Statement on

behalf of South Africa

by

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at the

Department of International Relations and Cooperation of the Republic of South Africa in the Sixth Committee of the General Assembly

under the following topics:

"peremptory norms of general international law (jus cogens); immunity of state officials from foreign criminal jurisdiction; protection of the atmosphere; and succession of states in respect of state responsibility"

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Mr Chairman

Allow me to join others who have spoken before me in thanking, through you, the Chairman of the Commission, Professor Georg Nolte, for introducing Cluster 2 topics to this Committee. My delegation is grateful to you Mr Chairman for affording us the opportunity to share some thoughts on the topic entitled "**peremptory norms of general international law (jus cogens)**". My delegation welcomes the Commission's consideration of this topic. We congratulate the Special Rapporteur, Professor Dire Tladi, on his well-researched and comprehensive report and commend him for the noteworthy progress that has been made on this topic. Before getting to the current report under review, the South African delegation would like to start by restating the fact that the 1st report, which reflected in-depth and extensive research on the matter of the peremptory norms of general international law, was an eye-opener. It traced the historical evolution of the concept of jus cogens, and along the way dispelled some myths concerning apparent persistent objection by some States.

Mr Chairman

On the 2nd Report which is about *inter alia* investigating the rules on the identification of the norms of *jus cogens,* including the sources of such norms, as well as the relationship between *jus cogens* and non-derogation clauses in international law, the Special Rapporteur firmly based his framework for the identification of peremptory norms of general international law in Article 53 of the Vienna Convention on the Law of Treaties, of 1969. This ensures that the Commission's work remains in the realm of treaty law, and widely accepted customary international law. The Commission made substantial headway into creating a framework for the acceptance and recognition of peremptory norms. The Commission's recognition of the general nature of peremptory norms, contained within the current Draft Conclusion 2, accurately captures the foundational ideas inherent to the doctrine of peremptory norms – namely, that they reflect and protect fundamental values, they are hierarchically superior, and they are universally applicable. The Draft Conclusions take a methodical approach towards laying out the framework for identifying peremptory norms of general international law – first presenting the definition as a whole, and then going on to develop and refine each of the concepts contained within the definition contained in Draft Conclusion 4, as stated in the Annex to the statement of the chairman of the drafting committee. The 2nd Report provides an excellent survey of the current jurisprudence, academic writing, and state practice with respect to identifying peremptory norms of general international law. The Special Rapporteur must be commended for succinctly finding a balance between these sources and providing draft conclusions that reflect the current status of peremptory norms within the body of general international law.

Mr Chairman

We look forward to the Special Rapporteur's work on the consequences that follow from a norm having a peremptory nature. We trust that he will apply the same rigorous analysis to these new questions surrounding peremptory norms as he did in the first two reports, and we expect an equally interesting dive into this area of international law. We agree with him that in order for a norm of general international law to acquire the status of *jus cogens* it has to be recognized by the "international community of States as a

whole" as having a particular quality, namely, that it may not be derogated from. As explained in the report, non-derogation is itself not a criterion for *jus cogens* status. Rather, the acceptance and recognition that the norm has that quality constitutes the criterion for *jus cogens*. On its own, non-derogation is the primary consequence of peremptoriness. This consequence is what distinguishes *jus cogens* norms from the majority of other norms of international law, namely *jus dispositivum.* We welcome the Special Rapporteur's undertaking that non-derogation will be addressed in the third report of the Special Rapporteur in 2018.

Mr Chairman

We also look forward to the Special Rapporteur's fourth report, to be issued in 2019, which would address remaining miscellaneous issues as well as proposals on an illustrative list of *jus cogens* norms. However, our concern does remain on whether an illustrative list should be produced or developed. In our view, a list would soon become obsolete and although it may be seen as instructive, serving as guidance, it would not aid international lawyers in providing tools to determine for themselves whether norms have achieved the status or not. The presence of a list or lack thereof does not reflect on the ultimate goals of this project. If the Commission were to include a list, making explicitly clear that the list was illustrative and not exhaustive, then that could provide helpful guidance to states. Nevertheless, if the Commission ultimately decides not to include a list the Conclusions developed will stand regardless, and allow for peremptory norms to be further identified and developed.

