Translated from French

Comments and observations by Switzerland on the topic "Peremptory norms of general international law (*jus cogens*)"

General comments

Switzerland takes note of the draft conclusions on peremptory norms of general international law (*jus cogens*)", which the International Law Commission has adopted on first reading and disseminated for comments and observations.

Switzerland thanks the Commission for its work and for preparing the draft conclusions. Switzerland supports the general objective pursued by the Commission through its draft conclusions and the commentaries thereto. It welcomes any clarification of the nature and content of *jus cogens* norms aimed at strengthening international law and enhancing legal certainty for the entire international community.

Specific comments

Draft conclusion 3

The essential characteristics associated with *jus cogens* norms, as set out in draft conclusion 3, reflect the Swiss understanding of the general nature of such norms. *Jus cogens* norms are so fundamental for the international community that they cannot be derogated from under any pretext. Switzerland has repeatedly affirmed their hierarchically superior character.[1] In that regard, *jus cogens* constitutes a material limit for treaties, pursuant to article 53 of the Vienna Convention on the Law of Treaties, and also for amendments to the Federal Constitution of the Swiss Confederation. Furthermore, Swiss practice accepts that *jus cogens* norms also take precedence over any conflicting rule arising from a resolution of an international organization.[2]

[1] Federal Council, "*La relation entre droit international et droit interne. Rapport du Conseil fédéral en réponse au postulat 07.3764 de la Commission des affaires juridiques du Conseil des Etats du 16 octobre 2007 et au postulat 08.3765 de la Commission des institutions politiques du Conseil national du 20 novembre 2008*", 5 March 2010, FF 2010 2067, p. 2086; Federal Council, message concerning the popular initiative "*Contre la construction de minarets*", 20 November 2013, FF 2013 8493, p. 8502.

[2] Federal Council, "*La relation entre droit international et droit interne. Rapport du Conseil fédéral en réponse au postulat 07.3764 de la Commission des affaires juridiques du Conseil des Etats du 16 octobre 2007 et au postulat 08.3765 de la Commission des institutions politiques du Conseil national du 20 novembre 2008*", 5 March 2010, FF 2010 2067, p. 2086.

Swiss jurisprudence has upheld universal applicability, or the fact that *jus cogens* norms are binding on all subjects of international law.[3]

While there is no doubt that *jus cogens* norms are intended to reflect and protect the fundamental values of the international community, the French version should perhaps refer to "*des valeurs fondamentales*" rather than "*les valeurs fondamentales*", in order to more closely reflect the English version.

Draft conclusion 5

With regard to draft conclusion 5, paragraph 2, Swiss practice accepts that a treaty provision stipulating that certain rights or obligations are non-derogable is an indicator of an absolute norm. Such indicators might include, for example, provisions prohibiting States parties from concluding contradictory treaties, prohibiting the suspension of certain treaty provisions owing to a state of emergency or prohibiting reservations.[4]

Draft conclusion 16

Draft conclusion 16, according to which decisions of international organizations that would otherwise have binding effect do not create obligations under international law that are in conflict with a peremptory norm, is in line with the Swiss understanding of *jus cogens*. This legal consequence follows naturally from the hierarchical superiority of *jus cogens* norms set out in draft conclusion 3. The relevant case law of the Federal Supreme Court of Switzerland confirms that decisions of international organizations are binding on Switzerland insofar as they do not violate peremptory norms of international law (*jus cogens*).[5]

Draft conclusion 17

Switzerland suggests that the French version of draft conclusion 17, paragraph 1, be reworded, since the literal translation, "*dans lesquelles tous les États ont un intérêt juridique*", does not seem appropriate in French. It should be made clear that States have a legal interest in respect for *jus cogens* norms, and that those norms give rise to obligations *erga omnes* by virtue of their fundamental and peremptory character.

[3] *Nada v. SECO*, ATF 133 II 450, recital 7.
[4] Ibid., recital 7.1.
[5] Ibid., recital 7; Judgment 1A.48/2007 (of the Federal Supreme Court) of 22 April 2008, recital 5.4.

