Islamic Republic of
I R A N
Permanent Mission to the United Nations

Statement by

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Before

The Sixth Committee

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On Agenda item 79:

"Report of the International Law Commission

on the work of its sixty-third and sixty-fourth sessions"

Immunity of State officials from foreign criminal jurisdiction

Provisional application of treaties

Formation and evidence of customary international law

Treaties over time

The obligation to extradite or prosecute (aut dedere aut judicare)

The Most-Favoured-Nation clause

بسم الله الرحمن الرحيم

Mr. Chairman,

In its second statement under this item, the delegation of the Islamic Republic of Iran would like to share its views and comments on the topics 'Immunity of State officials from foreign criminal jurisdiction', 'Provisional application of treaties', 'Formation and evidence of customary international law', 'Treaties over time', 'The obligation to extradite or prosecute (aut dedere aut judicare)' and 'The Most-Favoured-Nation clause'.

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VI. Immunity of State officials from foreign criminal jurisdiction

Mr. Chairman,

With regard to 'Immunity of State officials from foreign criminal jurisdiction', my delegation wishes to express its appreciation to the former Special Rapporteur, Mr. Roman A. Kolodkin, for his efforts and to commend Ms. Concepcion Escobar Hernandez who has been appointed as Special Rapporteur, for his preliminary report on the topic.

The subject of "Immunity of State officials from foreign criminal jurisdiction" is of critical importance in stability of inter-State relations. It derives from some of the main principles of contemporary international law, particularly the principle of sovereign equality of States and non-intervention, without which the exercise of State sovereign rights and functions would be hampered essentially.

International law grants to certain categories of State officials an absolute immunity *ratione personae*, from foreign criminal jurisdiction. It covers both acts performed in their official capacity and their private acts, during the period they hold office. The principle of immunity of the "troika" (Head of State, Head of Government and Minister of Foreign Affairs) which is well established and recognized under customary international law is the key guarantor of stability in international relations and the effective tool for the smooth exercise of prerogatives of the State. This immunity shall cease to apply to their private acts as soon as they leave office. However, they shall continue to enjoy immunity for acts performed in their official capacity without time limit, as those acts are deemed to be acts of the State. It remains for the Commission to determine which acts shall not be considered as 'official acts' for which immunity would cease to be applied.

We share the note of caution expressed by the former Special Rapporteur that The International Law Commission should focus on codifying the existing rules of international law in this area rather than engaging in an exercise for progressive development. We endorse the observation by some members of the Commission (as reflected in paragraphs 92 and 93, page 95 of the report) regarding the particular importance of the distinction between progressive development of international law and its codification as well as between *lex lata* and *lex ferenda,* in the consideration of this topic.

The Commission is expected to take the principle of sovereignty and its ensuing components, principally the immunity of State before the courts of another State, as its departure point and avoid confusing this subject with the subject of accountability of State officials. In this regard, the ICJ's affirmation in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti V. France)* that a claim of immunity for a State official is, in essence, a claim of immunity for the State, merits especial attention.

My delegation shares the note of caution expressed by some members of the Commission (paragraph 100, page 96 of the report) with respect to the alleged trend to limit State immunity before foreign national jurisdictions. In the light of the most recent judgment by the ICJ, namely *Jurisdictional Immunities of the State (Germany*

V. Italy), one can, now, hardly argue against the deeply established principle of immunity before national criminal jurisdictions under contemporary international law. Generally speaking, we do not consider it productive for the Commission to struggle to develop a contrived rule as progressive development of international law where there is already an authoritative clear ruling by the ICJ to the contrary. With that in mind, my delegation disagrees with the suggestion of some members of the Commission articulated in paragraph 132 (page 102) of the report.

Let me conclude my remarks on this topic by echoing the sentiment raised by some members of the Commission (para. 110, page 99) that the Commission is better served if any confusion with certain controversial subjects, such as 'universal jurisdiction' which is under consideration in the Sixth Committee, be avoided.

VII. Provisional application of treaties

Mr. Chairman,

The topic 'Provisional application of treaties' is one of the new topics included in the ILC's programme of work. We regard this exercise as a useful one in clarifying and complementing, if needed, the provisions of Article 25 of the 1969 Vienna Convention on the Law of Treaties. The topic appears to be related to two other topics currently on the agenda of the Commission, namely 'Treaties over time' and 'Formation and evidence of customary international law', in many respects, and therefore the Special Rapporteur can exploit the Commission's findings under those topics to accelerate his work on the present topic.

