ISRAEL

SIXTH COMMITTEE

CHECK AGAINST DELIVERY

Statement by
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Ministry of Foreign Affairs

Report of the International Law Commission on the work of its sixty-ninth session

CLUSTER II

Protection of the Atmosphere

Immunity of State Officials from Foreign Criminal Jurisdiction

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Mr. Chairman,

Israel would like to commend the Special Rapporteur, Mr. Shinya Murase, for his valuable work on the fourth report on the "**Protection of the Atmosphere**", as well as the three previous reports regarding other aspects of this topic. In his recent report, the Rapporteur focuses on the interrelationship between international law on the protection of the atmosphere and other fields of international law, namely international trade and investment law, the law of the sea and international human rights law.

The State of Israel recognizes the importance of the issues that are referred to in the three new preambular paragraphs, including marine pollution from land-based sources; greenhouse gas emissions from ships; sea-level rise; and intergenerational equity considerations.

Furthermore, the State of Israel supports the principle of harmonization of laws. Having said that, Mr. Chairman, the State of Israel objects to the integrative approach proposed by the Special Rapporteur and believes that each subject should be addressed in the context of the appropriate legal regime. The State of Israel objects to the unnecessary linkage of the separate legal regimes and to creating potential overlap, as each legal sphere constitutes the *lex specialis* to be applied to the appropriate situation and has different standards and guiding principles.

This position is particularly relevant with respect to the consideration of associating the international law on the protection of the atmosphere and international human rights law, due to the numerous and significant differences between these two legal regimes. For example, international human rights law is concerned with the specific individual, and infringements are addressed through the prism of the individual, while protection of the atmosphere is inherently a general and collective issue.

Thus, we would like to caution against an approach that promotes the overlap of what should be separate and intrinsically different legal regimes.

Mr. Chairman,

With respect to the Special Rapporteur intention to address matters relating to implementation, compliance and dispute settlement in his next report, the State of Israel would like to take this opportunity to briefly express its general position regarding these matters:

The State of Israel appreciates the need to promote compliance and adherence to international law and implementation of rules and norms related to the protection of the atmosphere, as well as the need to establish an agreed and just mechanism for dispute settlement through amicable negotiations between the parties concerned with respect to issues relating to this important topic. At the same time, it is imperative to avoid duplication of procedures or bodies. Thus, any compliance mechanism to be created and the scope of its capacities must be limited to the subject of protection of the atmosphere and focus on issues that are not already the subject of or addressed by existing, related mechanisms. Such a mechanism should be facilitative in nature, and function in a transparent, impartial, non-adversarial and non-punitive manner. In this context, the State of Israel would like to voice its general concern regarding the possible politicization of such a professional and politically neutral subject and the potential abuse of compliance mechanisms. The State of Israel welcomes any proposal that would serve to safeguard against such potential abuses.

Mr. Chairman,

The State of Israel would like to reiterate its appreciation for the attention that has been dedicated by the International Law Commission to the important issue of atmospheric pollution and our country's overall commitment to the protection of the atmosphere.

Mr. Chairman,

With regard to the topic of **Immunity of State Officials from Foreign Criminal Jurisdiction**, Israel would like to state at the outset that we attach great importance to ensuring that the perpetrators of crimes are brought to justice and support international efforts to effectively fight crime and combat impunity.

At the same time, and alongside the mechanisms that exist to advance the aim of bringing criminals to justice, there is universal recognition of the longstanding legal

principle of immunity of State officials from foreign criminal jurisdiction. As is well known, this immunity is procedural and is separate from the substantive question of the legality of the conduct in question which, in appropriate circumstances, could be prosecuted by the State of the official or, when such a State waives immunity, by foreign States.

But the fact that such immunity is procedural does not make it any less essential or fundamental as a legal principle. Indeed, the field of immunity is well established in international law and was developed to protect the important principles of the independence of States and their sovereign equality, to prevent political abuse, and to allow the proper functioning of State officials in the performance of their duties and the conduct of international relations.

