Islamic Republic of
I R A N
Permanent Mission to the United Nations

Statement by

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On Agenda item 78:
Report of the International Law Commission
on the work of its sixty-sixth session

Chapters VII, VIII and IX:
Subsequent agreements and subsequent practice in relation to interpretation of treaties
Protection of the atmosphere
Immunity of state officials from foreign criminal jurisdiction

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In the name of God, the Compassionate the Merciful

Mr. Chairman,

On the work of the Commission as reflected in Chapter VII: Subsequent agreements and subsequent practice in relation to interpretation of treaties, I would like to congratulate the Special Rapporteur and other members of the commission for consideration of the second report.

The Islamic Republic of Iran continues to believe that the transformation of the subject since its inclusion in the work of the Commission risks touching upon issues distant from its original mandate. This is particularly evident in the focus of the work of the Special Rapporteur on interpretation of treaties rather than the topic of subsequent agreements and subsequent practice. A distinction should be made between interpretation of treaties and the act of determining what conduct constitutes subsequent practice, in the exercise of, or motivated by, the treaty while acquiring the consent of other State Parties.

On the consideration of the variety of forms that subsequent agreements and subsequent practice can take under article 31, paragraphs (a) and (b) of the Vienna Convention on the Law of Treaties, it seems that the Commission has accorded excessive weight to silence and inaction

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of a State Party to the Convention. It goes without saying that the element of "consent" is a prerequisite to acceptance of any kind and that silence on political grounds cannot be credited as conduct, giving rise to subsequent practice. Emphasis must be put, in this regard, on "certain circumstances" as also pointed out in the report; thus, we are of the view that subsequent practice should be established on a case by case basis.

We cannot join the Commission's conviction that both externally oriented conduct and internally oriented conduct contribute to subsequent practice under article 31, paragraph 31 (b) without the need to meet any particular formal criteria. Consideration of externally oriented conduct including official acts, statements and voting at the international level is understandable as these can clearly contribute to subsequent practice; but acts published at the internal level such as official legislative acts or judicial decisions need to be particularly linked to the application of the treaty to be merited as subsequent practice. Here again, the special circumstances surrounding a given conduct at the national level is more significant considering the different values accorded to treaties in different legal systems.

Also, as the International Court of Justice indicates in its recent judgment in the case concerning Whaling in the Antarctic (Australia vs. Japan), when decisions are made within international organizations by consensus or by an unanimous vote, they 'may' be relevant for the interpretation of the treaty concerned. Consensus, therefore, cannot *per se* define the limits and scope of the treaty and it is simply one of the many factors relevant in the interpretation of the provisions of the latter. Finally, political convenience often overshadows legal assumptions of States in joining consensus, a fact which can render overly prescriptive any serious assessment of unanimous decision-making within international organizations.

Mr. Chairman,

Turning to the topic of "Protection of the Atmosphere" we believe that this subject is tightly interwoven with political, technical and scientific considerations; this, however, does not mean that the importance of the legal issues surrounding the topic should be downgraded. In fact, the decision of the Sixth Committee to include the topic in the long-term program of work of the Commission is based on such an understanding.

The task assigned to the Special Rapporteur to that end is fraught with difficulties; therefore, the approach adopted should be applied with caution and ample flexibility to meet the anticipated purposes. This is justified by the mere fact that the Commission's task consists in "identifying custom, whether established or emerging, [...] and identifying, rather than filling, any gaps in the existing treaty regimes". It seems that the Commission is aware of the unique nature of the job. The question arises as to the end result of the task undertaken by the Special Rapporteur; while the task is not aimed at filling treaty gaps in international legal instruments applicable to State activities in the atmosphere, it seems that the concerns about the topic deserve more than merely pure research. Refraining from an approach not limited to a pure research requires a flexible approach concerning the 2013 understanding.

As regards draft guideline one, the use of technical terms seems inevitable as defining the boundaries of atmosphere is *per se* accompanied by technicalities; such a definition could be,

however, an initial delineation of a political convenience entity subject to legal definition, further complemented by technical commentaries.

With respect to draft guideline 2, we found the selection of the terms describing the scope of the work precise enough to include "alteration of the composition of the atmosphere" and "significant adverse effects", which can serve as a proper starting point. On subparagraph (b), we are of the view that having resort to basic principles of international environmental law is inevitable. Examining rights and obligations of States regarding the protection of atmosphere is impossible without expounding upon principles such as *sic utere*, polluter pays, cooperation or precautionary approach.

On the legal status of the atmosphere addressed in draft guideline 3 and in line with the unavoidability of resort to basic principles of international environmental law, including protection of atmosphere as a 'common concern of humankind', it is in the view of the Islamic Republic of Iran attached to the necessity of inter- and intra-generational equity and special role of the developed countries in the protection of the atmosphere.

The Commission will, without doubt, take into account the circumstances and particular requirements of developing countries specifically in line with their endeavors for sustainable development as recognized in instruments forming the foundation of international environmental law specially the 1992 Rio Declaration on Environment and Development.

Mr. Chairman,

On the topic of immunity of State officials from foreign criminal jurisdiction, we are of the view that it is deeply grounded in the rock of sovereign equality of States. Based on the principles of sovereign equality of states, it is premised that State and its rulers are one for the purposes of immunity. This specially holds true with regard to Heads of State, Heads of Government and Ministers for foreign affairs. In fact, their functions grant them representative status in international relations. In other words, international law attributes to them representational function which shall be taken into account in international relations. But in the dynamic international affairs, State officials other than the so-called troika are assuming greater importance than ever before, some of whom stand out due to their special political positions. The sensitive position they hold has raised concerns over their personal immunity on their missions abroad. Expansion of personal immunity towards State officials other than the troika would not be an incongruous exercise if we consider the numerous occasions in which they travel abroad as the representative of their respective States. This is the realities of the international relations that we are facing at this time and era. The issue could be considered *de lege ferenda* (with a view to the future law).

On the identifying of a link between the State official and the respective State, one might opt for "nationality" as the main element for the establishment of a genuine relationship. This appears to be a strong legal connection based on which the institution of immunity from foreign criminal jurisdiction can be triggered.

I thank you