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STATEMENT

BY

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IN THE

SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

UNDER THE AGENDA ITEMS

"SUBSEQUENT AGREEMENTS AND SUBSEQUENT PRACTICE IN RELATION TO THE INTERPRETATION OF TREATIES"; "IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION"; AND "CRIMES AGAINST HUMANITY"

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Mr Chairman

Thank you for affording us the opportunity to share some thoughts on the agenda item "Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties". First of all, please allow my delegation to congratulate the ILC, and more specifically Mr Georg Nolte, Special Rapporteur on the topic of Subsequent Agreements and Subsequent Practice, on the work done on this topic since its addition to the ILC's work programme in 2012.

The topic of "Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties" goes to the heart of the work that every international lawyer does – treaty interpretation. Especially in view of the rapid evolution and development that has been experienced in international law over the last century, the way in which we now interpret treaties that were entered into at a time when the international legal framework was vastly different, may very well give rise to legal uncertainty. The matter of the interpretation of treaties – the instruments that are the repositories of rights and obligations that States have *vis-à-vis* each other - also directly affect the conduct of relations between States. The topic also confirms that international law is a dynamic legal system and not merely a static interpretation of rules, for at the heart of this topic lies the so-called doctrine of intertemporal law.

Mr Chairman
The Commission should be commended for five draft conclusions adopted on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties. Nonetheless, we should not lose sight of the fact that the Vienna Convention on the Law of Treaties is the primary source of the rules of treaty interpretation. The work of the Commission on this topic should therefore serve to clarify and support the rules set out in the Vienna Convention, and should not seek to create new or competing rules. For this reason, draft conclusions are the more appropriate product for this topic.

Draft Conclusion 1 makes this approach apparent. It provides that the rules on treaty interpretation are set out by Article 31 and 32 of the Vienna Convention on the Law of Treaties and therefore confirms the general approach with respect to the interpretation of treaties, contained in these provisions of the Convention.

Of interest to my delegation, Draft Conclusion 1(4) distinguishes between subsequent agreements and subsequent practice as set out in Article 31 of the VCLT, and other subsequent practice as a supplementary means of interpretation under Article 32. This, of course, is a reflection of the fact that each separate treaty should be dealt with on its own merits, and should be interpreted as such. It does, however, raise the following question for my delegation:

A State may rely on a Model Treaty to negotiate all treaties of a specific type, for example, Bilateral Air Services Agreements on Double Taxation Treaties, and then conclude a number of such treaties based on this Model Treaty (co-called "first generation treaties"). The State may then decide to refine (not change) a specific provision in the Model Treaty based on certain difficulties it has had with that provision in the treaties that it has concluded so far. If the State then proceeds to conclude all further treaties of that specific type with the refined clause (co-called "second generation treaties"), what role, if any, would the refined clause play in

interpreting the first generation treaties? At least one of the parties' intentions with that clause have been clarified through subsequent agreements with other States in the second generation treaties, although the text of the first generation treaties remains unchanged.

With regard to Draft Conclusion 2, my delegation is in agreement with the Commission that subsequent agreements in relation to a specific treaty, and subsequent practice in relation to the treaty, is objective evidence with regard to the Parties' intention in concluding the treaty and should, all things being equal, be taken as a guide to determining the ordinary meaning of the terms of a treaty in their context and in the light of the treaty's object and purpose. Draft Conclusion 3 addresses the evolution of treaties over time. On the one hand, there is a clear "pacta sunt servanda" agreement to be made with regard to this draft conclusion, namely that the intention of the parties was to apply specific terms in the treaty as it was generally understood at the time of concluding the treaty and that if the parties' intention had changed, this changed intention would have clearly shown from subsequent agreements and subsequent practice in relation to the treaty. This does not mean, however, that party's can change the objective meaning of the treaty through subsequent practice. In other words, there should be a clear distinction made between amendment and interpretation in relation to treaties.

