



# ITALY

## GENERAL ASSEMBLY

68<sup>th</sup> Session

Sixth Committee

18<sup>th</sup> meeting

Agenda item n. 81

REPORT OF THE INTERNATIONAL LAW COMMISSION

## STATEMENT BY

Min. Plenipotentiary Andrea TIRITICCO

DIRECTOR FOR LEGAL AFFAIRS  
MINISTRY OF FOREIGN AFFAIRS

(NEW YORK, OCTOBER 29<sup>th</sup>, 2013)

Check against delivery

Mr. Chairman,

At the outset, please allow me to express my congratulations to you and to the other members of the Bureau on your election and on the admirable way in which you, Mr. Chairman, are conducting the work of this Committee.

I also wish to thank the Chairman of the International Law Commission Amb. Mr. Bernd H. Niehaus of Costa Rica, for his presentation of this year's report, in particular with regard to the topics addressed by this intervention of the Italian delegation.

On the basis of the programme of work of this Committee, I will address today three main topics: Chapter IV of the ILC Report on "Subsequent agreements and subsequent practice in relation to the interpretation of treaties"; Chapter V on "Immunity of State officials from foreign criminal jurisdiction"; and Chapter XII entitled "Other decisions and conclusions of the Commission", in which I will place emphasis on the programme of work of the Commission.

Mr. Chairman,

I shall first address the topic of "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". My delegation wishes to express its appreciation for the choice adopted by the Commission to the effect of restricting the scope of its study of originally on the topic of "treaties over time" to that of "subsequent agreements and subsequent practice in relation to the interpretation of treaties". My delegation believes that his decision will enhance a more focused and effective treatment of one of the most critical issues pertaining to the law of treaties, hence, allowing for a smooth implementation of the programme of work outlined in 2012 and 2013 for the topic at issue. I should also like to congratulate Professor Georg Nolte for his first report on the topic.

The Italian delegation also welcomes the first five conclusions adopted by the ILC at its 2013 session which it finds well suited to the general streamlined approach to the matter. Overall, the conclusions adopted so far seem to meet the general aim to elaborate future drafting propositions with may have a sufficiently robust normative content, while preserving at the same time the flexibility inherent in the concept of subsequent practice. This approach appears to be appropriately evidenced by draft-**Conclusion 1** on the "General rule and means of treaty interpretation". The latter, as we see it, correctly reflects the double role that subsequent practice can play as an authentic means of interpretation under the general rule enshrined in article 31, paragraph 3, letters (a) and (b) of the Vienna Convention, on the one hand, and also as a supplementary means of interpretation under the rule of article 32 of the Vienna Convention, on the other. In this vein, paragraph 5 of the conclusion appropriately reminds that the interpretation of a treaty consists of a "single combined operation", as originally indicated by the ILC in its *travaux préparatoires* on arts. 31 and 32 of the Vienna Convention, and further endorsed in the 2006 Commission's Report on the Fragmentation of International Law.

Mr. Chairman,

My delegation also supports Draft-**Conclusion 2**, insofar as it emphasises the objective character of subsequent agreements and subsequent practice as evidence of the parties' common understanding as to the meaning of a treaty. In this respect, the qualification there provided of subsequent agreements and subsequent practice as authentic means of interpretation seems to provide an appropriate complement to the contents of article 31, paragraph 3, letters (a) and (b) of the Vienna Convention. As to Draft-**Conclusion 3**, it appears to appropriately reflect the approach to the matter authoritatively developed in the case law of the International Court of Justice, with special regard to its 2009 Judgment concerning the *Dispute Regarding Navigational and Related Rights*. The definitions of subsequent agreements and subsequent practice

provided for in Draft-**Conclusion 4** appear to be fine-tuned and consistent with the overall approach taken by the Commission on the topic in hand.

As to Draft-**Conclusion 5**, it addresses a delicate issue, namely that concerning the attribution of subsequent practice relevant for the purposes of treaty interpretation, or that of the determination of the scope of the subjects whose conduct is relevant thereto. Having regard to attribution, the ILC commentary rightly explains that the expression “conduct attributable” is borrowed from the language of the draft articles on State responsibility. However, one may wonder whether the principles on attribution under the law of international State responsibility are fully applicable also to the attribution of conduct relevant on the subject under consideration.

