



Statement by
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On Agenda Item 81
Report of the International Law Commission
on the work of its sixty-third and sixty-fifth session
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Mr. Chairman,

At the outset, my Delegation would like to express our appreciation to the International Law Commission for its laudable achievements in continuing its important contribution to the promotion of the progressive development of international law and its codification. I would like to express my appreciation to the Chairman of the ILC, Mr. Bernd H. Niehaus, for his eloquent presentation on the work of the Commission during its 65th session.

I would also like to express my appreciation to the two Special Rapporteurs for their outstanding efforts and contribution: Mr. Georg Nolte, the Special Rapporteur on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation; and Ms. Concepción Escobar Hernandez, the Special Rapporteur on the Immunity of State Officials from Foreign Criminal Jurisdiction.

Allow me now to make a few comments and observations on several issues under consideration in the report.

Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation

Mr. Chairman,

Indonesia shares the view that the work on “Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation” is very important. Such work will provide guidelines and reference points for the never-ending work of treaty interpretation.

In its Report, the Commission has notably shown an important progress in the work on the topic by presenting four Conclusions, namely Conclusion 1 on “General rule and means of treaty interpretation”, Conclusion 2 on “Subsequent agreements and subsequent practice as authentic means of interpretation”, Conclusion 3 on “Interpretation of treaty terms as capable of evolving over time”, Conclusion 4 on “Definition of subsequent agreement and subsequent practice”, and Conclusion 5 on “Attribution of subsequent practice”.

It is not my intention to make comments on each of the conclusions. Suffice it for my Delegation at this stage to state that my Delegation basically agree to the general thrust of the provisions in the five conclusions.

On Conclusion 1, “General rule and means of treaty interpretation”, the Indonesian delegation wishes to emphasize the importance of Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (VCLT) which provide general rules of interpretation of treaties and supplement means of interpretation.

Furthermore, we support the notion that the interpretation of a treaty consists of a single combined operation and must not be taken as laying down a hierarchical order. Reviewing the decisions of various international courts and tribunals, there seems to be no established and consistent patterns of use of different means or elements of treaty interpretation in the decisions of such courts and tribunals.

My delegation welcomes Conclusion 3 on “Interpretation of treaty terms as capable of evolving over time”. We agree that subsequent agreement and subsequent practice as a means of treaty interpretation may assist in determining whether or not an evolutive interpretation of a particular term of a treaty is appropriate. However, we are of the view that evolutive interpretation must be treated with caution. International courts and tribunals recognize that a treaty

is concluded to serve the interest of the parties at the time of its conclusion as well as the interest of the parties that might be evolving over time.

In that sense, my delegation is of the view that there are three principles that must be adhered to in the evolutionary interpretation of treaties: (1) The need to preserve the stability of the treaty. Evolutive interpretation of the provisions of a treaty should not be too broad as to undermine or contradict the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose, as it would lead to the modification or amendment to the treaty under Article 39 of VCLT. (2) The need for express agreement of the parties in the case of subsequent agreements, and for tacit understanding in the case of subsequent practice. (3) As regards multilateral treaties, evolutive interpretation of the treaty must be grounded on the agreement or common understanding of all State Parties.

Pertaining to the “Attribution of subsequent practice”, the Indonesian delegation agrees to the commentary on paragraph 2 of Conclusion 5 that subsequent practice by non-state actors should be understood in a broad sense. It serves only as a contributing factor in the assessment by State Parties whether there is a subsequent practice among the State Parties concerned.

Immunity of State Officials from Foreign Criminal Jurisdiction

Mr. Chairman,

Turning to the issue of the Immunity of State Officials from Foreign Criminal Jurisdiction, we understand that there are certain issues that are sensitive in nature, in particular those concerning exception of immunity. We are of the view that before discussing exception, there is a need to address and understand the basic concept, principles and rules on immunity to which the exceptions might apply. We therefore look forward to further study and deliberation on this issue by the Commission.

The Indonesian delegation also understands that there is an on-going discussion under this august Committee on the scope and application of the principle of universal jurisdiction. Therefore this deliberation should not be done in a manner that might pre-judge the outcome of the discussion on the scope and application of the principle of universal jurisdiction.

On the issue of immunity *ratione personae*, my delegation is of the view that personal immunity is certainly one of the most important parts of the draft articles. As reflected in customary international law, only the Head of State, Head of Government and Foreign Minister enjoy such immunity *ratione personae*.

At this stage, we are of the view that extending immunity *ratione personae* to high ranking officials other than the Troika has no sufficient ground in practice and in international law. Furthermore, it would not be beneficial for the advancement of deliberations on this issue as the discussion would be diverted to the discussion to establish the criteria for determining the high-ranking officials other than the Troika that shall be entitled to enjoy immunity *ratione personae*, rather than focusing the discussion on more important and substantive matters in the draft articles. This will also depend on each country’s organizational structure and decisions at the national level as to the extent of specific power and authority being granted to individual high-ranking officials.

My delegation supports Article 4 paragraph 1 of the draft articles, in which provides immunity *ratione personae* would be enjoyed by Heads of State, Heads of Government and Ministers for Foreign Affairs only during their time in office. Therefore, any acts of persons falling under the category of Troika committed before assuming and after completing their term in office would be their respective personal responsibility and they will no longer be entitled to the enjoyment of protection under immunity *ratione personae*.

Mr. Chairman,

With regard to the inclusion of new topics on the program of work of the Commission, my Delegation welcomes the new topic “Protection of the environment in relation to armed conflicts”, with Ms. Mari G. Jacobsson as the Special Rapporteur for the topic. We also welcome the new topic “Protection of the atmosphere” with Mr. Shinya Murase as the Special Rapporteur for the topic, where the scope of work on the topic has been determined.

Before I conclude, Mr. Chairman, My Delegation wishes to reiterate the view that in order to contribute to the work on international law, it is imperative that we should continue to foster even stronger and more intensive engagement between the ILC and the 6th Committee.

I thank you.

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