected to the norm itself, the rights flowing from the norm, the obligations imposed by the norm, the compliance with the obligations etc.[346] It decided that all of these elements are relevant and for that reason decided that the commentary would explain further. Having reviewed the commentary, the Special Rapporteur agrees that it can be made clearer in the commentary what is meant by "have a legal interest."

168. Japan also suggested that the Commission explain whether there had been any development of State practice in respect of paragraph 2.[347] This is an issue which can be addressed in the commentary. Italy, having expressed support for the draft conclusion, suggested that the reports of Mr. Roberto Ago, a former Special Rapporteur, be referenced in the commentary.[348] The United States also made some suggestions for the commentary which the Special Rapporteur, and in due course the Commission, will address.[349] First, the United States requested that the Commission clarify the choice of "international community as a whole" as opposed to "international community *of States* as a whole", which is used in earlier draft conclusions (draft conclusions, 2, 4 and 7). Second, the United States wished the Commission to indicate that the use of word "rules" in the draft conclusion did not have the effect of bestowing on the draft conclusions or the articles on the responsibility of States for internationally wrongful acts a legally binding effect. The Special Rapporteur agrees with this understanding of the word "rules" but believes that it applies to all the draft conclusions, including those relevant to the Vienna Convention since the Convention *as such* does have a legally binding effect on non-parties.

2. Recommendations of the Special Rapporteur

169. On the basis of the discussion above, the Special Rapporteur does not recommend any modification to the text of the draft conclusion. However, suggestions for the strengthening of the relevant commentaries will be made in due course. In particular, recent developments, such as the request for the order of provisional measures by the International Court of Justice in the case of *The Gambia v. Myanmar*, delivered after the adoption of the draft conclusions on first reading, will need to be accommodated.

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

No circumstance precluding wrongfulness under the rules on the responsibility of States for internationally wrongful acts may be invoked with regard to any act of a State that is not in conformity with an obligation arising under a peremptory norm of general international law (*jus cogens*).

[346] See statement of the Chair of the Drafting Committee, Mr. Claudio Grossman Guiloff, on peremptory norms of general international law (*jus cogens*), 31 May 2019 (A/CN.4/SR.3472).
[347] Japan, comments and observations by States (above note 14).
[348] Italy, comments and observations by States (above note 14).
[349] United States, comments and observations by States (above note 14).

1. Comments and observations by States

170. Draft conclusion 18 concerns circumstances precluding wrongfulness. It received very few comments from States.

171. France noted that it was a surprise that the Commission did not include a discussion of the relationship between the use of force and self-defence.[350] Italy similarly noted that the commentary did not address "the thorny issue of the relationship between self-defence …and the prohibition on the use of force".[351] While this is a very interesting issue, on which the Special Rapporteur has a special interest and has written much, the Special Rapporteur believes this discussion, even if couched as being concerned with circumstances precluding wrongfulness, would go beyond the scope of the fundamentally methodological nature of the topic. A related comment was raised by Belgium concerning consent. Belgium suggested that the commentary make clear that consent may play a role in the interpretation of certain *jus cogens* rules, giving as an example the situation of an intervention by invitation.[352] While the Special Rapporteur agrees with this proposition,[353] he also believes this goes beyond the scope of the current topic. That proposition concerns more a clarification of the rules on State responsibility and circumstances precluding wrongfulness than it does the effect of *jus cogens* rules on the circumstances precluding wrongfulness. Thus, at least at the time of writing, the Special Rapporteur would prefer not to address this issue in the commentary. At the most, the Commission may consider flagging these issues and explaining why it has opted not to address them.

172. The United States made the same comment concerning draft conclusion 18 as it did concerning draft conclusion regarding the use of the term "rules".[354]

2. Recommendations of the Special Rapporteur

173. The Special Rapporteur does not deem it is necessary to recommend any modification to draft conclusion 18.

Draft 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.

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[350] France, comments and observations by States (above note 14).
[351] Italy, comments and observations by States (above note 14).
[352] Belgium, comments and observations by States (above note 14).
[353] For the view of the Special Rapporteur, see Tladi, Dire, "The Extraterritorial Use of Force against Non-State Actors" (2021), *Collected Courses of the Hague Academy of International Law*, vol. 223, at p. 317 *et seq.*
[354] United States, comments and observations by States (above note 14).

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.

1. Comments and observations by States

174. Draft conclusion 19 concerns particular consequences of serious breaches of peremptory norms. Unlike draft conclusion 18, draft conclusion 19 was the subject of many observations by States. While some States supported it, others questioned whether it was reflective of customary international law, and yet others suggested some modifications.

175. Cyprus expressed support for draft conclusion 19, stating that it attached great importance to it.[355] It underlined the customary obligation to cooperate to bring to an end serious breaches of obligations stemming from *jus cogens*.[356] In its view, the "customary character of the duties of cooperation, non-recognition and non-assistance entails that States must perform those duties regardless of the existence of a judicial or political decision … calling on them to do so".[357] Nicaragua also expressed strong support for the draft conclusion, which, it noted, had recently been confirmed by the International Court of Justice.[358] Cuba stated that draft conclusion 19 reflected "international consensus" on the consequences of *jus cogens* for peremptory norms.[359] While the Netherlands did not expressly state that it supported draft conclusion 19 and the obligations included therein, its statement that, in its view, "States do not necessarily have to take these collective measures within the framework of an international organization" can only be understood as an expression of a belief that there was some duty to act, which could be exercised in a variety of ways – a position that Special Rapporteur wholly agrees with.[360]

176. Other States questioned whether draft conclusion 19 reflected customary international law at all. Israel, for example, stated that article 41, paragraph 1, of the articles on the responsibility of States for internationally wrongful acts, on which the first paragraph of draft conclusion 19 is based, was, when adopted, and remains until now, a reflection of the progressive development of international law and is not based on State practice.[361] This position was expressed equally by the United Kingdom.[362] The United States stated that it "strongly objects" to draft conclusion 19 because the "supposed obligations listed" therein "do not reflect customary international law".[363] In a related, but slightly different comment, the Russian Federation noted that draft conclusion 19 was drafted more like draft articles than draft conclusions.[364]

177. Japan, likewise, questioned whether the cases referred to in the commentary supported the contents of draft conclusion 19.[365] For example, it noted that neither of the advisory opinions of the International Court of Justice on *the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* or on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*

