

Statement by the United States of America
74th General Assembly Sixth Committee Debate on
Agenda Item 79: Report of the International Law Commission
on the Work of its 71st Session
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October 29, 2019

*Cluster I – Crimes Against Humanity, Peremptory Norms of International Law,
Other Decisions and conclusions of the Commission*

Thank you, Mr. Chairman.

I would like to begin by thanking Mr. Pavel Šturma, the Chairman of the Commission, for his presentation of the Commission's report and recent leadership of the ILC.

The United States remains supportive of the work of the ILC. The Members of the Commission are to be congratulated for their hard work over the past year, and on behalf of the United States, I extend my thanks for their dedication to international law. We also thank the Office of Legal Affairs, and particularly its Codification Division, for its continued effort to support the work of the ILC. The United States considers the ILC's work in the codification and the promotion of the progressive development of international law to be of vital interest, and we follow its proceedings closely. We look forward to addressing its work over the next several days.

Mr. Chairman, I would like to begin by addressing the ILC's draft articles on the **prevention and punishment of crimes against humanity**. The United States has a long history of supporting justice for victims of crimes against humanity and other international crimes. The adoption and widespread ratification of certain multilateral treaties regarding serious international crimes – such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide – have been a valuable contribution to international law, and the United States shares a strong interest in supporting justice for victims of atrocities. We submitted extensive U.S. Government comments on the project in April 2019.

We would like to thank the Special Rapporteur for this project, Sean Murphy, for his prodigious efforts. He has brought tremendous value to this project, and we particularly appreciate his efforts to take into account States' views on this topic. Robust interaction and a productive relationship between States and the ILC is vitally important to the relevance and continuing vitality of the Commission's work. We have also particularly appreciated his extensive consultations with Member States.

With due appreciation of the importance and gravity of the subject, the United States submits that it is not yet the moment to consider negotiating a convention based on the draft articles. Careful consideration must be given to the draft articles and commentaries by all States. In addition, although some of the written comments submitted by the United States and others were taken into account in the final draft articles, the ILC chose not to incorporate other State proposals for revision. The United States is therefore concerned that as currently formulated, the draft articles lack clarity with respect to a number of key issues, and believes these issues must be addressed in order to reach consensus among States and to ensure that any future convention would be effective in practice.

Among other concerns, the draft articles need to be flexible in implementation, accounting for a diversity of national systems, parties to the Rome Statute and States that are not parties to the Rome Statute, as well as diversity within national systems. The draft provisions of the proposed convention are also not sufficiently mindful of the challenges that have arisen in the area of international criminal justice, including by reflecting lessons learned and reforms enacted after overbroad assertions of jurisdiction by national and international courts. In this context, the United States recalls and reiterates its continuing, longstanding, and principled objection to any assertion of jurisdiction by the International Criminal Court over nationals of States that are not parties to the Rome Statute, including the United States, absent a UN Security Council referral or the consent of such a State.

For these reasons, the United States respectfully proposes that the subject of Crimes Against Humanity be included on the Sixth Committee Agenda for the 76th session, for further work based on the draft articles. Consideration should be given to potential modalities of work that would enable thorough, substantive exploration of the challenges that are posed by a potential convention on crimes against humanity, such as a working group. An inclusive and rigorous approach would have the greatest probability of a successful outcome that strengthens the ability to provide justice for victims of crimes against humanity.

Mr. Chairman, I will now address the topic of **peremptory norms of general international law**, or *jus cogens*. We recognize the work of the Commission on this project and in particular the efforts of Special Rapporteur Professor Dire Tladi. We look forward to providing our full comments to the draft conclusions by December 2020. In the meantime, we offer preliminary observations on six of the draft conclusions, which reflect our ongoing concerns with this project. We hope these comments will be constructive as other Member States and the Commission further consider this topic.

