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71<sup>st</sup> Session  
of the General Assembly  
Sixth Committee

**Agenda Item 78**

**Report of the International Law Commission**

**on the Work of its 68<sup>th</sup> Session**

**Cluster 2: Chapters VII, VIII & IX (Crimes against humanity; Protection  
of the atmosphere; Jus cogens)**

**Statement by**

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New York, 27 October 2016

Mr. Chairman,

With regard to the topic “**Crimes against humanity**”, the Austrian delegation commends the Special Rapporteur Sean Murphy for his second report on this topic and extends its thanks to the Secretariat for the memorandum on existing treaty-based monitoring mechanisms that may be of relevance to the future work of the Commission.

The draft articles adopted provisionally this year by the Commission deal with some fundamental issues, such as jurisdiction and other matters that are of general significance. Although my delegation concurs with the majority of these draft articles, they nevertheless raise some points to be mentioned:

Before doing so, let me express my delegation’s support for the proposal made by Iceland on behalf of the Nordic states that, following the example of the Rome Statute, draft article 5 should explicitly exclude the imposition of the death penalty.

*We support draft article 5 on “criminalization under national law”. With regard to its paragraph 4, which follows the wording of Article 33 of the Rome Statute on the International Criminal Court by stipulating that orders of a government or of a superior do not exclude criminal responsibility, we are of the view that such orders should be considered in the context of provisions on mitigating circumstances, to be elaborated at a later stage. We understand paragraph 26 of the commentary, which refers to “orders from a superior to serve as a mitigating factor at the sentencing stage”, to point in this direction.*

Draft article 5 paragraph 7, which deals with the criminal and other liability of legal persons, leaves it to individual states to establish such a liability or not. This approach deviates from the Rome Statute, but we support the more flexible approach of the Commission. However, this paragraph must not be understood as affecting state immunity. *We wonder why the word “liability” was used instead of the word “responsibility” and would have appreciated some explanation of this in the commentary. We also wonder why in this particular context the draft article exceeds the framework of criminal law and ventures into the fields of civil and administrative law.*

According to draft article 6 paragraph 1 (a) on the establishment of national jurisdiction, a state has to establish its jurisdiction *inter alia* “when the offence is committed in any territory under its jurisdiction”. Under draft article 4, however, a state has to take “effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction or control”. We do not see a good reason for this discrepancy. Although paragraph 6 of the commentary on draft article 6 explains that the term “jurisdiction” has to be understood as also including *de facto* control, it seems that a harmonization of the wording, explicitly referring to “jurisdiction or control”, is necessary in order to avoid misunderstandings. However, we do not believe that draft article 4 should be revisited, as it is suggested in paragraph 6 of the commentary on draft article 6. Rather, the expression “jurisdiction or control” should be used throughout the draft articles, which would be in conformity with the use of this expression in human rights instruments.

*Draft article 6 paragraph 3 should not be understood as permitting “the exercise of any criminal jurisdiction established by a State in accordance with its national law” in breach of applicable rules of international law.*

A problem regarding the term “jurisdiction” arises also in connection with draft article 7 on “investigation”, according to which a state has to commence investigations “whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction”. In addition to the problem of “jurisdiction or control” mentioned before, there is also the question whether a state should not also be obliged to investigate if a crime was committed outside the territory under its jurisdiction, for example on a ship flying its flag or on board of an aircraft registered in it. A related question concerns the obligation to investigate if suspects are present on the territory of a state or if crimes have been committed by nationals as staff members of peace-keeping operations. *The resolutions of the General Assembly regarding the criminal accountability of United Nations officials and experts on mission, such as Resolution 69/114, encourage states to take the necessary measures in cooperation with the United Nations, which include investigation. To extend the obligation to investigate in this draft article to cover peacekeepers would enhance the objective of this General Assembly Resolution.*

*Draft article 9 on “Aut dedere aut judicare” refers also to the surrender to international criminal tribunals; it is our understanding that these tribunals also comprise hybrid courts or tribunals that combine both national and international elements. My delegation concurs with the view expressed in the commentary that a reference to the recognition of the jurisdiction of the relevant international tribunal prior to the surrender of the suspect is unnecessary. The denial of the international tribunal to accept the suspect would trigger the obligation of the surrendering State to prosecute.*

*Draft article 10 on “fair treatment of the alleged offender” contains an inconsistency: Paragraph 1 addresses any person against whom measures are being taken, whereas paragraph 2 only relates to “any such person that is in the custody in a State that is not of his or her nationality”. It is our understanding that the rights of the persons mentioned in paragraph 2 are additional to those mentioned in paragraph 1. Moreover, in the interest of clarity, the reference in paragraph 3 to “laws and regulations of the States” should be reformulated to also include international obligations, since the rights in paragraph 2 are also based on international law.*

Mr. Chairman,

Permit me now to turn to the topic **“Protection of the atmosphere”**. The Austrian delegation commends Special Rapporteur Shinya Murase for his valuable third report regarding the obligations of states to prevent atmospheric pollution and mitigate atmospheric degradation, the requirement of due diligence and environmental impact assessment. At this session, the Commission adopted five guidelines and a preambular paragraph that prompt our delegation to make only few comments.