[355] Cyprus, comments and observations by States (above note 14). See also, for support, Greece, A/C.6/74/SR.24, para. 35; Micronesia (Federated States of), A/C.6/74/SR.24, para. 100.
[356] Cyprus, comments and observations by States (above note 14).
[357] *Ibid.*
[358] Nicaragua, A/C.6/74/SR.23, para. 73.
[359] Cuba, A/C.6/74/SR.25, para. 21.
[360] Netherlands, comments and observations by States (above note 14).
[361] Israel, comments and observations by States (above note 14).
[362] United Kingdom, comments and observations by States (above note 14).
[363] United States, comments and observations by States (above note 14).
[364] Russian Federation, comments and observations by States (above note 14).
[365] Japan, comments and observations by States (above note 14).

explicitly referred to *jus cogens*. Israel and the United States also made the point that these two advisory opinions do not explicitly refer to *jus cogens*.[366] Those States therefore suggested that if the Commission wishes to retain draft conclusion 19 it should provide further evidence of State practice in the commentary. The request for further elaboration of new State practice was put forward by other States, including Australia[367] and the Netherlands.[368] Poland encouraged the Commission to refer more to recent developments which could be used to underpin the draft conclusion.[369] Italy, while also observing that the two advisory opinions concern erga omnes obligations, requested that the Commission clarify whether, in its view, the Court, in those two advisory opinions, had identified a *jus cogens* norm without stating so explicitly. If so, Italy requested that this view be made explicit in the commentaries.[370]

178. Japan also suggested that since draft conclusion 19 only mentions the obligations of cooperation, non-recognition and non-assistance, it may raise questions about whether other obligations do not exist. Japan, in particular put forward, as an example of another duty, the duty to refrain from the exercise of a veto in relation to *jus cogens* breaches.[371]

179. To begin with the last point mentioned, the Special Rapporteur does not deem it either necessary or appropriate to discuss the particular example cited, which, if the law did evolve in that direction, would probably simply be an illustration of an existing duty, namely the duty to cooperate to bring any serious breach of an obligation to an end. On this point, the Special Rapporteur takes note of the comments by France concerning the implications of paragraph (5) of the commentary on the Security Council.[372] It should be emphasized that paragraph (5) in no way directs the Council, or its members, as to which measures to adopt in the face of a serious breach. Thus, the discretion provided for in Article 42 of the Charter of the United Nations remains intact.

180. Concerning the point about reliance on the jurisprudence of the International Court of Justice that did not explicitly refer to *jus cogens*, as the Special Rapporteur has noted in several debates on this very question and on these very advisory opinions, he did not believe that the only function of the Commission was to parrot the Court. The Commission was not only entitled but obligated to make assessments and draw conclusions as to what the various materials it relied upon implied with regard to the role of law. In relation to the jurisprudence of the Court, the Commission is duty-bound to draw conclusions about what that jurisprudence means.[373] Notwithstanding this, the Special Rapporteur did believe, as suggested by Australia, Italy, Japan and the Netherlands, that the commentary could be strengthened by identifying further examples of practice relevant to this question. The Special Rapporteur would make recommendations to the Commission on this point at an appropriate time.

181. The Netherlands also posed a question as to whether the Commission could not address in the commentaries the question of countermeasures as a lawful means of

[366] Israel, comments and observations by States (above note 14).
[367] Australia, comments and observations by States (above note 14).
[368] Netherlands, comments and observations by States (above note 14).
[369] Poland, A/C.6/74/SR.23, para. 124.
[370] Italy, comments and observations by States (above note 14).
[371] Japan, comments and observations (above note 14).
[372] France, comments and observations by States (above note 14).
[373] The Special Rapporteur believes this was the import of the suggestion of Italy to clarify whether, in the Commission's view, the Court had identified a norm of *jus cogens*, even though not explicitly identifying it as such.

responding to serious breaches.[374] France and Italy appeared to go even further.[375] France stated that the Commission, by explicitly excluding unilateral measures, had appeared to go beyond "the more balanced compromise" of the 2001 articles on responsibility of States for internationally wrongful acts.[376] The Special Rapporteur believes that countermeasures are a controversial part of those articles and that their status in law is not settled. In that context, and without prejudice to the position in law of countermeasures, draft conclusion 19, by qualifying the duty to cooperate by the phrase "through any lawful means", has left this question open. It is not, in the view of the Special Rapporteur, for the Commission in its work on this topic to resolve outstanding issues of the law of State responsibility *that did not concern, in particular, peremptory norms*. In this connection, it should be recalled that article 54 of the articles on responsibility of States for internationally wrongful acts referenced by France and Italy, does not specify a rule but is merely a without prejudice clause.[377] The Commission should be reluctant to turn without prejudice clauses into statements of rights.

182. Spain, while expressing support for draft conclusion 19, suggested the deletion of paragraph 3, which, it notes, does not address the consequences of breaches but rather describes what constitutes a serious breach.[378]

183. Draft conclusion 19 concerns what are termed "serious" breaches of *jus cogens* norms.[379] The commentary to draft conclusion 19, at paragraph (9), states that a "view was expressed that the word 'serious' should be omitted from the text of draft conclusion 19". The United Kingdom, in this connection, observed that debates concerning "what constitutes a 'serious breach'" will affect the utility of the draft conclusion.[380] Colombia observed that the implications of the word "serious" may be that there is no duty to end breaches of peremptory norms that are not regarded as serious.[381] It therefore proposed that the language be reviewed to ensure that there will also be consequences for any breaches of peremptory norms, with a particular emphasis on those that are serious.[382] Colombia noted also that the commentaries do not clarify what constitutes "serious".[383] Similarly, Poland said that the idea that only serious breaches attracted the consequence of non-recognition "required further consideration".[384] In particular, Poland questioned whether "there could be a 'simple' breach of a *jus cogens* norm" – by which the Special Rapporteur assumes that it means a "non-serious breach". Egypt made a similar statement, i.e., that draft conclusion 19 should apply to all breaches, and not only to serious ones.[385]

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[374] Netherlands, comments and observations by States (above note 14).

[375] France, comments and observations by States (above note 14); Italy, comments and observations by States (above note 14).

[376] *Ibid*.

[377] Art. 54 of the articles on responsibility of States for internationally wrongful acts (above note 46): "This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.".

[378] Spain, comments and observations by States (above note 14).

[379] See Report of the Commission on the work of its seventy-first session, *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), para. 57, para. (1) of the commentary to draft conclusion 19 (" … nor does it address the consequences of breaches of peremptory norms that are not serious in nature.").

[380] United Kingdom, comments and observations by States (above note 14).