On the other hand, there are specific treaties and specific subject matters which, by its very nature, is capable of evolving over time. The clearest example of this would probably be human rights treaties, often referred to as "living instruments".

My delegation holds the opinion that whether treaty provisions are capable of an evolutive interpretation should be considered on a case by case basis. This appears to be in line with what the ILC had in mind when drafting this conclusion and my delegation would suggest that it be made clear in the commentary accompanying the draft conclusion.

With regard to the question posed by my delegation earlier in this Statement, the answer may well be that the clause in the first generation treaties was one capable of evolving over time, and that the refinement that took place in the second generation treaties should be considered as an indication of what the parties intended the clause to evolve towards, provided that the refined second generation treaty text is compatible with the first generation treaty text.

Mr Chairman
Draft Conclusion 4 goes to the heart of the issue, in defining what is subsequent agreements and subsequent practice. My delegation does not have any substantive difficulties with the definitions, but would suggest that, due to its importance, this conclusion be moved forward, possibly as a second conclusion following the statement of the general rules. My delegation notes the reference to non-state actors in Draft Conclusion 5. From the First Report of the Special Rapporteur released in March 2013, it appears that the non-state actors that the ILC intends to refer to in this context, are international organisations, NGOs and organisations such as the ICRC. My delegation accepts the role that these actors play in international law and recognises the value that the work and conduct of these actors could add on specific treaties. We also note that draft conclusion 5 clearly states that the conduct of these actors would not constitute subsequent practice in the sense intended by the Vienna

Convention on the Law of Treaties, but may have relevance in assessing the subsequent practice of parties to a treaty.

Having said all this, my delegation would call on the ILC to clarify in the commentary to this draft conclusion the value the conduct of these organisations will have in assessing the subsequent practice of the parties to a treaty. Care should be taken to ensure that the object and purpose of a treaty should be determined with reference to the actions of the Parties to the Treaty. We will reserve further comment until such time as we have had sight of the commentary to this draft conclusion.

Mr Chairman

On the whole, my delegation applauds the work done by the ILC in preparing these draft conclusions, and we look forward to the work that will follow on this topic.

Mr Chairman
Let me now turn to "Immunity of State officials from foreign criminal jurisdiction". It is my honour to deliver this statement on behalf of the delegation of South Africa on the topic of "Immunity of State officials from foreign criminal jurisdiction".

I would like to begin by congratulating Ms Concepción Escobar Hernández, the Special Rapporteur for this topic and expressing our appreciation for her second report.

The work of the Commission on the issue of immunity from foreign criminal jurisdiction is of great importance as it touches on fundamental principles of international law and has the potential to have far reaching implications for the stability of relations between states. The International Law Commission, being concerned with the progressive development of international law and its codification, has the potential to make a significant contribution towards greater legal certainty regarding existing principles of international law, as well as contribute to the incremental development of legal rules which, if done in a sound manner, can greatly enhance the friendly relations between states.

With respect to the question of immunity of state officials from foreign criminal jurisdiction, we need to strike a careful balance between the need to protect the well established norm of immunity of representatives of states from the jurisdiction of foreign states, while preventing impunity for serious crimes. On the one hand it is necessary to respect fundamental principles such as sovereign equality of states, immunity and territorial integrity, while on the other hand the recent developments in international law on the protection of human rights oblige us to prevent impunity, particularly for serious crimes of international concern. Such a delicate balance is only possible if the current state of the law is thoroughly investigated and understood. Finding the appropriate balance requires us to critically assess, and not just assume, the existence in law and state practice of immunity, the extent of such immunity as well as available exceptions if any.

Determining the existing basis of the immunity of state officials is a complex task that touches on an array of other issues in international law, including state responsibility and immunity, implied or express waiver of immunity and the dynamic area of international criminal law and the development of universal jurisdiction for certain grave international crimes.

