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STATEMENT OF THE CHAIRMAN OF THE INTERNATIONAL LAW COMMISSION, MR. PEDRO COMISSÁRIO AFONSO

Part Two

***Chapters VII-IX:** Crimes against humanity; Protection of the atmosphere and Jus cogens.*

Thank you Mr. Chairman,

In my second statement introducing the Commission's report, I address three substantive chapters VII to IX. I will start with Chapter VII, dealing with **"Crimes against humanity".**

Chapter VII: Crimes against humanity

Mr. Chairman,

The Commission has already provisionally adopted last year four draft articles on the topic. This year, the Commission had before it the second report of the Special Rapporteur, Mr. Sean Murphy, which proposed six draft articles, as well as a memorandum by the Secretariat providing information on existing treaty-based monitoring mechanisms that may be of relevance to the future work of the International Law Commission.

The report was discussed by the Commission in the plenary and the six draft articles proposed therein were referred to the Drafting Committee. The Commission also requested the Drafting Committee to consider the question of the criminal responsibility of legal persons on the basis of a concept paper to be prepared by the Special Rapporteur. Upon consideration of two reports of the Drafting Committee, the Commission provisionally adopted draft articles 5 to 10 together with commentaries. The text of the

provisionally adopted draft articles and commentaries can be found at **paragraphs 84 and 85** of the report. I will address these draft articles in turn.

Draft article 5, entitled **"Criminalization under national law",** sets forth various measures that each State must take under its criminal law to ensure that crimes against humanity constitute offences, to preclude any superior orders defence or any statute of limitation, and to provide for appropriate penalties commensurate with the grave nature of such crimes. It comprises seven paragraphs.

Paragraph 1 provides that each State shall take the necessary measures to ensure that crimes against humanity, as such, constitute offences under its criminal law. Draft article 5, paragraphs 2 and 3, then further require the State to criminalize certain ways by which natural persons might engage in such crimes.

Under **paragraph 2**, each State shall take the necessary measures to ensure that basic modes of liability are criminalized under its national law, namely: committing a crime against humanity; attempting to commit such a crime; and ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

Paragraph 3 addresses the issue of command or other superior responsibility. It provides that superiors are criminally responsible for crimes against humanity committed by subordinates, in circumstances where the superior has engaged in a dereliction of duty with respect to the subordinates' conduct.

Paragraph 4 states that each State shall take the necessary measures to ensure that the fact that an offence referred to in the article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding the criminal responsibility of a subordinate. Such exclusion of superior orders as a defence exists in a range of treaties addressing crimes.

Paragraph 5 indicates that each State shall take the necessary measures to ensure that the offences referred to in the draft article shall not be subject to any statute of limitations.

Paragraph 6 provides that each State shall ensure that the offences referred to in the article shall be punishable by appropriate penalties that take into account the grave nature of the offences. This approach has been adopted for numerous treaties.

Paragraph 7 addresses the liability of "legal persons" for the offences referred to in draft article 5. The Commission decided to include a provision on liability of legal persons for crimes against humanity, given the potential involvement of legal persons in acts committed as part of a widespread or systematic attack directed against a civilian population. In doing so, it has focused on language that has been widely accepted by States in the context of other crimes and that contains considerable flexibility for States in the implementation of their obligation.

Mr. Chairman,

Let me now turn to draft article 6.

Draft article 6 – **"Establishment of national jurisdiction" -** provides that each State must establish jurisdiction over the offences referred to in draft article 5 in certain cases. It contains three paragraphs. **Subparagraph (a)** of paragraph 1 requires that jurisdiction be established when the offence occurs in the State's territory, a type of jurisdiction often referred to as "territorial jurisdiction". **Subparagraph (b)** calls for jurisdiction when the alleged offender is a national of the State, a type of jurisdiction at times referred to as "nationality jurisdiction" or "active personality jurisdiction". **Subparagraph (c)** concerns jurisdiction when the victim of the offence is a national of the State, a type of jurisdiction at times referred to as "passive personality jurisdiction". Given that many States prefer not to exercise this type of jurisdiction, this jurisdiction is optional.

