



PERMANENT MISSION OF SINGAPORE
TO THE UNITED NATIONS

318 EAST 48TH STREET, NEW YORK, NY 10017
TEL: (212) 826 0840 FAX: (212) 826 2964

**STATEMENT BY MR. DAVID LOW, DELEGATE TO THE 71ST SESSION
OF THE UNITED NATIONS GENERAL ASSEMBLY, ON AGENDA ITEM
78 ON THE REPORT OF THE INTERNATIONAL LAW COMMISSION
ON THE WORK OF ITS SIXTY-EIGHTH SESSION (CLUSTER 3:
CHAPTERS X, XI & XII OF A/71/10), SIXTH COMMITTEE,
1 NOVEMBER 2016**

Please check against delivery

Mr Chair,

1. My delegation thanks the International Law Commission for its report on the topics, 'Protection of the environment in relation to armed conflicts', 'Immunity of State officials from foreign jurisdiction' and 'Provisional application of treaties'.

Protection of the environment in relation to armed conflicts

2. On the topic of '**Protection of the environment in relation to armed conflicts**', my delegation thanks the Special Rapporteur for her comprehensive third report. At the close of this quinquennium, the Special Rapporteur's three reports and the Commission's work on this cross-cutting topic are a lasting contribution to help Member States address a difficult and very contemporary legal challenge.

Immunity of State officials from foreign jurisdiction

3. On the topic of ‘Immunity of State officials from foreign criminal jurisdiction’, we would first like to thank the Special Rapporteur for her detailed report on the limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction.

4. Regarding the issue of exceptions to immunity *ratione materiae*, my delegation has previously expressed disagreement with the characterisation, by the previous Special Rapporteur, of the “predominant view” that there are no exceptions to immunity *ratione materiae*. We therefore welcome, and concur, with the conclusion, drawn by the present Special Rapporteur in her fifth report, that limitations and exceptions do apply to the immunity *ratione materiae* of State officials from foreign criminal jurisdiction.

5. We also note the Special Rapporteur’s draft article 7¹. With the benefit of the detailed analysis of existing state practice in the Special Rapporteur’s fifth report, and considering the different views expressed by members of the Commission on draft article 7², we appreciate the difficulties faced by the Special Rapporteur in attempting to specify a list of crimes which should be excluded from immunity *ratione materiae*. In this regard, my delegation has previously suggested that a more pragmatic way to begin the analysis might be to consider:

¹ A/71/10, footnote 1408.

² A/71/10, paras. 235-244.

- (a) Who is entitled to decide whether immunity *ratione materiae* exists in respect of a specific crime?
- (b) In each case, what would be the legal basis for such a decision? For example, would the International Criminal Court take jurisdiction over such a crime on the basis of a customary international law exception to immunity *ratione materiae*, or on the basis of a treaty-based exception, applying only to States Parties to the Rome Statute?
- (c) What evidential threshold is required before a decision-maker can make a conclusive legal finding that an exception to immunity *ratione materiae* exists in respect of a specific crime?

6. Singapore again suggests that framing the analysis in this way may be more useful than seeking to specify a list of crimes at the outset. Such an approach may also avoid the “odd” situation described by some members of the Commission that the invocation of immunity from foreign criminal jurisdiction, which is preliminary in nature and decided in *limine litis*, would otherwise depend on a determination of whether a crime had actually been committed³.

7. In addition, my delegation has five specific comments on the topic. First, we commend the Special Rapporteur’s meticulous compilation of treaty practice,

³ A/71/10, para. 238.

national legislative practice, international judicial practice, national judicial practice and other work of the Commission of relevance to the subject. Further to this, we would be interested in the Special Rapporteur's analysis of the merits of the various legal bases for the exclusion of immunity *ratione materiae*, in particular with a view of developing a consistent approach towards the scope of, as well as limitations and exceptions to, immunity *ratione materiae*. In line with this, we found the Commission's discussion on issues concerning the legal nature of immunity (paragraphs 221-234 of the Report) to be informative.

