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Draft report of the International Law Commission on the work of its seventieth session

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Chapter VIII
Peremptory norms of general international law (*jus cogens*)

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A. Introduction

1. At its sixty-seventh session (2015), the Commission decided to include the topic "*Jus cogens*" in its programme of work and appointed Mr. Dire Tladi as Special Rapporteur for the topic.[1] The General Assembly subsequently, in its resolution 70/236 of 23 December 2015, took note of the decision of the Commission to include the topic in its programme of work.

2. At its sixty-eighth session (2016) and sixty-ninth session (2017), the Commission considered the first and second reports of the Special Rapporteur,[2] respectively.

3. At its sixty-ninth session, following a proposal by the Special Rapporteur in his second report,[3] the Commission decided to change the title of the topic from "*Jus cogens*" to "Peremptory norms of general international law (*jus cogens*)".[4]

B. Consideration of the topic at the present session

4. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/714 and Corr.1), which considered the consequences and legal effects of peremptory norms of general international (*jus cogens*). On the basis of his analysis, the Special Rapporteur proposed thirteen draft conclusions.[5]

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[1] At its 3257th meeting, on 27 May 2015 (*Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), para. 286). The topic had been included in the long-term programme of work of the Commission during its sixty-sixth session (2014), on the basis of the proposal contained in the annex to the report of the Commission (*ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10), para. 23).

[2] A/CN.4/693 and A/CN.4/706.

[3] A/CN.4/706, para. 90.

[4] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), para. 146).

[5] The text of draft conclusions 10 to 23, as proposed by the Special Rapporteur in his third report, reads as follows:

Draft conclusion 10
Invalidity of a treaty in conflict 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*). Such a treaty does not create any rights or obligations.

2. An existing treaty becomes void and terminates if it conflicts with a new peremptory norm of general international law (*jus cogens*) that emerges subsequent to the conclusion of the treaty. Parties to such a treaty are released from any further obligation to perform in terms of the treaty.

3. To avoid conflict with a peremptory norm of general international law, a provision in a treaty should, as far as possible, be interpreted in a way that renders it consistent with a peremptory norm of general international law (*jus cogens*).

Draft conclusion 11
Severability of treaty provisions in conflict with peremptory norm of general international law (*jus cogens*)

1. A treaty which, at its conclusion, is in conflict with a peremptory norm of general international law (*jus cogens*) is invalid in whole, and no part of the treaty may be severed or separated.

2. A treaty which becomes invalid due to 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 regards to their application;

(b) the provisions that are in conflict with a peremptory norm of general international law (*jus cogens*) do not constitute an essential basis of the consent to the treaty; and

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

Draft conclusion 12
Elimination of consequences of acts performed in reliance of invalid treaty

1. Parties to a treaty which is invalid 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 eliminate the consequences of any act performed in reliance of the provision of the treaty which is in conflict with a 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 unless such a right, obligation or legal situation is itself in conflict with a peremptory norm of general international law (*jus cogens*).

Draft conclusion 13
Effects of peremptory norms of general international law (*jus cogens*) on reservations to treaties

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

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*).

Draft conclusion 14
Recommended procedure regarding settlement of disputes involving conflict between a treaty and a peremptory norm of general international law (*jus cogens*)

1. Subject to the jurisdictional rules of the International Court of Justice, any dispute concerning whether a treaty conflicts with a peremptory norm of general international law (*jus cogens*) should be submitted to the International Court of Justice for a decision, unless the parties to the dispute agree to submit the dispute to arbitration.

2. Notwithstanding paragraph 1, the fact that a dispute involves a peremptory norm of general international law (*jus cogens*) is not sufficient to establish the jurisdiction of the Court without the necessary consent to jurisdiction in accordance with international law.

Draft conclusion 15
Consequences of peremptory norms of general international law (*jus cogens*) for customary international law

1. A customary international law rule does not arise if it conflicts with a peremptory norm of general international law (*jus cogens*).

2. A customary international law rule not of *jus cogens* character ceases to exist if a new conflicting peremptory norm of general international law (*jus cogens*) arises.

3. Since peremptory norms of general international law (*jus cogens*) bind all subjects of international law, the persistent objector rule is not applicable.

Draft conclusion 16
Consequences of peremptory norms of general international law (*jus cogens*) on unilateral acts

A unilateral act that is in conflict with a peremptory norm of general international law (*jus cogens*) is invalid.

Draft conclusion 17
Consequences of peremptory norms of general international law (*jus cogens*) for binding resolutions of international organizations

1. Binding resolutions of international organizations, including those of the Security Council of the United Nations, do not establish binding obligations if they conflict with a peremptory norm of general international law (*jus cogens*).

2. To the extent possible, resolutions of international organizations, including those of the Security Council of the United Nations, must be interpreted in a manner consistent with peremptory norms of general international law (*jus cogens*).

Draft conclusion 18
The relationship between peremptory norms of general international law (*jus cogens*) and obligations *erga omnes*

Peremptory norms of general international law (*jus cogens*) establish obligations *erga omnes*, the breach of which concerns all States.

5. The Commission considered the third report at its 3414th to 3421st, and 3425th meetings, on 30 May and 1 June 2018, and from 2 to 4 and 9 July 2018.

6. At its 3425th meeting, on 9 July 2018, the Commission referred draft conclusions 10 to 23,[6] as contained in the Special Rapporteur's third report, to the Drafting Committee.

