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Statement by

Mr M. Koteswara Rao

Counsellor & Legal Adviser

on

Agenda Item 78

Report of the International Law Commission

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Permanent Mission of India to the United Nations
235 East 43rd Street, New York, NY 10017 • Tel: (212) 490-9660 • Fax: (212) 490-9656
E-Mail: india@un.int • indiaun@prodigy.net

Mr. Chairman

On the topic, **Identification of Customary International Law,** we would like to commend the Special Rapporteur Sir Michael Wood for his second Report on this topic which contains eleven draft conclusions.

The Report covered the central questions concerning the approach to the identification of rules of customary international law, in particular the two constituent elements (these elements - being a "general practice" and "accepted as law" – commonly referred to as "state practice" and "*opinio juris*" respectively). We generally agree with the approach adopted by the Special Rapporteur in his Report.

The draft has been divided into four parts, namely: introduction; two constituent elements; and a general practice accepted as law. We understand that the Special Rapporteur will focus in his next Report the relationship between treaty and custom, role of International Organizations and whether they may have an influence on custom as well as regional, special and bilateral customs and their relationship to CIL, if any.

While we welcome the Special Rapporteur's methodology in identifying the State practice, primarily the International Court of Justice (ICJ) decisions including their separate and dissenting opinions, however, excluding other international tribunals may sometimes be mismatched and minimalistic approach to the topic. Therefore, the Special Rapporteur may not leave other tribunals decisions for identifying the customary international law. It may be noted that in the *Arrest Warrant* case of the ICJ, the Court ruled that the Minister of Foreign Affairs enjoys *rationae persone* immunity for the reason that the Foreign Affairs Minister has plenary competence in international relations. This was questioned by many States

initially but later agreed by them. The response of the Court certainly helps us to understand the identification of Customary International Law.

Mr. Chairman,

It is well known that the customary international law (CIL) is a formal source of international law. The ICJ is mandated to apply CIL to settle the disputes brought before it by the States. Article 38 (1) (b) of the IC Statute describes CIL "as evidence of general practice accepted as law". CIL consists of "settled practice" of States and the belief that it is binding. Thus it has objective and subjective/mental elements (*opinio juris*).

While conventional law is both formal and material source of international law, CIL is not considered to be material source. Therefore, unlike the treaty provisions it is not so easy to find out what the applicable CIL is in a given case or situation; the amount of evidence that needs to be produced or examined and relative weight/importance to be given to the objective or subjective elements to identify or for formation of CIL are tough call. The challenge is compounded, if the persons who seek to apply CIL are domestic lawyers, judges, courts or arbitral tribunals, who may not be trained or well versed in international law. And it is not easy even for those who have training and experience in international law, to identify rules of CIL in all cases. There is no readily available guidance or methods by which evidence of the existence or process of formation of CIL rules could be appreciated and identified.

We would like to see that both elements the 'State practice' and '*opinio juris*' are given equal importance in the study. The practice of States from all regions should be taken into account. In this regard, the developing States, which do not publish digests of their practice should be encouraged and assisted to submit

their State practice including their statements at international and regional fora, and the case-law, etc.

At the same time, we urge the Commission to exercise utmost caution in taking into account the arguments and positions advanced by the States before international adjudicative bodies and, should not be detached from or devoid of the context in which they were made.

Chapter XI – Protection of the Environment in Relation to Armed Conflicts

Mr. Chairman,

Now turning to the topic, 'protection of the environment in relation to armed conflicts', I thank the Special Rapporteur Ms. Marie G. Jacobsson for her preliminary report. The Report provided an overview of the topic and examined the aspects relating to scope and methodology. It is our understanding that the Special Rapporteur will focus her work to clarify the rules and principles of international environmental law applicable in relation to armed conflict situations.

Armed conflicts have often devastating effects on the environment. They affect the ecosystems directly (degradation of the natural environment, pollutions due to different military activities, illegal exploitation of natural resources...) or indirectly (deforestation, massive exodus of refugees...). Field needs clarification and coherence.

Environmental laws have witnessed a spectacular development during the last two decades as the urgency of the need for the solution of the environmental problem has become more and more apparent, both at the national and international levels. It is the duty of each State not to allow its territory to be used in such a manner as to injure another and this principle was laid down in the *Trail*

Smelter Arbitration case. The Trail Smelter Tribunal stated that, under international law, no State has the right to use or permit the use of its territory in such a manner as to cause injury to the territory of another State.

We support the three-phased approach adopted by the Special Rapporteur for facilitating the work. While dealing the topic in a comprehensive manner, it will be relevant to see the existing international legal framework, including the areas of international humanitarian law, international human rights law, international refugee law, international environmental law, as they provide legal obligations that either directly or indirectly have a bearing on the protection of the environment in relation to armed conflict.

Chapter VI: The obligation to extradite or prosecute (*aut dedere aut judicare*)

Mr. Chairman

On Chapter VI of the ILC Report, we thank the Working Group of the ILC and its Chairman, Mr Kriangsak Kittichaisaree for accomplishment of the work on the topic, **the obligation to extradite or prosecute (*aut dedere aut judicare*)** during the 66th session of the ILC. We also thank the Commission and the Special Rapporteur, Mr, Zdzislaw Galicki for the work done on this topic since 57th session of the ILC.

