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**STATEMENT
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**IN THE
SIXTH COMMITTEE OF THE GENERAL ASSEMBLY UNDER
THE AGENDA ITEMS “EXPULSION OF ALIENS,
PROTECTION OF PERSONS IN THE EVENT OF DISASTERS,
JUS COGENS, AND CRIMES AGAINST HUMANITY”**

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Mr Chairman

Thank you for affording us the opportunity to share some thoughts on the agenda item "Expulsion of Aliens." The Commission's work on the Draft Articles on the Expulsion of Aliens has within the relatively short time of a decade since inclusion on the programme of work during the fifty-sixth session in 2004, borne fruit in the adoption of both the Draft Articles and the commentaries thereto by the Commission, and its submission to the General Assembly. This is the result of the unfailing hard work of the Special Rapporteur, Mr Maurice Kamto, ably supported by the Drafting Committee. A special word of appreciation must therefore be addressed to Mr Kamto and the members of the Drafting Committee. Their work has laid a firm foundation for the elaboration of a convention based on the Draft Articles, which are formulated in concise and clear terms. This structured approach taken in the drafting will be of great benefit when negotiations for a convention commence in due course.

Mr Chairman

Migration is a world-wide phenomenon and affects all continents and most communities, resulting in the presence of foreign nationals on the territories of States, which, in some cases, requires that such people then need to be expelled. However, this must be done within the parameters of a proper legal framework, both in international law and within the domestic law of the State concerned. In this respect, we note that the Draft Articles to a large extent follows the contours of South African law as it has developed since the introduction of the South African Constitution and Bill of Rights in 1996 and of its domestic legislation, notably the *Immigration Act* (Act 13 of 2002), the *Extradition Act* (Act 67 of 1962, as since amended) and the *Refugees Act* (Act 130 of 1998).

The values of respect for human dignity and the human rights of aliens in Draft Article 13 and the prohibition of discrimination in Draft Article 14, are central pillars of South Africa's Bill of Rights. In view of the aforesaid, we also welcome the approach taken in the Draft Articles to include within its scope categories of people who enjoy special protection under international law, such as refugees and stateless persons, but without prejudice to the special rules and regimes in international law that may govern their relationship with the State where they are present. We also note the provision in Article 23(2) which holds that a State not applying the death

penalty shall not expel an alien to a State where the alien has been or may be sentenced to a death penalty, unless an assurance has been obtained that the death penalty will not be imposed or, if imposed, will not be carried out, which has been interpreted as an obligation in South African law in the decision by the Constitutional Court in *Mohamed v President of the Republic of South Africa* (2001) and subsequent cases before the courts.

Mr Chairman

We are on record that we are of the view that the specific provisions on the right of a State to exercise diplomatic protection (Draft Article 31) and on State Responsibility accruing to a State expelling an alien in violation of the obligations contained in the Draft Articles (Draft Article 30), are essentially restating the specific Draft Articles dealing with those topics and could be therefore be left out. However, this is a matter that can be addressed when work on a Convention commences.

On this note, we have taken note of the recurring references to progressive development in the draft articles. We are of the view that this new approach of making strict distinction between progressive development and codification is unfortunate.

Mr Chairman

Let me now turn to item "Protection of Persons in the event of disasters". South Africa wishes to congratulate, at the outset, the Commission for adopting on first reading the set of 21 Draft Articles on this important topic and to thank the Special Rapporteur, Mr Valencia Ospina, for the work done thus far.

At the sixty-fifth session many States expressed concerns in relation to, in particular, the inter-state right/duty *vis-à-vis* a more cooperative approach that should be taken into account when the Draft Articles are adopted on second reading. These two approaches will be dealt with in turn within the context of the 21 Draft Articles that were adopted on first reading.

Firstly, the Draft Articles contain provisions that create specific rights and duties with respect to the affected State on the one hand, and the assisting States and assisting actors, on the other. Certain rights and duties are applicable to both affected and assisting States and assisting actors.

However, as with all rights, there exists concomitant duties. This holistic approach of the Draft Articles obliges the affected and assisting States to ensure that their response to disasters fully respects the basic rights of all persons affected by disasters. The affected State, assisting States and other assisting actors have a mandatory obligation to protect the population of the affected State.