[381] Colombia, comments and observations by States (above note 14).

[382] *Ibid.*

[383] *Ibid.*

[384] Poland, A/C.6/74/SR.23, para. 124.

[385] Egypt, A/C.6/74/SR.26, para. 4.

184. The Special Rapporteur continues to believe that the consequences identified in draft conclusion 19 should apply also to all breaches. Nonetheless, given that divergence of views of States, including some that believed that the draft conclusion should not be included at all, he believes that it is best not to modify the text of the draft conclusion. Moreover, on reflection, the Special Rapporteur believes, as suggested by Poland's question, that all breaches of peremptory norms are serious.

185. With regard to the second paragraph of draft conclusion 19, the United States questioned the use of the word "situation".[386] It noted that there may well be situations created by breaches of *jus cogens* norms that have to be recognized because of the protections flowing from such recognition. These include, for example, situations of armed conflict resulting from a breach of the prohibition on the use of force, requiring the application of international humanitarian law. The Special Rapporteur does not disagree with the basic premise of the position put forward by the United States but believes this is precisely why paragraph (8) of the commentary was inserted. The Special Rapporteur will consider expanding the commentary to make that clear. Indeed, based on the comments by the United States, it may be necessary to more generally explain the Commission's choice of the word "situation" beyond the fact that it was the word used in the articles on responsibility of States for internationally wrongful acts.

186. Some comments on draft conclusions 17, 18, 19 also touched upon what was perhaps a general issue, namely the applicability of the draft conclusions to international organizations. Some States, for example Belarus,[387] Estonia,[388] France[389] and Italy[390] provided particularly detailed explanations of relevant parts of the commentaries that should be amended, including the deletion of paragraph (11). These States have suggested that it be made clear that these draft conclusions apply also to international organizations. This point, which, as Italy notes, applies in particular to the provisions on State responsibility, was the subject of a lengthy debate within the Drafting Committee. While, again as Italy correctly notes, the commentary merely refers to international organizations on the basis of a without prejudice statement, the statement of the Chair of the Drafting Committee suggested that the reference to "States" was to be seen as including international organizations.[391] The Netherlands, similarly raised the point concerning the applicability of *jus cogens* norms, suggesting that the Commission should elaborate commentaries on the applicability of those norms to actors other than States.[392] France, in the context of draft conclusion 19, also suggested that the Commission clarify the role of international organizations and, in particular,[393] clarify an apparent discrepancy between paragraphs (4), (5) and (7) and paragraph (11) of the commentary.[394] The

[386] United States, comments and observations by States (above note 14).

[387] Belarus, A/C.6/74/SR.24, para. 81 ("It should be stated clearly that peremptory norms of general international law were applicable to all subjects of international law, including international organizations. That comment was also applicable to draft conclusions 17 to 19 ...").

[388] Estonia, A/C.6/74/SR.26, para. 82 ("… it was important to analyse the effects of the draft conclusions not only on States but also on international organizations.").

[389] France, comments and observations by States (above note 14).

[390] Italy, comments and observations by States (above note 14).

[391] See statement of the Chair of the Drafting Committee, Mr. Claudio Grossman Guiloff on peremptory norms of general international law (*jus cogens*), 31 May 2019 (A/CN.4/SR.3472): "While the provision indicated that the obligation to cooperate was on States – as indicated in article 41 of the articles on State responsibility – the commentary would make it clear that the obligation to cooperate also applied to international organizations, as envisaged in the corresponding provision of the 2011 articles on responsibility of international organizations.".

[392] Netherlands, comments and observations by States (above note 14).

[393] France, comments and observations by States (above note 14).

[394] The former paragraphs seem to imply a duty on the part of international organizations, while paragraph 11 provides that the draft conclusion is without prejudice.

Special Rapporteur will reconsider a reformulation of the commentary to address this concern, which, in his view, is valid.

2. Recommendations of the Special Rapporteur

187. On the basis of the discussion above, the Special Rapporteur does not recommend any modifications of the text of the draft conclusion. However, the Special Rapporteur believes that significant changes may have to be made to the commentaries to take into account the comments made by States.

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

Where it appears that there may be a conflict between a peremptory norm of general international law (*jus cogens*) and another rule of international law, the latter is, as far as possible, to be interpreted and applied so as to be consistent with the former.

1. Comments and observations by States

188. Draft conclusion 20 concerns interpretation of the rules of international law consistent with peremptory norms. This draft conclusion did not raise much controversy, with most States deciding not to comment on the Commission's draft conclusion.

189. France, while not expressing opposition to draft conclusion 20, raised a question about the phrase "as far as possible".[395] In its view, the phrase "as far as possible" was problematic because "une règle risquant d'être en conflit avec une norme de *jus cogens* devrait – en raison de la nature même de ces normes – ne pas être appliquée du tout plutôt qu'être 'autant que possible'" ….[396] The Special Rapporteur is not able to agree with the observation of France. The rule of non-application applies to cases of "actual" conflict, not "une règle risquant d'être en conflit" (a potential conflict). In fact, the rule contained in draft conclusion 20 is intended to determine *whether* such a conflict exists.

2. Recommendations of the Special Rapporteur

190. On the basis of this discussion, the Special Rapporteur does not recommend any modification to draft conclusion 20.

Draft 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.

[395] France, comments and observations by States (above note 14).

[396] France, comments and observations by States (above note 14). Unofficial translation: "a rule that risks being in conflict with a norm of *jus cogens* should - because of the very nature of those norms - not be applied at all rather than be applied 'as far as possible'".

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.

1. Comments and observations by States

191. Draft conclusion 21 proposes a procedure for determining whether there has been a breach of *jus cogens* norms and the application of the consequences for breaches outlined in draft conclusions 10 to 19. Unlike draft conclusion 20, draft conclusion 21 attracted much interest and comments from States.

192. There were some States that questioned draft conclusion 21. In Australia's view, draft conclusion 21 is "unhelpful and unnecessary" and "should be removed".[397] The main reason, it seems, is that the draft conclusions are not intended to be adopted as a treaty. This concern has been raised by several States, including France, [398] Germany, [399] Israel, [400] Italy, [401] Japan, [402] Singapore, [403] Spain, [404] the Russian Federation[405] and the United States.[406] The Russian Federation noted, in particular, that the extension of the envisaged mechanism to cover Security Council resolutions, as would be the implication if draft conclusion 16 and its commentaries were retained in their current form, would also serve to undermine the maintenance of international peace and security.[407] Furthermore, Australia contended that it is not clear from the draft conclusion what the outcome would be if the relevant parties failed to reach agreement within the allotted time.

