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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"; "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 admission 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 [illegible] uncertainty. [illegible] repositories of rights and obligations that States have *vis-à-vis* each other [illegible] 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 [illegible] draft conclusions [illegible] 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 [illegible] 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 D[illegible]ties, and then conclude a number of such treaties based on this Model Treaty (so-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 (so-called "second generation [illegible]"), what role, if any, would the refined clause play in

interpreting the first generation treaties? At least some 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 [illegible] namely that the interpretation of the parties to apply [illegible] 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 [illegible]

My delegation holds the opinion that whether treaty provisions are capable of an evolutive interpretation should be [illegible] This approach appears to be in line with what the ILC had in mind when drafting this conclusion and my delegation would [illegible] 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 is 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 revised second generation treaty text is compatible with the first [illegible]

Mr Chairman

Draft Conclusion 4 goes to the heart of the issue in defining what is meant by 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 has a question with regard to Draft Conclusion 5. From the Third 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 [illegible] 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 [illegible]

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

Having said this, my delegation would [illegible] clarity 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 [illegible]

Mr Chairman

On the whole, my delegation applauds the work done by the [illegible] 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 [illegible] 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, [illegible] 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 [illegible] 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, [illegible] international law on the protection of human rights obliges us to prevent [illegible] particularly for serious crimes of international concern. Such a delicate balance is only possible if the [illegible] understood. Finding the appropriate balance [illegible] critically assess and [illegible] just assume, [illegible] 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 [illegible] 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 [illegible] 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

have n[illegible] number
the Rome Statute as a basis for the criminalization of the
not consider that the Rome Statute is deficient in [illegible] 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 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. South
South Africa is currently a Co-Focal Point for the issue of Complementarity and
are a number of projects and mechanisms in place which assist States in
practical effect to the Rome Statute, including ensuring that domestic legislation is in
place so that the system created by the Rome Statute of
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 new parallel
Convention relating to crimes against humanity. 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 wish to address is the
proposal for a robust inter-State cooperation mechanism for crimes against
humanity. It is true that the Rome Statute 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 such other with mutual
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 is
only focused on this most responsible for the most serious crimes. In order to ensure
that there is no impunity gap that the most responsible for serious crimes
held accountable, more efforts do need to be pursued on
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 established thereby.
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 [illegible]
how to add[illegible]

We invite the [illegible]
current form [illegible]
syllabus are not prevalent for all States [illegible]
to the Rome [illegible]
cooperation between [illegible]
are engaging [illegible]
[illegible] should be taken
of the Commission.

I thank you for your [illegible]