First, we have questions as to the purpose of **draft conclusion 3**, which, on its face, appears to introduce additional criteria for the identification of *jus cogens* norms. The commentary indicates this was not the intent. If that is the case, the content of draft conclusion 3 and its commentary seem more appropriately placed in a discussion of the historical development of the principle of *jus cogens*.

Second, **draft conclusion 5** addresses the bases for peremptory norms of international law. In our view, draft conclusion 5 is of limited utility. As a threshold matter, we wish to emphasize a point made in the commentary to draft conclusion 4: there is no substitute for establishing the existence of the relevant criteria for *jus cogens*. In this respect, we are particularly concerned by the statement that general principles of law may serve as a basis for *jus cogens*. We are not only unaware of any evidence to support this conclusion, but concerned by the implication that there are characteristics of general principles of law that would allow one to assume the existence of criteria required for establishing a principle of *jus cogens*. While general principles of law may influence the practice of States in this context, they do not themselves constitute an independent basis of peremptory norms.

Third, in respect of **draft conclusion 7**, we note that the Commission appears to have considered several variations of what standard of acceptance and recognition by States would be sufficient to meet the criteria “international community as a whole”. We have questions about whether “a very large majority” is sufficient in light of the peremptory status of *jus cogens* principles and note the ILC’s own discussion included formulations that suggest there should be a higher threshold. We appreciate that this is a difficult concept to capture and will be giving this careful thought as we prepare our full comments for submission by the end of next year.

Fourth, we must express again our concern about what is now **draft conclusion 16** (formerly 17), indicating that a resolution, decision, or other act of an international organization does not create binding effect if it is contrary to *jus cogens*. While the draft conclusion no longer expressly includes resolutions of the UN Security Council, the commentary makes clear that the conclusion would apply to such resolutions and could invite States, irrespective of Article 103 of the UN Charter, to disregard or challenge binding Security Council resolutions by relying on even unsupported *jus cogens* claims. We appreciate the note in the commentary that Security Council decisions require “additional consideration,” but remain highly concerned that what is now draft conclusion 16 could have quite serious implications, not least because there is no clear consensus on which norms have *jus cogens* status.

Fifth, we are confused by the inclusion of **draft conclusion 21**, the dispute resolution clause. In principle, we appreciate the idea of establishing procedural safeguards as a check on meritless assertions of a breach of a *jus cogens* norm. It is, however, unclear how the current proposal would work in practice if there were not agreement, at step 4, between the affected states to submit the matter to dispute resolution. More fundamentally, in our view it is inappropriate to include draft conclusion 21 for two reasons: First, international law imposes no obligation on states to agree to submit disputes relating to *jus cogens* – or disputes related to any other matter – to binding third-party dispute resolution. Second, and relatedly, these are draft conclusions that purport to reflect the existing state of the law rather than draft articles proposed for inclusion in a convention to be negotiated by states. Because international law imposes no

obligation on states to agree to submit disputes relating to *jus cogens* to binding dispute settlement, there is no basis for the ILC to reach a “conclusion” to this effect.

Finally, the United States disagrees with the decision to include **a non-exhaustive list** of peremptory norms in the draft annex. We recognize the effort to limit the list to a factual statement of norms that the ILC has previously referred to as having *jus cogens* status, without express comment as to whether those prior references were well founded. Even so, the list is presented as being “without prejudice to the existence or subsequent emergence of *other* peremptory norms”, which can be read as presupposing that the norms on the list have been properly included. Inevitably, questions will arise about why certain norms are included in this list and some, like piracy, are not, and whether the earlier ILC documents on which it relies accurately identified the *jus cogens* norms.

