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TO THE UNITED NATIONS



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AUPRÈS DES NATIONS UNIES

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**74th Session of the General Assembly of the United Nations
Sixth Committee**

Agenda item 79

**Report of the International Law Commission
(71st Session, A/74/10)**

Chapter IV – Crimes against Humanity

Chapter V – Peremptory norms of general international law (jus cogens)

Chapter XI – Other decisions and conclusions of the Commission

**Speech delivered by Mrs. Alina Orosan
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New York, October 2019

General remarks

At the outset I would like to extend this delegation's congratulations to you for assuming the chairmanship over our Committee and ensure you of our continued cooperation and support.

At the same time, I would like to express our appreciation to the Chair of the International Law Commission for the comprehensive presentation of the report on this year's ILC session and to all members of the ILC for their continued efforts in ensuring a good progress of work on topics on the agenda of the Commission, relevant for the progressive development and codification of international law.

Chairperson,

Turning to the order of business, with regard to the **Chapters IV and V** of the report, my delegation would like to submit the following views:

Chapter IV – Crimes against Humanity

In relation to Chapter IV – *Crimes against humanity*, my delegation echoes the statement of the European Union and extends its deep appreciation to the Commission and the Special Rapporteur, Mr. Sean D. Murphy, for the impressive work done on this topic and for the rich research material provided in the context.

Romania favours developing the draft articles into a global convention on prevention and punishment of crimes against humanity which will provide a strong legal basis for inter-state cooperation on the prevention, investigation and prosecution of such crimes.

There is also a need for a coherent approach in relation to all crimes of grave concern to the humankind to ensure that no fragmentation occurs especially in what concerns inter-state cooperation and mutual legal assistance. In this manner the overall objective of prevention and punishment of these crimes can be effectively attained.

Chapter V – Peremptory norms of general international law (jus cogens)

[General remarks]

Romania welcomes the adoption on first reading, by the Commission, of the draft conclusions on peremptory norms of general international law (*jus cogens*) and of the commentaries thereof.

We are confident that the text presented, on which Governments are invited to comment until the 1st December next year, will serve its purpose, namely to provide guidance to all those who may be called upon to determine the existence of peremptory norms of general international law (*jus cogens*) and their legal consequences.

While lending its support for the inclusion of this topic in the Commission's current programme of work, RO delegation was critical on the methodological option to address this challenging topic (which prevented States to intervene in its consideration in a more focused way) and pleaded at the same time for a coherent approach in line with the existing international law, specifically the *Vienna Convention on the Law of the Treaties*.

Having before us the whole set of draft conclusions and the corresponding commentaries, we are pleased to note that they are drafted in a well-balanced and careful manner and follow closely the *Vienna Convention on the Law of Treaties*. We also remark on a positive note that the draft conclusions do not deal with regional *jus cogens* norms, which we do not consider as existing.

Draft conclusions and the commentaries to them reflect, as well, the cautiousness of the Commission in dealing with the topic and this is best noticeable in *Conclusion 23* – non-exhaustive list of *jus cogens* norms.

Before referring in detail to *Conclusion 23* and to the annex, I would like to pause shortly on *Conclusion 13* – absence of effect of reservations to treaties on peremptory norms of general international law (*jus cogens*) and *Conclusion 21* – procedural requirements.

[Conclusion 13 - absence of effect of reservations to treaties on peremptory norms of general international law (jus cogens)]

According to paragraph 1 of Conclusion 13, a reservation to a treaty provision reflecting a *jus cogens* norm shall not affect the binding nature of the norm. Does this mean that the reservation is permissible at all? What is the effect on the reservation given that a treaty cannot be contrary to a *jus cogens* norm and that a reservation cannot be made if it is contrary to the object and purpose of a treaty? Presumably a reservation to a *jus cogens* norm is contrary to the object and purpose of the treaty. In our opinion further reflection is needed on whether this paragraph is indeed necessary as formulated.

[Conclusion 21 – procedural requirements]

Conclusion 21 mirrors in fact the procedure provided for in articles 65 to 67 from the *Vienna Convention on the Law of Treaties*¹.

We understand both from the text of the conclusion as well as from the commentary to it that *the intention* is not to alter the procedural requirements in place for activating the jurisdiction of the International Court of Justice, but just to *encourage* the submission to the International Court of Justice of a potential dispute between the invoking State and the objecting State. However, paragraph 4 of *Conclusion 21* and the corresponding commentaries² only reflect the situation when the dispute actually comes before the ICJ and they are drafted in such a manner as to suggest that the ICJ would have a jurisdiction to deal with such a dispute irrespective of the consent of the invoking State.

¹ Art. 65 - Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty; Art. 66 - Procedures for judicial settlement, arbitration and conciliation; Art. 67 - Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

² See paragraphs 8 and 9

Therefore, it is our view that the manner in which the text is written might suggest that this conclusion is a basis for ICJ jurisdiction irrespective of the consent of both States, which is not in line with the intention of the Commission when drafting the text, nor with the international law as it stands.

Having these comments in mind, it would be useful also to deal within this *Conclusion*, with the situation when the ICJ jurisdiction cannot be activated due to the lack of consent from both States. What happens in such circumstances? Is there any relevant state practice in this respect (as we note that the *Vienna Convention on the Law of Treaties* is also silent on the matter)?