It is highly questionable to assume that provisional application of a treaty, per se, can count as a practice evidencing the formation of a customary norm, since such alleged practice simply lacks the very basic constituting element of any 'customary rule', that is '*opinio juris*. That a State chooses not to become bound to a treaty by opting to remain as a signatory (and not to ratify it) signifies that that State does not deem the treaty in question to have any legal force vis-à-vis that State.

We feel it would be overly difficult, both under the 1969 Vienna Convention and in the light of State practice, to extract a unified practice capable of evidencing the formation of customary norms as a result of 'provisional application of treaties' effected by signature (short of ratification). We do not deem it appropriate methodologically to disproportionately overstate the subsequent practice at the price of overlooking State consent as an essential component in determining *opinion juris*.

It would be advisable also to follow a calculated and balanced approach when assessing the role and weight of regional and local practices as well as the decisions of domestic courts in the formation of a customary norm of international law.

VIII. Formation and evidence of customary international law

Mr. Chairman,

Regarding the topic "Formation and evidence of customary international law", my delegation maintains its position expressed last year in the Sixth Committee

during the debate on the report of 63rd session of the International Commission. My delegation continues to follow the ILC's debate on this topic with interest and will communicate its view to the Commission in due course. I would like, however, to reiterate one point regarding the methodology used by the Commission with regard to identification of customary international law. We think the Commission should make a clear distinction between State practice and international courts and tribunals' jurisprudence, on the one hand, and that of the domestic courts. Indeed, they could not be on an equal footing, when we want to identify the formation of a particular customary rule. The Commission should also follow a very cautious approach in gauging the role of unilateral acts in identifying customary international law. Moreover, the unilateral acts, especially those taken in violation of general international law, even if persisted throughout years, cannot be counted as evidence of an emerging rule or change of an existing rule.

IX. The obligation to extradite or prosecute (*aut dedere aut judicare*)

Mr. Chairman,

I would like to recognize the efforts of the Commission on this topic and the contributions of the Special Rapporteur, Mr. Zdzislaw Galicki, in this regard.

It seems to us that under the present circumstances, and especially in the light of the recent judgment (20 July 2012) by the ICJ in the case 'Questions relating to the Obligation to Prosecute or Extradite (Belgium V. Senegal), it would hardly be possible to prove the existence of a general obligation to extradite or prosecute based on customary international law. We do not believe that the inclusion of the clause 'to extradite or prosecute' in a growing number of international instruments can, per se, be construed as an evidence of the formation of a customary rule in this regard.

It is true that the Draft Code of Crimes against Peace and Security of Mankind, adopted in 1996 by the International Law Commission, establishes the obligation to extradite or prosecute persons suspected of having committed certain crimes. The fact, however, is that the Draft Code has not been well received by States in their practice on extradite or prosecute and obviously this Draft Code is progressive development of international law rather than its codification. Given that, the Commission is well advised to revisit the exercise, taking into account the raison d'etre of the inclusion of the topic in the ILC's programme of work.

Regarding the relationship between obligation to extradite or prosecute and universal jurisdiction, we believe there is a substantial difference between the two concepts, the second being of procedural nature. The discussions in the Sixth Committee on the item "The scope and application of the principle of universal jurisdiction" should not affect the possible ILC's decision on the topic of 'The obligation to extradite or prosecute', since it is highly unlikely that the Sixth Committee would opt for referring the former to the ILC. Moreover, we do not deem it advisable to link the two subjects.

X. Treaties over time

Mr. Chairman,

Turning now to the topic "Treaties over time", my delegation takes note of the continuing consideration of this topic by the Commission. My delegation would like to highlight two points at this stage. First, the role of subsequent practice as a means of treaty interpretation should not be overestimated. Second, and in the same line, we are not sure if it would be suitable to give different organs of the State an equal treatment when we want to identify subsequent practice. We also have some doubt about the role of "social practice", its meaning and its scope.

I conclude by underlining the importance of taking into account by the Commission of the views and concerns expressed during the sessions of the Sixth Committee by the member States. The views expressed by delegates during the debate on the ILC's annual report in the Sixth Committee shall be given the same treatment as the written comments communicated by member States to the Commission.

XI. The Most-Favoured-Nation clause

Mr. Chairman,

Regarding the topic "The Most-Favoured-Nation clause", my delegation notes the complexity of the issue. My delegation also notes the fact that this is the third time the Commission is entertaining this topic. My delegation, therefore, cautions on viability of the exercise given the fact that it is highly and closely related and intertwined with other fields of international law, particularly private international law, trade law and investment areas which are generally under the UNCITRAL and WTO. We hope, though, that the Commission's efforts will lead to tangible results this time.

Thank you, Mr. Chairman.