Statement by the Republic of Türkiye at the Sixth Committee

Report of the International Law Commission on the Work of its 73rd Session

(3 October - 18 November 2022)

CLUSTER I

"Peremptory norms of general international law (jus cogens)"

Madame Chair,

We would like to thank the Special Rapporteur Mr. Dire Tiladi for his reports and the deliberations held in the Commission on the topic "peremptory norms of general international law (jus cogens)".

As regards the topic, from the very outset we underscored that there was not sufficient state practice to work on the subject. It is also evident from the comments and observations of states submitted so far and the deliberations held by the Commission itself that there prevail deeply divergent views. We are of the opinion that the topic is still immature.

We regret that certain concerns and comments raised by Türkiye and some other states during the work have not been taken into consideration.

I would like to emphasize that we uphold our statements previously submitted on the topic. It is also worth recalling again that the inclusion of "jus cogens" in the Vienna Convention on the Law of Treaties was one of the reasons why Türkiye didn't become a party to this Convention.

Türkiye, at the time, expressed its concern that "jus cogens" not being defined in the Convention would pave the way for each state to interpret it to fit its own needs. It was actually what has happened during the work on this topic for which we refer to our position in our

previous statements. Within the context of the said Convention, Türkiye had also objected to "hierarchal superiority" between the norms which is actually peculiar to national legal systems with an authority to determine and enact as such.

Madame Chair,

Before moving forward, we would like to comment on two points in the fifth report of the Special Rapporteur Mr. Dire Tladi.

In the report, while addressing a comment on the binding effect of the usage of "rules" in draft conclusion 17, it was asserted that "…the Convention as such does have a legally binding effect on non-parties". We would like to clarify that Türkiye is not a State Party to the "Vienna Convention on the Law of Treaties" and it does not have a legally binding effect on Türkiye.

As for the second point; the report refers to Türkiye as taking "the explicit view that the draft conclusions as a whole were a progressive development". It is worth emphasizing that our statement should have read as Türkiye "continued to have misgivings about the need for progressive development of the concept of jus cogens". We also questioned from the very outset the need for the Commission to include the topic in its programme of work. We also previously underlined that "the outcome of the work could remain an analysis, general overview of conceptual issues related to jus cogens".

In this context, without prejudice to our position, we would like to share some comments and observations. We emphasize that the absence of a comment or expression of position on any particular draft conclusion or commentary with its references cannot be construed as endorsement of the content thereof.

First, we recall our previous statements in which we expressed concern that the scope and criteria for identification of "jus cogens" are ambiguous and do not include any guiding substantial elements. We are still of the view that "non-derogability" cannot be a criterion for identification, but rather may be a consequence.

Second, in regard to draft conclusion 2, we observe that the phrase "fundamental values of the international community" would have the potential to further add to the ambiguity of the subject, exposing it to variety of potential interpretations and ensuing controversies.

Third, as regards paragraph two of draft conclusion 5, which states that general principles of law may also serve as a basis for "peremptory norms of general international law

(jus cogens)", we would like to draw attention to the vagueness of the concept which is prone to add more subjectivity to the topic. Furthermore, in the commentaries the Commission itself recognizes that "… there is little practice in support of general principles of law as a basis for peremptory norms of general international law (jus cogens)" and further cites a couple of judicial decisions and scholarly work to support its inclusion. We find the justification rather unconvincing.

Fourth, we recall suggesting the deletion of paragraph two of draft conclusion 7 to give clarity to paragraph one. The assertion in paragraph two that "Acceptance and recognition by a very large and representative majority of States is required for the identification of a norm as a peremptory norm of general international law (jus cogens); acceptance and recognition by all States is not required." is in contrast with draft conclusion 3 and the wording of the "Vienna Convention on the Law of Treaties" which provides "the international community of States as a whole" as an apparent higher standard for "acceptance and recognition of peremptory norm of general international law (jus cogens)". Moreover, it is worth noting that with the requirement "a very large and representative majority of states", the Commission falls behind the "extensive and virtually uniform" standard it had set for customary international law, which paradoxically it recommended as "the most common basis for peremptory norm of general international law (jus cogens)". We therefore do not agree with the wording "a very large and representative majority of states" and think that it should have been amended as "the international community of States as a whole" or at least, as suggested by a number of States, as "virtually all States".

