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At the Meeting of the Sixth Committee

On Agenda Item 79: Report of the International Law Commission on the Work of Its Sixty-fourth Session (Part II - Chapters VI, VII, VIII, IX, X & XI)

Mr. Chairman,

First of all, we would like to thank the International Law Commission for its comprehensive report on the work of its 64th Session, as well as members of the International Law Commission for their work and significant contribution to the codification and progressive development of international law over the past year.

Mr. Chairman,

We will in this intervention, make general comments and observations on Chapters VI, VIII, IX, and X of the Report.

1. Immunity of State Officials from foreign criminal jurisdiction

Concerning the topic "Immunity of State Official from foreign criminal jurisdiction" in Chapter VI, we welcome the preliminary report of the Special Rapporteur and her considerations on methodological, substantive and procedural approaches. Given the complexity of the topic and its political sensitivities, it is essential that those aspects must be considered thoroughly and comprehensively before any further step is taken.

With respect to the methodology, even though the topic was a classic topic in international law, we do not find it compelling to draw a sharp distinction between codification and progressive development of international law when dealing with it. They are incorporated into the mandate of the Commission. In the consideration of the topic, at any stage, the Commission should bear in mind both

lex lata and *lex ferenda*. We believe that the practice of the Commission does not support such a distinction for the purpose of methodology. It is necessary, in our view, for the Commission, to take a systemic approach which could ensure the coherence and consistency in the international legal system and give due consideration to the respect for sovereignty and the protection of human right and combat impunity.

As to the scope of the topic, since it is confined to the issue of immunity of State officials from foreign criminal jurisdiction, we consider that it would be inappropriate to address, in this context, the issue of immunity from civil jurisdiction though the differentiation between immunity from civil and criminal jurisdictions should be kept in mind, as well as the question of jurisdiction, including the extent to which universal jurisdiction may bear on this topic.

As regards the question of immunity *ratione personae* and immunity *ratione materiae*, we are of the view that the emphasis needs to be put on functional base. Immunity *ratione personae* attaches to the status of a person while immunity *ratione materiae* attributes to the acts he performs on behalf of a State. For this reason, in order to identify the persons covered by immunity *ratione personae*, it would be appropriate to take a careful consideration of his status and role, not only in regular but also in special circumstances. The list of the beneficiaries of immunity *ratione personae*, in this connection, could be open. In determining the scope of official acts subject to immunity *ratione materiae,* which in our view is necessary, the official acts of a State which enjoy immunity should be taken in to account.

All of these substantive issues require further research and examination. In this regard, we support the plan of the Special Rapporteur to proceed on the basis of a thorough review of the State practice, doctrine and jurisprudence, both national and international levels as well as her intention to submit draft articles on this topic in her next report.

2. Formation and evidence of customary international law

With regard to the Chapter VIII on the formation and evidence of customary international law, we welcome the Commission's study of this topic which would make a contribution to the clarification and implementation of the rules of law in

international affairs and we would like to thank its Special Rapporteur, Sir Michael Wood, for his note on fundamental questions which are useful to initiate debate, setting out the road map for the future work on this topic.

As to the scope of the topic, we agree with the Special Rapporteur that the topic should cover the formation and evidence of customary law in various fields of international law. The clarification of the process of formation and the identification of customary international law are of great theoretical and practical importance for its acceptance and implementation by States. We also share the view with the Special Rapporteur and other members of the Commission that a general study of *jus cogens* should not be included within the scope of this topic. Though customary international law may have some *jus cogens* norms, it is not necessary to deal with this issue as it does not really link to formation of customary law.

Concerning the points that may be covered in this topic by the Commission, we support the suggestion that the topic should focus on an analysis of the elements of state practice and *opinio juris*, including their characterization, their relevant weight and their possible manifestations in relation to the formation and identification of customary international law. These elements play a key role in formation and identification of customary law and would help to clarify this process. In addition, the relationship between custom and treaties, including its implications on the formation of custom should also be considered and paid much attention.

In connection with the form of outcome of the Commission's work on this topic, we are in favor of the Special Rapporteur's proposal on development of a tool possibly in the form of guidelines with commentaries. We believe that such a tool would be helpful for states in the interpretation and application of public international law.

3. The obligation to extradite or prosecute

Turning to the Chapter IX on the obligation to extradite or prosecute, we would like to state that the Judgment made by the ICJ on Questions relating to the Obligation to Extradite or Prosecute in the case between Belgium and Senegal on 20 July 2012 confirms the established role of this obligation in the fight against

impunity and implementation of international justice.

In this regard, even though we concur with the views expressed in the Commission that an attempt to harmonize different multilateral treaty regimes on the obligation to extradite or prosecute is less than meaningful exercise, we still believe that further consideration of the topic would be useful for the interpretation and implementation of the existing treaties on the subject. We agree with some members of the Commission that the absence of a determination on the customary law nature of the obligation would not pose insurmountable obstacle in the further consideration of the topic since the Commission's mandate is both codification and progressive development of international law.

However, we would like to recommend the Commission, before taking any decision on whether and how to proceed with the topic, to review the general background of the work and study the Judgement of the ICJ in the case between Belgium and Senegal on 20 July 2012. The proposed general framework prepared by the Working Group in 2009 should also be taken in to consideration.

4. Treaties over time

With respect to Chapter X on Treaties over time, we would like to welcome the decision of the Commission to change the format of the work as recommended by the Study Group and to appoint Mr. Georg Nolte as Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". The new format would enable the Commission to focus on the outcome of the work.

In view of this change, the main focus of this topic would be on Article 31 paragraph 3 (a) and (b) of the Vienna Convention on the Law of Treaties, namely the legal significance of subsequent agreements and subsequent practice for interpretation of treaties. This issue, in our view, needs to be clarified to avoid any conflict that may arise from interpretation of treaties.

We support the plan suggested by the Chairman of the Study Group on how to proceed with the work on this topic. His preliminary conclusions which are based on judicial decisions practice of States raise some key issues for further consideration and deserve attention. We encourage the Chairman to continue his work in the same manner and look forward to his first report as Special Rapporteur

of the topic.

Mr. Chairman,

In conclusion, we would like once again to thank the Commission and its Special Rapporteurs for their hard work during sixty-forth session. We will continue to extend our full support to the work of the Commission and wish it further success in the future.

Thank you.