



PERMANENT MISSION OF CUBA TO THE UNITED NATIONS  
315 Lexington Avenue, New York, N.Y. 10016 (212) 689-7215, FAX (212) 689-9073

## **STATEMENT BY THE CUBAN DELEGATION ON AGENDA ITEM 81 “REPORT OF THE INTERNATIONAL LAW COMMISSION. CLUSTER I**

**New York, 28 October- 6 November 2019.**

Allow me to congratulate the International Law Commission on the remarkable work carried out at the seventy-first session in order to make progress on the items on its agenda.

The Cuban delegation would like to congratulate Mr. Pavel Sturma in his capacity as Chairman of the International Law Commission.

Mr. Chairman,

With regard to the general elements, the delegation of Cuba wishes to express that the ILC has made a very important contribution to the progressive development of international law and to its codification. It is enough to mention that the great legal and regulatory bodies of international law had emerged from the work of that respectable commission. Consequently, the contribution that all States could make to the work of that body was therefore of critical significance for the progressive development of the codification.

Mr. President,

We appreciate the preparation of the fourth report of the Special Rapporteur, Mr. Sean D. Murphy (A/CN.4/725), on the topic “Crimes against Humanity” and we acknowledge the work carried out by the International Law Commission in submitting a draft articles adopted on second reading.

Cuba, a historic supporter of the respect for international law and its principles, and particularly, the international criminal law, attaches great importance to this issue. The draft articles submitted by the Commission on Crimes against Humanity should play a fundamental role for the purposes of preventing international impunity.

The fight against the impunity for international crimes committed is of utmost importance and relevance within the current international context. For that reason, Cuba welcomes the draft articles elaborated by the International Law Commission for being a valid contribution to the efforts to achieve international prevention of such crimes.

It also provides us with a useful guidance for States that have not yet adopted legal regulations on the criminalization and prosecution of such crimes at the national level.

The draft articles have attempted to compile a wide variety of principles and postulates contained in international conventions relating to this type of crimes.

Mr. President,

Cuba recognizes the efforts made by the Special Rapporteur to take into account various national and regional approaches in order to enrich the draft articles and contribute to international consensus.

In this regard, Cuba considers it appropriate to reiterate that the draft articles should contain, as a fundamental principle, that the primary responsibility for preventing and punishing serious international crimes committed under their jurisdiction, understood as crimes against humanity, should fall, primarily on the State concerned. Cuba shares the view expressed by others that this principle should be clearly reflected in one of the articles of the draft, regardless of whether it may be mentioned in the preamble or in the commentaries.

One of the fundamental principles of international criminal law is that States have the sovereign prerogative to exercise, in their national courts, jurisdiction over crimes against humanity committed in their territory or by their nationals. This principle is based on the fact that no one is in a better position to effectively prosecute perpetrators of such crimes than the State with jurisdiction on grounds of the territory or the nationality of the accused or the victims. The foregoing will result in a better application of justice, since the interests of the victims, the rights of the accused and other similar aspects will be taken into account. Only in the event that States are unable or unwilling to exercise jurisdiction over these crimes, would it be necessary to consider the application of other prosecution mechanisms.

The Commission should continue to consider the commentaries elaborated by States, since they will yield a practical benefit in its task of ensuring that the draft articles (and the possible future international convention on which they are based) do not conflict with the respective national legislations applicable to crimes against humanity.

This action by the Commission will enable the draft articles to be widely accepted by the international community and, consequently, to become the basis for the conclusion of an international conventional instrument on the prevention and punishment of crimes against humanity and thus to serve in the efforts to strengthen the international criminal justice system. A convention on crimes against humanity should avoid conflicts with international instruments already adopted and ensure consistency with the existing rules and institutions of international criminal law. The binding force of such instruments derives from the consent of States to international law and its formation process. The Commission, by itself, cannot be understood as a kind of legislative body responsible for

establishing norms of international law. Its valuable contribution has been to document the issues in which States have elaborated norms of relevance to international law and to propose those issues in respect of which States might be interested in studying the possibility of preparing them.

