Permanent Mission of the Islamic Republic of Iran to the United Nations

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Statement by
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before the Sixth Committee of the
77th Session of the United Nations General Assembly
on
Agenda item 78:
"Report of the International Law Commission on the work of its Seventy-third session"
Cluster I
Chaps: I, II, III, IV (Peremptory norms of general international law (*jus cogens*)), V (Protection of the environment in relation to armed conflicts), and X (Other Decisions)
New York, 25 October 2022

Mr. Chairperson,
Distinguished members of delegates

We would like to express our appreciation to the Special Rapporteur, Mr. Dire Tladi, for his extensive work on this topic and preparation of his fifth report on the "Peremptory norms of general international law (*Jus Cogens*)". My delegation also commends the Commission's work on this topic for providing guidance and recommendations on the identification and nature of the peremptory norms of general international law as well as their consequences and legal effects.

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Before expressing our views on the provisions of the Draft Conclusions on identification and legal consequences of the peremptory norms of general international law, we would like to briefly make two general comments:

Firstly, with regard to the nature of the Draft Conclusions, it appears that the ILC has never determined in its three recent works, i.e. "the Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties", "the Draft Conclusions on Identification of Customary International Law", and the present Draft Conclusions, what are the legal values and characteristics of these ILC's outputs which are not intended to be a foundation for a subsequent treaty by member states similar to "draft articles" prepared by the Commission. We would like to request the ILC to shed light on this matter whether the "draft conclusions", "guidelines" and other similar documents are of a prescriptive or descriptive nature, also define their boundaries and scope, and more generally, determine what is their status in international law. In the same vein, we would like to ask the ILC to elucidate what is the meaning and scope of the new concept of "codification by interpretation" referred to by the special rapporteur in his fifth report.

Secondly, the Islamic Republic of Iran believes that the provisions set forth in the present Draft Conclusions are reflecting the practice of the international community of States as a whole and it should be regarded as progressive development of international law. Needless to say, several landmark cases of the International Court of Justice as the main judicial organ of the United Nations have been considered by the special rapporteur on the present topic. Therefore, our delegation

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supports the general approach taken by the Commission to identify peremptory norms of general international law.

Having said that, we would like to address our views and concerns in relation to the text of the Draft Conclusions.

Mr. Chairperson

With respect to the notion of "fundamental values" referred to in draft conclusion 3 on "General nature of peremptory norms of general international law", while it is agreed that the peremptory norms of general international law reflect and protect fundamental values of the international community, this concept has not been addressed by the 1969 Vienna Convention on the Law of Treaties (VCLT) and it appears that a new criterion has been appended to 1969 Vienna Convention for acceptance and recognition of *Jus Cogens*. Hence, this phrase should have been either omitted from the main text or clarified more vividly in the commentaries.

As opposed to the draft conclusion 5 on "Bases for peremptory norms of general international law (*jus cogens*)", which introduces customary international law as the most common basis for norms of peremptory character, the ICJ in order to identify the peremptory character of torture, in paragraph 99 of its 2012 judgment on the case concerning *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal) enumerates several sources such as international instruments of universal application, General Assembly resolutions as well as domestic law of almost all States. The Islamic Republic of Iran is of the opinion that the sources referred to in the ICJ Judgment are all inclusive, and therefore, one source should not be preferred or

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prioritized over other sources; rather, in conformity with ICJ's approach, all the sources should be considered collectively and generally in identifying the norms of peremptory character.

Mr. Chairperson

We agree with the ILC's Approach in respect to Draft conclusion 6 on "Acceptance and recognition" that there must be evidence to indicate a norm is accepted and recognized by the international community of States as a whole as a peremptory norm. Nonetheless, we have some comments on the forms of evidence referred to in the draft conclusion 8. With respect to public statements made on behalf of States we are of the opinion that any statement as such must have been delivered by the State organs or agents in their official capacity in accordance with draft article 2 of the ILC's 2001 "Draft articles on Responsibility of States for Internationally Wrongful Acts". With regard to the works of international organizations or expert bodies in general, the reference to such entities in the present report seems to be in contrast to Commission's recent work, namely, the "Draft Conclusions on Identification of Customary International Law", in which such entities were not mentioned at all. An integrated approach should be preferably adopted by ILC towards topics under consideration and topics completed. Moreover, we believe that the resolutions or any other outcomes of such entities cannot be *per se* regarded as evidence for or even subsidiary means of determination of the peremptory character of norms, unless such a document is authoritative or expresses general consensus. As has been noted by the ICJ in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* on 8 July 1996, "General Assembly resolutions, even

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if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradua1 evolution of the *opinio juris* required for the establishment of a new rule" (paragraph 70).

