



SIXTH COMMITTEE

CHECK AGAINST DELIVERY

Statement by

Ms. Meital Nir-Tal

Legal Department
Israel Ministry of Foreign Affairs

Report of the International Law Commission on the work of its seventy-
second session

Agenda Item 82

29 October 2021

United Nations, New York

CLUSTER II

(Sea-Level Rise and Immunity of State Officials from Foreign Criminal Jurisdiction)

Thank you Madame Chair,

Starting with the topic of **sea-level rise**, the State of Israel supports the efforts of the international community to prepare for its potential implications. Israel agrees that this issue poses a concrete global challenge, particularly to those countries that are already impacted -- or potentially impacted -- by this worrisome phenomenon.

This matter raises a variety of concerns in a number of disciplines, including in the legal realm. Indeed, 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.

Madame Chair,

Israel welcomes the Commission's discussion, as reflected in the report, of the potential legal effects of sea level rise on the preservation of base lines, maritime delimitation and on islands.

Israel reiterates its position that the work of the Commission and the Study Group on this topic should not serve to undermine the delicate balance achieved by existing maritime boundary agreements, which meaningfully and significantly contribute to positive cooperation, as well as to regional and international stability, both in the political sense as well as in the **legal** sense.

The Government of Israel takes note in this vein of the discussion and conflicting views in the Report regarding the nature of baselines and maritime limits, and whether they are – quote - “inherently ambulatory” or, rather, should be considered fixed in nature.

We also take note in this context of the Study's reference to the 2018 conclusions of the International Law Association Committee on International Law and Sea Level Rise -- cited in paragraph 281 of the ILC report -- which set forth, *inter alia*, that changes in land and maritime boundaries should not constitute an unforeseen or fundamental change of circumstances under Article 62(2) of the Vienna Convention of the Law of Treaties that would affect the legal validity of an agreement. The Government of Israel continues to study and consider this important discussion on the inter-ministerial level, as it is of great relevance to the entire topic of sea level rise, and we look forward to weighing in on this debate at a future date.

Madame Chair,

Israel expects the Study Group to adopt a careful approach in light of the complexity and multi-disciplinary and multi-faceted nature of this topic. In this vein, we would like to raise some concerns regarding a number of statements in the recent report, as well as regarding the methodology employed by the study group.

One such example relates to the references in the report to the potential emergence of rules of customary international law. Israel believes that given the limited state practice

in this field -- as acknowledged by the study group itself -- it is doubtful whether any conclusion regarding evidence of existing binding rules of international law on the subject of sea level rise could be drawn at this juncture. Israel refers in this context to the ILC draft guidelines on the Identification of Customary International Law, and urges the Study Group to follow the methodology set forth therein. Israel also cautions against the Study Group reaching any conclusions on this topic from the mere fact that a given treaty is silent on a certain matter.

Madame Chair,

In conclusion, the Government of Israel thanks the International Law Commission Study Group for taking up this important and most relevant topic, and looks forward to continuing to engage and to contribute positively to this project.

Madame Chair,

Turning now to the topic of “**Immunity of State Officials from Foreign Criminal Jurisdiction**” Israel would like, at the outset, to thank the Special Rapporteur, Ms. Concepción Escobar Hernández, and the Commission more broadly, for the work done on this topic.

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 for good reason. They were developed to protect the elemental principles of State sovereignty and equality; to prevent international friction 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.

Madame Chair,

Before commenting on this year’s report regarding this topic, we would like to reiterate our concerns regarding several of the draft articles provisionally adopted by the Commission thus far. Israel continues to consider that certain draft articles have failed to reflect the current state of play of customary international law accurately, and constitute – instead -- suggestions for the possible progressive development of the law — but without openly acknowledging that fact. Should the Commission, nonetheless, propose such progressive development, it should, at the very least, make note of that explicitly. Israel would ask in this regard that our statements on this topic in previous years be considered together with this current one.

Madam Chair,

Israel wishes to make particular mention again of Draft Article 7, which proposes exceptions to immunity *ratione materiae*. Israel shares the view -- echoed by other States, as well as by several members of the Commission itself -- that this Draft Article does **not** represent the current state of international law. Nor does it reflect any

purported “trend” in this direction. This was confirmed only recently 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 should be **deleted**. Having said that, and without prejudice to this position, should the Commission, nonetheless, decide to retain Draft Article 7, we would expect the Commission to state clearly that this Draft Article reflects a mere proposal for the progressive development of current law that States may or may not choose to adopt.

Furthermore, Israel once again asks 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 high-ranking State officials who enjoy such immunity is **broader**. Again, if the Commission decides to retain these particular Draft Articles, it should be made clear that they do not reflect customary international law.

Madame Chair,

Israel welcomes the progress made this year with regard to the procedural safeguards discussed in the Special Rapporteur’s seventh report. In particular, Israel considers that the present wording of Draft Article 8, paragraph 2, properly reflects the rule that immunity must be determined at the earliest stage, *in limine litis*. The changes made to paragraph 2 now make it compatible with this rule, by underlining that the forum state ought to examine questions of immunity before initiating criminal proceedings or taking coercive measures that may affect the foreign official in question.

Additionally, Israel welcomes the deletion of the previous paragraph 4 of Draft Article 11 regarding deducing waivers of immunity from international treaties, as that text was plagued with difficulties and would have led to unwelcomed ambiguity in this regard.

Madame Chair,

With regard to Draft Article 10, Israel rejects the possible underlying assumption that only if the State of the official invokes immunity, then the question of immunity should be considered by the forum State. Israel reiterates its past statements on this matter, according to which there is a presumption of immunity in the case of foreign State officials. This immunity applies unless the State of the official: gives express notice of the lack of immunity in a particular case; explicitly waives the official’s immunity in writing; or until a clear determination of the absence of immunity is made. Israel thus maintains its view -- as expressed by several Member States as well as by some Commission members -- that the invocation of immunity is not a precondition for its application, as immunity exists as a matter of customary international law.

