



Comments of Portugal to the Draft Conclusions on Peremptory Norms of General International Law (*jus cogens*) adopted on first reading by the International Law Commission

Portugal welcomes the opportunity to present its written comments and observations to the twenty-three Draft Conclusions (and Draft Annex) on Peremptory Norms of General International Law (*jus cogens*), and commentaries thereto, adopted, on first reading, by the International Law Commission (hereinafter, "the Commission") at its Seventy-First session (2019).

Portugal salutes and renews its tribute to the Commission and the Special Rapporteur Mr. Dire Tladi, for their work on this topic. The discussion on *jus cogens* contributes to upholding the stability of the international legal system. Adding clarity to the subject is instrumental in helping States to better identify peremptory norms of general international law and comply with them.

Portugal values this set of Draft Conclusions and Draft Annex and underlines the relevance of *jus cogens* and its central place in the general international legal architecture.

Portugal is pleased that the work of the Special Rapporteur and of the Commission on this topic so far is not reduced to a simple repetition of what is provided under Article 53 of the 1969 Vienna Convention on the Law of Treaties (VCLT) nor to the traditional discussions on *jus cogens*.

Draft Conclusion 2 [Definition of a peremptory norm of general international law (*jus cogens*)] nearly replicates the definition of *jus cogens* contained in the VCLT and accurately enumerates the cumulative criteria for a norm to be granted the status of a peremptory norm of general international law.



Consequently, Portugal is of the opinion that the references in **Draft Conclusion 3 [General nature of peremptory norms of general international law (*jus cogens*)]** as them being norms that (i) "reflect and protect fundamental values of the international community", (ii) are "hierarchically superior to other rules of international law" and (iii) are "universally applicable" do not raise confusion nor generate new criteria for identifying a norm as *jus cogens*. Instead, Portugal supports those references as a clarification of the general nature of *jus cogens* and as characteristics usually associated with these norms.

Considering the characteristic of *jus cogens* as universally applicable norms and the criteria of the acceptance and recognition by the international community of States as a whole for a norm to be deemed *jus cogens* – see **Draft Conclusion 7 (International community of States as a whole)** –, Portugal takes this opportunity to recall its concerns regarding the **identification of regional *jus cogens*** and the need for a careful approach. Portugal argues that discussions on regional *jus cogens* should not impair the integrity of peremptory norms of general international law as norms that are universally recognizable and applicable. Such discussions should also not lead to a confusion between the concepts of *jus cogens* and of regional customary law.

Therefore, Portugal is pleased that the Commission has reached a compromise solution regarding regional *jus cogens*. As the Special Rapporteur himself has concluded¹, the notion of regional *jus cogens* does not find support in the practice of States. Thus, Portugal supports the decision of not including a draft conclusion on this matter and relying on the commentaries of the Commission.

Regarding **Draft Conclusion 23 (Non-exhaustive list) and the Draft Annex**, as oftenly noted at the Sixth Committee, Portugal would support an

¹ Cf. Paragraph 47 (p. 21) in Mr. Tladi's Fourth Report on Peremptory Norms of General International Law.



illustrative list of *jus cogens* norms, as was the proposal of the Special Rapporteur in its Fourth Report² – and as the Commission had considered to do at a previous occasion, during its adoption of the 1966 Draft Articles on the Law of Treaties.

Still, Portugal salutes the effort made by the Commission, in Draft Conclusion 23, to provide the non-exhaustive list contained in the annex to the Draft Conclusions and looks forward for such a list to remain in final outcome of the work of the Commission in this topic.

Although Portugal understands the reasons behind the pragmatic method used for constituting the non-exhaustive list – *i.e.* referring to some of the norms that have been referred to as *jus cogens* by the Commission in the past –, it would appreciate a concise study as to the current status as *jus cogens* of the norms contained therewith. Portugal suggests that such an assessment is yet conducted by the Commission before the Draft Annex is finalised.

Furthermore, the non-exhaustive list seems too condensed, as there are other widely recognized *jus cogens* norms that could have been listed. Indeed, and in support of the progressive development of International Law, Portugal regrets that the list is not more ambitious – neither in number nor content-wise – regarding norms identified as *jus cogens* by the Commission during its consideration of other topics (for instance, those on the Law of Treaties and on the Responsibility of States, or the prohibition of piracy). In this regard, Portugal would welcome, for example, a reference to peremptory environmental norms, such as the obligation to protect the environment, as *jus cogens*.

² Cf. Paragraph 137 (p. 63) in Mr. Tladi's Fourth Report on Peremptory Norms of General International Law.



To conclude, Portugal reiterates its sincere appreciation for the work of the Commission so far on the topic of Peremptory Norms of General International Law (*jus cogens*) and looks forward to a fruitful outcome by the Commission.