ARMENIA

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UNGA 77 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.

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 note that the Commission added it to its main programme in 2015 and that the consideration of the topic is now being proposed to be concluded. In light of its far-reaching importance, we see merit in continuing consideration of this topic by the Commission, with a view to seeking to make the improvements necessary to provide the draft conclusions with the strongest foundation possible for their subsequent use in practice.

We note that there is precedent for the Commission to undertake further work on a topic to revise the initial work done by the first Special Rapporteur. For example, after six reports by the first Special Rapporteur on what eventually became the 'responsibility of States for internationally wrongful acts' project, the Commission did not conclude that project for another forty years. Following the controversial reception of the first two reports of the Special Rapporteur on the 'succession of States in matters other than treaties' project, the Commission decided to focus on succession to State property and debt for which another twelve years were needed to conclude the project. Consequently, there is nothing unusual in the idea that the Commission might take further time to refine a topic, especially, on such a sensitive and complex area as peremptory norms.

For example, we have ongoing concerns about the positivist basis expressed in draft Conclusion 5 as 'bases for peremptory norms'. 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'.[1] We acknowledge that practice and scholarly writings continue, confusingly, to cite both State practice and moral considerations[2] but we nonetheless contest the supposed basis of State

[1] *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).
[2] A/74/10, 166-167 (para. 3).

consent for peremptory norms as ahistorical. Draft Conclusions 6, 7 and 8 and their commentaries provide scant explanation on how such a norm is supposed to be 'accepted and recognised' by the international community of States. 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.[3]

Concerning draft Conclusion 7(2), a question arises whether acceptance by 'a very large majority of States' can be quantified.[4] 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.

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, [5] 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 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.[6]

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[7] and Articles 26, 40 and 41 of the Articles on the Responsibility of States for Internationally Wrongful Acts 2001.[8] Concerning draft Conclusion 11, we find the text on paragraph 2 to be unclear and the commentary to be unconvincing as to why the Commission has settled on the proposed outcome with respect to separability.

As it has been noted, 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.[9]

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[3] Ibid., 185 (para. 10).
[4] A/74/10, pp. 167-168 (para. 6).
[5] *Jurisdictional Immunities of the State (Germany v. Italy, Greece Intervening)* [2012] ICJ Rep. 99, 140-142 (paras 92-97).
[6] See, e.g. – App. No. 35343/05 *Vasilauskas v. Lithuania*, European Court of Human Rights (Grand Chamber), Judgment of 20 October 2015, paras 113, 165-166.
[7] 1155 UNTS 331.
[8] A/56/10.
[9] In the *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 – *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. Yet, some 62 States expressly asserted its peremptory status in their pleadings while no State expressly denied it – https://www.icj-cij.org/en/case/169. See, e.g. – written pleadings of Belize (pp.5, 11-12); Netherlands (pp. 2, 4,

Whilst Armenia opines that self-determination has both customary and peremptory status, we concur with the view that draft Conclusion 23 would benefit from stronger methodological coherence. As aforementioned, as a matter of empirical reality, the indicative list of peremptory norms would not have been recognised as peremptory norms through orthodox, positivist methodology at the time of their recognition. However, we would assert that the moral law is the foundation for their historical recognition, not State practice.

Mr Chairman,

On the 'protection of the environment in relation to armed conflicts', this is a timely and important topic that offers the potential for progressive development of the extant treaty and customary law in order to strengthen environmental protection in armed conflicts, taking into account the increasing prominence of international environmental law in the practice of international courts and tribunals.[10] To achieve this objective, Armenia considers it to be necessary for the International Law Commission to continue its work on this project in order to change the format of its intended output for the project. Whereas the draft Principles with commentaries provide a useful analytical resource concerning the substance of the field, the text needs to be used as a platform to develop concrete proposals for *legal* codification. In particular, proposals for amendments to treaties pertaining to the law of armed conflict would be a suitable medium through which to give tangible form to the abstract Principles.

An example might be to amend Article 55 of Protocol I to the Geneva Conventions of 1977 and the addition of a counterpart provision to Protocol II of the Geneva Conventions of 1977.[11] This example is premised upon a change to the substance of draft Principle 13(2).

Armenia considers the draft Principles to be too broad and anodyne to be of practical use. For example, Principles 9 ('State responsibility'), 12 ('Martens Clause') and 14 ('Application of the law of armed conflict to the natural environment') are superfluous, as they repeat certain well-established rules of general international law. A more important problem is the word 'appropriate' deployed in draft Principles 3(2), 5(1), 6, 11 and 20(2) with respect to preventative measures. This term is so broad as to dilute its effectiveness: what does 'appropriate' mean and who is to determine its meaning? If it is the State that should take preventative measures, then her interpretation is likely to conflict with the interpretation of others.

A clearer and more effective standard of obligation for preventative measures would be the customary rule of due diligence with respect to transboundary harm[12] to which the draft Principles at present refer solely in the context of occupation. Whereas the draft Commentary to Principle 20 refer to 'the established principle that each State has an obligation not to cause significant harm to the environment of other States or to areas beyond national jurisdiction' as

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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 (Mauritus); 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).

[10] E.g. – A/CN.4/685 (28 May 2015), paras 92-119.

[11] See also Article 8(2)(h)(iv) of the Statute of the International Criminal Court 1998 to broaden the definition of the war crime against the environment.

[12] E.g. – *Certain Activities carried out by Nicaragua in the Border Sea (Costa Rica v. Nicaragua)/Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* [2015] ICJ Rep. 665, para. 104.

