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STATEMENT

BY

THE DELEGATION OF THE REPUBLIC OF INDIA

ON

AGENDA ITEM 81

**“REPORT OF THE INTERNATIONAL LAW COMMISSION
ON THE WORK OF
ITS SIXTY-FIFTH SESSION- Part-1”**

AT THE

**SIXTH COMMITTEE OF THE 68TH SESSION OF THE
UNITED NATIONS GENERAL ASSEMBLY**

NEW YORK

Mr. Chairman,

At the outset, I would like to thank Mr. Bernd H. Niehaus, Chairman of the sixty-fifth session of the International Law Commission, for the comprehensive introduction of the report of the session and for guiding the work of the Commission at this session. I also thank all the Members of the Commission for their valuable contribution to the work of the Commission.

Mr. Chairman,

The first cluster of topics includes two very important topics namely, "Subsequent agreements and subsequent practice in relation to the interpretation of treaties"; and "Immunity of State officials from foreign criminal jurisdiction".

We express our appreciation to the Special Rapporteur Mr. George Nolte for presentation of his first report on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". The Rapporteur has extensively analyzed articles 31 and 32 of the Vienna convention on the Law of Treaties and presented four draft conclusions for consideration of the Commission, which resulted in the provisional adoption of five draft conclusions.

Mr. Chairman,

We agree with the observation that the rules contained in articles 31 and 32 of the Vienna Convention reflect the customary international law. The subsequent practice is an authentic means of interpretation that can be taken into account while interpreting the terms used in and the provisions of the treaty, but cannot be taken as conclusive or legally binding unless the parties agree.

There is a clear distinction between a subsequent agreement and a subsequent practice. We agree with the Commission that "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" *ipso facto* has the effect of constituting an authentic interpretation of the treaty, whereas a "subsequent practice" only has this effect if it "shows the common understanding of the parties as to the meaning of the terms". The subsequent practice can only be taken into account as a means of interpretation, if it establishes an agreement between the parties. The basic determining factor whether or not a subsequent agreement or practice has acquired the status as a

means of interpretation of a treaty is the acceptance thereof by all parties to the treaty.

Similarly, the evolutive interpretation of the treaty could not be merely a matter of the presumption of the intent of parties, unless there is a clear acceptance by parties in the favour of such interpretation, particularly in regard to treaties that lay down the specific rights of each Party. Therefore we do feel that nature of the Treaty may be relevant for determining whether more or less weight should be given to certain means of interpretation.

Mr. Chairman,

Turning to the topic of “Immunity of State officials from foreign criminal jurisdiction”, we appreciate the efforts of the Special Rapporteur Ms. Concepcion Escobar Hernandez and congratulate her for the second report on this topic, wherein six draft articles were elaborated, which were redrafted in three draft articles by the Drafting Committee and consequently provisionally adopted by the Commission with commentary.

We agree with the understanding of the Commission reflected in paragraph 10 of the commentary to paragraph 2 of draft article 1 that the rules regulating the immunity from foreign criminal jurisdiction of persons connected with activities in specific fields of international relations are the treaty-based and custom-based “special rules”. We are of the view that making reference to the regimes under which the special rules fall, would provide greater clarity in understanding the nature of immunity.

Mr. Chairman,

Regarding the *immunity ratione personae*, It is universally accepted that the Heads of State, Heads of Government and the Foreign Ministers, the so called *Troika*, are entitled to the immunity from criminal jurisdiction of foreign States by virtue of their representational capacity for the State abroad and functional necessity.

We consider that, were the same criteria applied, a few other high ranking Officials especially, Ministers of Defence and Ministers of International Trade

could also be considered as the State Officials deserving immunity from the criminal jurisdiction of foreign States. We urge the Special Rapporteur to collect and analyze the State practice in this regard and come up with appropriate propositions.

Mr. Chairman,

We agree with the Drafting Committee that the definitions part of the topic could be considered towards the end of the work. Further, the work on the topic may take the form of draft articles to be presented to the UNGA and the States. This would fill the gap in the immunity law.

Mr. Chairman,

We welcome the decision of the Commission to include in its programme of work the topics of, "Protection of the environment in relation to armed conflict" and "Protection of atmosphere" and appointment of Ms. Marie G. Jacobsson and Mr. Shinya Murase, respectively, as the Special Rapporteurs for the topics. We consider these topics timely and look forward to the reports of the Special Rapporteurs.

We acknowledge the cautious approach of the Commission, with regard to the topic of "Protection of atmosphere", especially as to what issues should not be dealt with under this topic and agree that the outcome of the work on this topic should be the draft guidelines rather than developing a convention.

We also note the Commission's decision to include the topic "Crimes against humanity" in its long-term programme of work. We note with interest the written proposal made on the topic by the Commission Member, Mr. Sean D. Murphy. As a preliminary comment, we would like to stress for the need of in-depth study and thorough discussion on the need to undertake work on this topic, in view of the existing international instruments including the International Criminal Court that have already dealt with crimes against humanity.

Mr. Chairman,

Finally, in conclusion, we would like to congratulate the Commission and others involved for successfully holding the 49th Session of the International Law Seminar pursuant to the General Assembly resolution 67/92. India was one of the voluntary contributing countries to the United Nations Trust Fund for the

International Law Seminar. We agree with the Commission that these annual Seminars indeed made valuable contribution in allowing successive generations of young international lawyers pursuing academic or diplomatic career or in the civil services of their country. We look forward to the holding of 50th session of the International Law Seminar.

Thank You.