



SIXTH COMMITTEE

CHECK AGAINST DELIVERY

Statement by

Ms. Sarah Weiss Ma'udi
Legal Advisor
Permanent Mission of Israel to the United Nations

ILC Cluster III

Chps: VII (Succession of States in respect of State responsibility) and VIII (General principles of law)

Agenda Item 82-III

2 November 2021
United Nations, New York

Madame Chair,

Starting with the topic “**General principles of law**”, Israel would like to thank the Special Rapporteur for his first two reports, which provided useful information about this source of international law.

Regarding the issue of the relationship between different sources of international law, Israel shares the view expressed by several States that general principles of law may be considered and applied – if relevant – only where no treaty rule or customary international law applies to a given situation. Israel believes that such recourse to general principles would be consistent with the jurisprudence of the International Court of Justice and the intention of the drafters of the Court’s Statute.

With regard to Draft Conclusion 2, Israel agrees with the Special Rapporteur and numerous States that the term “civilized nations” is archaic and should be replaced with a more suitable term, such as “community of States” or “community of States as a whole”. Israel believes that using the term “States” instead of “nations” is more appropriate, given that article 38(1)(c) of the ICJ Statute no doubt refers to the legal systems of States. This is also consistent with the text of Draft Conclusion 4.

Madame Chair,

As for the proposed Draft Conclusion 3(a), Israel agrees with the Commission that there are general principles which may be derived from national legal systems. With regard to Draft Conclusion 4(a), Israel believes that a principle could be considered as ‘general’ per se only if it is to be found in an overwhelming number of legal systems of States belonging to diverse legal traditions. This is also consistent with the text of proposed Draft Conclusion 5, which correctly calls for a rigorous comparative analysis of State practice.

Concerning the term “other relevant materials” proposed in connection with Draft Conclusion 5(3), Israel believes that this term is too vague, and might give way to overly broad interpretation. Israel suggests that the said draft conclusion, or the commentary thereto, clarify what the term “other relevant materials” may include. In any case, this category should include only materials that clearly represent the authoritative legal view of the relevant State.

Madame Chair,

With regard to Draft Conclusion 3(b) and the proposed category of general principles of law that may have developed within the international legal system, Israel strongly believes that there is insufficient State practice to suggest or to demonstrate the existence of such a category. The Special Rapporteur himself has acknowledged the dearth of State practice in this regard as well, and the Commission should take this fact into consideration. Moreover, this category does not seem to be supported also by the *travaux préparatoires* of Article 38(1)(c) of the Statute of the International Court of Justice, which discusses general principles formed within domestic legal systems.

Israel further notes in this vein that the question of the existence of such a category is the subject of significant disagreement among Member States and even within the Commission itself. In Israel’s view, the very fact that there is significant divergence amongst States concerning the very existence of such a putative source of international law - and not merely disagreement regarding its nature or contours – calls for extreme caution when considering this matter. This may well be -- in and of itself – a sufficient reason not to consider principles of this so-called ‘second category’ as a source of international law.

Madame Chair,

The inherent problems associated with the suggested category of “general principles of law formed within the international legal system” become even more evident in Draft Conclusion 7, which proposes ways to identify such principles. The suggested criteria – which are supported by scant relevant State practice -- conflate the source of general principles of law with other sources of international law, namely, international treaties and customary international law. In their current form, the suggested criteria risk undermining basic tenets of international treaties and customary international law, as well as the foundational principle of State sovereignty that underlies them.

One difficulty exposed by Draft Conclusion 7 is found in paragraphs (a) and (b) of that Draft Conclusion, which appear to suggest that general principles of international law may emerge from -- or overlap with -- rules of conventional or customary international law. In so doing, these paragraphs appear to conflate these sources of international law, which are – in Israel’s view – very much distinct.

With regard to the first criterion mentioned in Draft Conclusion 7(a), -- which refers to principles widely recognized in treaties and other international instruments -- this criterion could be interpreted as allowing for the application of certain treaty provisions to States which are not parties to the treaty in question. Such an interpretation would undermine the foundational principle of international law that States are bound by a treaty only to the extent that they had agreed to be bound.