On the other hand, according to Article 64 of the *Vienna Convention on the Law of Treaties*, “[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates”. Therefore, due to *erga omnes* effect of the *jus cogens* norm, all international treaties (bilateral or multilateral) must conform to such a norm. In this case, would the opposition of the majority of States to the invoking by one (or few) States of a conflict with a *jus cogens* norm as a ground for the invalidity or a termination of a rule of international law invalidate a determination that such a norm is indeed a *jus cogens* norm? That is the reversed majority. Does the procedure under articles 65 to 67 of the *Vienna Convention on the Law of Treaties* really apply in case of article 64 situations?

It is our view that the commentaries could address better these aspects.

[Conclusion 23 – non-exhaustive list]

Reverting to *Conclusion 23*, as previously stated by our delegation, mindful of the objections raised by some members of the Commission, as well as by some delegations as to drawing-up such a list, its elaboration and its inclusion in an annex represents a useful element. However, it is not very clear to us why the list is limited only to those norms on which, previously, the ILC took a stance in considering them *jus cogens* norms and not even all such norms identified by the Commission in its work. In our view the list should include all norms identified by the ILC in its activity as *jus cogens*, as well as other norms having a *jus cogens* character based on the criteria just identified by the Commission as reflected by state practice and/ or the jurisprudence of international courts and tribunals. Why, for instance, only two of the fundamental principles of international law are considered *jus cogens* norms while the others are not?

To conclude on this point: Romania favours the drawing up of a non-exhaustive list of *jus cogens* norms as an annex to the conclusions, reflecting also the methodological approach to the identification of these norms, but we consider that the list as it is should not be limited only to those norms considered by the ILC in its previous work as having a peremptory nature. Therefore, we do think that in further analyzing the topic more consideration should be given to adapting conclusion 23 and the corresponding list to reflect other norms of international law reaching the *jus cogens* status in order to prevent the risk of disqualifying other norms as being peremptory norms of international law.

On a final note, we would like to express our gratitude to the Special Rapporteur, Mr. Dire Tladi, for his ample and meticulous research on this important issue, for the solutions proposed to the

Commission, as well as for the availability to address the comments received, either on substance or on methodology. His efforts represented a solid basis for developing the draft conclusions, adopted on first reading. We look forward to bringing our contribution in the next steps of this exercise.

Chapter XI – Other decisions and conclusions of the Commission

With reference to the last chapter of the Report, my delegation would like to share its views on the *model clauses in relation to provisional application of treaties* and the *long-term programme of work*, as follows:

Model clauses in relation to provisional application of treaties

This delegation acknowledges with gratitude the efforts of the Special Rapporteur to provide model clauses that cover a wide variety of state practice and which actually draw on language already inserted in various international treaties.

While model clauses 1, 2 and 5 reflect a wide practice on treaty provisions relating to provisional application of treaties, we are not sure of the applicability of draft model clause 3 (opt in/opt out). It is not clear when the non-negotiating State/ international organisation could make such a statement. Could such a statement occur in the context of the signature of the treaty by the non-negotiating State/ international organization? Would non-opposition imply acceptance or the model clause envisages only express acceptance? In our view, draft model clause 3 reflects a certain formalism which is not necessarily to be found in Article 25 of the *Vienna Convention on the Law of Treaties*.

Reading draft model clause 4 against Article 25 para. 1 letter b) of the *Vienna Convention on the Law of Treaties*, we are not sure of the necessity of a declaration of a State in respect of non-application of the provisional application in the context in which a decision as per provisional application was taken through a resolution to which that State does not agree. According to mentioned provisions of the Vienna Convention, the provisional application of treaties occurs when States have *agreed* to that in whatever form. Therefore, if a State does not agree to a resolution which also includes a decision on a provisional application of a treaty, in view of art. 25 of the Vienna Convention, it is clear that such a provisional application does not occur.

Long-term programme of work

Approaching the conclusion of my intervention, I would just briefly pause on the decisions taken in relation to the future work of the ILC, especially on the topics proposed to be included in the long-term programme of work. I would not insist that the ILC should focus its activity on progressive development and codification of international law and its outcome should be useful to States.

- a. Reparation to individuals for gross violations of international human rights and serious violations of international humanitarian law

Regarding the proposed new topic of reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law, we would like to place on

record our doubts regarding the need for the Commission to embark in an exercise of codification and progressive development on the matter, especially aimed at producing draft guidelines or draft principles.

In our view, the previous work of the ILC on diplomatic protection and state responsibility, as well as the studies undertaken by various treaty bodies have already sifted through existing best practices and can offer good guidance in respect of the norms, principles and procedures related to reparation owed to individuals for violations of international law. For example, one could mention 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 UN General Assembly in 2005.

Therefore, we are not convinced that this topic is necessarily one which the ILC should dwell with.

b. Prevention and repression of piracy armed robbery at sea

We took note with interest of the intention to include prevention and repression of piracy and armed robbery at sea among the topics on the ILC's long-term programme of work. Piracy continues to be a matter of concern for the international community; while existing international law, in particular the United Nations Convention on the Law of the Sea, provides a solid legal framework in order to address this threat, there remain issues deserving a closer attention. In particular, effective prosecution of pirates is essential in order to fight piracy and armed robbery at sea, and it would be worthwhile to analyse whether there are any gaps in this respect in the applicable legal regime.

Thank you.