Mr. Chairperson

As concerns the draft conclusion 7 regarding "International community of States as a whole", from our point of view, the standard for the identification of *Jus Cogens* norms is "the acceptance and recognition by the international community of States as a whole" and the same wording of the 1969 VCLT, should be maintained throughout the whole text of the draft conclusions. For the sake of clarification, the Islamic Republic of Iran believes that the phrase "a very large majority of States" does not indicate a numerical value, rather it should be read as accepted and recognized by majority of all the main legal systems in accordance with Draft conclusion 3 of the ILC's "Consolidated text of draft conclusions on General Principles of Law".

As respects the Draft conclusion 12 on "Consequences of the invalidity and termination of treaties conflicting with a peremptory norm of general international law", since according to article 53 of the 1969 VCLT if a treaty at the time of its conclusion conflicts with a peremptory norm of general international law, the whole treaty would

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be null and void, we are of the conviction that it will not grant acquired rights to a third party.

Mr. Chairperson

Concerning the paragraph 3 of draft conclusion 14 on "Rules of customary international law conflicting with a peremptory norm of general international law", the commentary states that the persistent objector rule does not apply to peremptory norms of general international law, contrary to the standard mentioned in draft conclusion 7 i.e., "the acceptance and recognition by the international community of States as a whole". In this regard, the International Court of Justice asserts in paragraph 74 of the 1969 judgment of North Sea Continental Shelf Cases (Germany vs. Denmark/Netherlands) that State practice is "an indispensable requirement" for the formation of a rule of customary international law which must be "both extensive and virtually uniform". The ILC should have taken into consideration that while the persistent objection of certain States to a rule of customary international law is relevant in the process of its formation, particularly when custom is regarded as the most common source of identification, it could be as well relevant in the process of identifying peremptory norms of general international law. In other words, the standard for establishing *jus cogens* can be no less than what is required to establish customary international law.

Mr. Chairperson

As respects the draft conclusion 15, it is noteworthy that according to ILC's 2011 "Guide to Practice on Reservations to Treaties", a reservation is considered as a unilateral act made by a State or an

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international organization, regardless of its name, phrasing, or even the fact that it was formulated jointly by a group of States or international organizations. It is remarkable that principle 8 of ILC's 2006 "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations" expresses that a unilateral act which is in conflict with a peremptory norm of general international law is void. Bearing this in mind, the Islamic republic of Iran, in line with principle 9 of ILC's "Guiding Principles on unilateral act of States" is of the view that no obligation may result for other States from the unilateral acts of several States or an individual State. Moreover, in accordance with the 1951 ICJ judgment on *Fisheries case* (United Kingdom v. Norway), page 124, unilateral acts of States shall be according to international law. In this regard, the ICJ held that: "Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law".

Mr. Chairperson

On the Draft Conclusion 16 regarding "obligations created by resolutions, decisions or other acts of international organizations conflicting with a *Jus Cogens*", as we reiterated in our last statement on this topic, our delegation is of the opinion that non-derogability of peremptory norms would be equally applicable to the resolutions, decisions and other acts of the UN bodies, specifically the Security Council. In this regard, we are of the conviction that article 103 of the UN Charter is solely with respect to contractual commitments and as has been stipulated in this article, "in the event of a conflict between the obligations of the UN Member States under the present Charter and

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their obligations under any other international agreement, their obligations under the present Charter shall prevail". Therefore, in the event of conflict between peremptory norms and the Charter obligations, *Jus Cogens* norms remain superior and Article 103 of the UN Charter will not be applied. It seems that Article 24 of the Charter is ignored by some States; according to which the Security Council discharge its duties, "in accordance with the Purposes and Principles of the United Nations" and "the specific powers" granted to this body are laid down in Chapters VI, VII, VIII, and XII of the Charter. It is crystal clear that paragraph 3 of Article 1 the UN Charter has embodied the norms of fundamental importance, which correspond to the *jus cogens* norms, namely, "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".

