

Translated from Spanish

Mexico City, 31 January 2017

Contribution of Mexico to the work of the International Law Commission on the topic “*jus cogens*”

The present document constitutes Mexico’s response to the following request from the International Law Commission concerning the topic “*jus cogens*”:

“The Commission would appreciate being provided by States with information relating to their practice on the nature of *jus cogens*, the criteria for its formation and the consequences flowing therefrom as expressed in:

- (a) official statements, including official statement before legislatures, courts and international organizations; and
- (b) decisions of national and regional courts and tribunals, including quasi-judicial bodies.

I. Statements by Mexico in multilateral forums

(a) The following is a transcript of the statement delivered by Mexico at the United Nations Conference on the Law of Treaties, held in 1968 and 1969, on the article concerning *jus cogens*.

“5. Mr. SUÁREZ (Mexico), introducing his delegation's amendment (A/CONF.39/C.1/L.266), said that it was more one of form than of substance and his delegation would support the International Law Commission's article 50.

6. It was not easy to formulate with all due precision a rule on the subject of *jus cogens*. The text as it stood involved a *petitio principii* when it stated that States were precluded from validly concluding a treaty in breach of a norm “from which no derogation is permitted”, in other words a norm that the parties could not modify by treaty. That remark was not intended as a criticism of the Commission; perhaps it was not possible to arrive at a better wording. Although no criterion was laid down in article 50 for the determination of the substantive norms which possessed the character of *jus cogens* – the matter being left to

State practice and to the case law of international courts – the character of those norms was beyond doubt.

7. In municipal law, individuals could not contract out of legislative provisions which were a matter of public policy. In international law, the earliest writers, including the great Spanish forerunners and Grotius, had been deeply imbued with the principles of the then prevailing natural law. They had therefore postulated the existence of principles that were derived from reason, principles which were of absolute and permanent validity and from which human compacts could not derogate. Without attempting to formulate a strict definition suitable for inclusion in a treaty, he would suggest that the rules of *jus cogens* were those rules which derived from principles that the legal conscience of mankind deemed absolutely essential to coexistence in the international community at a given stage of its historical development.

8. There had always been principles of *jus cogens*. Although few in number at the time when inter-State obligations were equally few, they had been increasing since and would continue to increase with the expansion of human, economic, social and political relations. The norms of *jus cogens* were variable in content and new ones were bound to emerge in the future, for which provision was made in article 61. Others might cease in due course to have the character of *jus cogens*, as had happened in Europe in regard to the doctrine of religious unity and the law of the feudal system.

9. In view of the varying character of the rules of *jus cogens* it was essential to stress that the provisions of articles 50 and 61 did not have retroactive effect. The emergence of a new rule of *jus cogens* would preclude the conclusion in the future of any treaty in conflict with it; the effects already derived from earlier treaties, however, were not affected, in accordance with the general principle of non-retroactivity recognized in article 24, which the Committee had already approved. In that connexion, the provisions of article 67, paragraph 2 (b), were also relevant.

10. The purpose of the Mexican amendment (A/CONF.39/C.1/L.266) was simply to introduce into article 50 an express provision embodying the non-retroactivity rule, which had been recognized by the International Law Commission. He would not press for a vote on it, but would merely ask that it be referred to the Drafting Committee.”¹

¹ Official Records of the United Nations Conference on the Law of Treaties, first session, Vienna, 26 March to 24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole (A/CONF.39/11), 52nd meeting, 4 May 1968, paras. 5-10.

(b) In the Sixth Committee debate on the report of the International Law Commission at the seventy-first session of the General Assembly (2016), Mexico stated the following:

“Mexico wishes to thank the Special Rapporteur, Mr. Dire Tladi, for his excellent work over the past year. His first report provides a useful analysis of the historical evolution of the concept of *jus cogens*, its legal nature and the form and content of the Commission's future work on the topic. We agree that, given the nature of the topic, the best way to address the matter is in the form of conclusions and commentary thereto.

We consider it appropriate for such conclusions to illustrate the nature, scope, formation and, above all, the legal effects of *jus cogens* norms. Given the peremptory nature of such norms, we also agree that it is important for the conclusions to take into account State practice, the decisions of international, regional and national tribunals and doctrine

The inclusion of an indicative list of *jus cogens* norms in the draft text, provided it is not exhaustive, might be a very useful tool for identifying the content of *jus cogens*.

Such an undertaking should be carried out carefully to avoid the list being considered a *numerus clausus* and to ensure that it reflected the various sources of international law, including court rulings, State practice and doctrine. This takes on particular relevance in respect of norms that comply with the elements of *jus cogens* but have not yet been the subject of court proceedings.

