SIXTH COMMITTEE

CHECK AGAINST DELIVERY

Statement by

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ILC Cluster I

Chps: I,II,III,IV
Crimes against Humanity

Chapter: V
Peremptory norms of general international law (*jus cogens*)

Chapter: XI
Other decisions

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Mr. Chairperson,

The Government of Israel would like to express its deep appreciation to the International Law Commission and the Special Rapporteur, Mr. Sean Murphy, for their valuable work related to the codification of "Crimes against Humanity".

Israel welcomed the work of the International Law Commission from the outset, as an expression of its consistent commitment to the prevention and punishment of grave international crimes that are of concern to the international community as a whole, including crimes against humanity.

Israel notes the provisional adoption by the Drafting Committee on second reading of the Draft Preamble, the Draft Articles and the Draft Annex: Prevention and punishment of crimes against humanity.

While, in our view, several concerns raised by Israel and other States throughout this process were not sufficiently addressed in the documents adopted by the Drafting Committee, we, nonetheless, sincerely commend the Special Rapporteur for a transparent work process, and for the methodology which he has employed, which emphasized the importance of relying on State practice.

Mr. Chairperson,

In general terms, Israel is of the view that a comprehensive treatment of the prohibition on crimes against humanity would benefit the international community. We further believe that in order to secure the broadest acceptance of such a project, and to ensure its utility, it is of critical importance that the Draft Articles accurately reflect customary law and widely accepted principles on the subject and -- of no less importance -- that they contain effective safeguards against potential abuse.

In this light, we wish to draw attention once again to the need to place specific and well-articulated safeguards on mechanisms for the enforcement of, or adherence to, the proposed Draft Articles.

One of the most fundamental principles of international criminal law is that States have the primary sovereign prerogative to exercise jurisdiction in their national courts over crimes that have been committed in their territory or by their nationals. This principle is consistent with the notion that the State with territorial or national jurisdiction is usually best suited to prosecute crimes effectively, and that it is in the interests of justice -- with due consideration to the interests of victims, the rights of the accused and other similar considerations -- for local jurisdictions with clear jurisdictional links to be given primacy. Only when such States are unable or unwilling to do so, may alternative mechanisms be considered.

Hence, assertion of jurisdiction by a State that lacks clear and established territorial or national links to an alleged crime should be the rare exception -- not the rule -- and resorting to such jurisdiction should be carefully and cautiously circumscribed. Israel remains

the standard that had been proposed in previous versions - "knew or, owing to the circumstances at the time, should have known".

As noted in past statements, Israel also highly values the particular attention given in the Commentary to crimes against humanity committed by non-State actors. Indeed, Israel strongly believes that any codification of "crimes against humanity" should cover crimes committed by states and non-state actors alike, due to the increased involvement of non-State actors in the commission of crimes against humanity.

Mr. Chairperson,

As a final matter on this topic, Israel would like to address the Committee's decision to recommend the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the Draft Articles.

Prior to any agreement on the desired forum for the negotiation and elaboration of any convention on this subject, it is clear that further deliberation is required on several critical and outstanding issues raised by many States, including Israel. For example, the definition of crimes against humanity in the Draft Articles is still far from consensual. Moreover, there are other outstanding matters, including those pertaining to the limits to the establishment and exercise of jurisdiction that require further discussion; the issue of safeguards against unwarranted or politicized prosecution; and the application of the convention to nationals of non-party States, just to mention few. Israel reiterates the need to reach broad consensus on such key issues, which remain controversial, and require further discussion.

Indeed, in light of the concrete and detailed comments many States have submitted regarding specific Draft Articles, the differences that exist, and the importance of the subject matter, it seems inadvisable to regard the current Draft Articles automatically as a "zero draft" for any future process. Equally, it seems appropriate that States be given adequate time to review and consolidate their positions and effectively address outstanding issues in a process informed by the work of the ILC on this topic, which should serve as a basis for such discussion.

We would thus support the proposal to establish a forum within the framework of the seventy-sixth session of the Sixth Committee, in which States would come prepared to review this matter, and engage in an inclusive, robust and efficient discussion focused on clarifying outstanding issues and resolving significant differences towards the potential elaboration of a convention.

In this context, Mr. Chairperson, allow me to make a more general observation with regard to the negotiation and conclusion of international legal conventions. While noting the importance of this topic, we believe that recent experience has shown that it is generally unwise to convene an international conference before broad consensus is reached on key issues. Indeed, it is the very importance of the subject matter here that recommends a more studied and deliberate approach. Promoting a convention prematurely when important

concerned that enforcement and jurisdiction mechanisms under the Draft Articles could potentially be abused by states and other actors in order to advance political goals, or to attain publicity, rather than be employed in appropriate circumstances as a genuine legal tool in order to protect the rights of victims and to put an end to impunity for serious international crimes. The result would not just lead to abuse in a specific case, but to the politicization of the prosecution of crimes against humanity in general, and to the undermining of the legal authority of the instruments pursuant to which such prosecutions took place. Safeguards that ensure that these mechanisms are used appropriately and which prevent their abuse, are, thus, of primary importance.

