

**Report of the International Law Commission
on the work of its seventy-third session
(*Agenda item 77*)**

Mr. Chairman,

We are very happy to be back to our discussions on the Report of the International Law Commission, in-person in New York.

Since I am taking the floor for the first time, let me congratulate you, and the other members of the Bureau, on your election. We are very happy to have you as chair of our Committee.

Allow me to also thank the Chair of the International Law Commission, Mr. Dire Tladi for presenting the Report on the work carried out by the Commission during its seventy-third session.

In today's statement, my delegation will begin by making a few general comments on the Commission's work, including on Chapter X of the Report, "Other Decisions". We will then address the topics "Peremptory norms of general international law" and "Protection of the environment in relation to armed conflicts".

The other chapters of the Report will be addressed in the coming days, according to the clusters proposed.

In the interest of time, my delegation will deliver an abbreviated version of its statements. The full statements will be made available for publishing on the website of the Committee.

General comments and other decisions (*Chapters I, II, III and X*)

Mr. Chairman,

Portugal has followed the work of the International Law Commission during its seventy-third session with great interest and attention. We welcome the adoption, on second reading of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) and of the draft principles on protection of the environment in relation to armed conflict. We would also like to convey our appreciation for the adoption, on first reading, of 18 draft articles and a draft annex on immunity of State officials from foreign criminal jurisdiction, together with commentaries thereto, a topic of great relevance.

Mr. Chairman,

We welcome the Commission's decision to include on its programme of work the topic "Prevention and repression of piracy and armed robbery at sea". Portugal has been actively engaged on legal issues relating to piracy and has been advocating for a holistic and sustainable approach, focusing not only on the repression of these illicit acts, but also and particularly on their prevention. *Portugal has been co-chairing, with Mauritius, the Legal Forum of the Contact Group on Piracy off the Coast of Somalia, which has recently expanded the scope of its mandate. Portugal also currently chairs the Maritime Working Group of the Montreux Document Forum on Private and Military Companies.*

The work of the Commission on this topic could be important for clarifying the application of the Law of the Sea and Human Rights Law to piracy and armed robbery at sea, in addition to matters such as the detention, prosecution, extradition and transfer of sentenced pirates or armed robbers.

The Commission has also included the topic "Subsidiary means for the determination of rules of international law" in its programme of work. We hope that the work of the Commission may contribute to the codification and progressive development of international law and provide a useful solution to certain negative consequences of the fragmentation of international law.

Portugal will follow the consideration of these topics by the International Law Commission with interest.

Mr. Chairman,

In our introductory remarks we would also like to refer to the broader issue of codification and progressive development of international law under the auspices of the United Nations. The Charter establishes this task as a core function of the General Assembly. And history shows that the contribution of the United Nations to international law has been immense.

However, codification seems to be in decline for some time. The products of the International Law Commission may have different formats and outcomes. Nevertheless, in some cases where the Commission expressly recommends the adoption of draft articles as a convention, the 6th Committee has not acted and has prioritized consensus, even if it is only a minority of states opposing to moving forward.

We should always strive for consensus. However, consensus is a goal; not a rule or a dogma. Consensus brings the responsibility to engage and negotiate in good faith; but it cannot be used as a veto. Unless we address this issue and seek to improve the working methods of this body, the potential of the contribution of the International Law Commission and the 6th Committee may be severely impaired and undermined, at a time when we need more international law that better regulates the fast evolving context of international relations.

We thus feel that it would be important for the 6th Committee, together with the Commission, to reflect on working methods and procedures for following up on the work of the ILC, particularly with respect to codification, and have a careful and responsible consideration of the challenges that the General Assembly is facing in fulfilling one of its core functions.

Peremptory norms of general international law (*Chapter IV*)

Mr. Chairman,

I would now like to turn to the subject of "Peremptory norms of general international law (*jus cogens*)". Portugal wishes to congratulate the Commission for adopting the draft Conclusions on second reading. We would also like to convey our appreciation to the Special Rapporteur, Mr. Dire Tladi, for his outstanding contribution to this topic.

The draft Conclusions are of great importance in assisting the identification of *jus cogens* norms to which its states must adhere, thus contributing to the predictability and stability of the international legal system.

We are pleased to note that the regional jus cogens norms are omitted from the draft Conclusions. Otherwise, the integrity of general international jus cogens norms, a concept that is universally recognized and applicable, could be compromised.

Mr. Chairman,

Portugal welcomes draft Conclusion 23 and the annex with a list of *jus cogens* norms. However, Portugal believes that the Commission could have been more ambitious in both the number of and the content of norms listed in the annex.

For instance, a reference to peremptory environmental norms, such as the obligation to protect the environment, would have been welcomed.

