



NOTE. 068 /2021

The Permanent Mission of the Republic of South Africa to the United Nations, presents its compliments to the Secretary-General of the United Nations and has the honour to refer its comments to the draft conclusions on peremptory norms of general international law (jus cogens) adopted, on first reading, by the International Law Commission at its seventy-first session.

The Permanent Mission of the Republic of South Africa to the United Nations avails itself of this opportunity to renew to the Secretary-General of the United Nations the assurances of its highest consideration.



New York, 10 May 2021

The Secretary-General of the United Nations



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The Permanent Mission of the Republic of South Africa to the United Nations presents its compliments to the Secretary-General of the United Nations.

In accordance with paragraph 54 of the Report of the International Law Commission (ILC) at its 71st session (A/74/10), the Republic of South Africa appreciates the opportunity to submit its comments and observations on the ILC Draft Conclusions on peremptory norms of international law (*jus cogens*), adopted on first reading by the ILC.

We wish to pay special tribute to the Special Rapporteur, Mr Dire Tladi, for the constructive way in which he led the Commission towards the successful adoption of the first reading text on this most difficult topic. Special words of congratulations are also due to the Chairperson of the Drafting Committee for the 71st Session, Mr Grossman Guiloff as well as previous Chairs of the Drafting Committee, Messrs Sturma, Rajput and Jalloh, as well as to the ILC as a whole, for their work on the topic of *jus cogens*.

South Africa is particularly pleased with the Commission's work on *jus cogens*, and we are convinced that the strengthening of *jus cogens* is of critical importance in light of the many challenges posed to the upholding of the Rule-of-Law internationally. The Commission has managed to deliver a well-balanced text of Draft Conclusions, supported by practice and judicial decisions of international courts and tribunals. While the Draft Conclusions avoid the philosophical debates of whether *jus cogens* is based on natural law or positive law, they strike a good balance between the values underpinning *jus cogens* and the need for some sort of recognition and acceptance by the international community. We generally support the Draft Conclusions.

Draft Conclusion 3

We believe this is a very important draft conclusion which should be retained. We do think the commentaries can be strengthened to indicate more clearly the relationship between criteria and the characteristics. We agree that the characteristics can provide extra support but it should perhaps be made clear that this does not take away the need to show acceptance and recognition.

Draft Conclusion 5

In our view treaty rules do not constitute norms of general international law. However, as noted in the commentaries, they can be reflect norms of general international law. This distinction appears somewhat lost in the Draft Conclusion and commentaries thereto.

Draft Conclusion 8

We understand the Commission's need to follow closely on its work on Customary International Law. Yet, the exercise of determining acceptance and recognition is different from the exercising of determining practice for the purposes of customary international law. This distinction, which is made clearly in Draft Conclusion 6 and its commentaries, seems lost here. We suggest that the commentary make more clear that what is being sought is not the practice of States, but the collective acceptance and recognition which, though found in the same materials as those for practice, is different.

Draft Conclusion 11

We agree with the views of some members of the Commission, notably former member and now Judge of the ICJ Georg Nolte, that the Commission has stuck too closely to the Vienna Convention. There is no reason, whether in practice or in logic, not to provide for separability where it is possible, even in relation to invalidity at the time of the conclusion of the treaty.

Draft Conclusion 13

We believe the Commission should reconsider this draft conclusion. In our view reservations in conflict with peremptory norms should be declared invalid. We understand the reasoning of the Commission, and the fear that this may be read to impose the jurisdiction of a tribunal without a State's consent, but we are of the view that this can be addressed by a without prejudice clause.

Draft Conclusion 16

In our view, the decisions/resolutions of the UNSC should be explicitly mentioned in the text of Draft Conclusion 16. As noted by some members of the Commission, the UNSC is particularly relevant here because of its decisions also enjoy a measure of hierarchical superiority. It is thus relevant to point out that the priority enjoyed by its decisions by virtue of Art 103 of the Charter is limited by jus cogens.

We fully understand the fear that this might lead to undermining the UNSC. For that reason we would suggest that a clause be inserted noting that the application of this rule is subject to the dispute settlement procedure in Draft Conclusion 21. This point might also be further emphasised in the commentary.

Draft Conclusion 23

Lastly, although limited, we support the contents of this Draft Conclusion 23. We understand the need for an expanded list but also understand, as the Commission has stated, that this would change the nature of the project.

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The Secretary-General to the United Nations



10 May 2021