



# SLOVENIA

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## STATEMENT

BY

**Ms Božena Forštnarič Boroje**

**Head of International Law Department  
Ministry of Foreign Affairs of the Republic of Slovenia**

Agenda item 83

Report of the International Law Commission on the work of its sixty-seventh session: Chapter VI: Identification of customary international law, Chapter VII: Crimes against humanity

70th Session of the General Assembly  
Sixth Committee

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Mr Chairman,

Slovenia is honoured to address the Sixth Committee regarding the work of the International Law Commission on the topics of *Identification of customary international law* and *Crimes against humanity*.

With respect to Chapter VI: Identification of customary international law, Slovenia would like to commend the Special Rapporteur, Mr Michael Wood, for further analysing the topic in his third report.

In this context, my delegation considers that a detailed analysis of the topic addressing such complex issues is most welcome, not only for theoretical purposes, but first and foremost for practitioners as a useful tool in deciding and deliberating on the most difficult questions of international law, including within different national legal orders. Slovenia fully supports the Commission's request to the Secretariat to draft a memorandum on the role of national courts' decisions in the case law of international courts and tribunals of a universal character for the purpose of determination of customary international law.

Regarding the Special Rapporteur's detailed examination of the interplay between the notions of "general practice" and "*opinio juris*", we especially appreciate the analysis of the relevance of the temporal order between the two. The report concludes, and my delegation concurs, that "in seeking to ascertain whether a rule of customary international law had emerged, it was necessary in every case to consider and verify the existence of each element separately in that that generally required an assessment of different evidence for each element." We agree, however, that it is the presence of the two, rather than a particular order, that is crucial for such a determination. This also reflects the inherently flexible nature of customary international law and its role within the international legal system.

Moving to the question of inaction, Slovenia shares the view that, in some cases, inaction could be ascertained as evidence of "*opinio juris*"; however, we should also be careful to consider all the other relevant elements that form a deliberate and active decision by the state, such as circumstances that call for reaction, actual knowledge of the practice in question and the duration of inaction, thereby putting inaction into the relevant context.

As for the issues of particular custom and persistent objector, Slovenia agrees with the proposed draft conclusions, although we propose that additional attention be devoted to the definitions and limits regarding appropriate terminology and geographical determination. In addition, we see merit in making a clear distinction between customary international law and *jus cogens* as well as *erga omnes* obligations, especially in relation to the notion of persistent objector. As mentioned above, in our view, *jus cogens* are not ordinary legal rules, but in fact reflect commonly accepted values that mark the level of development of a society as a whole, which are peremptory in nature and from which no derogation is allowed.

It is important, however, not to excessively fragment customary international law by dissecting it into several "regional legal orders". This would impede the coherent unity of international customary law. Too many "regional legal orders" with their own rules could hinder the development and coherence of international customary law.

Turning to Chapter VII: Crimes against humanity, Slovenia would like to thank the Special Rapporteur, Mr Sean D. Murphy, for his comprehensive first report, which has a detailed contextual analysis of the issues at hand, and notes the ambitious tentative road map for the completion of the work on this topic. My delegation welcomes the proposed four draft articles on the scope, general obligation, definition, and obligation of prevention.

Slovenia recognises that the present draft articles encompass some key fundamental notions that are vital for our understanding of crimes against humanity, which we would like to see preserved, namely the irrelevance of the criminalisation of conduct under national law as a precondition for crimes against humanity to be found to exist, and the irrelevance of the existence of armed conflict, whether of an internal or international character.

Slovenia commends the methodology taken with respect to the definition of crimes against humanity that follows Article 7 of the Rome Statute and draws on the Elements of Crimes. The Rome Statute is a major milestone in modern international law. With 123 states parties, the Statute is an indispensable source of guidance for current work on the topic. In this context, Slovenia notes that draft Article 3 will need to be amended to reflect the activation of the ICC's jurisdiction over the crime of aggression. As a member of the International Criminal Court, my delegation would like to point to the need for any new treaty on crimes against humanity to be consistent with, and complementary to, the Rome Statute.

With regard to the four draft articles, Slovenia appreciates the emphasis placed not only on the aspect of punishment, but also on the obligation of prevention, whereby we welcome the effort to encompass both state and non-state actors in draft Article 4, paragraph 2. While my delegation fully supports such an approach, we consider that the current placement of draft Article 4, paragraph 2, in conjunction with paragraph 1, might not lead to the immediate conclusion that non-state actors are also subjects of draft Article 4. Slovenia would thus recommend that paragraph 2 be revisited.

As to Section IV of the Special Rapporteur's report, Slovenia would like to reiterate the importance of inter-state cooperation on mutual legal assistance and extradition with respect to atrocity crimes. Slovenia recognises that, unlike in the case of some other international crimes, such as transnational organised crime or corruption, there is no modern multilateral treaty providing for mutual legal assistance and extradition for genocide, war crimes and crimes against humanity. This, in turn, hinders the effectiveness of domestic prosecutions. Recognising the importance of closing this legal gap, Slovenia, together with the Netherlands, Belgium and Argentina, is leading an initiative for a Treaty for Mutual Legal Assistance and Extradition for Domestic Prosecution of the Most Serious International Crimes, i.e. the MLA initiative. The initiative thus covers all core international crimes, i.e. genocide, war crimes and crimes against humanity. Slovenia is pleased to note that the MLA initiative has already received support from almost 50 States from all regions, including states that are not parties to the Rome Statute, and its value has been increasingly recognised by practitioners. Supporters of the MLA initiative recognise the merit in adopting the MLA and extradition treaty, which would deal with all three groups of atrocity crimes and would be drafted as a useful tool for practitioners.

Slovenia looks forward to a future discussion on this topic.

Thank you.