I T A L Y

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SIXTH COMMITTEE

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REPORT OF THE INTERNATIONAL LAW COMMISSION

STATEMENT BY

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Mr. Chairman,

At the outset, please allow me to express my congratulations to you and to the other members of the Bureau on your election and on the admirable way in which you, Mr. Chairman, are conducting the work of this Committee.

I also wish to congratulate the Chairman of the International Law Commission Amb. Kirill Gevorgian on his election, and thank him for the presentations of this year's report.

Italy wishes to align itself with the statements delivered by the European Union on the topics: Expulsion of Aliens and Protection of persons in the event of disasters, and with those to be delivered on Identification of customary law and Provisional application of treaties.

Today, in my national capacity, I will address three main topics: "Subsequent agreements and subsequent practice in relation to the interpretation of treaties"; "Immunity of State officials from foreign criminal jurisdiction" and "*aut dedere aut judicare*". I will also briefly mention "Protection of the atmosphere".

Mr Chairman,

First of all I shall address the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". The Italian delegation wishes to support Draft conclusions 6, 8, 9 and 10, which it finds well suited to the general streamlined approach to the matter under consideration. As to Draft conclusion 7 on 'Possible effects of subsequent agreements and subsequent practice in interpretation', allow me to draw the attention of the Commission to two delicate issues raised by it and its Commentary: namely, to the notion of 'interpretation', on the one hand, and to the effects of subsequent practice as a means of treaty modification, on the other.

As to the former, the possible effects of subsequent agreements and subsequent practice on interpretation should be more clearly distinguished from their actual, or potential, impact in terms of amendment and/or modification. Although one subscribes to the view emphasized by the Commission that the distinction between 'interpretation' and 'modification' is undoubtedly a difficult one (paragraph 24 of commentary to Conclusion 7), further efforts should be made in order to clarify the difference between the two concepts. Otherwise, the change of title of the topic under discussion, shifting its focus from modification to interpretation, would be deprived of its *raison d'être*.

Having regard to the possible effects of subsequent practice on treaty modification in Draft conclusion 7, paragraph 3, we would propose deletion, or rephrasing of the sentence 'The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized'. Since the ILC decision is now to focus specifically on interpretation, it may not be appropriate, at least at this stage, to take a conclusive stand on the issue of treaty modification. Besides, as recognized by the Commision's Commentary, ambiguity between interpretation and modification persists. This is so also against the background of the authoritative case law of the International Court of Justice which 'prefers to accept broad interpretations which may stretch the ordinary meaning of the terms of the treaty' as admitted by the Commentary itself (paragraph 33 of the Commentary to Draft conclusion 7).

Mr Chairman,

I now turn to Chapter IX of the Report, dealing with the topic "Immunity of State officials from foreign criminal jurisdiction". Italy wishes to commend the Special Rapporteur, Professor Conception Escobar Hernandez, for her third report which included two draft Articles presented to the Commission. We also wish to reiterate the importance that we attach to a comprehensive and in-depth analysis of this topic, which touches upon several issues of critical relevance in today's State and judicial practice. At this stage, we intend to submit a number of comments mainly focused on the two articles provisionally adopted by the Commission.

The third report by Mrs, Escobar Hernandez deals especially with the subjective element of the notion of immunity ratione materiae. The general concept of a "State official" and the criteria to identify such persons for the purpose of immunity from foreign criminal jurisdiction are examined. Draft articles 2 (e) and 5 are the results of the discussion contained in the report.

Mr. Chairman,

Pursuant to draft article 2 (e) ""State official" means any individual who represents the State or who exercises State functions"". According to the relevant commentary, this definition is to be intended as common to both categories of persons who enjoy immunity ratione personae and immunity ratione materiae. However, whereas the persons who enjoy immunity ratione personae are then listed in the subsequent article 4 of the draft articles, the Commission did consider neither possible nor suitable to draw up an exhaustive or an indicative list of the positions of those individuals to whom immunity ratione materiae may apply. In this regard, we agree with the criteria indicated in draft article 2 (e) for identifying "State officials", which require a specific link between the State and the official, namely : representation of the State or the exercise of State functions. At the same time, the examples referred to in the commentary of categories of "State officials" that have appeared in national and international case-law regarding immunity of

jurisdiction is particularly helpful in providing guidance with regard to the existence of the said link.

