



SIXTH COMMITTEE

CHECK AGAINST DELIVERY

Statement by

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Legal Department

Ministry of Foreign Affairs

ILC Cluster III

Chps: IX

Protection of the Environment in Relation to Armed Conflict

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Succession of States in Respect of State Responsibility

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Immunity of State Officials from Foreign Criminal Jurisdiction

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Mr. Chairperson,

The State of Israel notes with appreciation the work carried out by the new Special Rapporteur for the topic of "**Protection of the Environment in Relation to Armed Conflict**", Ms. Marja Lehto. At this opportunity, Israel wishes to thank the previous Special Rapporteur, Ms. Marie Jacobsson, and express its appreciation to the work of the working group, chaired by Mr. Vázquez-Bermúdez.

The State of Israel wishes to reiterate its position that some of the draft principles adopted by the Commission on this topic reflect progressive development of international law, and should not be read as representing the current state of the law. Israel expressed its concerns regarding this matter before this committee in the past, and considers it appropriate to briefly make reference to them in this context.

With respect to the first report of the new Special Rapporteur, Israel acknowledges the significance of the different legal regimes that this report addresses: international environmental law; the law of armed conflict; and international human rights law. It goes without saying that Israel respects the applicable rules of international law, with respect to each of these distinct regimes.

At the same time, it should be recalled that these regimes are completely different in nature and distinct from one another. Each of them was designed for a specific purpose; each involves its own considerations; and, accordingly, each includes a unique, appropriate, set of rules. Therefore, the State of Israel suggests that the Commission take a more cautious approach with respect to the inter-relation between the different legal regimes.

Mr. Chairperson,

The State of Israel welcomes the Special Rapporteur's statement, according to which the Commission should not seek to change international humanitarian law relating to occupation, since it believes that any such development of humanitarian law, if necessary, should be done only within the appropriate legal framework.

In addition, it should be noted that a legal discussion regarding the protection of the environment in relation to armed conflict, is likely to include attempts to address and resolve complicated questions and controversial issues and terms, and we have doubts whether the ILC is the appropriate forum for the settlement of these kinds of issues.

Mr. Chairperson,

While the law of armed conflict is not designed to protect the environment *per se*, it does require the protection of the environment to a certain extent, by limiting environmental harm that prejudices the health and well-being of the civilian population.

Without derogating from its principled position, the State of Israel would like to add some specific comments with respect to the text of the suggested draft principles.

Regarding draft principle 19.2, Israel is of the view that the word 'significantly' should be added before the word 'prejudice,' in order to maintain a proper balance between the prevention of significant harm to the environment and the prevention of significant prejudice to the health and well-being of the population.

As for draft principle 19.3, we would recommend that the Commission not adopt the text as provisionally adopted by the Drafting Committee, as it does not, in our view, reflect the current state of the law. Instead, we think it preferable for the Commission to adopt the text originally suggested as draft principle 19.2 of the Special Rapporteur's first report, which is more reflective of *lex lata*.

Regarding draft principle 20, the text should reflect existing applicable international law, in this case – the Regulations annexed to the Fourth Hague Convention Respecting the Laws and Customs of War on Land (1907). Article 55 of these Regulations addresses, *inter alia*, the issue of the use of natural resources by an occupying power. Article 55 instructs the occupying power to safeguard the capital of the properties, and administer them in accordance with the rules of usufruct. Draft

principle 20 seems to impose additional requirements and elements that go beyond the current state of law.. Accordingly, we believe that the text of the draft principle should be more properly aligned with the text of the Regulations.

Mr. Chairperson,

Turning to the subject of “**Succession of States in respect of State Responsibility**”, The Government of Israel would like to express its appreciation to the International Law Commission and the Special Rapporteur, Mr. Pavel Sturma, for their work related to the topic of “*Succession of States in respect of State Responsibility*”.

As acknowledged by the Special Rapporteur, the available State practice in this field is limited, “diverse, context-specific and often politically sensitive”. The limited State practice presents a significant challenge to the work of the Commission, and Israel shares the concern, presented by members of the Commission, as to the suitability of this topic for codification.

