EGYPT مصـــر

Permanent Mission of Egypt
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بعثـة مصـر الدائـــمة
لدى الأمـم المتحدة
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Report of the International Law Commission

Cluster One

Chapters: I, II, III

VII (Immunity of State officials from foreign criminal jurisdiction)

X (Sea-level rise in relation to international law)

XI (Other Decisions and Conclusions)

Delivered by Dr. Mohamed Helal
Counsellor & Legal Advisor

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Egypt aligns with the statement delivered by the Republic of Uganda on behalf of the African Group, and would like to add the following in its national capacity on the portions of the ILC's report included under Cluster 1, starting with the Immunity of State officials from Foreign Criminal Jurisdiction.

Egypt's principal concern with the approach adopted by the ILC in relation to this project is methodological in nature. To explain, allow me to compare two portions from two separate reports of the ILC.

The first quote is from the ILC commentaries on the Conclusions on Identification of Customary International Law, which underscore that the proper method to ascertaining the content of customary international law is the two-element approach. Specifically, the ILC stated:

> "The two-element approach is often referred to as "inductive" in contrast to possible "deductive" approaches by which rules might be ascertained other than by empirical evidence of general practice and its acceptance as law (opinio juris). The two-element approach does not in fact preclude a measure of deduction as an aid, to be employed with caution, in the application of the two element-approach."[1]

The second quote is from the report of the ILC during its sixty-ninth session during which the Draft Article 7 on the immunities of state officials from foreign criminal jurisdiction was discussed. The report states the following:

> "[T]he Commission considers that it must pursue its mandate of promoting the progressive development and codification of international law by applying both the deductive method and the inductive method."[2]

Herein resides the problem.

When dealing with the question of the immunities of state officials, the ILC abandoned the careful, judicious, and reasoned approach it adopted in its conclusions on customary international law. Instead of using the deductive approach as an aid to be used with caution, the ILC equated the inductive and deductive methods, and used a non-representative selection of judicial decisions that is not reflective of a widespread practice to confirm an outcome it had decided to adopted through a process of deduction.

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[1] A/73/10, page 126.
[2] A/72/10 page 125.

This is a flawed methodology.

Indeed, I encourage my distinguished colleagues on Sixth Committee to consider this matter, not only from the perspective of the question of the immunities of state officials, but from the perspective of the broader question of international lawmaking methodology. Allowing international law to be generated by deduction from preconceived ideas and where an inductive inquiry into practice and *opinio juris* is used only as an aid to deductive reasoning would be an unfortunate shift in the process by international lawmaking.

Egypt encourages the ILC to apply its own conclusions on customary international law, and to adopt a rigorous, inductive methodology in ascertaining the *lex lata* in this field.

Egypt also wishes to underscore that the obligation to respect the immunity of foreign State officials is an obligation of abstention. This is a procedural rule that proscribes the exercise of jurisdiction in relation to certain foreign officials.

The ILC is encouraged to take the proscriptive nature of this rule into consideration when examining state practice and expressions of *opinio juris* in this area of international law. This is because most instances of practice that the ILC has cited – especially in footnote 738 in the report of the ILC in its sixty-ninth session – relate to instances where a state has decided to extend it criminal jurisdiction to foreign officials.

However, the question I ask, is why has the ILC overlooked or deemphasized instances – and I am sure there are many – in which stated decided to abstain from exercising criminal jurisdiction in relation to foreign officials?

The problem is that, often, the decision of states to abstain from exercising criminal jurisdiction goes unreported. On the other hand, the exceptional situation in which a state decides to exercise prescriptive or enforcement jurisdiction over a foreign official in relation to conduct that occurs abroad attracts the attention of scholars and the media. However, this practice remains exceptional.

The ILC is encouraged to consider that the prohibitive nature of this rule, and to adopt a more rigorous and methodologically sound approach in determining whether there is indeed a pattern of widespread and systematic practice supporting the conclusions it reaches, especially on Draft Article 7.

Egypt would also like to offer the following remarks on the content of the draft articles:

First, Egypt encourages the ILC to consider including definitions of the terms "immunity," "criminal jurisdiction" and "criminal proceedings" – even if only in the commentary. The ILC should also consider providing greater clarity on the distinction between immunity and inviolability, while affirming that the immunities accorded to foreign officials apply broadly to all forms of criminal proceedings and all aspects of the exercise of criminal jurisdiction.

Second, Egypt is uncertain of the value of draft article 1(3). Egypt invites the ILC to consider deleting this provision. Agreements establishing international criminal courts or tribunals are a *lex specialis* that govern the relationship between parties to such agreements *inter se* and the relationship between parties to such agreements and the courts or tribunals established under these agreements. On the other hand, agreements of this nature remain entirely unopposable and inapplicable to non-parties to such agreements. If the ILC decides to retain this provision, it should add clearer language to reflect the *pact tertiis* rule that third-parties are unaffected by treaties to which they are not party.

Third, Egypt supports the definitions of "state official" and "acts preformed in an official capacity" in draft article 2.

Fourth, Egypt accepts the view that the members of the troika are beneficiaries of immunity *Ratione Personae*. However, Egypt is also of the view that there are solid juridical grounds to include other high-ranking, cabinet-level officials that should be included as officials enjoying immunity *Ratione Personae*. Indeed, in the *Arrest Warrant* case, the ICJ did not indicate that the members of the *troika* are the only individuals holding immunity *Ratione Personae*.

Fifth, Egypt supports the phrasing of Draft Article 6 proposed by the Special Rapporteur.

Mr. President,

Turning to the topic of Sea-Level Rise, Egypt congratulates the study group and its co-chairs on their work on this important topic, and we would also like to applaud the study group on the approach that it has adopted in engaging with this topic.

On the question of statehood, Egypt supports that the principle of the continuity of the statehood of states whose land surface is partially or fully submerged or that has become uninhabitable because of sea-level rise caused by climate change. This is consistent with widespread and representative practice and

opinio juris that confirms that states that experience a situation where they lose one of the criteria of statehood listed in the 1933 Montevideo Convention do not lose their status as states.

On the question of the protection of persons affected by sea-level rise, Egypt agrees with the need to combine a needs-based-approach with a rights-based-approach that would provide practical guidance to states on how to address the effects on sea-level rise on persons and communities, while also incorporating a capacity-based perspective to take into account the resources and capacities of both the affected and assisting states.

Egypt also supports the approach expressed by members of the study group on the need to recognize the UN Convention on the Law of the Sea as the *lex specialis* that applies to the sea, and which determines questions of maritime zones and maritime delimitation.

Egypt also encourages the study group to consider addressing the question of the responsibility of states for sea level rise.

Egypt realizes that this might be viewed as a controversial issue, but in our view, this is an unavoidable issue, and the ILC should not shy away from engaging with this question.

In our view, the climate change regime, including the Paris Agreement, and the UN Convention on the Law of the Sea, do not include a *lex specialis* regime of state responsibility that excludes the application of the *lex generalis* of state responsibility that are codified in the ILC Articles on State Responsibility.

The damage done to the environment caused by and imputable to developed states must have legal consequences, and we encourage the ILC to consider this matter.

That concludes Egypt's comments on Cluster One of the ILC report.

Thank you.