In terms of the theoretical and conceptual frameworks, Cuba would also like to comment that the Commission should evaluate the opportunity to classify the prohibition of crimes against humanity as a peremptory norm of general international law, bearing in mind that the Commission is currently working on the topic of "peremptory norms of general international law (*jus cogens*)". A similar issue arises with regard to the possibility that provisions relating to immunities and amnesty are set forth, taking into account, that work is under way in the Commission on the question of immunity of State representatives from foreign criminal jurisdiction.

Cuba further reiterates that the draft articles should be applied flexibly, taking into account the various existing legal systems (such as those inspired by Roman law or common law), as well as those states that are not parties to the Rome Statute of the International Criminal Court and the diversity within different national systems.

Mr. President:

We wish to conclude our statement by reiterating our commitment to continue to support the commendable work that the Commission has been carrying out with respect to this and other issues under its consideration, and specifically the work carried out by the special rapporteur on this topic, Mr. Sean D. Murphy.

Mr. President,

With regard to the topic of peremptory norms of general international law (*ius cogens*), it is of great importance for the continuity of the work of progressive codification of International Law.

In this regard, we appreciate the preparation of the fourth report of the Special Rapporteur, Mr. Dire Tladi (A/CN.4/727), and we acknowledge the work carried out by the International Law Commission to submit draft conclusions on which States have been requested to issue criteria before 1 December 2020.

Cuba regards as positive the set of 23 draft conclusions and an Annex prepared by the International Law Commission, which could become a guide, primarily methodological, so that States and international organizations can identify the emergence of peremptory norms of international law and the legal effects of such norms, without entering into a deep or content analysis of those norms.

It is precisely the hierarchy implied by the nature of the norm of *jus cogens* in relation to another norm of general international law, as well as its legal consequences, which turn these draft conclusions into a guiding document for international players for the best development of domestic governmental and jurisdictional practice.

In particular, the Cuban delegation considers that, in view of the technical nature of the topic, the draft conclusions should not be absolute or restrictive in their content and scope. In Conclusion 2, it should be borne in mind that the criteria for acceptance and recognition by the community of States as a whole in order to identify the norms of jus cogens, should not set limits to the number of States, but that such criteria should be assessed in accordance with the governmental and jurisdictional practice; and must take into account States with various legal systems.

With regard to draft conclusions 7, Cuba draws attention to taking into account the criterion of non-state players in the process of emergence of the norms of jus cogens, which, although they are taken into consideration in a supplementary and non-determining manner, we consider that the observations of state players should not conflict with basic principles of international law enshrined in the UN Charter, such as the principle of sovereign equality and the principle of non-intervention in the internal affairs of States.

In full consistency with what was claimed about draft conclusion 2 and reaffirming that this draft conclusions is a guide to the best practice of States and Organizations in their international relations, we assess that the various forms of evidence for the acceptance and recognition set out in paragraph 2, draft conclusion 8, should not be restrictive, precisely because of the difference in the existing legal systems that contribute to the emergence of such norms from different angles.

In draft conclusion 9, the qualifier "auxiliary means" for identifying peremptory norms of general international law is marked as positive, and in this regard, it means that the decisions of international courts, tribunals, experts and publicists should not supersede the practice of States and international organizations in their identification. In the practice of international jurisdictional bodies, the degree of caution exercised when referring to a norm of jus cogens is observed, without naming it as such, they recognize its existence. Such action is confusing and ambiguous, especially if one takes into account the *erga omnes* obligations arising from the peremptory norms of general international law just as they appear in conclusion 17 of the draft.

Draft conclusions 15 and 16, which establish the obligations created by unilateral acts of States, resolutions, decisions or other acts of international organizations which are in conflict with a peremptory norm of international law, are considered to reflect the consensus of member States to demand the unrestricted observance of the principles and rules of International Law in general in the face of the existence of a norm of jus cogens, and that their serious breach gives rise to international responsibility for States and particular consequences, in accordance with the provisions laid down in draft conclusion 19. Draft conclusion 19 reinforces the draft articles on international responsibility for wrongful acts studied by the ILC and adopted by this Commission.

