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**COMMENTS AND OBSERVATIONS OF THE STATE OF ISRAEL ON THE
DRAFT ARTICLES ON IMMUNITY OF STATE OFFICIALS FROM
FOREIGN CRIMINAL JURISDICTION ADOPTED BY THE
INTERNATIONAL LAW COMMISSION ON FIRST READING IN 2022**

I. Introduction

1. In accordance with paragraph 66 of the Report of the International Law Commission (hereinafter: “ILC” or “the Commission”) on the work of its 73rd Session (A/77/10), the State of Israel hereby submits comments and observations on the draft articles on immunity of State officials from foreign criminal jurisdiction adopted by the Commission on first reading in 2022. By reason of current events, Israel submits at this stage only some of its comments and observations, hoping to be able to supplement these in the coming weeks.
2. The State of Israel attaches great importance to ensuring that perpetrators of crimes are brought to justice, and to this aim supports various international efforts aimed at fighting crime and combating impunity effectively. At the same time, Israel considers that the longstanding and firmly established international legal rules on immunity of State officials from foreign criminal jurisdiction serve a vital function in expressing and safeguarding the fundamental principle of sovereign equality; in preventing serious international friction and political abuse of legal proceedings; and in allowing for the proper and unimpeded functioning of State officials in the conduct of international relations.
3. Accordingly, Israel attaches importance to the work of the ILC on this topic and welcomes the appointment of Mr. Claudio Grossman Guiloff as the new Special Rapporteur. While Israel appreciates the efforts undertaken by the Commission thus far and the modification of some propositions in response to State input, it considers the text adopted on first reading to be unsatisfactory in several significant respects and thus to require considerable amendment. Israel believes that during the second reading stage the Commission should revisit and grapple with the substantial problems and controversies still existing in the draft conclusions and in the commentary, and should take all the time necessary to produce an output that can usefully win general endorsement by States. We recall in this regard the positive example of the multi-year second reading stage of the draft articles on State responsibility.
4. It is in this context that Israel wishes to make a number of particular comments and observations in order to voice its misgivings concerning both the methodology and the substance of several of the draft articles.



II. Codification of existing law vs. progressive development of the law

5. Due to the importance of the topic, and the divergent views among States on several core issues with which the draft articles are concerned, Israel believes that the Commission should limit itself to stating and clarifying international law as it currently stands. Israel shares the concern of a significant number of States, and of several members of the Commission, that certain draft articles adopted by the Commission on first reading fail to reflect accurately the current state of customary international law and constitute instead proposals for the possible progressive development of the law, or even wholly new law, but without adequately and openly acknowledging this fact.
6. In Israel's view, should the Commission choose, despite the significant opposition of States, to endorse proposals for progressive development of the law in its draft articles and the commentary thereto, it ought to indicate that clearly in connection with each proposition for which that is the case.

III. Draft Article 3: Persons enjoying immunity *ratione personae*

7. Draft article 3 and the commentary thereto limit immunity *ratione personae* to three holders of high-ranking office in the State: Head of State, Head of Government, and Minister of Foreign Affairs (the 'troika'). This does not give expression to existing customary international law, as pronounced upon by the International Court of Justice, under which the category of holders of high-ranking office in a State who are entitled to such immunity during their term of office is broader.
8. Paragraph (2) of the commentary to draft article 3 notes two main reasons for the immunity *ratione personae* of the high-ranking State officials of which it speaks, namely their inherent position in representing the State in its international relations and the need to enable them to travel to exercise their function. These reasons are very much applicable to other high-ranking officials of the State, such as Ministers for Defense, as has been recognized in the case-law of various national courts. Israel recalls that a number of ILC members, too, held the view that immunity *ratione personae* is enjoyed by high-ranking State officials other than the troika, as mentioned in paragraph (11) to the commentary.
9. Therefore, Israel suggests that draft article 3 accurately reflect the existing law by incorporating a flexible criterion for immunity *ratione personae* that is based on the functions the officials perform and can accommodate the different constitutional structures of States.
10. If the Commission decides to retain the current text of the draft article, it should be made clear that it does not reflect existing customary international law.