The cornerstone of international law is the respect for State sovereignty and the affected State therefore bears the primary responsibility and duty to protect its population and those persons within its territory in the event of disasters by taking appropriate measures, as envisaged in Draft Article 12(9). Therefore, it may seek external assistance to the extent that a disaster exceeds its national response capacity. Consequently, the affected State has the right to determine, within its discretion, whether or not its internal capacity is sufficient to protect persons in the event of disasters who fall within its jurisdiction and control, and should not be obliged or compelled to seek external assistance but should rather have a right to seek such assistance if it so requires.

Although a right or entitlement is conferred on States, the United Nations and other external actors, the possession of a right gives the holder of that right an option to decide on whether to exercise it or not. This is not the intention of the Draft Articles. The intention is to place a mandatory duty, responsibility or obligation on assisting States and other assisting actors to provide genuine assistance to the affected State when requested to do so.

Mr Chairman

We turn now to address the cooperative approach between affected States, assisting States and other assisting actors which is of paramount importance within the context of disaster relief.

All assisting actors have a fundamental duty to cooperate in disaster relief operations as effective international cooperation is indispensable. This duty to cooperate is well established as a principle of international law and can be found in numerous international instruments. This cooperation, however, is subject to the affected State being the primary facilitator in relation to cooperation and, as such, cooperation should not be interpreted as diminishing the role of a sovereign State as the affected State's consent is required for any form of external assistance.

Given the above, we are of the view that in order to give effect to the rights and duties imposed by the Draft Articles on affected States, assisting States and other assisting actors, cooperation on all aspects of disaster relief and assistance is imperative. Without cooperation, the purpose and objective of the Draft Articles will not be achieved.

South Africa is proud that its national legislation on disaster management, the *Disaster Management Act, 2002*, is a comprehensive legally binding instrument which contains mandatory provisions that require compliance from the national, provincial and local spheres of government. The Act provides the foundation on which South Africa's disaster management system is built and focuses on disaster risk reduction in the form of prevention, mitigation and preparedness, as well as effective response and post-disaster recovery.

Aside from the rights/duty approach between affected States and assisting States and other assisting actors, it is proposed that the Commission considers incorporating a stronger right/duty approach between States and its affected population in the draft articles by, for example, strongly encouraging affected States to enter into national, multilateral, regional and bilateral agreements that will ensure that in the event that the affected State is unable to provide adequate relief and assistance to its population in the event of disasters due to lack of resources, other State parties to the agreement/s will have a legally binding duty to assist the affected State without the need to delve into issues such as right/duty to seek, or right/duty to offer assistance.

Mr Chairman

We turn now to address, in particular, 2 of the 5 sets of Draft Articles proposed by the Special Rapporteur for inclusion in the 21 draft articles that were adopted by the Commission on first reading. These proposed Draft Articles relate to those that were referred by the Commission to the drafting committee on 8 May 2014.

Firstly, we are of the view that the use of the words "*appropriate measures*" in Draft Article 18 be retained as the affected State should have a right to exercise its discretion when determining what actions need to be taken. An affected State may be unable to "*take all necessary measures*" to meet its

obligation as it may have limited resources at its disposal, and as a result thereof should only be expected to take "*appropriate measures*" that are, in its discretion, suitable in the circumstances in order to ensure compliance with the Draft Articles as a whole.

Secondly, upon perusal of the Draft Articles in their entirety, it becomes patently clear that no external assistance should be merely tolerated by, or acquiesced to, by the affected State. The affected sovereign State's unequivocal consent must be a prerequisite to any form of external assistance. It is therefore proposed that the use of the term "*consent*" as contained in Draft Article 4 be retained.

In conclusion, South Africa once again commends the Special Rapporteur as well as the Commission's efforts thus far in relation to the development of an overall legal framework that will in no doubt promote and contribute to various aspects and issues pertaining to the field of protection of persons in the event of disasters. However, in finalising and adopting the Draft Articles on second reading the Commission must take cognisance of the views expressed here on the previously adopted Draft Articles, in particular, whether the finalised instrument should adopt a rights/duty or more cooperative approach between affected States, assisting States and other assisting actors.

