# ISRAEL

70th Session of the General Assembly

---

CHECK AGAINST DELIVERY

---

Statement by:

Ms. Sarah Weiss Ma'udi
Director, International Law Department
Ministry of Foreign Affairs

Sixth Committee
Agenda Item 83

## Report of the International Law Commission on the Work of its Sixty-Seventh Session

United Nations
New York

PERMANENT MISSION OF ISRAEL
TO THE UNITED NATIONS
800 Second Avenue, 15th Floor
New York, NY 10017

Tel: 212-499-5510
Fax: 212-499-5515
info-un@newyork.mfa.gov.il
http://israel-un.mfa.gov.il

Mr. Chairman,

Israel commends the Special Rapporteur, Ms. Marie Jacobsson, for her valuable work on the second report regarding the "**Protection of the Environment in Relation to Armed Conflict**".

As we have stated in the past, we share the view that the Law of Armed Conflict contains a body of rules and principles that adequately address the issue of environmental protection. Israel does not see the need, at this juncture, to formulate new standards regarding environmental protection. Instead, we wish to propose an approach that lends to the clarification of existing international law.

Regarding the scope, we wish to reiterate our position, as stated last year, that the report, and the proposed principles, should exclude issues such as cultural heritage; natural resources; the question of specific weapons; and indigenous peoples. We believe that these matters are adequately addressed in other bodies of law, and any further discussion of them should take place in a different, more appropriate, forum.

Israel sees great importance in protecting the environment at all times, including in the context of armed conflict. We believe that the environment serves the population and safeguarding it is important as a means of protecting health and promoting sustainability.

In this context, we believe the measure of protection afforded to the environment under the Law of Armed Conflict is currently equivalent to the level of protection to be provided to civilian populations and civilian objects. In general, we feel that some of the language suggested by the Rapporteur and the Drafting Committee goes beyond the level of protection afforded to the environment under existing international law. Here we wish to voice concern, and urge the Rapporteur not to promote a standard that is inconsistent with current international norms.

Beyond our general comments, we would like to suggest modified or alternative language for certain, particular draft principles proposed by the Rapporteur and amended by the Drafting Committee:

- Draft principle II-1 addresses the general protection of the environment during armed conflict. For paragraph 1, we suggest the following phrasing: "the natural environment <u>enjoys general protection against attacks under</u> the law of armed conflict". This wording, as opposed to the wording "shall be respected and protected", reflects the existing and appropriate level of protection that is enjoyed by the environment, and references the relevant body of law, i.e., the Law of Armed Conflict.

- For paragraph 3 of the same draft principle we suggest the wording: "no part of the natural environment may be the object of attack, unless it has become a military objective". We believe this wording is consistent with the language commonly used in the Law or Armed Conflict and creates a clear distinction between intended and incidental harm to the environment.
- We find draft principle II-2, which states the applicability of the Law of Armed Conflict to the natural environment to be pertinent. However, we suggest removing the words "with a view to its protection" as that addition goes beyond the standard required under the Law of Armed Conflict.
- Regarding draft principle II-3, which addresses the application of the principle of proportionality to the environment, Israel believes that the concept of collateral damage to the environment must be addressed in a way that is consistent with the Law of Armed Conflict, and should be defined narrowly. We find the phrase "environmental considerations" to be vague and perhaps too broad, and note that some members of the committee were of a similar view. We suggest the wording "Damage to the environment which is expected to prejudice the health or survival of the population shall be taken into account when assessing what is necessary and proportionate in the pursuit of lawful military objectives".
- Regarding draft principle II-4, which prohibits acts of reprisals against the environment, Israel shares the position expressed by some members of the committee that this rule does not reflect customary law, and, thus, we suggest removing this draft rule.

Mr. Chairman,

With regards to the topic **"Immunity of State Officials from foreign criminal jurisdiction"**, Israel thanks the Special Rapporteur, Ms. Concepción Escobar Hernández, for her fourth report and commends her for the progress made on this important and complex topic. Israel also commends the contributions made by the members of the ILC. This year's work has resulted in two additional draft articles, addressing the definition of the term '*act(s) performed in an official capacity*', and the scope of immunity *ratione materiae.*

The definition of "act performed in an official capacity" in draft Article 2 subparagraph (f), as adopted by the Commission, reveals the complexities of these terms and the need for further

study of this matter. For instance, the term "State authority" lacks a clear definition, and may lead to some ambiguity as to the meaning of the word "authority". That is, the term "authority" could refer to the State official's powers as prescribed by national statutes and other forms of legislation, or it could be construed as relating to categories of forms of conduct that may be broadly recognized as actions that are generally known to be performed by State officials in their official capacity. Therefore, it is advisable that the term "State authority", and the exercise of such authority, be defined, or broadly construed, on a case-by-case basis, in accordance with the constitutional system, laws and regulations governing the State officials' conduct in their respective countries, rather than allowing courts in forum States to deduce such authority or lack thereof, based on their subjective and potentially arbitrary conclusion.

In this context, further attention should be given to the divergence presented in the Special Rapporteur's report as well as in statements made by member States, regarding the categorization of certain forms of conduct as acts performed in an official capacity. For the foregoing interpretive questions, an "act performed in an official capacity" should be defined in accordance with the functions carried out by the State organ to which the State official belongs, and considering specific State official in question. This means that the question of whether a given act falls within the category of an act performed in an official capacity should be resolved on a case-by-case basis.

Mr. Chairman,

Questions of immunity necessarily refer to the delimitation and mutual respect of the sovereign powers of States and are therefore political and sensitive. Thus, due consideration should be given to the fact that the functional necessities of inter-state relations lie at the heart of the established rules on immunity.

In anticipation of the Special Rapporteur's next report, which is expected to address the issue of limits and exceptions to the immunity of State officials from foreign criminal jurisdiction, we would like to point out the procedural nature of the immunity of state officials and to the notion that such immunity does not preclude them from relevant liabilities, specifically when brought before a proper legal forum. As stated by the ICJ in the *Arrest Warrant Case,* these officials can still be held criminally accountable without prejudice to the immunity from foreign criminal jurisdiction through measures, such as prosecution by their own national courts or a submission

of a waiver of their immunity by their State before a foreign court. Moreover, though the international community has identified certain serious international crimes, it has not yet developed rules of customary international law regarding waiving immunity of state officials in such crimes.

It is therefore necessary that the Commission's work proceed in a careful and measured manner, especially when contemplating changes to the scope of immunity and, in this context, we must stress the paramount importance of specifically identified *opinio juris* and relevant state practice relating to the subject at hand.

Israel will continue to follow this project closely.

Mr. Chairman,

Regarding the **"Provisional Application of Treaties"**, Israel welcomes the discussion on this matter and congratulates the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, on his third report on the topic.

As noted in the past, Israel does not provisionally apply treaties. However, there are exceptional circumstances in which the provisional application of treaties may be permitted. These include situations in which there is a clear financial or political significance for the provisional application of a treaty; cases in which there is a need for exceptional flexibility; or instances in which it is important not to wait for the completion of the lengthy internal requirements for the approval of the treaty. This practice is not part of the written legal framework, but is rather a matter of uncodified practice.

In any case, the Government of the State of Israel must approve the treaty and its provisional application prior to the date in which the agreement is provisionally applied. The Government's decision must contain special approval for provisional application before the treaty enters into force. The explanatory note submitted to the Government prior to its decision, must include a statement that the approval of the provisional application deviates from the general practice, and states the reasons for the exceptional approval in the specific case.

Thank you Mr. Chairman.