Fifth, as regards "evidence of acceptance and recognition", we are of the view that "silence" or "inaction" by relevant state cannot be taken as evidence of "acceptance and recognition". We also caution against "decisions of national courts" and "resolutions adopted by an international organization or at an intergovernmental conference" as forms of evidence. Since resolutions of international organizations cannot constitute evidence, it is the "conduct of states in connection with resolutions adopted by an international organization or at an intergovernmental conference" that must be taken into consideration. The resolutions of international organizations often do not reflect legal positions of states.

Draft conclusions under part three have the potential to disrupt well established Treaty relations among states. We observe that legally well-founded concerns of states have not been taken into consideration.

Sixth, as regards the assertions that "[t]he persistent objector rule does not apply to peremptory norms of general international law (jus cogens)", Türkiye has serious concerns. We object to contestations of the Commission as they are devoid of any state practice and maintain that the persistent objection of certain States to a rule of customary international law, particularly the persistent objection of a State which is specially affected by that rule, have to be taken into account while determining whether the rule has been accepted and recognised by the international community of States as a whole as "peremptory norm of general international law".

Seventh, as regards draft conclusion 19, we observe that the Commission relied, among other things, on the "draft articles on responsibility of States for internationally wrongful acts" to which states have not conferred legal status and customary status of which is debated. Moreover, as far as we understand, the resolutions, which were relied on by the Commission in support of its arguments in draft conclusion 19, were introduced as references during the deliberations of the Committee on the second reading without the scrutiny of states. We are both concerned on the method of the introduction and the inferences made particularly from the Security Council resolution 541 (1983) of 18 November 1983, which in fact do not mention anything about "jus cogens" or the so-called breach thereof. We share the concerns that the Commission has a specific mandate in relation to international law and should be impartial.

Last but not least, we also maintain our serious concerns regarding the "non exhaustive list of norms" attached to draft conclusions. Although the Commission itself stated in the commentary that identification of specific norms that have a peremptory character falls beyond the scope of the present draft conclusions, the Commission nevertheless has decided to include in an annex a nonexhaustive list of norms previously referred to by the Commission as having peremptory character.

"Protection of the environment in relation to armed conflicts"

Madame Chair,

We thank Special Rapporteur Ms. Marja Lehto for her reports and appreciate the deliberations held by the Commission on the topic of "protection of the environment in relation to armed conflicts".

We would like to provide our comments as well as understanding on the work of the Commission in relation to this topic. Please note that the absence of a comment or expression

of position on any particular draft principle or commentary thereto with its references cannot be construed as endorsement of the content thereof.

We uphold our previous statements on the topic and recall raising concerns about,

- Broadening of the judgement of a judicial organ competent on a specific area to other fields;

- Generalization of the subjective views based on a particular study;

- Authority of sources cited by the Commission[1];

- Broad interpretation of subjects such as occupation or protected zones;

- Expanding the subject to cover non-international armed conflicts;

- Selective analogy applied and so on.

As regards the sources cited by the Commission, it is worth particularly emphasizing that "draft articles on responsibility of States for internationally wrongful acts" relied on heavily in draft principles and commentary thereof are legally non-binding and whether they reflect customary international law is debated among states.

We previously called for intense scrutiny as regards the asserted correlation among three fields of law by the Commission, which we unfortunately cannot see as reflected.

The all-encompassing and ambitious approach taken to cover temporal application ("before, during, after an armed conflict, including in situations of occupation"), the scope ("to enhance the protection of environment in relation to armed conflicts"), type of measures ("to prevent, mitigate and remediate harm"), type of armed conflicts ("international armed conflicts and non-international armed conflicts") and addressees ("states", "international organizations",

[1] Aside from reliance mostly on scholarly work, non-binding decisions / resolutions / reports / policy documents of international organizations and international/regional court decisions, there are references to international agreements such as "Convention on the Protection and Use of Transboundary Watercourses and International Lakes" and "Convention on the Law of the Non-Navigational Uses of International Watercourses", which did not attract notable number of States. In the same token, the "Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD)" which was relied on attracted 78 States Parties, which could be an indication that it is not widely accepted. Moreover, "1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment" which was relied on for "cultural importance" and cited in paragraph (11) of Principle 4, was signed by 9 States and ratified by none, therefore the Convention did not enter into force.

