PERMANENT MISSION OF
JAMAICA TO THE UNITED NATIONS

STATEMENT BY

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ON

AGENDA ITEM 79: "*REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS SIXTY-THIRD AND SIXTY-FOURTH SESSIONS*"

IN THE SIX COMMITTEE
67TH SESSION OF THE UNITED NATIONS
GENERAL ASSEMBLY

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Mr. Chairman,

Since this is the first time my delegation will be taking the floor, I would wish to congratulate you on your election as Chair of the Sixth Committee. You can count on the full support and cooperation of my delegation.

It is indeed an honour for me to address the Committee on Agenda item 79. In this regard, my delegation aligns itself with the statement made by Chile on behalf of the Community of Latin American and Caribbean States.

My delegation wishes to commend the ILC on their continuing contribution to the codification and progressive development of international law as reflected in the very informative report on their sixty-forth session which treats with a number of significant topics. The Report identifies two (2) specific issues on which comments would be of particular interest to the Commission: the first, "*Immunity of State officials from foreign criminal jurisdiction*"; and secondly, "*Formation and evidence of customary international law*".

Immunity of State officials from foreign criminal jurisdiction

Addressing the first, there is little doubt that the rule of State immunity is solidly grounded in customary international law. The principle of sovereign equality runs counter to the exercise of jurisdiction by the courts of one State over another State or its representatives. The doctrine of immunity is based on the notion that it would be an affront to the dignity and sovereignty of a State for that State or an individual personifying the State to be impleaded before a foreign court. The rule is not absolute and a distinction is drawn between the acts of the sovereign as such (*jure imperii)* and other transactions of a commercial nature (*jure gestionis)*. The general principle is based on the recognition of the need to avoid interference with the exercise of the sovereign prerogatives of a foreign State.

The discussion in the Report of the ILC on immunity *ratione personae* suggests areas of consensus where rules of customary international law may readily be identified. The decision of the International Court of Justice (ICJ) in the *Arrest Warrant case* provides the clear statement

> "*that in international law it is firmly established that ... certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister of Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.*" (paragraph 51)

This is a generally accepted statement of the law *lex lata*. The ILC Report, however, suggests that there are differing views as to whether the immunity enjoyed by the so-called "troika", namely incumbent heads of State and Government and ministers for foreign affairs, and possibly by certain other incumbent high-ranking officials, is absolute or not. The views of the Special Rapporteur as detailed in previous ILC reports (A/66/10)

suggest (paragraph 110) that the immunity of the troika may be considered "to be absolute and to cover acts performed in an official and a personal capacity, both while in office and prior thereto." However, "[i]n light of the link between the immunity and the particular post, immunity *ratione personae* was temporary in character and ceased upon the expiration of their term in office; such former officials nevertheless continued to enjoy immunity *ratione materiae."*

Further "*[112]. Concerning the territorial scope of immunity, the Special Rapporteur considered that immunity takes effect from the moment the criminal procedure measure imposing an obligation on the foreign official is taken, irrespective of whether the official is abroad or not."*

As such, if one adopts the position articulated by the Special Rapporteur in previous reports of the ILC it may be stated that it would be contrary to international law for one State to seek to exercise criminal jurisdiction over a foreign Head of Government or Minister of Foreign Affairs, wherever that person may be. Indeed, there is a certain persuasive logic which supports this line of argument. As underscored by the ICJ in the *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* (3 February 2012, General List 143, at paragraph 82), the claim of immunity is of a preliminary procedural nature and operates to preclude the State or its representative from being subject to the trial process. A court should therefore not have to engage in an extensive enquiry into the merits of a case in order to determine whether a claim of immunity is in fact valid.

Mr. Chairman,

In the *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* ICJ Judgment of 4 June 2008, at paragraph 174) the ICJ observed that the rules of customary international law reflected in the Vienna Convention on Diplomatic Relations, while addressed to diplomatic agents, are necessarily applicable to Heads of State. This includes the inviolability of the Head of State and the requirement that all appropriate steps be taken to prevent any attack on his or her person, freedom or dignity. (VCDR, Article 29).

In that case the ICJ confirmed that while in office, a Head of State enjoys "*full immunity from criminal jurisdiction and inviolability which protects him or her 'against any act of authority of another State which would hinder him or her in the performance of his or her duties... Thus the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority"* (paragraph 170)

As such a summons that was no more than an invitation to testify which the Head of State could freely accept or decline was not an attack on the immunities from criminal jurisdiction enjoyed by the Head of State, since no obligation was placed upon him to appear in connection with the investigation. (*ibid.* paragraph 171)

It would seem clear that a Head of Government may not be forced to provide evidence in connection with an investigation conducted by a foreign State. He or she enjoys immunity from the judicial process.

Article 31(2) of the Vienna Convention on Diplomatic Relations clearly provides that, *"[a] diplomatic agent is not obliged to give evidence as a witness."* As above noted although the reference is to diplomatic agents it is equally applicable to Heads of Government and State. In line with this section 21 of the *Mutual Assistance (Criminal Matters)* of Jamaica states as follows

> "21. No person shall be compelled, in relation to a request ... [for mutual legal assistance], to give evidence or to produce documents or other articles which he could not be compelled to give or produce in criminal proceedings in Jamaica or in the relevant foreign state."

The effect of this section is that the Central Authority is prohibited from authorizing the taking of evidence or the production of documents or other articles and the transmission of the evidence, documents or other articles to the relevant foreign State where the person providing such evidence cannot be compelled to give or produce such evidence in the foreign State.