In this latter respect, we note that "military officials of various rank" are included among the categories of persons widely acknowledged as falling within the notion of "State officials" for the purpose of immunity from foreign criminal jurisdiction. Military personnel while performing official duties exercise by definition State functions and, in this case, the necessary link between the State and the official is well established. This is in line with international rules on state responsibility (in particular draft articles 4 and 5 adopted by the ILC in 2001) according to which "the conduct of any State organ shall be considered an act of that State under international law". In our statement on last year's ILC report we already underlined the need for the Commission to deal at the appropriate time with the issue of immunity of military forces in all its different aspects. What we wish to reemphasize at this juncture is that, apart from the special regimes contained in the so-called SOFA Agreements, and without prejudice for criminal accountability for grave international crimes, the rule on functional immunity from foreign criminal jurisdiction of military personnel for official acts is to be considered crystallized in customary international law and thus generally binding.

Mr. Chairman,

We also agree with the content of draft article 5, according to which "State officials acting as such enjoy immunity ratione materiae from the exercise of foreign criminal jurisdiction". Whereas the expression "State officials" is to be understood in the sense expressed in draft article 2 (e), the phrase "acting as such" refers to the official nature of the acts that are considered in each case and to the functional nature of the immunity ratione materiae. Moreover, as it is duly underlined in the commentary, the text of draft article 5: a)- refers to immunity "from….. foreign criminal jurisdiction", leaving aside the area of competence of international or mixed criminal tribunals; and b)- specifies once again, by stating that only the "exercise" of such jurisdiction is prevented, that the immunity is procedural in nature and does not exempt the criminal responsibility of the person concerned from the substantive rules of criminal law that are applicable.

In conclusion, we wish to reiterate our appreciation for the high quality of the work of the Special Rapporteur and we look forward to further progress on the various aspects of this important topic.

Mr. Chairman,

I turn now to the topic "Obligation to Extradite or Prosecute (aut dedere aut judicare)". This year, the Commission adopted the final report and decided to conclude its consideration of this subject. We wish to express our deep appreciation to the Working Group and to its Chairman, Mr. Kittichaisaree, for having produced, in an expeditious manner, a comprehensive and thoughtful document that will greatly assist States in dealing with this matter.

The report elaborates on a number of important aspects. It emphasizes the role played by the obligation to extradite and prosecute, contained in numerous conventions, in combating impunity in respect of a wide range of serious crimes. It provides an articulate discussion of the different types of provisions in multilateral instruments which include the clause "aut dedere aut judicare". In this respect, it also highlights the distinction (suggested in the separate opinion of Judge Yusuf to the ICJ judgment of 2012 in Belgium v. Senegal) into two broad categories: clauses imposing an obligation to extradite, and in which prosecution becomes an obligation only after the refusal of extradition; and clauses imposing a duty to prosecute, with extradition being an option (or becoming an obligation if the State fails to prosecute). The report correctly concludes that when drafting treaties States can decide for themselves which formula best suites their objective in a particular circumstance.

Other points are discussed in the report, which appear to be of special interest in relation to present and future State practice. I may refer to the elements of the obligation to extradite or prosecute to be included in national legislations (paras. 17 to 20 of the report); to the so-called "third alternative", consisting in the surrendering of the suspect to a competent international criminal tribunal, such as the ICC (paras. 27 to 30); to the gaps in the existing conventional regimes, which relate essentially to crimes against humanity, war crimes other than grave breaches and war crimes in non-international armed conflicts (paras.31 to 36).