Mr Chairman

We now turn to the topic entitled "**immunity of state officials from foreign criminal jurisdiction**". Once again, thank you for affording us the opportunity to share some thoughts on this topic. My delegation congratulates the Special Rapporteur, Professor Concepción Escobar Hernández, on her well-researched and comprehensive report and commends her for the noteworthy progress that has been made on this topic. We welcome the Commission's consideration of this topic and the fact that on the basis of the draft articles proposed by the Special Rapporteur in the second, third and fourth reports, the Commission has thus far provisionally adopted six draft articles and commentaries thereto. My delegation once submitted in one of our previous statements that a careful study must be made by the Commission on the possible limits to be set to immunity *ratione personae* and *ratione materiae* in the Draft Articles. We therefore welcome the fact that at its 3378th meeting, on 20 July 2017, the Commission considered the report of the Drafting Committee and provisionally adopted draft article 7 which was eventually adopted by majority vote. We subscribe to the view that Draft article 7 refers to crimes under international law in respect of which immunity from foreign criminal jurisdiction *ratione materiae* does not apply. The draft article contains two paragraphs, one that lists the crimes in paragraph 1 and one that identifies the definition of those crimes in paragraph 2. Paragraph 1 of draft article 7 lists the crimes which, if committed, would prevent the application of such immunity from criminal jurisdiction to a foreign official, even if those crimes had been committed by the official acting in an official capacity during his or her period in office. Thus, draft article 7 complements the normative elements of immunity from criminal jurisdiction *ratione*

materiae as defined in draft articles 5 and 6. Paragraph 2 of draft article 7 establishes a link between paragraph 1 of the article and the annex to the draft articles, entitled "List of treaties referred to in draft article 7, in paragraph 2". My delegation welcomes with appreciation the fact that, while the concept of "crimes under international law" and the concepts of "crime of genocide", "crimes against humanity", "war crimes", "crime of *apartheid*", "torture" and "enforced disappearance" belong to well established categories in contemporary international law, the Commission is mindful that the fact that draft article 7 refers to "crimes" means that the principle of legal certainty characteristic of criminal law must be preserved and tools must be provided to avoid subjectivity in identifying what is meant by each of the aforementioned crimes.

Mr Chairman

In its wisdom, which is highly appreciated and welcomed by my delegation, the Commission decided to include draft article 7 for the following reasons. First, there has been a discernible trend towards limiting the applicability of immunity from jurisdiction *ratione materiae* in respect of certain types of behaviour that constitute crimes under international law. This trend is reflected in judicial decisions taken by national courts which, even though they do not all follow the same line of reasoning, have not recognized immunity from jurisdiction *ratione materiae* in relation to certain international crimes. In rare cases, this trend has also been reflected in the adoption of national legislation that provides for exceptions to immunity *ratione materiae* in relation to the commission of international crimes. This trend has also been highlighted in the literature, and has been reflected to some extent in proceedings before international tribunals. Second, the Commission also took into account the fact that the draft articles on immunity of State officials from foreign criminal jurisdiction are intended to operate within an international legal order whose unity and systemic nature cannot be ignored.

Mr Chairman

A lot has been said about Article 7 and during the intense debate among the ILC members within the Commission. We also heard what some delegations have said in this room in their statements about Article 7. We, once again, wish to re-iterate what we said in one of our previous statements that a careful balance must be struck between the need to protect the traditional norm of immunity of representatives of States from the jurisdiction of foreign States, based on fundamental international law principles such as the equality of States, and the norms of the protection of human rights and the prevention of impunity for international crimes. We subscribe to the view that such a delicate balance is only possible if the current state of the law is thoroughly investigated and understood. Finding the appropriate balance requires us to critically assess, and not just assume, the existence in law and state practice of immunity, the extent of such immunity as well as available exceptions if any. My delegation is of the view that Article 7 has a pontential of being a good starting point that will bring to the fore the aforementioned careful and delicate balance, I repeat, between the need to protect the well-established norm of immunity of representatives of states from the jurisdiction of foreign states, while preventing impunity for serious crimes. Article 7 is therefore really a

point of departure and definitely a step in the right direction towards achieving and striking the aforementioned careful and delicate balance.