We agree with the Special Rapporteur that if an illustrative list is not drawn up, the Commission will need to provide examples of *jus cogens* norms in the commentary in order to provide some guidance. In that case, the Commission must clearly identify the sources of its examples.

Mexico considers that the draft conclusions should avoid deviating from article 53 of the Vienna Convention on the Law of Treaties; the language of draft conclusion 3, paragraph 1, should therefore be reconsidered.

With regard to future work on the topic, the Special Rapporteur should address the sources of *jus cogens*, their relationship with *erga omnes* obligations and the non-derogable nature of their legal consequences, especially in cases of non-compliance or violations. We suggest that a study should be carried out on the emergence of new norms of *jus cogens* that

derogate from earlier ones and their invalidating effects, including the question of who determines the existence of conflicting norms.

Lastly, we hope that the treatment of the topic will be in harmony with other topics currently under consideration.”

II. Statements by Mexico before international courts

(a) In June 1995 Mexico submitted written comments to the International Court of Justice, in the context of the request for an advisory opinion on the legality of the threat or use of nuclear weapons. In its submission, Mexico affirmed the *jus cogens* nature of the norms applicable to armed conflicts, to the maintenance of international peace and security and to the upholding of humanitarian principles, as follows:

“7. Despite the fact that international law has been addressing the issue of nuclear weapons for some time, the establishment of an express prohibition on the use of such weapons has yet to meet with success. As will be demonstrated throughout this document, the absence of an express prohibition has proved irrelevant and, consequently, turn out to be insufficient to generate any presumption of the legality of the use or threat of the use of nuclear weapons. The norms applicable to armed conflicts and to the maintenance of international peace and security, which are of a legally binding nature for all the States (*jus cogens*), are more than sufficient to state without question that the use or threat of the use of nuclear weapons is under no circumstance permitted by international law.

[...]

78. In light of the aforementioned considerations, in the opinion of the Government of Mexico the general principles codified in the Regulations annexed to the Hague Convention IV, the 1977 Protocol Additional to the Geneva Conventions of 1949 and in the Preamble of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects of 1980, are peremptory norms of general international law (*jus cogens*) as established by the Vienna Convention on the Law of Treaties of 1969.

Conclusions

79. The above paragraphs lead to the conclusion that in accordance with international law relating to the maintenance of international peace and security, to armed conflicts and to other obligations subscribed by the States on disarmament issues, the threat or use of nuclear weapons is not permitted by international law under any circumstances. The scope of the obligations that constitute the grounds for this conclusion make it evident that no circumstance whatsoever would justify the threat or use of nuclear weapons.

80. The body of international law on which such a prohibition is based is made up of conventional and customary norms, including peremptory norms of general international law by virtue of which the threat or the use of weapons of mass destruction could not be legitimized. On the contrary, the treaties and resolutions of United Nations organs reinforced by the current status of applicability of norms on the maintenance of international peace and security, point to the ultimate goal of total elimination of all nuclear weapons.”²

(b) Mexico also referred to *jus cogens* norms in its 2002 request for an advisory opinion from the Inter-American Court of Human Rights concerning the juridical condition and rights of undocumented migrants:

“In the context of the principle of equality before the law embodied in article II of the American Declaration, article 24 of the American Convention, article 7 of the Universal Declaration and article 26 of the [International] Covenant [of Civil and Political Rights ...] [...]

4) What is the nature today of the principle of non-discrimination and the right to equal and effective protection of the law in the hierarchy of norms established by general international law and, in this context, can they be considered to be the expression of norms of *ius cogens*? If the answer to the second question is affirmative, what are the legal effects for the OAS Member States, individually and collectively, in the context of the general obligation to respect and ensure, pursuant to article 2, paragraph 1, of the [International] Covenant [on Civil and Political

² Note verbale dated 19 June 1995 from the Embassy of Mexico in the Netherlands to the International Court of Justice, paras. 7 and 78-80.

Rights], compliance with the human rights referred to in articles 3 (l) and 17 of the OAS Charter?”³

III. Decisions of regional courts

In response to a request from Mexico, the Inter-American Court of Human Rights issued advisory opinion OC-18/03 of 17 September 2003 on the juridical condition and rights of undocumented migrants, in which it ruled that the fundamental principle of equality and non-discrimination fell within the sphere of *jus cogens*:

“98. Originally, the concept of *jus cogens* was linked specifically to the law of treaties. As *jus cogens* is formulated in article 53 of the Vienna Convention on the Law of Treaties, “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”. Likewise, article 64 of the Convention refers to *jus cogens superviniente*, when it indicates that “[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.” *Jus cogens* has been developed by international case law and legal writings.

