



Statement of Portugal

at the 74th Session of Sixth Committee of the General Assembly

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Agenda Item 79

**Report of the International Law Commission on the work of its
Seventy-First Session – Cluster I**

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Mr. Chairman,

Since I am taking the floor for the first time, let me congratulate you on your election as Chair of the Sixth Committee.

Allow me also to thank the Chairman of the International Law Commission, Mr. Šturma for presenting the Report on the work carried out by the Commission during its seventy-first session.

In today's statement, I will begin by making some general comments on the Commission's work. I will then address the topics 'Crimes against Humanity' and '*Jus Cogens*'. The other topics of the Report will be addressed in the coming days, according to the clusters proposed.

Introduction and other issues (Chapters I-III and XI of the Report)

Mr. Chairman,

Portugal has followed the works and outputs of the seventy-first session of the International Law Commission with much interest. We would like to note in particular the adoption on second reading of the draft Articles on 'Crimes against Humanity', as well as the adoption on first reading of the draft Conclusions on '*Jus Cogens*' and of the draft Principles on 'Protection of the Environment in Relation to Armed Conflicts'.

We would also like to thank the oral report of Mr. Gómez Robledo on the topic 'Provisional Application of Treaties'. Portugal will submit its comments to the draft model clauses as requested.

My delegation further supports the inclusion in the Commission's long-term programme of work of the topic "Reparation to Individuals for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law". We feel that this will be another step in advancing the status of the individual under international law and for the progressive development of a humanistic perspective of International Law.

Mr. Chairman,

The Commission also decided to include in its long-term programme of work the topic "Prevention and Repression of Piracy and Armed Robbery at Sea".

Time and again History has proved that piracy and armed robbery at sea are crimes of opportunity and that they will proliferate whenever and wherever possible. Moreover, they also show a deep connection to other associated criminal activities and networks, including international terrorism, human trafficking, and cultural and environmental criminality. *Preventing these illicit acts and responding to them requires legal solutions, within an integrated strategy based on Human Rights and capacity-building.*

For a number of years now, my country has been actively engaged in legal issues relating to piracy. Portugal is the current Chair for the Maritime Working Group of the Montreux Document Forum, as well as the co-chair, with Mauritius, of the Piracy Legal Forum of the Contact Group on Piracy off the Coast of Somalia. In these fora, Portugal has advocated for a holistic and sustainable approach, focusing not only on the repression of these illicit acts, but also on their prevention. We believe that the root causes of piracy and armed robbery at sea are linked to social and economic exclusion and to difficulties on upholding the rule of Law at the domestic and international levels.

Portugal has always supported the idea of reflecting on legal issues applicable or relating to piracy and armed robbery at sea, from the Law of the Sea to International Human Rights Law, International Humanitarian Law, in addition to matters such as the detention, prosecution, extradition and transfer of sentenced pirates or armed robbers.

In this sense, we find it useful that the International Law Commission has decided to include this topic in its long-term programme of work. We think that the discussions at the Commission could be important for clarifying provisions in the UNCLOS that are applicable to piracy at sea as well as look into this criminal activity not only from a repression perspective but also through a prevention angle.

Nevertheless, Annex C of the report does not introduce many details on how the work of the Commission will develop with regards to the prevention of piracy at sea – which would be of particular interest for Portugal. In fact, the Annex seems to focus on deterrence measures as primary preventive measures against piracy and armed robbery at sea. At a time when piracy in the western Indian Ocean is suppressed but not solved from a structural point of view, consideration of effective preventive measures is especially important.

Portugal will follow the consideration of this topic by the International Law Commission with attention and interest.

Mr. Chairman,

In what relates the combined work of the General Assembly and the Commission, we wish to convey the concerns – that we share with others – regarding the fulfilment by the Sixth Committee of its role in the codification and progressive development of international law. The Charter of the United Nations confers on the General Assembly this responsibility. We fear that for the past years the Sixth Committee has not been up to the task.

The Sixth Committee has to make an increased effort to favourably consider, as a principle, the recommendations of the Commission regarding its products. Otherwise interested States will look into other frameworks to negotiate and adopt international conventions. We should not outsource functions that lie primarily with the United Nations.

Moreover, although highly desirable, consensus frequently paralyses action and often blocks outcomes desired by a very large majority. Consensus should be first and foremost a way of achieving a compromise decision. It is an incentive for member states to negotiate and reach common positions to uphold the noble task that the Charter has conferred on the General Assembly.

Mr. Chairman,

To conclude this part of the intervention, Portugal would like to praise the contribution of the Secretariat to the codification and progressive development of International Law.

Crimes against Humanity (Chapter IV of the ILC Report)

Mr. Chairman,

I will now turn to Chapter IV of the International Law Commission's Report and the set of draft articles adopted by the Commission, on second reading, on "crimes against humanity".