7. At its 3402nd meeting, on 14 May 2018, the Chairperson of the Drafting Committee presented an interim report of the Drafting Committee on "Peremptory norms of general international law (*jus cogens*)", concerning draft conclusions 8 and 9 that it had provisionally adopted at the seventieth session. At its 3434th meeting, on 20 July 2018, the Chairperson of the Drafting Committee presented a further interim report of the Drafting Committee, concerning draft conclusions 10 to 14 that it had provisionally adopted at the seventieth session. Both reports were presented for information only, and are available on the website of the Commission.[7]

1. Introduction by the Special Rapporteur of the third report

8. In providing a review of the debate in the Sixth Committee, the Special Rapporteur recalled that, while States had generally agreed with the criteria for the identification of

Draft conclusion 19
Effects of peremptory norms of general international law (*jus cogens*) on circumstances precluding wrongfulness

1. No circumstance may be advanced to preclude the wrongfulness of an act which is not in conformity with an obligation arising under a peremptory norm of general international law (*jus cogens*).

2. Paragraph 1 does not apply where a peremptory norm of general international law (*jus cogens*) emerges subsequent to the commission of an act.

Draft conclusion 20
Duty to cooperate

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

2. A serious breach of a peremptory norm of general international law (*jus cogens*) refers to a breach that is either gross or systematic.

3. The cooperation envisioned in this draft conclusion can be carried out through institutionalized cooperation mechanisms or through ad hoc cooperative arrangements.

Draft conclusion 21
Duty not to recognize or render assistance

1. States have a duty not to recognize as lawful a situation created by a breach of a peremptory norm of general international law (*jus cogens*).

2. States shall not render aid or assistance in the maintenance of a situation created by a breach of a peremptory norm of general international law (*jus cogens*).

Draft conclusion 22
Duty to exercise domestic jurisdiction over crimes prohibited by peremptory norms of general international law (*jus cogens*)

1. States have a duty to exercise jurisdiction over offences prohibited by peremptory norms of international law (*jus cogens*), where the offences are committed by the nationals of that State or on the territory under its jurisdiction.

2. Paragraph 1 does not preclude the establishment of jurisdiction on any other ground as permitted under its national law.

Draft conclusion 23
Irrelevance of official position and non-applicability of immunity *ratione materiae*

1. The fact that an offence prohibited by a peremptory norm of general international law (*jus cogens*) was committed by a person holding an official position shall not constitute a ground excluding criminal responsibility.

2. Immunity *ratione materiae* shall not apply to any offence prohibited by a peremptory norm of general international law (*jus cogens*).

[6] *Idem*.

[7] http://legal.un.org/ilc.

norms of *jus cogens* provisionally adopted by the Drafting Committee, a few had recommended the inclusion of additional elements, such as non-derogation, fundamental values of the international community, and practice. He noted the call for greater clarity concerning the concept of "acceptance and recognition". While many States had agreed that there should be a "a very large majority" of States accepting and recognizing the peremptory character of a norm, some preferred a more stringent qualifier that would not be seen just from the perspective of numbers but also from the representative character of the group of States. He also recalled the divergence in views concerning the sources of law that could form the basis of a peremptory norm, but noted that there was near-universal agreement that customary international law was a source.

9. The Special Rapporteur then introduced his proposed draft conclusions contained in section IV of the third report. He noted that draft conclusions 10, 11 and 12 were based on provisions of the Vienna Convention on the Law of Treaties of 1969 ("1969 Vienna Convention"), except for paragraph 3 of draft conclusion 10, providing for a treaty to be interpreted in a manner consistent with *jus cogens*, which he considered being a necessary consequence of article 31, paragraph 3 (c), of the Convention requiring the relevant rules of international law to be taken into account in the interpretation of treaties. Moreover, he noted that there was a significant amount of practice in support of the content of paragraph 3 of draft conclusion 10.

10. Draft conclusion 13 concerning the effects of peremptory norms of general international law (*jus cogens*) on reservations to treaties was based principally on the guideline 4.4.3 of the Guide to Practice on Reservations to Treaties,[8] adopted by the Commission in 2011.

11. Draft conclusion 14 contained a recommended procedure regarding settlement of disputes involving conflict between a treaty and a norm of *jus cogens*. The Special Rapporteur recalled the fundamental importance of article 66 of the 1969 Vienna Convention for the application of articles 53 and 64 thereof. Nonetheless, in his view it was difficult to incorporate the procedure therein into a set of non-binding draft conclusions. Instead, he considered that his proposal for draft conclusion 14 would, for cases in which article 66 of the 1969 Vienna Convention did not apply (e.g., because the States concerned were not parties to the Convention), serve as encouragement for parties to submit their disputes to judicial settlement, including by the International Court of Justice.

12. As regarded draft conclusion 15, the Special Rapporteur noted that paragraph 1 was based on a number of decisions of national courts in which *jus cogens* norms were held to prevail over the rules of customary international law. In his view, such findings necessarily implied that existing norms of *jus cogens* would invalidate or prevent customary international law rules from coming into being. The second paragraph of draft conclusion 15, concerning the conflict of a customary international law rule with a new *jus cogens* norm, was based on article 64 of the 1969 Vienna Convention, and had been supported by States and by judgments of the European Court of Justice. The Special Rapporteur further noted that paragraph 3, concerning the non-application of the persistent objector rule to *jus cogens* norms, was consistent with the universal nature of *jus cogens* and had been accepted in State practice, including in the decisions of national and regional courts.

13. With regard to draft conclusion 16, on the invalidity of a unilateral act in conflict with a norm of *jus cogens*, the Special Rapporteur noted that the use of the phrase "is invalid" tracked guiding principle 8 of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations,[9] adopted by the Commission in 2006.

14. Draft conclusion 17 concerned the binding resolutions of international organizations. The Special Rapporteur noted that the proposition, contained in the first paragraph, that binding resolutions of international organizations did not establish binding obligations if they conflicted with a norm of *jus cogens*, was supported by a significant amount of

[8] *Yearbook … 2011*, vol. II (Part Two), para. 75.