In this context, those parts of the issued Security Council resolutions that are contrary to peremptory norms of general international law, will not create any obligation for States. Although the possibility of adoption of a Security Council resolution in complete contrast to a norm of peremptory character is unlikely; however, it is not impossible. The history of the practice of the Security Council exhibits instances of adopted resolutions that at the stage of implementation led to a potential conflict with norms of *Jus Cogens*. For instance, UNSC Resolution 748 dated 31 March 1992 concerning sanctions against the Libyan Arab Jamahiriya, which the Organization of African Unity (OAU) by its decision on 10 June 1998 (Doc. A/AHG/Dec.127 XXXIV) decided to no longer implement the sanctions decreed by this UNSC resolution against Libya because of "the seriousness of the human and material losses" that these sanctions had inflicted. Another instance is the UNSC

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Resolution 1267 dated 15 October 1999 which the Court of First Instance of the Court of Justice of the European Union in its judgment in the Case no. T-306/01 (Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities) dated 21 September 2005 ruled that UNSC Resolutions "must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community" (paragraph 281).

This can put into question the credibility of the UN Security Council as if it is above the law and does not consider itself to be bound by law, even the most fundamental ones that are peremptory norms of general international law. Without doubt United Nations is the result of Sovereign State's will which cannot for any reason violate peremptory norms of general international law; now my question is when according to the general principle of "*nemo dat quod non habet*", "no one can transfer a better title than what he himself possesses", how can UN member States grant or delegate this right to Security Council to not be bound by the norms of peremptory character?

As a final point on this topic, **Mr. Chairperson**, in relation to draft conclusion 23 on "non-exhaustive list", we reiterate our position that it is hardly to be convinced by the necessity of introduction of a non-exhaustive list of norms of peremptory character as the annex, since from a methodological point of view, this list may substantially change the process-oriented nature of this topic. It might also lead to the misinterpretation that the ILC is the main body to recognize and

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identify the peremptory norms of general international law. In our view the Commission should have concentrated on discussing methodological aspects and secondary rules, rather than the legal status of particular norms.

Furthermore, identifying some of the norms as *Jus Cogens* norms, might be controversial at this stage and requires an in-depth study and merits to be chosen as future topics for consideration by the Commission. For instance, the ICJ in its ruling dated 30 June 1995 in the case concerning *East Timor* (Portugal v. Australia) considers the principle of self-determination of an *erga omnes* character rather than *jus cogens* (paragraph 29). In the same vein, the ICJ in its 1996 advisory opinion regarding *Legality of the Threat or Use of Nuclear Weapons*, has only referred to "fundamental rules of IHL", not all of IHL rules, as intransgressible principles of international customary law (paragraph 79).

Now turning to the topic of "**Protection of the environment in relation to armed conflicts**", **Mr. Chairperson,** we would like to thank the Special Rapporteur Ms. Marja Lehto, for her valuable work on the topic in general, and her third report in particular which focuses on reviewing the comments and observations of States, international organizations and others on the draft principles and commentaries adopted on first reading. We are also thankful to the Commission for the consideration of the work during the past year.

As a general comment my delegation would like to point out as far as the law of armed conflict is concerned, both the customary rules and the provisions of treaty law prohibit belligerent parties, directly or indirectly, from inflicting unnecessary damage on the environment. In

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accordance with well-established rules of customary law pertaining to armed conflict, parties to the armed conflict are obliged, to protect the environment during the armed conflict. These rules include proportionality and the prohibition on military operations not directed against legitimate military targets, as well as the prohibition of destruction of enemy property not imperatively demanded by the necessities of war.

