



**Statement
on behalf of the
Republic of South Africa**

by

**Advocate Sandea de Wet, Chief State Law Adviser
(International Law)**

at the

**Department of International Relations and
Cooperation of South Africa**

before the Sixth Committee of the General Assembly

under the following Cluster 2 topics:

**“Protection of the Atmosphere”
and “Peremptory Norms of General International Law
(Jus Cogens)”**

24 - 26 October 2018

Mr Chairman

I wish to thank the Chairman of the Commission, Professor Eduardo Valencia-Ospina, for introducing Cluster 2 topics to this Committee. South Africa welcomes the work done on the topic entitled “**Protection of the Atmosphere**” and congratulate Professor Shinya Murase, Special Rapporteur, on the excellent work done on this topic. Since the Commission decided to include this topic at its sixty-fifth session in 2013, we have observed robust engagements from member States. South Africa further welcomes the fact that the Commission is dealing with issues that are of great importance to the world community today. There can be no doubt that human and natural environments that can be and are adversely affected by certain changes in the condition of the atmosphere mainly caused by the introduction of harmful substances, causing transboundary air pollution, ozone depletion, as well as changes in the atmospheric conditions leading to climate change. It is therefore opportune that the Commission seeks, through the progressive development of international law and its codifications, to provide guidelines that may assist the international community as it addresses critical questions relating to transboundary and global protection of the atmosphere. Having provisionally adopted nine draft guidelines and eight preambular paragraphs, during the previous sessions, South Africa, welcomes the proposed three additional draft guidelines on the protection of the atmosphere concerning implementation, compliance and dispute settlement. Mindful of the request that comments and observations should be submitted to the Secretary-General by 15 December 2019, South Africa will use the time to study the draft guidelines and to submit its views to the Committee.

Mr Chairman

We now turn to the topic entitled “**peremptory norms of general international law (jus cogens)**”. My delegation welcomes the opportunity to speak on this topic as peremptory norms of general international law (*jus cogens*) are important to South Africa. *Jus cogens* constitutes one of the fundamental pillars of the rule of law in the international legal order and sets a minimum standard against which the conduct of States should be measured. South Africa deems it increasingly important that those values which are accorded a special status in the relations of States should be cherished, protected and enforced, and the uncertainty and unprecedented deviations from international law by States in recent times underscore this position. South Africa therefore welcomes the continued work of the International Law Commission on this topic and we acknowledge the valuable contribution that its work is making in expanding thoughts on *jus cogens*.

South Africa congratulates the progress being made by the Special Rapporteur, Professor Dire Tladi, with whom we have a special bond. The comprehensive and wide-ranging third report on the consequences and legal effects of *jus cogens* submitted by the Special Rapporteur in February 2018, is a testament to a large volume of work covered since the first and second reports. The third report does much to move towards a common understanding on *jus cogens*.

Mr Chairman

The third report assisted by firstly dealing with the previous consideration of the topic in the Commission and in the Sixth Committee before tackling the challenging aspect of the consequences of *jus cogens*. We strongly support the Special Rapporteur's approach to proceed on the basis of established practice of considering a variety of materials and sources in an integrated manner, and to avoid theoretical debates. Paramount is an analysis of State practice in all its forms, judicial practice, literature and other relevant materials, and we are of the view that the Special Rapporteur indeed succeeded in this aim with the application of the same rigorous analysis to the question of consequences and legal effects as he did in the first two reports. In conformance to our previous statements on the present topic, we welcome the Special Rapporteur's references to non-derogation as a consequence of *jus cogens* rather than the classification of non-derogation as a criterion. Notwithstanding the previous sentiments expressed by a small number of other States that appear to accept non-derogation as a criterion, we wish to encourage the Commission to embrace the classification of non-derogation as a consequence and not as a criterion. South Africa previously stated that non-derogation is the primary consequence of peremptoriness, and that this consequence is what distinguishes *jus cogens* norms from the majority of other norms of international law. We welcome the Special Rapporteur's remarks that support non-derogability as a consequence in the context of the invalidity of treaties on account of conflict with *jus cogens* in his third report. South Africa also encourages the Commission to devote special attention to the distinction between consequences and criteria in its work on this topic. The Special Rapporteur's third report expertly navigated the fine nuances between invalidity of treaties on account of *jus cogens* that existed at the time that the treaty was entered into as opposed to *jus cogens* that came into being after a treaty was concluded. The third report's conclusions that make a distinction between severability that is allowed in the instances of subsequent invalidity of a treaty because of newly emerging *jus cogens* and non-severability in the case of pre-existing *jus cogens* is supported. South Africa also supports the Special Rapporteur in attempting to ameliorate the harsh consequence of treaty invalidity and the clear conflict with the principle of *pacta sunt servanda* by referring to the general rules of treaty interpretation.

