Translated from French

Comments and observations of France on the draft conclusions on peremptory norms of general international law (*jus cogens*) adopted by the International Law Commission

Summary

France wishes to thank the International Law Commission for preparing and transmitting these draft conclusions and the commentaries thereto. France believes that the dialogue with the Commission on the topic of peremptory norms of general international law (*jus cogens*) is taking place in a context where public international law is, in general, faced with issues of coherence and articulation which may affect its clarity and intelligibility.

In such a context, the full objective of the dialogue that has been initiated between the Commission and States on *jus cogens* must be to consolidate and strengthen international law by making it clearer and more intelligible, while ensuring legal certainty for all its actors. As the United Nations organ charged with the codification and progressive development of international law, the Commission has an important leadership role to play in that regard.

It must be admitted that the manner in which *jus cogens* is invoked by certain courts, both domestic and international, reflects a development of the concept that goes beyond what was originally envisaged in articles 53 and 64 of the Vienna Convention on the Law of Treaties of 23 May 1969. The concept not only affects the foundations of the international legal order, from a theoretical point of view, but also has concrete and practical implications, particularly when it is taken up by national judges. It is therefore important, owing to the significant legal consequences that some intend to attach to *jus cogens*, that the concept be approached in a thorough, prudent and reasonable manner.

With regard to the observations and comments on the draft conclusions transmitted by the Commission, France wonders, first of all, how the Commission envisages the status that should be conferred on the text. Although the Commission states in paragraph (2) of its commentary to draft conclusion 1 that the draft conclusions are intended merely “to provide guidance”, they do indeed contain a number of prescriptive provisions.

In draft conclusion 5,[1] use of the term "bases", which generates a number of ambiguities, should be reconsidered. France has taken note of the explanations provided by the Commission in paragraph (3) of its commentary to the draft conclusion that the term "bases" is meant to capture the "range of ways that various sources of international law may give rise to the emergence of a peremptory norm of general international law". In the opinion of France, the idea developed here refers to the sources that confer on certain norms the character of *jus cogens*. Hence, it may be legally more appropriate to use the term "sources" – instead of "bases" – to refer to the process by which a norm of international law acquires the character of *jus cogens*.

Given the nature of *jus cogens* norms, it seems reasonable, in the view of France, to rule out the possibility of entities other than States (and, to a lesser extent, international organizations) having a role, even a subsidiary one, in the determination of such norms. Indeed, this is what the Commission suggested, and rightly so, in its commentary to the first paragraph of draft conclusion 7, when it noted that the paragraph "seeks to make clear that it is the position of States that is relevant and not that of other actors". Moreover, a qualitative logic reflecting, inter alia, the diversity of legal systems or geographical distribution should be added to the "quantitative" logic set out in draft conclusion 7. The practice of States that are particularly concerned is, a fortiori, fundamental and should be duly taken into account when considering whether the generality of a rule of *jus cogens* has been achieved.

The second paragraph of draft conclusion 9[2] may raise a number of doubts. It seems risky to classify expert bodies established by States or international organizations as a "subsidiary means" for the determination of *jus cogens* norms. While there is no doubt that the International Law Commission, given the mandate it derived from the General Assembly, its particularly rigorous working methods and the recognized quality of its experts, can lay claim to such classification (as it points out, rightly, in paragraph (8) of its commentary), the same is not necessarily true of all expert

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

1. Customary international law is the most common basis for peremptory norms of general international law *(jus cogens*).

2. Treaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*)".

2. **"Conclusion 9 - Subsidiary means for the determination of the peremptory character of norms of general international law**

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for determining the peremptory character of norms of general international law.

2. The works of expert bodies established by States or international organizations and the teachings of the most highly qualified publicists of the various nations may also serve as subsidiary means for determining the peremptory character of norms of general international law."

bodies. For example, both inside and outside the United Nations, certain expert bodies (which are not always composed of lawyers) adopt controversial findings, based on legal reasoning that is, to say the least, questionable. The question of the role, even if it is a subsidiary one, that these bodies might have in the determination of *jus cogens* should be approached with greater caution.

With regard to the consequences of *jus cogens* norms, the Commission states in the first paragraph of draft conclusion 14 that "a rule of customary international law does not come into existence if it conflicts with a peremptory norm of general international law (*jus cogens*)". However, the existence of a "conflict" necessarily implies the existence of the conflicting norms. If one of them does not exist, then there can be no conflict. It is indisputable that the existence of *jus cogens* has the effect of introducing a hierarchy of norms in international law. Yet, for a hierarchy to exist, there must be norms at the various levels of the legal order under consideration, and such norms must have a relationship of conformity from the lower level to the higher level. Reasoning in terms of the "non-existence" of conflicting norms, as the Commission suggests, means paradoxically erasing any idea of normative hierarchy.

France is concerned that draft conclusion 16[3] could be interpreted in such a way as to allow a State to unilaterally withdraw from a resolution of the Security Council, adopted under Chapter VII of the Charter of the United Nations, on the ground that, in its view, the resolution is inconsistent with a norm of *jus cogens*. Paragraphs (2) and (4) of the commentary to the draft conclusion are not reassuring and do not provide any guarantees in that regard.

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

A resolution, decision or other act of an international organization that would otherwise have binding effect does not create obligations under international law if and to the extent that they conflict with a peremptory norm of general international law (*jus cogens*)."

Draft conclusion 21[4] also gives rise to a number of reservations. The very presence of a "procedural" draft conclusion in the text transmitted by the Commission raises questions about the status of the text. Such a draft conclusion would undoubtedly have a place in a draft treaty instrument (as suggested by the Commission when it wrote, in its commentary to draft conclusion 21, "that detailed dispute resolution provisions are embedded in treaties and do not operate as a matter of customary international law"). However, in the view of France, the 23 draft conclusions and their annex should not be adopted in the form of an international treaty.

France urges that the indicative list of *jus cogens* norms be removed from the draft conclusions.

4. **"Conclusion 21 - Procedural requirements**

1. A State which invokes a peremptory norm of general international law (*jus cogens*) as a ground for the invalidity or termination of a rule of international law is to notify other States concerned of its claim. The notification is to be in writing and is to indicate the measure proposed to be taken with respect to the rule of international law in question.

2. If none of the other States concerned raises an objection within a period which, except in cases of special urgency, shall not be less than three months, the invoking State may carry out the measure which it has proposed.

3. If any State concerned raises an objection, then the States concerned are to seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. If no solution is reached within a period of twelve months, and the objecting State or States concerned offer to submit the matter to the International Court of Justice, the invoking State may not carry out the measure which it has proposed until the dispute is resolved.

5. This draft conclusion is without prejudice to the procedural requirements set forth in the Vienna Convention on the Law of Treaties, the relevant rules concerning the jurisdiction of the International Court of Justice, or other applicable dispute settlement provisions agreed by the States concerned."