So if an individual such as a member of the troika enjoys immunity before the courts of a foreign sovereign State by virtue of customary international law perforce such person cannot be compelled to give evidence in Jamaica in the context of a request for mutual legal assistance. This would seem to be settled law *lex lata.*

The resolution adopted by the *Institut de droit international* at its meeting in Vancouver in 2001 on "Immunities from Jurisdiction and Execution of Heads of State and Government in International Law," affirms,

> "that special treatment is to be given to a Head of State or a Head of Government, as a representative of that State and not in his or her personal interest, because this is necessary for the exercise of his or her functions and the fulfilment of his or her responsibilities in an independent and effective manner, in the well-conceived interest of both the State or the Government of which he or she is the Head and the international community as a whole". (added emphasis)

Jamaica supports this view and sees the rule of customary international law providing for the conferral of immunity on State officials as in the interest of the international community as a whole. The role of the Commission in identifying rules of *lex lata* and possibly stimulating discussion on the law's progressive development is of particular significance to us. It will no doubt provide practical guidance to judges and legal practitioners, who while not necessarily schooled in international law, are nevertheless called upon to argue and adjudicate on claims of immunity involving the exercise of criminal jurisdiction by foreign States.

Jamaica welcomes the appointment of Ms. Concepcion Escobar Hernandez as Special Rapporteur on the 'Immunity of State officials from foreign criminal jurisdiction,' but also thanks Mr. Romjan Kolodkin for the quality of his work.

Formation and evidence of customary international law

Mr. Chairman,

The second matter on which the Commission has indicated that our comments would be of interest to them concerns the formation and evidence of customary international law.

Jamaica has a dualist legal system. As such rules of treaty law must be expressly incorporated by an act of the Legislature to have effect in municipal law. Rules of customary international law however form part of the common law and may be applied in so far as they do not conflict with statute law. Additionally, rules of Community law, I refer to the Caribbean Community including the CARICOM Single Market and Economy, incorporate rules of customary international law in so far as they are relevant to areas addressed by the Revised Treaty which establishes CARICOM. The Revised Treaty instructs the Caribbean Court of Justice (CCJ) to refer to relevant rules of international law in determining disputes concerning the interpretation and application of the Treaty. The scope of the reference is not limited to rules of treaty interpretation (as found for example in the WTO Dispute Settlement Understanding (DSU) but rather covers all sources of international law. In this regard, the Caribbean Court of Justice has affirmed that it may look to general principles of international law and rules of customary international law as demonstrated in the practices of CARICOM Member States, the constitutions and legislation of the region, judicial decisions and various other authoritative pronouncements. Therefore in defining rules of international law the Caribbean Court of Justice has emphasized that it is searching for evidence of Caribbean State practice.

The growth in the number of independent sovereign States over the past half century impacts the extent to which rules identified as customary international law may truly claim to be of universal application. It raises questions of the legitimacy of any such claim. A generally accepted international practice, it may be suggested, should demonstrate the involvement of different regions and cultures, and evidence acceptance beyond OECD countries to include the more vulnerable and marginalized members of the international community. The rules accepted by a few great powers traditionally defined customary international law. That is clearly no longer the case. Yet the capacity of States to participate in the process of rule formation is not equal.

Natural disasters and other areas of particular interest

Mr. Chairman,

With regard to other subjects treated within the ILC Report, Jamaica continues to closely review the text of the draft articles on the protection of persons in the event of disasters

provisionally adopted so far by the Commission. Jamaica as a small island developing State (SIDS) is particularly vulnerable to natural disasters. The vestiges of Hurricane Sandy are felt here in New York but also in Jamaica. Hurricane Sandy – then a much smaller weather system in comparison to what hit the East coast of the United States - left seventy percent (70%) of Jamaica without power, which fortunately has now been restored. As a small island developing State that continues to suffer the devastating impact of severe weather events linked to climate change, we are keen on ensuring that the requisite measures are in place to support developing countries in their efforts to overcome the challenges associated with climate change.

One area of particular interest is that of the provision of adequate resources and greater access to related technology to better support developing countries in their efforts to implement adaptation measures. The importance of scientific, technical, logistical and other cooperation to avert and also alleviate natural disasters is therefore a matter on which we would like to see greater emphasis. In this regard Jamaica views Draft Article A which elaborates on the duty of States to cooperate among themselves, and with competent international organizations as a welcome insertion into the text. We believe the provision could still be further refined in future drafts.

Jamaica further affirms that the response to disasters must take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable. The human rights of persons affected by natural disasters must be respected, and in particular the inherent dignity of the human person.

Mr. Chairman,

Several other areas of the ILC report provide an impetus for further reflection. The effect of subsequent practice on the interpretation of treaties is raised in Chapter X of the ILC Report, "Treaties over time". The possible role of subsequent agreements and subsequent practice in respect of treaty modification is of practical relevance, particularly in the regional context. Chapter XI of the ILC on the Most Favoured Nation (MFN) Clause is an area where we believe that the work of the Commission may be deepened.

The inconsistencies in decisions of ICSID tribunals post- the *Maffezini* award does not promote stability and certainty in the law. The work of the Commission in this area will heighten the awareness of States so that they, in the future may, at a minimum, explicitly clarify their intention as to whether procedural and/or substantive matters should fall within the scope of the MFN clause.

The interface between bilateral investment treaties (BITs) and the WTO General Agreement on Trade in Services (GATS) has not yet been explored in the ILC discussions as conveyed in the Report. Potentially relevant in this context are provisions concerning the extension of national treatment to BIT treaty partners, as well as other obligations, including the commitment to fair and equitable treatment, guarantees against

expropriation, or access to investor-State arbitration. We hope that the work of the ILC may assist in achieving greater clarity in the law.

In closing, Mr. Chairman, we wish, once again, to welcome the Report of the ILC.

I thank you Mr. Chairman