193. France contended that if the draft conclusion were to be kept, a number of improvements would need to be made.[408] First, France believed that a clear distinction should be made between situations covered by the regime established in articles 65 and 66 of the Vienna Convention and those not covered by that regime.[409] Similarly, Japan noted that parties to the Vienna Convention consented to the procedures set out

[397] Australia, comments and observations by States (above note 14).
[398] France, comments and observations by States (above note 14). In this context, France states that draft conclusion 21 invites confusion about the status of the draft conclusions as a whole.
[399] Germany, comments and observations by States (above note 14)
[400] Israel, comments and observations by States (above note 14).
[401] Italy, comments and observations of States (above note 14).
[402] Japan, comments and observations by States (above note 14).
[403] Singapore, comments and observations by States (above note 14).
[404] Spain, comments and observations by States (above note 14).
[405] Russian Federation, comments and observations by States (above note 14).
[406] United States, comments and observations by States (above note 14).
[407] Russian Federation, comments and observations by States (above note 14).
[408] France, comments and observations by States (above note 14).
[409] *Ibid.*

in articles 65 and 66[410] – an observation that suggests that the Commission cannot interfere with or undermine that treaty regime.[411] On the other hand, Japan also observed that the procedures in the Vienna Convention cannot be imposed on non-State parties (and, one might add, on those States that made a reservation to the dispute settlement regime in the Vienna Convention).[412] On this issue, El Salvador stated that the draft conclusion should make it clear that it does not establish an obligation to submit a matter to adjudication.[413] Colombia also recalled that the International Court of Justice can only have jurisdiction where the parties to a dispute have accepted its jurisdiction.[414]

194. A related, but somewhat different concern, is that raised by Colombia[415] and the United States,[416] namely that the Commission should not be seen as suggesting that the International Court of Justice is the preferred forum for addressing particular legal issues.

195. In its second point, France stated that it would be necessary to clarify who the possible author of the invocation of a peremptory may be, i.e., may a State that is not party to the treaty invoke the procedure or is the procedure limited to parties to the relevant treaty?[417] Also in connection with "concerned States", France stated that it was necessary to clarify which States should be the recipient of the notifications, particularly in respect of customary international law, a point made also by Czechia.[418] These States suggested that it would be impossible to expect the notifying State to inform all States that participated in the formation of a rule of customary international law. On a related point, Italy maintained that the use of the phrase "a State" is problematic since it may suggest that there is necessarily only one State that might have concerns about a provision.[419] Italy also suggested that the use of the phrase "States concerned" might suggest that there are some States that are not concerned.[420]

196. In a third point, France noted that the reference to "States concerned" should be modified to allow for the possibility of notification to international organizations concerned.[421] Finally, France noted that the French translation of the draft conclusion did not always follow the English.[422]

197. Czechia posed an interesting theoretical issue, namely whether the procedure would need to be followed in the case of a national court seeking to invalidate a customary international law.[423]

198. As to the first point raised by France, and amplified by Japan, concerning the relationship between the draft conclusion and the Vienna Convention dispute settlement regime, the Special Rapporteur believes that this is a valuable comment. The Special Rapporteur would point out that this was the purpose of the without prejudice clause in paragraph 5. The Special Rapporteur hopes that this point also addresses the comment by Colombia and El Salvador that the draft conclusion should

[410] Japan, comments and observations by States (above note 14).
[411] *Ibid*.; see also Russian Federation, comments and observations by States (above note 14).
[412] Japan, comments and observations by States (above note 14).
[413] El Salvador, comments and observations by States (above note 14).
[414] Colombia, comments and observations by States (above note 14). It was clearly important to Colombia that this point was stressed; Colombia made the point several times, in different ways.
[415] Colombia, comments and observations by States (above note 14).
[416] United States, comments and observations by States (above note 14).
[417] France, comments and observations by States (above note 14).
[418] *Ibid*.; Czechia, comments and observations by States (above note 14).
[419] Italy, comments and observations by States (above note 14).
[420] *Ibid*.
[421] France, comments and observations by States (above note 14).
[422] *Ibid.*
[423] Czechia, comments and observations by States (above note 14).

not impose a duty to submit to adjudication. Yet the Special Rapporteur would be willing to consider strengthening the commentaries to make the point even clearer if it is possible to do so.

199. As to the possible authors of the notification, i.e., whether non-party States are entitled to be authors of the notifications, the Special Rapporteur points out that France is correct that the draft conclusion adopted a more open approach in keeping with the *erga omnes* nature of *jus cogens* norms. In response to the comment concerning consistency of this more open approach with the Vienna Convention, the Special Rapporteur would point to the fact that the Vienna Convention, applying by definition to treaty relations, of course adopted a narrower approach. However, and here the Special Rapporteur would point to France's first comment, namely that narrower regime continued to apply as between the parties to the Vienna Convention to which articles 65 and 66 applied, this provision being, as explained above, a recommended procedure did not, as a matter of law, affect any of those rules.

200. Similarly, it is correct, as noted by France, that the Commission also decided on a broad approach for the recipients of the notification. France noted the practical difficulty of notifying all States that had contributed to the formation of a customary international law.[424] Yet, under these draft conclusions it is not only those States (and entities) that had actively participated in the practice but all States to which the rule applies. For the Commission, the practical difficulty identified by the France is not an obstacle for two reasons. First, in the case of a multilateral treaty, the notification can be transmitted to the depository. Second, in other cases, as noted in paragraph (5) of the commentary, the notification can be distributed through the Secretary-General of the United Nations. The Special Rapporteur agrees with France's suggestion regarding "States concerned", i.e., that the draft conclusions should also refer to international organizations. The Special Rapporteur takes note of the fourth point concerning translation. This is an issue that should be addressed by the Commission.

201. On the issue raised by Italy that the phrase "a State" necessarily means that only one State is concerned, the Special Rapporteur struggles to understand the logic. All that paragraph one does is to indicate the steps that a State, any State or number of States, should take if such States identifies a potential conflict. There is nothing in that choice of phrase that precludes the possibility of other States also sending notifications. The Special Rapporteur similarly does not share the concern of Italy concerning the use of the phrase "concerned States". One can imagine a treaty with five State parties which another State, whether a State party or not, believes is contrary to *jus cogens*. It is unclear why the notification referred to in paragraph one by the State believing the treaty to be invalid should, *as a rule*, also be addressed to other States that are not party to that treaty.

