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# Statement by Mr. XU Hong

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## At the 71st Session of the UN General Assembly

*On Agenda Item 78*

**Report of the International Law Commission on the work of its sixty-eighth session**

*(Part II: Chapters 7, 8, 9, 10, 11, 12)*

***New York, 28 October 2016***

Mr. Chairman,

May I now share China's views on some of the topics addressed by the International Law Commission.

On the topic of "crimes against humanity", the 68th session of the Commission deliberated on the second report submitted by Mr. Murphy, the Special Rapporteur, and adopted Draft Articles 5 to 10 and the commentaries thereto. The Chinese delegation thanks the Commission and the Special Rapporteur for the outstanding job done, and would like to make the following points:

First, on the working method of the Commission. The Chinese delegation has noted that the ILC has set under this topic the objective of formulating an international convention specifically on crimes against humanity. But judging from the deliberations at the Sixth Committee last year, it is apparent that States have not reached a wide consensus on this point. The second report and the Draft Articles adopted by the Commission basically rely on analogous deduction primarily by sorting and summarizing relevant provisions in other international conventions on combating international crimes. This is not codification of the provisions related to crimes against humanity as found in existing laws, but proposing to draft a new law. Though the Commission used a similar approach in relation to very few topics such as the Law on Non-navigational Uses of International Watercourses, in view of the complexity and sensitivity of the topic on crimes against humanity per se, the advisability of this working method is open to question.

Second, on the stipulation in Draft Article 5 that States should legislate to list crimes against humanity as offences under their respective criminal code. Chinese delegation is of the view that on the need or otherwise for

legislation and on how to go about it, States should be given certain room for autonomy in decisions. As for the form of legislation, States should be allowed to stipulate, in light of the realities of their national legislation, provisions on the crimes listed in the above-mentioned draft article under the offences of "crimes against humanity" or some other offences.

Mr. Chairman,

This year, the ILC is deliberating on the topic of *jus cogens* for the first time. The Chinese delegation thanks Mr. Tladi, the Special Rapporteur, for submitting his first report. As the rules of *jus cogens* involve issues of fundamental importance in international law, it is of great theoretical and realistic significance that the Commission conduct discussions with a view to clarifying the legal issues related to *jus cogens*. The Chinese delegation would like to share the following views on the first report on this topic and the proposed draft conclusions:

First, the deliberations on this topic should strictly follow the provision in Article 53 of the 1969 Vienna Convention on the Law of Treaties, i.e., *jus cogens* is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". The work on this topic should focus on clarifying the meaning of the basic elements of *jus cogens* as mentioned above on the basis of taking stock of state practice, with the emphasis on codifying existing laws rather than drafting a new law. Addition of new elements, if needed, should be fully backed by state practice and be universally accepted or recognized by States.

Second, China has taken note of the core elements of the *jus cogens* concept as proposed by the Special Rapparteur, including "universal

applicability", that "*jus cogens* norms are superior to other norms of international law" and "protect(ion) of fundamental values of the international community". In China's view, these proposed elements are obviously at variance with the basic elements of *jus cogens* as defined in Article 53 of the above-mentioned convention and are, in essence, an alteration of *jus cogens*. Elements of *jus cogens* have a bearing on the major interests of all States and direct implications on their rights, obligations and responsibilities. Is there a need for adding new core elements? What is the basis for such additions? And what implications would they have? These are questions that China suggests warrant further studies.

Third, China has noted the Special Rapporteur's proposal that "*jus cogens* norms are superior to other norms of international law". Does this imply that *jus cogens* should prevail over the UN Charter and relevant resolutions of the Security Council? Article 103 of the UN Charter stipulates explicitly that "obligations under the present Charter shall prevail" over "obligations under any other international agreement". How is the relationship between *jus cogens* and the Charter of the United Nations to be handled? China believes that this kind of questions await further explanation.

Fourth, in China's view, it is not suitable to prepare at this stage a list or annex related to the rules of *jus cogens*. The correct approach would be to collect and study state practices as they relate to *jus cogens* and, on that basis, clarify the specific standards of *jus cogens* before exploring the need or otherwise for preparing a list or annex.

Mr. Chairman,

On the topic of "protection of the atmosphere", the Chinese delegation thanks the Commission and Mr. Shinya Murase, the Special Rapporteur, for

the work done. In the view of the Chinese delegation, the adopted Draft Guidelines by and large follow the condition of understanding set by the Commission in 2013, and reflect fairly objectively the outcome of relevant studies on the protection of the atmosphere. In this connection, the Chinese delegation would like to set forth the following views:

First, the expression in preamble paragraph 4 of "aware of the special situation and needs of developing countries" is rather weak and has not taken into full account the special circumstances and real needs of developing countries. By comparison, the expression in the Special Rapporteur's third report, i.e., "Emphasizing the need to take into account the special situations of developing countries" is more appropriate.