Mr Chairman

As we observe a shift in the development of international law from absolute immunity towards more restrictive approach immunity and as we contribute to the development of the law in this area, it is important to ensure that we conduct our work in a careful, sober and responsible manner. While the fight against impunity is inextricably linked to our common aspiration to guarantee fundamental human rights and ensuring that justice is served, particularly for grave international crimes, such as genocide, war crimes and crimes against humanity, we should ensure that, when considering developing the rules that accord immunity to state officials, misuse of jurisdiction for political purposes is avoided.

The judgement of the International Court of Justice in the *Arrest Warrant* case provides a starting point for assessing the current state of the law on the question of immunity of state officials. In its judgment, the court reminded us that "immunities are not granted [to state officials] for their own benefit, but to ensure the effective performance of their functions on behalf of their respective States."[1]

Mr Chairman

Turning now to the Draft Articles adopted by the Commission, as well as the commentaries accompanying them, we are of the view that the dual approach of immunity *ratione personae* and immunity *ratione materiae* is an appropriate one. While we also understand the Commission's decision to begin with salient aspects of immunity *ratione personae,* we would point out that various aspects of immunity are intricately connected and that the Commission may wish to come back to certain aspects once a full picture is developed.

The first set of Draft Articles address a number of issues, namely the scope of the Draft Articles and various aspects pertaining to immunity *ratione personae.* Perhaps the most far reaching decision of the Commission pertains to holders of immunity *ratione personae.* We have noted the debate within the Commission and particularly the views expressed by some members of the Commission that Ministers for Foreign Affairs do not enjoy immunity *ratione personae.* While the report of the Special Rapporteur asserts that South Africa stated in our statement of last year that Ministers for Foreign Affairs do not enjoy immunity *ratione personae,* in fact we simply called for greater clarification without expressing a view one way or the other. On this subject, we had this to say:

"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."

While we have not expressed a view, and do not intend to do so now, we would still point out that on this crucial question, it is important that the Commission does an extensive search for state practice and that reliance on rhetoric and theory should not be sufficient. In assisting the Commission we would point to South Africa's own domestic legislation. Specific pieces of legislation relevant to this and other issues on immunity include the Diplomatic Immunities and Privileges Act of 2001 as well as

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[1] Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment of 14 February 2002, paragraph 53.

the Foreign States Immunities Act of 1981. Although both pieces of legislation address different categories of immunities, i.e. the immunities of a state and the immunities of diplomats, they are both not silent on the type of immunities in play. Assessing the implications of these Acts, as well as of legislation and court cases from other states relevant to the question of the holders of immunity *ratione personae* is necessary.

We look forward to further reports and more Draft Articles which, we hope, will uncover state practice and strike the kind of balance we spoke of earlier.

Mr Chairman

Let me now turn to last item "Crimes Against Humanity". My delegation wishes to thank the Committee on the Long-Term Programme of Work for the important work it does and in particular, expresses appreciation for its consideration of the paper by Mr Murphy on Crimes Against Humanity which has since been added on the Commission's Long-Term Programme of Work.

The rationale for the topic, as far as we could tell from the syllabus adopted, is that there is currently a gap in the existing legal framework. The proposal is therefore to prepare Draft Articles, which would later become a Convention on the Prevention and Punishment of Crimes Against Humanity in order to fill in the identified gaps.

The first gap identified in the identified syllabus is that there is no international treaty currently in existence which obliges States to criminalise and exert domestic jurisdiction over crimes against humanity. It is argued that while the Geneva Conventions and the 1948 Genocide Convention codify war crimes and genocide, nothing criminalises crimes against humanity.

