Comments of the Czech Republic on the International Law Commission's draft conclusions on peremptory norms of general international law (*jus cogens*), adopted on first reading

The Czech Republic welcomes the opportunity to present written comments on the set of draft conclusions, together with commentaries thereto, on peremptory norms of general international law (*jus cogens*), adopted, on first reading, by the International Law Commission at its seventy-first session (2019).

We commend the Commission for its work on and the completion of the first reading of the draft conclusions and appreciate outstanding contribution of the Special Rapporteur, Mr. Dire Tladi, to the preparation of the draft conclusions.

General comments

We concur with the methodology of the Commission, which focuses on the structural aspects of peremptory norms of general international law and is consistent with the approach to peremptory norms applied in course of the elaboration of the Vienna Convention on the Law of Treaties and in Commission's work on other relevant topics.

We agree with the key elements of the definition of a peremptory norm in draft conclusions 2, which closely follows the language of article 53 of the 1969 Vienna Convention. We also concur with the characterization of peremptory norms of general international law as reflecting and protecting fundamental values of the international community, which are hierarchically superior to other rules of international law and universally applicable (draft conclusion 3). Both draft conclusions are closely interconnected and have to be read together.

Concerning the identification of peremptory norms, as well as their legal consequences in respect of other rules of international law, or in respect of their breach, the Czech Republic supports:

- the two-criteria requirement for (two-step approach to) the identification of peremptory norms (conclusion 4) and the emphasis on evidence of their acceptance and recognition as peremptory norms (conclusion 6),

- underscoring of the fact that it is only States whose acceptance and recognition is relevant for the identification of peremptory norms of general international law (draft conclusion 7),

- basic parameters of conclusions concerning legal consequences of peremptory norms of general international law in respect of treaties and reservations (conclusions 10 – 13) and other sources of international law (conclusions 14, 15 and 16), conflicting with peremptory norms; and

- conclusions concerning legal consequences of these norms in the context of the law of responsibility of States for internationally wrongful acts (conclusions 17 – 19).

Specific comments

With regard to some draft conclusions we have the following questions or specific comments:

Conclusion 5 - Bases for peremptory norms of general international law (*jus cogens*)

We note the commentary of the Commission according to which the words "basis" and "bases" used in the conclusion are to be understood flexibly and broadly. Nevertheless, we are of the opinion that the Commission could further clarify different character of the bases, which "may give rise to the emergence of peremptory norms of general international law". In our view, the customary international law norms are the primary means of formation of *jus cogens* norms, since its "general binding character makes them the most appropriate vehicle for peremptory norms".[1] The treaty provisions may serve as basis for peremptory norms only when and to the extent that they reflect peremptory norms of general (customary) international law, as explained in paragraph 9 of the commentary to conclusion 5, as well as in conclusion 11 of the Commission's Conclusions on identification of customary international law of 2018.

The Commission notes in its commentary that there is little practice in support of general principles of law as a basis for peremptory norms of general international law. The general principles of law are derived from national legal systems and are usually only viewed as a means to fill the gaps in the application of treaties and customary international law. We would appreciate more in-depth analysis of this problem by the Commission.

Conclusion 9 - Subsidiary means for the determination of the peremptory character of norms of general international law

As regards paragraph 2 of this draft conclusion, the Commission should explain why the "works of expert bodies established by States or international organizations" are specifically mentioned and highlighted in this provision. In its Conclusions on identification of customary international law (2018), the Commission mentioned the "output of international bodies engaged in the codification and development of international law" only in its commentary to the general term of "the teachings of the most highly qualified publicists", without specifically including the "output" in the text of the conclusion itself.

Conclusion 14 - Rules of customary international law conflicting with a peremptory norm of general international law (*jus cogens*)

First sentence of paragraph 1 envisages a situation, which is quite difficult to imagine in practice. It presupposes that, in parallel with an existing peremptory norm of general international law (accepted and recognized by the international community of States as a whole), an antithetical process could take place giving rise to a conflicting norm of the general international law conditioned by existence of *"usus longaevus"* and *"opinio iuris"*.

[1] Mark E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties, Martinus Nijhoff Publishers, p. 670.