Allow me to express my delegation's appreciation to the Special Rapporteur, Mr. Sean Murphy, and to the Commission for their thorough work on this. In our view, it represents a significant advancement in the prevention and punishment of crimes against humanity.

Mr. Chairman,

Over the past years, during our discussions on this subject at the Sixth Committee, Portugal has had the opportunity to underscore the relevance that we attach to this topic.

The final outcome that we have before us confirms our conviction that it is possible to build, on the basis of these draft Articles, a suitable internationally binding legal framework.

Therefore, we welcome and support the Commission's recommendation to the General Assembly to elaborate an international convention on the basis of the draft articles on prevention and punishment of crimes against humanity.

Mr. Chairman,

Notwithstanding Portugal's support to the draft Articles, allow me to offer a few remarks.

On the definition of 'crimes against humanity', we understand the rationale behind the 'without prejudice clause' in draft Article 2, paragraph 3 as to ensure that the definition does not call into question any broader definitions that may exist in international law. However, we would have preferred a more dynamic definition that would immediately benefit from amendments made to the definition of 'crimes against humanity' in the Rome Statute. This, in our view, would contribute to the harmonization and consistency of international criminal law.

Moreover, also regarding the definition of 'crimes against humanity', international bodies, including international criminal courts and tribunals, have taken 'gender' as a socially constructed concept. We took good note of the fact that such contemporary approach to 'gender' is reflected in the commentary to draft Article 2. However, we are of the view that the Commission should have gone further and include it also in the text of draft Article 2.

Mr. Chairman,

My delegation would also like to make a brief reference to the Mutual Legal Assistance Initiative, where, as you know, is also under consideration the possibility of concluding an international convention to enhance States' cooperation, not only where crimes against humanity are concerned but also other most serious crimes. We are looking forward to the discussions on how these two proposals may work together in setting a legal framework for the

fight against these crimes. In our view, these proposals are complementary and there are different ways in which they can be developed together.

However, the existence of these two projects should not be used as an excuse to not proceed with any of them.

Mr. Chairman,

To conclude, it is Portugal's position that this is the right moment to convene an international conference to negotiate and adopt a convention on 'crimes against humanity' on the basis of the draft Articles produced by the Commission.

We sincerely hope that the General Assembly rises to its responsibility under the Charter of the United Nations to codify and progressively develop international law and thus decides on the necessary steps to bring these draft Articles into life.

***Jus Cogens* (Chapter V of the ILC Report)**

Mr. Chairman,

I would like to address now the topic of Peremptory norms of general international law (*jus cogens*).

My delegation wishes to congratulate the Special Rapporteur, Mr. Dire Tladi, on his fourth report. We would also like to commend the International Law Commission for adopting the set of 23 draft Conclusions and commentaries on this topic on first reading.

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 will submit commentaries and observations in due time, as requested by the Commission. We would like nevertheless to offer at this moment some brief remarks on the draft Conclusions.

Mr. Chairman,

Portugal has conveyed in the past some concerns regarding the identification of regional *jus cogens* and the need for a careful approach. In our view, 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. They should also not lead to a confusion between the concepts of *jus cogens* and of regional customary law.

We are thus pleased that the Commission has reached a compromise solution regarding regional *jus cogens*. Like the Special Rapporteur, we believe that International Law does not recognize regional *jus cogens* as it is defined by the Commission. We also support the decision of not including a draft conclusion on this matter and relying on the commentaries of the Commission.

Mr. Chairman,

Portugal has often spoken at the Sixth Committee in favor of the idea of an illustrative list of *jus cogens* norms and, in this sense, we understand the pragmatic method used by the Commission on the non-exhaustive illustrative list.

However, although being illustrative, this list seems to be too condensed. There are other widely recognized *jus cogens* norms that could have been listed. Moreover, as a defender of the progressive development of International Law, Portugal regrets that this list is not more ambitious – neither in number nor content-wise – regarding norms identified by the Commission during its consideration of other topics as, for instance, those on the Law of Treaties and on the Responsibility of States. For example, we would have welcomed a reference to peremptory environmental norms, such as the obligation to protect the environment as *jus cogens*. Therefore, although the list is welcomed, in our view, it falls short from its potential.

Mr. Chairman,

In conclusion, Portugal values this set of draft Articles and continues to underline the relevance of *jus cogens* and its central place in the general international legal architecture. We are therefore pleased that the work of the Special Rapporteur and of the Commission on this topic is so far not reduced to a simple repetition of what is provided under Article 53 of the Vienna Convention on the Law of Treaties neither to the traditional discussions on *jus cogens*.

Thank you, Mr. Chairman.