

ISRAEL

SIXTH COMMITTEE

CHECK AGAINST DELIVERY

Statement by
Shoshi Reshef Mor
Legal Advisor

Report of the International Law Commission on the Work of its Sixty-
Eighth Session

Cluster III

Protection of the environment in relation to armed conflicts
Immunity of State officials from foreign criminal jurisdiction
Provisional application of treaties

Agenda Item 78

2 November 2016

United Nations, New York

PERMANENT MISSION OF ISRAEL
TO THE UNITED NATIONS
800 Second Avenue, 15th Floor
New York, NY 10017

Tel: 212-499-5510
Fax: 212-499-5515
info-un@newyork.mfa.gov.il
<http://israel-un.mfa.gov.il>

Mr. Chairman,

Israel commends the Special Rapporteur, Ms. Marie Jacobsson, for her valuable work on the third report regarding the “**Protection of the Environment in Relation to Armed Conflict**”. Israel recognizes the importance of protecting the environment, both in times of peace and in times of armed conflict.

We share the view expressed by numerous States, that the issue of environmental protection in relation to armed conflict is **sufficiently addressed under the various rules and standards of the Law of Armed Conflict**, which is the *lex specialis* that would apply in such a situation. Therefore, we believe that it is unnecessary to develop new principles regarding this topic and do not support attempts to merge environmental law with the Law of Armed Conflict as the Laws of Armed Conflict themselves already create the appropriate balance in addressing the matter. Furthermore, and as expressed by the ILC in its own report, draft Principle II-3 may provide clarification on applicable customary law, but should not create legal innovations.

Notwithstanding Israel’s position that there is, in our view, no justification for the development of these Principles, we would like to comment on some specific aspects of the existing Draft Principles:

- Israel shares the ILC’s view that the proposed definition of “remnants of war” in Draft Principle III-3 is too broad, as it goes beyond the definition set in the United Nations Convention on Certain Conventional Weapons (1980). Although the 5th Protocol to the Convention on Certain Conventional Weapons is not binding, there is no justification for broadening the definition of “remnants of war” beyond that particular, existing definition. We do not agree with the ILC’s comment that the definition is somehow under-inclusive, as we cannot identify missing elements in this definition.

In addition, we share the Commission’s criticism regarding the use of the term “without delay” in Draft Principle III-3. The standard of “without delay” belongs not to the regime of remnants but to the regime of mines, and as the ILC observed, this standard is inappropriate as it imposes a requirement that goes beyond accepted State practice.

- Regarding Draft Principle IV-1, which deals with the rights of indigenous peoples, Israel shares the ILC's view, as asserted in the report, that this issue is beyond the scope of environmental protection, and has no place in this context.
- With respect to the Commission's Commentary on Draft Principle II-1 of the second report (2015), we would like to reiterate that the Law of Armed Conflict is the relevant legal regime during an armed conflict. Moreover, Draft Principle II-1 and the Commentary to this Principle seek to treat the environment as a whole as a civilian object which merits protection under the rule of distinction during armed conflict. We believe that such a view is inaccurate and impractical, and does not reflect the applicable legal standards and the precise definition of what constitutes a civilian object.
- Furthermore, the draft articles fail to define the term "natural environment" and therefore render the scope and content of the obligations unclear and open to exploitation.

In conclusion, while Israel thanks the Special Rapporteur for her efforts, we have concerns both with the content of the draft principles and the project as a whole.

Mr. Chairman,

With regards to the topic "**Immunity of State Officials from Foreign Criminal Jurisdiction**," Israel thanks the Special Rapporteur, Ms. Concepción Escobar Hernández and commends her for the progress made on this important and complex topic. Israel also appreciates the contributions made by the members of the ILC. This year's work has generated an additional draft article—suggesting 'limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction.'

Israel recognizes the importance of combating impunity and ensuring that perpetrators of the most serious crimes of international concern are brought to justice. The international system has created mechanisms and principles in this regard, while preserving the legal tool of immunity from foreign criminal jurisdiction in particular situations where it serves as merely a procedural bar to prosecution. Immunity was

developed to protect the important principles of the independence of States and their sovereign equality, and to allow for the proper functioning of State officials in the performance of their duties.

Israel is of the view expressed by many other States, that to date, there are no clear norms of international law regarding exceptions or limitations to immunity, nor is there a trend to the development of such a norm. A similar view was also articulated by Special Rapporteur Kolodkin in his Second Report in 2010 [A/CN.4/631].

It is important to note that national authorities and courts have accepted claims of immunity of State officials asserted on their behalf by States, including in cases in which violations of *jus cogens* norms were alleged. Further study of these issues by the ILC would help shed light on State Practice and whether there are restrictions or limitations on immunity.

In addition, Israel would like to note that the Report has explored some new areas in the field of Immunity of State Officials from Foreign Criminal Jurisdiction- such as corruption. We suggest further study of State Practice in this regard before any substantive conclusions are reached.

As discussed in earlier reports, the timing as to when immunity questions are considered is also relevant, as the question of the immunity of a State official from foreign criminal jurisdiction should both in principle and in practice be considered when the State is contemplating exercising criminal jurisdiction. In recent years, some states faced with politically-motivated applications based on universal jurisdiction have adopted laws, policies or practice to mandate consideration of the issue of immunity at the earliest stage. Therefore, further study is required with regard to decisions at this early stage, as many of these decisions are not made public, and would not necessarily be reflected in the case law of national courts. These decisions are critical for attaining a fuller understanding of State Practice and for identifying whether any new trends do, in fact, exist.

As there are gaps in our understanding of State Practice, Israel is of the view that it is premature to ask States to comment on Draft Article 7, as the issue of immunity must

be fully studied as a whole, before conclusions can be reached with regard to limitations and exceptions to immunity. As the matter is not yet ripe for discussion, Israel is not submitting comments to Draft Article 7 at this time, and will consider relaying our comments as the work of the Commission progresses. That being said, and without prejudice to its future position on Draft Article 7, Israel objects to the substance of the draft article, and to procedurally creating exceptions or limitations to immunity without further study of relevant State Practice.

Israel will continue to follow this project closely.

Mr. Chairman,

Regarding the “**Provisional Application of Treaties**”, Israel commends the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, for his valuable work on the fourth report on this matter.

As part of the discussion on state practice of provisional application of treaties, and in continuation to the Special Rapporteur’s analysis of the national practice of states in the third and fourth report, Israel wishes to clarify its practice on this issue. Israel’s de facto practice does not generally permit the provisional application of treaties, however there are exceptional situations in which it may be permitted. These situations include cases in which the internal requirements for the approval of the treaty are lengthy or where there is an urgent need for the application of the treaty, such as treaties of great political or economic significance.

Even in the rare instances in which provisional application is implemented, such a step is subject to numerous procedural conditions. Israel does not provisionally apply treaties unless it has previously completed its internal legal procedures necessary for the entry of the treaty into force. For example, the provisional application of the treaty is done through a specific decision by the Government of the State of Israel, that approves the treaty itself, as well as its provisional application. Upon submission of such a treaty for Government approval, the explanatory note must include a clear statement that recognizes that the approval of provisional application deviates from general practice, as well as the exceptional circumstances that require a deviation in

the specific case. The provisional application will then be carried out in accordance with the mechanism specified in the treaty.

Thank you, Mr. Chairman