In this respect, Israel wishes to reiterate its basic position that the work of the Commission should focus on the codification of international law, as reflected in State Practice, and its view regarding the primacy of States as compared to other actors operating in the international legal arena. Israel further wishes to share the caution expressed by several members of the Commission concerning the reliance on academic writings and the work of the Institute of International Law when seeking to reflect and codify the state of the law accurately.

We recognize that this project is in its infancy, and like some members, we believe it is too early to determine its final form but, in any event, we believe that it should be of a discretionary nature and be subsidiary in character to agreements between States, including the injured State of an internationally wrongful act. We therefore support the proposal made by members of the Commission that a provision expressly indicating this stance should be added.

As a final note, we agree with the Special Rapporteur's recommendation to the Commission to consider changing the title of the topic to "*State Responsibility Problems in Cases of Succession of States*".

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. Concepcion Escobar Hernandez, for her last Report on this topic, and commend the cautious approach that has been taken in this connection.

Israel attaches great importance to ensuring that the perpetrators of crimes are brought to justice, and supports international efforts to fight crime effectively and to combat impunity. At the same time, and alongside the various mechanisms that exist to advance the aim of bringing criminals to justice, the longstanding and fundamental legal principle of immunity of State officials from foreign criminal jurisdiction is firmly established in the international legal system. It was developed to protect the important principles of State sovereignty and equality, to prevent political abuse of legal proceedings, and to allow the proper functioning of State officials in the performance of their duties and in the conduct of international relations. This rationale is as imperative today as it was centuries ago.

Mr. Chairperson,

Before we comment on this year's Report of the ILC on this topic, we would like to reiterate our concerns relating to the Draft Articles provisionally adopted by the Commission thus far. Indeed, we believe that comments made this year by States should be read together with the observations they shared in the past, in particular, in last year's discussion. Either way, the present statement is without prejudice to the position Israel has previously presented on this topic.

Mr. Chairperson,

As we have said before, Israel has significant concerns that the Draft Articles provisionally adopted thus far have failed to accurately reflect customary international law on this subject, and have failed to adequately acknowledge this fact.

In particular, we share the view of many other States regarding the unsatisfactory treatment of the issue of immunity *ratione personae* and the exceptions to immunity *ratione materiae* in Draft Article 7.

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*” – Heads of State, Heads of Government and Ministers of Foreign Affairs – are entitled to this immunity, under customary international law the category of State officials who enjoy such immunity is wider, and depends rather on the particular character and necessity of their functions.

With respect to Draft Article 7 that was provisionally adopted by the Commission last year and that stipulates exceptions to the applicability of immunity *ratione materiae*, Israel shares the view echoed by other States that it corresponds neither to customary international law in force nor to any “trend” in this direction. Accordingly, we believe that the Draft Articles should not include any exceptions or limitations to immunity from foreign criminal jurisdiction, and that Draft Article 7 should be completely altered if not deleted.

Mr. Chairperson,

Without prejudice to this position, we believe that if the ILC proceeds with a discussion of exceptions – an effort which we do not encourage and which in any event would be an attempt to propose *lex ferenda* only – this discussion must be held in conjunction with the discussion of safeguards rather than separately from it. In this

context, we welcome the ILC's suggestion in the current Report that specific safeguards be developed to address questions arising from Draft Article 7.

Consequently, with regard to the present Report of the ILC, we stand behind the Special Rapporteur's suggestion that when considering the procedural aspects of immunity, the Commission should definitely take into account the need to respect the sovereign equality of States and the need to protect the proper functioning of international relations. We also welcome the Special Rapporteur's statement concerning the entitlement of a foreign State official to procedural safeguards recognized under international law, in particular international human rights law where applicable. Additionally, we share the view of the Special Rapporteur that a proper consideration of the procedural aspects would reduce the risk of political abuse.