"non-State armed groups", "corporations", "civil society organizations") through different and distinct fields of law inevitably prevented the compliance of the outcome with any of them.

We underline that our legitimate concerns and legally well-founded propositions were not adequately reflected in the work of the Commission, as in the case of some other States.

Thus, Türkiye's previously expressed concerns remain relevant today.

The conflation of international human rights law, environmental law and humanitarian law in draft principles in and of itself leads to assertions beyond existing law or to modification of already existing rules or other references through interpretation.[2]

Striking examples would be assertions based on subjective inferences made from and misrepresentation of the judgement of the European Court of Human Rights regarding the "Loizidou case". In paragraph (4) of the commentary to the Introduction of Part Four titled "Principles applicable in situations of occupation", it is contended that "It is widely acknowledged that the law of occupation applies to such cases provided that the local surrogate acting on behalf of a State exercises effective control over the occupied territory. The possibility of such an "indirect occupation" has been acknowledged by the International Criminal Tribunal for the Former Yugoslavia, the International Court of Justice, and the European Court of Human Rights." citing in footnote no. 729 the aforementioned case in support of the argument. The relevant judgement of the European Court of Human Rights relates to the applicability of the European Convention of Human Rights, not to the applicability of "law of armed conflict" and there is nothing in the judgement that could suggest "acknowledgement of the so-called indirect occupation".

Furthermore, in support of the argument provided in paragraph (3) of the commentary to draft principle 19 which states that "The International Court of Justice has notably interpreted respect for the applicable rules of international human rights law as part of the obligations of the Occupying Power under article 43 of the Hague Regulations.", the Commission again cited

[2] Such as in the commentaries, the qualifiers of existing treaty rules were at times left out such as "Subject to its national legislation" phrase in Convention on Biological Diversity, Art.8/(j); "which are of outstanding universal value" phrases in Articles 1 and 2 of the World Heritage Convention. In this context, it is also worth noting as regards the assertions for "States, international organizations and other relevant actors" in Principle 5 titled "Protection of the environment of indigenous peoples" that Türkiye is not a State Part to "ILO Indigenous and Tribal Peoples Convention" and refers to reservations or declarations it had made for international agreements that have provisions regarding "indigenous peoples".

in footnote no. 741 the "Louizidou case". The aforementioned case has no relation either with the

ICJ judgement or the Hague Regulations. On the other hand, attributions to "invasion" or "occupation" are not compatible with reality, when taking into account the 1960 Treaties and the nature and contents of the relevant UN documents.

In light of the inclusion of some vague and controversial expressions either in the draft principles or the commentaries with its references, such as the so-called "non-State armed groups", "non-State actors", "parties to an armed conflict" or "relevant actors", Türkiye reiterates its longstanding position that they are open to misinterpretation and abuse since they do not make any differentiation between other actors and terrorist organizations[3] or illegal organizations to which national legislation applies. It is worth underlining once more that terrorist organizations cannot be "parties to an armed conflict" and the draft principles cannot be used as a pretext to engage with terrorist organizations.

In view of the foregoing, it is the understanding of Türkiye that the draft principles and the commentary thereof together with its references as a whole do not codify or restate existing international law nor is the interpretation of the international agreements to which Türkiye is a State Party.

The draft principles and the commentary thereof together with references in any event do not and cannot create new obligations for Türkiye, beyond the international agreements to which it is already a State Party.

"Other Decisions and conclusions of the Commission"

Madame Chair,

Before concluding my remarks, I would like to say a few words on Chapter X, "Other decisions and conclusions of the Commission".

Türkiye is an ardent supporter of the rules based multilateral international system.

International law is an indispensable component of international order and should be diligently developed and strengthened. The International Law Commission plays an important role through its recommendations in this endeavour. We appreciate the Commission's efforts

3 As evidenced by the footnote no. 507 of paragraph (12) of the commentary to draft principle 9.

and we welcome the inclusion of “Prevention and repression of piracy and armed robbery at sea”, “Subsidiary means for the determination of rules of international law” and “Settlement of international disputes to which international organizations are parties” to its current programme of work.

We are looking forward to following the work of the Commission on these topics.

Thank you, Madame Chair.