6th Ctee
23rd meeting
Item 78

STATEMENT BY
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United Nations General Assembly
69th Session

Sixth Committee
Agenda item 78
Report of the International Law Commission
Part 2
Chapters VI, VII, VIII and IX

Chapter VI

Mr. Chairman,

Today, I wish to address two of the subjects covered by this year's report of the International Law Commission.

Chapter VII

(Subsequent agreements and subsequent practice in relation to the interpretation of treaties)

Mr. Chairman,

1. Concerning the topic of subsequent agreements and subsequent practice, we took note with great interest of the second report of the Special Rapporteur, Professor George Nolte and the provisional adoption of five draft conclusions with commentaries thereto by the Commission.
2. We appreciate the general and descriptive character of the draft conclusions and understand they should be seen more as a practice pointer to assist the interpreter in his or her endeavours than a prescriptive set of rules.
3. As with his previous report, we believe the commentaries to the draft conclusions provide a rich and valuable analysis of practice, including the case-law of international courts, identifying relevant questions to be

asked when identifying and weighing subsequent agreements and subsequent practice in relation to treaty interpretation.

4. With respect to the question whether subsequent practice may have the effect of amending or modifying a treaty, we appreciate the cautious approach of the Special Rapporteur. As was recognised, the dividing line between interpretation and amendment or modification of a treaty may in practice sometimes be difficult to draw. The process of amending or modifying treaties, through the operation of articles 39 to 41 of the Vienna Convention on the law of treaties, should indeed be clearly distinguished from the process of interpretation of treaties.

5. We intend to provide a more detailed reaction to this report in written form in the near future.

Mr. Chairman,

Chapter IX
(Immunity of State officials)

6. I would now like to turn to the topic of immunity of state officials from foreign criminal jurisdiction. First of all, let me extend my compliments to the Special Rapporteur, professor Concepción Escobar Hernández, for

her third report on the topic. Allow me to concentrate on the draft articles currently under consideration and their commentaries.

7. The Commission has now proposed a definition of the term 'State official'. As we also said last year and the year before, we prefer the term 'representative of the State acting in that capacity' to the term used by the Commission ('State official'). To some extent our concerns have been addressed by the definition in the present draft article 2(e), but the definition at present seems too open. First, it is too wide in that it separates individuals representing the state from individuals exercising State functions. This seems to include representatives of states who are not acting in that capacity at the critical moment. Although we agree with the Commission that the definition must encompass State representatives with representational rather than State functions in a narrow sense, this can also be addressed by the phrase 'representatives of the State acting in that capacity'. This would cover also those representatives of the State with a more representational function.

8. We are also concerned by the vagueness of the term 'State functions'. Although the commentaries provide an in depth explanation of the term, we are not convinced this will adequately prevent its abuse. Perhaps a

terminology that resembles, *mutatis mutandis*, the definition of state organ in the Articles on State Responsibility is to be preferred.

9. In addition, although members of official missions presumably fall within the scope of the present definition, the commentaries do not refer to members of special missions. My government would therefore suggest the Commission include a paragraph expressly referring to this group of representatives of states, with a reference to the customary status of the rule granting immunity to all members of official missions.

10. The second issue I would like to address is draft article 5 and its commentaries. Firstly, we agree that confusion with 'act performed in an official capacity' should be avoided, but perhaps the phrase 'acting as such' could be replaced by 'acting in that capacity' to reflect the official, as opposed to private, capacity of the individual concerned.

11. Secondly, in view of the non-absolute character of immunity *ratione materiae*, we appreciate the fact that a further draft article on the substantive scope of immunity *ratione materiae* will follow. However, it must be avoided that the present draft article be read as providing all State officials acting in that capacity with immunity in all circumstances. As we stated last year, international law has gradually come to recognize that immunity *ratione materiae* does not cover private acts committed

while in office, nor that it extends to international crimes in the course of duty. National courts may in fact decline to grant immunity to persons enjoying immunity *ratione materiae*, including former Heads of State, Heads of Government or Ministers of Foreign Affairs, when suspected of international crimes or of crimes committed in private capacity.

12. This is a development my Government supports, as it considers international crimes to fall inherently outside the scope of acts in official capacity and therefore not susceptible to the plea of immunity. The Draft Articles should allow the non-application of immunity in such situations.

Thank you Mr. Chairman