In this context, Israel wishes first to welcome the important clarifications provided by the Special Rapporteur in the commentary, which call upon states to adopt procedural safeguards, and acknowledge the need to do so prior to any attempt to exercise universal jurisdiction.

Nevertheless, Israel is of the view that due to the risk of abuse and the importance of its prevention, the Draft Articles still do not sufficiently address this issue. In order to attract wide acceptance and to prevent unwarranted and politically motivated attempts to initiate proceedings, the safeguard mechanisms should, in our view, be an integral part of the Draft Articles themselves and the adoption of such mechanisms, as exist today in numerous jurisdictions, should be advanced by the Draft Articles as necessary and standard practice.

Mr. Chairperson,

Another important issue Israel has raised throughout this process is that the Draft Articles should accurately reflect well-established principles of international law. For example, with regard to Draft Article 6, paragraph (5), which deals with the issue of immunities of foreign State officials, Israel would like to reiterate its position that paragraph 5 has no effect on any procedural immunity that both current and former foreign State officials may enjoy. It is Israel's view that the issue of immunities continues to be governed by conventional and customary international law and obligations between States.

In addition, Israel reiterates its position that Draft Article 6, paragraph (8), dealing with measures to establish criminal, civil or administrative liability of legal persons, does not reflect existing customary international law. As the Commission itself acknowledged, criminal liability of legal persons has neither featured significantly to date in international criminal courts and tribunals, nor been included in many treaties addressing crimes at the national level.[1]

In this vein, Israel also takes note of the change to Draft Article 6, paragraph (3) in order for it to reflect more accurately customary international law regarding command responsibility, by adopting the standard of "knew or had reason to know", as opposed to

[1] Report of the International Law Commission Seventy-first session (29 April–7 June and 8 July–9 August 2019), page 81.

issues remain outstanding and significant gaps exist between leading States risks producing poor last minute compromises.

We are all no doubt familiar with the way in which hasty and ill-considered political bargains can be generated under the pressure to conclude a convention at all costs once a conference has been convened, and avoid the appearance of failure. Ostensible agreement may be achieved in the moment, but the result risks producing bad law and bad outcomes for decades to come, while risking the exclusion of many States from joining foundational legal documents such as the one under discussion here.

The wiser and more sustainable course, in our perspective, is to move more cautiously, even if somewhat more slowly, to ensure a firm legal foundation is established, wide legitimacy is achieved and as inclusive a process as possible is undertaken, so that the ultimate legal product adopted is one that is effective and will stand the test of time.

Mr. Chairperson,

Turning now to the topic of Peremptory norms of general international law, or *'jus cogens'*, the State of Israel attaches importance to this subject, 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, as well as the extensive deliberations on this complex topic in the Commission. Given its importance and inherent sensitivities, this topic must be handled with great care, and it is in this light that Israel wishes to make a number of observations and voice some concerns.

First, we would like to address the methodology employed thus far by the Special Rapporteur in his work, which has been a matter of concern not only for numerous States, but for the members of the International Law Commission themselves. In particular, we would note that the Special Rapporteur has relied greatly on theory and doctrine, rather than upon relevant State practice, which, in our view, should be the primary focus in this context.

In addition, the Special Rapporteur's analysis as to the existence and content of *jus cogens* norms regularly depends on the decisions of international courts and tribunals, even though Article 53 of the 1969 Vienna Convention on the Law of Treaties refers to the acceptance and recognition of "the international community of *States* as a whole". In our view, the lack of rigorous analysis of State practice, as is required in this field, risks undermining the legal authority and accuracy of important elements of this project and is especially striking considering the sensitive nature of the subject matter.

Second, Israel remains concerned that the exceptional character of *jus cogens* norms and the very high threshold for their identification, pursuant to Article 53 of the Vienna Convention on the Law of Treaties, are not always accurately reflected in the Draft Conclusions. Thus, for example, Article 53 of the Vienna Convention requires not only

'acceptance' – which may suffice, for example, in the formation and identification of customary international law – but also unequivocal and affirmative 'recognition' of a norm as one having a *jus cogens* character. Draft Conclusion 8 does not appear to underline, or even to explain, this cumulative requirement of "acceptance *and* recognition".

