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

Crimes against humanity
(Chapter VII)
Protection of the atmosphere
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Mr. Chairman,

Let me start by addressing Chapter VII of the Commission's Report devoted to the topic "**Crimes against humanity**".

I would like to begin by commending the Special Rapporteur, Mr. Sean Murphy, for the detailed report presented this year. We would also like to thank the Secretariat for the Memorandum prepared on this topic regarding information on existing treaty-based monitoring mechanisms which may be of relevance to the future work of the International Law Commission.

Mr. Chairman,

As we have had the opportunity to state before this Committee, Portugal considers that the Commission must conduct its study on this subject with caution and resorting to the existing rules and practice so as to prevent entering into conflict with the existing legal framework dealing with crimes against humanity.

Particularly, the Rome Statute and the language contained therein should continue being one of the key references to the work of the ILC and, as expressed by some members of the Commission, it is important to have in consideration the relations between these draft articles and the Statute.

Mr. Chairman,

Overall, the draft articles presented this year constitute a good basis and the Commission should continue to look into solutions already adopted while drafting.

We would like to offer some brief comments on the issue of the liability of legal persons. Indeed from the discussion it raised within the Commission, it is not a consensual subject and not all States recognize such liability.

In our delegation's view, the wording proposed for paragraph 7 of draft article 5 is a good basis for a solution, since it offers flexibility and gives discretion on the matter to States. However, there may be merit in further studying this question.

The Commission should also consider whether it is necessary to adapt draft article 6 on the establishment of national jurisdiction, and its commentary, since this provision was initially designed to take into consideration cases where the offender is an individual and not a legal person.

Mr. Chairman,

Portugal will continue following with utmost interest the work of the Commission on this topic, namely in what regards the provisions on judicial cooperation, which can contribute to the fight against impunity and ensuring accountability where crimes against humanity are committed.

Mr. Chairman,

I will now turn to the topic '**Protection of the Atmosphere**' included in the programme of work of the ILC in 2013. Allow me to start by thanking the Special Rapporteur, Mr. Shinya Murase, for his third report on this pressing matter.

Portugal reaffirms its understanding that this topic must be addressed in a balanced and positive way. It must also be addressed having in mind all the areas related with environmental law and also the progress of scientific knowledge on environmental dynamics. For that reason, we welcome the dialogue with scientists that preceded the debate in the Commission.

Mr. Chairman,

Environmental damages know no borders. Nor do the people and the ecosystems affected by environmental disasters that may have occurred in the territory of other State. Therefore, the references to the joint action of States in the Draft Guidelines could be more assertive, as the joint action may be – in many cases – the most effective way to face and remedy environmental damages.

Mr. Chairman,

We have no doubts that the atmosphere is a natural resource and must be dealt with as such. At the same time, we share the doubts of some of the Commission's members as to whether the atmosphere can be legally addressed in the same way as transboundary aquifers or watercourses are, for instance. Thus, we are of the view that this question deserves a deeper reflection by the Commission.

As a final point, we would also like to encourage the Commission to further develop its work on the consequences of the recognition of the

obligations related to the protection of atmosphere as *erga omnes* obligations.

Mr. Chairman,

Let me now turn to Chapter IX of the Commission's Report devoted to the new topic "*Jus cogens*" and thank the Special Rapporteur, Mr. Dire Tladi, for his first report.

The historical overview, the analysis of the conceptual foundations of *jus cogens* and also the mapping of the disagreements and different views on this topic provided a good starting point for the Commission's work and prompted a fruitful debate during this year's session, confirming our understanding that this was – and is - a pressing topic.

Mr. Chairman,

The inclusion of the topic of *jus cogens* in the programme of work of the Commission was a remarkable achievement. This is a topic of vital importance for the development of international law, since the existence of peremptory norms protects the core values of the international community.

As we all also know, this remains a contentious topic. While there is widespread consensus that there are peremptory norms of international law, there is far from consensus on the particular norms that already have achieved that status or what are requirements for a norm to be considered a *jus cogens* norm.

The main challenge of the Commission for the next years will be to deliver tangible and concrete results. For this reason, we think that the road to take on this topic should be a pragmatic and realistic one.

Mr. Chairman,

The possible drafting of an illustrative list of norms of international law that have reached the status of *jus cogens* was one of the most heated topics of the Commission's debate.

For our part, we would find the exercise challenging and interesting on itself, as it would require the Commission to analyse a wide set of norms in all fields of international law. It might also be useful to devise guidelines in

the jurisprudence and State practice that would shed light on how to identify a *jus cogens* norm.

Still, such an exercise might be premature at this stage. It would imply an overwhelming work and might consume much of the Commission's time on the subject. This excessive focus on making such a list may be harmful for the development of the theme, as the chance to explore the understanding of *jus cogens* norms from other standpoints would be lost. It would also drift from the methodology proposed by the Rapporteur.

Mr. Chairman,

To conclude, this a topic that we will continue to follow with great interest and look forward to analysing a complete set of draft conclusions, an outcome that, for the moment, seems to our delegation to be the appropriate one.

Thank you, Mr. Chairman.