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The Permanent Mission of Austria to the United Nations presents its compliments to the Secretary-General of the United Nations, and in reference to the request by the International Law Commission for comments and observations by governments on specific issues on which comments would be of particular interest to the Commission (Chapter III of the Commission's report on its 68th session), has the honour to convey the enclosed statements delivered by Austria during the debate in the Sixth Committee as well as additional written comments.

The Permanent Mission of Austria to the United Nations avails itself of this opportunity to renew to the Secretary-General of the United Nations the assurances of its highest consideration.

New York, 7 February 2017



To the
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4 Enclosures

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71st Session

of the General Assembly

Sixth Committee

Agenda Item 78

Report of the International Law Commission

on the Work of its 68th Session

**Cluster 2: Chapters VII, VIII & IX (Crimes against humanity; Protection
of the atmosphere; Jus cogens)**

Statement by

Professor August Reinisch

New York, 28 October 2016

[...]

Mr. Chairman,

The Austrian delegation wishes to commend Special Rapporteur Dire Tladi for his most informative and broad first report on the topic of "**Jus cogens**". My delegation welcomes the Commission's decision to focus its work on this important topic to which former Austrian ILC member Alfred Verdross contributed the theoretical foundations.

As already indicated in Austria's statement of last year, my delegation is in favour of including an illustrative list of examples of norms having acquired the status of *jus cogens*. It has also read with particular interest the Special Rapporteur's considerations on this issue and shares his opinion that the Commission should not refrain from producing an illustrative list only because such a list might be misinterpreted as being an exhaustive list. The Austrian delegation finds the compromise solution suggested by the Special Rapporteur in paragraph 17 of his first report, to include an annex comprising examples of *jus cogens* norms referred to in the commentary, an acceptable way to assuage concerns apparently voiced by some ILC members as well as by states. We remain of the firm opinion, however, that it would be one of the crucial added benefits of dealing with this topic if the Commission could deliberate on and ultimately produce such an illustrative list.

As regards the first three draft conclusions contained in the Special Rapporteur's report, the Austrian delegation wishes to add a few remarks.

As regards, draft conclusion 2 paragraph 1 we agree with the proposal to distinguish between *jus dispositivum* and *jus cogens* at the outset. However, we suggest some modifications of the current wording suggested. The wording "agreement of" before "States" in the first sentence of draft conclusion 2 paragraph 1 should be omitted because, as correctly stated in the second sentence of the same paragraph, such change can take place not only by various forms of agreements but also by customary law.

The expression "*jus dispositivum*" placed in brackets at the end of the first sentence may give rise to misunderstandings since it directly follows that part of the sentence which describes norms from which changes are prohibited, i.e. "*jus cogens*." My delegation thus suggests that the reference to "*jus dispositivum*" in brackets be moved to immediately precede the wording "unless such modification". This change would also correspond to draft conclusion 3 paragraph 1 where the expression "*jus cogens*" in brackets is placed immediately after the notion of "peremptory norms of international law".

Finally, as a matter of drafting, it would appear preferable to use the expression "peremptory norms of international law (*jus cogens*)" already in draft conclusion 1 where the term *jus cogens* first appears, instead of in draft conclusion 3 paragraph 1.