Draft conclusion 23 and annex

Switzerland welcomes the creative solution found by the Special Rapporteur with regard to draft conclusion 23 and the annex to the draft conclusions. Switzerland appreciates the inclusion of a general provision, in draft conclusion 23, to the effect that the non-exhaustive list does not preclude a broader understanding of *jus cogens*. It wishes to reaffirm that the non-exhaustive list of peremptory norms of general international law (*jus cogens*) is useful. Switzerland proposes that the existence of abundant State practice relating to a broader understanding be mentioned in the commentary.

The norms included in the annex are of fundamental importance to the international community and to Switzerland.

Switzerland strongly supports the inclusion of the fundamental rules of international humanitarian law in the non-exhaustive list of *jus cogens* norms. A considerable number of rules of international humanitarian law are of a fundamental character. This position is supported by the jurisprudence of international[6] and national courts,[7] and is also reflected in the practice of Switzerland.[8]

[6] For example, in the *Kupreškić* case, the Trial Chamber of the International Tribunal for the Former Yugoslavia stated that "most norms of international humanitarian law", including in particular "those prohibiting war crimes … are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character" (*Prosecutor v. Zoran Kupreškić et al., Case No. IT-95-16-T, Judgment, Judicial Reports 2000*, para. 520). In the *Tadić* case, the Appeals Chamber of the Tribunal, when determining the applicable rules of international law, held that the Tribunal was able to apply any treaty which was "not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law" (International Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor v. Dušan Tadić et al., Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, *Judicial Reports 1994–1995*, para. 143). See also International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J Reports 1996*, para. 79 ("a great many rules of humanitarian law applicable in armed conflict ... constitute intransgressible principles of international customary law").

[7] In the *Agent Orange Product Liability Litigation* case, a United States district court held that the rules against torture, war crimes and genocide were *jus cogens* (United States District Court for the Eastern District of New York, Judgment of 28 March 2005, para. 136). Furthermore, the Supreme Court of Argentina has held that the prohibition of war crimes, and the non-applicability of any statute of limitations to such crimes, were *jus cogens* (Supreme Court of Argentina, *Arancibia Clavel, Enrique Lautaro s/ homicidio calificado y asociación ilícita y otros, Case No. 259, Judgment of 24 August 2004*). The Constitutional Court of Colombia has also held that rules of humanitarian law "are binding on States and all parties in armed conflict, even if they have not approved the respective treaties, because [of their] peremptoriness" (Judgment No. C-225/95 of the Constitutional Court of Colombia). The Federal Criminal Court of Switzerland has held that the prohibition of war crimes is part of *jus cogens* (Judgment TPF 2012 97 (BB 2011.140) of 25 July 2012, recitals 5.4.3 and 5.3.5).

[8] Judgment TPF 2012 97 (BB 2011.140) of 25 July 2012, recitals 5.4.3 and 5.3.5; Federal Council, "*Clarifier la relation entre le droit international et le droit interne – Rapport du Conseil fédéral en exécution du postulat 13.3805*", 12 June 2015, p. 13; Federal Council, message concerning the initiative "*Pour le renvoi effectif des étrangers criminels (initiative de mise en œuvre)*", 20 November 2013, FF 2013 8493, p. 8502; Federal Council, "*Rapport additionnel du Conseil fédéral au rapport du 5 mars 2010 sur la relation entre droit international et droit interne*", 30 March 2011, p. 3412; Federal Council, "*La relation entre droit international et droit interne. Rapport du Conseil fédéral en réponse au postulat 07.3764 de la Commission des affaires juridiques du Conseil des Etats du 16 octobre 2007 et au postulat 08.3765 de la Commission des institutions politiques du Conseil national du 20 novembre 2008*", 5 March 2010, FF 2010 2067, pp. 2086 and 2116; Federal Council, message concerning the popular initiative "*Contre la construction de minarets*", 27 August 2008, FF

There is a difference in the terminology used in the French version of the annex ("*règles fondamentales du droit international humanitaire*" and the English version ("basic rules of international humanitarian law"). Switzerland is of the view that the wording in the English version is too restrictive and encourages the Commission to address the difference by amending the English to read "fundamental rules of international humanitarian law". This wording is the most closely aligned with the jurisprudence of the International Court of Justice, which the Commission uses as the grounds for defining the fundamental rules of international humanitarian law as peremptory norms of general international law.[9]

