

ISRAEL

69th Session of the General Assembly

CHECK AGAINST DELIVERY

Statement by:

ISRAEL
Ms. Sarit Weizman, Minister
for International Law Cooperation
Ministry of Foreign Affairs

Sixth Committee

Agenda Item 78

**Report of the International Law Commission on the Work
of its Sixty-Sixth Session**

3 November 2014

United Nations

New York

Mr. Chairman,

On the issue of "**Identification of Customary International Law**" the Government of Israel wishes to once again express its sincere appreciation to the International Law Commission and the Special Rapporteur, Sir Michael Wood, for their efforts to shine light upon this complex issue, despite the obvious and considerable methodological and practical challenges.

The State of Israel welcomes the impressive project of the draft conclusions and has given careful consideration to the report. We support the 'two-element approach' proposed by the rapporteur as the primary tool for identification of the existence of a rule of customary law and the fact that emphasis was placed on the need to take into account the pertinent circumstances in each particular case.

We would also like to emphasize the importance of draft conclusion 9 concerning the need of the relevant practice to be 'sufficiently widespread and representative' in order to give rise to a custom and the emphasis the draft conclusions put on looking to specially affected States for the identification of a customary rule.

With regard to draft conclusion 7, we would like to concur that inaction may constitute a type of State practice that may reflect the existence of an applicable customary law rule. In addition, we support the conclusion that conflicting statements by various state organs on a particular practice weaken the weight to be given to that practice.

Israel strongly agrees with the statement put forth by the rapporteur that actions of non-state actors are not 'practice' for purposes of the formation or identification of customary international law. In this context we wish to reiterate our government's past position that widening the scope of potential actors for such analysis beyond State actors is, inter alia, fraught with the risk of political bias. Moreover, there is a question of how, from a practical point of view, one would limit the scope and nature of non-state actors to be included or excluded from such analysis.

Israel strongly supports an approach 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 and analysis of state practice. In this vein, and with regard to the significance of oral statements, we believe no weight should be given to mere political statements as evidence of a customary rule.

On the issue 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 specialized legal fields, , it is important to adopt a cautious 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 particular regional practices or on a particular legal field would serve only to increase incoherence and uncertainty and cause greater discrepancies between States.

Israel fully supports the Special Rapporteur's reaffirmation of the 'two element' approach, as enshrined in Article 38.1 of the Statute of the International Court of Justice. This position was embraced by Israel's High Court of Justice in the 1983 Abu Itta decision.¹

Finally, 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 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*.

Israel supports the Special Rapporteur's intention to continue the research and the formulation of the conclusions and commentaries which will serve as a general interpretive guide for international and domestic courts and practitioners.

To conclude, the Government of Israel looks forward to the fruitful exchange of views between States and to the future work of the Commission on this topic.

With regard to the topic of "**Protection of the Environment in Relation to Armed Conflict**", Israel commends the Special Rapporteur, Ms. Marie Jacobsson, for her valuable work on the preliminary report which focuses on the relevant rules and principles applicable in peacetime to potential armed conflict.

As a matter of principle, Israel attaches great importance to the protection of the environment, including in the context of armed conflict.

With respect to the preliminary report, we share the view that the Laws of Armed Conflict contains a body of rules and principles that adequately address the issue of environmental protection. Accordingly, we welcome the decision of the Special Rapporteur to focus her work on identifying already existing legal obligations and principles. We also agree with the Special Rapporteur that non-binding draft guidelines might be the preferred approach to address this topic.

Israel concurs with the approach adopted by the Special Rapporteur to exclude from the scope of the research certain issues such as the protection of cultural heritage; the effect of particular weapons; and the issue of refugee law, all of which are fully addressed in other bodies of law.

In this context, we would recommend not expanding the scope of the discussion to include a broader analysis of the laws of armed conflict, but rather to focus on the defined subject matter.

In that matter, we agree with the analysis of the Special Rapporteur that human rights law is separate and based on different principles than international environmental law. Therefore, we believe the scope of the work should be limited to the matter at hand

¹ HCJ 69/81 **Bassil Abu Itta et al v. the Chief of Judea and Samaria** (1983), para 14 in Justice Shamgar opinion.

and not go beyond this to other unrelated fields of law. That other would also include the exclusion of indigenous people which was flagged by the Special Rapporteur. Here too, we believe this body of law is beyond the scope of the discussion.

Mr. Chairman,

With regards to the topic "**Provisional Application of Treaties**" Israel commends the discussion on the subject of provisional application of treaties in the commission and congratulates the special Rapporteur, Mr. Juan Manuel Gómez-Robledo, for his second report on the topic.

As noted in previous meetings, the provisional application of treaties does not fall within Israel's general policy with regard to treaty law. However, in exceptional circumstances only, a treaty may be provisionally applied. Such exceptional circumstances may include cases of urgency and cases in which there would be a great political or financial significance for the prompt application.

Any such provisional application would require prior approval by the Government of the State of Israel which would include a statement as to the extraordinary circumstances that would justify the provisional application of the treaty in the specific case. All treaties that were provisionally applied by Israel thus far were approved in advance by the Israeli Government. The Government of Israel's decision included the approval of the treaty itself and of its provisional application..

Mr. Chairman,

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

The work carried out thus far highlights the complexities of the MFN clause in Bilateral Investment Treaties (BITs). Of particular interest is the question of scope and coverage 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.

Israel would like to reiterate the significance which it attributes to the principle of consent between parties negotiating such agreements, with regards to the scope and coverage of MFN clauses, including the consent to exclude certain provisions from the MFN clause.

Israel shares the study group's approach regarding the importance and relevance of the Vienna Convention of the Law of Treaties, which should serve as a point of departure for the interpretation of investment treaties. We look forward to receiving the revised draft final report which is envisaged to be presented for consideration at the sixty-

seventh session of the Commission in 2015 and look forward to examining the adoption of relevant outcomes.

Thank you Mr. Chairman.