It is a difficult task to reconcile the principle of enforceability of treaties with invalidity because of the operation of *jus cogens* and an interpretation of a treaty to reconcile both principles, as outlined by the Special Rapporteur, is preferred.

Mr Chairman

The work on the issues of the consequences of *jus cogens* on State responsibility (in particular in distinguishing between consequences of breaches and serious breaches), the relationship between *jus cogens* and obligations erga omnes, the effects of *jus cogens* on criminal responsibility, jurisdiction of international courts, customary international law and Security Council resolutions are extremely enlightening. This can assist all States to navigate an area of international law that has proven to be more complex than anticipated. South Africa also notes the explanations in the third report relating to immunities and its interrelation with the violation of *jus cogens* norms. This is a topic that South Africa will follow with particular interest in light of the contemporary questions raised before and in the context of the International Criminal Court, and which we believe will assist the international community in dealing with immunity against prosecutions based on some of the most serious international crimes.

We also recognise the commendable work of the Drafting Committee and refer to the oral interim reports of the Chairperson of the Drafting Committee, Professor Charles Jalloh, delivered through oral statements in May and July 2018, as well as the speed at which the Drafting Committee has dealt with the matter. In particular, the Drafting Committee focused on the 14 new draft conclusions submitted through the Special Rapporteur's third report. The Committee was able to consider and adopt draft conclusions 10 to 14 of the third report. The Drafting Committee did well to further align the draft conclusions with the Vienna Convention on the Law of Treaties and the previous work of the Commission. In dealing with draft conclusion 14 (concerning the procedural requirements applicable in a situation in which a State invokes a conflict with *jus cogens* as a ground for the invalidity or termination of a rule of international law), the Drafting Committee excelled in balancing the need to reconcile the principle of enforceability of treaties with invalidity because of the operation of *jus cogens*. As the Drafting Committee was required to creatively lay down procedures that will aid in balancing the competing principles, the consideration of who should be notified, whether a response is required from other parties, and allowing for a reasonable time for responses incorporates pragmatic steps that contribute much to taking the matter forward. We noted that draft conclusions 15 to 23 are yet to be considered by the Drafting Committee and we urge the Drafting Committee to finalise that work at the earliest opportunity.

Mr Chairman

South Africa looks forward to the Special Rapporteur's fourth report that is intended to provide proposals on how to proceed with the question of an illustrative list of *jus cogens* norms and consider any miscellaneous issues. Although we maintain the view that an illustrative list would soon become obsolete and would not aid international lawyers in providing tools to determine for themselves whether norms have achieved the status of *jus cogens*, we would support the inclusion of a list if it is clear that such list is illustrative, not exhaustive, and without prejudice to the draft principles enumerated.

We also note that the third report is still intended to consider the issue of regional *jus cogens*. South Africa is concerned that entertaining a concept such as regional *jus cogens* would have a watering-down effect on the supreme and universal nature of *jus cogens* as a peremptory norm that should be equally applicable to all States notwithstanding the region that a State may be located in. We hold the view that the issue of regional *jus cogens* should not be entertained or considered, as it has the potential to dilute the priority of obligations created by *jus cogens*.

In conclusion, South Africa encourages the International Law Commission through the Special Rapporteur and Drafting Committee to continue its important work on this matter in light of our firm belief that this topic is of increasing importance to assist the international community to maintain a rule-based world order wherein all States and peoples can peacefully co-exist and flourish.

Thank you very much for your attention.