Paragraph 2 addresses a situation where the other types of jurisdiction may not exist, but the alleged offender "is present" in the territory under the State's jurisdiction and the State does not extradite or surrender the person in accordance with the present draft articles. In such a situation, even if the crime was not committed in its territory, the alleged offender is not its national and the victims of the crime are not its nationals, the State nevertheless is required to establish jurisdiction given the presence of the alleged offender in territory under its jurisdiction. This obligation helps to prevent an alleged offender from seeking refuge in a State that otherwise has no connection with the offence.

Paragraph 3 makes clear that the draft article does not exclude any other jurisdiction that is available under the national law of that State.

Let me now turn to **draft article 7**, which is entitled "***Investigation***".

This draft article addresses situations where there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in territory under a State's jurisdiction. That State is best situated to conduct such an investigation, so as to determine whether crimes in fact have occurred or are occurring and, if so, whether governmental forces under its control committed the crimes, whether forces under the control of another State did so or whether they were committed by members of a non-State organization. A comparable obligation has featured in some treaties addressing other crimes.

Mr. Chairman,

Draft article 8 provides for certain preliminary measures to be taken by the State in the territory under whose jurisdiction an alleged offender is present.

Paragraph 1 calls upon the State to take the person into custody or take other legal measures to ensure his or her presence, in accordance with that State's law, but only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted. **Paragraph 2** provides that the State shall immediately make a preliminary inquiry into the facts. **Paragraph 3** requires the State to immediately notify the States referred to in draft article 6, paragraph 1, of its actions, and whether it intends to exercise jurisdiction. Doing so allows those other States to consider whether they wish to exercise jurisdiction, in which case they might seek extradition

Let me now turn to draft article 9, ***"Aut dedere aut judicare"***.

Draft article 9 obliges a State, in the territory under whose jurisdiction an alleged offender is present, to submit the alleged offender to prosecution within the State's national system. The only alternative means of meeting this obligation is if the State extradites or surrenders the alleged offender to another State or competent international criminal tribunal that is willing and able itself to submit the matter to prosecution. This obligation is commonly referred to as the obligation *aut dedere aut judicare*, which has been recently studied by the Commission and that is contained in numerous multilateral treaties addressing crimes.

Finally, let me turn to **draft article 10 "Fair treatment of the alleged offender"**. It comprises three paragraphs.

Paragraph 1 provides that any person against whom measures are being taken in connection with an offence referred to in draft article 5 shall be guaranteed at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law. While the term "fair treatment" includes the concept of a "fair trial", in many treaties reference to a fair trial is expressly included to stress its particular importance. In addition to fair treatment, an alleged offender is also entitled to the highest protection of his or her rights,

whether arising under applicable national or international law, including human rights law.

Paragraph 2 addresses the State's obligations with respect to an alleged offender who is not of the State's nationality and who is in "prison, custody or detention". In such situations, the State in the territory under whose jurisdiction the alleged offender is present is required to allow the alleged offender to communicate, without delay, with the nearest appropriate representative of the State or States of which such a person is a national, or the State or States otherwise entitled to protect that person's rights. Further, the alleged offender is entitled to be visited by a representative of that State or those States. Finally, the alleged offender is entitled to be informed without delay of these rights.

Paragraph 3 provides that the rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, provided that such laws and regulations do not prevent such rights being given the full effect for which they are intended.

Mr. Chairman,

To conclude this chapter, I would like to take this opportunity to point out that the Commission has reiterated its request for information on this topic made in 2014. In particular, the Commission would be grateful to States if they could provide it with information (a) on whether their national law at present expressly criminalizes "crimes against humanity" as such and, if so, to provide the text of the relevant criminal statute(s); (b) on conditions under which they are capable of exercising jurisdiction over an alleged offender for the commission of a crime against humanity (e.g. when the offence occurs within its territory or when the offense is by its national or resident); and (c) on decisions of their national courts that have adjudicated on questions concerning crimes against humanity.

***Chapter VIII*: Protection of the atmosphere**

Mr. Chairman,

The second substantive chapter that I will address today is chapter VIII, concerning the topic **"Protection of the Atmosphere".** Since its inclusion in the Commission's programme of work in 2013, the Commission has considered two reports by the Special Rapporteur, and has provisionally adopted three draft guidelines and four preambular paragraphs, together with commentaries thereto. This year, the Commission had before it the third report of the Special Rapporteur, Mr. Shinya Murase. This report analysed several key issues relevant to the topic. These concerned the obligations of States to prevent atmospheric pollution and to mitigate atmospheric degradation and the requirement of due diligence and environmental impact assessment. It also explored questions concerning sustainable and equitable utilization in relation to the atmosphere, as well as legal limits on certain activities aimed at intentional modification of the atmosphere. Consequently, 5 draft guidelines on the obligation of States to protect the environment, environmental impact assessment, sustainable utilization of the atmosphere, equitable utilization of the atmosphere and geo-engineering were proposed, together with an additional preambular paragraph were proposed. Moreover, it was proposed to renumber the draft guideline on international cooperation provisionally adopted by the Commission in 2015.