Mr. President,

In our view, draft conclusion 21 includes, in a supplementary manner, other means of settling disputes that may be used by States in the event of the nullity or termination of a rule of general international law by invoking a rule of jus cogens. In this regard, it is positive that priority is given to the application of the provisions of article 33 of the Charter and to the positive law contained in the Vienna Convention on the Law of Treaties, the rules on the jurisdiction of the International Court of Justice or other applicable provisions on the settlement of controversies agreed upon by States.

In addition, the non-exhaustive list of peremptory norms of general international law, which is undoubtedly a guide for States to determine whether we are in the presence of a norm of jus cogens that have already acquired such status, is assessed as useful and valuable.

Mr. President,

Cuba agrees with other States that the draft conclusions constitute a positive guide in identifying the norms of jus cogens that describe their nature, scope, formation, legal consequences and reinforce the draft articles on the responsibility of States for wrongful acts.

Cuba wishes to reiterate its support for the consideration of the item before us today within the framework of the Sixth Committee. Reflecting on this issue in the current international juncture contributes decisively to a better development of relations among countries within a framework of genuine application of the purposes and principles of the Charter of the United Nations.

We favour the attempt to reach, in the form of draft conclusions and their annex, a document that reinforces the legal framework established in the Charter and other norms of International Law, especially in the current international scenario where some States turn unilateral acts contrary to the principles and purposes of the Charter and of international law into "legitimate" practice. It also contributes to the violation of principles and norms such as the right to self-determination of States, which includes respect for the existence of various regimes or political systems, as well as demanding responsibility from States that commit such serious acts as genocide, aggression, crimes against humanity, or others that threaten the peace, security and survival of the planet and its inhabitants.

Let us provide States with these draft conclusions on norms of jus cogens with an additional tool to hold accountable those actors who violate International Law by denying it the effectiveness established by the binding nature of the obligation arising from the compliance or noncompliance with a norm of this kind. At the same time, let us offer national and international jurisdictions and governmental bodies greater support in the search for international justice in the face of crimes that remain unpunished and that will also require the will of those present here to demand an effective responsibility.

Mr. President:

With regard to other issues, and in particular the issue of the rising sea levels, this is an issue of utmost importance, given our geographical status as an archipelago. Studies conducted in the country show that there is a 1.5 to 2 meter annual shoreline retreat, while the National Tidal Network reports an increase of 2.14 millimeters per year in the acceleration of the average sea level rise. The foregoing translates into an increase in sea level in our archipelago of 27 cm by 2050.

In this regard, we welcome the decision of the International Law Commission to include in its long-term programme of work the topic: "Sea-level rise in relation to international law".

The sea level rise is nothing more than a reflection of man-made climate change, an issue to which our State has devoted special attention for decades and which has been reflected in various international forums. The National Plan for Economic and Social Development until 2030 includes sea level rise among the difficulties identified.

As a reflection of the above, in 2017 the Council of Ministers of the Republic of Cuba approved the "State Plan To Tackle Climate Change" or Task Life, as it is popularly known. Its actions include combating and/or mitigating the impact of the loss of shorelines caused by rising sea levels. These actions include, among others, the reinforcement of some coastal areas and the displacement of the coastal population.

Mr. President,

It is useful to discuss this topic in order to propose viable solutions between the changes occurring in the climate and the law of the sea in force, reflected mainly in the United Nations Convention on the Law of the Sea, as depositary of customary law.

Although the practical implications, especially in the area of navigational safety, must be taken into account, modifying baselines and maritime boundaries and/or earmarking resources to ensure that baseline points or certain geographical features survive sea-level rise, they would have a negative impact on small island developing states (exactly those that have contributed least to climate change) not to mention the respective legal insecurity.

We hope that the Commission will take into account the provisions and the spirit of the existing international law, including UNCLOS, in order to maintain, as far as possible, the stability and predictability of the existing law.

Thank you