ISRAEL

68th Session of the General Assembly

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Ministry of Foreign Affairs

Agenda Item 81

Report of the International Law Commission on the work of its sixty- third and sixty fifth sessions

United Nations, New York

4 November 2013

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ILC 2013- Cluster III

Mr. Chairman,

Allow me to reiterate my delegation's deep appreciation of the work of the ILC, and to address the topics currently before the Committee.

With regard to the consideration of "**Protection of persons in the event of disasters**", Israel commends the Special Rapporteur, Mr. Eduardo Valencia-Ospina, for his valuable work on the Sixth Report which focuses on prevention, mitigation and preparedness in respect of disasters.

Israel attaches great importance to prevention as a key element in the comprehensive and effective response to the threats of disasters. Accordingly, in 2008 the Israeli Government established the "National Emergency Authority" which is responsible for the coordination and guidance of government agencies and local authorities in the field of disaster management. The Authority works toward raising public awareness of risk prevention, mitigation of harm and preparedness. The Israeli Government also conducts national exercises, often with the observation and participation of international bodies.

In addition, Israel, through its Emergency International Force, has also been involved in education and capacity building in foreign countries, mainly to facilitate sustainable health and education infrastructures, before, during and after a disaster. Israel remains committed to such international cooperation and will continue to offer assistance whenever necessary and possible.

However, while Israel continues to attach great importance to this topic, we wish to reiterate our view that the topic should not be considered in terms of rights and duties but rather in terms of guiding international voluntary cooperation efforts. Israel reiterates further its view that the duty of States to cooperate should be understood in the context of the affected State retaining primary responsibility for protection of

persons in the event of disasters. We are accordingly of the view that this should also be reflected in the draft articles currently proposed by the Rapporteur.

Turning now to the topic of "**Formation and evidence of customary international law**" it is fitting to once again express our sincere appreciation to the International Law Commission and the Special Rapporteur, Sir Michael Wood, for their substantial efforts to further clarify this complex issue, notwithstanding the considerable methodological and practical difficulties in doing so.

The Special Rapporteur's first report on the formation and evidence of customary international law provides a learned introduction into the vast array of complicated issues stemming from the topic. The State of Israel has given careful consideration both to the report and to the memorandum submitted by the Secretariat. Our delegation would like to use this opportunity to raise a number of concerns before the Committee in view of the Special Rapporteur's future program of work.

With respect to the question of the role of international organizations in the identification or formation of rules of customary international law, Israel wishes to reiterate its stated position that any such analysis by the Special Rapporteur should be considered with great caution. The role of non-state actors in the identification or formation of customary rules should be extremely limited both for reasons of possible political biases as well as to avoid any institutional fragmentation. Resolutions, reports and statements made by multilateral organizations, in particular by U.N. agencies and bodies, are not solely motivated by legal contemplation and often echo political imbalances, selective considerations, and pressures of a temporary nature. Therefore, such reflections of so-called "soft law" should not be considered as establishing any legal obligations in respect of a certain practice, or serve as evidence for such. It is in this sense that we question the appropriateness of observations 13 and 14 to the Secretariat's memorandum as well as of possible future reliance by the Special Rapporteur on the London Statement of Principles of the International Law Association.

Israel strongly supports a methodology of research that puts an emphasis on States as the sole developers of international rules of customary nature. The identification of such rules should thus rely on a comprehensive review of the actual practice of States coupled with opinio juris. The jurisprudence of international courts should be relied upon as a subsidiary means of identification, only when it includes such comprehensive review. While conducting the research, no weight should be given to political statements, general reactions or mere omissions by States.

On the topic of "special" or "regional" customary international law, as well as on the issue of whether there are alternative rules for the formation and evidence of customary international law in different legal fields, such as international human rights law, international humanitarian law, and international criminal law, Israel believes that it is important to adopt a careful and responsible approach to the analysis. In an already fragmented international legal system, further diversification of the rules for the formation and evidence of custom, based on the particular region or on the legal field in question, would only serve to increase incoherency and uncertainty. It is Israel's position that any divergence from the broadly accepted two-component test enshrined in both Article 38.1(b) of the Statute of the International Court of Justice and in the vast jurisprudence of international and national tribunals and courts would be counterproductive. Israel wishes to stress that any sway towards what the Special Rapporteur coins "modern" scholarly approaches, would undermine the authoritative force of custom as a source of international law and could potentially unravel the fragile structures of our current international legal system.