'customary international environmental law',[13] this standard is not applied throughout the text. Though the due diligence obligation in current law pertains to *transboundary* harm, we suggest that the adoption of the due diligence standard to environmental protection in armed conflict would be a useful piece of progressive development.

Another significant omission from the text is the precautionary principle (sometimes called the 'precautionary approach') which has been increasingly applied by States in treaty law and international adjudication[14] to the point that it has either crystallised or is approaching crystallisation as customary international law.[15] As a Chamber of the International Tribunal for the Law of the Sea stated in its Advisory Opinion of 2011:

> 'The precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law.'[16]

As a methodological point, whereas the draft Commentaries engage with the ICRC study on customary international humanitarian law,[17] this should be done in a more precise way, whether to *identify* the *lex lata* (taking into account criticisms made of the ICRC study as constituting, at times, 'progressive development'[18]) or to *propose* the *lex ferenda*.

A substantive issue on which the Commission should engage in progressive development of current treaty law is the definition of the obligation to protect the natural environment against 'widespread, long-term and severe damage', which appears in draft Principles 13(2) and 19. This formula derives from the definition codified in Article 55 of the First Additional Protocol to the Geneva Conventions of 1977 and was replicated in Article 8 of the Statute of the International Criminal Court of 1998. The retention of this restrictive definition, which arguably sets a high threshold,[19] in draft Principle 13(2) fails to progressively develop the law.

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[13] A/74/10, 279 (para. 1), 280 (para. 6).

[14] E.g. – *Gabčikovo-Nagymaros Project Case (Hungary v. Slovakia)* [1997] ICJ Rep. 62, paras 97, 113 (Hungary); *Nuclear Tests (New Zealand v. France)* [1995] ICJ Rep. 290 (paras 5, 35)(New Zealand); *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* [2010] ICJ Rep.14, paras 161, 164 (Argentina, Uruguay).

[15] International Law Commission Draft Conclusions on Identification of Customary International Law, A/73/10, para. 65, Conclusion 11.

[16] *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area (Advisory Opinion)* [2011] ITLOS Rep. 10, para. 135. See also the ICRC Customary International Humanitarian Law Database, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule44, Rule 44: 'There is practice to the effect that lack of scientific certainty as to the effects on the environment of certain military operations does not absolve parties to a conflict from taking proper precautionary measures to prevent undue damage…[t]he precautionary principle in environmental law has been gaining increasing recognition. There is, furthermore practice to the effect that this environmental law principle applies in armed conflict…[t]he ICRC, in its report submitted in 1993 to the UN General Assembly on the protection of the environment in time of armed conflict, referred to the precautionary principle as "an emerging, but generally recognized principle of international law [whose object it is] to anticipate and prevent damage to the environment and to ensure that, where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason to postpone any measures to prevent such damage". This assertion was not contested by any State.'

[17] Henckaerts and Doswald-Beck, *International Committee of the Red Cross: Customary International Humanitarian Law* (2005).

[18] Bellinger and Haynes, 'A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law', 89 *International Review of the Red Cross* (2007), 89.

[19] ICRC Customary International Humanitarian Law Database, Rule 45, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule45: 'If widespread, long-term and severe damage is inflicted, or the natural environment is used as a weapon, it is not relevant to inquire into whether this behaviour or result could be justified on the

We recommend that the Commission revisit this issue in order to propose a definition that enhances environmental protection.

Whilst the application of draft Principle 13(2) to both international and non-international armed conflicts[20] is welcome, the draft Principle will have no practical effect without amendment to the Second Additional Protocol to the Geneva Conventions as well as the Rome Statute to provide for duties for States and individuals with respect to non-international armed conflicts. The development of a proposal by the Commission for the consideration of States that are party to both treaties may facilitate amendment of both treaties.

The rationale for the omission of the explicit prohibition of means and methods of warfare provided by Articles 35(3) and 55(1) of the First Additional Protocol is difficult to understand. The report of the Commission states: 'Concerns that this exclusion may weaken the text of the draft principles should be considered in light of the general nature of the draft Principles.'[21] This reference reinforces our aforementioned recommendation that the Commission convert the draft Principles into proposals for concrete treaty amendment rather than leave them in an abstract or 'general' format.

As explained in the second report of the Special Rapporteur,[22] Armenia notes that Article 16 of the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts of 2001 foresees two different types of assistance in the commission of an internationally wrongful act: aiding and assisting rising to the level of co-perpetration; and 'aid or assistance proper' by which the assisting State has only a supportive role in the realization of the wrongful act. These two scenarios carry different implications for the 'assisting State' in the attribution of compensation.

Mr Chairman,

On the 'inclusion of new topics in the programme of work', Armenia welcomes the decision to add the topic entitled 'settlement of international disputes to which international organizations are parties'. This is a practical and important topic in modern international practice. We urge the Special Rapporteur and the Commission to include disputes of a private or tortious character in the scope of the work because these have been the most pertinent categories of dispute in practice. Examples include disputes arising out of the use of force, peacekeeping as well as contractual relationships.

We also welcome the addition of the topics 'prevention and repression of piracy and armed robbery at sea' and 'subsidiary means for the determination of rules of international law'. For each of the three topics, we urge the Commission to consider either the production of proposals for 'hard law' or study reports, rather than draft principles or conclusions.

Thank you.

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basis of military necessity or whether incidental damage was excessive. It was for this reason that the expression in Additional Protocol I "widespread, long-term and severe" sets such a high threshold. The three conditions are cumulative and the phrase "long-term" was understood by the adopting States to mean decades.'

[20] A/74/10 (16 September 2019), 251 (para. 7).

[21] Ibid., 251 (para. 9).

[22] A/Cn.4/728 (27 March 2019), paras 119-121.