SIXTH COMMITTEE

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Statement by

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Report of the International Law Commission
on the work of its seventy-third session – Cluster I

Agenda Item 77

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Thank you Mr. Chairperson,

We would like to begin by thanking the Chairperson of the International Law Commission, Mr. Dire Tladi, for his report to the Sixth Committee, and all members of the Commission for their work during this year's busy session. We are particularly grateful to the Chairperson of the Drafting Committee, Mr. Ki Gab Park, for all his hard work. We also sincerely thank the Codification Division of the Secretariat and its Director, Mr. Huw Llewellyn, for their excellent work.

With the present quinquennium drawing to a close, we would also like to extend a warm welcome to the newly elected members of the Commission, and wish them great success in the important role they are taking on.

Mr. Chairperson,

The International Law Commission plays an important role in making recommendations regarding the promotion of the progressive development of international law and its codification. Its ability to make effective recommendations which will be accepted by States will determine whether the Commission can strengthen what the preamble to the UN Charter refers to as "conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." States and the Commission share the responsibility for achieving such success. Indeed, the Commission's dialogue with States holds the key to its ability to fulfil its mandate.

It is in this vein that we would like to make three general remarks concerning the work of the Commission and the need to attain and maintain the confidence of States in the Commission.

First, we believe that the Commission should pay due regard to the views and comments of Governments on their drafts. This is of particular importance during the second reading stage, before the Commission finalizes its drafts. We recall that the Sixth Committee may invite the Commission to reconsider its drafts in light of comments of Governments and the discussions in the Sixth Committee, as it has done in the past following the second reading stage of the Commission's work on arbitral procedure.

Second, we reiterate that it is incumbent on the Commission, in working on any topic on its agenda, to survey the practice of States as comprehensively and accurately as possible as clearly reflected in the Commission's Statute. Indeed, State practice is indispensable to the codification and progressive development of international law.

Third, we emphasize that the Commission should continually bear in mind the critical distinction between codification and progressive development of international law, which in effect creates *lex ferenda*. It should ensure that texts put forward by it as codification of existing law accurately reflect and are sufficiently underpinned by State practice and *opinio juris*; and it should indicate the extent of agreement on each point in the practice of States, as well as any divergences and disagreements that may exist. Therefore, when the Commission proposes a draft text for the progressive development of the law, the Commission should make that clear.

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 norms of international law that has a unique role in safeguarding the most fundamental rules of the international community of States.

Israel appreciates the efforts of the Special Rapporteur, Mr. Dire Tladi, as well as the extensive deliberations in the International Law Commission on this complex topic. However, Israel regrets that the Special Rapporteur and the Commission did not adequately address most of the concerns that Israel and numerous other States have raised in their prior statements. Given its importance and inherent sensitivities, Israel wishes to voice its concerns before the Sixth Committee regarding the final draft of the Conclusions.

As Israel has noted in its prior statements, we believe that the draft conclusions should strictly reflect customary international law and widely accepted principles, so as to enhance their credibility and facilitate their wide acceptance. Israel repeatedly stressed that 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. This is especially important in view of the apparent divergent views among States on several issues discussed in the draft conclusions. For instance, part four of the draft conclusions, which pertains to the legal consequences of *jus cogens* norms mainly reflects suggestions for the progressive development of international law.

As Israel has consistently stated in previous sessions and submissions, the current text of the draft conclusions does not enjoy widespread support and will unfortunately only lead to further disagreement and controversy, and, ultimately, undermine the legal authority of important elements in this project.

Mr. Chairperson,

Israel would like to reiterate its main concerns regarding the text of the draft conclusions. At the outset, we wish to clarify that the following comments should be seen as non-exhaustive. For further elaboration, we refer to Israel's detailed written submission on the draft conclusions as adopted on second reading.

