

STATEMENT BY DR. NEERU CHADHA, JOINT SECRETARY, 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 ON OCTOBER 30, 2013

Mr. Chairman,

At the outset, India joins others in thanking Mr. Bernd H. Niehaus, Chairman of the sixty-fifth session of the International Law Commission, for the comprehensive introduction of the report and for guiding the work of the Commission at this session. We also thank all the Members of the Commission for their valuable contribution to the work of the Commission.

Mr. Chairman,

Our focus will be on some issues on “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 Prof. 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.

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 a treaty cannot be merely a matter of the presumption of the intent of parties, particularly in regard to treaties that lay down specific rights for each Party and where such an interpretation can alter the core rights of a party. Therefore we are of the view 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”. The Commission has decided not to include an explicit reference to international conventions and instruments. However, 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 and scope of the 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 request the Special Rapporteur to consider and analyze the views of States in this regard and come up with appropriate propositions.

Mr. Chairman,

We welcome the decision of the Commission to include in its programme of work the topics “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 Mr. Sean D. Murphy. As a preliminary comment, we would like to stress on a thorough examination on the need to undertake work on this topic, in view of the existing international instruments including the Statute of the International Criminal Court that already includes crimes against humanity.

Mr. Chairman,

Finally, in conclusion, we would like to congratulate the Commission and others 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 contributors to the United Nations Trust Fund for the International Law Seminar. We agree with the Commission that these annual Seminars indeed make valuable contribution in allowing successive generations of young international lawyers to familiarise themselves with the work of the Commission and many international organizations based in Geneva. We also look forward to the holding of 50th anniversary of the International Law Seminar.

Thank You.

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