Following its debate on the report, the Commission decided to refer the draft guidelines, together with the preambular paragraph, as contained in the Special Rapporteur's third report, to the Drafting Committee.

You now have before you draft guidelines 3, 4, 5, 6 and 7, as well as a preambular paragraph, together with commentaries thereto, provisionally adopted by the Commission this year. These are reflected in **paragraphs 95** and **96** of the report. Like last year, the Commission also had a useful dialogue with scientists, organized by the Special

Rapporteur, which continues to greatly facilitate its work. The summary of the informal dialogue is available on the website of the Commission.

I will now briefly address the preambular paragraph and the guidelines adopted by the Commission at the present session.

The **fourth preambular paragraph** makes the factual statement of being: "*Aware* of the special situation and needs of developing countries". This formulation is based on the seventh paragraph of the preamble of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses. Its inclusion bears on considerations of equity in relation to the special situation and needs of developing countries. Both the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, and the 1992 Rio Declaration on Environment and Development, in principle 12 and principle 6, respectively, highlight this consideration in the protection of the environment. This is similarly reflected in article 3 of the 1992 United Nations Framework Convention on Climate Change and article 2 of the 2015 Paris Agreement.

Draft guideline 3 on the **Obligation to protect the atmosphere** is central to the present draft guidelines. In particular, draft guidelines 4, 5 and 6, which seek to apply various principles of international environmental law to the specific situation of the protection of the atmosphere, flow from this guideline. It will be recalled that the draft guidelines deal with atmospheric pollution and atmosphere degradation. It thus covers both the transboundary and global contexts relevant in protection of the atmosphere, and the corresponding varying obligations thereto. The formulation is based on principle 21 of the Stockholm Declaration, and principle 2 of the 1992 Rio Declaration. As presently formulated, the draft guideline is without prejudice to whether or not the obligation to protect the atmosphere is an *erga omnes* obligation in the sense of article 48 of the articles on responsibility of States for internationally wrongful acts.

The draft guideline reflects the obligation of due diligence. Due diligence requires States to "ensure" that activities within their jurisdiction or control by States themselves,

individuals and private actors do not cause significant adverse effects. The obligation "to ensure" does not require the achievement of a certain result but only requires the best available efforts so as not to cause significant adverse effects. It necessitates States to take appropriate measures to control public and private conduct. Due diligence implies a duty of vigilance and prevention. It also implies taking into account the context and evolving standards, of both regulation and technology. The reference to "prevent, reduce or control" denotes a variety of measures to be taken by States, whether individually or jointly, in accordance with applicable rules as may be relevant to atmospheric pollution on the one hand and atmospheric degradation on the other.

Draft guideline 4 deals with the important question of **Environmental impact assessment.** In the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* case, the International Court of Justice has affirmed that "a State's obligation to exercise due diligence in preventing significant transboundary harm requires that State to ascertain whether there is a risk of significant transboundary harm prior to undertaking an activity having the potential adversely to affect the environment of another State." The draft guideline is formulated passively in order to signal that this is an obligation of conduct and given the broad nature of economic actors the obligation does not necessarily attach to the State itself to perform the assessment. What is required is for the State to put in place the necessary legislative, regulatory and other measures for an environmental impact assessment to be conducted with respect to proposed activities. Notification and consultations are also key to such an assessment.

For an environmental impact assessment to be triggered the draft guideline requires that the proposed activities should be "which are likely to cause significant adverse impact" on the atmosphere. The impact of the potential harm must be "significant" for both "atmospheric pollution" and "atmospheric degradation". What constitutes "significant" involves a factual determination.

