

74th Session of the General Assembly

Sixth Committee

Agenda Item 79

Report of the International Law Commission

on the work of its 71st Session

Cluster I: Chapters: I, II, III, IV (Crimes against humanity), V (Peremptory norms of general international law (jus cogens)) and XI (Other decisions)

Statement by

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New York, 28 October 2019

Chairperson,

Austria commends Special Rapporteur Sean Murphy and the Commission for the successful completion of the second reading of the **“Draft articles on prevention and punishment of crimes against humanity”** and expresses its appreciation for this contribution to the development of international criminal law.

Austria welcomes the effort to base the draft articles as much as possible on the Rome Statute of the International Criminal Court, and also welcomes the explicit reference to the Rome Statute in the preamble of the draft articles. This approach precludes the risk of divergences.

As to the understanding of the term “jurisdiction” used also in various other texts prepared by the ILC, Austria notes that according to the commentary to the present draft articles this term is to be understood in a broad sense so that it also encompasses situations of “*de facto*” jurisdiction or control. However, like in other texts prepared by the Commission, for example the draft principles on protection of the environment in relation to armed conflicts, we would have preferred the use of the combined terms “jurisdiction or control” also in the present draft articles to describe this broad scope of application. We believe the Commission should make more efforts to use coherent language in its texts.

Regarding draft article 14 on “Mutual legal assistance”, Austria supports strengthening international cooperation as envisaged in this draft article, in particular its paragraph 9 concerning cooperation with international mechanisms. As regards draft article 15 on dispute settlement, Austria welcomes the reference in the draft articles to the main judicial organ of the United Nations, the International Court of Justice, and advocates the acceptance of its compulsory jurisdiction.

Austria strongly supports the recommendation of the Commission to elaborate a convention on prevention and punishment of crimes against humanity on the basis of the draft articles. In Austria’s view, the successful work of the ILC, to which we have all contributed through deliberations of this Committee over several years, deserves appropriate follow-up. We therefore call on this Committee to decide that an international convention shall be concluded on the basis of the draft articles adopted by the International Law Commission. Such a convention would close the existing gap concerning the criminalization of crimes against humanity and would constitute an important supplement to the Rome Statute of the International Criminal Court: The ICC’s jurisdiction is, in practice, confined to high-ranking perpetrators, whereas the new convention would oblige states to establish jurisdiction over crimes against humanity and either institute proceedings against any suspected perpetrator of a crime against humanity or otherwise extradite her or him, irrespective of status or rank. We believe that a diplomatic codification conference would be the most suitable forum for the elaboration of such a convention. The Austrian government is currently considering the possibility of hosting such a conference in Vienna.

In addition, we would like to underline once again that other initiatives to elaborate international instruments concerning mutual legal assistance with regard to the prosecution of atrocity crimes are complementary and do not preclude the elaboration of a Convention on prevention and punishment of crimes against humanity. It will, however, be necessary to avoid duplication between the different instruments.

Chairperson,

My delegation welcomes the adoption by the Commission of the “**Draft conclusions on peremptory norms of general international law (jus cogens)**” on first reading. We appreciate the work of Special Rapporteur Dire Tladi and his fourth report. We are pleased to see that the Special Rapporteur finally proposed a draft conclusion referring to a non-exhaustive list of *jus cogens* norms in an annex to the draft conclusions and that this proposal has been accepted by the Commission. Austria has stated several times in the Sixth Committee that such a list would be a helpful addition to the work of the Commission on *jus cogens* norms.

For the moment, Austria would like to confine its remarks to this non-exhaustive list of *jus cogens* norms. Although we are able to concur with this list in general, we nevertheless wish to make the following three observations:

First, as to the prohibition of aggression, listed as the first example of *jus cogens* norms in the annex, it is unclear whether this wording comprises all aspects of the general prohibition of the use of force pursuant to Article 2(4) of the Charter of the United Nations. As the commentary to the draft annex indicates, the ILC had taken such a broad view when it referred in 1966 to the “law of the Charter concerning the prohibition of the use of force” as *jus cogens*. The wording now chosen for the annex, “prohibition of aggression”, does not exclude an interpretation that would restrict the *jus cogens* norm to the narrower scope of General Assembly resolution 3314 (XIX) of 1974 on the definition of aggression, which does not encompass the mere threat of force. The commentary, however, seems to suggest that the broader scope is envisaged. It would thus seem consistent to replace “prohibition of aggression” by “prohibition of the use of force”.

