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Permanent Mission to the United Nations

Statement by

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On Agenda item 81:

Report of the International Law Commission

on the work of its sixty-third and sixty-fifth sessions

Part One (Chapters IV and V):

Subsequent agreements and subsequent practice in relation to the interpretation of treaties

Immunity of State officials from foreign criminal jurisdiction

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بسم الله الرحمن الرحيم

Mr. Chairman,

My delegation would like to begin by expressing its appreciation to Mr. Bernd H. Niehaus, Chairman of the International Law Commission for his comprehensive presentation on the work of the Commission at its sixty-fifth session. We also commend the members of the Commission for their contributions to the work of the Commission. The efforts of the Codification Division of the Office of Legal Affair, particularly those of Mr. George Korontzis as the secretary of the Commission is also well recognized.

Mr. Chairman,

Having studied the recent report of the International Law Commission as appears in document A/68/10, I would like to make some comments at this stage on Chapters IV and V: "subsequent agreements and subsequent practice in relation to the interpretation of treaties" and "immunity of State officials from foreign criminal jurisdiction".

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Chapter IV

"Subsequent agreements and subsequent practice in relation to the interpretation of treaties"

Mr. Chairman,

My delegation examined the first report presented by Mr. Georg Nolte, the Special Rapporteur on this subject. The report itself seems to reveal a kind of conceptual metamorphosis this topic has undergone over the years, from the time of its original inception in 2008 under the title of "Treaties over time" to the present date. Originally intended to study the subsequent practice of States parties to a treaty with a view to determining the criteria for discerning such practice, the project appears to be increasingly shifting toward interpretation of treaties. The draft conclusions presented by the Special Rapporteur indicate such tendency quite visibly. This could be described as "dynamic" or "evolutionary" interpretation of treaties, rather than "static" interpretation of treaties invoking the methods set out under Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties to determine the intention of the States parties at the time of the treaty's conclusion. This means the prevalence of "temporal" element. That said, my delegation doubts about the references made in certain draft conclusions to the interpretation of treaties by invoking some articles of the Vienna Convention.

Indeed, these articles and their commentaries are sufficiently clear in this regard in the sense that the Commission apparently fails to include the temporal element in interpretation of the provisions of a treaty. What this body should, in our opinion, do, though, is to discover the intention of the States parties which sometimes may be beyond or below the very clear provisions of a treaty. The question is not only to determine the factors that may have played a role in bringing some states to ignore or simply modify certain provisions of a treaty to which they are parties. This is called "subsequent practice" and should not be confused with "interpretation" of treaties.

Furthermore, the Commission is mandated to determine under what conditions this practice, initiated or exercised by some States parties, could be considered as having acquired the consent of the other parties to a treaty and thus making a provision of the treaty obsolete or changing it profoundly. We must recognize that we are no longer here in the context of interpretation of a treaty, an issue that arises when the meaning and scope of a given treaty are unclear and can be interpreted in different ways leading to different results.

Mr. Chairman,

Many references are made in the commentaries to the draft conclusions to non-state actors. It seems that there is a confusion about the role of these actors in the formation of customary international law through the influence they may exert on the practice of some States, a question that goes beyond the scope of this topic, i.e., the influence of these actors in the decision-making of some States to apply certain provisions of a treaty in a narrow or broad manner. A State may be directed to comply with the subsequent practice of non-State actors, including the "social practice", contrary to the clear provisions of a treaty to which they are parties. Such attitude, namely expecting that this subsequent practice initiated as such could secure the

agreement of other States parties to the treaty, is undoubtedly a violation of the treaty obligations of that State vis-à-vis other States parties.

One can hardly rule out that the "policy", not "practice", of some non-State actors may influence some States and lead them to apply the provisions of certain instruments in a different way other than envisaged under the text of the treaty. The key question that arises in such cases is that under what circumstances this "new practice", which is incompatible with the clear provisions of a treaty, could be imposed on other States Parties to this instrument.

To conclude, Mr. Chairman, my delegation's strong preference for the Commission is to stick to the original mandate and avoid stretching the topic beyond what was originally the intention of both the Commission and general membership.

Chapter V

"Immunity of State officials from foreign criminal jurisdiction"

Mr. Chairman,

My delegation appreciates considerable efforts made by Ms Concepcion E. Hernandez, Special Rapporteur, as well as important contributions made by her predecessor Mr. Kolodkin on this topic.

For one thing, the subject should not be considered solely in terms of codification. Rather, it is both legally appropriate and practically convenient to formulate provisions *de lege ferenda* taking due account of the requirements of international relations of States.

A key point that deserves to be entertained by the international community is the beneficiaries of immunity *ratione personae*. It is undisputed, and in fact well established, that under international law the Heads of State, Heads of Government and Ministers of Foreign Affairs are deemed to represent the State by the sole fact that they exercise their inherently designated functions, without being necessary for the relevant State to confer special powers to them. This immunity they enjoy is both justified and justifiable on the ground that they must be able to perform their functions free from any impediment when they are outside the territory of their respective States. Today, though, senior State officials other than those composing the so-called "troika" are regularly commissioned to represent their States in inter-State interactions and participate in international fora held outside their national territory.

This relatively new but burgeoning model of international diplomacy merits special attention by international community and deserves to be safeguarded under international law. The legal practice and jurisprudence of a growing number of States signify that immunity *ratione personae* are consistently granted to such State representatives while they are on an official mission in their territory. Even a larger number of States have, including during the debates held here in this Committee, opted for this broad approach by invoking, among others, the ICJ's jurisprudence in the "Arrest Warrant Case" which does not limit immunity to persons enjoying it traditionally.

It seems, therefore, that a trend is quite visibly emerging in favor of the extension of immunity to government officials, Attorney Generals/General Prosecutors and presidents of national parliaments when they perform functions similar to those of "troika" during their official missions abroad. It shall be noted, nevertheless, that the immunity granted to these categories of State representatives has temporal character meaning that such immunity is, by nature, associated with the duration of the exercise of the functions entrusted to them.

To sum up, my delegation is of the view that the Commission's exercise on the topic in question shall be guided by existing rules of international law, as also evidenced in the jurisprudence of the International Court of Justice and taking into account the inevitable needs of an effective and stable international relations.

I thank you.