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**UNITED STATES MISSION TO THE UNITED
NATIONS**

**Statement by the United States
72nd General Assembly Sixth Committee
Report of the International Law Commission
on the Work of its 69th Session
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November 1, 2017

**Peremptory Norms of General International Law, Succession of States in Respect to State
Responsibility, Protection of the Environment in Armed Conflict**

Peremptory Norms of General International Law

With respect to the topic of Peremptory Norms of General International Law (*jus cogens*), Mr. Chairman, we want to thank the special rapporteur, Professor Dire Tladi, for the substantial amount of work and analysis he has devoted to this project. We note that the Drafting Committee has provisionally proposed several new draft conclusions.

We appreciate that the topic of peremptory norms of international law is of considerable intellectual interest and recognize that a better understanding of the nature of *jus cogens* might contribute to our understanding of certain areas of international law, perhaps most notably human rights law. However, we continue to have a number of concerns with this topic. As we have explained on previous occasions, from a methodological point of view, we wonder if there is sufficient international practice on important questions, such as how a norm attains *jus cogens* status and the legal effect of such status vis-à-vis other rules of international and domestic law.

As a threshold matter, we believe that the criteria for the identification of peremptory norms must be based on, and be consistent with, Article 53 of the Vienna Convention on the Law of Treaties (VCLT). In this regard, we appreciate that the draft conclusions regarding the identification of peremptory norms proposed by the Committee correctly reflect the complete definition of peremptory norms set forth in Article 53. Nevertheless, a number of concerns remain and we would like explain two of them here. First, we agree with the statement in paragraph one of Draft Conclusion 5 that customary international law is the most common basis for peremptory norms of general international law. However, contrary to what is asserted in paragraph 2 of the same conclusion, we are not aware of any examples of peremptory norms that

are based on general principles of law. We would, therefore, suggest that the reference to such general principles be deleted or that the commentary explain that it has not been established that such principles could ever actually be a basis for peremptory norms of international law.

In addition, with respect to Draft Conclusion Nine of the Special Rapporteur's report, which deals with evidence of acceptance and recognition and has not yet been discussed by the Drafting Committee, we do not believe that judgments and decisions of international courts and tribunals may serve as evidence of acceptance and recognition by States of norms as peremptory norms. Both Conclusion 13 of the Commission's Customary International Law project and Article 38 of the Statute of the International Court of Justice appropriately recognize judgments and decisions of international courts and tribunals only as a subsidiary means for determining rules of law. We believe that this is the approach that should be taken with respect to the identification of peremptory norms as well.

Succession of States in Respect to State Responsibility

We thank the Special Rapporteur, Pavel Sturma, for his efforts in producing the first report on succession of states in respect of state responsibility (A/CN.4/708), which examines the scope of the project and sets out four proposed draft articles.

We appreciate that the Commission's work on the topic of succession of States in respect of State responsibility may lead to greater clarity in this area of the law. However, we are not confident that the topic will enjoy broad acceptance or interest from States, in view of the small number of States that have ratified the 1978 Vienna Convention on Succession of States in Respect of Treaties and the 1983 Vienna Convention Succession of States in Respect of State Property, Archives, and Debts.

The issues raised by the topic of state succession in respect of State responsibility are complex, and careful and thoughtful consideration by governments will be required as the Commission continues to develop the draft articles. At this early stage, we urge the Commission to be clear when it believes it is codifying existing law as opposed to progressively developing the law.

In respect of Draft Article 3 as proposed by the Special Rapporteur, we note that the relevance of agreements to succession of States in respect of responsibility is described as depending in part on the type of agreement at issue. We are uncertain whether the distinctions among the types of agreements described in the draft article and commentary – including so-called devolution agreements, claims agreements, and other agreements – are well understood and established in State practice. We believe the draft article could benefit from further consideration as to whether these distinctions provide a sound basis on which to base general conclusions about State practice in this area. At the same time, we believe paragraph 4 of Draft Article 3 is correct to recognize the central importance of the principles reflected in Articles 34 through 36 of the Vienna Convention on the Law of Treaties, including the general rule that a treaty does not create rights or obligations for a third State without its consent, for the issues addressed in Draft Article 3.

We will continue to study the draft articles adopted by the Commission based on the reports produced by the Special Rapporteur.

Protection of the Environment in Armed Conflict

Mr. Chairman, with respect to the topic “Protection of the Environment in Relation to Armed Conflicts,” the United States would first like again to express its thanks for the efforts of the prior Special Rapporteur, Ms. Marie G. Jacobsson, in drafting reports that recognize the complexity and controversial character of many of these issues. We look forward to the contributions of the new Special Rapporteur, Ms. Marja Lehto.

We would like to note certain areas of concern from the proposed draft principles that emerged from the ILC’s Drafting Committee in August 2016 that we hope the new Special Rapporteur will take into account.

First, with regard to the general scope of the project, we remain concerned by the interest and attention paid to addressing the concurrent application of bodies of law other than international humanitarian law during armed conflict. International humanitarian law is the *lex specialis* in situations of armed conflict, and the extent to which rules contained in other bodies of law might apply during armed conflict must be considered on a case by case basis.

Second, we are similarly concerned that this would not be the appropriate forum to consider whether certain provisions of international humanitarian law treaties reflect customary international law. We emphasize that such an undertaking would require an extensive and rigorous review of State practice accompanied by *opinio juris*.

Third, we are concerned that several of the draft principles are phrased in mandatory terms, purporting to dictate what States “shall” or “must” do. Such language is only appropriate with respect to well-settled rules that constitute *lex lata*. Yet the principles indicate, in an introductory clause, that they are aimed in substance at “enhancing” the protection of the environment in relation to armed conflict – in other words, at influencing the progressive development of the law. Indeed, there is little doubt that several of these principles go well beyond existing legal requirements. For example, Draft Principle 8 introduces new substantive legal obligations in respect of peace operations and Draft Principle 16 expands the obligations under the Convention on Certain Conventional Weapons to mark and clear, remove, or destroy explosive remnants of war to include “toxic or hazardous” remnants of war.

Once again, we thank Ms. Marie Jacobsson and the Commission for their impressive work, and look forward to the efforts of Ms. Marja Lehto on this topic that is so important to all of us.

Thank you, Mr. Chairman.