Secondly, the reference to “basic rules of international humanitarian law” as a *jus cogens* norm is not sufficiently precise. The references in the commentary to the articles on state responsibility and to the study on fragmentation of international law, which mentions as one example for basic IHL rules the “prohibition of hostilities directed at civilian population”, do not provide sufficient clarity. It merits further study whether the “basic rules” encompass also other important norms of international humanitarian law, such as the “Martens Clause” and the principles and rules on distinction, proportionality, military necessity and precaution in attack as well as the protection of persons *hors de combat*.

Thirdly, while we understand that the draft annex is not meant to be exhaustive, we wonder why the Commission has not made the attempt to include at least all the norms it had identified as *jus cogens* in its previous work in the list. We wonder why these “other norms having

peremptory character” referred to in the Commentary were excluded. We request the Special Rapporteur and the Commission to continue their analysis which norms are to be included in the list of peremptory norms and to provide a more thorough reasoning in the commentary why these norms are considered to be peremptory.

Chairperson,

Allow me to turn now to the new topics added to the long-term programme of work of the Commission.

The topic **“Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law”** has been added because it appeared that it could be useful to provide guidance to states in the field of reparation to individuals for damage caused by such violations.

The Austrian delegation would be interested to learn what the proposed topic would add to the “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, adopted by the General Assembly already on 16 December 2005 (UNGA Res 60/147). These Principles and Guidelines receive only scant attention in two footnotes of the working paper annexed to the Commission’s report as Annex B, although they largely cover the “specific issues” identified in the paper.

While we are open to the idea of studying the various practices in the field of remedies and reparations for gross violations of international human rights law and serious violations of international humanitarian law, we wonder whether the intended mixture of *de lege lata* analysis and *de lege ferenda* suggestions could substantially add to the already existing “Basic Principles and Guidelines”.

The topic **“Prevention and repression of piracy and armed robbery at sea”** has not yet been addressed by a specific comprehensive international instrument that is in accordance with modern international criminal law. However, it remains to be seen to what extent the Commission’s work can go beyond the UN Convention on the Law of the Sea, the Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation (SUA Convention) and the Protocol thereto.

With respect to the Commission’s programme of work, we noted with regret that the topics **“Universal criminal jurisdiction”** and **“The settlement of disputes to which international organizations are parties”** have not been taken on this year. Let me reiterate that in our view both issues do not only meet the ILC’s criteria for the selection of topics, but are also of high practical relevance for states. Hence, we would very much support their inclusion in the Commission’s current agenda.

At its past session, the ILC also received an oral report by the Special Rapporteur Juan Manuel Gómez Robledo for the “**Provisional application of treaties**” on proposed model clauses to be annexed to the draft guide on this topic. We note that the annex to this year’s ILC report contains several model clauses. However, we miss a model clause allowing also negotiating states to opt-in into the provisional application of a treaty, not just non-negotiating states. This is important since some states are only able to apply a treaty provisionally after the relevant steps under domestic law, including parliamentary approval, have been taken. Moreover, the model clauses should also provide for a possibility to terminate or suspend a provisional application, even if a state does not intend to become a party in the future. With these improvements the draft model clauses will certainly be of practical value for states in drafting relevant treaty provisions.

Chairperson,

Permit me to conclude with some general remarks. This year marks the **50th anniversary of the Vienna Convention on the Law of Treaties**, the “Treaty on Treaties” and maybe the most fundamental outcome of the ILC’s work. In an increasingly interdependent and complex international environment, the Vienna Convention continues to play a central role in public international law, maybe now more than ever, and remains a significant foundation for political and legal international relations to this day. The anniversary has been commemorated by various events throughout the year and all around the globe. To round up the celebrations, the Austrian foreign ministry organizes a seminar for practitioners and treaty experts entitled “The Vienna Convention from a Practitioner’s View – Does it provide answers to all questions?” in Vienna on 19 November 2019. Perhaps on this occasion, we might also be able to identify future topics for the ILC.

Thank you for your attention.