



**Statement
on behalf of the
Republic of South Africa**

by

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before the Sixth Committee of the General Assembly

under the following

Cluster 1 topics:

**“Crimes against Humanity”
and “Peremptory Norms of General International Law
(*Jus Cogens*)”**

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Mr Chairman

Allow me to join others who have spoken before me in thanking, through you, the Chairman of the Commission, Professor Pavel Šturma, for introducing Cluster 1 topics to the Sixth Committee. My delegation is grateful to you Mr Chairman for affording us the opportunity to share some thoughts on the topic entitled “**Crimes against Humanity**”. First of all, please allow my delegation to congratulate Professor Sean Murphy, Special Rapporteur, on his report and for the exemplary work that has been done on the topic of crimes against humanity. We are also grateful to those that provided written comments on this topic in the preceding year.

Mr Chairman

The first use of the term “crimes against humanity” dates back to the early 20th century. The world has since witnessed the commission of such crimes on too many occasions. South Africa has itself experienced crimes against humanity in its history. Yet, “crimes against humanity” is the only category of most serious crimes which is currently not governed by an international convention. The process for drafting a convention on the prevention and punishment of crimes against humanity commenced in 2008. We are thus very pleased to see that the draft articles have now been adopted on the second reading.

South Africa places great emphasis on inter-State cooperation and the development of domestic laws to ensure the prevention of the most serious crimes, such as crimes against humanity. Whilst international courts serve an

important role in this regard, it is essential, in keeping with the principle of complementarity, that States remain the first line of defence in the investigation and prosecution of perpetrators of international crimes.

The draft articles present a mechanism through which States can strengthen their domestic laws as well as to allow for cooperation with other States in order to ensure accountability for crimes against humanity.

Mr Chairman

South Africa would have liked to see the inclusion of war crimes and genocide within the parameters of the draft articles. However, we note that a multilateral convention focused on mutual legal assistance and extradition for all serious international crimes is underway. Nevertheless, it would be necessary to ensure that such initiative and the draft articles remain complementary to each other.

The draft articles require States to criminalize crimes against humanity under national laws. South Africa has indeed done so through its Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, which criminalized crimes against humanity together with war crimes and genocide as per the definitions contained in the Rome Statute of the International Criminal Court.

The aforementioned Implementation Act provides South Africa with wide jurisdiction and includes jurisdiction over citizens, persons ordinarily resident in or merely present in South Africa, as well as those who have committed a crime against a South African citizen or person ordinarily resident in the country. Under the Implementation Act, South Africa accordingly has universal jurisdiction over crimes against humanity.

Mr Chairman

In relation to the Commission's recommendation, South Africa largely supports the content of the draft articles and is pleased to note that some of its previous concerns have been clarified in the report.

South Africa supports the elaboration of a convention, in principle. To do so via the General Assembly may take considerable time, particularly if one has regard for the slow pace of finalization of the draft articles on Responsibility of States for Internationally Wrongful Acts, and Diplomatic Protection. However, the previously mentioned initiative for extradition and mutual legal assistance for all atrocity crimes will follow the route of a diplomatic conference. It may thus be better to elaborate a convention in the General Assembly – thus covering all options.

Ultimately, the manner selected should be one that will not be unduly delayed and that will allow for the largest number of ratifications in order for cooperation to be successful.

Mr Chairman

We now turn to the topic entitled “**peremptory norms of general international law (*jus cogens*)**”. Once again, thank you for affording us the opportunity to share some thoughts on this topic. My delegation welcomes the opportunity to speak on this topic as peremptory norms of general international law are important to South Africa. South Africa is particularly pleased with the progress of the International Law Commission’s work on *jus cogens*, and we are convinced that the strengthening of *jus cogens* is of critical importance in light of the many challenges posed to the upholding of the Rule-of-Law internationally. We maintain the view, expressed previously in this forum, that it is important to reinforce and bolster the minimum standards against which the conduct of States should be measured. The increased certainty that the Commission’s work on *jus cogens* will bring is eagerly awaited.

South Africa notes with appreciation, the work of the Commission in adopting a full set of 23 draft conclusions with commentaries on first reading. The approach adopted by the Commission on the initiative of the Special Rapporteur and recommendation of the Drafting Committee, was that the Commission will not adopt any draft conclusions until such time as the complete set of draft conclusions were ready for consideration, and it is clear that this approach assisted in ensuring an integrated set of draft conclusions that could be internally aligned and refined until the last moment.

We wish to pay special tribute to the Special Rapporteur, Professor Dire Tladi, for the constructive way in which he led the Commission towards the successful adoption of the first reading text on this most difficult topic. Special words of congratulations are also due to the Chairperson of the Drafting Committee for the 71st Session, Mr Grossman Guiloff as well as previous Chairs of the Drafting Committee, Professors Sturma, Rajput, and Jalloh.

Mr Chairman

Since it is the first time that the Sixth Committee has seen a set of draft conclusions adopted by the Commission on this topic, allow us to be rather comprehensive. As a general comment, we find sensible the balance reliance on previously agreed instruments such as the Vienna Convention, on the one hand, and, on the other hand, moving beyond such texts. In our view this balance is achieved mainly by using previous instruments as a point of departure but ultimately allowing the Commission's work to be driven by available State practice and jurisprudence of international courts. We are particularly appreciative that the Commission did not attempt to provide answers to the many interesting theoretical debates, but rather stuck to its lane of progressive development of international law and its codification.