These two situations seem to be mutually exclusive and accordingly the hypothesis of paragraph 1 appears rather theoretical.

With respect to paragraph 2, we would appreciate it if the Commission could clarify, in the commentary, how the principle of separability, applicable in the context of the law of treaties (as reflected in conclusion 11, paragraph 2), is transposed and applied with respect to rules of customary international law. In the case of treaties, the principle of separability concerns the treaty (containing number of rules, norms or obligations) as a whole and is based on the presumption of the termination of the whole treaty, unless certain conditions of the separability are met. In the case of a rule of customary international law, the separability is applied with respect to a "rule" and without any specification of the conditions for such separability.

Conclusion 15 - Obligations created by unilateral acts of States conflicting with a peremptory norm of general international law (*jus cogens*)

As regards paragraph 2 of this draft conclusion, see commentary to draft conclusion 14, paragraph 2, *mutatis mutandis* (the application of the principle of separability with respect to an obligation created by unilateral acts of States).

Conclusion 16 - Obligations created by resolutions, decisions or other acts of international organizations conflicting with a peremptory norm of general international law (*jus cogens*)

See commentary to draft conclusion 14, paragraph 2, *mutatis mutandis* (the application of the principle of separability with respect to an obligation created by resolutions, decisions or other acts of international organizations).

Conclusion 21 - Procedural requirements

According to the commentary to the draft conclusion, suggested procedural requirements apply to treaties as well as to other international obligations deriving from other sources of international law. While the law of treaties contains detailed substantive and procedural rules on the invalidity and termination of treaties, other sources of international law lack such rules. It is not clear which cases of application of *jus cogens* norms in respect of other rules of international law (customary international law, unilateral acts of states, decisions and other acts of international organisations) would trigger the application of the procedure envisaged in draft conclusion 21. For example, would the application of a peremptory norm of general international law in the proceeding before national court, invalidating (according to the decision of the court in question) a rule of "ordinary" customary international law, call for the application of the procedure under conclusion 21? Furthermore, what should be the criteria for the determination of the "States concerned" which are to be notified of the claim concerning the application of a peremptory norm of general international law in respect of "other sources of international law"? (In case of treaties, the party invoking relevant claim under article 65 of the Vienna Convention on the Law of Treaties notifies all other parties of the treaty.) Further clarification of these issues seems necessary.

The Commission further states that not every aspect of the detailed procedure in the draft conclusion constitutes customary international law. The Commission should, in its commentary, further explain, emphasize and specify that relevant aspects and provisions of the draft conclusion represent only recommended practice, not customary international law.

Finally, the Czech Republic would like to point to the incorrect information contained in footnote 914 concerning the Czech Republic. Czechoslovakia acceded to the Vienna Convention on the Law of Treaties on 29 July 1987, with a reservation to article 66 (a) concerning the submission of disputes to the International Court of Justice. However, on 19 October 1990, Czechoslovakia notified the Secretary-General of its decision to withdraw the reservation made upon accession with respect to article 66 of the Convention. In 1993, the Czech Republic succeeded to the rights and obligation of former Czechoslovakia under the Convention. Therefore, the Czech Republic accepts the jurisdiction of the International Court of Justice under article 66 and should be deleted from the list of states seeking to exclude the application of this provision.

Conclusion 23 (Non-exhaustive list) and Annex

The Czech Republic maintains doubts concerning the inclusion of the list of examples of peremptory norms in the Annex. On the one hand, we appreciate and regard as useful the commentary to draft conclusion 23 containing comprehensive and detailed references to peremptory norms of general international law identified by the Commission in its previous work on other topics. On the other hand, the list contained in the draft Annex seems to be rather simplistic (the description of the relevant peremptory norms sometimes does not reflect differing formulations of the norm in the previous work of the Commission), unclear and undefined.

Therefore, we suggest to retain the text of the commentary to draft conclusion 23 and delete the draft Annex. (The list of peremptory norms identified by the Commission in its previous work on other topics could be included in one of the paragraphs of the commentary to draft conclusion 23.) The text of draft conclusion 23 should be amended accordingly.