202. As to the problem raised by Czechia, it is not at all clear to the Special Rapporteur why this issue arises only in respect of rules of international law other than treaties – a careful reading of the Czech statement suggests that its concerns relate to the application of this draft conclusion to other sources. After all, it is very possible that a national court might decide to invalidate a treaty applicable between the State it represents and another State (or other States) in circumstances where the Vienna Convention regime applies. In the view of the Special Rapporteur, such a scenario, whether in relation to customary international law or treaty law, would not be dependent on the application of either the procedure in draft conclusions 20 or for that matter the Vienna Convention regime, unless the State concerned wished to give effect to that invalidation at the international level.

[424] France, comments and observations by States (above note 14).

203. Czechia has also noted that the information contained in a footnote concerning the status of its acceptance of the jurisdiction of the International Court of Justice under article 66 (a) of the Vienna Convention needs to be updated.[425] The Special Rapporteur thanks Czechia and will suggest to the Commission that the footnote be simplified so as not provide detailed information, as that information may change in the future.

204. While preferring that draft conclusion 21 be deleted, Israel stated that if it were to be kept, the commentary should state that the provision as a whole did not reflect existing law.[426] Greece, which did not express an objection to the draft conclusion, preferred that it be drafted as a recommendatory provision and not, as was currently the case in its view, a binding provision.[427] Similarly Spain stated that if the draft conclusion were to be kept, the consistent view of the International Court of Justice that the mere invocation of a violation of a peremptory norm cannot be the basis for its jurisdiction[428] should be reflected. These are all issues that can be addressed when the Commission adopts the commentaries on second reading.

205. There were, however, some States that expressed support for draft conclusion 21. Slovenia, for example, noted the balance struck by the Commission in both following the procedure in the Vienna Convention, while not imposing it on non-State parties.[429] Estonia also stated that it supported draft conclusion 21, which, it said, was in line with the Vienna Convention.[430] Cuba stated that it was pleased that the draft conclusion referred to the mechanisms in Article 33 of the Charter of the United Nations, and the International Court of Justice.[431] The United Kingdom too saw value in the provision while acknowledging some of the tensions it caused.[432] In this connection, the United Kingdom made useful suggestions for change, in addition to the changes to the commentaries that might be considered.[433] In particular, it suggested that the reference to the word "requirements", which suggested a sense of obligation, might be deleted from the title.[434] It also suggested that the provision's placement might be reconsidered so that it was not included as part of the "legal consequences".[435] These are both helpful suggestions. Greece also suggested that it should be made clear, both in the text and in the commentary, that draft conclusion 21 was recommendatory in nature.[436]

206. Similarly, while Romania adopted what seemed to be a positive attitude to draft conclusion 21, it raised some questions about its implications.[437] In particular, Romania thought it would be appropriate if the draft conclusion addressed the position in the circumstances that the jurisdiction of the Court was not activated in

[425] Czechia, comments and observations by States (above note 14).
[426] Israel, comments and observations by States (above note 14).
[427] Greece, A/C.6/74/SR.24, para. 37. In its statement, Greece referred to the use of the words "is to", "are to" and "may not carry out the measure …".
[428] Spain, comments and observations by States (above note 14).
[429] Slovenia, comments and observations by States (above note 14) ("The Republic of Slovenia appreciates the effort that the Commission has put into establishing a mechanism in draft conclusion 21 that in general follows the procedure under articles 65 to 67 of the Vienna Convention .., yet takes into account the reservations that many States have lodged with regard to the jurisdiction of the International Court of Justice while still protecting legal certainty and providing the possibility to 'cure' a potential situation where a rule would be in conflict with a peremptory norm.").
[430] Estonia, A/C.6/74/SR.26, para. 84.
[431] Cuba, A/C.6/74/SR.25, para. 22.
[432] United Kingdom, comments and observations by States (above note 14).
[433] United Kingdom, comments and observations by States (above note 14).
[434] *Ibid.*
[435] *Ibid.*
[436] Greece, A/C.6/74/SR.24, para. 37.
[437] Romania, A/C.6/74/SR.23, para. 77.

paragraph four. This was, of course, a difficult question, which could perhaps be further clarified in the commentary.

207. Colombia suggested that it could be made clearer that the measures referred to in the first paragraph were "in accordance with public international law".[438] While the Special Rapporteur understands this concern, he is of the view that since the draft conclusion is not taking a position on the lawfulness of the measures, it is unnecessary for it to make that specification. In particular, in the view of the Special Rapporteur, whether the measures are, in fact, "in accordance with public international law" will reveal itself through the application of draft conclusion 21.

208. It should come as no surprise that draft conclusion 21 attracted as much comment, nor should it come as a surprise that many States raised similar difficulties. This draft conclusion is not, as the Commission tries to make clear in its commentary, reflective of international law. Moreover, it seeks to balance two factors that are particularly difficult to balance, i.e., the need to ensure the effectiveness of the consequences for breaches of peremptory norms, while also discouraging the unilateral invocation of the rules contained in the draft conclusion. The Special Rapporteur recognizes that the comments and concerns by States cannot be fully addressed because of the vexed nature of those questions. Nonetheless, the Special Rapporteur believes that to simply not have this draft conclusion would be dangerous. For these reasons, it is important to address, as much as possible, the comments made, both in the text of the draft conclusion and the commentary thereto.

2. Recommendations of the Special Rapporteur

209. On the basis of the views of States described, the Special Rapporteur believes that significant modifications are required in respect of draft conclusion 21. These recommendations are, in the main, intended to signify that draft conclusion 21 is not binding, nor does it imply the establishment of jurisdiction, nor does it affect the dispute settlement procedure:

(a) First, the Special Rapporteur would recommend that the draft conclusion be renamed "Recommended procedure";

(b) Second, the placement of the draft conclusion can be changed. It is currently situated in Part Three, which addresses (legal) consequences, which may suggest that the procedure described is a legal consequence of *jus cogens*. The Special Rapporteur recommends that draft conclusion be placed under Part Four (General provisions);

(c) It is also recommended that a new paragraph be inserted, making clear the relationship of the parties to treaties, such as the Vienna Convention, setting out that particular dispute settlement procedures remain unaffected by the draft conclusion;

(d) In paragraph 1, the words "States concerned" can be replaced by "States concerned and other entities, as may be appropriate";

(e) Finally, there will need to be modifications to the text (as reflected below) and commentaries to address other comments by States.