*Portugal further wishes to note that it has no objection to changing the title of the draft Conclusions to "Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms of General International Law." Indeed, such a change could be useful in order to clarify that the draft conclusions deal not only with the identification of peremptory norms of general international law (*jus cogens*), but also with its related legal consequences.*

Mr. Chairman,

With regard to draft Conclusion 7(2), Portugal agrees with the inclusion of the expression "*and representative*." Indeed, the acceptance and recognition of a *jus cogens* norm must not depend only on a "*very large majority of States*." It is important that such a majority is also representative, for example, of the diversity of legal systems and cultures of the different regions of the world.

*Equally, Portugal agrees that "constitutional provisions" may provide sound evidence of the acceptance and recognition of a *jus cogens* norm. Constitutional texts serve as ethical, moral, and societal foundation stones of our communities. The priorities they embed and express are, therefore, relevant in this regard. Therefore, Portugal welcomes the inclusion of "constitutional provisions" in draft Conclusion 8(2).*

Mr. Chairman,

Regarding draft Conclusion 10(2), Portugal considers that the inclusion of "subject to paragraph 2 of draft conclusion 11" clarifies the relationship between the two draft conclusions. Indeed, without this new addition, one could erroneously be led to conclude that they provide for different solutions - one that would allow for separability and one that would not. In this sense, the new

formulation of draft Conclusion 11(2), invites no special comments. However, in view of this issue and in the interest of clarity, Portugal considers that it would have been better to combine the solutions of draft Conclusions 10 and 11 in a single and stand-alone draft conclusion.

Finally, with regard to draft Conclusion 17(1), we would have preferred that the phrase "in which all States have a legal interest" would be retained. There is no doubt that the legal interest of States can take many forms. However, it seems that the new wording could lead to the notion that the legal interest of one State may be different from that of another. This could lead to the assumption that there could be a fragmentation of legal interests in relation to jus cogens norms. Instead, it seems more appropriate to assume that a legal interest of a state in relation to such a norm arises only because it is primarily a legal interest of the international community as a whole. In Portugal's view, this latter approach could have been better expressed by the phrase "in which all States have a legal interest."

Mr. Chairman,

Having said that, we would like to conclude by conveying once more our satisfaction with the work of the Commission on this topic.

We thus hope that the General Assembly will be ready to take note of the draft Conclusions on *ius cogens*, as well as its annex, and commend them to the attention of States and of all relevant actors who may be called upon to identify *ius cogens* norms and to apply their legal consequences.

Protection of the environment in relation to armed conflicts (*Chapter V*)

Mr. Chairman,

Allow me to now turn to the topic “Protection of the environment in relation to armed conflicts”, whose draft Principles were adopted in second reading by the Commission.

Portugal wishes to commend the Commission for this important accomplishment. We would also like to congratulate the Special Rapporteur, Ms. Marja Lehto, for her outstanding contribution in the preparation of the draft Principles. A word of appreciation is also due to the previous Special Rapporteur, Ms. Marie Jacobsson.

Mr. Chairman,

The draft preamble acknowledges that an effective protection of the environment in relation to armed conflicts requires that measures are taken by States, international organisations, and other relevant actors to prevent, mitigate and remediate harm to the environment before, during and after an armed conflict.

Since the environment is a common good of humanity, it should be a common endeavour of States, international organisations, corporations, and individuals to fight environmental degradation, and to cooperate in the protection of the environment – everywhere and at all times, including in relation to armed conflicts, whatever their nature or how long they last.

The draft Principles reflect a progressive perspective concerning the impact of armed conflicts on environment, where not only International Humanitarian Law, but also International Human Rights Law, Law of the Sea, International Criminal Law, and International Environmental Law are applicable.

Mr. Chairman,

Throughout the years and at this very Committee, my delegation has argued in favour of a human right to environment, which in turn is linked to the enjoyment of other human rights.

A few months ago, the General Assembly recognised for the first time the human right to a clean, healthy, and sustainable environment, by Resolution 76/300 of 28 July 2022. One hundred and sixty-one Member States, including Portugal, voted in favour of this resolution.

Although there is no reference in the draft Principles to a human right to a sustainable environment, its recognition can be inferred from many of the obligations concerning the prevention, mitigation, and remediation of harm to the environment before, during and after armed conflict.

Mr. Chairman,

Portugal acknowledges that an absolute protection of the environment is not feasible, as conditional protection is necessary to guarantee a balance between military, humanitarian, and environmental concerns. We find that an acceptable balance has been achieved in this regard.

We thus hope that, also in this case, the General Assembly will be ready to take note of the draft Principles on the protection of the environment in relation to armed conflicts and commend them to the attention of States and international organizations, as well as of all other relevant actors that may be called upon to deal with the subject.

Thank you, Mr. Chairman.