As to guideline 4 on “environmental impact assessment” my delegation wonders why only such procedures should be applied. When the Commission dealt with the topic of “prevention of transboundary damage from hazardous activities”, it deliberately refrained from referring only to environmental impact assessment procedures, but instead referred to

the broader term "assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment" in order to show more flexibility. *The commentary qualifies the obligation under guideline 4 as one of conduct. However, one may wonder whether the distinction between obligations of conduct and obligations of result is appropriate in this case, since once the required environmental impact assessment has been carried out, this obligation has achieved its objective.*

*With regard to guideline 5 on "sustainable utilization of the atmosphere", my delegation, while sharing the view that the atmosphere is a limited resource, for general reasons of drafting sees no need to refer to this explanation in the guideline itself and suggests to reflect it rather in the preamble or in the commentary.*

As to guideline 6 on "equitable and reasonable utilization of the atmosphere" my delegation welcomes the respect for intergenerational equity but wonders how and by whom the interests of future generations will be identified. We would welcome further explanations in the commentary.

As to guideline 7 on "intentional large-scale modification of the atmosphere", my delegation wonders about the relationship of this guideline with guideline 3 regarding the "obligation to protect the atmosphere": Guideline 3 obliges States to protect the atmosphere by taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation. Guideline 7 states that "activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to any applicable rules of international law". Contrary to guideline 3, guideline 7 is formulated in very soft terms and does not specify the actor, which could be either a state or private person. This would raise the question how private activities can be directly addressed by a rule of international law and not through implementing state legislation. The commentary refers to the ENMOD Convention, but this convention addresses only states, either as actors engaged in military or any other hostile use of environmental modification techniques or as legislators. Accordingly, it would seem more appropriate to limit the scope of guideline 7 to states.

Mr. Chairman,

The Austrian delegation wishes to commend Special Rapporteur Dire Tladi for his most informative and broad first report on the topic of "***Jus cogens***". My delegation welcomes the Commission's decision to focus its work on this important topic to which former Austrian ILC member Alfred Verdross contributed the theoretical foundations.

As already indicated in Austria's statement of last year, my delegation is in favour of including an illustrative list of examples of norms having acquired the status of *jus cogens*. It has also read with particular interest the Special Rapporteur's considerations on this issue and shares his opinion that the Commission should not refrain from producing an illustrative list only because such a list might be misinterpreted as being an exhaustive list. The Austrian delegation finds the compromise solution suggested by the Special Rapporteur in paragraph 17 of his first report, to include an annex comprising examples of *jus cogens* norms referred to in the commentary, an acceptable way to assuage concerns apparently voiced by some ILC members as well as by states. We remain of the firm opinion, however, that it would be one

of the crucial added benefits of dealing with this topic if the Commission could deliberate on and ultimately produce such an illustrative list.

As regards the first three draft conclusions contained in the Special Rapporteur's report, the Austrian delegation wishes to add a few remarks.

As regards, draft conclusion 2 paragraph 1 we agree with the proposal to distinguish between *jus dispositivum* and *jus cogens* at the outset. However, we suggest some modifications of the current wording suggested. The wording "agreement of" before "States" in the first sentence of draft conclusion 2 paragraph 1 should be omitted because, as correctly stated in the second sentence of the same paragraph, such change can take place not only by various forms of agreements but also by customary law.

The expression "*jus dispositivum*" placed in brackets at the end of the first sentence may give rise to misunderstandings since it directly follows that part of the sentence which describes norms from which changes are prohibited, i.e. "*jus cogens*." My delegation thus suggests that the reference to "*jus dispositivum*" in brackets be moved to immediately precede the wording "unless such modification". This change would also correspond to draft conclusion 3 paragraph 1 where the expression "*jus cogens*" in brackets is placed immediately after the notion of "peremptory norms of international law".

Finally, as a matter of drafting, it would appear preferable to use the expression "peremptory norms of international law (*jus cogens*)" already in draft conclusion 1 where the term *jus cogens* first appears, instead of in draft conclusion 3 paragraph 1.