[438] Colombia, comments and observations of States (above note 14).

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

The present draft conclusions are without prejudice to consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail under international law.

1. Comments and observations by States

210. Draft conclusion 22 is a without prejudice clause, which, like many without prejudice clauses, has a rather deep history. It was generally acceptable to States, with most States opting not to comment on it at all. Italy, for example, commented on draft conclusion 22 mainly to make an observation on the methodological approach chosen by the Commission and with a view to making more substantive comments on draft conclusion 23.[439]

211. The Islamic Republic of Iran requested the deletion of draft conclusion 22 because, in its view, a without prejudice clause did not fit within the scope of the topic.[440] The Special Rapporteur does not understand what is meant by this because the purpose of the draft conclusion was precisely to describe what was excluded from the topic. The United Kingdom welcomed the draft conclusion as an improvement over the initial provision of the Special Rapporteur, although it believed it would be even better if the draft conclusion were deleted altogether.[441] In relation to the accompanying commentary, the United Kingdom questioned the "emphasis" in the commentary on immunities, while also referring to the *Jurisdictional Immunities of the State* case.[442] With respect to the comments of the United Kingdom, the Special Rapporteur did not agree that there was an "emphasis" on immunity, since immunity was mentioned together with other potential consequences not addressed in the draft conclusions. The Special Rapporteur also found the reference to the *Jurisdictional Immunities of the State* case somewhat contradictory since discussing that case would, by definition, require the very same emphasis that the United Kingdom was lamenting.

212. For other States, such as France and Italy,[443] it was regrettable that the Commission had opted not to address the consequences of *jus cogens* for specific norms. In their view, such an approach would have made the draft conclusions more useful than they currently were.[444]

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[439] Italy, comments and observations by States (above note 14).
[440] Iran (Islamic Republic of), A/C.6/74/SR.27, para. 28.
[441] United Kingdom, comments and observations by States (above note 14): see also Italy, comments and observations by States (above note 14); it ought to be mentioned that Italy's observations on draft conclusion 22 suggest that it would have preferred the Commission to consider addressing the issues of immunities as had been proposed by the Special Rapporteur ("A more comprehensive and far-reaching project would have also given the opportunity to the ILC to deal with some of the most relevant and contentious issues on the legal effects of *jus cogens* norms to the prohibition of crimes against humanity and to international humanitarian law on the rules on State immunity (a topic only evoked in paragraph 4 of the commentary to draft conclusion 22 and to which Italy attaches the greatest importance).").
[442] United Kingdom, comments and observations by States (above note 14).
[443] France, comments and observations of Governments (above note 14); Italy, comments and observations by States (above note 14).
[444] *Ibid.*

213. The Netherlands requested the Commission to explain in the commentary why certain consequences applied only to some norms and not to others.[445] Japan, for its part, disagreed that procedural rules on immunities are specific and not general.[446] This position is apparently based on the judgment of the International Court of Justice in the *Jurisdictional Immunities of the State* case, although the Special Rapporteur cannot see the connection between the generality or specificity of the consequences, on the one hand, and the dictum of the Court, on the other. At any rate, in response to these questions it is sufficient simply to note that, for example, the consequences of rules such as immunity would, by definition, only be applicable to those *jus cogens* norms whose breach constitute crimes under international law. The breach of the principle of self-determination, for example, does not constitute a crime and therefore does not raise consequences related to immunity.

2. Recommendations of the Special Rapporteur

214. The Special Rapporteur does not recommend any modification to the text of draft conclusion 22.

Draft 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.

1. Comments and observations by States

215. Draft conclusion 23, and the accompanying list, contain a list of norms that the Commission had previously recognized as having a peremptory character. The comments of States on the draft conclusion and its annex were as varied as they were numerous. Given the approach that the Commission had adopted for the first reading, it will not be productive to comment on the individual views on the merits or demerits of particular norms. Thus, this section of the report will focus principally on the

[445] Netherlands, comments and observations by States (above note 14).
[446] Japan, comments and observations by States (above note 14).

question of whether to have or not to have the list and not whether this or that norm ought to have been included or excluded.

216. Before addressing the comments by States, it is necessary to recall briefly the choice made by the Commission with regard to the illustrative list (or better termed, non-exhaustive list). The Commission decided that to prepare a list of its own was not practical. It was understood that to prepare a list on the basis of the methodology adopted in the draft conclusion would take decades. Moreover, the Commission took the view that the preparation of such a list would not be consistent with the fundamentally methodological nature of the topic. On this basis, the Commission decided to annex to the draft conclusion a non-exhaustive list of norms that the Commission had, in its previous work, identified as having a peremptory character.[447]

217. It is necessary to emphasize three aspects about the Commission's approach. First, the list of norms is without prejudice to other norms that the Commission may have referred to as having a peremptory character. Second, the list of norms contained in the annex is without prejudice to the emergence of *jus cogens* in the future. Third, the list is without prejudice to other norms that currently have the status of *jus cogens* but that have not been referred to previously by the Commission.

218. Several States expressed the view that the draft conclusion should not include the annex with a list of norms of *jus cogens*. For some States the inclusion of any list must be based on an assessment of the relevant norms applying the criteria developed by the Commission in the draft conclusions.[448] In effect, most of these States believed that there were certain norms on the list that did not meet the criteria for *jus cogens* or, phrased differently, that the Commission did not offer justification, consistent with its criteria, for the identification of these norms.[449] Another reason put forward for the non-retention of the list is that having a list would go against the methodological nature of the topic.[450] Some States also questioned the manner in which the particular norms were identified.[451] Some States believed the inclusion of a list based solely on what the Commission had previously identified would not add much value.[452]

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[447] The decision-making process of the Commission is aptly captured in the written statement of France, comments and observations by States (above note 14).

[448] Australia, comments and observations by States (above note 14); see also Armenia, A/C.6/74/SR.26, para. 69; China, A/C.6/74/SR.23, para. 55; Czechia, comments and observations by States (above note 14); France, comments and observations by States (above note 14); India, A/C.6/74/SR.26, para. 8; Iran (Islamic Republic of), A/C.6/74/SR.27, para. 28; Ireland, A/C.6/74/SR.24, para. 41; Israel, comments and observations by States (above note 14); Italy, comments and observations by States (above note 14); Nordic countries, comments and observations by States (above note 14); Russian Federation, comments and observations by States (above note 14); Turkey, A/C.6/SR.26, para. 73; United Kingdom, comments and observations by States (above note 14); United States, comments and observations by States (above note 14).