Furthermore, concerning the proposed Draft Article 10, paragraph 2, Israel rejects the requirement according to which invocation of immunity can only be done in written form. Such requirement does not necessarily reflect international practice in this regard as the assertion of immunity may be conveyed to the forum state orally as well.

Madame Chair,

Referring to the previously proposed paragraph 6 of Draft Article 10 concerning the examination *proprio motu* of the question of immunity, which was not included in the proposed Draft Article and is expected to be addressed at a later stage, Israel believes that Draft Article 10 should not distinguish between immunity *ratione personae* and immunity *ratione materiae* with regard to the requirements for their invocation. Therefore -- like some Commission members -- Israel maintains that when immunity *ratione personae* or immunity *ratione materiae* is not invoked by the State of the official, the forum State must still consider or determine *proprio motu* the question of immunity as soon as it becomes aware that a foreign official may be affected by the exercise of its criminal jurisdiction.

In addition, while Draft Article 10, paragraph 1 provides that --quote -- “A State may invoke the immunity of its official when it becomes aware that the criminal jurisdiction of another State could be or is being exercised over the official. Immunity should be invoked as soon as possible” --end quote --, Israel maintains -- as did several members of the Commission -- that the State of the foreign official is under no obligation to invoke immunity *immediately* upon becoming aware of the possibility or exercise of criminal proceedings. After all -- as also acknowledged by the Special Rapporteur, and as is implicit in Draft Article 12, paragraph 2 -- the State of the foreign official may need to consider various relevant issues prior to communicating its position on the matter.

Madame Chair,

Moving on to the issue of the determination of immunity -- which is expected to be dealt with in a separate draft article that has not yet been considered by the Drafting Committee -- as mentioned in previous statements, Israel wishes to reiterate that this future draft article should assert that the determination of immunity should be made by the *competent authorities* of the forum State, which are not necessarily its *courts*. Israel, thus, shares the view of some Commission members, according to which the draft article should refrain from exclusively relying on the judiciary in determining issues of immunity. Though the prominence of the judiciary in determinations of immunity prior to the initiation of criminal proceedings may reflect common practice amongst civil-law national legal systems, the draft article should adopt a more inclusive approach that also reflects the practice of other national systems, in which the executive branch plays a leading -- if not decisive -- role in determining issues of immunity.

Furthermore, issues of immunity -- especially those pertaining to complementarity or subsidiarity -- may well be discussed between the executive and prosecutorial authorities of the relevant States before the matter reaches any court. Therefore, Israel suggests avoiding any unwelcomed divergence from the current law and practice in terms of determinations on the temporal and procedural stages in which issues of immunity are considered and determined.

Israel believes that specific determinations regarding immunity of foreign officials should be considered by the highest-level of decision makers in the forum State, and only after consultation with the State of the official. Needless to say, decisions on whether to initiate a criminal investigation entails the risk of violating the official's immunity under customary international law, with all the significant and weighty implications that might follow. Consultations between the forum State and the State of the foreign official allow the former to examine in a proper and thorough manner all relevant information, including issues of subsidiarity or complementarity, 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 must be suspended for the duration of consultations between the relevant Governments regarding the issue of immunity.

Madame Chair,

Lastly, Israel would like to refer to the proposed Draft Article 18. Israel believes that the justification provided by the Special Rapporteur for a draft article relating to the issue of international criminal tribunals is unconvincing. In her eighth report, the Special Rapporteur argued that a specific draft article on the issue of international criminal tribunals would be necessary in order to clarify that immunities before international criminal tribunals should be excluded from the scope of these draft articles, and ensure that the final outcome of the Commission's work on the topic of Immunity of State Officials from Foreign Criminal Jurisdiction would not undermine the rules of international criminal law. However, the title of the topic already refers to 'foreign' jurisdiction, and Israel notes that paragraph 6 of the commentary to Draft Article 1 clearly states that "the immunities enjoyed before international criminal tribunals, which are subject to their own legal regime, will remain outside the scope of the draft articles". Israel believes that Draft Article 18 is thus redundant and may cause confusion, and, therefore, should be omitted. To the extent that the Commission is nonetheless interested in including a 'without prejudice' point in the text of the draft articles, Israel suggests incorporating the text just cited in the commentary to Draft Article 1, in the actual text of Draft Article 1.

Israel notes in this regard that there was broad agreement throughout the process that the issue of immunities before international criminal tribunals would remain outside of the scope of the draft articles, and this understanding -- appropriately -- led the Special Rapporteur to refrain from any detailed, comprehensive, and critical assessment of the issue of immunities before international criminal tribunals.

Madame Chair,

It is against this background that Israel is concerned with the fact that the Special Rapporteur makes reference to the *Al-Bashir* judgment of the ICC Appeals Chamber when presenting the text of the proposed Draft Article 18. That judgment includes several unfounded and highly controversial propositions with which a significant number of States, including Israel, are in strong disagreement. These include, but are not limited to, the highly problematic proposition that there is no Head of State immunity from prosecution before international criminal tribunals under customary international law. Israel believes that determinations regarding the existence or lack thereof of immunity before international tribunals should be decided in accordance with the specific legal instrument under which each tribunal operates. Moreover, those treaties cannot, of course, create any legal obligations for a third-, non-party State without its explicit consent.

Israel believes that the Commission should have due regard for the strong and wide-ranging criticism of the *Al-Bashir* judgement, and refrain from including any reference to this highly controversial and widely criticized judgement in the commentary accompanying the draft articles on this topic.

I thank you, Madame Chair.