Draft guideline 5 on **Sustainable utilization of the atmosphere** and **draft guideline 6** regarding **Equitable and reasonable utilization of the atmosphere** draw

upon the environmental principles of sustainable utilization and equitable and reasonable utilization and apply them correspondingly with specific reference to the protection of the atmosphere. Indeed, draft guideline 5 indicates that the atmosphere is a natural resource with limited assimilation capacity, an aspect not always obvious.

Like minerals, oil and gas or water resources, the atmosphere, in its physical and functional components, is exploitable and exploited. The formulation "its utilization should be undertaken in a sustainable manner" is simple and not overly legalistic. It seeks to reflect a paradigmatic shift towards viewing the atmosphere as a natural resource that ought to be utilized in a sustainable manner. It is presented more as a statement of international policy and regulation than an operational code to determine rights and obligations among States. As the commentary notes, however, some members expressed doubts as to whether the atmosphere could be treated analogously as transboundary watercourses or aquifers.

Although equitable and reasonable utilization of the atmosphere is an important element of sustainability, as reflected in draft guideline 5, it was considered important to state it as an autonomous principle in **draft guideline 6**. This draft guideline is also formulated at a broad level of abstraction and generality. The formulation that the "atmosphere should be utilized in an equitable and reasonable manner" draws, in part, upon article 5 of the Convention on the Law of the Non-navigational Uses of International Watercourses, and article 4 of the Law of transboundary aquifers. It requires a balancing of interests and consideration of all relevant factors that may be unique to either atmospheric pollution or atmospheric degradation. The second part of the formulation addresses questions of intra- and intergenerational equity. In order to draw out the link between the two aspects of equity, the Commission elected to use the phrase "taking into account the interests of future" instead of "and for the benefit of present and future generations of humankind".

Finally, **draft guideline 7**, deals with specific aspects concerning **Intentional large-scale modification of the atmosphere.** These are activities the very purpose of

which is to alter atmospheric conditions. This draft guideline addresses only intentional modification on a large scale. The term "activities aimed at intentional large-scale modification of the atmosphere" is taken in part from the definition of "environmental modification techniques" that appears in the Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques.

The term "activities" is to be broadly understood. However, there are certain other activities prohibited under international law, which are not covered by the present draft guideline, such as those by the Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques and Protocol I to the Geneva Conventions of 1949. Accordingly, the present draft guideline applies only to "non-military" activities. Military activities involving deliberate modifications of the atmosphere are outside the scope of the present guideline. Moreover, those other activities which are governed by other regimes will continue to be governed by those regimes. Draft guideline 7 does not aim to stifle innovation and scientific advancement. Principles 7 and 9 of the Rio Declaration acknowledge the importance of new and innovative technologies and cooperation in these areas. At the same time, this does not mean that those activities always have positive effects. Accordingly, the draft guideline simply sets out the principle that such activities, if undertaken, should be conducted with prudence and caution. It does not seek either to authorize or to prohibit such activities unless there is agreement among States to take such a course of action. As noted in the commentary, a number of members remained unpersuaded that there was a need for a draft guideline on this matter, which essentially remains controversial, and the discussion on it was evolving, and is based on scant practice. Other members were of the view that the draft guideline could be enhanced during second reading.

In chapter III, the Commission has reiterated its request made in 2014 for the provision of relevant information on domestic legislation and the judicial decisions of the domestic courts. Any additional information received would be appreciated preferably by **31 January 2017.**

This concludes my presentation of chapter VIII.

***Chapter IX*: Jus cogens**

Mr. Chairman,

The third and last substantive chapter that I will address today is **chapter IX,** concerning the topic **"*Jus cogens*".** This topic was included in the Commission's programme of work in 2015. This year, the Commission had before it the first report of the Special Rapporteur, Mr. Dire Tladi, which set out the general approach of the Special Rapporteur and provided an overview of conceptual issues relating to *jus cogens*. The report traced the historical evolution of *jus cogens*, discussed its legal nature and provided an overview of the debate in the Sixth Committee on the topic. It also discussed methodological issues and proposed three draft conclusions.

Following the plenary debate, The Commission decided to refer draft conclusions 1 and 3 to the Drafting Committee. The draft conclusions are still in the Drafting Committee, which did not have enough time this year to conclude its work. An interim report on the draft conclusions provisionally adopted by the Drafting Committee thus far was presented by the Chairman of the Drafting Committee for information only. It is expected that the Drafting Committee will continue its work on these draft conclusions next year, together with any further draft conclusions that might be referred to.

