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deal with the introductory Chapters I to III and Chapter XII, "Other decisions and conclusions of the Commission," as well as the first two substantive chapters of the 2013 report, namely Chapter IV concerning "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and Chapter V relating to the topic "Immunity of State officials from foreign criminal jurisdiction". The second statement will be devoted solely to "Reservations to treaties" in the 2011 report. In my third and final statement I will revert to the 2013 report and address the remaining Chapters VI to XI, dealing, respectively, with "Protection of persons in the event of disasters, "Formation and evidence of customary international law"; "Provisional application of treaties"; the "Protection of the environment in relation to armed conflicts"; "The Obligation to extradite or prosecute (*aut dedere aut judicare*)"; and "The Most-favoured-Nation clause".

Mr. Chairman,

Chapters I-III and XII: Introductory Chapters and Other decisions and conclusions of the Commission

The Commission's session this year was the second of the present quinquennium. As is evident from the summary contained in Chapter II, the Commission took steady steps towards building upon last year's work. It commenced substantive consideration of the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", following the appointment last year of a Special Rapporteur for the topic, and provisionally adopted draft conclusions on the topic. It also proceeded for the first time to adopt, provisionally, draft articles on the topic "Immunity of State officials from foreign criminal jurisdiction", as the Special Rapporteur in her second report built upon last year's preliminary report. The Commission continued to make marked progress on the "Protection of persons in the event of disasters" such that the completion, on first reading, of a set of draft articles on the topic is within the horizon. The Commission held a useful debate on the topic "Formation and evidence of customary international law", whose title has been changed to "Identification of

customary international law", as well as on the topic "Provisional application of treaties". The Commission, through its Working Group, continued to consider the issues related to the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", bearing in mind the judgment of the International Court of Justice in *Belgium v. Senegal*; a detailed report of the Working Group appears as annex A to the report. The Commission, in the framework of its Study Group, also continued to advance further in its work on the topic "The Most-Favoured-Nation Clause". The Commission also decided to include two new topics in its current programme of work, namely "Protection of the environment in relation to armed conflicts", appointing Ms. Marie G. Jacobsson as the Special Rapporteur for the topic, and already commencing an exchange of views thereon, and the "Protection of the Atmosphere", for which Mr. Shinya Murase was appointed Special Rapporteur. The inclusion of the latter topic was on the understanding that:

(a) Work on this topic will proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range transboundary air pollution. The topic will not deal with, but is also without prejudice to, questions such as liability of States and their nationals, the polluter-pays-principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights;

(b) The topic will also not deal with specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States. The project will not seek to "fill" the gaps in the treaty regimes;

(c) Questions relating to outer space, including its delimitation, are not part of the topic;

(d) The outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein.

As work continues on the Commission's programme of work, the task of identifying new topics remains an on-going exercise for the Working Group on the Long term programme of work. At the current session, the Commission included in its long-term programme of work the topic "Crimes against humanity

In the last forty-nine sessions, the work of the Commission has proceeded, in part, alongside the International Law Seminar. It is reflective of the Seminar's value that some members of the Commission and judges of the International Court of Justice have been its past participants. Its relevance and continued vitality depends on the sustained commitment of States who kindly make voluntary contributions. The Commission remains grateful for such acts of generosity and encourages more contributions. Next year, the Seminar will commemorate its fiftieth anniversary. Accordingly, the Commission, in cooperation with the Legal Liaison Office of the United Nations in Geneva, will organize an appropriate event, which would coincide with the annual visit of the President of the International Court of Justice to the Commission. Invitations will be issued once the date of the visit are known,

The Commission has emphasized in the past the work of the Codification Division, which serves as the Secretariat of the Commission, constitutes part and parcel of the working methods of the Commission. Its involvement in research projects on issues in the programme of work of the Commission remains invaluable. At the current session, the Secretariat prepared two memoranda on the topics "Provisional application of treaties" (A/CN.4/658) and "Formation and evidence of customary international law" (A/CN.4/659), for which the Commission is most appreciative.

Mr. Chairman,

I shall now move on to the substantive chapters of the report.

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

I will start first with Chapter IV of the report, which concerns the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". This year, the Commission had before it the first report of the Special Rapporteur , which contained four draft conclusions. The report was discussed in the

plenary of the Commission and the four draft conclusions proposed therein were referred to the Drafting Committee. The Drafting Co

as to the meaning of the treaty. The conclusion thus recognizes that the common will of the parties, where expressed through subsequent agreements and subsequent practice as defined in article 31, possesses a specific authority with respect to the identification of the meaning of the treaty, even after the conclusion of the treaty. The character of subsequent agreements and subsequent practice under article 31, paragraph 3 a) and (b) as "authentic means of interpretation" does not, however, imply that those means necessarily possess a conclusive, or legally binding, effect. As provided by article 31, paragraph 3, subsequent agreements and subsequent practice constitute only means of interpretation that shall "be taken into account" as part of the "single combined operation" of treaty interpretation.