Moreover, the term “other international instruments” is extremely vague. The Special Rapporteur’s suggestion that general principles may be found in UN General Assembly resolutions is highly problematic, not least given their largely political – rather than legal – nature. Indeed, the International Court of Justice - including in the *Marshall Islands* case - has stressed that great caution is required before assigning any normative value to such resolutions. The limited value of resolutions and the caution that is required in evaluating them has also been recognized by the Commission itself in its work on the identification of customary international law.

Madame Chair,

Turning now to the second identification criterion in draft conclusion 7(b), which refers to principles that underlie general rules of conventional or customary international law, we believe that this proposed criterion presents difficulties similar to those we noted earlier regarding possible recourse to treaties. Indeed, we believe this draft conclusion contains even more inherent flaws. Firstly, the proposed criterion is too vague, and could give way to reading ideas into treaties that do not actually exist therein, supporting arguments that customary law dictates more than what accepted State practice does. These possible implications risk undermining the framework of treaty law and customary rules, and risk inviting subjective interpretations that jeopardize overall legal stability and predictability.

Furthermore, it is worth noting that customary rules do not necessarily apply universally. This is particularly true in situations where there is a persistent objector to a certain rule. In this context, Israel recalls that the persistent objector is a well-established concept in international law, and is recognized by the Commission itself in the context of its work on the topics of “Identification of customary international law” and “Peremptory norms of general international law (*jus cogens*)”. Draft Article 7(b) could be read to suggest that a general principle may be deduced from customary rules, potentially circumventing -- in an unacceptable manner-- the persistent objector rule. This issue raises an important question, which the Commission should explore, of whether general principles of international law apply to States that have expressly rejected them.

With regard to the third criterion in Draft Conclusion 7(c), which refers to principles inherent in the basic features and fundamental requirements of the international legal system, Israel believes that this notion is extremely vague and subjective, and lacks a basis in State practice accepted as law. Moreover, we believe that this notion risks undermining the well-established framework of the sources of international law, laid on in article 38(1) of the ICJ Statute.

In light of the above, Israel would advise the Commission to give very careful consideration to the question whether the so-called ‘second category’ of general principles should be pursued if at all, and how it may be justified and identified.

Madame Chair,

Finally, on this first topic, with regard to Draft Conclusion 8(2), Israel believes that only final or otherwise definitive decisions of higher courts should be taken into account in the context of determining whether the judicial system of a State has, indeed, recognized the existence and content of a given general principle of law.

Madame Chairperson,

Turning now to the topic of "**Succession of States in respect of State Responsibility**", Israel would like to express its appreciation to the International Law Commission and to the Special Rapporteur, Mr. Pavel Sturma, for their work thus far.

At the same time, Israel has reservations with regard to the approach followed in connection with this topic. Israel is of the view that the Commission is at its best when -- per the accepted approaches of international law -- it takes on topics where there is a well-developed body of State practice and jurisprudence that require refinement or clarification. It follows that the Commission should choose topics of general international law that are of interest and utility to States, and which do not give rise to strong objections.

Madame Chair,

With regard to the Fourth Report on this topic, Israel is concerned with the approach adopted by the Special Rapporteur therein, according to which "the requirement of general practice as an element of identification of customary international law cannot be applied too strictly".¹ Israel urges the Commission to uphold the accepted methodology for the determination of rules of customary international law, which was only recently embodied in the Commission's conclusions on that topic.

An additional point of concern is the lack of clarity concerning the Special Rapporteur's approach to the scope of this project. In that respect, Israel urges the Special Rapporteur to refrain from taking positions on related -- but distinct -- areas of law, such as the law of state responsibility itself.

¹ A/CN.4/743, para. 20.

With respect to the final outcome, Israel does not see the proposed draft articles as appropriate for serving as a basis of a future convention. In this vein, we respectfully suggest that the current form of draft guidelines may be more appropriate in this particular context.

Madame Chair,

As a concluding remark, Israel would like to acknowledge that the choice of the proper topics for the ILC to take up is a responsibility shared by both the Commission and States. Therefore, Israel believes that it is important that as many States as possible voice their positions on this matter, and on the Commission's work more generally, in order to provide appropriate guidance to the Commission and ensure that the outcome will best serve States at the end of the day.

I thank you Madame Chair