SIXTH COMMITTEE

CHECK AGAINST DELIVERY

Statement by

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ILC Cluster II

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Peremptory norms of general international law (*Jus Cognes*)

Agenda Item 82

24 October 2018

United Nations, New York

Mr. Chairperson,

The state of Israel would like to thank the Special Rapporteur, Mr. Shinya Murase, for his valuable work and for the efforts dedicated to drafting the fifth report on the "Protection of the Atmosphere", as well as the four previous reports regarding other aspects of this topic.

In his recent report, the Special Rapporteur proposes draft guidelines on the issues of implementation, compliance, and dispute settlement concerning the draft guidelines adopted on this topic in previous years.

Mr. Chairperson,

The State of Israel wishes to take this opportunity to express, once again, its principled commitment to the protection of the atmosphere, as also expressed in specific undertakings provided for in agreements, arrangements and treaties to which it is a party. Israel attaches importance to the protection of the environment, and consistently takes concrete steps to promote the protection of the atmosphere.

Having said that, Mr. Chairperson, Israel wishes to reiterate its objection to the integrative approach proposed by the Special Rapporteur in previous reports. As Israel has stated in previous discussions on this topic, such a linkage between separate legal regimes is both unnecessary and inappropriate, as each of these regimes constitutes the *lex specialis* to be applied to the appropriate situation and comprises different standards and guiding principles. In this context, the pertinence of Draft Guideline 9 is questionable.

Israel would also recall that during last year's discussion on this topic, here in the Sixth Committee, Israel expressed its concern that the inclusion of issues regarding implementation, compliance or dispute settlement within the contours of this specific topic would not only be unnecessary, but would also create significant and unfortunate potential for abuse.

Mr. Chairperson,

Israel continues to hold this view. While recognizing the importance of promoting compliance and adherence to international law, including with respect to protection of the atmosphere, it should be recalled that the various legal frameworks that address protection of the atmosphere already include specific mechanisms for the implementation, compliance and dispute settlement. These existing mechanisms were carefully designed to meet the needs of each of the frameworks. Against this background, it appears that Draft Guidelines 10, 11 and 12 may be both unnecessary and potentially counterproductive.

Mr. Chairperson,

At this opportunity, Israel would like to express its satisfaction with the progress achieved thus far in the negotiations regarding the implementation of the Paris Agreement. Israel attaches great importance to the upcoming Conference of the Parties to the Paris Agreement, which will take place in Poland. The State of Israel is looking forward to the adoption of the Paris Agreement Work Programme, which is expected to take place in this conference, thus allowing for the full implementation of the provisions of the Paris Agreement.

Mr. Chairperson,

With regard to "Provisional Application of Treaties", Israel commends the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, and the International Law Commission on their valuable work on the Draft Guidelines.

Israel is in the process of studying these draft guidelines with a view to considering preparing written comments on them, and reserves its right to address this issue until such time.

Mr. Chairperson,

The State of Israel attaches importance to the topic '**Peremptory norms of general international law *(jus cogens)***', which concerns a distinctive category of international law that has a unique role in safeguarding the most fundamental rules of the international community of States. Israel appreciates and closely follows the efforts of the Special Rapporteur, Mr. Dire Tladi on this complex topic, which, given its inherent sensitivities, must be handled with great care. In this context, we would like to recall that the Commission itself noted in its first session on this topic in 2016, that the Special Rapporteur was encouraged to keep in mind the differences in understanding expressed by Member States and accordingly, approach the issue with great caution. Israel wishes to voice some concerns regarding several aspects of the project.

Firstly, the State of Israel has a number of concerns regarding the methodology employed by the Special Rapporteur. For example, we believe, as other delegations have noted, that the work of the Special Rapporteur relies to greatly on theory and doctrine, rather than upon relevant State practice, which, in our view should be the primary focus in this context.

Moreover, from a purely methodological point of view, the request of the Special Rapporteur not to circulate to the ILC in plenary session the draft conclusions that were provisionally adopted by the Drafting Committee, but rather to wait and send the entire draft text only after it has been finalized at a later date, derogates from the accepted working practice of the ILC. We are of the view that this proposed approach does not properly allow for a robust and dynamic debate on the conclusion and on commentaries, including substantive and meaningful input from States on this topic, which is of utmost importance.

Moving beyond methodological issues, Israel is of the view that the ILC's work on this topic should reflect existing international law so as to facilitate the credibility and wide acceptance of its outcome in a matter as significant as jus cogens, with its possible far reaching consequences. Israel believes that the Commission has rightly chosen to engage in codification of existing law rather than its progressive development.