Having regard to the determination of the subjects whose conduct may be relevant as subsequent practice, it is not clear from the combination of the draft-text and the commentary before us whether the important issue of the “collective” conduct - or the so-called ‘institutional practice’, i.e., the conduct of collective organs of international organizations and its bearing its interpretation of the constitutive treaties of such organizations - falls within the scope of para. 1, or 2, of the said Draft-Conclusion. The ILC commentary seems to suggest that statements or conduct of actors, such as international organizations, can reflect of initiate relevant subsequent practice of the parties to a treaty, but should not be conflated with such practice. Consequently, such statements or conduct could not amount *per se* to ‘subsequent practice’ under arts. 31 and 32 of the Vienna Convention, but could only be relevant for the purposes of assessing the subsequent practice of the parties to a treaty. However, one may also consider the conclusions reached by the International Criminal Tribunal on the Former Yugoslavia in the *Tadic* case whereby the settled practice of the Security Council to consider internal armed conflicts as a threat to the peace manifests the “common understanding of the United Nations membership in general” and reflects the “subsequent practice of the membership of the United Nations at large”. It is the belief of my delegation that this issue deserves further consideration in the future work of the ILC.

Mr. Chairman,

Finally, allow me to draw the attention of the Commission on the possible interconnections between the topic at issue and that on “Formation and evidence of customary international law”. As subsequent practice for the purposes of treaty interpretation may become a relevant factor for identifying or prove the existence of customary rules.

Mr. Chairman,

Turning now to Chapter V, I wish to submit the comments of the Italian delegation on the topic: “Immunity of State officials from foreign criminal jurisdiction”.

We wish to thank the Special Rapporteur on this topic, Professor Conception Escobar Hernandez, for her second report, which included six draft articles presented to the Commission. The report deals with some key questions such as the scope of the topic and of the draft articles; the concepts of immunity and jurisdiction; the difference between immunity *ratione personae* and immunity *ratione materiae*; and the normative elements of the regime of immunity *ratione personae*. The text of three draft articles were provisionally adopted by the Commission at the last session. We wish to praise the in-depth analysis of the relevant issues and related case-law that characterizes the commentary on the three draft articles.

Mr. Chairman,

Italy’s specific comments at this stage relate mainly to article 1 of the text provisionally adopted by the Commission, dealing with the scope of the draft articles. Draft article 1 refers to a number of important concepts, in the context of the topic concerned. In particular, the commentary rightly points out that notions such as “State officials” that would enjoy immunity and “criminal jurisdiction” that would identify the scope of the immunity will deserve further consideration at a later stage. The same commentary underlines that the Commission decided to confine the scope of the draft articles to immunity from the foreign criminal jurisdiction, namely from the criminal jurisdiction “of another State”. Consequently, the current work on the

topic would not concern the proceedings before international criminal tribunals, while the subject of immunities before the so-called mixed or internationalized criminal tribunals would be addressed in due course.

This latter point, which indirectly refers to the role of international criminal justice, leads me to re-emphasize the importance, in today's international legal order, of judicial institutions such as the International Criminal Court, and the other International Criminal Tribunals for the prevention and punishment of grave international crimes. In this context, not only the question of immunities and related exceptions finds a special regulatory framework within international criminal proceedings, for example under article 27 of the Rome Statute of the ICC, as indicated by the International Court of Justice in its Judgement in the Arrest Warrant case. The substantial body of case-law which has emerged nowadays on the irrelevance of the official capacity of individuals accused of the most serious crimes appears to be evidence of a more general consolidation of this principle, which should be taken into account also in the exercise of national jurisdictions. Accordingly, the Commission, in its future work should consider the overall development of international practice on the impact of the nature of the crime on the issue of granting immunities.

We agree with the Commission on the point, which is clearly stated in the commentary to the draft articles, that immunity from foreign criminal jurisdiction is procedural in nature and does not exempt the criminal responsibility of the person concerned from the substantive rules of criminal law that are applicable. In other words, individual responsibility for breach of the substantive rules of criminal law remains intact, while a State cannot exercise jurisdiction over a given conduct due to the immunity enjoyed by an official of another State. The International Court of Justice has repeatedly affirmed this principle, both with regard to immunity of foreign officials and State immunity.

