IRELAND

Statement by

Ms. Anne-Marie O'Sullivan
Assistant Legal Adviser
Department of Foreign Affairs and Trade

at the

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Agenda Item 78:

The Report of the International Law Commission on the Work of its 68th Session

PART 2 – Ch VII (Crimes against humanity), Ch VIII (Protection of the atmosphere), and Ch IX (*Jus Cogens*)

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PERMANENT MISSION OF IRELAND TO THE UNITED NATIONS
885 SECOND AVENUE, NEW YORK, NY 10017 TELEPHONE 212 421-6934 FAX 212 752-4726
newyorkpmun@dfa.ie

Mr Chair,

1. I will speak today on the topics of "Crimes against humanity" and "Jus Cogens". A slightly longer written version of my remarks will be made available.

Crimes against humanity

2. With regard to the topic of "Crimes against humanity", Ireland thanks the Special Rapporteur, Mr Sean Murphy, for his comprehensive second report on this topic, and the Drafting Committee for its careful consideration of draft articles 5, 6, 7, 8, 9 and 10.

3. My delegation also expresses its gratitude to the Secretariat for its memorandum entitled "Information on existing treaty-based monitoring mechanisms which may be of relevance to the future work of the International Law Commission" which is a valuable contribution to the work of the Commission. We believe this will form a useful basis upon which to assess proposed monitoring mechanisms for a future convention on crimes against humanity.

4. My delegation welcomes the consideration given by the Special Rapporteur and the Drafting Committee to the relationship between their work and the Rome Statute, which provides for the international prosecution of crimes against humanity. In particular, we welcome the use of Article 28 of the Rome Statute as a basis for draft article 5 paragraph 2 which deals with command or other superior responsibility. Ireland is of the view that where the draft articles deal with the liability of natural persons for crimes against humanity, they should not deviate from the provisions of the Rome Statute.

5. In relation to the decision of the Commission to address the liability of legal persons for crimes against humanity in draft article 5 paragraph 7, we note that the Commission's recommendation moves away from the approach taken by the drafters of the Rome Statute, who noted the deep divergence of views on inclusion of criminal responsibility of legal persons in the Statute and ultimately did not include such a provision in the Statute.

6. We agree with the statement of the Special Rapporteur at paragraph 41 of his second report that criminal responsibility for corporations is not uniformly recognised worldwide and the approach adopted in jurisdictions where it is recognised can diverge significantly. The Commission itself notes in its commentary on draft article 5(7) that the criminal liability of legal persons has not featured significantly to date in international criminal courts or tribunals. We would therefore suggest that further consideration be given as to whether to include draft article 5 paragraph 7.

7. As my delegation previously stated on the introduction of this topic, we do not wish to see the work of the Commission on this topic divert attention away from the international initiative towards the development of a Multilateral Treaty for Mutual Legal Assistance and Extradition in Domestic Prosecution of Atrocity Crimes and we therefore welcome the Special Rapporteur's engagement with officials from the countries which initiated this project. We note that it is proposed that the Special Rapporteur's third report will address a number of issues, including the rights and obligations applicable to the extradition of alleged offenders and the rights and obligations applicable to mutual legal assistance in connection with criminal proceedings. Given that these issues will overlap significantly with the subject matter of the

proposed Multilateral Treaty, we encourage the Special Rapporteur to continue liaising with these officials.

Jus Cogens

8. Turning to the topic of "Jus Cogens", Ireland thanks the Special Rapporteur, Mr Dire Tladi, for his first report on this interesting topic and would like to offer the following observations in response to the methodological questions raised therein.

9. First, we agree with the concern expressed by the Special Rapporteur that attempting to provide an illustrative list of *jus cogens* norms could change the nature of the topic, blurring its fundamentally process-orientated nature by shifting the focus towards the status of particular primary rules. Ireland favours an approach that focuses on the way in which *jus cogens* rules are to be identified and the legal consequences flowing from them. Nevertheless, we tend to agree that the work on this topic will, by necessity, be required to provide some examples of *jus cogens* norms in order to provide guidance as to their nature, the requirements for their elevated status and their consequences or effects. As regards the specific question posed as to whether examples of *jus cogens* norms treated in the Commission's work should be listed in an annex, while we remain open to considering alternative approaches, as an initial view my delegation would tend to see little added benefit to providing such an annex, particularly given that it might risk giving rise to the very disadvantages associated with a list of norms, even if it is stated to be illustrative and non-exhaustive.

10. Secondly, regarding the materials on which the Commission should base its work, notwithstanding that the topic is of a more theoretical nature than might typically be the case, we endorse the approach succinctly outlined by the Special Rapporteur in paragraph 45 of his report, namely that "What is important for the purposes of the Commission's work is whether *jus cogens* finds support in the practice of states and jurisprudence of international and national courts – the currency of the Commission's work. While the views expressed in the literature help to make sense of the practice, and may provide a framework for its systematization, it is state and judicial practice that should guide us".

11. Thirdly, we concur with the view that Articles 53 and 64 of the Vienna Convention on the Law of Treaties ought to be central to our work on this topic, and that it is important to remain faithful to these provisions. Accordingly, we would encourage an in-depth study of the *travaux-préparatoires* of the relevant provisions of the Convention. In particular, we consider that it is important that additional requirements for the recognition of *jus cogens* not be inadvertently created.

12. Regarding future work, we look forward to the next report of the Special Rapporteur considering the sources of *jus cogens* norms and the relationship between *jus cogens* and non-derogation clauses in human rights treaties, with the consequences of *jus cogens* norms forming the basis of the third report. The criteria for elevation, and the manner of determining whether a *jus cogens* norm is "accepted and recognised" as such "by the international community of states as a whole" are, in our view, critical aspects of this topic. Regarding the universal nature of *jus cogens* norms, while we are somewhat sceptical as to *jus cogens* being applied on a regional basis, albeit that there might be regional norms of a non-derogable

nature, we look forward to this being examined in future reports, together with the applicability of the doctrine of persistent objector.