We do not have much to say about draft conclusion 1. We have noted the Special Rapporteur's view concerning regional *jus cogens* which we think is well-balanced in and we support the conclusion, namely, that the notion of

regional *jus cogens* does not find support in the practice of States. It may have been valuable to include this in the commentary to draft conclusion.

On draft conclusion 2, we accept the Commission's decision to rely on article 53 of the Vienna Convention. As the commentary illustrates, the definition in article 53, though said to be "for the purposes of" the Vienna Convention, is accepted in the practice of States as the general definition of peremptory norms of general international law.

Mr Chairman

Draft conclusion 3 is, for us, a very important draft conclusion. South Africa is fully supportive of the wording used in draft conclusion 3 when it refers to 'values of the international community' that are 'universally applicable' and 'hierarchically superior' in identifying the characteristics of *jus cogens*. We have noted the minority views in the commentary to the effect that the characteristics in draft conclusion 3 are not supported by practice. Given the wealth of materials in the commentary, we find this surprising and we hope that the Commission would revisit the inclusion of this minority on second reading. We have also noted, again with surprise, the minority view that the relationship between these characteristics and the criteria is "obscure". To us the commentary is very clear that these characteristics may contribute, indirectly, to the application of the criteria.

We think Part II of the Draft Conclusions is rather straightforward. We would, however, suggest that the Commission adopts a much clearer line concerning the role of general principles of law and treaty law in the formation of peremptory norms. Concerning draft conclusion 7, on the international community of States as a whole, we think that the phrase “a very large majority” is sufficiently balanced. We do not think, as suggested by the minority view, that there should be a requirement that all states, or even virtually all States, should accept and recognize the peremptory character. That would be tantamount to establishing a veto right on the establishment of peremptory norms.

South Africa is concerned about the balance in draft conclusion 9. It seems to exclude the possibility that decisions of national courts can also serve as a subsidiary means for the determination of peremptory norms of general international law.

Mr Chairman

Turning now to Part III, we can largely agree with the Commission’s approach to legal consequences of peremptory norms. We are in large agreement with the Commission’s decision to stick to the language of the Vienna Convention in relation to the consequences of peremptory norms for treaties. We are, however, sympathetic with the view expressed in paragraph 2 of the commentary to draft conclusion 11 that in some cases severability may be

justified even in cases where the conflict exists at the time of conclusion of the treaty in question.

On draft conclusion 16, we note that the Special Rapporteur had explicitly included resolutions of the UNSC in the text but the Commission has decided to address it only in the commentary. In our view, it would be better for the text of the Draft Conclusions to specifically state that resolutions of the UNSC are also subject to peremptory norms.

We have taken note of the minority view concerning draft conclusion 19, namely, that the particular consequences of breaches of peremptory norms should apply to all breaches and not only serious breaches. To our mind, all breaches of peremptory norms are serious. We are therefore in agreement with the minority view and hope that in the second reading text, the word “serious” would be deleted.

Mr Chairman

South Africa recognizes the novelty of draft conclusion 21 which seeks to balance the undesirability of unilateral action by States and the need for a stable and peaceful international community and legal system, on the one hand, and the need to ensure respect for peremptory norms on the other hand. As we read the provision, it exerts pressure on disputing States to resort to the ICJ if they can resolve any dispute through amicable means. We note that the commentary makes clear the consequences if the objecting State(s) make an

offer for the submission of the disputes to the ICJ. We recommend that, on second reading, the commentary makes clear that if no offer to submit the matter for adjudication by the ICJ, the notifying party can adopt the measures it had proposed. Alternatively, the text might be redrafted to provide the possibility for any State to offer to submit the matter for adjudication and to provide for negative inferences for any group of State that refuses.

This draft conclusion, which we support in principle, does raise some practical difficulties. We are still applying our minds to these and will provide more detailed comments in our written submission.

Mr Chairman

With respect to the illustrative, we have taken note of the middle road approach adopted by the Commission which refers to norms already identified by the Commission having reached peremptory status without elaborating a new list from scratch. We have consistently advocated for such an approach and we are therefore in agreement. We recognize that in the ideal world, the Commission could have elaborated a new list, but we agree with the comments made by an unnamed member of the Commission in the Fourth Report that such an exercise would take at least fifty years. Given the importance of this topic, we would not support this course of action.

In conclusion, Mr Chairman

Jus cogens is a fundamentally important topic to all States, and we wish to recognize the excellent work of the Special Rapporteur, the Drafting Committee, its Chairs, and the Commission for bringing the topic to a point where it can be debated before the Sixth Committee. We note that, pending progress of the first reading at the Sixth Committee, it is possible that the Secretariat will send out requests for comments on the draft conclusions. We urge all States to pay special attention to this topic and to provide comments by the deadline to be set so that the topic can be taken up by the Commission for the second reading in 2021. South Africa will continue to monitor this topic with great interest.

Thank you very much for your attention.