First, as previously stated, not just by Israel, but also by the members of the International Law Commission themselves, the Special Rapporteur has relied greatly on theory and doctrine, rather than upon relevant State practice, which, in our view, should have been the primary focus in this context. The lack of rigorous analysis of State practice raises significant concerns, as already mentioned earlier.

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 accurately encapsulated in the draft conclusions. For example, the requirement in Article 53 that a norm be so "accepted and recognized" by *"the international community of States as a whole"* sets an extremely high standard of State acceptance and recognition. That threshold is not met by the current language of Draft Conclusion 7(2), which erroneously refers to

"a very large and representative majority of States". Israel believes that the threshold established in Article 53 entails virtually nearly *universal* acceptance and recognition of a norm in order for it to be identified as "jus cogens", and that regrettably this seems to have been dilutes in draft Conclusion 7(2). As Israel has stressed in its prior 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 parameters that divides peremptory norms from other norms must be clearly identified. A less thorough approach is, in our view, a recipe for politicization and confusion.

Third, as noted above, Israel is of the view that the draft conclusions should strictly reflect customary international law. Israel therefore made it clear that it opposes the incorporation of elements in the Commission's draft conclusions that fail to adequately reflect existing law. However, we note the lack of due regard and sufficient consideration of these concerns, as mentioned earlier in our opening statement. In particular, Israel remains concerned regarding 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, like many other states which have voiced their concern in the past, we are doubtful whether the particular consequences referred to are reflective of existing international 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, a situation created by a breach of *jus cogens*.

As previously mentioned, this draft conclusion appears to be based, largely, on the Draft Articles on State Responsibility as well as on two non-binding 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 the Draft Articles on State Responsibility reflect customary international law. As for the two advisory opinions that relate to this Draft Conclusion, it should be recalled that in both advisory 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, which are not legally binding in any case, cannot serve as a relevant source to establish a duty of States to cooperate to bring a breach of *jus cogens* to an end. The commentary to draft conclusion 19 acknowledges that these two advisory ICJ opinions do not make explicit references to *jus cogens* norms. Nevertheless, the commentary contends that there is a significant overlap between *jus cogens* norms and *erga omnes* obligations, such that the deduction that the Court in these decisions was referring to *jus cogens norms* "is not unwarranted." The commentary further states that "since in judicial decisions *erga omnes* obligations have been said to produce the duty to cooperate to bring to an end all serious breaches…" and since all *jus cogens* norms "produce *erga omnes* obligations, it follows that all peremptory norms would also produce this duty." These contentions actually further support Israel's assertion that the Special Rapporteur tends to conflate the term *erga omnes* with the term *jus cogens*, which conveys a misleading impression of the existing state of customary international law.

Mr. Chairperson,

Israel would also 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, which were elaborated in Israel's prior statements, 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, once again risking the dilution of the concept of *jus cogens* norms and its legal authority.

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 it. 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.

Third, Israel would like to note 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, seems uncalled for. The commentary to the draft conclusion 23 states that in putting together this list, the Commission "did not apply the methodology it set forth in draft conclusions 4 to 9." According to the commentary, "the list is intended to illustrate, by reference to previous work of the Commission, the types of

norms that have routinely been identified as having peremptory character, without itself, at this time, making an assessment of those norms." Yet if the list does not even presume to reflect the methodology proposed by the draft conclusions, it further undermines the value of its inclusion and raises significant concerns.

In conclusion, for these reasons and others, Israel is of the view that the draft conclusions should not include a list of substantive norms, whether illustrative or otherwise. Previous sessions and submissions from numerous States indicate persistent and collective concerns regarding the incorporation of this list and the norms it refers to as *jus cogens* and that it would be a legal error to do so. As we earlier stated, the Commission should pay due regard to States comments, particularly on highly significant topics such as *jus cogens*. This position is in line with our more general position, 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. Failure to do so would diminish credibility of the work of the Commission

Mr. Chairperson,

In view of the above, Israel askes the Sixth Committee to request the General Assembly to take note of the serious concerns that were raised by Israel and numerous other Sates in their prior and current statements on this subject. Despite the importance of the subject matter, and the number of comments submitted by States on this issue, Israel notes that the second reading was conducted too briefly, and wishes to express that in our view, this topic deserved a more in-depth discussion and further consideration.