In considering this purported gap, we would note that while the Rome Statute does not specifically provide that States should enact the necessary legislation to give effect to the Convention and to provide for penalties for persons guilty of an offence, as is provided in Article 5 of the Genocide Convention, it is implicit in the Rome Statute that States criminalise the most serious crimes in order for States Parties to give effect to their obligations under Rome Statute. Furthermore, the Preamble of the Rome Statute is clear that States Parties must, "ensure the effective prosecution of the crimes by taking measures at the national level and by enhancing international cooperation". It is true that in order for a State to properly implement the Rome Statute, the criminalization of the Rome Statute crimes is necessary and essential in order to give effect to the provisions of the Rome Statute, including the provision made for the arrest and surrender of individuals sought by the International Criminal Court. The cornerstone of the Rome Statute system is complementarity, which means that the domestic jurisdiction would take precedence and the International Criminal Court would only be utilized as a court of last resort. The entire system created by the Rome Statute is therefore under-pinned by the necessity for States themselves to be in a position to investigate and prosecute serious crimes, including crimes against humanity, which is already sufficiently and clearly defined and elaborated in the Rome Statute.

South Africa in its implementing legislation of the Rome Statute has criminalized crimes against humanity, as defined in Article 7 of the Rome Statute. Furthermore the provisions of the legislation do provide for limited extra-territorial application. We

have noted a number of other Parties to the Rome Statute who have similarly utilised the Rome Statute as a basis for the criminalization of the crimes. We therefore do not consider that the Rome Statute is deficient in creating the possibility for States to criminalize the offences and would rather view the real issue as either lack of political will or lack of capacity to draft implementing legislation which criminalizes serious crimes or perhaps just delays owing to administrative or bureaucratic reasons. A new Convention on crimes against humanity would, therefore, not necessarily remedy the concern of an insufficient number of States criminalizing crimes against humanity.

Furthermore, there is a significant amount of international interest and attention in what has become known as "Positive Complementarity" which is essentially the strengthening of domestic capability to investigate and prosecute serious crimes. South Africa is currently a Co-Focal Point for the issue of Complementarity and there are a number of projects and mechanisms in place which assist States in giving practical effect to the Rome Statute, including ensuring that domestic legislation is in place so that the system created by the Rome Statute which is based on complementarity actually works in practice.

In order to establish whether there is a need for the codification and progressive development of international law in this area, we would consider that the existence of the Rome Statute and an increasing number of States becoming party to the Rome Statute would not make it necessary for there to be a focus on a new parallel Convention relating to crimes against humanity as we believe that the Rome Statute has already a sufficient legal basis for the criminalization of crimes against humanity and this is adequate, including for my country South Africa, to have criminal jurisdiction over crimes against humanity.

The second gap identified in the syllabus which we would want to address is the proposal for a robust inter-State cooperation mechanism for crimes against humanity. It is true that the Rome Statute in Part 9 places obligations for the States Parties to cooperate with the court but there is no similar obligation for states to cooperate with each other. While the Genocide Convention does make provision for the granting of extradition in accordance with the laws and treaties, there is no specific provision compelling States to provide each other with mutual legal assistance or creating a cooperation regime for serious crimes. Consequently, the deficiency identified in the Rome Statute to compel cooperation among States, would relate to all the serious crimes and not be peculiar to crimes against humanity alone.

The International Criminal Court through its prosecutorial strategy, until this point only focused on this most responsible for the most serious crimes. In order to ensure that there is no impunity gaps and that all persons responsible for serious crimes are held accountable, more efforts do need to be placed on promoting domestic prosecutions through a system of cooperation between States and we would need to look further at the role of the ICC in this regard, in order to ensure that it delivers its mandate for justice and accountability in a sustainable way.
We would be cautious for the International Law Commission pursuing any topic which may undermine the Rome Statute system. States which have not ratified the Rome Statute may deem it sufficient to only ratify the proposed Convention on the prevention of crimes against humanity and remain outside of the Rome Statute

system. If there are gaps in the international criminal framework we should consider how to address these issues while promoting universality of the Rome Statute.

We invite the International Law Commission to re-consider whether this topic, in its current form would be a priority, bearing in mind that the gaps identified in the syllabus are not prevalent for all States, and in particular those States that are party to the Rome Statute. There may be other ways to address the issue of improving cooperation between States when it relates to serious crimes and we note that there are ongoing initiatives in this regard. We would therefore have some reservations in accepting that the topic in its current form should be placed onto the current agenda of the Commission.

I thank you for your attention.