[9] *Yearbook … 2006*, vol. II (Part Two), para. 176.

literature and public statements by States maintaining that Security Council resolutions were subject to norms of *jus cogens*, as well as by decisions of domestic, regional and international courts. He also noted that, similar to paragraph 3 of draft conclusion 10, paragraph 2 of draft conclusion 17 contained an interpretative presumption indicating that, to the extent possible, resolutions of international organizations were to be interpreted in a manner consistent with norms of *jus cogens*. Such assertion found support in statements by States in various contexts and in the judgments of the European Court of Justice.

15. As regarded draft conclusion 18, the Special Rapporteur maintained that it was virtually universally accepted that *jus cogens* norms established *erga omnes* obligations.

16. Draft conclusions 19, 20 and 21 concerned aspects of international responsibility. Draft conclusion 19, drawn from draft article 26 of the articles on the responsibility of States for internationally wrongful acts,[10] adopted in 2001 (hereinafter, "articles on State responsibility"), confirmed in paragraph 1 that the circumstances precluding wrongfulness under general international law did not apply to breaches of obligations arising from *jus cogens* norms. The second paragraph sought to prevent responsibility arising retroactively where a norm of *jus cogens* emerged subsequent to the commission of an act in breach of that norm.

17. Draft conclusion 20 concerning the duty to cooperate to bring to an end through lawful means any serious breach of a *jus cogens* norm. The first paragraph was based on paragraph 1 of draft article 41 of the articles on State responsibility. The duty to cooperate was a well-established principle of international law. It had been codified by the Commission in the draft articles on the protection of persons in the event of disasters,[11] adopted in 2016, and had found support in the *Wall* advisory opinion of the International Court of Justice[12] and the *La Cantuta* case[13] in the Inter-American Court of Human Rights.

18. Draft conclusion 21, providing for a duty not to recognize as lawful a situation created by a breach of a *jus cogens* norm and not to give aid or assistance in the maintenance of such a situation, was based on paragraph 2 of draft article 41 of the articles on State responsibility. The Commission, in 2001, had recognized that the duty enjoyed a customary international law status, as confirmed by the International Court, in the *Legal Consequences for States* [14] and the *Wall* opinions, as well as in resolutions of the Security Council and the General Assembly. He also pointed out that, differing from draft conclusion 20, draft conclusion 21 was not limited to "serious" breaches, since the duty of non-recognition or non-assistance was based on the peremptoriness of the norm and not the seriousness of its breach. He noted, in that regard, that neither the *Legal Consequences for States* or *Wall* opinions, had specified the seriousness as a threshold in the case of the duty not to recognize or give assistance. Moreover, since that duty, unlike the duty to cooperate, did not require positive conduct, and was thus less onerous a duty, the lowered threshold was justified.

19. Draft conclusion 22, on the establishment of jurisdiction over crimes prohibited by norms of *jus cogens*, was based on draft article 7 of the draft articles on crimes against humanity,[15] adopted by the Commission on first reading in 2017, albeit in a more simplified

[10] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 76.

[11] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), para. 48.

[12] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 200, para. 159.

[13] *La Cantuta v. Perú (Merits, Reparations and Costs)*, Series C, No. 162, Judgment, 29 November 2006, Inter-American Court of Human Rights, para. 160 ("[a]s pointed out repeatedly, the acts involved in the instant case have violated peremptory norms of international law (*jus cogens*) … In view of the nature and seriousness of the events … the need to eradicate impunity reveals itself to the international community as a duty of cooperation among states").

[14] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 54, para. 119.

[15] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), para. 45.

formulation. Paragraph 2 adopted the same approach to the question of universal jurisdiction as had been done in paragraph 3 of draft article 7, given the prevailing uncertainty in State practice.

20. Draft conclusion 23 concerned the irrelevance of official position and the non-applicability of immunity *ratione materiae*. Paragraph 1, establishing that a person's official capacity did not constitute a ground excluding responsibility, was inspired by draft article 6, paragraph 3, of the draft articles on crimes against humanity adopted on first reading in 2017, and was generally accepted as being part of customary international law. Paragraph 2, providing for the non-applicability of immunity *ratione materiae* in the case of offences prohibited by *jus cogens* norms, was based principally on draft article 7 of the draft articles on the immunity of State officials from foreign criminal jurisdiction,[16] adopted provisionally by the Commission in 2017. Despite the criticism that draft provision had received, including that there existed State practice contradicting the exception, the Special Rapporteur pointed out that such contradictory practice was typically based on cases concerning civil proceedings and proceedings against States, which were not meant to serve as precedent for immunities in a criminal context, as suggested by several judicial decisions, including that of the International Court of Justice in the *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* case.[17]

2. Summary of debate

(a) General comments

21. Members generally welcomed the third report on peremptory norms of general international law (*jus cogens*). Several members commended the Special Rapporteur for attempting to address all the possible consequences of *jus cogens*, beyond the law of treaties and that of State responsibility, the two main areas in which the Commission had previously made extensive codification efforts. It was noted that the consequences of *jus cogens*, for example, for international criminal law, customary international law and Security Council resolutions, presented important practical problems and generated debate in the academic literature, and that the divergent views in case law should not prevent the Commission from dealing with those issues.

22. Several members supported the Special Rapporteur's practical approach to the examination of the topic, as opposed to taking a doctrinal or excessively theoretical approach. The challenge posed by the lack of practice and the relative complexity of the political and moral elements involved was further pointed to. It was emphasized that the Commission should take a cautious approach and examine all aspects of the consequences of *jus cogens* in a balanced manner and on the basis of the existing law and established practice. It was noted that the characteristics of *jus cogens* were intertwined with the consequences of their breach and the two should be considered together. The concern was expressed that the Special Rapporteur was attaching legal significance to what were essentially descriptive elements, such as non-derogability, which was a criterion for identification of *jus cogens* norms, not a legal consequence thereof. It was suggested that a study of the negotiating history of articles 53, 64 and 66 (a) and other relevant provisions of the 1969 Vienna Convention and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 be undertaken.

