

**Written Comments by Austria on the
Draft Conclusions on peremptory norms of general international law (*jus cogens*)**

19 May 2021

1. In reply to the Secretary-General's request of 17 September 2019 for comments and observations on the Draft Conclusions on peremptory norms of general international law (*jus cogens*) adopted on first reading by the International Law Commission, Austria would like to provide the following comments:

2. Austria welcomes the work of the International Law Commission on peremptory norms, one of the major pillars of international law. When, in the course of the elaboration of what became the 1969 Vienna Convention on the Law of Treaties, the Commission examined this subject for the first time, a major step was made to address a fundamental issue that affects the whole system of international law. Although some states had doubts as to the advisability of a reference to such norms in the context of the law of treaties, references to peremptory norms were ultimately accepted. The Commission had come to the conclusion that there were certain rules of international law from which derogations were not possible.

3. Austria understands from the title of the present topic, peremptory norms of general international law (*jus cogens*), and from Draft Conclusion 1 as well as from the ILC Commentary¹ on the respective Draft Conclusion (para. 7) that the Conclusions do not address norms of a purely regional character. As a consequence, Austria understands that the Commission leaves it open whether regional peremptory norms exist and may revert to this issue at a later stage.

4. Draft Conclusion 3 states *inter alia* that peremptory norms of international law "are hierarchically superior to other rules of international law". Austria welcomes the recognition of a hierarchy of norms also in the field of international law. However, hierarchical superiority may have two possible meanings. It may imply that the existence and application of a higher-ranking norm is a necessary condition for the creation of lower ranking norms ("hierarchy of norm creation") or that the existence of a higher ranking norm leads to the derogation of lower ranking norms that are in conflict with the higher ranking norm ("hierarchy of derogation"). In the present context, also in view of the wording of Articles 53 and 64 of the Vienna Convention on the Law of Treaties ("is void", "becomes void"), we are obviously only dealing with a hierarchy of derogation. Thus, the ILC Commentary on Draft Conclusion 3 (para. 12) stating that "[t]he idea that peremptory norms of general international law (*jus cogens*) are universally applicable, like that of their hierarchical superiority, flows from non-derogability", should be clarified in this regard.

5. The function of peremptory norms was already examined by the Commission's Study Group on fragmentation of international law, as mentioned in the ILC Commentary on Draft Conclusion 2 (para. 2, footnote 702). After recognising the variety of hierarchies, the Study Group's report² stated that "[h]ierarchy should be treated as an aspect of legal reasoning within which it was common to use such techniques to set aside less important norms by reference to more important ones. This was what it meant to deal with such techniques as

¹ As reflected in Chapter V of the Report of the International Law Commission on its Seventy-first session (A/74/10).

² UN Doc. A/CN.4/L.663/Rev.1 of 28 July 2004.

conflict rules. It was advisable not to overstretch the discussion on hierarchy but to limit it to its function in resolving conflicts of norms” (para. 60).

6. In the context of the present Draft Conclusions, the hierarchical superiority of peremptory norms of international law is only referred to in Draft Conclusion 3 (“are hierarchically superior to other rules of international law”), the legal effects of hierarchical superiority are addressed in other Draft Conclusions, in particular in Part Three on the legal consequences of peremptory norms. The Draft Conclusions of Part Three envisage strict consequences: conflicting treaties are void (Draft Conclusion 10), conflicting rules of customary international law do not come into existence (Draft Conclusion 14). These consequences follow the wording of Articles 53 and 64 of the Vienna Convention on the Law of Treaties. It is the understanding of the Commission that such norms are void *ab initio* (see ILC Commentary on Draft Conclusion 10, para. 4). However, as the procedure recommended by the Commission in Draft Conclusion 21 shows, there is an element of temporary uncertainty until the conclusion of this procedure, which – notwithstanding the Commission’s principled position of automatic voidness – contains elements of voidability.

7. As to Draft Conclusion 5, Austria supports the view that it would be preferable to refer to “sources” of peremptory norms of international law instead of “bases” for such norms, in conformity with the terminology normally used in connection with Article 38 of the Statute of the International Court of Justice.