8. Secondly, concerning the relationship between immunity and responsibility, we agree with the view of the Special Rapporteur and several members of the Commission that immunity cannot be equated with impunity. As Singapore has previously stated in the Sixth Committee, the former serves only as a procedural bar to criminal proceedings and does not absolve a State official of any individual criminal responsibility on a substantive level.

9. Thirdly, concerning the Commission's comments on draft article 7, we agree with the Special Rapporteur and the views expressed by some members of the Commission that the attribution of *ultra vires* acts of State officials to a State for the purpose of State responsibility is different from the issue of *ultra vires* acts which do not entitle the official concerned to immunity *ratione materiae*.

10. Fourthly, concerning the commentary to draft article 2(f), we look forward to the Commission's further work in this area, in particular, to address the question of

whether or not acts *ultra vires* can be considered as official acts for the purpose of immunity from foreign criminal jurisdiction. We would also support further analysis on the scope of immunity *ratione materiae vis-à-vis acta jure gestionis*, acts performed in an official capacity but exclusively for personal benefit and acts of persons acting under governmental direction and control, such as private contractors.

11. Fifthly, concerning future work, we agree with the Commission's emphasis on the link between limitations and exceptions and the procedural aspects of immunity. We also empathise with the concerns expressed by several members of the Commission concerning the need to avoid proceedings which were politically motivated or an illegitimate exercise of jurisdiction. In this respect, our delegation has previously highlighted that it would be useful to focus on safeguards to ensure that exceptions to immunity *ratione materiae* are not applied in a wholly subjective manner.

Provisional application of treaties

12. Turning to the topic of 'Provisional application of treaties', Singapore continues to welcome the Commission's attention to this important and practical topic. We thank the Special Rapporteur for his fourth report. In particular, we commend the Special Rapporteur on his particular effort to engage with the views of States, and on his collaboration with the Treaty Section of the UN Office of Legal Affairs in verifying state practice. This is a critical aspect of the Commission's work on this topic.

13. As a general observation, my delegation agrees with the view expressed in the Commission's report that more examples are needed to substantiate the conclusions supporting the draft guidelines provisionally adopted to date. This is also the case with draft guideline 10, which we understand was sent to the Drafting Committee at the end of the 68th session.

14. In this respect, we were struck by the relative absence of examples from Asia or the members States of the Association of Southeast Asian Nations (ASEAN). My delegation has some sympathy for the view, expressed by the Special Rapporteur, that it is difficult to obtain the relevant information. There may, however, be some utility in exploring partnerships with institutions in Asia that have undertaken regional studies of treaty practice. One example is the Centre for International Law at the National University of Singapore. To assist the Commission, my delegation also undertakes to provide a written response concerning Singapore state practice within the stipulated deadline.

15. In line with these comments, my delegation looks forward to studying the Secretariat's memorandum analysing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last twenty years with the Secretary-General, which provide for provisional application, including treaty actions related thereto. We also take this opportunity to acknowledge the invaluable assistance of the Secretariat in supporting this important work.

16. My delegation has three further specific comments on the topic. First, concerning reservations, my delegation agrees with those members of the Commission who expressed the view that some further work is required on the relationship between provisional application and reservations. In particular, we would be interested in the Commission's views on the relationship between provisional application and those guidelines of the Guide to Practice on reservations to treaties which have been specifically highlighted at paragraph 275 of A/71/10.

17. Secondly, concerning invalidity of treaties, we agree that some further work is also required in this regard. In particular, we think there is merit in distinguishing between the three situations described at paragraph 276 of A/71/10. We suggest that this analysis be kept in mind when the Drafting Committee examines draft guideline 10 at the 69th session.

18. Thirdly, concerning future work, while we support the proposition that the Commission should generally work efficiently and with dispatch, we are of the view that some further analysis of state practice is required before the Commission can conclude work on this topic. As such, we do not support the preparation of model clauses at this time. We also do not support the examination of the question of application of treaties that enshrine the rights of individuals, as we consider that the rules concerning provisional application will be the same unless separately and explicitly provided for in the relevant treaty.

19. As ever, Singapore looks forward to continuing our engagement with the

Commission in the course of its work on these very important issues.

Thank you, Mr. Chair.

* * * * *