Finally, Israel would like to commend the Special Rapporteur on a number of important conclusions reached in his last report. First, with regards to the decision not to deal with the issue of rules of jus cogens nature, the delegation of the State of Israel wishes to support the view that this matter should not be included at this stage for pragmatic reasons, as jus cogens norms present their own set of unique difficulties which fall outside the scope of the present topic. Furthermore Israel wishes to support

the Special Rapporteur's pertinent clarification that not all international acts bear legal significance, referring in his report, inter alia, to acts of comity, courtesy and tradition. We concur with the Special Rapporteur that when States undertake certain deeds on an ex-gratia basis, such acts should not be viewed as necessarily establishing either state practice or opinio juris. With regards to the outcome of the Study, we support the Special Rapporteur's intention to continue the research towards the formulation of a set of conclusions and commentaries which will serve as a general interpretive guide for international and domestic courts and practitioners.

We look forward to the fruitful exchange of views between States and to the further work of the Commission on this topic.

On the topic of **"Provisional Application of Treaties",** Israel welcomes the inclusion of this topic in the long-term programme of work of the Commission and congratulates the Special Rapporteur for his First Report on the topic.

In this regard we wish to inform the Committee that the practice in Israel is that, while there is a possibility for the use of provisional application of treaties, it is applied only in exceptional circumstances. For example, provisional application may be relevant in cases of urgency or if exceptional flexibility is needed, or where a treaty is of great political significance or it is important not to wait for completion of the lengthy process of compliance with States' constitutional requirements for the approval of a treaty. As a general policy, however, Israel does not provisionally apply treaties.

With respect to the topic of **"The obligation to extradite or prosecute"**, the Government of the State of Israel wishes to express it appreciation to the significant work conducted by the International Law Commission on this topic. The legal developments this past year have proven once again that this is not merely a theoretical subject, but a practical legal tool requiring states to implement their treaty obligation to extradite or prosecute as part of the international fight against impunity.

As Israel has stated in its previous statements before the Committee, the legal basis of the principle to extradite or prosecute is solely derived from treaty-based obligations. There is not sufficient basis under current international law or State practice to extend such an obligation beyond binding international treaties which explicitly contain such an obligation. We agree with the working group's conclusion that when drafting treaties States can and should decide for themselves which of the conventional formulas of the obligation to extradite or prosecute best suits their objective in the particular circumstance. In this regard, Israel further agrees with the conclusion that it is futile to try and harmonize the various provisions and set out one model for all situations and treaties, owing to the great diversity in the formulation, content, and scope of the obligation to extradite or prosecute in conventional practice.

In addition, Israel wishes to reiterate its view that the concept of universal jurisdiction should be clearly distinguished from the principle of the obligation to extradite or prosecute ("Aut Dedere Aut Judicare").

Finally, Israel wishes to express its appreciation to the Working Group for its study of the International Court of Justice's judgment on the case of *Belgium v. Senegal*. Nevertheless, Israel wishes to express its doubts as to whether broad and far-reaching implications could be derived from the specific circumstances presented in the judgment.

With respect to the topic of **the Most Favoured Nation Clause**, we appreciate the comprehensive and thorough research relating to this clause in the field of investment law which has been undertaken by the Study Group.

The work carried out thus far highlights the complexities of the MFN clause in Bilateral Investment Treaties (BITs). In particular, the question of scope of the MFN clauses as concerns the substantive and procedural aspects of the dispute settlement mechanisms contained in BITs and investment chapters in trade agreements is of particular interest, as is the method of application of the Ejusdem Generis principle by investment arbitration tribunals. We would like to highlight the significance which Israel attributes to the principle of consent between parties negotiating such agreements, with regards to the scope and coverage of MFN clauses, and/or the

consent to exclude certain provisions from the MFN clause. We look forward to the continuing work of the Study Group and its contribution in analyzing the jurisprudence concerning the MFN clauses in services and investment agreements, in addition to other aspects which the Study group intends to explore.

Thank you.