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Chapter VI: Immunity of State officials from foreign criminal jurisdiction;
Chapter VII: Provisional application of treaties;
Chapter VIII: Formation and evidence of customary international law;
Chapter IX: The obligation to extradite or prosecute (*aut dedere aut judicare*);
Chapter X: Treaties over time;
Chapter XI: Most-Favoured-Nation clause.

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S T A T E M E N T

by

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Mr. Chairman,

Let me start with congratulating Professor Nolte on becoming the Special Rapporteur of the newly reformulated topic of „Subsequent agreements and subsequent practice in relation to the interpretation of treaties". His work on the problem has been so far truly remarkable. We'll be wating for his first report on the reformulated topic with great interest.

Poland welcomes the narrowing of the scope of a subject as previously described - „Treaties over time", which proved to be too nebulous to deal with in normative terms. But it was certainly a good start. Particularly we would like to commend nine preliminary conclusions adopted by a Study Group in 2011 and six additional preliminary conclusions adopted in 2012. As the work on the newly defined subject is at its preliminary phase, I would like to make just two points.

First, speaking in general terms, it is important to preserve flexibility which characterizes use of the subsequent agreements and subsequent practice as means of interpretation of treaties. The normative content of the future guidelines should maintain the balance between the *pacta sunt servanda* canon and the need for necessary adjustment of treaties to inevitability of the constantly changing world. I understand that such sentiment has been widely shared by the members of the Commission and the Special Rapporteur himself.

Second, a more practical remark. It seems rather obvious that the decisions of national courts constitute an essential part of the practice of States. The survey of those decisions should be conducted as a matter of priority and its results reflected as soon as possible in the forthcoming reports of the Commission on the subject.

Mr. Chairman,

Poland commends the Commission's choice of the topic of the "Provisional Application of Treaties" as a subject for its further elaboration and welcomes Mr. Gomez-Robledo as the Special Rapporteur to lead that endeavor. Poland expects the Commission to come up with useful directives and guidelines for States

in their application of Article 25 provisions of the Vienna Convention on the Law of Treaties of 1969. Simultaneously we notice that similar problems arise when a treaty is concluded by an international organization either with States or with other international organizations. It is noteworthy that provisional application of a treaty may constitute very helpful instrument particularly in situation when there is a need for matters covered by the treaty to be dealt with urgently. Thus, we are awaiting the results of the Commission's works on the subject with great interest. Given the preliminary stage of the Commission's works on the subject let me limit my specific remarks to two points.

First, let me emphasize that there can be no doubt that the essence of the provisional application of treaties lies in its flexibility. That characteristic feature, inherent in this institution should be, by all means, preserved. In our view and practical experience, the issue deserves a detailed and careful analysis.

Second, let me formulate an important caveat. The Vienna Convention of 1969 is a superb, extraordinary instrument of constitutional nature that proved its utility. However, taking into account the lapse of more than 30 years from its entry into force, we are of the opinion that it might be recommended to study the convention as a whole, in order to review its provisions as confronted with a subsequent practice. This would be a perfect task for the ILC, corresponding with recent work of the Commission on both law of treaties and other sources of international law (incuding in particular effects of war upon treaties, reservations to treaties, unilateral acts, and currently customary law).

Furthermore, my delegation is convinced of significance of ILC work on topic extradite or prosecute (*aut dedere aut iudicare*). We are of the view that studies on this topic are very needed, particularly in the context of combating impunity for most serious crimes of international law. We hope that this year judgment of International Court of Justice in case Belgium *versus* Senegal will be helpful and inspiring for Commission in its further work on the topic.

As regards the topic "Immunity of State officials from foreign criminal jurisdiction" we agree with the new Special Rapporteur, Ms Concepción Escobar Hernández, that this classical issue of international law have to be considered in the light of new challenges and developments. In this context we are of the view that searching

for a balance between the rules relating to immunity of State officials and other principles of international law, including human rights and a necessity to punish perpetrators of grave and serious crimes, under international law, should be one of the primary objective in the work of the Commission.

Referring to the topic "Most Favoured-Nation clause" we concur with the opinion that work on this issue should be placed in the broader normative framework. We have noticed that until now Commission concentrated primarily on investment law. Overall, we are of the view that drafting guidelines on this issues would have a very practical value, taking into account the fact, that the case law on MFN is far from being consistent.

Mr. Chairman,

Polish delegation welcomes including the topic formation and evidence of customary international law into a long-term program of the ILC. We emphasize that customary international law plays an important role in international and domestic judicial practice, as well as constitutes an important basis of foreign policy decisions by the governments. We also realize that a practice of identification and application of CIL is far from uniformity. Law enforcement agencies including some international courts and tribunals often refer to alleged customary rules, without checking State practice nor existence of *opinio iuris*. A certain uniform approach to the problem and guidelines for interpretation of customary law would be mostly welcome. We are convinced that skills and experience of the Special Rapporteur, Sir Michael Wood, will contribute well to an elaboration of a set of rules governing CIL.

Taking into account the fact that the work of the Commission on the topic is in its initial phase, we would like to present some remarks as to the scope and procedures governing the future activities. We are convinced that the work of the ILC should result in a set of guidelines addressed to practitioners and not in a draft convention.

In accordance with art. 38 of ICJ Statute, and with well-established international jurisprudence, two elements (practice and *opinio iuris*) are necessary for a formation of CIL. In our opinion, the former element is fundamental at a stage of formation of custom, while the latter is crucial in an application of customary rules. It is also more and more visible,

that practice and *opinio iuris* often mix together, so that it could be difficult to make a clear distinction between them. The research of the Commission should concentrate on an analysis of both factors: what elements (action/omission) of what subjects should be taken into account while identifying the state practice, and how *opinio iuris* can be ascertained. As a former factor constituted subject of numerous studies, and an international jurisprudence is well established, the latter still remains unclear. In particular a problem whether *opinio iuris* can be ascertained on the basis of resolutions of agencies of international organizations including the United Nations General Assembly is extremely sensible and politically and legally important.

Polish delegation suggests that neither theoretical studies of the bases of customary law, nor phenomena like general principles of law or peremptory norms of international law with their mutual relationship with the CIL should be considered in the work of the Commission, at least at a first stage. These issues, although important, are irrelevant to the main topic, and could result in prolongation of the study. Neither it is necessary nor desirable to cover the origins of art. 38 of the ICJ Statute. On the contrary, we find useful including an issue of a binding force of customary law upon new States, that were deprived of any influence upon the formation of custom. According to a rule which is well established in international law theory and practice, new States are bound by customary law in force at the time of their establishment. We reject a clean slate doctrine, and we are for clarity and certainty of an international legal order, but we could imagine that in exceptional situations, with respect to particular norms, a certain flexibility comparable to a persistent objector's position could be granted to new States.

Finally, as we support an idea of unity of an international legal order, we reject a differentiated approach to customary law, depending of a particular area of international law. All international legal norms should be subjected to the same test regarding their nature, origin and binding force. Fragmentation of international law would lead to a destruction of a legal order and therefore would be contrary to an interest of international community.

Thank you Mr. Chairman.