We take note of the decision of the ILC for not adopting draft articles on the topic.

We are, however, of the view that instead of totally leaving the applicability of this principle to the suitability and convenience of States, the international community would have benefited, if some certainty and consistency is brought in the application of this principle based upon established international legal practice,

ensuring thereby that the serious crimes would be prosecuted and the impunity is fought against.

Chapter VIII: Protection of Atmosphere

Mr. Chairman,

We congratulate the Special Rapporteur Prof. Murase for submitting first report on the topic "Protection of the atmosphere". It is noted that the Commission considered the report without formally adopting it in this session.

The Special Rapporteur's report addressed inter alia the general objective of the project, providing the rationale for work on the topic, delineating its general scope, identifying the relevant basic concepts and offering perspectives and approaches to be taken with respect to the subject; and presented three draft guidelines concerning (a) the definition of the term "atmosphere; (b) the scope of the draft guidelines; and (c) the legal status of the atmosphere.

Mr. Chairman,

Considering the threats posed to the atmosphere, in particular, by air pollution, ozone depletion and climate change, the protection of the atmosphere is extremely important for humankind. In this context, there lies a general obligation for all the States to protect the atmosphere.

We note with interest that Prof. Murase dealt the topic by providing a historical sketch of atmosphere in international law through diverse sources and

subsequently through the relevant judicial decisions rendered by the ICJ in Nuclear Test Case, *Gabcikovo - Nagymaros* Case, *Pulp Mills* Case, etc.

The proposed three guidelines of the Special Rapporteur need an in depth analysis since they involve technical, scientific and legal issues. With regard to the concept of atmosphere as a common 'concern' of mankind, dealt in the Draft Guideline 3 - legal status of atmosphere, the Special Rapporteur may explore more legal reasoning and justification to propose such a concept for this topic, as the concept is highly debated and less accepted in other areas/fields of international law.

While formulating the future guidelines, the Special Rapporteur may ensure that the interests of developing countries are protected in case of any obligations and 'the principle of common but differentiated responsibility' need to be considered and respected. The Special Rapporteur may also focus more on cooperative mechanisms to address issues of common concern, and this aspect may be given priority.

Mr. Chairman,

At national level, the environmental protection rights and duties are enshrined in the Indian Constitution. Besides, India has an elaborate legal framework on environmental protection. Key national laws for the prevention and control of industrial and urban pollution, include the Environment (Protection) Act of 1986 (EPA); Public Liability Insurance Act of 1991; National Environmental Tribunal Act of 1995 and National Environmental Appellate Authority Act of 1997.

India also has a number of national policies governing environmental management. The National Environment Policy (NEP) of 2006 is the most recent pronouncement of the government's commitment to improving environmental conditions while promoting economic prosperity nationwide. The NEP's key objectives include conservation of critical environmental resources, intra-generational equity, livelihood security for poor, integration of environment in economic and social development, efficiency in environmental resource use, environmental governance, and enhancement of resources for environmental conservation. This policy promotes mainstreaming of environmental concerns into all development activities, advocating important environmental principles and identifying regulatory and substantive reforms.

Chapter IX - Immunity of State Officials from Foreign Criminal Jurisdiction

Mr. Chairman,

We appreciate the progress made thus far in ILC on the work of the topic, "Immunity of State Officials from Foreign Criminal Jurisdiction". We commend the Special Rapporteur, Ms. Concepcion Escobar Hernandez for her third report on the topic.

The Commission considered the draft article 2(e) on the definition of 'State official' and draft article 5, on the 'beneficiaries of immunity *ratione materiae'* and provisionally adopted these two draft articles.

Mr. Chairman,

Based on the analysis of the State practice made by the Special Rapporteur, the concept of 'State Official' is defined as 'any individual who represents the

State or who exercises State functions'. We agree with the understanding of the Commission as reflected in paragraph 4 of the commentary to draft article 2(e) that the term 'individual' has been used to indicate that the draft articles cover only natural persons.

The Commission noted that the individuals who may be termed as "State official" for the purposes of immunity *ratione materiae* must be identified on a case-by-case basis and the linkage is his/her representation of the State or exercise of State functions. Thus the emphasis was on the link between the individual and the State and the form of that link is irrelevant. It is our understanding that the Special Rapporteur may deal with specific situations while considering with the substantive scope of immunity (e.g., a private contractor represents the State - would this link be sufficient to cover this situation under the definition as a 'State official').

In the draft article 5, the phrase "acting as such" refers to the official nature of the acts of the officials and therefore, this would establish a distinction with immunity *ratione personae.* Although it is clear that the essence of immunity *ratione materiae* is the nature of the acts performed and not the status of the individual who performs them, however, we agree with the majority of the Commission members view that it would be useful to identify the persons in this category of immunity, since immunity from foreign criminal jurisdiction applies to these individuals.

Thank you Mr. Chairman.

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