23. Satisfaction was generally expressed with the fact that most of the draft conclusions proposed by the Special Rapporteur were based on relevant provisions of the 1969 Vienna Convention, and other instruments adopted by the Commission. The lack of a parallel structure in the draft conclusions dealing with the consequences of conflict with *jus cogens* for various sources of international law was, however, questioned. Some members would prefer that the same structure as that in articles 53 and 64 of the 1969 Vienna Convention

[16] *Ibid.*, para. 140.

[17] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 130, para. 70 (national legislation), and p. 141, para. 96 (case law).

be applied to the consequences of *jus cogens* for sources of international law other than treaties. They further stressed the need to set out procedures for ascertaining the invalidity of a particular source of international law owing to conflict with *jus cogens*.

24. Several members agreed that the draft conclusions could be grouped into different parts according to their context and be organized in a coherent, concise and effective manner, closely following the structure of the existing instruments. The view was expressed that the Commission should reconsider the appropriateness of having draft "conclusions" as the outcome of its consideration of the topic.

25. It was noted that the Special Rapporteur had not proposed a draft conclusion relating to general principles of law, which implied that a general principle of law in conflict with a *jus cogens* norm may nevertheless be valid. Some members supported such non-inclusion on the ground that no conflict could possibly be conceived of in the case of general principles of law. The view was also expressed that the Commission should strive to bring new elements to the topic, beyond those of its previous work.

26. The view was expressed that, throughout the draft conclusions, the use of terms such as "consequences", "legal effects", "void", "invalid" and others should be consistent with the usage in existing instruments. It was suggested that the notion of "conflict" used in the draft conclusions should be clarified to provide guidance or criteria to States when deciding whether a treaty or act was, as a matter of law, in conflict with a norm of *jus cogens*.

(b) Specific comments on the draft conclusions

(i) Draft conclusion 10

27. Some members noted that the first sentence of paragraph 1 replicated article 53 of the 1969 Vienna Convention, and suggested that the second sentence, providing that treaties in conflict with *jus cogens* did not create any rights or obligations, be further clarified in the commentary. It was also suggested that the second sentence more closely track the formulation of article 71, paragraph 2 (a), of the Convention. It was also suggested that the second sentence was superfluous.

28. While recognizing that direct conflict of treaties with *jus cogens* was extremely rare, some members supported the inclusion of paragraph 3, providing that treaties should be interpreted in a manner consistent with *jus cogens*, as interpretative guidance for States. It was suggested that the commentary clarify that the provision should not override the rules of interpretation in the 1969 Vienna Convention and customary international law. The view was expressed that the issue of interpretation would presumably be pertinent to all sources of international law and was better addressed in a separate draft conclusion. Several drafting suggestions aimed at improving the clarity of the provision were made.

(ii) Draft conclusion 11

29. Some members welcomed paragraph 1, which confirmed that a treaty, which at the time of conclusion was in conflict with a *jus cogens* norm, could not be separated. A preference was expressed for a structure whereby the separability approach contained in paragraph 2 would be presented as the general rule, with non-severability (currently in paragraph 1) presented as a special rule applicable to the case of article 53 of the 1969 Vienna Convention. A more detailed consideration of the justification for applying different legal consequences to such situations was called for. The view was expressed that the draft conclusion could also cover acts of international organizations that create obligations for States. It was further suggested that paragraph 1 be redrafted to be consistent with paragraph 1 of draft conclusion 10, and that it should highlight the absoluteness of non-separability of treaty provisions in conflict with existing *jus cogens* norms.

(iii) Draft conclusion 12

30. The view was expressed that the phrase "any act in reliance of the treaty", at the end paragraph 1 of draft conclusion 12, was too broad to describe the relationship between the treaty and the act and could be replaced by "any act performed as a result of the implementation of the treaty". It was also suggested that the qualifier "as far as possible",

which appeared in article 71 of the 1969 Vienna Convention, be included in paragraph 1 to ensure the practicability of the provision, or that an explanation be included in the commentaries as to why the formulation of the provision differed slightly from article 71. It was further suggested that a new paragraph be inserted between paragraphs 1 and 2 tracking paragraph 1 (b) of article 71, to the effect that States must also bring their mutual relations into conformity with *jus cogens*. A further suggestion was to align the formulation of paragraph 2 with that of article 71, paragraph 2 (b), in particular by including a reference to the "maintenance" of rights, obligations or situations. The view was expressed that the draft conclusion should also have included the provisions of articles 69 and 70 of the 1969 Vienna Convention, dealing with invalidity or termination of treaties in all situations, including on account of conflict with *jus cogens*.

31. Since draft conclusion 12 dealt with the consequences of invalidity or termination of a treaty, it was also suggested that the provision was better placed after draft conclusion 14.

(iv) Draft conclusion 13

32. The view was expressed that paragraph 2 of draft conclusion 13 was of relevance to the field of human rights treaties, and reference was made to the general comment of the Human Rights Committee on reservations to the International Covenant on Civil and Political Rights,[18] to the effect that reservations contrary to peremptory norms in such a human rights treaty would not be compatible with its object and purpose. The view was expressed that the very existence of norms of *jus cogens* in a treaty did not mean that any reservation to the treaty, for example a reservation to a compromissory clause, was invalid. It was also suggested that the provision be located elsewhere in order to avoid any misunderstanding that disputes over reservations to a treaty were also subject to the recommended judicial settlement procedure contained in draft conclusion 14.

