Statement by H.E. Dr. Rohan Perera, Permanent Representative of Sri Lanka to the United Nations in New York

Agenda Item 81 (Cluster II)

Report of the ILC Chapter VII Immunity of State Officials from Foreign Criminal Jurisdiction

Friday, 27th October 2017
Trusteeship Council Chamber, UNHQ

(Please check against delivery)

Mr. Chairman,

Permit me to join all other speakers in extending, on behalf of my delegation, our warm appreciation to the Chairman of the Commission Mr. Georg Nolte, for his comprehensive presentation of the Second Cluster of topics in the Commission's Report. I also take this opportunity to extend to him our sincere congratulations on the work that has been accomplished at the 69th Session of the ILC under his stewardship.

My intervention today is primarily on Ch. VII of the Report on the topic, "Immunity of State Officials from Foreign Criminal jurisdiction" – a topic of critical importance to Member States and one on which there has been an intense debate within the Commission.

We welcome the Fifth Report of the Special Rapporteur Ms. Concepción Escobar Hernández and appreciate the efforts that have been made on the question of limitations and exceptions to immunity of State Officials from Foreign Criminal Jurisdiction. We wish to underline in this regard, the need to proceed with circumspection, on a difficult topic, given both the legal complexity and the political sensitivity of the issues at hand and their critical importance to Member States.

The Report, concludes that it had not been possible to determine the existence of a customary rule that allowed for the application to immunity and exceptions in respect of **immunity ratione personae** or to identify a trend in favour of such a rule.

On the other hand, the Report concludes that the limitations and exceptions to the immunity of State Officials from foreign criminal jurisdiction, were extant in the context of **immunity ratione materiae**. Special Rapporteur states that "although varied, the practice showed a clear trend towards considering the commission of international crimes, as a bar to the application of immunity ratione materiae of State officials from foreign criminal jurisdiction ……."

It is this conclusion and the approach adopted through Draft Article 7 that has generated a sharply divisive debate within the Commission and has led, unfortunately, to a decision through recourse to a vote, on an issue, which, in our view must by its very nature, be the subject of further critical analysis and a decision to be taken by consensus.

Questions have been raised in the course of the debate as to whether the report does contain sufficiently cogent evidence to support the conclusion that has been reached on the existence of limitations and exceptions in respect of acts ratione materiae that has been proposed.

While recognizing that the discussion of the practice in the Report was indeed extensive, the criticism has been made, inter-alia, that examples cited in the Report related to State immunity or immunity in civil proceedings rather than criminal prosecutions; that they were taken from different contexts and that the report selectively discussed cases that supported the establishment of limitations and exceptions while disregarding evidence indicating the opposite.

Without delving too much into all these aspects, I intend to flag few important issues on which my delegation feels strongly and wish to put on record our positon.

Firstly, the extent of the Treaty Practice that has been cited, with regard to limitations and exceptions to immunity, is problematic. Treaties dealing with 'international crimes of a serious nature', as reflected in those criminal law enforcement treaties providing for an 'extradite or prosecute' regime, do not expressly provide 'limitations and exceptions' to immunity in respect of crimes covered under these Conventions. In our view such Treaties cannot be considered as contributing towards the existence of a customary rule. To establish the existence of such a customary rule, requires much more cogent and clear and unequivocal evidence of Treaty Practice.

Secondly, it is a matter of concern that considerable reliance is being placed on treaties expressly providing for individual criminal responsibility for international crimes, where immunity is denied in proceedings before international courts or tribunals. Such treaties, by definition, should not have a bearing on the question of immunity of State official before **domestic** Courts of a foreign State. The blurring of the distinction between the application of limitations and exceptions in **proceedings before an International Court** on the one hand and in **proceedings before the domestic courts of a foreign State** on the other, makes the basic approach of Draft Art 7, somewhat problematic. The draft article is by and large grounded on the ICC Statute and, consequently, cannot be considered as reflective of a Customary Law principle establishing limitations and exceptions to immunity of State officials in foreign criminal jurisdictions. In the case of the ICC Statue, States who have subscribed to the Instrument, have as a matter of sovereign discretion, **voluntarily renounced the right to claim immunity** in respect of the core crimes under the Statue, even in respect of the Troika. The Statute therefore should not have a bearing on the question of the immunity of State officials from prosecution before national Courts.

This fundamental point of distinction between prosecution before a domestic Court of a foreign state and one before an international court or tribunal has a critical bearing on the overall approach with regard to draft Art.7. In our view aligning draft Art. 7 with the approach of instruments relating to International Courts/tribunals would run the inevitable risk of affecting the peace and stability in relations among states, when one State opts to exercise criminal jurisdiction over the officials of another State, before their own national courts, as cogently pointed out by some members of the Commission. This approach in our view militates against the sanctity of the principle of sovereign equality of States enshrined in the charter, and could jeopardize the broad acceptability of the draft articles as a whole, a scenario that should, as a matter of prudence, be carefully avoided.

In our view, it would be necessary to focus on existing law (lex lata) and to build up a solid foundation of existing State practice, as the starting point. The aspect of progressive development (lege ferenda) could be addressed at a subsequent stage.

Finally, Mr. Chairman my delegation wholeheartedly agrees with the views that have been expressed in the Commission on the need to recognize the crucial relationship between possible

exceptions to immunity ratione materiae and the **procedural safeguards** that would ensure that such exceptions would not be abused for partisan political purposes. In our view too, this Article should have been adopted only in conjunction with such safeguards - a view that has also been clearly expressed around this room during this debate.

My delegation notes with satisfaction, however, that the Special Rapporteur has reiterated her conviction that the Commission should deal thoroughly with procedural issues, including necessary procedural guarantees and safeguards to prevent politicization and possible abuse in the exercise of criminal jurisdiction and that the Sixth Report would be devoted to procedural questions. We would emphasize the importance of the right of waiver in appropriate circumstances, as a key element in this regard.

While we as Member States look forward to the Sixth Report, we wish the Special Rapporteur Ms. Escobar Hernández, with whom I have had the pleasure of working over the years, both in the Committee as well as during my tenure in the Commission, the very best as she proceeds with the challenging task of dealing with the complex question of immunity of State Officials from foreign criminal jurisdiction.

Turning briefly to the topic of Protection of the Atmosphere, I wish to thank the Special Rapporteur Shinya Murase on his work on this topic as reflected in his Fifth Report. The Special Rapporteur has presented a restructured single Draft Guideline 9 with 4 preambular paragraphs dealing with the inter-relationship between the protection of the atmosphere and other relevant rules of International Law.

We welcome this approach and wish to underline in particular the inextricable linkage between the protection of the atmosphere and the oceans.

The LOS Convention provided a basic framework way back in 1982, for dealing with the Ocean Environment and the duty to cooperate among States to protect and preserve the Ocean environment.

Since then we have witnessed new and serious threats to the Oceans in the form of sea level rise, increasing acidity, floating plastics among many others. These aspects as you are well aware, Mr. Chairman, received particular attention at the recent High-level Conference on the Oceans to which you made a significant contribution.

We also welcome the recognition of the fact that special consideration should be given to persons and groups, particularly vulnerable to atmospheric pollution and atmospheric degradation. The invocation of the fundamental principle of intergenerational equity which recognizes that the global commons are held in trust for the benefit of the future generations a principal well recognized in the jurisprudence of the International Court of Justice, is most pertinent.

We wish the Special Rapporteur well, as he proceeds to deal with other important aspects of this topic, such as implementation at the national level, compliance at the international level and settlement of disputes.