Mr. Chairperson

Turning to the topic of "**Protection of the environment in relation to armed conflict**", the State of Israel acknowledges the third report of the Special Rapporteur, Ms. Marja Lehto. We appreciate the observations made by the Special Rapporteur on States' comments, including those submitted by Israel, in which our position on the various Draft Principles and commentaries was placed on record in detail.

As a general observation, the State of Israel wishes to reiterate its position that the inaccuracies concerning the state of the law in the draft principles that employ mandatory language appear, in places, to owe to the Commission's desire to "make the topic more manageable and easier to delineate". There are a few methodological choices that raise particular concern.

The draft principles borrow from formulations found in recognized legal obligations, or merge together different rules from different legal contexts and conflate the rules of international humanitarian law, international human rights law and international environmental law, in a way that alters or misrepresents the substance or scope of application of those rules. Additionally, while Israel recognizes the significance of the different legal regimes, we reiterate that the boundaries between these regimes must not be blurred, as is at times evident throughout the draft principles. Rather, these legal fields should be understood as distinguishable from one another, each designed for a specific purpose.

Throughout the report, the Special Rapporteur makes use of terms that are not a part of the general discourse of the law of armed conflict. This is exemplified *inter alia* in Draft Principe 19, wherein the phrase "health or survival" is replaced with "health and well-being". An additional example is apparent in Draft Principle 14, which alters the existing balance struck in international humanitarian law, by granting elevated status to humanitarian considerations over military necessity.

Moreover, the draft principles set aside the accepted legal distinction between international and non-international armed conflicts, and on several occasions make assertions without sufficient substantiation.

Lastly, the Commission amalgamates legal obligations together with suggestions for practical implementation, progressive development of the law and non-binding standards. We note that while the third report of the Special Rapporteur addresses this issue, it often does not affirm whether specific draft principles reflect customary law, or are of "a more recommendatory nature. This lack of clarity may potentially lead to erroneous interpretations of the law.

With regard to the final outcome of the project, we are of the position that the draft principles constitute recommendatory guidelines, since they amalgamate legal obligations together with suggestions for practical implementation, progressive development of the law and non-binding standards. In this context, we support the Special Rapporteur's acknowledgment that the draft principles are not intended to become a treaty.

As an overarching matter, the State of Israel recalls that the protection of the natural environment is anthropocentric in nature, in the sense that under customary international law, an element of the natural environment constitutes a civilian object only when it is used or relied upon by civilians for their health or survival. This approach finds ample support in the actual practice of States and many other legal sources. Israel welcomes the statement in the third report of the Special Rapporteur that addresses this issue and explicitly acknowledges that the "anthropocentric approach is inherent in the law of armed conflict". At the same time, Israel regrets the fact that text of the principles had remained vague in this regard and has not been clarified accordingly, and that no explicit elaboration was added about the "anthropocentric" approach in the commentary. In this context, we note that the Special Rapporteur presents the view whereby the natural environment is a civilian object, as one which enjoys general support. However, this claim is based solely on the ICRC's *Guidelines on the Protection of the Natural Environment in Armed Conflict*, making no reference to state practice.

Mr. Chairperson,

Israel would like to reiterate its principled position that the Commission is indeed mandated to engage in progressive development of the law, but such development must be based upon sufficient and convincing state practice.

Before we move to the next topic, Israel wishes to clarify that the aforementioned comments should be seen as non-exhaustive and affirms its previous positions and its comments on specific draft principles, as stated in its submission to the rapporteur in their entirety.

I thank you, Mr. Chairperson.