In addition to the obligation under customary law, parties to armed conflict are obliged, in accordance with treaty law, to protect the environment in time of war. The 1977 Additional Protocol I to the 1949 Geneva Conventions contains a number of articles relevant to the protection of the environment. The articles of particular relevance are: Article 35(3), which prohibits the employment of methods or means of warfare which "are indeed, or may be expected to cause widespread, long-term and severe damage to the natural environment"; Article 55, which imposes an obligation upon the States Parties to be careful in conducting war in order to protect the environment against such damage; Article 54, which protects objects indispensable to the survival of the civilian population; and ultimately, Article 56, which protects certain works and installations containing dangerous forces. Therefore, consideration of the provisions of Protocol I leads us to the conclusion that it prohibits clearly, firstly, attacks on the environment and secondly, the use of the environment as a tool of warfare.

In the same vein Articles 53 and 147 of the Fourth Geneva Convention provide a degree of indirect protection for the environment, in the context of protecting property rights in occupied territories. In this respect, extensive destruction and appropriation of property, not

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justified by military necessity and carried out unlawfully and wantonly constitutes a grave breach of the Convention, or even a war crime. Therefore, in the event that an occupying power destroys, for example, industrial installations in an occupied territory, causing consequent damage to the environment, it would be in violation of the Fourth Geneva Convention,

However, apart from the above-mentioned, it must be underlined that the general principles of customary international law clearly contain specific rules pertaining to protection of the environment. A fundamental rule of customary law, incorporated in Principle 21 of the 1972 Stockholm Declaration, is the obligation of States not to damage or endanger significantly the environment beyond their jurisdiction. There are a considerable number of international and regional agreements that support this rule, including *inter alia*, the 1982 UN Convention on the Law of the Sea, the 1978 Kuwait Convention on the Protection of Marine Environment in the Persian Gulf and Sea of Oman, the 1985 Vienna Convention on the Protection of the Ozone Layer, the 1992 Framework Convention on Climate Change, and the 1992 Convention on Biological Diversity.

That being said, we are of the view that the present Draft Principles should either reflect written rules of international law or International custom. However, in cases that these Draft Principles are reflecting recommendations aimed at the progressive development of international law, they do not and cannot give rise to new obligations for States.

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Mr. Chairperson

We take note that the draft principles would apply to international as well as non-international armed conflicts without any distinction; however, considering the dichotomy introduced in the 1949 Geneva Conventions between international armed conflicts (IAC) and non-international armed conflicts (NIAC), my delegation is of the view that the applicability of the rules of former to the latter doesn't seem possible, since the scope and type of government's obligations towards the environment in armed conflicts are different comparing to non-state actors. For example, a non-state actor cannot be bound to compensate for damages inflicted to the environment, nevertheless, this should not be regarded as the freedom of States or other actors to not comply with the rules of IHL.

As concerns the role of international organizations in protection of the environment during armed conflicts, the Islamic republic of Iran attaches high importance to the role of the International Committee of the Red Cross in the progressive development and promotion of IHL. It should be emphasized that the unique role of ICRC in carrying out its work in an impartial manner, based on the functions underpinned in the Geneva conventions since its establishment cannot be regarded as a basis for other NGOs activities.

Speaking of the role of international organizations in protection of the environment during armed conflict, we should point out that the international organizations which deploy forces for peace operations have to pay due regard to protect the environment as well, according to any relevant obligations that they may have under international law. That being the case, in the event of inflicting any considerable

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destruction to the environment they shall be responsible under the 2011 ILC's Draft articles on the Responsibility of International Organizations.

To conclude this topic, **Mr. Chairperson**, a threshold should be established for the long-term, widespread and severe damage, otherwise, we're afraid not only it could not be regarded as the progressive development of international law, but also it would be a mere repetition of what has been asserted in previous documents codified by international community of States.

It is noteworthy that my delegation continues to attach great importance to the topic, follows it with interest and as appropriate, continues to contribute to, and looks forward to its completion with due regard to diverse aspects of protection of the environment in relation to armed conflicts.

And finally, **Mr. Chairperson,** regarding the topic of "**other decisions**", we take note of the topics proposed for the program of work of the ILC and welcome the future work of the commission in this regard. Concerning the inclusion of the topic "Prevention and repression of piracy and armed robbery at sea", our views are what we have stated earlier and unchanged.

I thank you, Mr. Chairperson.