



28 October 2019

**UNGA 74 Sixth Committee / Agenda item: 79 - Report of the International Law Commission on the work of its seventy-first session: Cluster I**

Statement by Permanent Mission of Armenia to the United Nations

Mr Chairman,

At the outset, we thank the International Law Commission for presenting their annual report for which we would like to offer the following remarks.

Concerning Chapter IV of the Report of the International Law Commission on the ‘crimes against humanity’ topic, Armenia acknowledges that the intention of the draft articles is to fill a perceived gap in the international legal landscape by adding to a new, sister treaty to the Convention on the Prevention and Punishment of the Crime of Genocide of 1948<sup>1</sup> as well as the Geneva Conventions with respect to war crimes.<sup>2</sup>

We believe that question of priority of jurisdiction needs to be addressed in regard to three bases for the assertion of jurisdiction prescribed in draft Article 7, paragraph 1, namely: territoriality, active personality or passive personality. We acknowledge in this regard that there are different arguments for the prioritisation of one basis of jurisdiction over another: the essential point is to ensure legal clarity.<sup>3</sup> This need is underscored by the fact that a substantial number of Member States participate in other treaty regimes<sup>4</sup> that provide for surrender obligations for suspects of crimes against humanity. The potential for conflicts of jurisdiction arising from the current version of the draft Articles is not ameliorated by the addition of draft Article 13(12) to ‘give due consideration’ to a requesting State asserting territoriality, which is exacerbated by the frailty of the dispute settlement mechanism proposed in draft Article 15.

We also observe that the notion of ‘fair treatment’ in draft Article 11 needs to be clarified with respect to the standard of obligation of fair trial, which varies around the world, not only but particularly with respect to regional human rights courts. The replacement of the term ‘fair treatment’ with ‘fair trial’ would facilitate clarity. Whilst the Commentary to draft Article 11 cites Article 14 of the International Covenant on Civil and Political Rights on multiple occasions, we propose that this provision and the jurisprudence of the UN Human Rights Committee therefrom be expressly stipulated as the ‘UN standard’ applicable to the draft Articles.

<sup>1</sup> 78 UNTS I-1021.

<sup>2</sup> A/CN.4/725 (18 February 2019), pp. 9-12 (paras 22-26).

<sup>3</sup> Ibid., pp. 8-9 (paras 20-21); A/74/10 (16 September 2019), p.14.

<sup>4</sup> E.g. – 2187 UNTS 3.

For future action, we are in favour of a diplomatic conference to negotiate a convention rather than the immediate adoption of draft articles by the General Assembly. In light of the substantive concerns that we have expressed, we consider that this conference should be scheduled at a suitable time, such as three to five years from now, to allow States the opportunity to study this product of the International Law Commission in order to develop their positions.

Mr Chairman,

Regarding the topic ‘Peremptory norms of general international law (*ius cogens*)’, we consider this project on a fundamental field of general international law to be a useful one. We have some concerns, however, with draft Conclusions 4 and 5 on the ostensible positive law (*ius dispositivum*) basis of peremptory norms as ‘super-custom’. Rather, we assert a natural or moral law (*ius naturale*) basis, cross-referring to Conclusion 3 as well as the commentary and jurisprudence cited therein.<sup>5</sup> We recall, for example, the famous *dictum* of the International Court of Justice in the *Genocide Reservations Advisory Opinion*, cited by the Commission: ‘the universal character of the condemnation of genocide...[which] shocks the conscience of mankind and results in great losses to humanity, and [which] is contrary to moral law’.<sup>6</sup> We acknowledge that practice and scholarly writings continue, confusingly, to cite both State practice and moral considerations<sup>7</sup> but we nonetheless contest the supposed basis of State consent for peremptory norms as ahistorical. This results in the illogicality of the notion that the persistent objector rule ‘does not apply’ to peremptory norms in draft Conclusion 14, paragraph 3, while a peremptory norm is not opposable to a State insofar as it maintains its persistent objection.<sup>8</sup>

The issue thus arises as to *how* the moral law is to be identified and to what degree of ‘commonality’ or ‘universality’ required for identification.<sup>9</sup> Concerning draft Conclusion 7(2), a question arises whether acceptance by ‘a very large majority of States’ can be quantified.<sup>10</sup> The phrasing of the current draft is such that the Commission might as well adopt ‘total acceptance’, as the difference is so slight as to be negligible. The bar is set so high that those peremptory norms that are today generally recognised as such would not have been so recognised at the time that they were first propounded as peremptory norms. We invite the Commission to study these important questions.

A key issue is the relationship between a peremptory norm of substantive character and a positive rule of international law of procedural character. Whilst the *Jurisdictional Immunities Case* appears to definitively state that the procedural rule is not displaced by the substantive rule,<sup>11</sup> we suggest that the Commission consider this matter afresh. For example, whether it is possible for the definition of genocide *as a peremptory* norm to be enlarged beyond the

---

<sup>5</sup> Ibid., pp. 150-157 (paras 3-6, 13).

<sup>6</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] ICJ Rep. 15, p. 23 cited in *ibid.*, 155-156 (para. 729).

