Statement by Adv Andre Stemmet, Senior State Law Adviser, Department of International Relations and Cooperation of the Republic of South Africa, in the Sixth Committee of the General

The Obligation to Extradite or

Mr. Chairman,

Our delegation wishes to reiterate the importance of the principle of the obligation to extradite or prosecute and to point out that our delegation still holds the view that this principle is a key element in the quest to end impunity for international crimes such as genocide, crimes against humanity and war crimes in particular. My delegation believes this important principle requires a State having custody of a suspect to either extradite the person to a State having jurisdiction over the case or to instigate its own judicial proceedings.

We acknowledge the importance attached by states to this topic. This topic is perceived as a useful tool in resolving problems confronting states in implementing the obligation to extradite or prosecute and importantly, in bridging the gap between domestic and international systems in the international criminal justice system.

Mr. Chairman,

In so far as the Report of the Commission is concerned, my delegation wishes to comment as follows:

1. *Scope of obligation to extradite or prosecute*

My delegation supports the Commissionôs adopted approach that in order to reach a conclusion on the nature and scope of the obligation to extradite or prosecute, the relevant conventions should be analyzed on a case-by-case basis. Like the Commission, we also believe that there are some trends and common features in the more recent conventions containing the obligation to extradite or prosecute.

2. *Effective fulfilment of the obligation to extradite or prosecute undertaking necessary national measures*

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international law. As such, it is important that the work of the ILC on this topic serves to complement and supplement Articles 31 and 32 the Vienna Convention on the Law of Treaties, the latter dealing with supplementary means of interpretation. My delegation therefore strongly supports the decision of the ILC to prepare its work in the form of draft conclusions.

The supporting role of the Draft Conclusions to Articles 31 and 32 of the Vienna Convention on the Law of Treaties also appears from the Statement of the Chairman of the Drafting Committee, Mr. Gilberto VergneSaboia. In introducing Draft Conclusion 6, Mr. Saboia states that ñ*[l]ike other draft conclusions, [Draft Conclusion 6] is not overly prescriptive and should be seen more as a practice pointer to assist the interpreter in his or her endeavours*ò

It is my delegationôs hope that the ILC continues this project in this manner, acknowledging and promoting the primacy of the Vienna Convention on the Law of Treaties while contributing to the development of international law by identifying and codifying these ñpractice rulesò of treaty interpretation with regard to Subsequent Agreements and Subsequent Practice.

Mr Chairman,

Turning to the Draft Conclusions themselves, my delegation is generally satisfied with the conclusions and commentary. It is clear from the ILCôs work that subsequent agreements and subsequent practice must relate specifically to the treaty being interpreted, and therefore (for example) if a Stateôs treaty practice changes over time to become more and more

specific in subsequent treaties of the same type, such subsequent treaty practice would not have an impact on the interpretation of older treaties of that type that are not as specific. The challenge lies in determining whether the subsequent agreement or practice truly relates to the treaty that is being interpreted, but, as my delegation understands from the ILCôs report, this is very much a factual situation that has to be determined on a case-to-case basis.

With regard to Draft Conclusion 7, relating to the effect of subsequent agreements and subsequent practice, it is apparent from the conclusion and commentaries, that this too is highly dependent on the circumstances of each case.

A question that my delegation faced in our consideration of this Draft Conclusion is what would happen in a case where a Stateôs practice concerning a specific treaty changed over time? At what point would the Stateôs prior or initial practice no longer be relevant and would a new practice take precedence? The answer to this question might tie in with Draft Conclusion 8, on the weight to be given to subsequent agreements and subsequent practice as a means of interpretation. One could argue that the weight to be given to the new practice should depend on the criteria identified in Draft Conclusion 8 ï i.e. the new practice would only supersede the initial practice once it is clear and specific and repeated a sufficient number of times to establish it as the new practice. On the other hand, it is likely that the States involved would argue that the new practice immediately supersedes the initial practice, regardless of any other criteria.

Mr Chairman,

My delegation finds the inclusion of a specific Draft Conclusion about decisions adopted within the framework of a Conference of States Parties extremely interesting and informative. It does, however, raise the question whether the same principles would apply to meetings or large groups of States in other fora, for example within the context of the United Nations (such as the General Assembly, or the Human Rights Committee or the Economic and Social Council). It is clear that the Conference of States Parties refers to a Conference established within the context of a specific treaty, whereas the UN bodies referred to have a more general mandate.

treaty, my delegation would like to draw the attention of the ILC to the following examples:

Firstly, our delegation would like to draw the attention of the ILC to the North American Free Trade Agreement. While not strictly falling within the scope of either of the specific questions posed (it not relating to an international organization or a treaty body consisting of independent experts), it is an example of a treaty providing States with the opportunity to agree to an interpretation of some of the norms in the treaty, which interpretation would be binding before any subsequent arbitral tribunals.