Mr Chairman

We now turn to the topic entitled **"protection of the atmosphere".** In this respect, allow us to first welcome the work of the Commission and thereafter, congratulate Professor Shinya Murase, Special Rapportuer for this topic on the job well done. We reiterate what we said in our last year's statement that the efforts by the international community to protect the atmosphere is of the crucial importance for our sustainable development and well-being. The atmosphere is common resource of global concern and the effects of human interference in the atmosphere have impacts beyond national borders. Protection of the atmosphere should therefore be addressed by international law as far as possible. It is evident that the area of protection of the atmosphere has evolved through treaty making as well as state practice giving rise to customary law norms. Nevertheless, such development has not always been systematic and consistent. Specialised legal instruments have been developed to address particular aspects of human interference with the atmosphere without necessarily considering the body of international environmental law holistically.

Mr Chairman

We expressed our concern in our last year's statement that the work on this topic has adopted a blanket exclusion of many rules and principles that, in our view, are integral part of the law on the protection of the atmosphere. This concern still stands. We regard the rules and principles on questions such as precautionary principle, the preventive principle and the polluter pays principle forming integral part of the law on the protection of the atmosphere and it is not clear how the Commission can possibly study the international law on the protection of the atmosphere while ignoring them. We are still concerned about the exclusion of the common but differentiated responsibility principle, which, in our view, is a cornerstone of international law relating to the protection of the atmosphere. My delegation would therefore like to re-emphasize the need for the guidelines to address the issue of responsibility in an appropriate manner. We still hold the view that it is possible to extract, from the body of international law on State Responsibility, principles on responsibility that would be particularly helpful in guiding States within the field of atmospheric pollution and degradation.

Mr Chairman

That being said, my delegation wishes to express its support for the continuation of this project, and look forward to receiving further work prepared by the Special Rapporteur, in this regard.

Mr Chairman

Finally, we now turn to the topic entitled **"succession of states in respect of state responsibility".** South Africa would like to congratulate the Commission and the Special Rapporteur, Mr Pavel Šturma, for the impressive progress that has been made in a short time on this topic. In particular, we welcome the two draft articles on scope and use of

terms that have been provisionally adopted by the Commission. We believe that these articles are very helpful in setting a clear outline of the topic that allows us to focus on the essentials of this issue. Although state succession is becoming an increasingly rare occurrence, we believe nonetheless that the work of the Commission on this topic can make a valuable contribution by bringing clarity to the legal issues that states affected by state succession may face.

Mr Chairman

Cases of transfer of a part of a state's territory, secession, dissolution, unification or the creation of a new independent State often bring with them much contestation and uncertainty. It would be very helpful indeed if there are at least some clear legal principles that could be invoked or referred to to bring about an orderly and peaceful resolution of such situations. South Africa is of the view that the principle of state consent should however remain central to the Commission's consideration of this topic. Predecessor states, successor states, as well as third states with claims derived from state succession, should always have the option to resolve disputes between them arising from state succession through consultations and negotiation. Since state succession is an exceptional, and usually a historic event, each case of succession has its own causes, features and concomitant challenges politically, economically and socially that will necessitate a tailor-made approach. While the parties concerned would benefit from clear legal guidelines and the fair and unbiased support of the international community, it will ultimately be up to them to ensure that any disputes arising from state succession is settled peacefully and amicably.

Mr Chairman

South Africa will therefore follow this issue with keen interest and we look forward to the Special Rapporteur's next report and draft articles that are practice-based and respectful of state sovereignty.

I thank you for your attention.