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Statement of Japan

United Nations General Assembly, Sixth Committee, 74th SESSION,
Report of the International Law Commission on the work of its seventy-first
session (Agenda item 79), Cluster I

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Thank you, Mr / Madam Chairperson,

At the outset, on behalf of the delegation of Japan, I would like to extend our sincere congratulations on your assumption of the Chair of the Sixth Committee.

Japan also appreciates the leadership of the President of the ILC this year, Mr. Pavel Šturma, as well as the contributions of all the Special Rapporteurs and the ILC Members.

Before going into detailed comments, Japan would like to highlight three general observations on the work of the ILC.

Firstly, as pointed out by some previous interventions, the output documents of the ILC have become voluminous. States and international courts make references to the works of the ILC when interpreting international law. Thus, States should be able to examine thoroughly the works of the ILC, which, at present, may not be the case. The problem is severe as increasingly works of the ILC take the forms of draft conclusions or draft guidelines which, unlike draft

articles of a treaty, will not be subject to diplomatic negotiations.

Secondly, the object of the ILC is the progressive development of law on the one hand and the codification of law on the other. At the Sixth Committee, we should discuss the work of the ILC bearing in mind this distinction.

Thirdly, the work of the ILC and the discussions in the Sixth Committee will lead eventually to the unification of the standards of international norms in various fields. It is desirable that such outcomes continue to be supported broadly by State practices.

Having recognized this, a State may derogate from the unified standards through bilateral or plurilateral agreements, unless such agreements conflict with *jus cogens*. If such derogation is not allowed, States may hesitate to commit to codification of treaties, and codification treaties may not be able to adapt to subsequent developments in the international community. This applies to treaties in the field of, for example, consular relations. Treaties drafted by the ILC and adopted by States should leave room for flexibility in which States can change their rights and obligations by concluding other treaties bilaterally or with a limited number of parties, if necessary.

Mr / Madam Chairperson,

Based on these points, Japan would like to comment on the selection of topics in the ILC. Japan welcomes the decision of the ILC to include the new topic “Sea-level rise in relation to international law” in its program of work. Japan appreciates the fact that the ILC responded expeditiously to the requests of the Member States. Japan believes that the inclusion of “Evidence before international courts and tribunals” in the program of work may be useful for States.

Japan is aware that the ILC will be completing many items by 2021. Consideration should be made on what might be useful for the ILC to examine in future. However, it is also true that States need time to digest the work of the

ILC.

Two new topics were included in its long-term program of work this year, namely “Reparation to Individuals for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” and “Prevention and Repression of Piracy and Armed Robbery at Sea”. Given the fact that many topics are already considered or under consideration in the ILC, Japan is against inclusion of these two topics in its program of work.

Crimes against Humanity

Mr. / Madam Chairperson,

The agenda identifies two concrete topics in this cluster. I would like to address the topic of the draft articles on “prevention and punishment of crimes against humanity”. Japan would like to congratulate the successful completion of the second reading. Especially, Japan extends its gratitude to Professor Sean Murphy, the Special Rapporteur.

Japan regards this topic, not as the codification of existing law, but as a legislative work aimed at making a treaty. In order for the draft articles to be adopted as a treaty and receive broad support among States, national criminal laws of States need to be taken into account. From that perspective, I would like to stress five points.

Firstly, Article 2 of the Draft Articles contains the definition of crimes against humanity, and Article 6, Paragraph 1 obliges State Parties to criminalize under national laws. Criminalization under national laws may entail various technical difficulties related to legislation. It would be beneficial to grant States a certain discretion in the process of criminalization.

Secondly, Paragraphs 2 and 3 of Draft Article 6 stipulate that States shall ensure that not only perpetrators of crimes against humanity but also of other forms of

liability are punishable under domestic criminal law. Since States have differing provisions regarding the so-called modes of liability, it is desirable to grant States a certain room for discretion.

Thirdly, Paragraph 5 of Draft Article 6 stipulates that an official position of a person is not grounds for excluding criminal responsibility for crimes against humanity. Immunity from the national jurisdiction of foreign States has been discussed in the ILC and in international courts. The commentaries to the draft articles make a distinction between criminal responsibility and immunity from foreign criminal jurisdiction, of which we take due note. On the other hand, we would like to register our concern on possible confusion in practice.

Fourthly, according to Paragraph 6 of Draft Article 6, States Parties shall ensure that crimes against humanity shall not be subject to any statute of limitations. Crimes against humanity contain various conduct and thus may have a wide range of penalty depending on the specific conduct in question and the modes of liability. Paragraph 6 of draft Article 6 may pose difficulties in implementation.

Fifthly, Paragraph 8 of Draft Article 6 provides for the liability of legal persons. We note that this paragraph gives State Parties discretion with regard to national legislation. On the other hand, as Stated in the commentaries, relevant case law has not been established in international criminal courts and tribunals. The definition of “legal persons” can also be controversial. We should avoid a situation in which a firm finds itself in difficulty due to remote capital relations with another firm that existed several decades ago.

Japan would like to emphasize that it is important to put an end to impunity for crimes against humanity. Japan highlights these points in order to ensure that the draft articles gain wide support among a large number of States.

Peremptory norms of general international law (*Jus cogens*)

Mr/Madam Chairperson,

I would like to address the topic of “Peremptory norms of general international law (*Jus cogens*)”. Japan would like to congratulate the Commission and the Special Rapporteur, Mr. Dire Tladi, on the completion of the first reading of the topic.

Jus cogens is an important topic for all States. Given this importance, Japan is compelled to note that it was not until the completion of the first reading that all the commentaries were made available. Japan stresses that states should be able to examine thoroughly the work of the ILC.

I would like to make few points concerning Draft Conclusions.

Firstly, the Special Rapporteur originally proposed the draft conclusions on criminal jurisdiction and exceptions to immunity *ratione materiae*. However, the ILC wisely decided to adopt Draft Conclusion 22 instead of those proposed, bearing in mind that the scope of this topic is limited to the identification and legal consequences of *jus cogens*.

Secondly, Draft Conclusion 8 on evidence of acceptance and recognition is much the same as Draft Conclusion 10 of “identification of customary international law”. It is questionable whether the same evidence can be used to identify general international law and *jus cogens*.

Finally, the ILC adopted the non-exhaustive list as an annex of Draft Conclusion 23. Japan has been reiterating that the list would be helpful if it were drafted with reasons and evidence. However, the list adopted norms that were previously considered by the Commission as having peremptory status in the commentaries of the Draft Articles on the Law of Treaties, Articles on the Responsibility of States for Internationally Wrongful Acts, and the 2006 work of its Study Group on fragmentation of international law. It is questionable whether consensus among States exists that those listed enjoy status different from other norms. Japan considers it advisable to delete the list at the second reading to avoid controversy.

Mr / Madam Chairperson,

The delegation of Japan makes these points as *jus cogens* is an important topic for all States.

I thank you.

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