Certainly, some of the items in this list are *jus cogens* norms, including most prominently the prohibition of genocide. We are not convinced, however, that other specific items on the list either should be included or are accurately described. For example, while the United States recognizes the right to self-determination, we question whether this right constitutes a *jus cogens* norm such that it is hierarchically superior to other norms. The ILC itself has been inconsistent with respect to this conclusion, which is reflected in its lack of methodology when considering the status of the right to self-determination in prior projects. In this context, we note that, in discussing the status of the right to self-determination, the commentary obscures the distinction between peremptory norms and obligations *erga omnes*. While peremptory norms give rise to obligations *erga omnes*, the reverse is not always the case and cannot be assumed with respect to the right to self-determination. Other items on the list may very well constitute peremptory norms, but are ill defined in the annex and commentaries. As an example, we would point to the inclusion of what is described as “the basic rules of international humanitarian law”. Even if one were to accept that some IHL rules are *jus cogens* norms, there is considerable uncertainty as to which are peremptory. The report suggests that some future project may resolve which specific IHL rules are peremptory, but the need for this future work only underscores why this broad category should not be included in the annex, and indeed, why **draft conclusion 23** and the annex should be removed.

Mr. Chairman, I would like to conclude by addressing the other decisions of the Commission during its 71st session. First, I would note that the Special Rapporteur on the topic **Provisional application of treaties** has proposed a series of “model clauses” for possible inclusion in its draft guide on this topic. We are currently reviewing these draft clauses, and considering whether including them would provide any particular benefit. We may provide additional views as part of the U.S. Government’s formal comments on this project later this year.

I would now like to turn to the Commission’s consideration of **new topics**. With the end of the quinquennium still two years away, and as the Commission considers several possible new topics, now might be a valuable time for the ILC to consider its workload and working methods. The United States recalls discussions in this Committee last year, during which some States

expressed concerns with the number of topics and the tremendous resources it takes for States to conduct meaningful review of the voluminous materials produced by the Commission. We share those concerns and respectfully submit that the ILC should consider whether it would be more valuable to tackle fewer topics. A more targeted approach could allow for deeper government engagement and increased opportunity for comment by a wider array of states. In that respect, the United States would favor the ILC taking on only one new topic – in addition to the work that has begun on sea level rise – at this time.

Of the proposed new topics, the United States would be most supportive of ILC consideration of the **prevention and repression of piracy and armed robbery at sea**. Piracy remains an issue of critical international concern. While there is much existing codified and customary international law, further elucidation by the ILC may prove useful.

The United States does not support adding to the ILC's program of work the proposed topic of "**Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law**." Focusing the topic on "gross violations" of international human rights law and "serious violations" of IHL is likely to create three significant challenges. First, it is difficult to see how the project could avoid addressing the substance of these two distinct bodies of law, given that it sets a threshold for the level of violation that would potentially be addressed, and the substance of these bodies of law has been addressed extensively elsewhere. Second, there is a risk that the topic could be politicized, as there may be significant disagreement on the types of situations that give rise to "gross" or "serious" violations. Finally, given the many variables in the context of reparations, including the forum and process for such claims and facts of the particular situation, we believe it would be difficult to identify generalizations that would be valuable and instructive. We also continue to have concerns with the ILC taking up the topic "universal criminal jurisdiction" while it is still under active deliberation in the Sixth Committee, including in a working group, and remain concerned about the parameters of any potential study.

Finally, I would like to offer one observation with respect to the ILC's work products. As the ILC has increasingly moved away from draft articles, its work products have been variously described as conclusions, principles or guidelines. It is not always clear what the difference is among these labels, particularly when some of these proposed conclusions, principles, and guidelines contain what appear to be suggestions for new, affirmative obligations of States, which would be more suitable for draft articles. This is the case, for example, in the draft principles on protection of the environment in relation to armed conflict. Although fashioned merely as "principles," the first substantive provision, Principle 3, provides that "States shall, pursuant to their obligations under international law, take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflict." It would be useful to have more transparency as to what the ILC intends by fashioning conclusions, principles, and guidelines, and whether any distinctions should meaningfully be drawn between them. A Commission delineation on this issue may also help avoid confusion as to what status should be afforded to the ILC's work in the absence of a clear expression of State consent to codification.

Thank you, Mr. Chairman.