

STATEMENT BY YOLANDE DWARIKA, PRINCIPAL STATE LAW ADVISER
(INTERNATIONAL LAW) TO THE SIXTH COMMITTEE OF THE GENERAL
ASSEMBLY ON THE REPORT OF THE INTERNATIONAL LAW COMMISSION ON
THE WORK OF ITS 64th SESSION
PART 2,
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The South African delegation notes with pleasure the progress in developing the topic: Immunity of State Officials from Criminal Jurisdiction. We warmly congratulate the Special Rapporteur, Ms Escobar Hernández on her appointment and we take this opportunity to thank the former Special Rapporteur Mr Kolodkin for his contribution to this topic which no doubt will serve as a good foundation as the current Special Rapporteur charts her own way forward on the topic.

Mr Chairman,

South Africa attaches great importance to this topic and we welcome the approach taken by the Special Rapporteur in her preliminary report. Even though the report is

evolving and dynamic. The establishment of the International Criminal Court, which seeks to bring an end to impunity is evidence of this reality. We are therefore convinced that the ILC must place sufficient emphasis of the progressive development of international law insofar as it relates to this topic and we would welcome a thorough analysis of the emerging trends pertaining to immunity, in light of contemporary international law.

Mr Chairman,

In 2009 South Africa raised important issues which we considered as vital to the development of this topic. We continue to hold the view that the scope of immunities, both immunity *rationae materiae* and immunity *ratione personae* would need deeper reflection and we are therefore pleased to see that this discussion is progressing. It is widely accepted that serving Heads of State and Government enjoy personal immunity, furthermore, the Arrest Warrant case has held that Foreign Ministers are also entitled to immunity *ratione personae*. We would benefit from clarification by the ILC on the scope and extent of the applicability of immunity *ratione personae* for the so called "Troika" and whether there are benefits to restrict its application to other officials.

The ILC has also sought specific information on whether the distinction between immunity *ratione personae* and immunity *ratione materiae* result in different legal consequences in domestic cases, further information will be d bHn(r)-6.4 (a173 ()JdTd-0.6 (t)-e (d)-1

as recent arbitral awards concerning provisional application, South Africa is of the opinion that the prevailing view should be that States who agree to provisionally apply a treaty, are bound to apply the relevant provisions of that treaty in the same way as if the treaty has entered into force, subject to the conditions provided in the particular provisional application clause.

We are mindful of the problems of inconsistency often associated with the formation of customary international law. Nonetheless, we are confident that the foundations of customary international law on the formation and evidence of customary international law remain valid and useful. Moreover, the flexibility associated with customary

decision of the ILC to continue its work on the Most-Favoured-Nation (MFN) clause, and