



SIXTH COMMITTEE

CHECK AGAINST DELIVERY

Statement by

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

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Thank you Mr. Chairperson,

At the outset, Israel would like to thank the Special Rapporteur, Ms. Concepción Escobar Hernández, and the International Law Commission, for the work done on the topic of “**Immunity of State officials from foreign criminal jurisdiction**”.

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 rightly so. They were developed to protect the elementary principles of State sovereignty and equality; to prevent international disharmony and political abuse of legal proceedings; and to allow for the proper and unimpeded functioning of State officials in the performance of their duties and in the conduct of international relations. This underlying rationale remains as important and as central to international law and international relations today as it was centuries ago.

Mr. Chairperson,

Israel takes note of the provisional adoption by the Commission on first reading of the text of the draft articles on immunity of State officials from foreign criminal jurisdiction. Israel also notes the request by the Commission to receive comments and observations regarding the draft articles by December 1, 2023, to which Israel intends to submit its own comments and observations. Therefore, the comments presented in this session of the Sixth Committee should be seen as non exhaustive, and address only some aspects of the work. In this vein, Israel refers also to its previous statements on this topic together with the current one.

Mr. Chairperson,

By way of participating substantively in the ILC discussions, Israel would like to contribute some helpful remarks, and reiterate certain concerns regarding several of the draft articles provisionally adopted by the Commission thus far. Israel continues to maintain that certain draft articles fail to reflect the current state of play of customary international law as supported by state practice and *opinio juris*, and constitute – instead – proposals for the possible progressive development of the law — without openly acknowledging that fact. Should the Commission recommend to endorse such progressive development, it should, at the very least, make note of that explicitly. It should be made clear what constitutes codification of existing customary international law, and what constitutes progressive development of the law or even suggestions for new norms altogether, the latter of course, in any case, does not reflect customary international law.

In this regard, Israel wishes to make particular mention once again of Draft Article 7 and its related annexes, which proposes exceptions to immunity *ratione materiae*. Israel would like to recall that some members of the Commission voted against the Article during the 69th session in 2017, and their position remains unchanged despite the adoption of the text in 2022, as also stated in commentary 3 to Draft Article 7. Israel reiterates that the adoption of the text in the first reading does not in any way undermine Israel's position on the matter. Israel shares the view - echoed by other States, as well as by several members of the Commission itself - that this Draft Article does not reflect the current state of international law. Since the adoption of Draft Article 7, this has been confirmed by a number of domestic courts, which held that no such exception applies when officials acted in the course of the performance of their official duties. Israel thus reiterates its position that Draft Article 7 is not based on sufficient and relevant state practice or *opinio juris*, and should therefore be removed. In light of the above, and without prejudice to this position, should the Commission decide to retain Draft Article 7 for a second reading, Israel hopes the Commission would state clearly that this Draft Article reflects a mere proposal for the progressive development of the law and does not constitute a codification of existing customary international law.

Furthermore, Israel would like to reiterate its requires that to the Commission to reconsider its position on the issue of immunity *ratione personae* discussed in Draft Article 3 and Draft Article 4. While these Draft Articles specify that only three persons, known as the “*troika*” – the Head of State, Head of Government and Minister of Foreign Affairs – enjoy immunity *ratione personae*, Israel notes that under customary international law, as reflected in the case-law of the International Court of Justice and of domestic courts, the category of State officials who enjoy such immunity is **in fact broader**. As noted above, Israel recommends that if the Commission decides to retain these Draft Articles, it should be made clear that this is not a reflection of customary international law.

Mr. Chairperson,

Israel welcomes the omission of proposed Draft Article 18 relating to the issue of international criminal tribunals, which Israel believes was redundant and a source of confusion, and notes the incorporation of a ‘without prejudice’ addition on the issue in paragraph 3 of Draft Article 1. Israel also welcomes the omission of the accompanying commentary to Draft Article 18, and in particular references to the highly controversial and widely criticized *Al-Bashir* judgement of the ICC Appeals Chamber.

Furthermore, Israel generally welcomes the progress made with regard to the procedural safeguards, without derogating from its position regarding Draft Article 7, and intends to submit to the Commission specific comments and observations in this regard.

Mr. Chair,

As mentioned in previous statements, Israel shares the view that the determination of immunity should be made by the competent authorities of the forum state, which are not necessarily its courts, and welcomes the change in this regard in the language of paragraph 1 of the Draft Article 14. Additionally, Israel reiterates its view that specific determinations regarding immunity of foreign officials should be considered by the highest-level decision makers in the forum State, and only after consultation with the State of the official. Needless to say, decisions on whether to initiate criminal proceedings or to take coercive measures that may affect the foreign official in question, entail the risk of violating the official's immunity under customary international law, and may ensue significant and weighty implications. Consultations between the forum State and the State of the foreign official before exercising criminal jurisdiction allow the former to examine in a proper manner the relevant information, including issues of subsidiarity, thus preserving the stability of international relations and the sovereign equality of States. Accordingly - as previously articulated by several members of the Commission - proceedings against the official should not be initiated before consultations between the relevant Governments regarding the issue of immunity have taken place.

With regard to settlement of disputes, Israel cannot support the mechanism in paragraph 2 of Draft Article 18, according to which one of the states concerned may unilaterally refer the dispute to the International Court of Justice. It is of Israel's opinion that the ICJ would be an appropriate forum to resolve disputes on the determination of immunities, only if the consent of all states involved is given.

Mr. Chairperson,

Israel will further address these and other aspects of the Draft Articles in its detailed comments and observations, which will be filed separately. Israel believes that, in principle, the second reading stage can, and should, be dedicated to addressing significant issues. As noted above, some issues are seen as very controversial in the context of this work, such as Draft Article 7. We encourage the Commission to dedicate the necessary time and effort to revisit and address these issues.

Mr. Chairperson

Turning now to the topic sea-level rise. Israel considered with interest the second issues paper, prepared by Ms. Galvão Teles and Mr. Ruda Santolaria, as well as the report of the Study Group. Israel is fully committed to the global fight against climate change, and reiterates its support for the efforts of the international community to confront this complex issue. Israel joins numerous other States in acknowledging that climate change constitutes an existential threat to humanity. Rising sea levels, as a consequence of climate change, threaten not only low-lying and small island developing States, but all States, directly or indirectly.

Israel reiterates its view that sea-level rise has potential far-reaching implications on key underpinnings of our international legal order, including the principles of legal stability, security, and predictability. In this regard, Israel notes the preliminary character of the reflections in the abovementioned paper and report, and their purpose to serve as a basis for future discussions.

Mr. Chairperson,

At this stage, Israel would like to note the important debate within the Study Group regarding the issue of statehood. Primarily, Israel agrees with the co-chair of the Study Group that the preliminary reflections on statehood should not aim to prejudge or formulate conclusions on such a sensitive matter, which deserves considerable caution. Israel also takes note of the proposal by the co-chair of the Study Group, regarding the importance of the potential distinction between criteria for the creation of a State and those for its continued existence.

I thank you, Mr. Chairperson.