Draft conclusion 3: Interpretation of treaty terms as capable of evolving over time

Draft conclusion 3 addresses the role which subsequent agreements and subsequent practice may play in the determination of whether or not the meaning of a term of a treaty is capable of evolving over time. The conclusion should not be read as taking any position regarding the appropriateness in general of a more contemporaneous or a more evolutive approach to treaty interpretation. Instead, the conclusion should be understood as indicating the need for some caution regarding the adoption of an evolutive approach. The conclusion emphasizes that subsequent agreements and subsequent practice, similar to other means of treaty interpretation, can support both a contemporaneous or evolutive interpretation, as appropriate. In other words, subsequent agreements and subsequent practice may provide useful indications to the interpreter for assessing, as part of the ordinary process of treaty interpretation, whether or not the meaning of a term is capable of evolving over time.

Draft conclusion 4: Definition of subsequent agreement and subsequent practice

Draft conclusion 4

Mr. Chairman,

scope of the draft articles. As is clear from paragraph 1, the draft articles apply to the immunity of State officials from foreign criminal jurisdiction. It is understood that they only address State officials, and their immunity, in relation to criminal jurisdiction arising from the horizontal relationship between one State and another. It seeks to make clear at the outset that the draft articles refer to the immunity of State officials, such immunity is in respect of criminal jurisdiction; and such jurisdiction is the jurisdiction of another State. Paragraph 2 of draft article 1 relates to regimes which are not prejudiced by the draft articles on account essentially that they are already covered by special rules of international law, some of which have been the subject of prior work by the Commission. It is cast as a saving clause. These are persons covered by diplomatic immunities; consular immunities; immunities in relation to special missions,; immunities concerning missions to international organizations, or delegations to organs of international organizations or to international conferences; immunities relating to international organizations; and other regimes, including those dealing with situations covered in particular by status of forces agreements and applicable customary international law. The particular rules on immunity contained in each special regime define the scope of the saving clause. As is also noted in the commentary, the use of "in particular" in the paragraph is intended to signal that the clause is not exclusive, as it is recognized that special rules in other areas may be found in practice, particularly in connection with the establishment in a State's territory of foreign institutions and centres for economic, technical, scientific and cultural cooperation, usually on the basis of specific headquarters agreements.

Before I turn to draft article 3, it may be noted that draft article 2 as presented by the Special Rapporteur in her second report deals with "Use of terms". The Drafting Committee of the Commission proceeded on the general understanding that the draft article on possible definitions was a work in progress and will be subject to further consideration in the future. For the time being, the draft article remains in the Drafting Committee and a rolling text will continue to be considered and developed.

Draft article 3: Persons enjoying immunity ratione personae

Draft article 3 deals with persons enjoying immunity *ratione personae*, this type of immunity is status-based. The draft article confines itself to identifying the persons to whom this type of immunity applies, namely Heads of State, Heads of Government and Ministers for Foreign Affairs. It does not deal with the substantive scope of such immunity. Immunity *ratione personae* for the Heads of State, Heads of Government and Ministers for Foreign Affairs. is justified based on representational and functional considerations. The enjoyment of immunity *ratione personae* by the Heads of State, Heads of Government and Ministers for Foreign Affairs is supported by State practice and jurisprudence. As will be recalled, in its judgment in the *Arrest Warrant* case, the International Court of Justice expressly stated that in international law it was firmly established that certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoyed immunities from jurisdiction in other States, both civil and criminal. This was reiterated by the Court in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*. The Commission is aware that the *Arrest Warrant* case has been the subject of critical commentary in relation to immunity *ratione personae* of the Minister for Foreign Affairs, as it was predicated on deductive reasoning rather than on an analysis of State practice, but it nevertheless considers that there are sufficient grounds in practice and in international law to conclude that the Head of State, Head of Government and Minister for Foreign Affairs enjoy immunity *ratione personae* from foreign criminal jurisdiction.

Whether or not other "high-ranking officials" should enjoy immunity *ratione personae* for purposes of the present draft articles was a matter of detailed discussion in the Commission. In the final analysis, it was decided that such other "high-ranking officials" should not enjoy immunity *ratione personae* for purposes of the present draft articles. This is without prejudice to the rules pertaining to immunity *ratione materiae*, which will be the subject of consideration at a later stage. It is also noted that when such

officials are on official visits, they enjoy immunity from foreign criminal jurisdiction based on the rules of international law relating to special missions.

Unlike draft article 1, draft article 3, uses the phrase “immunity from the exercise of” with respect to foreign criminal jurisdic

cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

Before I conclude my statement on this Chapter, I wish to draw your attention to Chapter III of the report. According to the work plan proposed by the Special Rapporteur, the Commission's consideration of the topic next year will be devoted to the consideration of aspects concerning immunity *ratione materiae*. Accordingly, the Commission requests the provision of information on the practice of State institutions, particularly judicial decisions, that elucidate the meaning given to the phrase "official acts" and "acts performed in an official capacity" in the context of the immunity of State officials from foreign criminal jurisdiction. It would be appreciated if such information were made available by 31 January 2014.

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