[449] China, A/C.6/74/SR.23, para. 55; Russian Federation, comments and observations by States (above note 14); India, A/C.6/74/SR.26, para. 8; Israel, comments and observations by States (above note 14); Italy, comments and observations by States (above note 14); Uzbekistan, A/C.6/74/SR.26, para. 35; the United States, comments and observations by States (above note 14).

[450] Colombia, comments and observations by States (above note 14); Nicaragua, A/C.6/74/SR.23, para. 71; Russian Federation, comments and observations by States (above note 14); Iran (Islamic Republic of), A/C.6/74/SR.27, para. 28.

[451] See, for example, France, comments and observations by States (above note 14).

[452] Ireland, A/C.6/74/SR.24, para. 41; France, comments and observations by States (above note 14); Germany, comments and observations by States (above note 14) ("Concerns remain that the adoption of an enumerative list of specific *jus cogens* norms might lead to wrong conclusions and bears the risk of establishing a *status quo* that might impede the evolution of *jus cogens* in the future."); Russian Federation, comments and observations by States (above note 14); Iran (Islamic Republic of), A/C.6/74/SR.27, para. 28; the Netherlands, comments and observations by States (above note 14); Spain, comments and observations by States (above note 14).

219. Other States, however, supported the inclusion of a non-exhaustive list.[453] In particular, Brazil commended the Commission for managing to come up with what it referred to as a balanced approach to address the tension between the need to have some kind of a list and the practical difficulties identified above.[454] Similarly, Switzerland congratulated the Commission for the creative solution to address this tension.[455] Yet even some of the States supporting the list would have preferred the Commission to base the norms on the list on the application of some methodology.[456] Chile proposed that the chapeau to the draft conclusion be redrafted to make plain that not each norm had been considered.[457]

220. Some States, while supporting having the list, would have preferred the Commission to include other norms.[458] The Federated States of Micronesia was pleased that the commentaries specifically mentioned the protection of the environment which, in its view, met the criteria for peremptoriness.[459] Other States suggested a reformulation of some of the norms identified in the annex.[460]

221. Other States noted the absence of particular norms, in particular principles of the Charter of the United Nations, as norms of *jus cogens*, suggesting that these should be included in the list.[461] Portugal, more broadly, suggested that before the list is finalized the Commission conduct an in-depth analysis to identify current *jus cogens*.[462]

222. There were other States that took a slightly more ambiguous approach. These were States that suggested that the Commission approach the subject with caution, without expressly rejecting the list.[463]

223. In its observations, France suggested that, given the questions surrounding the list, it might be better to have an introductory commentary describing the

[453] Austria, comments and observations by States (above note 14); Belarus, A/C.6/74/SR.24, para. 85; Belgium, comments and observations by States (above note 14); Brazil, A/C6/74/SR.24, para. 92; Chile, A/C.6/74/SR.26, para. 114; Croatia, A/C.6/74/SR.25, para. 56; Estonia, A/C.6/74/SR.26, para. 85; Mexico A/C.6/74/SR.25, para. 11; Micronesia (Federated States of), A/C.6/74/SR.24, para. 98; Portugal, comments and observations by States (above note 14); Romania, A/C.6/74/SR.23, para. 79; Sierra Leone, A/C.6/74/SR.27, para. 27; Slovakia, A/C.6/74/SR.23, para. 86; Slovenia, comments and observations by States (above note 14); South Africa, comments and observations by States (above note 14); Switzerland, comments and observations by States (above note 14).

[454] Brazil, A/C.6/74/SR.24, para. 92.

[455] Switzerland, comments and observations by States (above note 14).

[456] Slovakia, A/C.6/74/SR.23, para. 85.

[457] Chile, A/C.6/74/SR.26, para. 114.

[458] Romania, A/C.6/74/SR.23, para. 79.

[459] Micronesia (Federated States of), A/C.6/74/SR.24, para. 99.

[460] See, e.g., Austria, comments and observations by States (above note 14); France, comments and observations by States (above note 14); Slovenia, comments and observations by States (above note 14); Spain, comments and observations by States (above note 14), suggesting that aggression ought to be replaced by the "law of the Charter concerning the prohibition of the use of force …"; Switzerland, comments and observations by States (above note 14), suggesting that "basic rules of international humanitarian law" be reformulated as "fundamental rules of international humanitarian law".

[461] Austria, comments and observations by States (above note 14); China, A/C.6/74/SR.23, para. 55; Colombia, comments and observations by States (above note 14); France, comments and observations by States (above note 14); Nicaragua, A/C.6/74/SR.23, para. 71; Russian Federation, comments and observations by States (above note 14); Croatia, A/C.6/74/SR.25, para. 56.

[462] Portugal, comments and observations by States (above note 14).

[463] Bulgaria, A/C.6/74/SR.26, para. 105; Uzbekistan, A/C.6/74/SR.26, para. 35; Republic of Korea, A/C.6/74/SR.26, para. 59.

Commission's earlier work.[464] Czechia suggested the deletion of the annex but the retention of the draft conclusion (with the necessary modifications).[465]

224. This discussion above illustrates a number of points. First, the position of States on whether to have an illustrative list is divided in the same ways as it has been in the Commission, with most States supporting the list but a not insignificant number opposed. Second, some States that support the list prefer to see it expanded. Third, the arguments posed for and against are exactly the same as those raised in the Commission. For the Special Rapporteur, the net result of this dynamic is that the draft conclusion, its commentaries and the attached annex should remain the same.

2. Recommendations of the Special Rapporteur

225. On the basis of this discussion, the Special Rapporteur does not recommend any modification to either the text of draft conclusion 23 or to the annex.

[464] France, comments and observations by States (above note 14).
[465] Czechia, comments and observations by States (above note 14).

IV. Marked-up text of the draft conclusions adopted on first reading with proposed modifications

Part One
Introduction

Conclusion 1
Scope

The present draft conclusions concern the identification and legal consequences of peremptory norms of general international law (*jus cogens*).

Conclusion 2
Definition of a peremptory norm of general international law (*jus cogens*)

A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized 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.

Conclusion 3
General nature of peremptory norms of general international law (*jus cogens*)

Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable.

Part Two
Identification of peremptory norms of general international law (*jus cogens*)

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

To identify a peremptory norm of general international law (*jus cogens*), it is necessary to establish that the norm in question meets the following criteria:

(a) it is a norm of general international law; and

(b) it is accepted and recognized 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.

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

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

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

Conclusion 6
Acceptance and recognition

1. 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.