99. In its development and by its definition, *jus cogens* is not limited to treaty law. The sphere of *jus cogens* has expanded to encompass general international law, including all legal acts. *Jus cogens* has also emerged in the law of the international responsibility of States and, finally, has had an influence on the basic principles of the international legal order.

100. In particular, when referring to the obligation to respect and ensure human rights, regardless of which of those rights are recognized by each State in domestic or international norms, the Court considers it clear that all States, as members of the international community, must comply with these obligations without any discrimination; this is intrinsically related to the right to equal protection before the law, which, in turn, derives “directly from the oneness of the human family and is linked to the essential dignity of the individual.” The principle of equality before the law and non-discrimination permeates every act of the powers of the State, in all their manifestations, related to respecting and ensuring human rights. Indeed, this principle may be considered peremptory under general international law, inasmuch as it applies to all States, whether or not they are

³ Inter-American Court of Human Rights, advisory opinion OC-18/03 of 17 September 2003 on the juridical condition and rights of undocumented migrants, para. 4.

party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals. This implies that the State, both internationally and in its domestic legal system, and by means of the acts of any of its powers or of third parties who act under its tolerance, acquiescence or negligence, cannot behave in a way that is contrary to the principle of equality and non-discrimination, to the detriment of a determined group of persons.”⁴

IV. Decisions of national courts

(a) The following findings by the Supreme Court of Justice recognize the *jus cogens* character of the prohibition of torture.⁵

i. In 2013 the Supreme Court of Justice issued the following opinions:

1. ***"Torture constitutes a special, more serious category that gives rise to an obligation of strict scrutiny in accordance with national and international standards.***

*The prohibition of torture as an absolute right is recognized and protected as jus cogens in line with the constitutional and treaty-based framework. In that regard, article 22, paragraph 1, of the Political Constitution of the United Mexican States prohibits torture and article 29 of the Federal Constitution emphasizes that the prohibition of torture and the protection of personal integrity are rights that may not be suspended or restricted under any circumstances, including in the event of invasion, serious disturbance of public order or any other circumstance that places the public in grave danger or in a situation of conflict. The protection of the legal right to personal integrity is the primary objective of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, as also envisaged in article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights. The obligations assumed by Mexico under the Inter-American Convention to Prevent and Punish Torture include the obligations to criminalize torture, investigate all claims or allegations of torture and exclude any evidence obtained through torture. Torture therefore constitutes a special, more serious category that requires careful analysis in accordance with national and international standards with regard to its impact both as a human rights violation and as a crime.*⁶

⁴ Ibid. paras. 97-101.

⁵ Some local courts have held that the prohibition of torture has the character of *jus cogens*: see ninth district court of the state of Guanajuato, *amparo indirecto* 815/2012, 11 September 2013; and ninth district court of the state of Guanajuato, case No. 24/2014, 27 October 2015.

⁶ Supreme Court of Justice, *amparo en revisión* No. 703/2012, 6 November 2013, separate opinion, tenth session, court of the first instance, chamber, Gaceta del Semanario Judicial de la Federación (Weekly Judicial Gazette), vol. I, 23 May 2014, opinion 1a, CCV/2014 (10a), p. 561.

2. ***"The prohibition of torture, including the meaning and scope of that prohibition, constitutes an absolute right; the consequences and effects of torture stem from its impact both as a human rights violation and as a crime.***

*In accordance with the constitutional and treaty-based framework, the prohibition of torture is recognized and protected as an absolute right which falls within the sphere of international jus cogens; the consequences and effects of torture have an impact in two areas, both as a human rights violation and as a crime. In this regard, the first chamber of the Supreme Court of Justice has held that: 1. Persons who claim to have been victims of torture have the right to prompt action by the authorities to ensure that their claim is investigated and, where appropriate, prosecuted; in this regard, the authorities have an obligation to investigate torture and, where appropriate, prosecute it as a crime, and to conduct the necessary investigations with all due diligence to determine responsibility. 2. The obligation to protect this right is incumbent upon all the national authorities, not only those which are called upon to investigate or try such cases. 3. Bearing in mind the pro homine principle, for the purposes of this right, any type of report or information relating to torture which is brought to the attention of any authorities in the course of their duties must be treated as a complaint about an act of torture. 4. When a person has been subjected to coercion as a means of breaking down resistance, evidence obtained in such manner must be excluded.*⁷

- ii. In judgement No. 4530/2014 of 30 September 2015, the Supreme Court of Justice ruled as follows:

"Matters which form part of the constitutional order governed by constitutional interpretation in our country, including the prohibition of torture, involving the protection of personal integrity, as a human right, cannot be suspended or restricted under any circumstances. The right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment is therefore an absolute right with the character of jus cogens. Accordingly, the authorities have an obligation to prevent, investigate and punish torture. [...]

