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INTERNATIONAL LAW ASSOCIATION
AMERICAN BRANCH
EST. 1922

SETTLEMENT OF DISPUTES

ABILA STUDY GROUP

CRIMES AGAINST HUMANITY

OCTOBER 16, 2025

INTERNATIONAL LAW ASSOCIATION
AMERICAN BRANCH
EST. 1922

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SETTLEMENT OF DISPUTES

Proposed Revised Text for Article 15 of the
Draft Articles on Prevention and Punishment of Crimes against Humanity [ILC Draft]

Article 15 Settlement of disputes

1. States Parties shall endeavour to settle disputes concerning the interpretation ~~or~~**,** application**, or fulfilment** of the ~~present draft articles~~**Convention** through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation ~~or~~**,** application**, or fulfilment** of the ~~present draft articles~~**Convention**, **including those relating to the responsibility of a State Party for engaging in acts or omissions constituting crimes against humanity or a State Party's responsibility to prevent and punish crimes against humanity,** that is not settled through negotiation shall, at the request of one of those States Parties, be submitted to the International Court of Justice, unless those States Parties agree to ~~submit the dispute to arbitration~~ **a different mode of dispute settlement**.

3. Any State Party may invoke the responsibility of another State Party under this Convention in accordance with the procedures set out in this article.

~~3. Each State may declare that it does not consider itself bound by paragraph 2 of this draft article. The other States shall not be bound by paragraph 2 of this draft article with respect to any State that has made such a declaration.~~

~~4. Any State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration.~~

Explanatory Notes

1. This proposal is intended to clarify the scope of the dispute settlement clause of the Draft Articles and the process by which States Parties may adjudicate disputes thereunder.

2. The proposal suggests the addition of disputes concerning the **"fulfilment"** of treaty obligations in the first and second paragraphs of Draft Article 15. This language would parallel Article IX of the Genocide Convention.[1] Early drafts of the Genocide

[1] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 art IX ("Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the

Convention did not include "fulfilment", prompting States to consider "whether there was a difference between the *application* and the *fulfilment* of a convention and whether, therefore, it was necessary to retain both words in the text".[2] The representative of India argued that "the word 'application' included the study of circumstances in which the convention should or should not apply, while the word 'fulfilment' referred to the compliance or non-compliance of a party with the provisions of the convention".[3] States ultimately adopted a joint amendment expanding the dispute settlement clause to include disputes "relating to the interpretation, application *or fulfilment* of the Convention".[4] While the significance of the word "fulfilment" continues to be discussed today,[5] its addition to the dispute settlement provision will ensure its applicability in all relevant circumstances.

3. The proposal also suggests clarifying that such disputes include those **"relating to the responsibility of a State Party for engaging in acts or omissions constituting crimes against humanity or a State Party's responsibility to prevent and punish crimes against humanity",** in the second paragraph of Draft Article 15. This language reflects the framing in Draft Article 3, the commentary to which recognizes that:

> [a] formula that calls for States not to engage in "acts that constitute" crimes against humanity is appropriate since States themselves do not commit crimes; rather, crimes are committed by persons, but the "acts" that "constitute" such crimes may be acts attributable to the State under the rules on the responsibility of States for internationally wrongful acts.[6]

This language also mirrors, in part, Article IX of the Genocide Convention, which provides for the inclusion of disputes "relating to the responsibility of a State for

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responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.").

[2] UNGA Sixth Committee (103rd meeting) (12 November 1948) UN Doc A/C.6/SR.103, 432 (emphases added).

[3] Ibid 437.

[4] UNGA Sixth Committee, 'Draft Convention on Genocide: Report of the Economic and Social Council' (3 December 1948) UN Doc A/760, para 15 (emphasis added).

[5] In *Sudan v United Arab Emirates*, Sudan argued that the word "fulfilment" in Article IX of the Genocide Convention is a "unique feature [...] among compromissory clauses in conventions concerning human rights" and "supports the view that Article IX [...] should be considered to constitute part of the '*raison d'être* of the treaty'". *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in Sudan (Sudan v United Arab Emirates)* Verbatim Record CR 2025/1 (10 April 2025) paras 42, 45. But see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, para 168 (observing that the addition of the word "fulfilment" "does not appear to be significant in this case"), Separate Opinion of Judge Tomka, paras 51-52 (opining that "the word 'fulfilment' adds nothing legally relevant to the obligation to apply the Convention" and "does not expand the jurisdiction *ratione materiae* of the Court in comparison with the concept of 'application of the Convention' as it appears in Article IX"), Declaration of Judge Skotnikov, 373 (observing that "the addition of 'fulfilment' is not particularly significant").