Similarly, the requirement in Article 53 that a norm be so "accepted and recognized" by *"the international community of States as a whole"* sets an additional higher standard 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". Israel believes that the threshold set in Article 53 entails virtually universal acceptance and recognition, but this notion regrettably seems to have been lost in the present draft text.

Mr. Chairperson,

As Israel has stressed in its statements on this topic, the threshold and process for the identification of *jus cogens* norms under international law must be particularly demanding and rigorous. To preserve the effectiveness and acceptance of a hierarchy of norms in international law, the boundary that divides peremptory from other norms must be identified clearly and monitored vigilantly. A less thorough and less legally meticulous approach may seem appealing to some, but it is in our view a recipe for politicization, confusion and disagreement, and, ultimately, for the undermining of the authority and force of the legal norms themselves.

It follows that that the Draft Conclusions, and the work of the ILC on this topic more generally, should strictly reflect customary international law and widely accepted principles, so as to enhance their credibility and facilitate their wide acceptance. If the Commission nevertheless decides to engage in proposals regarding the law's progressive development, it should at the very least be transparent when doing so.

In this light, Israel opposes the incorporation of elements in the Commission's Draft Conclusions that fail to reflect existing law adequately. In particular, we view 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 on the Law of Treaties.

With respect to Draft Conclusion 19, for example, we are doubtful whether the particular consequences referred to are reflective of existing customary law, including regarding the asserted duty of States to cooperate to bring a breach of *jus cogens* to an end and the asserted prohibition against recognizing, or rendering assistance in maintaining, a situation created by a breach of *jus cogens*.

We would note that this Draft Conclusion appears to be based, to a great extent, on the Draft Articles on State Responsibility as well as on some advisory opinions of the International Court of Justice. As for the Draft Articles on State Responsibility, Israel reiterates the view shared by numerous States that not all of the Draft Articles reflect customary international law. As for the two advisory opinions that relate to this Draft Conclusion, it should be recalled that in both opinions the Court did not explicitly identify a norm of *jus cogens*, but rather noted the *erga omnes* character of the right in question. Accordingly, these two advisory opinions cannot serve as a relevant source to establish a duty of States to cooperate to bring a breach of *jus cogens* to an end. Indeed, we would note more generally that the Special Rapporteur's tendency to conflate the term *erga omnes* with the term *jus cogens* leads to a misleading impression of the existing state of law. Moreover, even if, *arguendo*, we were to accept the view that these non-binding advisory opinions were relevant to a *jus cogens* analysis, it is highly doubtful if two single non-binding opinions are sufficient to establish the existence of a duty of States to cooperate to bring to an end a breach of a *jus cogens* norm.

Similarly, Draft Conclusion 21 also does not reflect existing international law. This Draft Conclusion concerns the procedure for the invocation of, and the reliance upon, the invalidity of rules of international law, by reason of them being allegedly in conflict with peremptory norms of general international law. Yet the procedure offered in this Draft Conclusion is novel. Indeed, the Commentary to Draft Conclusion 21 itself explicitly states that "not every aspect of the detailed procedure set forth in Draft Conclusion 21 constitutes customary international law." Greater transparency is called for by the Commission in identifying these innovative aspects of the Draft Conclusions.

In the same vein, Israel continues to support the decision made by the Commission not to include draft conclusions that concern the exercise of domestic jurisdiction over offenses that may be prohibited by *jus cogens* norms, as well not to address the question of immunities in this context.

We would also like to make a brief comment with respect to Draft Conclusion 14, which states that the persistent objector rule does not apply to *jus cogens* norms. The Commentary maintains that a *jus cogens* norm may develop notwithstanding a persistent objector, as the acceptance and recognition required for the identification of such norms are of "a very large majority of States". The analysis here appears too broadly articulated and potentially confusing, in light of the high threshold actually set in Article 53 of the Vienna Convention on the Law of Treaties for identifying a *jus cogens* norm. Given that virtually universal acceptance and recognition is legally required, it is doubtful whether a *jus cogens* norm can indeed develop and crystallize in the face of significant persistent objection.

Mr. Chairperson,

Israel would, as a final point on this subject, like to reiterate its significant misgivings regarding the inclusion of a non-exhaustive list of norms that the International Law Commission had previously referred to as having a *jus cogens* status in the annex to the Draft Conclusions. This is for numerous reasons, among which we would briefly mention the following.

First, Israel does not agree that all of the norms listed in the annex are of *jus cogens* character, and is of the view that the list is likely to generate significant disagreement among States and dilute the concept of *jus cogens* norms and its legal authority. For instance, the Special Rapporteur included the right of self-determination in the list. While self-determination is undoubtedly a significant right under international law, it is highly questionable whether it has met the standard codified in Article 53 of the Vienna Convention on the Law of Treaties. Indeed, in a recent case that was brought before the International Court of Justice, the Court itself appears to have deliberately refrained from referring to the right of self-determination as a *jus cogens* norm.