Mr Chairman

Let me now turn to item "Jus Cogens". Please allow me to express my delegation's support for the inclusion of this new topic in ILC's program of work. In light of the new guidance that has become available on the topic of jus cogens since the topic was last considered by the ILC, my delegation believes that its study at this time fits well with the ILC's mandate to promote the progressive development and codification of international law, and we commend ILC member Professor Dire Tladi for his work in having the topic added to the ILC's Programme of Work.

Mr Chairman

The concept of "jus cogens" has always been a nebulous one. International lawyers will be able to give a definition for the term jus cogens, but beyond a few undisputed norms such as the prohibition on torture, the prohibition of slavery, the prohibition of genocide and the

prohibition of racial discrimination, probably very few international lawyers will be able identify jus cogens norms and motivate why such norms should be considered as jus cogens. Considering the importance and potential consequences of jus cogens norms to the international legal order, having clarity on the functioning, content and consequences of jus cogens norms will be beneficial to all States, international organizations and other interested parties. In our opinion, the biggest value of the ILC's study of jus cogens will lie in the identification of the requirements for a norm to reach the status of jus cogens and the effects of a jus cogens norm on international obligations.

Mr Chairman

The value of this new topic to States lie precisely in the current nebulous nature of jus cogens. As rightly indicated in the Annex to the Report on the ILC that describes this topic, jus cogens norms are, more and more frequently, being invoked in international legal disputes. And just because, in the cases that have so far been heard by the ICJ, States have agreed on the jus cogens nature of a norm relevant to the dispute, does not mean that the concept of jus cogens is a simple one. The value of this topic lies not only therein that States will have the tools to determine which norms have reached the status of jus cogens, but also in the fact that States will have the tools to determine which norms have not reached the status of jus cogens. This will bring much needed certainty to this field – certainty which will be welcomed by international lawyers and which will assist lawyers and judges within the domestic law domain who may be faced with questions on jus cogens and its effect on domestic legislation.

Mr Chairman

With regard to the requirements for a norm to reach the status of jus cogens, my delegation is specifically interested to hear the ILC's views on the interaction between customary international law and jus cogens. Does a norm have to rise to the level of customary international law before it can rise to the level of jus cogens? Is it even possible for a norm to become jus cogens without having been accepted as customary international law? We note that the ICJ in the *Belgium v Senegal* case stated that the prohibition against torture is a jus cogens norm, based on the "widespread international practice and on the opinion juris of States". How does this test differ from the test for Customary International Law used by the ICJ in the

North Sea Continental Shelf case, which also looked at State Practice and *opinion juris* to determine whether a rule can be considered as customary international law? And if there is no difference, how does one distinguish between norms with Customary International Law status and jus cogens norms? Or would the difference between jus cogens norms and customary international law norms lie in the consequences of acting in breach of the relevant norm? While Customary International Law norms can be superseded by a subsequent treaty, jus cogens norms can, according to the Vienna Convention on the Law of Treaties, only be superseded by subsequent jus cogens norms. A treaty provision or an act that is in conflict with a jus cogens norm would be null and void. But even then there are exceptions to the rule. While it is generally accepted that the prohibition on the use of force is jus cogens in nature, it is still technically possible for a State to consent to force being used – presumably through a treaty provision to that effect. Or is this example merely the exception that proves the rule? There exist further questions on the consequences of acting in breach of a jus cogens norm. For example, if a single treaty provision is in conflict with a jus cogens norm, would only that treaty provision be null and void or would the whole treaty be null and void? Would the rules on the consequences of acting in breach of a jus cogens norm also prevent an actor from benefiting from its acts – for example would an aggressor State still be able to claim the benefit of the rule that belligerents are not responsible for damage caused to subjects of neutral states in military operations? We are confident that these and many more questions will be addressed by the ILC in its study of the topic.