Mr. Chairperson,

Moving to the safeguards themselves, as discussed in the Special Rapporteur's most recent report, Israel attaches much importance to the criterion that concerns the question of what should be the appropriate national jurisdiction to be exercised over a foreign State official. For example – and in line with Israel's position regarding the essential role of the principle of subsidiarity to which I will get to in a moment – Israel believes that in general, there is no room for the application of universal jurisdiction against foreign State officials as a first resort. Therefore, we support the request of some members of the ILC to discuss the definition of the term “jurisdiction,” as used in the Draft Articles, in order to bring certainty to the kind of jurisdiction affected by the rules of immunity of State officials. We also support the request of some ILC members to discuss the question of whether the exercise of jurisdiction over foreign State officials should be subjected to a decision by a higher domestic court rather than a lower one. In this context, we would also like to stress the need for decisions on these matters to be taken by the most senior levels in the forum State, upon being provided with legal advice and after consultation with the home State of the State official.

Additionally, we embrace the conclusion of some ILC members that it is important to devise a communication mechanism between the forum State and the State official's home State, which would recognize the principle of subsidiarity or complementarity. Such communication should be standard procedure in the consideration of criminal proceedings against foreign State officials, including at the pre-indictment stage. Such a mechanism would ensure that immunity is preserved in cases where the State official's home State determines that the State official has acted in the performance of his duties. We believe that the notion that States with the closest and most genuine jurisdictional links must be the ones which resolve the question of the best and most efficient way to ensure the promotion of the interest of justice, has a crucial role in this context. We also believe that as a default rule, the State with the closest and most genuine jurisdictional links is the State official's home State.

In this regard, we would like to stress that the principle of subsidiarity does not necessarily require the full exercise of criminal jurisdiction by the States with the closest jurisdictional links. Rather, it requires the State to be willing and able to genuinely assess the case at hand and apply to it the appropriate legal framework, which may, but not must, amount to criminal proceedings.

Israel also welcomes the Special Rapporteur's view according to which it is significant to discuss, as part of the safeguards, how the proper communication between the forum State and the State officials' home State would be ensured. In addition, we support the proposal to have a discussion on what mechanisms would enable the State officials' home State to have its legal positions made known and taken into consideration by the forum State.

Moreover, Israel welcomes the reference made by some ILC members to the role played by the Ministries of Foreign Affairs of the forum States in those cases where criminal proceedings are initiated against foreign State officials. This reference evidences the acknowledgement of the sensitivity of situations where State officials are subjected to foreign criminal jurisdiction, in terms of stability of international relations and the sovereign equality of States.

We would like to add our support to the Special Rapporteur's conclusion that immunity must be considered by the forum State at the earliest possible opportunity. However, Israel does not share the view of the Special Rapporteur that immunity may not be considered automatically from the start of an investigation. Israel believes that immunity is a procedural threshold that prevents any criminal proceedings from being initiated. Indeed, no criminal proceedings, including questioning or investigation, may be conducted before the question of immunity is properly examined, including by communicating with the authorized representatives of the home State of the official concerned.

In addition, Israel would advise to tread carefully with regard to the Special Rapporteur's observations with regard to the distinction between immunity and inviolability as well as a distinction between the person of the State official and the assets that might be sought for seizure as part of the criminal proceedings against him or her. Caution should be adopted so as not to undermine and even nullify the very essence of immunity of State officials from foreign criminal jurisdiction in this way.

Mr. Chairperson,

Israel will have more to say on this issue 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. This is indeed a matter of utmost importance in the present context.

At the same time, we believe that the current Draft Articles as provisionally adopted by the ILC do not reflect the current state of the law, and in fact undermine well established legal principles that continue to be applicable to, and necessary for, the

contemporary conduct of international relations. If the ILC wishes to propose the progressive development of the law in a certain direction, then it should be transparent and clear that this is the purpose of the exercise and allow States to react accordingly. If it is seeking to give expression to the law as it is, and in our view as it should remain, then it has missed the mark. In either case, we believe that a more detailed and robust engagement with Member States on this topic is necessary for the ILC's contribution to be useful and effective.

Thank you, Mr. Chairperson.