<sup>7</sup> A/74/10, 166-167 (para. 3).

<sup>8</sup> Ibid., 185 (para. 10).

<sup>9</sup> Ibid., 156 (paras 14-15).

<sup>10</sup> A/74/10, pp. 167-168 (para. 6).

<sup>11</sup> *Jurisdictional Immunities of the State (Germany v. Italy, Greece Intervening)* [2012] ICJ Rep. 99, 140-142 (paras 92-97).

definition of Article II of the Genocide Convention. If so, whether this would displace a procedural rule, such as the rule of intertemporal law for State responsibility and the rule of *nullen crimen sine lege poena* for criminal responsibility.<sup>12</sup>

On draft Conclusions 8 and 9, the phrase ‘subsidiary means of interpretation’ inverts the process by which peremptory norms have been recognised in practice. Courts, not States, have been the leaders on it, as has the International Law Commission; for example, with respect to Articles 53 and 64 of the Vienna Convention on the Law of Treaties 1969<sup>13</sup> and Articles 26, 40 and 41 of the Articles on the Responsibility of States for Internationally Wrongful Acts 2001.<sup>14</sup> Concerning draft Conclusion 11 and the debate concerning ‘void in whole’ or ‘void in part’,<sup>15</sup> we suggest that the Commission explore examples, whether from practice or hypotheticals, in which the competing policies could operate.

We support the fusion of *ius cogens* and *erga omnes* concepts in draft Conclusion 17. These are two sides of the same coin, yet much time and effort is spent on debating their theoretical relationship. We note, however, the conflict between this draft Conclusion and the notion of ‘persistent objector’ in draft Conclusion 14(3): in spite of the ostensible ‘customary’ basis of peremptory norms, the persistent objector rules does not apply to them,<sup>16</sup> yet any State has the right to invoke peremptory norms against any other State? Paradoxically, quasi-universal State consent is said to underpin peremptory norms, which nonetheless disregard the usual modalities for the application of State consent.

As other delegations have noted in this debate, these methodological problems are manifested in the indicative list of peremptory norms in draft Conclusion 23. For example, the right to self-determination is included by the Commission in the indicative list, yet a small minority of States contest its status as a peremptory norm. In the recent *Chagos Islands* advisory proceedings at the International Court of Justice, the Court reiterated that it has an *erga omnes* character but did not address its peremptory status; perhaps, in part, due to the open questions concerning the identification of peremptory norms, particularly in light of the historical time periods examined in those proceedings.<sup>17</sup> Yet, some 62 States expressly asserted its peremptory status in their pleadings<sup>18</sup> while no State expressly denied it.

Whilst Armenia opines that self-determination has both customary and peremptory status, we concur with those States that have criticised draft Conclusion 23 for want of methodological coherence. As aforementioned, by the stringent ‘super-custom’ approach of the Commission, as a matter of empirical reality, the indicative list of peremptory norms would not have been

---

<sup>12</sup> See, e.g. – App. No. 35343/05 *Vasiliauskas v. Lithuania*, European Court of Human Rights (Grand Chamber), Judgment of 20 October 2015, paras 113, 165-166.

<sup>13</sup> 1155 UNTS 331.

<sup>14</sup> A/56/10.

<sup>15</sup> A/74/10, pp. 177-179.

<sup>16</sup> *Ibid.*, pp. 191-192 (paras 5-6); Articles on the Responsibility of States for Internationally Wrongful Acts 2001, above n 14, Art. 48.

<sup>17</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, International Court of Justice, Advisory Opinion of 25 February 2019, p.42 (para. 180), <https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>.

<sup>18</sup> <https://www.icj-cij.org/en/case/169>. See, e.g. – written pleadings of Belize (pp.5, 11-12); Netherlands (pp. 2, 4, 8-9); African Union (pp.65-66); African Union (15 May 2018, p.14); South Africa (p.4); Cyprus (11 May 2018, p.5); Portugal (pp.10-11); Brazil (para. 15); Mauritius (p.205). For the oral proceedings, see CR 2018/27, p.26 (African Union); CR 2018/20, pp.47, 64 (Mauritius); CR 2018/22, pp.14-15 (South Africa); CR 2018/23, pp.46 (Brazil), 48-50 (Cyprus); CR 2018/26, pp.13 (Serbia), 18 (Thailand).

recognised as peremptory norms at the time of their historical recognition. However, we would assert that the moral law is the foundation for their historical recognition, not State practice. The task of the Commission to identify a methodological basis for this moral law to underpin its work.

Mr Chairman,

On ‘reparations to individuals for gross violations of international human rights law and serious violation of international humanitarian law’, we consider the idea to be topical and potentially useful in light of difficulties encountered in current practice. The focus in the report is said to be how individuals may obtain reparation for violations of human rights law and IHL. The topic appears to be oriented towards greater elaboration on the modes of reparation, rather than access to dispute settlement mechanisms. Rather than draft guidelines or principles, it is worth to consider proposing amendments to the range of treaties that presently exist to provide criteria on reparation.

Thank you.