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Statement by the United States
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Agenda Item 78: Report of the International Law Commission
on the Work of its 68th Session

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Crimes Against Humanity, *Jus Cogens*, Protection of the Atmosphere

Crimes Against Humanity

Mr. Chairman, the United States continues to follow with great interest the Commission's work on the topic of "crimes against humanity." Special Rapporteur Sean Murphy brings tremendous value to bear in the Commission's work on this topic, including the challenging questions that this topic raises.

As described in the Commission's work to date, the development of the concept of "crimes against humanity" has played a critical role in the pursuit of accountability for some of the most horrific episodes of the last hundred years. Further, the widespread adoption of certain multilateral treaties regarding serious international crimes – such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide – has been a valuable contribution to international law. Because crimes against humanity have been perpetrated in various places around the world, including by non-State actors, the United States believes that careful consideration and discussion of draft articles for a convention on the prevention and punishment of crimes against humanity could also be valuable.

As we have previously noted, this topic's importance is matched by the complicated legal issues that it implicates, and we expect that under Special Rapporteur Murphy's stewardship, these issues will continue to be thoroughly discussed and carefully considered in light of States' views as this process moves forward. We are continuing to study the ILC's ten draft articles and commentary on this topic carefully, as they present a number of complex issues, on which we are still developing our views. We are deeply grateful to Special Rapporteur Murphy and to the other members of the Commission for their work on a topic of such importance, and we eagerly look forward to their continued efforts.

Jus Cogens

With respect to the topic of *jus cogens*, Mr. Chairman, we would like to thank the special rapporteur, Professor Dire Tladi, for the substantial amount of work and careful analysis he has devoted to this project. We note that the Commission has now considered Professor Tladi's first report on this topic, that the Commission has referred two of the report's draft conclusions to the

Drafting Committee, and that the Committee has provisionally adopted parts of these draft conclusions.

We appreciate that this topic of *jus cogens* is of considerable intellectual interest and recognize that a better understanding of the nature of *jus cogens* might contribute to our understanding of other issues of international law, perhaps most notably in the area of human rights law. However, we continue to have a number of concerns. From a methodological point of view, we have concerns that only limited international practice exists on important questions, such as how a norm attains *jus cogens* status, and the legal effect of such status vis-à-vis other rules of international law and domestic law. That limited precedent may make it difficult to draw valid conclusions.

We also have some questions about the second paragraph of draft conclusion 3 proposed by the special rapporteur, which has not yet been adopted by the drafting committee. This paragraph reads as follows; “Norms of *jus cogens* protect the fundamental values of the international community, are hierarchically superior to other norms of international law and are universally applicable.” We are concerned that the meaning and purpose of this paragraph are unclear and that describing *jus cogens* norms as protecting “fundamental values” and as “universally applicable” would open the door to attempts to derive *jus cogens* norms from vague and contestable natural law principles, without regard to their actual acceptance and recognition by states.

Protection of the Atmosphere

Mr. Chairman, with respect to the topic “Protection of the Environment in Relation to Armed Conflicts,” we acknowledge the significant amount of work that the special rapporteur, Mr. Shinya Murase, has done on this topic. However, we continue to be concerned about the direction it appears to be taking.

Our original concerns, which have only intensified as this topic has progressed, run along two main lines.

First, we did not believe that this topic was a useful one for the Commission to address. Various long-standing instruments already provide general guidance to States in their development, refinement, and implementation of treaty regimes, and, in many instances, very specific guidance tailored to discrete problems relating to atmospheric protection. As such, we were concerned that any exercise to extract broad legal rules from environmental agreements concluded in particularized areas would not be feasible and might potentially undermine carefully negotiated differences among regimes.

Second, we believed that such an exercise, and the topic more generally, was likely to complicate rather than facilitate ongoing and future negotiations and thus might inhibit State progress in the environmental area.

Accordingly, we opposed inclusion of this topic on the Commission’s agenda. Our concerns were somewhat allayed when the Commission adopted an understanding in 2013,

which we hoped might prevent the work from straying into areas where it could do affirmative harm. But we have been disappointed. All three reports that have thus far been produced have evinced a desire to re-characterize the understanding and to take an expansive view of the topic. And while we had concerns with many aspects of the draft guidelines provisionally adopted by the Commission this summer, the most serious concerns relate to the purported identification of “obligations” or “requirements” in contravention of the 2013 understanding that work on this topic would not impose new legal rules or principles on current treaty regimes.

Looking forward, we are particularly concerned by the Special Rapporteur’s proposed long-term plan of work. If it were to be followed, the work would continue to stray outside the scope of the understanding and into unproductive and even counterproductive areas. For these reasons we call upon the Commission to suspend or discontinue its work on this topic.

Thank you, Mr. Chairman.