IV. Draft Article 7: Crimes under international law in respect of which immunity *ratione materiae* shall not apply

11. Israel shares the view, expressed by other States as well as by several members of the Commission itself, that draft article 7 does not reflect the current state of customary international law, nor should it be welcomed as a proposal for progressive development of the law. The Commission should take into account the serious concerns raised by States in this regard, especially given the highly sensitive nature of this issue. The Commission should therefore allocate as much time as necessary in order to produce an output that could gain general approval among States.
12. Paragraph (9) of the commentary to draft article 7 refers to 23 judicial decisions listed in footnote 1012 in contending that “*there has been a discernible trend towards limiting the applicability of immunity*”. Israel respectfully submits that these decisions cannot be seen as constituting a “discernible trend”. As some members of the Commission have noted, the cases referred to in support of the existence of the alleged discernible trend are neither consistent nor clear. The draft commentary itself reflects the deep divisions within the Commission on this point, and makes clear that several members of the Commission hold the firm view that State practice does not support limiting immunity *ratione materiae*. As stated in a footnote to the commentary, members explained that out of the 23 cases mentioned above, only 10 cases “purportedly expressly address the issue of immunity *ratione materiae* of a State official from foreign criminal jurisdiction under customary international law, and that most of those cases actually provide no support for the proposition that such immunity is to be denied.” Furthermore, it should be noted that there are also judicial decisions where immunity *ratione materiae* has been invoked and accepted by national courts in criminal proceedings.¹
13. Indeed, even after the provisional adoption of draft article 7, State practice continued to demonstrate that States do not recognize exceptions to official immunity *ratione materiae* from foreign criminal jurisdiction. These decisions are supported by additional recent judgements upholding immunity of foreign officials in other cases.
14. It should further be noted that State practice that is highly relevant to this topic is not always easily accessible, in particular Government decisions not to open an investigation or initiate criminal proceedings against a foreign State official on the basis of a legal conviction that there is immunity. Judicial proceedings may well be the exception, and the Commission should not lose sight of that.

¹ See 2023 ILC report, page 235, footnote 1015.



15. It is Israel's view that those members of the Commission who argued that draft article 7 would constitute "new law" (see paragraph 12 of the commentary) are correct in their assessment.
16. It is therefore Israel's position that draft article 7 should be deleted. Israel notes that some members of the Commission voted against the draft article during the 69th session in 2017, and their position remained unchanged despite the adoption of the text in 2022, as also stated in paragraph 3 of the commentary to this provision.
17. Without prejudice to this position, should the Commission decide to retain draft article 7 on second reading, the Commission should make it clear that it is engaged in progressive development rather than codification of the law. The commentary must be amended so as to clearly reflect this fact. Furthermore, during the second reading, the Commission should allow sufficient time to attend to the serious problems and controversies that exist with regard to the text and scrutinize carefully any State practice invoked in connection thereto.

V. Procedural Safeguards

18. Israel begins by noting that the procedural safeguards proposed in part Four of the draft articles do not, and cannot, sufficiently overcome the myriad of difficulties that draft article 7 might give rise to.
19. To mention but some of Israel's concerns, we reject the underlying assumption expressed in draft article 11, that only if the State of the official invokes immunity, then the question of immunity should be considered. Israel shares the view expressed by other States, and several members of the Commission, according to which the invocation of immunity by the State of the official is not a prerequisite for its application, because immunity applies as a matter of international law unless the State of the official suggests otherwise, or waives immunity (expressly and in writing), or until a clear determination of its absence is made. Any presumption of a lack of immunity would doubtless be open to abuse and serve as a means to circumvent the immunity of State officials. In addition, Israel is of the view that the requirement proposed in draft article 11, paragraph (2), of invocation of immunity in written form only, does not reflect international practice in this regard, as immunity may also be invoked orally.
20. With regard to draft article 15, concerning the transfer of the criminal proceedings, Israel is of the view that States with the closest and most genuine jurisdictional links to the matter at hand should have primary jurisdiction as they are generally best able to uphold the interests of justice. In this vein, Israel believes that when the State of the official is willing to assess the case and to apply to it the appropriate legal framework, it should be the obligation of the forum State to decline to



exercise its jurisdiction in favor of the jurisdiction of the State of the official. This would be in conformity with the established customary rule on subsidiarity. While this view is mentioned in the commentary, it should find expression in the text of the draft article, as it is not easily understood from the current text.

21. With regard to draft article 18(2), which may be relevant only in the event that the draft articles are proposed as a basis for a future treaty, Israel suggests the addition of an opt-out clause as suggested by some Members of the ILC and noted in paragraph 12 to the commentary of this draft article.

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