



SIXTH COMMITTEE

CHECK AGAINST DELIVERY

Statement by

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ILC Cluster II

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Agenda Item 79

1 November 2019

United Nations, New York

Mr. Chairperson,

With regard to the topic of “**Immunity of State Officials from Foreign Criminal Jurisdiction**” Israel would like, at the outset, to thank the Special Rapporteur, Ms. Concepción Escobar Hernández, for her seventh report on this topic.

Israel attaches great importance to ensuring that perpetrators of crimes are brought to justice, and supports international efforts to fight crime and combat impunity effectively. At the same time, the longstanding and fundamental rules on immunity of State officials from foreign criminal jurisdiction are firmly established in the international legal system, and for good reason. They were developed to protect the elemental principles of State sovereignty and equality, to prevent political abuse of legal proceedings, and to allow for the proper functioning of State officials in the performance of their duties and in the conduct of international relations. This rationale remains as imperative today as it was centuries ago.

Before commenting on this year’s report on this topic, we would like to reiterate our concerns regarding the Draft Articles provisionally adopted by the Commission thus far. Indeed, we believe that comments made this year by States, including our own, should be read together with the observations shared in the past.

Mr. Chairperson,

Despite the welcomed progress made this year with regard to procedural safeguards, Israel continues to have significant concerns that certain Draft Articles provisionally adopted by the Commission have, thus far, failed to reflect customary international law on this subject accurately, and have failed to acknowledge this fact adequately.

In particular, we share the view of many other States regarding the unsatisfactory treatment of the issue of immunity *ratione personae* in Draft Article 3 and the exceptions to immunity *ratione materiae* in Draft Article 7, which were provisionally adopted by the Commission. With respect to the issue of persons enjoying immunity *ratione personae*, while the relevant Draft Article specifies that only three persons, known as the “*troika*” – the Head of State, Head of Government and Minister of Foreign Affairs – are entitled to this

immunity, we note that under customary international law the category of State officials who enjoy such immunity is broader, and largely depends on the particular nature of their functions. The case-law of the International Court of Justice clearly supports this position. In Israel's view, the Commission should, thus, reconsider its position on the matter, particularly given the response by States thus far.

With respect to Draft Article 7 which proposes exceptions to the applicability of immunity *ratione materiae*, Israel shares the view echoed by other States, that this Draft Article reflects neither the international law in force, nor any purported "trend" in this direction. Israel is thus of the view that Draft Article 7 should be completely altered if not deleted.

Mr. Chairperson,

Without prejudice to this position, Israel discourages the ILC from proceeding with a discussion of exceptions to immunity, but, in any event, should it, nonetheless, decide to do so, it would merely be an attempt to propose *lex ferenda*. Furthermore, to the extent that this discussion is continued, it ought to be held in tandem with the discussion of safeguards, and not separately from it. In this context, we welcome the Special Rapporteur's statement that the Draft Articles contained in her Seventh Report are designed to apply to the Draft Articles as a whole, including Draft Article 7, although we would like to emphasize that we share the position expressed by other States, that the use of procedural safeguards could not sufficiently cure the flaws in some of the Draft Articles, including Draft Article 7.

Mr. Chairperson,

Turning to the procedural safeguards themselves, which were discussed in the Special Rapporteur's most recent report, Israel would first like to emphasize that under international law, questions of immunity are of a preliminary nature, and as such, they must be expeditiously decided at the earliest stage, *in limine litis*.

Israel would like to stress that immunity is a procedural threshold that ought to prevent any criminal proceedings from being initiated. Thus, Israel shares the view expressed by the

Special Rapporteur, according to which the *purpose* of Draft Article 8 is to determine that immunity must be considered at *the earliest* possible time. However, the text of Draft Article 8 as proposed by the Special Rapporteur does not properly reflect this view.

Although subparagraph 1 states that “the forum State shall consider immunity *as soon as it is aware* that a foreign official may be affected by a criminal proceeding”, subparagraph 2 -- as currently drafted -- requires only that the forum State determine the issue of immunity during “*an early stage* of the proceeding, before the indictment of the official and the commencement of the prosecution stage”. In Israel’s view, the question of immunity must be determined as soon as the forum State is aware that the foreign State official may be affected by the criminal proceeding. Accordingly, Israel believes that any text eventually adopted for Draft Article 8 should more accurately reflect the purpose as described by the Special Rapporteur and the current legal position.

Additionally, with regard to proposed subparagraph 3 of Draft Article 8, Israel agrees that immunity should be considered before the competent authorities of the forum State take any coercive measure against a foreign State official. In our view, the test as to whether a measure is coercive should be evaluated in each case, based on the nature of the measure to be taken, and, in particular, whether it may directly affect the State official in performance of his or her functions.

Mr. Chairperson,

With regard to the Special Rapporteur’s proposed Draft Article 9, which currently stipulates that “[i]t shall be for the *courts* of the forum State... to determine the immunity of State officials from foreign criminal jurisdiction...”, Israel is concerned that this would be incompatible with the requirement, currently stated in subparagraphs 1 and 3 of the proposed Draft Article 8, that consideration of immunity be made by the *competent authorities* of the forum State, as soon as they are aware that a foreign official may be affected by a criminal proceeding.