(v) Draft conclusion 14

33. Support was expressed for the proposed recommended dispute settlement procedure, which was aimed at facilitating a final decision on the invalidity of a treaty based on conflict with *jus cogens*. While some members were of the view that the disputes to be submitted to the International Court of Justice under the provisions should be limited to disputes concerning the invalidation of a treaty on account of conflict with norms of *jus cogens*, other members supported the extension of the procedure to disputes concerning the existence of a conflict between a treaty and a norm of *jus cogens*, as well as the consequences of invalidation. It was recalled that, while the Commission's 1966 draft articles had only included a reference to all means of dispute settlement, the States participating in the United Nations Conference on the Law of Treaties (the Vienna Conference) had deliberately included a special mechanism with respect to disputes concerning *jus cogens*, namely what became article 66, subparagraph (a), of the 1969 Vienna Convention. At the same time, it was questioned how the strong reluctance by States to accept judicial settlement in such circumstances, as evidenced by the significant number of reservations to article 66 of the Convention, could be overcome. The concern was also expressed that the resort to arbitration entailed a higher risk of inconsistency, which could run counter to the aim of consolidating the international legal system and achieving legal certainty. It was also queried whether the decision of the International Court of Justice, or of an arbitral tribunal, could lead to the invalidation or termination of the treaty, or would be merely declaratory.

34. Some members considered that the characterization of the procedure as being "recommended" had the effect of diluting the legally binding obligation on States Parties to the 1969 Vienna Convention to submit their disputes concerning the invalidity of a treaty owing to conflict with norms of *jus cogens* to the International Court of Justice. Such an

[18] Human Rights Committee, general comment No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40*, vol. I (A/50/40 (Vol. I)), annex V, para. 8.

outcome could risk leaving no definitive process for determining the invalidity of a treaty conflicting with *jus cogens*, and would create precisely the problem that States had sought to avoid when they included article 66 in the 1969 Vienna Convention. It was suggested, instead, that a unilateral assertion by a State as to the invalidity of a treaty due to its conflict with *jus cogens* could be the subject of another procedure, such as that contained in article 65 of the Convention; even if a national or regional court had already declared that a treaty violated a norm of *jus cogens*. It was also suggested that State consent to the jurisdiction of the International Court was not necessary when it came to a dispute regarding *jus cogens*. In terms of another proposal, a new paragraph could be added providing for the resort to the advisory jurisdiction of the International Court or to other amicable procedures for dispute settlement.

35. Other members questioned the necessity of including the draft conclusion in its entirety, since it was ultimately for States to choose the appropriate procedure for the resolution of disputes, and there was no hierarchy *per se* between the different methods listed in Article 33 of the Charter of the United Nations. The view was also expressed that the provision did not correspond with the approach of the Commission when developing draft conclusions, namely to reflect existing international law, since the Special Rapporteur had himself acknowledged that the provision did not reflect existing international law and had been included only as a recommended practice.

(vi) Draft conclusion 15

36. Support was expressed for the first two paragraphs concerning the consequences of *jus cogens* for customary international law, which followed the same approach as that applied to treaty law. At the same time, the view was expressed that the Commission should not circumvent the question of what made *jus cogens* norms different from rules of customary international law, since State consent was not the exclusive basis for *jus cogens*.

37. In terms of proposals for modifications, it was recalled that draft conclusions 3 and 5, as provisionally adopted by the Drafting Committee, had confirmed that a norm of *jus cogens* could be modified by a subsequent norm having the same character, and that customary international law was the most common basis for a norm of *jus cogens*, respectively. Accordingly, it was suggested that draft conclusion 15 could indicate the possibility that a rule of customary international law in conflict with a norm of *jus cogens* may still arise, so long as that new customary rule was accepted and recognized as a norm from which no derogation was permitted. Another suggestion was to include the words "not of a *jus cogens* character" in paragraph 1, as had been done in paragraph 2, in order to maintain the possibility of a replacement of one norm of *jus cogens* by another. It was suggested that the first paragraph be amended to indicate that practice and *opinio juris* cannot give rise to a norm of customary law if they conflict with *jus cogens*, instead of assuming that the rule of customary law already exists at the time of the conflict.

38. Several members expressed their satisfaction with paragraph 3, which excluded the applicability of the persistent objector rule with regard to norms of *jus cogens*, which, in their view, accorded with the without prejudice clause inserted in the draft conclusions on the identification of customary international law, adopted by the Commission on second reading, at the present session.[19] It was pointed out that a norm of *jus cogens* implied acceptance and recognition by a very large majority of States representing all regions and all legal systems. Accordingly, persistent objection by a small number of States concentrated in one region, for example, could not prevent the emergence of a *jus cogens* norm.

39. Nonetheless, some members were of the view that the proposed paragraph 3 did not fully reflect the complexity of the issue, which concerned the relationship between the superior status of *jus cogens* norms and the principle of State consent. The question was raised as to whether the status of a persistent objection, recognized at the stage of the formation of a rule of customary international law, should be denied if the customary rule subsequently attained the status of *jus cogens*. It was also suggested that there be further

[19] See chap. V above.

consideration given to the distinction between objections to an existing norm of *jus cogens* and objections raised during the formation of a norm of *jus cogens*. Another suggestion was that the question of persistent objection could be dealt with in the commentaries.

(vii) Draft conclusion 16

40. Several members emphasized the need to clarify the meaning of the term "unilateral act", as presented in the draft conclusion, for example by instead using the term "unilateral commitments", in order to emphasize that the draft conclusion related only to formal unilateral acts that created legal obligations. A suggestion was made to classify unilateral acts into three categories. It was queried whether the draft conclusion should also apply to international organizations. It was also suggested that the commentaries could clarify the distinction between unilateral acts and reservations.

