PHILIPPINES

Please check against delivery

STATEMENT

Permanent Mission of the Republic of the Philippines to the United Nations

Agenda Item - 77: Report of the International Law Commission on the work of its seventy-third session (Cluster I)

77th Session of the United Nations General Assembly

25 October 2022

United Nations Headquarters New York

Mr. Chair,

The Philippines thanks the International Law Commission for its comprehensive report on the work of its seventy-third session under the leadership of the Chair, Mr. Dire Tladi, and commend all its members for their collective efforts to promote, encourage and advance the rule of law through the progressive development of international law and its codification.

Our intervention will focus on "Peremptory norms of general international law (jus cogens)" in Chapter IV of the Report. The adoption of the Draft Conclusions on the identification and legal consequences of peremptory norms of general international law (jus cogens) marks a milestone in the field and we thank the Special Rapporteur Mr. Dire D. Tladi for this feat.

On Conclusion 7 (Paragraph 2) we note that the text reads "acceptance and recognition by a very large **and representative** majority of States is required for the identification of a norm as a peremptory norm of general international law (jus cogens)". While noting this amendment, we reiterate our observation in 2019 on the inconsistency of this text with the definition under Conclusion 3 - taken from Article 53 of the Vienna Convention on the Law of Treaties.

Of interest to us is the role of national courts in this process of identification of peremptory norms. In our jurisdiction, the decisions of national courts form part of the law of the land.

First, under Conclusion 8 (Paragraph 2), the decisions of national courts, are a form of evidence, among many, of acceptance and recognition of a norm of general international law as a peremptory norm.

This is in relation to Conclusion 4, on the criteria for the identification of a peremptory norm of general international law (jus cogens), which requires that the norm in question is not only a norm of general international law but that it is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Second, in Conclusion 9 (Paragraph 1), on the subsidiary means for the determination of the peremptory character of norms of general international law, regard may also be had to the

decisions of national courts.

Non-state actors, including sub-state entities, civil society, and individuals have petitioned the court for redress of grievances, invoking international legal norms, including jus cogens, in at least three instances, before the Philippine Supreme Court. In response, the national court has issued decisions that, as noted under Conclusion 8, now form part of evidence of state practice. In this regard, the commentary in Conclusion 7 (Paragraph 3) could perhaps also note this dynamic.

The Philippine Supreme Court, for instance, has long anticipated the work from the Commission on *jus cogens*.

In the 2010 case of *Vinuya v. Romulo*, a petition to compel action by the Philippine government with regard to war time reparations on the basis of, among others, obligations arising from *jus cogens*, the Philippine Supreme Court pronounced that:

> *Even the invocation of jus cogens norms and erga omnes obligations will not alter this analysis. Even if we sidestep the question of whether jus cogens norms existed in 1951, petitioners have not deigned to show that the crimes committed XXX violated jus cogens prohibitions at the time the Treaty XXX was signed, or that the duty to prosecute perpetrators of international crimes is an erga omnes obligation or has attained the status of jus cogens.*
>
> *XXX*
>
> *The term is closely connected with the international law concept of jus cogens. In international law, the term "jus cogens" (literally, "compelling law") refers to norms that command peremptory authority, superseding conflicting treaties and custom. Jus cogens norms are considered peremptory in the sense that they are mandatory, do not admit derogation, and can be modified only by general international norms of equivalent authority.*

The Supreme Court then traced the evolution of the jus cogens doctrine since the 1700s, cited the impact of the publication of the 1937 article, Forbidden Treaties in International Law, and noted that jus cogens gained even more recognition in the 1950s and 1960s as a result of the Commission's work in relation to the Vienna Convention on the Law of Treaties.

The Court, in rationalizing its decision, stated that "Though there was a consensus that certain international norms had attained the status of jus cogens, the ILC was unable to reach a consensus on the proper criteria for identifying peremptory norms."

The Court further recalled that, "After an extended debate over these and other theories of jus cogens, the ILC concluded ruefully in 1963 that "there is not as yet any generally accepted criterion by which to identify a general rule of international law as having the character of jus cogens." The Court then cited the Commission's commentary where the Commission indicated that "the prudent course seems to be to x x x leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals."

It concluded that, while the existence of jus cogens in international law is undisputed, no consensus exists on its substance, beyond a tiny core of principles and rules.

