

*Translated from French*

## **Sixth Committee**

### **Consideration of the report of the seventy-first session of the International Law Commission**

#### **Observations of the Kingdom of Belgium regarding the draft conclusions on peremptory norms of general international law (*jus cogens*)**

In his note verbale of 22 September 2020 regarding the draft conclusions on peremptory norms of general international law (*jus cogens*), which were adopted on first reading at the seventy-first session of the International Law Commission, the Secretary-General invited States to transmit to him any comments or observations they might have on the draft articles.

Belgium would like to congratulate the International Law Commission, in particular the Special Rapporteur, Mr. Dire Tladi, for the work done on this topic.

Belgium would also like to make the following comments:

#### **1. General comments**

For many of the draft conclusions, there are few concrete examples of application or practice. The Commission does not go into detail and limits itself to abstract formulations. Hypothetical examples are used to clarify matters only in a few exceptional cases, for example with regard to the impact of *jus cogens* on reservations to treaties (see the example of a discriminatory reservation to a treaty provision concerning the right to education in paragraph (4) of the commentary to draft conclusion 13). The Commission's work would be all the more useful if concrete examples of practical application were given elsewhere (for example in relation to draft conclusion 12, paragraph 2, concerning the consequences of the termination of treaties conflicting with a *jus cogens* norm on rights and situations created prior to termination).

#### **2. Draft conclusion 5, paragraph 2: Bases for peremptory norms of general international law (*jus cogens*)**

Belgium recognizes that treaty provisions “may also serve as bases for peremptory norms of

general international law (*jus cogens*)”,<sup>1</sup> but only for the specific reasons set out in paragraph (9) of the commentary to the draft article<sup>2</sup> with reference to the *North Sea Continental Shelf* case. To date, no exclusively treaty-based provision “[has] equal force for all members of the international community.”<sup>3</sup> Even if such a provision existed, it would still need to have the peremptory character described in draft conclusion 2.

### **3. Draft conclusion 7, paragraph 3: International community of States as a whole**

Belgium welcomes and supports the addition of paragraph 3 of draft conclusion 7. The precision it adds is very balanced and is necessary to ensure the political legitimacy of the identification of peremptory norms.

### **4. Draft conclusion 8, paragraph 2: Evidence of acceptance and recognition**

Belgium considers that, in order for “public statements made on behalf of States” delivered in the context of a contentious case or request for advisory opinion to constitute evidence of acceptance and recognition that a norm of general international law is a peremptory norm, they must, in principle, be made by the agent or co-agent of the State, not by counsel, witnesses or experts appointed by the State.

### **5. Draft conclusion 10: Treaties conflicting with a peremptory norm of general international law (*jus cogens*) and draft conclusion 11: Separability of treaty provisions conflicting with a peremptory norm of general international law (*jus cogens*)**

The draft conclusions indicate that a treaty that conflicts with a *jus cogens* norm at the time of its conclusion is void in whole. In the case of a treaty that is in conflict with a *jus cogens* norm that emerges later, the Commission has taken the view that in some cases only the provision or provisions conflicting with the norm are void, not the treaty in whole. This approach reflects articles 53 and 64 of the Vienna Convention on the Law of Treaties of 1969. However, the concept of general invalidity in the first scenario (conflict with a *jus cogens* norm at the time of the conclusion of the treaty) was

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<sup>1</sup> Draft conclusion 5, paragraph 2. A closer and more elegant French translation of the original English, “may also serve as bases for peremptory norms of general international law (*jus cogens*)”, might be: “peuvent également servir de fondement aux normes impératives du droit international général (*jus cogens*).” No changes are needed in the French version of paragraph 1.

<sup>2</sup> A/74/10, p. 163.

<sup>3</sup> *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at pp. 38–39, para. 63, cited by the Commission in paragraph (2) of the commentary to draft conclusion 5 as evidence of the meaning of the word “general” in the phrase “norms of general international law”.

not uncontroversial when the Vienna Convention was being drafted, and the approach is sometimes challenged in doctrine. Moreover, there are no concrete precedents to support the approach. It is recognized at the end of paragraph (2) of the commentary to draft conclusion 11 that “the view was expressed that there may be cases in which it would nevertheless be justified to separate different provisions of a treaty.” Belgium therefore wonders whether draft conclusion 11, paragraph 1, should be formulated more cautiously (in particular in view of the lack of practice), for example by amending it slightly to read: “A treaty which, at the time of its conclusion, conflicts with a peremptory norm of general international law (*jus cogens*) is in principle void in whole.”

Belgium wishes to recall that a claim that a treaty is invalid as a result of conflict with a *jus cogens* norm cannot have the effect of rendering a compromissory clause of the treaty inoperable, in particular when such a clause is being used to settle a dispute concerning the validity of the treaty.<sup>4</sup>

#### **6. Draft conclusion 16: Obligations created by resolutions, decisions or other acts of international organizations conflicting with a peremptory norm of general international law (*jus cogens*)**

Belgium welcomes the Commission’s explicit confirmation that resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations may not violate peremptory norms of general international law (*jus cogens*).

Belgium understands the phrase “does not create obligations under international law” in draft conclusion 16 to mean also that an act of an international organization that would otherwise have binding effect does not have such effect in itself. In other words, if an act of an international organization conflicts with *jus cogens*, it cannot create obligations within the organization’s own legal order, if such an order exists for the organization and its members apart from international law.

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

This draft conclusion confirms that grounds precluding wrongfulness, such as consent or necessity, may not be invoked to justify a violation of a peremptory norm of general international law (*jus cogens*). The commentary could clarify that this principle does not prevent “consent” from

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<sup>4</sup> See *Appeal relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment of 18 August 1972, I.C.J. Reports 1972, p. 12, para. 16 (b).

playing a role in the interpretation of certain *jus cogens* rules. The commentary to draft conclusion 18 could refer to the following passage from the commentary to the Commission's articles on the responsibility of States for internationally wrongful acts: "But in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose. Determining in which circumstances consent has been validly given is again a matter for other rules of international law and not for the secondary rules of State responsibility."<sup>5</sup>

#### **8. Draft conclusion 23: Non-exhaustive list**

Belgium welcomes the inclusion of a list of peremptory norms of general international law (*jus cogens*) and the Commission's clarification that the list is not exhaustive.

#### **9. Peremptory norms of general international law (*jus cogens*) and national public order**

It might be desirable to examine the question of whether *jus cogens* should necessarily form part of public order within national legal systems. Clarifying this in the draft conclusions could make peremptory norms more effective in the context of cases brought before national courts.

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<sup>5</sup> Draft articles on responsibility of States for internationally wrongful acts, commentary to draft article 26, para. (6).