(viii) Draft conclusion 17

41. Several members concurred with the position taken in draft conclusion 17 that binding obligations derived from resolutions of international organizations, including Security Council resolutions, should be invalid if they run counter to *jus cogens*. The view was expressed that the draft conclusions should address all resolutions of international organizations, including General Assembly resolutions concerning the maintenance of peace and security adopted in cases where the Security Council was unable to take a decision. It was also noted that other acts of international organizations, such as the regulations, directives and decisions taken by the European Union or acts by an intergovernmental conference, may also create legal obligations and should be addressed in the draft conclusions. Notwithstanding the paucity of State practice and the remoteness of the possibility of direct conflict with a *jus cogens* norm, some members still considered it important to single out Security Council resolutions, given their unique status owing to the application of Article 103 of the Charter of the United Nations, and their legal consequences for States in diverse fields of international law.

42. Other members doubted the appropriateness of the specific reference to the resolutions of the Security Council in the present project, which was aimed at formulating general rules. A concern was expressed as to its potential negative impact on the effectiveness of Security Council resolutions, and the collective security system established by the Charter of the United Nations. It was suggested that the provision could instead focus on the role of *jus cogens* norms as a reference for States when adopting resolutions within international organizations.

43. It was suggested that the provision should indicate that not only would the resolutions in violation of *jus cogens* no longer be binding, but they would also be invalid. Other suggestions included: making it clear that the consequences for international organizations should also include the duty of non-recognition and all other legal consequences arising from the conflict with a *jus cogens* norm, and that the possibility of separability be considered in relation to the invalidity of resolutions of international organizations, as in the case of the invalidity of treaties.

(ix) Draft conclusion 18

44. While supporting the proposition that *jus cogens* norms established obligations *erga omnes*, some members suggested that the commentaries should clarify the point that not all obligations *erga omnes* arose from *jus cogens* norms. A doubt was expressed as to whether it was correct to say that *jus cogens* norms "establish" obligations *erga omnes*. Some members suggested rephrasing the provision to better reflect the relationship between *jus cogens* norms and obligations *erga omnes*, as well as the consequences arising from them. It was also suggested that the formulation follow that of article 48, paragraph 1, of the articles on State responsibility. Another view expressed was that the draft conclusion should be limited to serious breaches of obligations arising under *jus cogens* norms, in line with articles 40 and 41 of the articles on State responsibility. The view was also expressed that the relationship between *jus cogens* and obligation *erga omnes* was complex and deserved more thorough and in-depth consideration, in order to present a broader

perspective on the issue and to reflect recent developments, such as the discussion as to whether obligations *erga omnes* could arise from rules relating to environmental protection.

(x) Draft conclusion 19

45. General agreement was expressed in relation to draft conclusion 19, which was based on article 26 of articles on State responsibility. At the same time, it was suggested that the provision follow the formulation of article 26 more closely. It was also proposed that the draft conclusions cover circumstances precluding wrongfulness in the context of the responsibility of international organizations. The view was further expressed that the draft conclusions could also cover countermeasures.

(xi) Draft conclusion 20

46. It was suggested that draft conclusion 20, paragraph 1, more closely follow the text of the *Legal Consequences for States* advisory opinion of the International Court of Justice by indicating that States were "under obligation"[20] to cooperate to bring to an end any serious breach of *jus cogens*. The view was also expressed that it was not clear whether a duty to cooperate reflected existing law, nor what precise obligations would flow from such duty.

47. It was suggested that paragraph 2 be aligned with paragraph 2 of article 40 of the articles on State responsibility, so as to read: "[a] breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation".

48. Some members questioned the necessity of paragraph 3, regarding forms of cooperation, not least because the provision made no reference to the collective security mechanism of the United Nations, including the Security Council. Another view expressed was that paragraph 3 was an effort to progressively develop the operationalization of the obligation to cooperate through institutions or in an *ad hoc* manner, which was welcome and to be supported.

(xii) Draft conclusion 21

49. While draft conclusion 21 was generally supported, several members questioned the omission of the qualifier "serious" before "breach", as contained in article 41, paragraph 2, of the articles on State responsibility, since it expanded the principle beyond what was provided for in those articles. In particular, it was observed that the reasons advanced by the Special Rapporteur for the omission of the words "serious" could apply equally to the duty to cooperate. Another view was that, while there was a strong legal and policy basis for confining the duty to cooperate to serious breaches of *jus cogens* (as per draft conclusion 20), the same was not true with regard to the duties not to recognize and not to render assistance to a breach. In that regard, it was observed the Commission should engage in progressive development in that area.

50. It was proposed that a further paragraph be added indicating that the non-recognition of a situation created by a breach of *jus cogens* should not negatively affect acts related to the civilian population, such as the registration of births, deaths and marriages.

(xiii) Draft conclusion 22

51. Different views were expressed as to the propriety of dealing with the questions of individual criminal responsibility and immunity *ratione materiae* (draft conclusion 23) within the draft conclusions being developed. Several members expressed support for addressing both issues in the context of a study on the consequences of the breach of *jus cogens*, and thus supported their inclusion in the draft conclusions. Several other members were of the view that draft conclusions 22 and 23 addressed primary rules of international criminal law regarding criminal prosecution under national jurisdiction and the effects of a

[20] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 54, paras. 117–119.

specific subset of rules of *jus cogens*, namely those prohibiting international crimes. Such approach, it was maintained, deviated from the scope of the topic, which was to be limited to secondary rules of international law, and focusing on the general effect of all rules of *jus cogens*.

52. As regarded paragraph 1 of draft conclusion 22, several members noted that the third report provided ample evidence in both treaty and case law to support the existence of a legal duty for States to establish jurisdiction over crimes prohibited by *jus cogens*, which derived from the prohibition of international offences and the obligation of States to cooperate in order to put an end to the serious violation of *jus cogens*. Some members regretted that the provision excluded the principle of passive nationality, and suggested addressing the issue of conflict of jurisdiction in the commentaries.