In 2011, in the case of *Bayan Muna v. Romulo*, cited in the current ILC Report, the Philippine Supreme Court again made a pronouncement on jus cogens in relation to a petition questioning the validity of non-surrender agreements:

> *"The term 'jus cogens' means the 'compelling law.'"Corollarily, "a jus cogens norm holds the highest hierarchical position among all other customary norms and principles." As a result, jus cogens norms are deemed "peremptory and non-derogable." When applied to international crimes, "jus cogens crimes have been deemed so fundamental to the existence of a just international legal order that states cannot derogate from them, even by agreement."*
>
> *These jus cogens crimes relate to the principle of universal jurisdiction, i.e., "any state may exercise jurisdiction over an individual who commits certain heinous and widely condemned offenses, even when no other recognized basis for jurisdiction exists." "The rationale behind this principle is that the crime committed is so egregious that it is considered to be committed against all members of the international community" and thus granting every State jurisdiction over the crime.*
>
> *Therefore, even with the current lack of domestic legislation XXX, it still has both the doctrine of incorporation and universal jurisdiction to try these crimes.*

In 2021, in the case of *Pangilinan v. Cayetano*, the Supreme Court stated that:

> *Generally, jus cogens rules of customary international law cannot be amended by treaties. As Articles 121, 122, and 123 allow the amendment of provisions of the Rome Statute, this indicates that the Rome Statute is not jus cogens. At best, its provisions are articulations of customary law, or simply, treaty law. Article 121(6) sanctions the immediate withdrawal of a state party if it does not agree with the amending provisions of the Rome Statute. Therefore, withdrawal from the Rome Statute is not aberrant. Precisely, the option is enabled for states parties.*

The evolution of the national court's reasoning on jus cogens underscores the value of having the Draft Conclusions in clarifying the state of international law on the topic, in establishing the criteria for the identification of peremptory norms of general international law, and its legal consequences. In bears noting that the Commentary on Conclusion 9 (Paragraph 1) states that the text is intended to convey that 'although decisions of national courts may serve as subsidiary means for the determination of peremptory norms of general international law (jus cogens), they should be resorted with caution' and that the weight to be accorded to such national decisions will depend on the 'reasoning' applied in that particular decision. This suggests that some state's national courts' decisions have more weight than others, depending on the reasoning applied. We propose that the Commentary be revised to reflect language to the effect that "consideration of such national decisions will depend on their value as evidence in relation to Conclusion 4."

On Part III, we note that the legal consequences of the peremptory norms of general international law.

We reiterate our earlier views, or reservation, on the utility of the non-exhaustive list of peremptory norms of international law as an annex to the conclusions. Although letters a to g of the Annex are already penalized under our national legislation, Republic Act No. 9851 (Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity), the Annex could be placed in the Commentary with a note on the application of the criteria.

On Chapter V, we welcome the Commission's timely adoption of the draft principles on the protection of the environment in relation to the armed conflicts and commend the Ms. Marja Lehto, the Special Rapporteur.

On Chapter XI on "Other decisions and conclusions of the Commission, the Philippines welcomes the inclusion of new topics in the programme of work, including on the topic "Settlement of international disputes to which international organizations are parties" and "Subsidiary means for the determination of rules of international law", *inter alia*, in its programme of work.

On the Commission's Long-Term Programme of Work, the decision of the Commission to recommend the inclusion of the topic "Non-legally binding international agreements" in the long-term programme of the work of the Commission is appreciated. Considering the old practice of having such instruments, and the continuing proliferation of non-legally binding agreements in inter-state relations, an examination of the nature and the regime of such agreements is long overdue. We note the Annexes of Chapter X, and on the scope the topic, we hope that this will not be too restrictive. On the possible form of work of the Commission, we see value in having guidelines and model provisions.

Finally, we commend the Commission for its role in advancing the rule of law. In this regard, considering the significant contributions of its members, particularly of the Special Rapporteurs, the Philippines supports the provision of honoraria to the Special Rapporteurs and the establishment of the ILC Special Rapporteurs Trust Fund.

Thank you. END

PHILIPPINE MISSION TO THE UNITED NATIONS
556 FIFTH AVENUE, NEW YORK, NY 10036 • TEL. (212) 764-1300 • FAX (212) 840-8602