[6] UNGA, 'Report of the International Law Commission (71st Session), Text of the Draft Articles on Prevention and Punishment of Crimes Against Humanity and Commentaries Thereto' (20 August 2019) UN Doc A/74/10 [hereinafter "ILC Draft Articles"] art 3, commentary para 2.

genocide or for any of the other acts enumerated in article III".[7] But in contrast to the Genocide Convention,[8] the Draft Articles include an explicit obligation for States to refrain from engaging in acts that constitute crimes against humanity.[9] By incorporating this language into the dispute settlement clause, there would be no question that violations of that obligation fall within the scope of the dispute settlement mechanism and the jurisdiction of the International Court of Justice ("ICJ"). This explicit reference is particularly important given the historical debate under the Genocide Convention as to whether the ICJ could determine State responsibility for genocide. The ICJ ultimately relied on the State responsibility language in Article IX to confirm that its jurisdiction extended not only to the attribution of acts of genocide to a State, but also to determining whether such acts had been committed.[10] Since crimes against humanity similarly implicate both individual criminal responsibility and State responsibility, having a clear reference to State responsibility in the dispute settlement clause would remove any ambiguity regarding the scope of the provision and the ICJ's competence for this purpose.

4. The ABILA Study Group considered but intentionally does not suggest imposing **a required time limit for negotiation** prior to submitting the dispute to the ICJ.[11] Although some treaties impose comparable restraints on the arbitration precondition,[12] almost no treaty specifies the amount of time required for

[7] Genocide Convention (n 1) art ix.
[8] The Genocide Convention does not expressly prohibit States from committing genocide. See *Bosnia and Herzegovina v Serbia and Montenegro* (Merits) (n 5) para 166 ("The Court next considers whether the Parties are also under an obligation, by virtue of the Convention, not to commit genocide themselves. It must be observed at the outset that such an obligation is not expressly imposed by the actual terms of the Convention.").
[9] ILC Draft Articles (n 6) art 3(1) ("Each State has the obligation not to engage in acts that constitute crimes against humanity."). The commentary to this Article notes that under this obligation, States may neither "commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law" nor aid or assist, direct, control, or coerce, another State in the commission of an internationally wrongful act. Ibid art 3, commentary paras 3, 6. See also the ABILA Study Group Proposal on Scope, General Obligations, and Obligation of Prevention.
[10] *Bosnia and Herzegovina v Serbia and Montenegro* (Merits) (n 5) paras 180-182.
[11] This was also considered and purposefully omitted by the ILC. See Sean D Murphy, Special Rapporteur, 'Third Report on Crimes against Humanity' (23 January 2017) UN Doc A/CN.4/704, paras 248-251.
[12] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 30(1) ("Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. *If within six months from the date of the request for arbitration* the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.") (emphasis added); Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, art 29(1) ("Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. *If within six months from the date of the request for arbitration* the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.") (emphasis added).

negotiations prior to resorting to inter-State compulsory dispute settlement.[13] The appropriate duration for a period of negotiation is context-dependent and fact-specific. Moreover, the ICJ has indicated that negotiations must be carried out in good faith.[14] The proposal thus preserves a wide margin of discretion for the Court to determine when the requirement for good faith negotiation has been met, including by assessing whether the duration of negotiations was appropriate and whether either Party unduly prolonged negotiations.

5. The proposal also recommends replacing the phrase "agree to submit the dispute to arbitration" in Draft Article 15 with the phrase "**agree to a different mode of dispute settlement**". This language parallels Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD").[15] CERD's *travaux préparatoires* demonstrate that negotiating States also considered the following draft language:

> 1. If there should arise between two or more Parties a dispute relating to the interpretation or application of this Convention, the said Parties shall consult together *with a view to the settlement of the dispute by*

[13] See Sean D Murphy (n 11) para 251. See also Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105, art 12(1) ("Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiations, shall, at the request of one of them, be submitted to arbitration."); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNST 167, art 13(1); International Convention Against the Taking of Hostages (17 December 1979, entered into force 3 June 1983) 1316 UNTS 205, art 16(1); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 12) art 30(1); International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3, art 42(1). Some bilateral and multilateral investment agreements do impose a time-limited period for negotiations.

[14] See, e.g., *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)* (Merits) [2018] ICJ Rep 507, para 86 ("While States are free to resort to negotiations or put an end to them, they may agree to be bound by an obligation to negotiate. In that case, States are required under international law to enter into negotiations and to pursue them in good faith."); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)* (Provisional Measures) [2018] ICJ Rep 406, para 36 (negotiations "require a genuine attempt by one of the parties to engage in discussions with the other party, with a view to resolving the dispute. Where negotiations are attempted or have commenced, the precondition of negotiation is only met when the attempt to negotiate has been unsuccessful or where negotiations have failed, or become futile or deadlocked."); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) [2011] ICJ Rep 70, para 157 (for a negotiation precondition to be fulfilled, there must be "at the very least [...] a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute").

[15] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195, art 22 ("Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.").

negotiation, investigation, mediation, conciliation, arbitration, recourse to regional bodies, judicial process or other peaceful means of their choice.