In this context, Israel shares the view echoed by some members of the Commission that it seems that there is an over-reliance in the Draft Articles on the judiciary in determining issues of immunity. While this may perhaps reflect criminal procedures in civil-law national systems, it does not reflect the practice of other national systems where executive and prosecutorial authorities play a more prominent role. Moreover, communications

between States relevant to issues of complementarity or subsidiarity should be conducted by executive and prosecutorial authorities, in the pre-indictment stage and before the matter reaches any court. Entrusting the power to determine immunity exclusively to the courts would overlook the differences between legal systems, and create divergence as to the temporal and procedural phases in which the issue of immunity may be determined. Thus, Israel's position, again in line with that of several members of the Commission, is that it would be preferable to refer to the *competent authorities* of the forum State or even simply to the *forum State* itself.

Consequently, Israel also believes that the definition proposed for the term "immunity from foreign criminal jurisdiction" in Draft Article 3, subsection (b), which refers to the protection from the exercise of criminal jurisdiction solely by *judges and courts*, should instead refer in a more general manner to the protection from the exercise of *any* criminal jurisdiction by *any authority* of the forum State.

Mr. Chairperson,

With regard to the Special Rapporteur's proposed Draft Article 9, Israel would also like to emphasize the need for determinations on foreign State official immunity to be taken by the highest levels in the forum State, and only after consulting with the State of the official, as the decision regarding whether to institute a criminal investigation carries, in and of itself, the risk of violating the official's immunity under customary international law. In this context, Israel welcomes the reference made by several Commission members to the central role played by the diplomatic channel in communications between the forum State and the State of the foreign official in such matters. State-to-State consultations enable the forum State to assess all relevant information, including issues of subsidiarity or complementarity. It also reflects awareness of the sensitivity of situations in which State officials are subjected to foreign criminal jurisdiction, in terms of the stability of international relations and the sovereign equality of States.

Consequently, Israel shares the view expressed by several Commission members that any notice to a forum State that an issue of immunity may have arisen must trigger consultations between the two States concerned, with the effect of suspending any proceedings during such consultations. Israel would welcome further discussions as to whether there are additional formal or informal mechanisms that would make it mandatory for the forum State to allow the State of the official to have its legal position or other relevant information

made known to the forum State, so that they can be taken into account before any decision on immunity is made by the forum State.

Mr. Chairperson,

Israel cannot accept the underlying assumption expressed in the Special Rapporteur's proposed Draft Article 10, that only if the State of the official invokes immunity *ratione materiae*, then the question of immunity should be considered. It is Israel's position that there should be a presumption of immunity in the case of foreign State officials, unless the State of the official clarifies the lack of immunity, or waives immunity -- expressly and in writing -- or until a clear determination of its absence is made. States have indeed learned, through experience, that any presumption of a lack of immunity is open to abuse and serves as a platform to circumvent the immunity of State officials.

In this context, Israel shares the view expressed by several Commission members, according to which the invocation of immunity is not a prerequisite for its application, as immunity exists as a matter of international law. Thus, Israel is concerned that the invocation mechanism as currently stipulated in the proposed Draft Article 10 may lead to the *de facto* breach of immunity *ratione materiae*, in the time preceding any invocation of immunity by the State of the official. In addition, Israel is of the view that the requirement proposed in Draft Article 10, paragraph (3), of invocation of immunity in written form only, does not necessarily reflect international practice in this regard. Indeed assertion of immunity can be -- as it often is -- relayed orally.

Additionally, referring to proposed subparagraph 6 of Draft Article 10, Israel agrees with some of the Commission members, that there should be no distinction between immunity *ratione personae* and immunity *ratione materiae* in terms of the requirement for the invocation of immunity.. Hence, Israel supports the proposal made by some Commission members, that when both immunity *ratione personae* and immunity *ratione materiae* are *not* invoked, the forum State should still consider or decide *proprio motu* the question of

immunity as soon as it is aware of the status of the foreign State official, or the nature of the acts involved.

Israel also agrees with the view expressed by some Commission members that there should be no obligation incumbent upon the State of the foreign official to invoke immunity *immediately*.

Israel, moreover, shares the concerns expressed by members of the Commission with regard to proposed Draft Article 11, paragraph (4), as it could be very difficult to – and I quote -- “deduce clearly and unequivocally” from a treaty a *de facto* waiver of immunity. In Israel’s view, this subparagraph should be deleted as it could lead to ambiguous and unwelcome outcomes, in particular because the interpretation of such provisions in treaties could be different in various States.

Mr. Chairperson,

Moving to the Special Rapporteur’s proposed Draft Article 13, Israel welcomes the efforts to advance the mutual cooperation and exchange of information between the forum State and the State of the official. Israel believes that direct dialogue between high levels in the respective States is of crucial importance to balance most efficiently the interests of preventing impunity on the one hand, and avoiding political abuse of legal proceedings and the infringement of the longstanding and fundamental legal principle of immunity of State officials enshrined in customary international law, on the other.