Second, as noted above, even if such a list is described as non-exhaustive and merely reflecting prior work of the International Law Commission, it would most likely be perceived by others as practically complete, or as a claim by the Commission that the norms included in the list are more significant than norms that were not included in the list. Indeed, it is unclear how the choice to include or exclude certain norms from the annex was made, which can only add to its contentious nature and to the charge that it lacks internal coherence. It may also be noted in this regard that the inclusion of any list of substantive norms of *jus cogens* in a project dedicated solely to the methodology of identifying such norms, may seem forced and uncalled for. A similar path was not taken, for example, in the context of the Commission's recent work on the topic 'Identification of customary international law'.

Third, the fact that the Commission arguably recognized certain norms in the past as *jus cogens* does not, in itself, guarantee that these norms would be recognized as *jus cogens* if we were to apply the methodology currently suggested by the Draft Conclusions, or more specifically required by Article 53 of the Vienna Convention on the Law of Treaties. In fact, most references by the Commission to *jus cogens* in the past were not substantiated by the kind of inquiry mandated by the Draft Conclusions themselves.

If the Commission were in fact interested in using its own past work to demonstrate that certain norms have a peremptory character, it should have, at the very least, shown that its past work was well-founded and based on a coherent methodology, in accordance with the principles described above. Otherwise, the list entails a somewhat unseemly and arguably unreliable act of self-referencing to assertions made, with no detail as to how these conclusions were reached or as to why the legal threshold for *jus cogens* was considered satisfied in such cases.

As noted, the process of identifying *jus cogens* norms should be extremely thorough in light of the far-reaching consequences involved in their identification. However, there is no evidence provided that this process was undertaken by the Commission in the examples that are cited. For instance, when addressing the right of self-determination in paragraph 12 of the commentary to Draft Conclusion 23, the Commission referred to several examples in which it supposedly already "recognized" this right as a *jus cogens* norm in the past. Yet if one actually looks at some of the examples mentioned in the commentary to substantiate this apparent "recognition", a different picture emerges. In some examples, the Commission examined the possibility of referring to the right of self-determination as an example of *jus cogens* norms without reaching a definitive conclusion. In other citations, the Commission actually stated specifically that it is better not to identify specific *jus cogens* norms, but rather to leave the full content of the rule of *jus cogens* to be worked out in State practice and in the jurisprudence of international tribunals. In yet another example cited in the commentary, the Commission conflated the term *jus cogens* with the term *erga omnes*, relying in its analysis on sources which referred to the right of self-determination as *erga omnes* rather than *jus cogens*. None of the sources cited in the commentary included a thorough methodological examination justifying the conclusion that the right of self-determination satisfied the *jus cogens* threshold.

Fourth, the norms listed in the annex are referred to in unspecific terms and have indeed been interpreted in different ways in various international law instruments. The absence of a clear definition for each of them creates ambiguity and confusion and makes it extremely difficult to assess or apply these norms. For instance, paragraph 8 of the commentary to Draft Conclusion 23 fails to clarify what the "basic rules of international humanitarian law" are. The commentary merely notes that the conclusions of the Study Group on Fragmentation of International Law referred in this context to "basic rules of international humanitarian law applicable in armed conflict," while the report of the Study Group on Fragmentation of International law referred generally to "the prohibition of hostilities directed at civilian population."

In sum, for these reasons and others, Israel shares the view that the Draft Conclusions should not include a list of substantive norms, whether illustrative or otherwise. This position, Mr. Chairperson, is in line with our more general stance, outlined in this statement, that work on the topic of *jus cogens* should be confined to stating and clarifying international law as it currently stands on the basis of rigorous methodology grounded in State practice. Only by doing so can the Draft Conclusions earn wide acceptance as helpful and credible. It is our hope that these and other changes will be made at the second reading stage.

Mr. Chairperson,

Finally, turning briefly to the subject of sea-level rise in relation to international law, Israel recognizes the concrete threat sea-level rise poses, especially to coastal areas and low-lying

coastal countries and the need to prepare for its potential implications. We, therefore, as we have stated in the past, welcome the work of the ILC on this topic, and will be following the work of the Study Group on this subject closely.

That said, as we noted in our remarks last year, any product of the Study Group should rely upon the application of existing principles of customary international law, rather than on developing new legal principles. Moreover, it is critical that the work of the ILC and the Study Group on this matter not to upset or undermine the delicate balance achieved by existing maritime border agreements, which meaningfully and significantly contribute to increased regional and international stability and positive cooperation.

I thank you, Mr. Chairperson