Article 2001 of NAFTA establishes a Free Trade Commission, which is made up of õcabinet level representativesò of NAFTA Parties (the USA, Canada and Mexico). The FTC has the power to supervise the implementation of NAFTA, to oversee its further elaboration and to resolve disputes regarding its interpretation or application. Such an interpretation

Agreement (Article IX(2) of the Marrakesh Agreement) and the IMF Articles.

While the NAFTA example is clear in that there is no doubt as to the legally binding value of the interpretation of the FTC, the practice of having committees made up of political stakeholders who have the power to limit or expand the scope of protections or standards provided for in a treaty, may be of value to the ILC in its study of this topic.

Mr Chairman,

Another example that is more on point with regard to the ILCôs specific question, is the example of human rights bodies such as the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. Both these committees are made up of independent experts and both committees issue so-called ñGeneral Commentsò about the rights contained in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights respectively. These General Comments make valuable contributions to States to determine the extent of their obligations under these two treaties.

The International Labour Organisation is another international organization that makes use of experts in the form of the Committee of Experts on the Application of Conventions and Recommendations. This Committee, inter alia, examines the application of international labour standards and can make observations to and direct requests from States. Although not necessarily interpretations of any of the ILOôs conventions, it is reasonable

establishing immunity *ratione materiae* can be twofold: representation of the State or the exercise of State functions.

Mr Chairman,

We are sure that the members of the Commission must be very aware of the old Latin dictum *omnis definition periculosa est*: all definitions are fraught with danger, and, one can add, uncertainty. We welcome the elaboration in the commentary of the concepts ñrepresentation of the Stateò and ñexercise of State functions,ò but are of the view that there are still considerable toiling to be done in this vineyard, both within the Commission and the hallowed halls of academia.

We also welcome the Commissionôs reference to special regimes in international law with respect to immunity contained in Draft Article 1(2). Of course, this provision is intended to clarify the relationship between immunity *ratione personae* and *materiae* on the one hand, and these special regimes on the other. The relationship with special regimes, and the definition of State functions, lead to another question: can State officials rely on immunity *ratione personae* or *materiae* from the jurisdiction of foreign domestic courts for the crimes generally known as ñinternational crimesò?

It has been submitted that there are two related policies underlying the conferment of immunity *ratione materiae.* Firstly, it provides a substantive defence to ensure that State officials are not held liable for acts that are in essence those of the State, and for which State responsibility must arise.

Secondly, on a procedural level, the immunity of State officials from the jurisdiction of foreign courts prevents that the immunity of the State be circumvented by proceedings against those who act on behalf of the State.[i]

It is clear that the question of immunity from the jurisdiction of international criminal tribunals, whether established by treaty or a binding resolution of the Security Council, falls outside the scope of the draft articles.

But what is the situation with respect to the jurisdiction of a foreign domestic court if the crime allegedly committed by a State official is an international crime? Will immunity *ratione personae/materiae* still apply?
It has been argued that such immunity should not apply on the basis thereof that immunity is accorded only to sovereign acts, and international crimes, being violations of *ius cogens* norms of international law, cannot constitute sovereign acts. There is a rich academic debate about which acts constitute international crimes, the status of international crimes in customary international law as well as on the question of whether such acts can indeed be considered as governmental acts. But let us not pursue these debates now, but look at the more delineated situation of where international treaties provide for extraterritorial jurisdiction by domestic courts over the acts such treaties aim to criminalise.

Mr Chairman,

The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* provides in Article 5(2) for jurisdiction by a State

over acts of torture as defined in the Convention when the alleged offender is present in any territory under its jurisdiction.

The *Convention on the Prevention and Punishment of the Crime of Genocide* provides in Article IV that persons committing acts of genocide shall be punished, ñwhether they are constitutionally responsible rulers, public officials or private individualsò. Article V contains the obligation for State Parties to criminalise genocide in their domestic jurisdictions and Article VI provides that persons can be charged for genocide by a competent tribunal of the State in the territory of which the act was committed. These provisions, read together, allow for State officials to be charged with genocide extraterritorially, in the domestic courts of a State where acts of genocide were committed, and for the exclusion of any procedural defence based on immunity *ratione personae* or

Mr Chairman,

officials from foreign criminal jurisdiction, which may provide si c-]