Mr. Chairperson,

Israel opposes the incorporation of elements in the Commission's draft conclusions that may clearly be identified as proposals for "progressive development" of the law, such as Draft Conclusion 14, which is explicitly labeled as a "recommended" procedure for dispute settlement mechanism and which does not, and indeed cannot, reflect existing law in the context of *jus cogens* norms.

Israel is likewise concerned with Draft Conclusion 20, which lays down a duty to cooperate to bring a breach of *jus cogens* to an end, and Draft Conclusion 21, which concerns a duty not to recognize or render assistance in a situation created by a breach of *jus cogens*. These draft conclusions are, to a great extent, based upon the Draft Articles on State Responsibility which, in our view, do not reflect customary international law. Israel views with concern the attempts to attach consequences to the violation of *jus cogens* norms that go beyond the function of jus cogens envisioned in article 53 of the Vienna Convention. The Special Rapporteur's recognition of the 'dearth in practice on the consequences of *jus cogens*' should also lead to this conclusion.

In the same vein, Israel supports the decision made this year in the Drafting Committee not to include draft conclusions that concern the exercise of domestic jurisdiction over a *jus cogens* crime and the question of immunities. Draft Conclusions 22 and 23, advanced in the Special Rapporteur's third report do not reflect existing customary law and, in any event, significantly deviate from the scope of this topic, which is meant by and large to focus on methodological rules of process, rather than on primary rules. While the decision has been provisionally made to take account of these problematic issues through a "no prejudice clause" to be drafted at a later date, we maintain that any reference to these issues is inappropriate in the present context. We would prefer no mention of them altogether. Our concern here is also that Draft Conclusions 22 and 23 can be viewed as prejudging the outcomes of the ILC's deliberations on the Draft Articles on Immunity of State Officials from

Foreign Criminal Jurisdiction, which are still very much open to debate both in the ILC and in the Sixth Committee.

Second, Israel notes that the threshold and process for the identification of *jus cogens* norms under international law must be particularly demanding and rigorous, and for good reason. We continue to believe that a major matter of concern in the draft conclusions as currently drafted is that they do not accurately capture this distinct threshold required due to the exceptional character of *jus cogens* norms, in particular the distinct threshold that is required for their identification.

Mr. Chairperson,

There are currently three separate draft conclusions that attempt to define a *jus cogens* norm (Draft Conclusions 2, 3, and 4), but these should further be fine-tuned in order to mirror the very stringent requirements involved and to limit the potential for politicization and fragmentation. The language of Article 53 of the Vienna Convention of the Law of Treaties, which is the basis for the draft conclusions relating to the criteria of *jus cogens*, sets a very high bar for a norm having a *jus cogens* character. Significantly, its requirement that a norm be "accepted and recognized" is a *cumulative* one.

It requires not only 'acceptance' - that may suffice, for example, in the formation and identification of customary international law – but there must be unequivocal affirmative acceptance *and* recognition of a norm as one having a *jus cogens* character. Paradoxically, however, the standard of identification of peremptory norms that is proposed here by the Special Rapporteur might be seen as actually **less** rigorous than the test for identifying customary norms, which would be an entirely unsatisfactory approach.

Yet the draft conclusions do not define how this enhanced requirement is to be met. Similarly, the requirement that a norm be so accepted and recognized by *"the international community of States as a whole"* sets an additional high threshold of State acceptance and recognition that is not met by the current language of draft

conclusion 7, which refers simply to "a very large majority of States". Instead, Israel believes that this requirement entails virtually universal acceptance and recognition, but this notion regrettably seems to have been lost in the present draft text. In this context, we believe that the draft conclusions and commentary should steer well clear of the sometimes careless way in which the label *jus cogens* is inappropriately attached to norms in some of the academic and popular discussion of this topic – resulting from lack of meticulousness in research and study – so as to ensure that this project properly and accurately reflects the state of the existing law and can attract support.

Finally, Israel reiterates its misgivings regarding the possibility of compiling a list of *jus cogens* norms, be it illustrative or comprehensive. Such an attempt is likely to generate significant disagreement among States and dilute the concept of *jus cogens* norms. One example may be found in the Special Rapporteur's third report, where he asserts numerous times that the right of self-determination is of a *jus cogens* character. While self-determination is a significant principle of international law, it is highly questionable whether it has met the standards captured in Article 53 of the Vienna Convention on the Law of Treaties. In any event, Israel notes that a similar endeavor was not considered necessary in the context of the topic 'Identification of customary international law'.

To conclude, Mr. Chairperson, we emphasize that work on the topic of *jus cogens* should be confined to stating and clarifying international law as it currently stands. This will make its conclusions both helpful and credible.

Thank you, Mr. Chairperson.