In this presentation, I will first provide a general overview of the debate in the Commission before turning to the Commission's plenary discussion of the draft conclusions.

Mr Chairman,

The members of the Commission recognized the **wide support** among Member States for consideration of the topic, as expressed in the Sixth Committee. Some Commission members preferred to limit the scope of the topic to the law of treaties, while

others maintained that the topic extended to other areas of international law, such as the responsibility of states for internationally wrongful acts.

With regard to the **methodology** to be pursued, members agreed with the Special Rapporteur that, in principle, the study should be based on both State and judicial practice, and supplemented by scholarly writings. Some members drew a distinction between judicial practice, which could aid the determination of the existence of *jus cogens*, and the practice of States, which gave the norms in question their peremptory character. Members also debated whether *jus cogens* was well-established or whether peremptory norms, by their nature, constituted exceptions.

Some members maintained that the **theoretical basis** of *jus cogens* was not necessarily to be found in natural or positivist schools of thought. Rather, they argued that peremptory norms derived their obligatory force from a general practice of States, undertaken as a matter of law. Members suggested that elements of *jus cogens* included: impermissibility of derogation; recognition as such by the international community; universal applicability; hierarchical superiority; and protection of the international public order (*ordre public*). Some members stated that peremptory norms were essentially norms of customary international law, while others pointed out that treaties might be at the origin or reflect norms of *jus cogens*, and that peremptory norms might also be based on general principles of law.

In his report, the Special Rapporteur advised against **developing an illustrative list of norms** that had acquired the status of *jus cogens*. During the debate, some members expressed support for developing such a list, arguing that it would allow the Commission to contribute to the identification of peremptory norms. Other members thought it not advisable to develop a list, for reasons of expediency and propriety.

The Commission further discussed the possible existence of **regional *jus cogens***. Some members categorically rejected this possibility, while others pointed to examples in which regional institutions, such as the Inter-American Commission on Human Rights,

had referred to regional *jus cogens*. The Commission also discussed the incompatibility of the notion of the **persistent objector** with *jus cogens* norms. In both cases, members suggested that it was too early to draw conclusions and that these issues deserved further study.

Mr. Chairman,

I will now turn to the Commission's discussion of the **draft conclusions** proposed by the Special Rapporteur. Members generally supported the development of draft "conclusions" on the topic. Some members, however, preferred to consider the form of outcome after analysing all the elements of peremptory norms.

As regards **proposed draft conclusion 1**, members debated whether the process of "identification" was merely a matter of recognition or whether it included a normative exercise to determine the existence and content of a norm. Members also discussed whether the provision should be expanded to include the activities of non-State actors.

Several members raised doubts about the scope and propriety of **proposed draft conclusion 2.** One criticism was that the provision treated *jus cogens*, on the one hand, as hierarchically superior, and, on the other hand, as an exception to a standard rule. The Special Rapporteur accepted the criticism that the draft conclusion dealt with issues that were outside the scope of the topic and needed not be referred to the Drafting Committee

Several members suggested that **proposed draft conclusion 3** be recast as a definition of *jus cogens*, and it was proposed that the provision track the formulation of article 53 of the 1969 Vienna Convention as closely as possible. Members also cautioned the Commission against inadvertently creating additional requirements for the recognition of *jus cogens*. The Commission further debated, *inter alia*, the meaning and the role of the notion of "hierarchical superiority" in the application and identification of peremptory norms; the necessity of referring to "fundamental values of the international community"; and the universal applicability of *jus cogens*. The Special Rapporteur

maintained that these three elements found support in the practice of States and the pronouncements of courts and tribunals.

Finally, Mr Chairman,

In his report, the Special Rapporteur proposed to dedicate his second report to the rules on the identification of norms of *jus cogens*, and the third report to the consequences of *jus cogens*. Members expressed support for this plan and made several other suggestions for **future work**. Following the debate, the Special Rapporteur noted that future reports might also look into the possibility of treaty-based *jus cogens* and the relationship between *jus cogens* norms and *erga omnes* obligations, as well as general principles of law. The Special Rapporteur further expressed his openness to suggestions for modifying the title of the project.

Mr. Chairman,

This completes the introduction of Chapter IX and my statement concerning the chapters included in the second cluster.

Thank you very much for your kind attention.