With regard to proposed Draft Article 13, paragraph (2), it is Israel’s view that an exchange of information through all existing channels between the respective States – including diplomatic channels and requests for mutual legal assistance – should be possible at all times, in order to encourage and facilitate the easy transfer of information at the earliest stage of the proceedings.

While a dialogue between the States concerned is highly advantageous, Israel views with importance the right of the State of the official, as expressed in proposed subparagraph 4 of Draft Article 13, to refuse a request for information if it considers that the request affects its sovereignty, public order, security or essential public interests. Bearing in mind the character of these grounds for refusal, their invocation is indeed a strong indication that the circumstances are such that immunity may very well apply. In any event, the exercise of this crucial right by the State of the official should not in and of itself serve as grounds in the forum State for declaring that immunity does not apply. In order to reflect this view, Israel believes that the word “sufficient” in proposed subparagraph 6 of Draft Article 13 should be deleted.

Notwithstanding the above, Israel shares the view expressed by some Commission members, that the list of grounds for refusal to provide information by the State of the official should not be of an exhaustive nature. For example, additional grounds for refusal may be that the State of the official considers the request a provocation, or is, in practice, designed to facilitate the bypassing of applicable immunity under customary international law.

Mr. Chairperson,

With regard to proposed Draft Article 14, as we have previously stated, States with the closest and most genuine jurisdictional links to the matter at hand should have primary jurisdiction as they are generally best able to uphold the interests of justice. Therefore, Israel believes that, as a rule, foreign jurisdiction over State officials should not be exercised as a first resort. In this vein, Israel believes that when the State of the official is willing to assess the case at hand in a genuine manner, and apply to it the appropriate legal framework, which may -- but not must, lead to criminal proceedings -- it should be the *obligation* of the forum State to decline to exercise its jurisdiction in favor of the jurisdiction of the State of the official. This rule, of course, should also apply to cases where the State of the official has already done all of the above. This would be in conformity with the established customary principle of subsidiarity. Similarly, Israel supports the proposal

made by several members of the Commission, to include a provision ensuring that a forum State cannot arbitrarily deny a request for the transfer of proceedings.

As a general remark, while Israel welcomes the acknowledgment by the Special Rapporteur regarding the status of her proposals as generally constituting the progressive development of international law, Israel reiterates the need to carefully take into account the practice of States and existing legal positions. A more cautious and nuanced approach is necessary, particularly because several of the provisions of the Draft Articles deal with matters regarding which there is ample and significant State practice, such as that concerning the consideration of the principle of subsidiarity in determining immunity, and the use of formal and informal consultations to attain relevant information in this regard.

Mr. Chairperson,

Last but not least, with regard to the Special Rapporteur's future program of work on the topic, which may include the question of cooperation with international criminal courts and its impact on immunity of State officials from foreign criminal jurisdiction, Israel wishes to recall Draft Article 1, as provisionally adopted by the Commission, according to which "[t]he present Draft Articles apply to the immunity of State officials from the criminal jurisdiction of *another State*". Additionally, paragraph 6 of the Commentary to Draft Article 1, as provisionally adopted by the Commission, states that, quote, "the immunities enjoyed before international criminal tribunals, which are subject to their own legal regime, will remain outside the scope of the Draft Articles".

Accordingly, Israel agrees with the view of most members of the Commission that the ILC should not enter into a debate in this regard, and should not deviate from the original purpose and scope of application of the Draft Articles. Israel further agrees with the view advanced during the Commission's debate, that the judgment of the ICC Appeals Chamber, dated 6 May 2019, concerning Al-Bashir, is, in any event, not the final word on the matter, and considers this judgment to be open to numerous interpretations; to be of limited application; and not free from considerable difficulties.

Mr. Chairperson,

Israel will have more to say on the Draft Articles and on the subject of exceptions and

safeguards should the ILC continue to discuss it.

For the time being, Israel appreciates the efforts that have been invested by the Special Rapporteur and the ILC to explore potential safeguards to immunity from foreign criminal jurisdiction of State officials.

At the same time, and as stated in the past, we reiterate our concern that the current Draft Articles as provisionally adopted by the ILC do not reflect the current state of the law in significant respects, and in fact, undermine well-established legal principles that continue to be applicable to, and necessary for, the conduct of peaceful and effective international relations.

If any progressive development of the law is suggested, the Commission should clearly indicate the work as such. If, however, the ILC seeks to give expression to the law as it stands, and, in our view, the law as it should remain, then it has, unfortunately, missed the mark regarding the key components of the provisionally adopted Draft Articles. In any event, we believe that a more detailed and robust engagement with Member States, and a reflection of their comments and concerns in the text of the Draft Articles and the Commentary thereto, are necessary for the ILC's contribution to be useful and effective.

In light of the many concerns raised by States on the content of the Draft Articles and their implications on current customary international law, Israel believes that at this juncture, deliberations on the final outcome of the work of this topic are highly premature. In any event, Israel does not consider it feasible to envisage the adoption of the Draft Articles in the form of a convention at this stage.

I thank you, Mr. Chairperson.