



Statement by H.E. Archbishop Bernardito Auza
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Agenda item 82: **Report of the International Law Commission
on the work of its seventieth session (Cluster III)**
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Mr. Chair,

My Delegation would like to thank the International Law Commission for the important work it is doing on the immunity of State officials from foreign criminal jurisdiction. As the sixth report of the Special Rapporteur notes, the law in this area is particularly complex and it is thus ripe for the Commission's efforts to clarify its nature and scope.¹

The Commission has laudably sought to balance the right of the forum State to enforce the laws within its jurisdiction, especially over criminal behavior, and the long-held principle that foreign officials should not be prosecuted for those acts performed in an official capacity, thus ensuring that they may continue to serve their communities. The difficulty of such effort is clear, given the diverging sovereignty concerns, as well as the competing desires to avoid not only impunity, but also politically motivated prosecutions. Indeed, the immunity of State officials from foreign jurisdiction is a crucial, long-standing principle of State sovereignty and international diplomacy that must be respected in order to ensure the peaceful and friendly relations among States.

Mr. Chair,

My Delegation welcomes the focus of the Special Rapporteur's sixth report on the procedural aspects of the immunity of State officials. Her analysis provides a crucial advance in the understanding of the procedural issues that arise with immunity, such as timing, invocation and waiver, all of which are important for an even-handed and transparent handling of immunity issues that best protects the sovereignty concerns in question. Indeed, proper consideration of this topic requires deliberation and careful treatment of, and attention to, State practice concerning the claims of immunity, as well as the mechanisms for communication, consultation, cooperation, and international judicial assistance in situations where immunity arises.

Regarding the timing, we fully agree with the Commission that immunity must be considered by the courts of the forum State at the earliest possible time, so as to afford the State invoking immunity, and by implication, the State official, some of the core benefits of immunity such as avoiding the disruption of the State functions and the substantial burden that the prosecution process places upon both the State and the accused.

Concerning the categories of acts affected by immunity, we fully concur with the Rapporteur: any measures aimed at imposing obligations on a foreign official that, in the

¹ Cf. A/73/10, 26.

event of non-compliance, could lead to coercive measures, may raise questions of immunity.² In our experience, it is not uncommon for foreign courts to attempt to summon public officials to appear before them, under subpoena, to give testimony in respect of official acts performed by the summoned official himself or in respect of facts known to him due to his official functions. In those cases, the practice of the Holy See is to invoke, through diplomatic channels, the immunity *ratione materiae* of the public official concerned while, at the same time, offering to provide to the forum State, in the best interest of justice, international legal assistance if so requested.

The immunity of public officials from foreign criminal jurisdiction may even arise in civil cases, if the official is summoned under a subpoena or if he is asked to declare under penalty of perjury. In one particular case, the court of the forum State was asked to set aside questions regarding an official's public activities as well as internal official communication while allowing him to give witness regarding those matters of which he was aware in his private capacity.³

Mr. Chair,

Procedural safeguards should be in place in order to prevent abusive or politically motivated prosecutions. Improper prosecutions threaten the very rule of law and thus justify particular caution before proceeding. It would therefore be desirable that the authorities of the forum State inform the State of the official, as early as possible, of their intention to prosecute and inquire whether the later State intends to claim immunity. In practice, though, the State of the official more often than not becomes aware of the attempt to exercise jurisdiction only when there is a request of mutual legal assistance.

In a recent case concerning the execution of a request to notify an official of the summons to appear before a foreign court, the Tribunal of the Vatican City State found that the only apparently wrongful act attributed to the official in question was in fact an act performed in his official capacity. The Vatican Tribunal, noting that customary international law grants immunity *ratione materiae* to public officials for those acts performed in the name of the Sovereign, concluded that the request for mutual legal assistance could not be executed.⁴

Mr. Chair,

Unquestionably, State officials should enjoy all the procedural safeguards recognized under international law, in particular human rights law. Procedures firmly rooted in human rights law, as well as in traditional principles of criminal justice, would also reduce the potential for improper prosecutions.

My Delegation supports the inclusion in the *Draft articles*⁵ of draft article 7, regarding those crimes in respect of which immunity *ratione materiae* does not apply. Indeed, there are some egregious criminal acts of international concern that never fall within the legitimate activities of a public official and which, therefore, should be excluded from any immunity. Immunity should not be confused with impunity. At the same time, though, it is

² Cf. A/73/10, 284.

³ United States, *In re Roman Catholic Archbishop of Portland in or.* 335 B.R. 815 (Bankr.Or., 2005), 834-835.

⁴ Tribunale dello Stato della Città del Vaticano, *Ordinanza Prot. N. 33/18*, 25 July 2018.

⁵ *Draft articles on immunity from foreign criminal jurisdiction of State officials provisionally adopted by the Commission*, A/CN.4/722, annex.

essential to define precisely which crimes are to be excluded from immunity. In this regard, the proposed reference to the definitions of the crimes set forth in a close list of treaties seems a good solution.⁶ Moreover, the proper application of the exception to immunity foreseen in draft article 7 would require the active cooperation among the forum State and the State of the official, in light of the principles of subsidiarity and complementarity.

My Delegation wishes to express its support for the Special Rapporteur's suggested plan for this project's future work, and looks forward to seeing a complete set of draft articles in the next report. We are convinced that the Commission's work in clarifying the issues on this complex topic will continue to assist in promoting the consensus necessary to ensure greater stability in this critical area of inter-State relations.

Thank you, Mr. Chair.

⁶ Art. 7.2.