



**Statement on
behalf of South Africa**

by

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at the

**Permanent Mission of the Republic of South
Africa to the United Nations in the Sixth
Committee of the General Assembly**

under Agenda Items

**“Protection of the Atmosphere” and “Jus
Cogens”**

28 October 2016

Mr Chairman

Thank you for affording us the opportunity to share some thoughts on the agenda item entitled "Protection of the atmosphere". At the outset, allow us to welcome the work of the Commission and as such, congratulate Mr Shinya Murase, Special Rapporteur for this topic on the job well done. South Africa still holds the view that the efforts by the international community to protect the atmosphere is of the crucial importance for our sustainable development and well-being. The atmosphere is common resource of global concern and the effects of human interference in the atmosphere have impacts beyond national borders. Protection of the atmosphere should therefore be addressed by international law as far as possible. As with international law generally, the area of protection of the atmosphere has evolved through treaty making as well as state practice giving rise to customary law norms. Such development has not always been systematic and consistent. Specialised legal instruments have been developed to address particular aspects of human interference with the atmosphere without necessarily considering the body of international environmental law holistically.

Mr Chairman

Despite not aiming to draft provisions that are legally binding or a complete codification of international law on this topic, my delegation holds the view that the work on this topic is very timeous and important, especially in light of the imminent entry into force of the Paris Agreement on 4 November 2016. However, we remain concerned about the blanket exclusion of many rules and principles that, in our view, are integral part of the law on the protection of the atmosphere. It is not clear how the Commission can possibly study the international law on the protection of the atmosphere while ignoring critical rules and principles like precautionary principle, the preventative principle and the polluter pays principle. We are particularly concerned about the exclusion of the common but differentiated responsibility principle, which, in our view, is a cornerstone of international law relating to the protection of the atmosphere. We note that the Paris Agreement also recognises the importance of differentiation. While we welcome the introduction of the new preambular paragraph 4, which recognizes the special situation and needs of developing countries, we remain of the strong view that precise operative language in the text of the Guidelines on the specific situation faced by developing States in relation to the protection of the atmosphere is required.

Mr Chairman

The preparation of these Guidelines is an ongoing project for the ILC. Despite the exclusion of various concepts relating to responsibility for atmospheric degradation from the scope of this project, my delegation would like to stress the need for the Guidelines to address the issue of responsibility in an appropriate manner. We hold the view that it is possible to extract, from the body of international law on State Responsibility, principles on responsibility that would be particularly helpful in guiding States within the field of atmospheric pollution and degradation. That being said, my delegation wishes to express its support for the continuation of this project, and look forward to receiving further work prepared by the Special Rapporteur in this regard.

Mr Chairman

With your permission, I now turn to *Jus Cogens*. At the outset, allow us to welcome the work of the Commission and as such, congratulate Mr Dire Tladi, Special Rapporteur for this topic entitled *Jus Cogens* on a well researched and comprehensive report. *Jus cogens* is an important topic, and whilst it is largely accepted by States that *jus cogens* as a concept exists, much obscurity continues to surround it. There is therefore a need to obtain some clarity hence we welcome with appreciation the report of the Special Rapporteur which came at a right time. This first report, which reflects in-depth and extensive research on the matter of *jus cogens*, was an eye-opener. It traces the historical evolution of the concept of *jus cogens* and along the way dispels some myths concerning apparent persistent objection by some States. Given the sensitivity of this issue, we think it is appropriate that the Special Rapporteur, rather than merely setting out his impression of what was said, to provide us with direct quotes by States and members of the Commission obtained from official summary records. We recognise that the Drafting Committee has delivered an interim report which was presented for information purposes only. We are in general in agreement with Draft Conclusions adopted by the Draft Committee. We note that the Special Rapporteur has expressed the intention to retain all the texts in the Drafting Committee until the Draft Conclusions are ready for adoption on a first reading. We would caution against such an approach which might have the effect of reducing transparency. We hope that the Special Rapporteur and the Commission will decide against this course of action.

Mr Chairman

At the Sixth Committee meeting in November 2014, during the discussion regarding the inclusion of *jus cogens* in the ILC's long term programme of work, South Africa supported the inclusion of *jus cogens*. South Africa expressed the need for greater clarity on the functioning, content and consequences of *jus cogens*. Such a study would allow for the identification of the requirements for a norm to reach the status of *jus cogens* and the effect of such norms on international obligations which would bring much needed certainty to the field. Whilst clarity will prove to be invaluable on the international front it will also be important in relation to domestic matters. Indeed, in South Africa, *jus cogens* has been raised in our own domestic court cases, but with limited discussion. We wish to reiterate our stance as delivered at the Sixth Committee meeting in November 2014. A concern does remain on whether an illustrative list should be produced. In our view, a list would soon become obsolete and although it may be seen as instructive, serving as guidance, it would not aid international lawyers in providing tools to determine for themselves whether norms had achieved the status or not. We are therefore pleased that the Commission is debating this issue and we hope that a decision will be made that takes into account all the factors. Additionally, in relation to the possibility of regional *jus cogens*, South Africa is circumspect. The existence of regional *jus cogens* could bring with it challenges to the universal nature of *jus cogens* and raises concerns for what would happen in instances where it were to conflict with universal *jus cogens*. In this connection, we note that the Special Rapporteur intends to study in the future the question of persistent objector. We agree with his preliminary observation that there can be no objection to *jus cogens* norms and would find it disconcerting if the Commission were to conclude otherwise.

Mr Chairman

The Special Rapporteur proposed three draft conclusions, of which draft conclusions 1 and 3 were referred to the Drafting Committee. The Drafting Committee has delivered an interim report in which it provisionally adopted the text of draft conclusion 1 and the first paragraph of draft conclusion 3 which has been renamed draft conclusion 2. We look forward to seeing the final result of the Drafting Committee. We wish to express our disappointment and surprise that the Commission was not able to agree on what we believe are basic and uncontroversial characteristics. It is

generally accepted that *jus cogens* norms are universally binding, reflect fundamental values and interests and are hierarchically superior. Indeed, as the report of the Special Rapporteur suggests, the Commission itself has recognised these elements in its previous work. We hope that the Drafting Committee will find it fit to speedily adopt these elements. South Africa supports the continued work of the Special Rapporteur and looks forward to the envisaged future work that would include, in 2017, investigating the rules on the identification of the norms of *jus cogens*, including the sources, as well as the relationship between *jus cogens* and non-derogation clauses in international human rights law and in 2018, the consequences of *jus cogens*. South Africa would be particularly interested in an analysis of the relationship between customary international law and *jus cogens*.

I thank you for your attention.