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.

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 and representative 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.

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.

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.

Part Three
Legal consequences of peremptory norms of general international law (*jus cogens*)

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

1. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*). The provisions of such a treaty have no legal force.

2. If a new peremptory norm of general international law (*jus cogens*) emerges, any existing treaty which is in conflict with that norm becomes void and terminates. The parties to such a treaty are released from any obligation further to perform the treaty.

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.

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

1. Parties to a treaty which is void as a result of being in conflict with a peremptory norm of general international law (*jus cogens*) at the time of the treaty's conclusion have a legal obligation to:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision of the treaty which conflicts with a peremptory norm of general international law (*jus cogens*); and

(b) bring their mutual relations into conformity with the peremptory norm of general international law (*jus cogens*).

2. The termination of a treaty on account of the emergence of a new peremptory norm of general international law (*jus cogens*) does not affect any right, obligation or legal situation created through the execution of the treaty prior to the termination of the treaty, provided that those rights, obligations or situations may thereafter be

maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law (*jus cogens*).

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*).

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 would come into conflict with an existing peremptory norm of general international law (*jus cogens*). ~~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*).

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

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*).

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*).

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.

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

No circumstance precluding wrongfulness under the rules on the responsibility of States for internationally wrongful acts may be invoked with regard to any act of a State that is not in conformity with an obligation arising under a peremptory norm of general international law (*jus cogens*).

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.

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

Where it appears that there may be a conflict between a peremptory norm of general international law (*jus cogens*) and another rule of international law, the latter is, as far as possible, to be interpreted and applied so as to be consistent with the former.

Part Four
General provisions

Conclusion 21 [22]
Without prejudice to consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail

The present draft conclusions are without prejudice to consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail under international law.

Conclusion 22 [21]
~~Procedural Requirements~~ Recommended procedure

1. It is recommended that a ~~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 should do so by notifying other States concerned and other entities as may be appropriate, ~~is to notify other States concerned~~ of its claim. The notification should be in writing and should 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~~ or entities notified raises an objection within a period which, except in cases of special urgency, will ~~shall~~ not be less than three months, the invoking State may carry out the measure which it has proposed.

3. If any State concerned or other entity as appropriate raises an objection, then the States concerned should ~~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 or other entity 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.

6. Any dispute settlement mechanism applicable in the relations between any parties to a dispute concerning peremptory norms is not affected by the provisions of this draft conclusion.

~~Part Four~~
~~General provisions~~

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.

V. Clean text of the draft conclusions with proposed amendments of the Special Rapporteur

Part One
Introduction

Conclusion 1
Scope

The present draft conclusions concern the identification and legal consequences of peremptory norms of general international law (*jus cogens*).

Conclusion 2
Definition of a peremptory norm of general international law (*jus cogens*)

A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized 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.

Conclusion 3
General nature of peremptory norms of general international law (*jus cogens*)

Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable.

Part Two
Identification of peremptory norms of general international law (*jus cogens*)

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

To identify a peremptory norm of general international law (*jus cogens*), it is necessary to establish that the norm in question meets the following criteria:

(a) it is a norm of general international law; and

(b) it is accepted and recognized 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.

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

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

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

Conclusion 6
Acceptance and recognition

1. 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.

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.

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 and representative 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.

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.

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.

Part Three
Legal consequences of peremptory norms of general international law (*jus cogens*)

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

1. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*). The provisions of such a treaty have no legal force.

2. If a new peremptory norm of general international law (*jus cogens*) emerges, any existing treaty which is in conflict with that norm becomes void and terminates. The parties to such a treaty are released from any obligation further to perform the treaty.

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.

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

1. Parties to a treaty which is void as a result of being in conflict with a peremptory norm of general international law (*jus cogens*) at the time of the treaty's conclusion have a legal obligation to:

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision of the treaty which conflicts with a peremptory norm of general international law (*jus cogens*); and

(b) bring their mutual relations into conformity with the peremptory norm of general international law (*jus cogens*).

2. The termination of a treaty on account of the emergence of a new peremptory norm of general international law (*jus cogens*) does not affect any right, obligation or legal situation created through the execution of the treaty prior to the termination of the treaty, provided that those rights, obligations or situations may thereafter be

maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law (*jus cogens*).

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*).

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 would come into conflict with an existing 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*).

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

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*).

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*).

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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.

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

No circumstance precluding wrongfulness under the rules on the responsibility of States for internationally wrongful acts may be invoked with regard to any act of a State that is not in conformity with an obligation arising under a peremptory norm of general international law (*jus cogens*).

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.

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

Where it appears that there may be a conflict between a peremptory norm of general international law (*jus cogens*) and another rule of international law, the latter is, as far as possible, to be interpreted and applied so as to be consistent with the former.

Part Four
General provisions

Conclusion 21
Without prejudice to consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail

The present draft conclusions are without prejudice to consequences that specific peremptory norms of general international law (*jus cogens*) may otherwise entail under international law.

Conclusion 22
Recommended procedure

1. It is recommended that 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 should do so by notifying other States concerned and other entities as may be appropriate, of its claim. The notification should be in writing and should indicate the measure proposed to be taken with respect to the rule of international law in question.

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

3. If any State concerned or other entity as appropriate raises an objection, then the States concerned should 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 other entity 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.

6. Any dispute settlement mechanism applicable in the relations between any parties to a dispute concerning peremptory norms is not affected by the provisions of this draft conclusion.

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;

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(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.

VI. Final outcome

226. In keeping with the recent practice of the Commission on topics aimed at clarifying the rules of international law on particular aspects, in particular those relating to sources, the Special Rapporteur proposes that the final form of the work on this topic be designated as “conclusions”. The term “conclusions” is meant to signify that while the text of the output is itself non-binding it is intended to describe the state of the law and offer guidance on its proper application. The Special Rapporteur did consider other designations such “guidelines” or “principles” but decided that “conclusions” were the appropriate designation for this type of output. This is all the more so, since previous similar topics, namely identification of customary international law and subsequent agreements and subsequent practice in relation to treaty interpretation adopted the same designation.

227. The Special Rapporteur proposes that the Commission recommend that the General Assembly:

(a) *Take note* of the draft conclusions of the International Law Commission on the identification of peremptory norms of general international law (*jus cogens*);

(b) *Commend* the draft conclusions, together with the commentaries thereto, to the attention of States and to all who may be called upon to identify peremptory norms of general international law (*jus cogens*) and to apply their consequences.