It is important to note that pursuant to article 7 of the Rome Statute of the International Criminal Court, a provision which is in force in the Mexican legal system, torture is an offence or a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. This even more clearly highlights the significance of torture as an act violating human rights, the practice of which is rejected by the international community. It is therefore clear that, in line with the constitutional and treaty-based framework, the prohibition of torture is recognized and protected as an absolute right which falls within the sphere of international jus cogens. [...]

In this regard, the Inter-American Court of Human rights has emphasized that torture and cruel, inhuman or degrading punishment or treatment are strictly prohibited under international human rights law. The

⁷ Ibid. page 562.

prohibition of torture and cruel, inhuman or degrading punishment or treatment is therefore absolute and non-derogable, even under the most difficult circumstances, such as war, threat of war, combating terrorism and other crimes, martial law or state of emergency, civil unrest or conflict, suspension of constitutional guarantees, internal political instability or other public emergencies or disasters. It is thus a prohibition which falls within the sphere of international jus cogens. This interpretation is in line with universal and regional treaties establishing that prohibition and the non-derogable right not to be subjected to any form of torture. Numerous international instruments enshrine this right and reaffirm the same prohibition, including under international humanitarian law. [...]

That is why international law encompasses various treaty and declaratory instruments which absolutely prohibit the practice of torture and other cruel, inhuman or degrading treatment or punishment, owing to their gravity and ability to degrade individual autonomy and human dignity. This prohibition has come to be considered as a norm of jus cogens, an absolute right which by its very nature is non-negotiable. [...]

The foregoing considerations are valid because, in line with the constitutional and treaty-based framework, the prohibition of torture is recognized and protected as an absolute right that falls within the sphere of international jus cogens. The consequences and effects of torture therefore have an impact in two areas: both as a human rights violation and as a crime. ”⁸

(b) At the federal level, the collegiate circuit courts recognized in 2016 that the guarantee of free assistance by a translator or interpreter for persons who do not understand or speak the language of a court constitutes a norm of *jus cogens*. The relevant opinion reads as follows:

"Due process for migrants in labour cases. The minimum guarantees entail the obligation of the labour court to appoint a translator or interpreter for an employer or worker who does not understand or speak Spanish.

The human right to due process has been reinforced by legal interpretations at both the local and the international levels, and is now understood from two angles, one procedural and the other substantive: the first refers to the essential procedural formalities and the second, to certain constitutionally protected rights, as the appropriate means to guarantee the substantive rights recognized under the Constitution. Since the purpose of due process is to achieve a just decision, a minimum set of requirements must be observed without fail in all court proceedings, in order to ensure the full and effective access of the accused to legal protection. These minimum guarantees have an impact on the determination of individual rights and obligations in all legal matters, not least those referred to in article 8, paragraph 2 of the Inter-American Convention on Human Rights, and include the right to be assisted, free of charge, by a translator or interpreter, if the person does not understand or speak the language of the court; they are not exclusive to the criminal sphere, but are also relevant to labour, civil, fiscal and all

⁸ Supreme Court of Justice, *amparo directo en revisión* 4530/2014, 30 September 2015, pp. 25, 27, 29, 36 and 43. This view has been reiterated in other rulings (3669/2014, 5880/2014, 4578/2014 y 1088/2015).

other spheres. Accordingly, recognition of the fundamental rights of migrants entails the corresponding obligation of the State to ensure the necessary guarantees for their protection, including jus cogens, as an interpretive norm of international law or minimum guarantee of a treaty-based standard which enables such persons (migrants) to understand fully the court proceedings. Since this obligation applies to all proceedings, before any State authority, including labour courts, the courts are obligated to appoint a translator or interpreter for an employer or worker who does not speak or understand Spanish and is involved directly in any proceeding, such as hearing of evidence. That is the only way to guarantee the protection of the human right to due process in accordance with articles 6, 11, 12 and 14 of the Migration Act. ⁹

⁹Second collegiate labour court of the 16th circuit, *amparo directo* 133/2016, 16 June 2016, 10th session, separate opinión, Gaceta del Semanario Judicial de la Federación (Weekly Judicial Gazette), book 36, 11 November 2016, vol. IV, subject(s): constitutional, labour, opinion: XVI.2o.T.4 L (10a.), p. 2359