Mr Chairman

My delegation notes the intention of the ILC to focus its study on the nature of jus cogens, the requirements for its identification, the consequences or effects of jus cogens and then to provide an illustrative list of norms which have achieved the status of jus cogens. We support all four of these objectives of the study, but consider the first three issues (nature, requirements and consequences) to be a greater priority than an illustrative list. While the illustrative list will be instructive and would without a doubt make a contribution to international law, it is our opinion that the ILC will make a greater contribution by giving international lawyers the tools to determine for themselves which norms have probably achieved the status of jus cogens rather than for the ILC to spend a considerable part of its time on this project attempting to articulate a reliable list of jus cogens norms

that will, even if it is complete at the time of publication, become incomplete over time. In any event, a large number of jus cogens norms will probably be identified and discussed in the course of drafting the commentaries on the rules identified by the ILC (whether they take the form of draft articles or another form altogether), which might make a separate list redundant.

Mr Chairman

My delegation has no doubt that this topic complies with the requirements to be added to the ILC's programme of work. We wish the ILC all the best in its work on this topic, and look forward to receiving its first report on jus cogens.

Mr Chairman

Let me now turn to the last item "Crimes Against Humanity". South Africa notes that the topic on Crimes Against Humanity has been accepted in the long term work of the Commission. While we have previously expressed some reservations in relation to the topic's inclusion, we remain attentive to this important topic and how the work in relation to crimes against humanity will progress. It will be recalled that our initial response to the inclusion of the topic, was that it does not reflect the need of States in respect of the progressive development of and codification of international law, due to the fact that the Rome Statute system sufficiently ensures that crimes against humanity are criminalised. We continue to hold the view that even in the absence of a stand-alone Convention on the Prevention and Punishment of Crimes Against Humanity, there remains sufficient legal basis for the criminalisation of crimes against humanity in national law.

Mr Chairman

South Africa, as a result of being a party to the Rome Statute, and in giving effect to the Rome Statute principle of complementarity, has incorporated the Rome Statute crimes, including crimes against humanity, into its domestic law by means of the *Implementation of the Rome Statute Act*, Act 27 of 2002. Consequently, South Africa is able to exercise jurisdiction in accordance with Section 4 of the aforementioned Act, which provides in Section 4(1) that despite anything to the contrary in any other law of the Republic, any person who commits a crime is guilty of an offence and liable on conviction to fine or imprisonment. Section 4(3) of the Act provides,

quite progressively, for extra-territorial jurisdiction for the South African courts, providing as follows:

"In order to secure the jurisdiction of a South African court for the purpose of this chapter any person who commits a crime contemplated in subsection (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if-

- a) that person is a South African citizen, or
- b) that person is not a South African citizen, but is ordinarily resident in the Republic, or
- c) that person, after the commission of the crime, is present in the territory of the Republic, or
- d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic."

Recently, scope of the *Implementation of the Rome Statute Act* was interpreted by the High Court and the Supreme Court of Appeal, and is presently being considered by the Constitutional Court.

Over and above this extra-territorial application of our domestic law, it is worth noting that Section 4(2)(a) of the ICC Act provides that notwithstanding any other law to the contrary, including customary and conventional international law, the fact that a person is or was a Head of State or government is not a-

- i) defence to a crime or,
- ii) ground for possible reduction of sentence once a person has been convicted of a crime.

The Act and relevant cases will be transmitted to the ILC, as requested.

Mr Chairman

In light of this, our experience is that we are able to give effect to the Rome Statute through criminalising crimes against humanity and other serious crimes, in domestic law. It is due to our domestic experience that we are of the view that there exists no lacuna in the existing international law framework in relation to crimes against humanity, as the Rome Statute system sufficiently fills that gap insofar as criminalisation and enforcement of crimes against humanity is concerned. As indicated previously, we do

not consider the Rome Statute system as being deficient in allowing for the criminalisation of crimes against humanity. We remain cautious that any work by the International Law Commission in this area should not undermine the Rome Statute system nor should it hamper efforts towards universality of the Rome Statute.

Mr Chairman

We do, however, consider that there could be important advances made on this topic and would suggest for consideration that any possible future work could be focussed on creating a regime or mechanism for inter-State cooperation, mutual legal assistance and extradition for all serious crimes, including crimes against humanity. It is true that the Rome Statute system creates a mechanism for cooperation and surrender of suspects to the ICC and not for cooperation between States. We therefore consider that work done on this topic could focus on the area of cooperation between States in relation to serious crimes, which could be of potential benefit to a larger grouping of States.

I thank you for your attention.