53. Other members were of the view that the third report did not sufficiently demonstrate that State practice supported the existence under international law of a duty for every State to exercise national criminal jurisdiction over all offences prohibited by *jus cogens* when committed on its territory or by its nationals. On the contrary, the fact that half or even the majority of States had no statute on crimes prohibited by *jus cogens*, such as crimes against humanity, the crime of apartheid and the crime of aggression, evinced the lack of general belief that such a duty existed under international law. It was further maintained that the examples provided in the third report of States exercising national criminal jurisdiction in implementing a treaty did not necessarily substantiate the claim being made in paragraph 1.

54. Several members supported retaining paragraph 2 in the form of a without prejudice clause, so as to allow for the potential expansion of the exercise of domestic jurisdiction on the basis of universal jurisdiction. It was suggested that the phrase "in accordance with international law" be inserted to acknowledge the current ambiguous state of the international law as regarded universal jurisdiction.

(xiv) Draft conclusion 23

55. As regarded paragraph 1 of draft conclusion 23, the view was expressed that the rule of the irrelevance of official position was well established.

56. With regard to paragraph 2, several members were of the view that the Special Rapporteur had approached the issue in a comprehensive manner by examining practice, both in support and in opposition, of the non-applicability of immunity *ratione materiae* to *jus cogens* crimes, and correctly concluded that the balance of authorities was in favour of the non-applicability of immunity *ratione materiae* to an offence committed in contravention of a *jus cogens* norm. Support was also expressed for drawing a distinction between criminal and civil jurisdiction when addressing the issue of the exceptions to immunity *ratione materiae*. It was suggested that it be clarified, in the draft conclusions or the commentaries, to which crimes such exceptions would apply.

57. Other members were of the view that the practice cited by the Special Rapporteur in his third report did not support the draft conclusions he proposed. It was noted that draft conclusion 23, as proposed, was potentially even broader than draft article 7 of the draft articles on the immunity of State officials from foreign criminal jurisdiction, adopted at the sixty-ninth session in 2017.[21] The concern expressed was that draft conclusion 23 could make it more difficult to reach agreement on the draft articles on immunity of State officials from foreign criminal jurisdiction, as well for the draft articles on crimes against humanity[22] to succeed as a convention.

58. Another view was that both positions in the Commission could be accommodated by narrowing the scope of the draft conclusion, including by developing a list of applicable crimes, and stressing the exceptional nature of the non-applicability of immunity *ratione materiae* in the commentary. Still others proposed leaving the provision in abeyance until

[21] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), para. 140.

[22] *Ibid.*, para. 45.

the conclusion of the work on immunity of State officials from foreign criminal jurisdiction and crimes against humanity.

(xv) Future work

59. Some members expressed regret about the procedure being followed, whereby draft conclusions were left pending in the Drafting Committee, without being considered by the plenary on an annual basis with accompanying commentaries, until the conclusion of the first reading of the entire set of draft conclusions. Another view expressed was that the procedure being followed was not a real impediment, since States were able to react in the Sixth Committee to the reports of the Special Rapporteur and his proposed draft conclusions, as well as the oral interim reports of the respective Chairs of the Drafting Committee.

60. Support was expressed for the development of an illustrative list of *jus cogens* norms. It was suggested that the list could draw from *jus cogens* norms identified in the previous work of the Commission. It was stressed that it was important to take as much account as possible of the comments received from States on what norms should be included in such a list. Others expressed caution, since the Commission might take a long time to agree on even an illustrative list.

61. It was noted that the possibility of regional *jus cogens* had attracted some support from States in the Sixth Committee, and it was suggested that the existence and relationship of regional *jus cogens* norms to universally applicable *jus cogens* norms be studied. Others doubted the existence of regional *jus cogens* and warned that any discussion on regional *jus cogens* might undermine the integrity of, and be contrary to, the notion of *jus cogens* being norms "accepted and recognized by the international community as a whole".

62. While support was expressed for the Special Rapporteur's intention to conclude the first reading of the draft conclusions at the next session of the Commission, a view was expressed that the Commission should not unduly rush to conclude its work on the topic.

3. Concluding remarks of the Special Rapporteur

63. The Special Rapporteur noted that the Commission had been generally supportive of the approach taken in his third report, and of the proposed draft conclusions. He shared the views of members as to the importance of a proper exposition of the consequences of *jus cogens* norms for the stability of the international legal system. He agreed with the concerns expressed as to the potential risk of not including appropriate and responsible safeguards. He reiterated the purpose of the topic, which was not to develop new rules but to make existing rules more accessible and understandable. He admitted that the relative dearth of State practice presented a challenge, but maintained that it was not an insurmountable obstacle, nor should it justify a conservative approach to the topic. Rather, he emphasized that the Commission's role should be to faithfully assess the practice, together with other sources on which the Commission normally relied, in order to come to the most accurate description of existing international law. He pointed out that many of his proposed draft conclusions contained formulations drawn from the 1969 Vienna Convention. At the same time, it was worth recalling that the structure of the Convention was not designed with only *jus cogens* norms in mind.

64. Turning to the proposed draft conclusions, the Special Rapporteur thanked members for their various comments and proposals for amendments, which could be discussed in the Drafting Committee or be reflected in the commentary. Members had generally agreed with draft conclusions 10 to 13. The first two paragraphs of draft conclusion 10, read together, provided the principal consequence arising from treaties conflicting with *jus cogens* norms, namely such a treaty would either be void at the time of conclusion or would become void owing to the later emergence of the *jus cogens* norm. Both paragraphs were drawn from the 1969 Vienna Convention. He concurred with the proposal to formulate a single draft conclusion containing a general rule on interpretation, based on his proposal for draft conclusion 10, paragraph 3, which would be applicable to all sources of international law. The corresponding commentary would clarify that such rule should conform with the rules of interpretation in the 1969 Vienna Convention. He also agreed that good faith was the

central basis for such interpretative rule, which was captured by the qualification "as far as possible" and could be further explained in the commentaries. The principle of *pacta sunt servanda* was a significant reason for the coherent and integrationist approach to treaty interpretation, and, where it was possible to be consistent with *jus cogens*, such approach would always be more preferable than the invalidation of the treaty.

