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77TH SESSION OF THE UNITED NATIONS GENERAL ASSEMBLY

Sixth Committee

Agenda Item 77

Report of the International Law Commission
on the work of its seventy-third session
Cluster II

Chapter VI: Immunity of State officials from foreign criminal jurisdiction

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Statement by
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Mr Chairman,

First of all, I would like to express our deep appreciation to the Special Rapporteur, Ms Escobar Hernandez, for her dedication and all her hard work during the last decade on a topic which, in our view, can rightly be considered as one of the most complex and sensitive issues on the agenda of the International Law Commission. Let me also commend the members of the Commission for the conclusion of the first reading of the Draft Articles on immunity of State officials from foreign criminal jurisdiction.

Mr. Chairman,

Turning to the text of the Draft Articles adopted on first reading, we would like, at this stage, to make the following comments:

With regard to the compromise text which was adopted on the relationship between the Draft Articles and the norms governing the functioning of international criminal tribunals, we welcome its placement as paragraph 3 of Draft Article 1. We tend to share, however, the concerns expressed within the Commission, as reflected in the Report of the Chair of the Drafting Committee, about the reference to "international agreements" which does not seem to fully encapsulate recent practice regarding the establishment of international courts and tribunals.

Concerning Article 11 dealing with the invocation of immunity, we would like to note that neither the Draft Article nor the Commentary thereof reflect the point made by several States last year that the invocation of immunity, a right of the State of the official as the Commission rightfully states, is not and should not be considered as a precondition to the application of immunity, since immunity, as the Commission noted, is part of international law. We only see such a reference in the Commentary of par. 2 of Draft Article 14 regarding the criteria to be taken into account by the forum State in determining immunity. We invite, therefore, the Commission to examine the possibility to introduce the above clarification preferably in the text of Draft Article 11 or, at least, in its Commentary, as well as to further elaborate on the effects of invocation or non-invocation of immunity on the obligation of the forum State to examine and determine immunity.

With regard to Draft Article 12 par. 5 expressly providing for the irrevocability of the waiver of immunity, and while we believe that a waiver of immunity should not be revoked arbitrarily, we would like to reiterate our concerns about the usefulness and desirability of such a provision, given the absence of State practice in this area.

Turning to Draft Article 15, we note that the Commission has included in paragraph 3 a "without prejudice" clause similar to the one inserted in Draft Article 14 par. 4(b) regarding the adoption or continuance of measures the absence of which would preclude subsequent criminal proceedings against the official. In the commentary of Draft Article 15 par. 3 the Commission makes reference to the commentary of Draft Article 14 par. 4(b) as to the meaning and the scope of this clause. Given the fact that Draft Article 15 regulates the transfer of proceedings by the forum State to the State of the official, we wonder whether the examples of the measures contained in the Commentary of Draft Article 14 par. 4(b) are also valid for the case contemplated in Draft Article 15 par. 3.

Finally, concerning Draft Article 18, last year we shared the view expressed by some Commission members that it is the intended purpose of this Article which is critical in order to decide about its inclusion in the Draft Articles and its formulation. This year we read in the relevant Commentary that the Commission, despite the fact that its recommendation regarding the outcome of its work on the topic is still pending, decided to include this Draft Article, first, in order to give States the possibility to commend on it before the second reading of the Draft Articles, and, second, because Draft Article 18 *"follows the logic underpinning the content and structure of Part Four of the draft articles"* and may be considered *"as the final step in the iter or logical sequence that serves as the common thread running through Part Four of the draft articles"*.

It seems to us, however, that the wording of Draft Article 18 does not serve either of the above purposes. On the one hand, it refers to "a *dispute concerning the interpretation or application of the present draft articles",* which is a wording usually used when a treaty is envisaged, and not, for example, to a dispute or difference relating to the determination or the application of immunity in a particular case. On the other hand, its wording departs considerably from the wording of similar clauses adopted recently by the Commission, namely Draft Article 15 of the Draft Articles on prevention and punishment of crimes against humanity which is mentioned in the relevant Commentary. As we noted last year, if the intention of the Commission is to propose an additional procedural safeguard complementing the guarantees included in Part Four and seeking to enable States to resolve differences relating to the determination and application of immunity at an early stage, thus avoiding a fait accompli and the consequent need to restore ex post facto international legality, this Draft Article should, in our view, be formulated as a recommendation to States to try to resolve such differences as earlier as possible using, at their

discretion, the means for peaceful settlement of disputes set forth in Article 33 of the UN Charter. If this is not the case, then as pointed out by some members of the Commission and several States last year, a dispute settlement clause would only be relevant if a future treaty was envisaged.