Virtual Engagement with Sixth Committee

Je vais commencer en Francais,

Merci Monsier le President de me donner la parole,

Je voudrais aussi envoyer mes remerciement au sixieme comite pour leurs commentaire sur le project conclusions de le Commission sur les normes imperatives du droit international general le'anne dernier

Je suis tres content pour l'opportunite d'avoir cet exchange avec les membres du Sixieme Comite,

Nous savons que les etats vont envoyer leurs commentaire ecrit a Juin l'annee prochaine J'espere que cet exchange va aider les etats avec leurs commentaires ecrits,

Je ne vais pas parler trop longuement, parce que J'espere que nous aurons un dialogue.

Maintenant je passer a l'anglais.

Mr Chairman,

Although I was not physically with the Sixth Committee in 2019, I listened very carefully to comments on the Draft Conclusions on Peremptory Norms by delegates of the Sixth Committee during the consideration of the report of the ILC. On the whole, I thought the responses to the Draft Conclusions were positive. Of course there are some States that have expressed some negative sentiments whether about the methodology employed by the Commission, methodology employed by the Special Rapporteur, the working methods, or substance of the Draft Conclusions. It is not my intention to respond to those here, although I could.

Although tempting to provide a detailed description of many of the draft conclusions adopted by the Commission, I think that would be counterproductive. I think what would be more productive would be to focus on two draft conclusions, namely draft conclusion 21 and draft conclusion 23. I do so not to influence your views but only to explain what those draft conclusions are aimed at and what they are not aimed at; what the Commission intended by them and what the Commission did not intend.

I choose to focus on these draft conclusions because I fear that they were the two that were most misunderstood. I think it might be useful to have a discussion on these two draft conclusions so that when States prepare their written comments, they do so with the clear understanding of what the Commission had in mind. This, I think would enable comments that can help the Commission to improve the draft conclusions as well as the commentary to the draft conclusions.

I begin with Draft Conclusion 21. Draft Conclusion 21 is a very important provision which, in my view, is indispensable. Whether you have it in its current form or not is a different question but I think it is an imperative provision – not imperative in the sense of *norme imperatief*, but imperative nonetheless.

When I first proposed this draft conclusiuon in the third report I had titled it recommended procedure. I had done so take into account the two sets of criticisms directed at DC 21 in the Sixth Committee last year, which by the way tend to pull in different directions. The first general criticism is that DC 21 might undermine the VCLT framework for dispute settlement. The second, and contradictory criticism, is that the DC seeks to impose a procedure that not all States have consented to, and which some States have objected to. My general comments are as follows:

First, DC 21 does not, in any way, undermine the procedure in the VCLT. First, para 5 explicitly states that DC 21 is without prejudice to the procedure in the VCLT.

But more importantly, DC 21 on its terms appears to work within the flow of the Vienna Convention. Indeed many of the elements from DC 21 are sourced from the procedure in the Vienna Convention.

Finally, in relation to para 4, which does depart from the Vienna Convention, on its terms, even though it does not establish the jurisdiction of the ICJ, it does not preclude such jurisdiction *where it already exists*.

But, while DC 21 is consistent with the VCLT, it is also not intended to impose the VCLT procedures on States that are not party to the VCLT or those States that entered reservations to the VCLT procedure.

For starters, para 5 is explicit that DC 21 is without prejudice to relevant rules concerning the jurisdiction of the International Court of Justice, or other applicable dispute settlement provisions agreed by the States concerned.

Moreover, on its terms para 4 does not require or imply the jurisdiction of the Court.

Finally, DC 21 avoids the use of clearly obligatory terms like “shall” to make clear that whatever obligations that may exist, are not imposed by the DC since the Draft Conclusions cannot imposed any obligations.

It is my hope that when States comment on the DCs, these brief points will be taken into account.

I turn now to DC 23 and I will be brief.

There are two major sources of criticisms – also incidentally pulling in opposite directions.

The first major source of criticism is that the not all norms on the list have been shown to be *jus cogens*. The second is that there are other norms of international law that should have made their way onto the list that did not find themselves on the list.

While these concerns pull in different directions, they both rest on one main pillar: The ILC did not, in putting together this list, apply its own criteria.

What should be understood however, is that the ILC's intention with DC 23 was much less ambitious and much more modest than what was originally envisioned when the project was proposed. While I believe that each and everyone of the norms meets the criteria adopted, the ILC does not in these DC make a claim about the peremptory status of any of these norms. All that the ILC does is to acknowledge those norms that it has in the past identified as jus cogens norms. So a couple of points:

DC 23 is clear that the Annex is without prejudice to the existence or subsequent emergence of other norms having a peremptory character.

DC 23 is thus merely illustrative of what the types of norms the Commission has previously identified as jus cogens. In keeping with the general objective of this project, it seeks to provide guidance to those that may be called upon to determine the existence of jus cogens.

DC 23 serves another, subsidiary purpose: it provides a single point of reference for all the outputs of the Commission in which jus cogens norms were identified, allowing a reader to easily access these, see the different formulations and considerations taken into account.

So, yes, there are some norms on the list that could be contested. There are other norms not on the list that could be included. But these do no detract from the accuracy of the list, since all that the list does is tell us what the Commission has done in the past.

I look forward to hearing your comments and I thank you.