Mr. Chairman,

Israel has significant concerns that the work of the ILC on this topic has failed to accurately reflect customary international law on this subject, and failed to adequately acknowledge this fact. Our concerns relate both to the Draft Articles themselves – which are inconsistent with widely recognized principles that govern this field – and to the manner in which they were adopted.

In particular, we share the view of many other States regarding the problematic nature of the treatment of the issue of immunity *ratione personae* and the exceptions to immunity *ratione materiae* in Draft Article 7.

With respect to the issue of persons enjoying immunity *ratione personae* during their term of office, while the Draft Articles specify only three persons, known as the "*troika*" – Heads of State, Heads of Government and Ministers of Foreign Affairs – according to customary international law, the group of high-ranking State officials who enjoy such immunity is not limited to the *troika.*

This position was reflected in the decision of the ICJ in the Arrest Warrant Case of the Democratic Republic of the Congo v. Belgium and in decisions of national courts, and also expressed by some of the ILC Members as well as numerous Member States in previous Sixth Committee meetings.

As noted previously by some ILC Members, international relations have evolved in a way that high-ranking State officials other than the *troika* have become increasingly involved in international fora and make frequent trips outside their national territory. Thus, if immunity *ratione personae* is attached to certain high-ranking State officials

because of the character and the necessity of their functions to the maintenance of international relations and international order, it follows that such immunity should not be limited to the *troika*, and should be granted to additional high-ranking State officials including, for example, Ministers of Defense and Ministers of International Trade. The non-exhaustive nature of the list of persons who enjoy immunity *ratione personae* was evident in the use of the term "such as" in the aforementioned judgement of the ICJ, and recognizes that the rationale for immunity is associated with the function the State official fulfills and not only the title of his or her office.

With respect to Draft Article 7 which was recently adopted by the Commission, stipulating exceptions to the applicability of immunity *ratione materiae*, Israel shares the view that there are no established norms of international law regarding exceptions or limitations to immunity from criminal jurisdiction of State officials, nor is there a trend towards the development of such norms.

In fact, the inclusion of exceptions would have the practical effect of greatly diminishing and even nullifying the immunity of State officials, as immunity of State officials would be violated as a matter of practice from the very process of examining the applicability of exceptions. This, in turn, also creates the opening for abuse for political purposes – something which the doctrine of immunity was intended to prevent.

The fact that Draft Article 7 was adopted by the Commission by a vote rather than by consensus – in contrast to the long-standing practice of the Commission - itself reflects the problematic nature of this provision and its failure to reflect accurately the state of the law.

Accordingly, we believe that the Draft Articles should not include any exceptions or limitations to immunity from foreign criminal jurisdiction, and that Draft Article 7 should be deleted.

Without prejudice to this position, we believe that should the ILC proceed with a discussion of exceptions – an effort which we do not encourage and which in any event would be an attempt to propose *lex ferenda* only – this must be done in conjunction with a discussion of safeguards rather than divorced from it.

Such safeguards could include, for example, the principle of subsidiarity, according to which criminal jurisdiction should be asserted by States with close and genuine jurisdictional links that are willing and able to genuinely to apply such jurisdiction, in order to facilitate effective prosecution and promote the interest of justice;

consultations with the sending State; the need for decisions on these matters to be taken by the most senior legal officials; and additional safeguards to ensure that foreign criminal jurisdiction is not exploited for political motives.
Israel will have more to say on this issue and on and the subject of exceptions should the ILC continue on this course.

To conclude, while we appreciate the effort that has been invested, we believe that work of the ILC on this topic and the manner in which it has proceeded have unfortunately not been satisfactory. The Draft Articles do not reflect the current state of the law, and in fact undermine well established, well accepted and well-founded legal principles, that continue to be applicable to, and necessary for, contemporary international relations. If the ILC wishes to propose the progressive development of the law in a certain direction, then it should be transparent and clear that this is the purpose of the exercise and States will react accordingly. If it is seeking to give expression to the law as it is, and in our view as it should remain, then it has missed the mark. In either case, we believe that more detailed and robust engagement with Member States on this topic is necessary for the ILC's contribution to be more effective and better received.

Thank you, Mr. Chairman.