65. The Special Rapporteur shared the concerns raised by some members about the absoluteness of the non-severability rule in cases of a treaty conflicting with an existing norm of *jus cogens*, as reflected in draft conclusion 11, paragraph 1, but found it difficult to depart from the provisions of the 1969 Vienna Convention without a coherent legal basis drawn from State practice. He did not support the suggestion that reference be made in draft conclusion 12 to articles 69 and 70 of the Convention, since they were not concerned with specific consequences of *jus cogens*.

66. On draft conclusion 14, concerning a recommended dispute settlement procedure, the Special Rapporteur was not opposed to inserting a new paragraph drawing from article 65 of the 1969 Vienna Convention if it was generally agreed by members. He, however, doubted the appropriateness of subjecting the consequences of breaches of *jus cogens* norms to agreements concluded through negotiations by two or more States. He reiterated that draft conclusion 14 did not seek to impose anything on any State, or to address jurisdictional issues or standing. Nor, did it downplay the legally binding obligations of States Parties to the 1969 Vienna Convention. He agreed to expand the range of options for settlement of disputes, and to reformulate the second paragraph into a without prejudice clause. He further explained that the placement of draft conclusion 14 at the end of the first cluster of draft conclusions did not minimize the importance of a procedure for the settlement of disputes, but rather was intended to illustrate that such procedure was linked to the draft conclusions concerning the conflict between treaties and *jus cogens* norms.

67. To address the concern of some members as to the logic underlying draft conclusion 15, paragraph 1, the Special Rapporteur suggested reformulating the paragraph to read: "[a] customary international law rule does not arise if the practice on which it is based conflicts with a peremptory norm of general international law (*jus cogens*)". He further agreed that the Drafting Committee could insert the phrase "not of a *jus cogens* character" in paragraph 1 to resolve the issue concerning the modification of a peremptory norm by a subsequent peremptory norm. As regarded paragraph 3, he did not have any objection to drawing a link between the effect of persistent objection during the formation of customary international law and the non-applicability of persistent objection once a norm had acquired the status of *jus cogens*.

68. The Special Rapporteur agreed with those members who had maintained that it was appropriate to specifically single out Security Council resolutions in draft conclusion 17, because the discussion on the effects of *jus cogens* norms on acts of international organizations often took place in the context of Security Council decisions, given the unique power of the Council as well as Article 103 of the Charter of the United Nations.

69. The Special Rapporteur opposed inserting the qualifier "serious" in draft conclusion 18, which, according to him, found no support in the articles on State responsibility and did not appropriately capture the relationship between norms of *jus cogens* and obligations *erga omnes*. At the same time, he had no objection to consider, in the Drafting Committee, aligning the text of draft conclusion 18 on the relevant passage in the *Barcelona Traction* judgment.[23] He further sought to explain the omission of the same qualifier in draft conclusion 21, by noting that it would be absurd to suggest that it was lawful for States to recognize or even assist in breaches of *jus cogens* that "were not serious".

70. The Special Rapporteur also agreed that draft conclusions 18 to 21 should apply not only to States but also to international organizations.

[23] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33.

71. The Special Rapporteur conceded that draft conclusions 22 and 23 were different from other draft conclusions and that this might be provide a cogent reason for not including these draft conclusions. However, he pointed out that the issue of the effect of *jus cogens* norms on immunities had been explicitly referred to in paragraph 17 of the syllabus to the topic prepared at the time of the decision to include the topic in the long-term programme of work of the Commission.[24] The issue had not drawn any objection at the time of its consideration by the Commission, nor had the exclusion of immunities from the topic been suggested by States or members of the Commission at the time. He noted, as also indicated by some members, that there was abundant practice in support of both draft conclusions, and that the Commission had previously adopted important draft conclusions based on more scant practice. He was not convinced by the argument that the inclusion of the two draft conclusions would result in no agreement being reached on other topics being considered by the Commission. He, similarly, did not accept that there was insufficient practice to support draft conclusion 23. He recalled that cases concerning civil proceedings, such as *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, that were often advanced to justify the view that there were no exceptions to immunity for international crimes of a *jus cogens* nature declared that they were not an authority for exceptions in cases related to criminal proceedings. While noting that these two draft conclusions enjoyed broad support from the Commission, he noted that, with a view to finding a way forward, both from a substantive point of view and from the perspective of attaining consensus in the Commission, the Commission might wish to address the issues mentioned by means of a without prejudice clause. In that context, he proposed that the Drafting Committee replace the two draft conclusions with a single without prejudice clause, which would read: "[t]he present draft conclusions are without prejudice to the consequences of specific/individual/particular peremptory norms of general international law (*jus cogens*)". The corresponding commentary would indicate that immunity *ratione materiae* was one such issue implicated by the provision and would be drafted in a non-prejudicial matter.

72. As regarded the comments on the working method of keeping texts within the Drafting Committee, without the preparation of commentaries, the Special Rapporteur noted that such a working method had been previously agreed to by the Commission, as a compromise. He recalled further that the topic had, each year, been considered during the second half of the session with insufficient time for the preparation and adoption of commentaries. Nonetheless, he undertook to produce a full set of commentaries for consideration by the Commission, on the understanding that the topic would be considered during the first half of the 2019 session.

73. Finally, the Special Rapporteur assured members that he would consider carefully all their comments regarding future work when preparing his fourth report. He agreed with various suggestions in that regard, such as the inclusion of a bibliography and the need for consistency on the use of terms, as well as that general principles should also be covered in the project.

[24] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), annex.