Second, activities "intended to modify atmospheric conditions" on a large scale , as described in Draft Guideline 7, generally refer to geo-engineering activities the pros and cons of which are still under discussion in the scientific community. In addition, if the activities in question violate the obligation to protect the atmosphere, they can entirely be dealt with under Draft Guideline 3. At present, there seems to be no need to come up with a special provision for addressing this issue.

Protection of the atmosphere is a common issue currently facing humanity and a composite issue that involves politics, law and science. It is the hope of the Chinese delegation that the Commission will fully realize the complexity and sensitivity of this issue, fully respect the existing mechanisms and efforts, and make more integrated studies of international practices under regional mechanisms, in a continuing and firm-footed effort to push ahead the work related to this topic.

Mr. Chairman,

This year, under the topic "Immunity of State officials from foreign

criminal jurisdiction", the highly complex and sensitive issue of exceptions was considered. The Commission conducted preliminary deliberation on the fifth report submitted by Special Rapporteur Mrs. Hernández. The Chinese delegation wishes to thank the Special Rapporteur and the Commission for their work.

The Chinese delegation supports the conclusion of the report that there is no exception in respect of immunity ratione personae. We do not support, however, the three exceptions to immunity ratione materiae as posited by the Special Rapporteur, i.e., serious international crimes, crimes that cause harm to persons or property in the territory of the forum State and crimes of corruption. My delegation noticed that the bulk of the evidence cited in the report for or against the aforementioned exceptions consists of just objections in minority opinion regarding (a small number of objections to) relevant ICJ decisions and civil cases before some national or international judicial bodies, such as the European Court of Human Rights. Such evidence is hardly convincing in that it lacks relevance and is clearly tendentious.

One, serious international criminal offences do not constitute an exception to immunity from foreign criminal jurisdiction. First of all, immunity is procedural in nature and falls under an entirely different category of rules vis-à-vis that of substantive rules which determine the lawfulness of a given act (including jus cogens). Therefore, violation of substantive rules should not preclude the application of procedural rules. This was confirmed in both the ICJ's Arrest Warrant case and the case of jurisdictional immunities of the State. Secondly, although international conventions against serious international crimes oblige states parties to establish jurisdiction or to assume obligations of cooperation in investigation, apprehension and extradition, this is without prejudice to the

immunity of officials from foreign criminal jurisdiction under customary international law. This was also confirmed in the ICJ's Arrest Warrant case.

Two, as regards crimes committed in the territory of the forum State that cause harm to persons or to property (territorial tort), we have noted that the report mainly draws on international treaties governing consular immunity and State immunity, as well as national legislations on immunity of countries like the United Kingdom, the United States, Russia and Australia. However, the exceptions in respect of harm to persons or property as established by these treaties and domestic legislations apply exclusively to civil procedures. By drawing direct parallels between these exceptions and exceptions to immunity of State officials from criminal jurisdiction, the report confuses immunity from civil jurisdiction with that from criminal jurisdiction without sufficient support in legislation and in practice.

Three, regarding crimes of corruption, in our opinion, these crimes generally do not involve immunity from criminal jurisdiction of a foreign court and therefore do not warrant being singled out as a standalone exception for study. Any official involved in a corruption case is held accountable primarily through domestic prosecution and, in case the suspect has fled abroad, he may be prosecuted in his home country after being extradited, repatriated or persuaded to return. Where assistance is required for prosecution in a foreign country, the State of the official should provide a waiver of his immunity.

Mr. Chairman,

In respect of the topic "Protection of the environment in relation to armed conflicts", the Chinese delegation supports the continued use in the third report by the Special Rapporteur Marie Jacobsson of the three-phase approach, namely, before, during and after the conflict. We would like to

suggest that future study further address the timing for the application of the draft principles by specifying which principles apply to all phases and which apply to only one of the phases. We also believe that the current report relies too much on legislative practices and relevant regulations but lacks the backing of a sound analysis of in-conflict examples and acts.

Mr. Chairman,

With respect to "Provisional application of treaties", the Chinese delegation sees both connection and distinction between the principle of pacta sunt servanda and the provisional application of treaties, which may cause them to clash in practice. Any potential solution should be based on a proper balance between the provisional application of treaties and domestic law in order to both preserve the validity of provisional application as a rule of international law, and leave some leeway for States to choose the application of treaties based on their domestic law. We further suggest that in light of the close connection between this topic and other treaty law regimes such as reservations to treaties, lapse of treaties and succession of States, a holistic approach is needed in the consideration. The validity of the current conclusions should also be backed up with more practical examples.

Thank you, Mr. Chairman.