

71ST SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY

SIXTH COMMITTEE

REPORT OF THE INTERNATIONAL LAW COMMISSION

PART II: CHAPTERS VII (Crimes against humanity), V (Identification of customary international law), VIII (Protection of the atmosphere), and IX (*Jus cogens*)

ADDRESS DELIVERED BY

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Mr Chairman,

Please allow me to begin my second address before this Sixth Committee by once again congratulating the International Law Commission on the quality of its work during its 68th session. On this occasion, my Delegation wishes to underline most especially the quality and depth of the reports presented in Chapters VII to IX.

Chapter VII: Crimes against humanity

As regards Chapter VII, dedicated to crimes against humanity, Spain would like, firstly, to congratulate Mr Sean D. Murphy on his second report, and the Commission on its draft articles and commentaries, which have been approved provisionally. We are aware of the inherent difficulty of this matter, of the wide variety of contentious issues that it raises, and of the internal divide that has occurred within the Commission. Even separating crimes against humanity from other crimes, such as genocide and war crimes, is a decision involving more than a few problems.

It is no surprise, therefore, that the report is excessively detailed (106 pages)—twice as many pages as the maximum recommended by the Commission in 2011. In the case of the report, this does not constitute a particular difficulty; it is comprehensible, since it is such a complex matter. But this length and this level of detail should not be extended to the wording of the draft articles.

In the same line as these preliminary general questions, it is equally surprising that, this far into the five-year period, the question of methodology is still a matter of debate in the Commission.

In any case, generally speaking, we consider the new draft articles appropriate and balanced. Moreover, they follow the model of treaties concerning offences and crimes. My Delegation believes, nonetheless, that certain issues of enormous significance still need more in-depth analysis. I will mention, by way of example, military tribunals, amnesty, the liability of legal persons, extradition issues or States' margin of appreciation. We also have the impression that on a good number of occasions the reason why one option is chosen over another, when there are several legal possibilities, could be more clearly indicated.

As regards *draft article 5 ('Criminalization under national law')*, we believe that it is particularly relevant that it includes provisions on ensuring that the offences in question are *not subject to any statute of limitations* (paragraph 5), and on the liability of *legal persons* (paragraph 7). However, certain very specific questions require some attention.

Firstly, the relationship between draft article 5 and draft article 3, which is on the definition of crimes against humanity, could possibly be better clarified in the commentary. Among other reasons, in order to be clear about whether the obligation of each State to take the necessary measures to ensure that crimes against humanity constitute offences under its

criminal law is applicable to the entire definition in article 3, or only to paragraph 1. It is, moreover, essential that terminological considerations, or considerations of any other nature, made by each State when making crimes against humanity constitute offences under its criminal law, do not give rise to descriptions that deviate from the meaning given to these crimes in draft article 3.

Secondly, my Delegation is not entirely convinced whether wording paragraph 2 of draft article 5 in very general terms is more appropriate than more detailed wording; this is the approach followed, for example, by the Rome Statute, which created the International Criminal Court.

Thirdly, we believe that the wording of paragraph 3 of draft article 5 could be improved. Perhaps Article 6 of the Convention on the Protection of All Persons from Enforced Disappearance could be used here as a source of inspiration.

Fourthly, even though we find it appropriate to foresee that States must adopt measures to establish the liability of legal persons, we believe that the wording of paragraph 7 could go further than existing national practice. This is a delicate issue that requires more thorough analysis.

With regard to *draft article 6 ('Establishment of national jurisdiction')*, we agree with the decision to follow the model of the Convention against Torture, instead of simply copying Article 8 of the Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind. The price paid for this is greater complexity and perhaps also apparent incoherence. However, it is, indeed, more in line with the reality of this crime; it is also in keeping with the standpoint of the Institute of International Law, expressed in its 2015 resolution on universal civil jurisdiction.

As for *draft article 7 ('Investigation')*, we consider that, despite its length, the report does not provide sufficient information on such an important question. In our view, neither does the commentary to the draft article. In fact, we believe that the reports issued in recent years by different bodies on the perpetration of international crimes in Libya or Syria provide interesting information on investigation. Likewise, my Delegation considers that the wording of draft article 7 should not only include the requirement for investigation to be impartial, but add that it should also be "prompt and thorough". Lastly, Spain believes that the issue of cooperation among States deserves the future attention of the Commission.

As regards *draft article 10 ('Fair treatment of the alleged offender')*, we welcome the fact that paragraph 2 provides for cases of dual nationality. The provision regarding stateless persons raises more doubts for us. Setting forth that the State involved in the case of stateless persons is "the State which, at that person's request, is willing to protect that person's rights" deviates from the majority of treaties on human rights. Neither does it follow the criteria adopted by the ILC's draft articles on diplomatic protection (2006),

which entrust the protection of stateless persons to the State in which they are lawfully and habitually resident (article 8.1). Spain does not seek to alter the criteria set forth in draft article 10, but it could be necessary to include some additional explanation in the commentary.

Chapter VIII: Protection of the atmosphere

Mr Chairman,

With regard to Chapter VIII, the purpose of which is the protection of the atmosphere, my Delegation wishes, first of all, to congratulate Mr Shinya Murase on the presentation of his third report on this issue. Our congratulations are also addressed to the Commission, on the provisionally approved texts.

As the EU has stated/will state, the reference in the *new paragraph of the preamble* to the needs of developing countries does not reflect the more balanced approach currently prevailing in this regard. The Paris Agreement of 2015, which talks about “common but differentiated responsibilities” (Article 2.2), falls along these new lines. The instrument finally approved by the International Law Commission should also fall along these lines.

Whether or not to include in *draft guideline 4* (*‘Environmental impact assessment’*) a reference to transparency and public participation as important elements in the environmental impact assessment procedure may be a moot point.

However, we do consider that the exclusion of military activities from the scope of *draft guideline 7* (*‘Intentional large-scale modification of the atmosphere’*) should be stated expressly in said draft.

Chapter IX: *Jus cogens*

Mr Chairman,

Moving on to Chapter IX, dedicated to *jus cogens*, the Spanish Delegation wishes to express its acknowledgement to the Special Rapporteur on this matter, Mr Dire Tladi for the first report he has submitted to the Commission, and to the latter for examining the issue.

The debates that have taken place in the Commission as a result of the first three draft conclusions by the Special Rapporteur have confirmed what we already knew and had already expressed: that even though *jus cogens* is extremely important, drawing conclusions involving this issue is a hugely complicated matter.

Spain continues to believe that it is fundamental to preserve the open and flexible nature of the process of creating *jus cogens* norms, and that producing a list of such norms could call this objective into question.

We are not entirely convinced that *draft conclusion 2* (*'Modification, derogation and abrogation of rules of international law'*) should allude to *jus dispositivum* norms in international law.

With regard to the expression “modification, derogation or abrogation” used in that draft conclusion and in the following one, we must admit that we do not see quite clearly the distinction between “abrogation” and “derogation” in international law.

As regards *draft conclusion 3* (*'General nature of jus cogens norms'*), we agree with those members of the Commission who have expressed their doubts regarding the need to allude in paragraph 2 to the hierarchical superiority of *jus cogens* norms. Said position must be considered a consequence of the peremptory nature of these norms, as stated in paragraph 1.

Lastly, Spain agrees with those who have expressed the need to allude to the difference between a norm's *jus cogens* nature and its *erga omnes* scope. Especially bearing in mind that, in its case-law, the International Court of Justice always alludes to *erga omnes* scope, without stating *expressis verbis* the *jus cogens* nature of norms and principles that we would all agree on classifying as such.

Thank you very much, Mr Chairman.