Against this background, I would like to conclude by praising again the work of the Commission, which concerns a crucial normative mechanism made available to the international community to avoid that those responsible for the most serious crimes may escape prosecution and punishment.

Mr Chairman,

Let me briefly address also Chapter VII on the Protection of the atmosphere. The Commission has engaged in discussion on the first Report of the Special Rapporteur, Professor Murase, whom we thank for his work on such an important issue. There still seem to be different approaches within the Commission on the topic and on its treatment. We believe that the understanding reached by the Commission last year should be considered sufficient for the work to proceed within those limits, conscious of the constraints deriving from negotiations in other fora and their dynamics. Clearly, this is a work in its initial phases and we would encourage the Commission to work on the basis of last year's understanding with a constructive spirit. We look forward to the discussion in the coming year.

Mr Chairman,

Since this is the only intervention of my delegation on the Report of the ILC, allow me to briefly touch upon three other issues: the topic protection of the environment in relation to armed conflicts, and on the future work of the Commission on the topics "Crimes against humanity" and "*jus cogens*".

As regards the protection of the environment in relation to armed conflicts, Italy continues to support the work undertaken by the Commission, and we are glad to note that some progress has been made on various aspects, in particular the scope and methodology of the exercise. We wish to thank the Special Rapporteur Mrs. Marie Jacobsson, for her preliminary report in which she provided an introductory overview of the so-called "peace-time obligations", namely to environmental rules and principles applicable to a potential armed conflict.

Mr. Chairman,

The debate on the preliminary report showed that while the majority of the Commission agreed with the temporal, three-phased approach adopted by the Special Rapporteur, some members were in favor of a thematic approach, that would not be based on a strict dividing line between temporal phases of the conflict. We also continue to support this latter view, having in mind that both the law of armed conflict and international environmental law consist of rules that are applicable before, during and after an armed conflict. In other words, the main objective for the ILC should be to identify State obligations under customary and conventional law with regard to the protection of the environment in relation to armed conflict, taking into account the vast body of legislation that may be applicable. The trends towards further development of the relevant discipline could also result from a comprehensive survey of State practice, however without implying any task to modify existing rules.

In this same vein, we do not see special reasons for limiting the substantive scope of the topic, as it was suggested by some members of the Commission in various areas. In particular, we are of the view that the concept of protection of the environment in situations of armed conflicts (both international and non-international) should include the protection of cultural property. Suffice it to mention the recent and ongoing examples of destruction of historic sites and illegal traffic of cultural objects in Syria and Iraq to underline how important this aspect has become for today's world legal order. Also, we believe that considerations of human rights should be part of the topic and, above all, the right to a safe and satisfactory environment should be duly considered in assessing State obligations in times of armed conflict.

As we stated last year, Italy believes that a sort of a handbook, summarizing the results of the work of the Commission, rather than a draft convention, should

be the outcome of this exercise. We look forward to witness steady progress in the ILC work of the next sessions, as indicated by the same Special Rapporteur.

Mr Chairman

On the topic "Crimes against Humanity" we salute the appointment of the Special Rapporteur Sean Murphy and look forward to the work of the Commission in this area. It is important to discuss this topic. However, it must be clear that Article 7 of the Rome Statute of the International Criminal Court is in no way under discussion. The focus of the work of the Commission should be on mechanisms to fill any jurisdictional gaps and on the implementation at the national level of international norms relating to this category of crimes. Moreover, in so doing the Commission should be mindful of initiatives focusing on fostering interstate judicial cooperation on ICC crimes.

Secondly, we agree that the issue of *jus cogens* is a subject matter that deserves deeper and careful analysis and we look forward to more elaboration on this topic, which admittedly has many complex facets.

Mr Chairman,

Finally, and in more general terms, we would like to recall an appeal this delegation has already made in the past. We would be more favourable on the ILC concentrating its work on fewer topics and possibly those that appear to be ready for bearing fruit of substantive progress in reasonable time and look forward to engage with the Commission more specifically on these ones.