



**INTERVENCION DEL DIRECTOR DE ASUNTOS JURIDICOS DEL MINISTERIO DE RR.EE. DE CHILE**

**EMBAJADOR CLAUDIO TRONCOSO R.**

**Capítulos correspondientes al cluster 2 del Informe de la Comisión de Derecho Internacional (CDI)**

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**STATEMENT BY THE LEGAL ADVISOR OF THE MINISTRY OF FOREIGN AFFAIRS OF CHILE**

**AMBASSADOR CLAUDIO TRONCOSO R.**

**Chapters belonging to cluster 2 of the International Law Commission Report (ILA)**

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CHILE  
SEVENTIETH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY  
SIXTH COMMITTEE  
REPORT OF THE INTERNATIONAL LAW COMMISSION

Mr. Chairman,

Since this is my first statement, I shall start by congratulating you on your election to chair this Committee, in recognition of your talents. My congratulations also go to all your colleagues in the Bureau.

I should also like to congratulate Mr. Narinder Singh, the Chairman of the International Law Commission, on his introduction of the Commission's 2015 report.

On this occasion, I should like to refer to three of the topics covered in the ILC report. I shall first refer to the topic "**Identification of customary international law**", dealt with in chapter VI of the report.

At the session the Special Rapporteur, Sir Michael Wood, presented to the Commission his third report on the topic, containing new paragraphs for three of the draft conclusions proposed in the second report and five new draft conclusions referring to the relationship between the two constituent elements of customary international law, the relevance of inaction, the role of treaties and resolutions, judicial decisions and writings, the relevance of international organizations, particular custom and the persistent objector.

As the Special Rapporteur already noted last year in his second report on the topic, the third report maintains the important distinction between the material and the psychological elements of custom: in other words, custom consists of general, constant and uniform practice, which is also generally accepted as law.

It will be recalled that the original title given by the Commission to this topic was "Formation and evidence of customary international law". In this regard, we agree with some members of the Commission that the change in the name of the topic should not affect its focus. It is therefore right that the Special Rapporteur is continuing to emphasize the importance of the elements that constitute custom and the way in which they emerge to form customary rules. The evidence of such elements, concerning which the Special Rapporteur has formulated specific guidelines, is already part of their identification. In view of the general agreement that the outcome of the work on this topic should be a set of practical and simple conclusions, with a commentary, aiming at assisting practitioners in the identification of rules of customary international law, we believe that it is vitally important to continue the discussion on the formation of customary rules.

As regards evidence of custom, we welcome the reference in draft conclusion 13 to resolutions adopted by international organizations or at international conferences and agree that they may be evidence of customary international law. We believe that special mention should be made of

resolutions of the United Nations General Assembly: because of the votes cast on them and their wording, these may provide a way of determining the existence of custom. We also support the Special Rapporteur's comment on the need for a discussion of the specific role played in international custom by the work of the International Law Commission. My delegation has no doubt that certain provisions of the draft articles submitted by the International Law Commission to the General Assembly can reflect customary international law and that others can constitute proposals for the progressive development of international law. From this viewpoint, these draft articles contribute to the study of international custom, although as such they remain proposals with a prepositive value and are not binding on States.

With regard to the topic of inaction, we believe that the comments on paragraph 3 of draft conclusion 11 should be expanded, since they should clearly establish the requirements for inaction to constitute evidence of acceptance of a conduct as law. In international law, where the will of States play a central role, silence generally does not imply consent and thus, in order for inaction by a subject of international law to be binding internationally, its scope must be clearly limited to cases where a reaction by one subject to another's conduct is desirable but does not occur.

We support draft conclusion 16 which states (and I quote) "A State that has persistently objected to a new rule of customary law while that rule was in the process of formation is not bound by the rule for as long as it maintains its objection",

We reiterate our appreciation for the work of the Special Rapporteur, Sir Michael Wood, and emphasize the importance of identifying the rules of customary international law in international law.

I shall refer, secondly, to the topic "**Crimes against humanity**" covered in chapter VII of the report. At the session, the Special Rapporteur, Mr. Sean Murphy, presented to the Commission his first report on the topic, which included two draft articles on the prevention and punishment of crimes against humanity and on their definition.

In connection with the treatment of crimes against humanity in international law, the Special Rapporteur has been particularly careful to try to focus his work on the actual prevention and punishment of such crimes (as explicitly stated in draft article 1). In his commentaries, the Special Rapporteur states (and I quote): "Part IX of the Rome Statute on 'International Cooperation and Judicial Assistance' assumes that inter-State cooperation on crimes within the jurisdiction of the ICC will continue to exist without prejudice to the Rome Statute, but does not direct itself to the regulation of that cooperation". The current draft therefore focuses on the approval of domestic legislation and effective and efficient cooperation between States in these areas, as is explicitly stated in draft article 4.