2. Any such dispute which cannot be settled in the manner prescribed shall be referred to the International Court of Justice for decision.[16]

While this was later condensed to "another mode of settlement", the drafting history indicates that States supported a broad range of options beyond arbitration.[17] The Draft Articles would benefit from the same broad language, which would permit alternative means of peaceful dispute settlement, including conciliation and mediation, in addition to arbitration.

6. The proposal further suggests including the following sentence as a third paragraph of Article 15: **"Any State Party may invoke the responsibility of another State Party under this Convention in accordance with the procedures set out in this article."** In recent years, there have been robust developments in the ICJ's jurisprudence recognizing the standing of any State to a multilateral convention to invoke the responsibility of another State for violations of *erga omnes partes* obligations.[18] While the Convention will undoubtedly impose such *erga omnes partes* obligations, it is

[16] ECOSOC, Draft International Convention on the Elimination of All Forms of Racial Discrimination, Final Clauses, Working Paper Prepared by the Secretary-General (17 February 1964) UN Doc. E/CN.4/L.679, draft art 8-D (emphasis added).

[17] It was observed by Belgium, for example, that the clause "provided for various modes of settlement offering ample opportunity for agreement before the Court was resorted to". UNGA Third Committee (1367th meeting) (7 December 1965) UN Doc. A/C.3/SR.1367, para 40.

[18] See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Merits) [2012] ICJ Rep 422, para 69 ("The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party."); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Preliminary Objections) [2022] ICJ Rep 477, para 107 (recalling that "the obligations in question are owed by any State party to all the other States parties to the relevant convention; they are obligations *erga omnes partes*, in the sense that each State party has an interest in compliance with them in any given case"); *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and Netherlands v Syrian Arab Republic)* (Provisional Measures) [2023] ICJ Rep 587, para 50 ("any State party to the Convention against Torture may invoke the responsibility of another State party with a view to having the Court determine whether the State failed to comply with its obligations *erga omnes partes*, and to bring that failure to an end"); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Provisional Measures) [2024] ICJ Rep 3, para 33 ("The common interest in compliance with the relevant obligations under the Genocide Convention entails that any State party, without distinction, is entitled to invoke the responsibility of another State party for an alleged breach of its *obligations erga omnes partes*"); *Obligations of States in respect of Climate Change* (Advisory Opinion) (23 July 2025), paras 440-441 (finding that "States' obligations pertaining to the protection of the climate system and other parts of the environment from anthropogenic [greenhouse gas] emissions, in particular the obligation to prevent significant transboundary harm under customary international law, are obligations *erga omnes*" and that "the obligations of States under [the United Nations Framework Convention on Climate Change and the Paris Agreement] are obligations *erga omnes partes*" and that, consequently, "all States parties [...] may invoke the responsibility of other States for failing to fulfil them").

nevertheless advisable to include a dispute settlement provision **that immediately clarifies this**. Such an express recognition may also avoid any debate that could prolong litigation regarding one State Party's right to bring a claim against another State Party under the Convention.

7. Lastly, the proposal recommends **the deletion of current paragraphs three and four** of Draft Article 15, which provide an express opt-out to the dispute settlement provision in paragraph two. These paragraphs are superfluous as, under the 1969 Vienna Convention on the Law of Treaties, States inherently retain the right to formulate a reservation when signing, ratifying, accepting, approving, or acceding to a treaty, unless the treaty provides otherwise.[19] If the Convention does not prohibit reservations, the express opt-out clause in the dispute settlement provision would be redundant.[20] More importantly, given the *jus cogens* nature of the prohibition of crimes against humanity,[21] as with genocide, not including an express opt-out from dispute settlement better promotes the object and purpose of a Convention on Prevention and Punishment of Crimes Against Humanity.[22]

[19] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 19.

[20] Provided the reservation is not incompatible with the object and purpose of the treaty. Ibid art 19(c); UNGA, 'Report of the International Law Commission (Sixty-third session), Guide to Practice on Reservations to Treaties' (2011) UN Doc A/66/10 19, para 4.2.6 ("A reservation is to be interpreted in good faith, taking into account the intention of its author as reflected primarily in the text of the reservation, as well as the object and purpose of the treaty and the circumstances in which the reservation was formulated.").

[21] ILC Draft Articles (n 6), Preamble, para 4.

[22] There is growing support for the position that dispute settlement is vitally important to the object and purpose of a convention of this nature. See *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda*) (Jurisdiction and Admissibility) [2006] ICJ Rep 6, Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma, paras 19-21; *Sudan v United Arab Emirates* Verbatim Record CR 2025/1 (n 5) para 35. Indeed, Brazil, Croatia, Mexico, and the Netherlands expressly characterized reservations to the dispute settlement provision of the Genocide Convention as incompatible with its object and purpose. See Multilateral Treaties Deposited with the Secretary-General, Status as at 1 April 2009, Volume I, Part I, Chapters I to VII (2009) UN Doc ST/LEG/SER.E/26, 150-151, 154.