Switzerland has a certain amount of practice on *jus cogens*. The mandatory provisions of international law limit the revision of the Federal Constitution, as expressly provided for in article 139, paragraph 3, article 193, paragraph 4, and article 194, paragraph 2 of the Constitution.[10] It should be noted that the concept of "mandatory provisions of international law" in Swiss national law is broader than the concept enshrined in article 53 of the Vienna Convention on the Law of Treaties. The Swiss understanding encompasses also other norms of international law, including certain guarantees enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms (article 2, paragraph 1, article 3, article 4, paragraph 1 and article 7 of the Convention) and, in some cases, guarantees of the International Covenant on Civil and Political Rights that must be respected during states of emergency.[11] Consequently, the Swiss understanding of *jus cogens* goes beyond the list in the annex to the draft conclusions.

Switzerland is of the view that, at the very least, the core human rights, with the status of customary law, are part of *jus cogens*. Switzerland has also considered the following principles to be

2008 6923, pp. 6929–2930; Federal Council, message 08.034, concerning the amendment of federal laws with a view to the implementation of the Rome Statute of the International Criminal Court, 23 April 2008, FF 2008 3461, p. 3474; Federal Council, message concerning a new federal constitution, 20 November 1996, FF 1997 I 1, pp. 369 and 454.

[9] See paragraph (5) of the commentary to article 40 of the articles on responsibility of States for internationally wrongful acts, referring to *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, *I.C.J Reports 1996*, p. 157, para. 79. In its advisory opinion, the Court States that: "It is undoubtedly because **a great many rules of humanitarian law** applicable in armed conflict **are so fundamental** to the respect of the human person and 'elementary considerations of humanity' as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case (*I.C.J. Reports 1949*, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further **these fundamental rules** are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (emphasis added).

[10] Federal Constitution of the Swiss Confederation, RS 101.

[11] Federal Council, "*La relation entre droit international et droit interne. Rapport du Conseil fédéral en réponse au postulat 07.3764 de la Commission des affaires juridiques du Conseil des Etats du 16 octobre 2007 et au postulat 08.3765 de la Commission des institutions politiques du Conseil national du 20 novembre 2008*", 5 March 2010, FF 2010 2067, p. 2115 ff; Federal Council, message concerning the initiative "*Pour le renvoi effectif des étrangers criminels (initiative de mise en œuvre)*", 20 November 2013, FF 2013 8493, p. 8503 ff.

part of *jus cogens*:[12]

- Principle of the sovereign equality of States
- Prohibition of collective punishment[13]
- Principle of personal and individual criminal responsibility
- Prohibition of the use of force (Article 2, paragraph 4, of the Charter of the United Nations of 26 June 1945)
- Principle of non-refoulement
- Protection against the arbitrary infliction of death[14]
- Protection against arbitrary detention
- Principle of *nulla poena sine lege*

Switzerland therefore encourages the Commission to analyse State practice carefully.

[12] Federal Council, message concerning the popular initiative "*Contre la construction de minarets*", 27 August 2008, FF 2008 6923, p. 6929 ff; Federal Council, message concerning a new federal constitution, 20 November 1996, FF 1997 I, p. 369. Federal Council, "*La relation entre droit international et droit interne. Rapport du Conseil fédéral en réponse au postulat 07.3764 de la Commission des affaires juridiques du Conseil des Etats du 16 octobre 2007 et au postulat 08.3765 de la Commission des institutions politiques du Conseil national du 20 novembre 2008*", 5 March 2010, FF 2010 2067, p. 2115 ff; Federal Council, message concerning the initiative "*Pour le renvoi effectif des étrangers criminels (initiative de mise en œuvre)*", 20 November 2013, FF 2013 8493, p. 8501 ff.

[13] United Nations Human Rights Committee, general comment No. 29 (on article 4 of the International Covenant on Civil and Political Rights), para. 11.

[14] General comment No. 3 on the African Charter on Human and Peoples' Rights: The right to life (article 4), para. 5.