The obligation of States to prevent and punish crimes against humanity is part of customary international law. In addition, the prohibition of crimes against humanity is a peremptory norm

of international law. The obligation of States to prevent and punish crimes against humanity is also included in the Rome Statute of the International Criminal Court.

Without prejudice to the foregoing, unlike the case of war crimes and genocide, there is no international treaty that specifically obliges States individually to prevent and punish such crimes. Thus the Commission's contribution in this area is essential in order to take one more step towards the protection of the most essential rights of the individual; for this reason, it should be reiterated that crimes against humanity are "crimes under international law", whether or not committed in time of armed conflict and whether or not criminalized under national law.

The establishment of prevention and punishment of crimes against humanity as an international obligation of States, by means of a specific treaty concerning such crimes, is essential so that we do not again have to bemoan the fact that innocent people fall victim to the most abhorrent behavior known to humanity.

We congratulate the Special Rapporteur on his work and look forward to his second report.

Thirdly, I shall refer to the topic "**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**", covered in chapter VIII of the report.

At this year's session, the Commission had before it the third report by the Special Rapporteur, Professor Georg Nolte, containing a draft conclusion on constituent instruments of international organizations.

Draft conclusion 11 specifically concerns treaties constituting international organizations and the way in which subsequent agreements and subsequent practice should be taken into consideration in interpreting them, in the light of articles 31 and 32 of the Vienna Convention on the Law of Treaties. As we know, the constituent instruments of international organizations are dealt with in article 5 of that Convention, which states that the Vienna Convention on the Law of Treaties shall apply to any treaty which is the constituent instrument of an international organization and to any treaty adopted within such an organization, without prejudice to any relevant rules of the organization.

For over a century, international organizations have played a leading role in international law and their constituent treaties are the basis of their status as subjects. We are today part of the most important international organization in the world: the United Nations, whose constituent treaty represents what we may call the Magna Carta of international law.

This is the context in which draft conclusion 11 acquires its importance, by stating that articles 31 and 32 of the Vienna Convention on the Law of Treaties are applicable to the constituent treaties of international organizations. This conclusion simply notes that, on certain occasions and in compliance with the high standards set by general practice and jurisprudence, a constituent treaty of an international organization may be interpreted by a subsequent agreement or practice. A well-known specific example of this is the interpretation of the term "affirmative vote" in paragraph 3 of Article 27 of the Charter of the United Nations, whereby the abstention

of a permanent member of the Security Council does not constitute an obstacle to the adoption of resolutions. This interpretation, resulting from a practice that emerged in historic circumstances in the Security Council, has enjoyed the general support of the Members of the United Nations.

In the opinion of our delegation, the interpretation of a treaty through a subsequent agreement or subsequent practice is a particular situation of strict law and, as we have stated previously, refers only to the interpretation of treaties. A treaty cannot be modified or amended by mere conduct. As stated by our President Michelle Bachelet in her speech to the General Assembly in September (I quote) “Our country is aware of our common responsibility to ensure that the international system functions smoothly. An essential element is the principle of adherence to international law, which includes strict respect for treaties, as a guarantee of peace and international stability”,

My delegation is following this topic with special attention and appreciates the meticulous work done by the Special Rapporteur. Accordingly, and in view of its importance in international law, we shall express our views on all the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties once these have been finally adopted by the International Law Commission.

Lastly, I should like to welcome the Commission’s inclusion of the topic “*Jus cogens*” in its programme of work. We note with interest the appointment of Professor Dire Tladi as the Special Rapporteur for the topic.

As we know, the famous article 53 of the Vienna Convention on the Law of Treaties refers to this concept and presumes the existence of *jus cogens*. Until a few decades ago, this concept raised questions on the part of some members of the international community and was not unanimously accepted. Today there is no doubt that the rules of *jus cogens* are the foundation underlying international law. There are few legal concepts on which such unanimity exists today.

For this reason, the work to be done by the Special Rapporteur is extremely important for the codification and progressive development of international law. How to identify a *jus cogens* rule and what is its legal nature are some of the most important questions to which the Commission must find answers.

There is no question about the importance of *jus cogens* rules in the international community, since they protect essential values shared by all humanity and are true norms of international public order limiting the autonomy of the will of States. My delegation wishes Mr. Dire Tladi every success to and offers him its cooperation in the important task that he will be performing as Special Rapporteur for this important topic.

Mr. Chairman,

In conclusion, I congratulate the Commission on the fruitful work that it has done this year. I should like to request this General Assembly, when it adopts the resolution on the Commission's report, in addition to approving the usual paragraphs and procedural decisions on the reports approved this year, to emphasize the valuable work done by the International Law Commission.

Thank you.