Paragraph 2 of draft article 1 deals with special regimes relating to immunity from foreign criminal jurisdiction. It states that the draft articles are "without prejudice" to the immunity from criminal jurisdiction enjoyed under special rules of international law. And it mentions, albeit not in an exhaustive manner, three categories of persons, namely a)-those connected with diplomatic missions, consular posts and special mission of a foreign State; b)-those engaged in activities connected with international organizations; and c)-the military forces of a state in a foreign country. Italy agrees with this approach of the Commission, which takes into account the existence of several systems of special rules which are applicable to certain categories of individuals: the Vienna Conventions on Diplomatic and Consular relations of 1961 and 1963 being the most relevant examples. However, we wish to submit one additional remark with respect to the regime of jurisdictional immunity of military forces.

The ILC report specifies that the third group of special rules include those regulating "the stationing of troops in the territory of a third State, even included in Status of Forces Agreements [...] in headquarters agreements or military cooperation accords envisaging the stationing of troops". We do not have objections with regard to this statement. Special regimes of this kind, especially contained in the so-called SOFA Agreements are well-known in international practice. However, it is our understanding that these regimes do not exhaust the cases in which the military forces of a State enjoy immunity from foreign criminal jurisdiction for acts performed in their official capacity.

We are confident that, at the appropriate time, the Commission will deal with the issue of immunity of military forces in a comprehensive manner which will take into account its different aspects.

Article 3 of the draft articles provisionally adopted by the Commission relates to the "persons enjoying immunity *ratione personae*". It states that "Heads of State, Heads of Government and Ministers of Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction". In support of this conclusion, the Commission refers to a number of judgements of the ICJ, in particular, in the *Arrest Warrant Case* of 2000, and in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters* of 2008, as well as to a conspicuous body of decisions of national courts. We do share the terms of the provision suggested by the ILC; this, however, with the caveat stemming from the previous general observation related to exceptions to immunity in case of commission of grave international crimes. We also do agree with the Commission on the point that there is *viceversa* insufficient practice, also at the level of international and national jurisprudence, for recognizing immunity *ratione personae* to other high-ranking

officials, different from the ones mentioned in draft article 3, without prejudice for the possible application of rules pertaining to immunity *ratione materiae*.

The scope of immunity *ratione personae* is then considered by draft article 4. In paras. 1 and 2, the Commission sets a time limit for the immunity, which is due to apply only during the term of office of Heads of State, heads of Government and Ministers of Foreign Affairs. Also immunity *ratione personae* covers all acts performed by the said officials “during or prior to their term of office”. In this latter respect, it is also our understanding that with regard to acts performed prior to the term of office, the immunity applies only if the criminal jurisdiction of a third State is to be exercised during the term of office of the officials concerned.

In conclusion, we wish to reiterate our appreciation for the work of the Special Rapporteur and of the Commission on the topic of immunity of state officials and we look forward to further progress in dealing with such an important issue.

Mr. Chairman,

My final remarks relate to the programme of work of the Commission and to the rule of law at the national and international levels. While we note that the work of the “Protection of the environment in relation to armed conflicts” has started under the guidance of the Special Rapporteur, Ms. Marie Jacobsson, we note that also the topic “Protection of the atmosphere” was included in the Commission’s programme of work and look forward to see the developments. We share the view, expressed in the ILC report, that the work on this latter topic should be limited within the defined limits and would not interfere with ongoing political negotiations or existing treaty regimes on the subject-matter concerned; and that its outcome should be that of draft guidelines rather than legally binding norms. Moreover, with regard to the inclusion of the topic “Crimes Against Humanity” in the long-term programme of work of the Commission, we look forward to the future discussions. In this respect, the paper prepared by Professor Sean Murphy and annexed to the report represents a solid basis for the future consideration of the topic and its various aspects.

Finally, Italy also greatly appreciates the relevance given in the ILC report to G.A. resolution 67/97 on the rule of law at the national and international levels, to the High Level declaration, and to the role that the Commission is called to play in promoting the rule of law. As the report rightly points out, implementing the rule of law constitutes the essence of the Commission, and of its work for the progressive development and codification of international law.

Thank you, Mr. Chairman