8. As to the separability of treaty provisions in conflict with peremptory norms of international law, addressed in Draft Conclusion 11, Austria questions whether the strict adherence to the non-separability regime for treaties in conflict with *jus cogens* existing at the time of a treaty’s conclusion is still the most suitable approach. While Austria is aware of the non-separability rule contained in Article 44(5) of the Vienna Convention on the Law of Treaties, restated in Draft Conclusion 11(1), it suggests that – at least in certain cases – a more nuanced approach would be preferable to “sanction” treaty provisions that violate *jus cogens*. Avoiding the invalidity of the entire treaty would be in line with the *favor contractus* principle. Therefore, Austria supports an extension to the entire Draft Conclusion of the approach already envisaged in Draft Conclusion 11(2) for *jus cogens* emerging after a treaty’s conclusion, which in determining the consequences takes account of the separability of a provision, its qualification as an essential basis of the consent to be bound and of the consideration whether continued performance “would not be unjust”. Austria also supports the suggestion to continue the search for a more specific expression than the rather vague term “unjust”, which belongs to legal philosophy rather than the terminology of positive law. A possible replacement could be that continued performance would not be “against the common interest of the parties”.

9. Draft Conclusion 13(2) according to which “[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*)” corresponds to Guideline 4.4.3.2³ of the ILC Guide to Practice on Reservations to Treaties.⁴ Austria concurs with this idea which has played a particularly prominent role in the context of human rights treaties, for instance regarding reservations to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, Austria would have preferred the wording proposed by the Special Rapporteur in para. 76(b) of his third report, which reads: “A reservation that seeks to exclude

³ “A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.”

⁴ https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_8_2011.pdf.

or modify the legal effects of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*) is invalid". This wording expresses more clearly the consequences of such a reservation for the applicability of the treaty to the reserving party.

10. In Austria's understanding, the first part of the wording of Draft Conclusion 16, referring to "a resolution, decision or other act of an international organization that would otherwise have binding effect", applies to all international organisations and their organs, including the UN Security Council. Austria supports strict adherence to the rule of law also in the context of the Security Council. It cannot be excluded that Security Council resolutions might in some cases lead to a potential conflict with *jus cogens*. In this context, Austria would like to point out, once again, that the final report of the Austrian initiative (2004 to 2008) on "The UN Security Council and the Rule of Law"⁵ concluded that the Security Council does not operate free of legal constraint, which means that the Council's powers are subject to the UN Charter and norms of *jus cogens*.

11. Austria welcomes the reluctance of the Commission to address the applicability of immunity *ratione materiae* for offences prohibited by *jus cogens* in the present context, as this issue is currently under examination by the Commission under the item "Immunity of State officials from foreign criminal jurisdiction". Not dealing with this issue in the present context helps to avoid potential inconsistencies and duplications.

12. Austria welcomes Draft Conclusion 23 concerning the non-exhaustive list of *jus cogens* norms in the Annex to the Draft Conclusions. It reiterates its view that such a list is be a helpful addition to the work of the Commission on *jus cogens* norms and also makes the previous work of the Commission on this subject more accessible. However, concerning the Annex, Austria wishes to state the following:

13. First, as to the "prohibition of aggression", listed as the first example of *jus cogens* norms in the Annex, it is doubtful whether this wording comprises all aspects of the general prohibition of the use of force contained in Article 2(4) of the Charter of the United Nations. As the ILC Commentary to Draft Conclusion 23 indicates (para. 5), the Commission had taken an inclusive view in 1966 when it referred to the "law of the Charter concerning the prohibition of the use of force" as *jus cogens*. Although the ILC Commentary seems to suggest a broader scope, the wording now chosen for the Annex, "prohibition of aggression", does not exclude an interpretation that would restrict the *jus cogens* norm to the narrower scope of General Assembly resolution 3314 (XIX) of 1974 on the definition of aggression, which does not encompass the mere threat of force. Therefore, it would be consistent to replace "prohibition of aggression" by "prohibition of the use of force".

14. Second, the reference to "basic rules of international humanitarian law" as a *jus cogens* norm is not sufficiently precise. The references in the ILC Commentary to the Articles on State Responsibility and to the Study on Fragmentation of international law, which mention the "prohibition of hostilities directed at civilian population" as an example for basic rules of international humanitarian law, are insufficient. It merits further study what specific norms of international humanitarian law are considered to be such "basic rules", which might encompass for instance the "Martens Clause" and the principles and rules on distinction, proportionality, military necessity and precaution in attack as well as the protection of persons *hors de combat*.

15. Third, while Austria understands that the Annex is not meant to be exhaustive, it would invite the Commission to make further attempts to include in it at least all the norms it had identified as *jus cogens* in its previous work.

⁵ UN Doc. A/63/69 – S/2008/270 of 7 October 2008, paras. 29, 37 and 49.