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**68<sup>th</sup> Session of the General Assembly of the United Nations  
Sixth Committee**

***Agenda item 79***

**International Law Commission  
Report on ILC's 65<sup>th</sup> Session**

Chapter I -III - Introductory parts

Chapter IV - Subsequent agreements and subsequent practice in relation to  
the interpretation of treaties

Chapter V - Immunity of State officials from foreign criminal jurisdiction

Chapter XII - Other decisions and conclusions of the Commission

**Speech delivered by Mrs. Alina Orosan  
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Mr. Chairman,

I would like to thank the Chair of the International Law Commission for the comprehensive presentation of the report on the last ILC session and to express the gratitude and appreciation of my delegation to all members of the International Law Commission for the work carried out during the Commission's 65th session.

As reflected in the report that is before us these days for debate, the Commission has continued its work on the topics already under its consideration for some sessions now, with significant progress on at least some of them, while it initiated, conscientiously, the consideration of other important topics for the development of international law, newly introduced on its agenda.

Romania's delegation welcomes the outcome of this work and takes this opportunity to present some of its views with regard to each of the topics. Our interventions will follow closely the cluster division and the organization of work proposed by the Chair.

We have taken note, as well, of the interest of the Commission in the comments of the States on some specific issues concerning four of the topics on its agenda as mentioned in Chapter III of the Report. We firmly intend to contribute to the research of the Commission on those particular topics by providing, in the delay specified, relevant Romanian practice and legislation, if any.

With regard to the items that make up the first cluster of our debate, my delegation underlines the following:

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

As regards the *Subsequent agreements and subsequent practice in relation to the interpretation of treaties*, Romania would like to express its gratitude to the Commission and to the Special Rapporteur, Mr. Georg Nolte, for the first report on this topic.

Romania welcomed in its last year intervention the more focused approach of the Commission on the subsequent agreements and, especially, on the subsequent practice of the States on the interpretation of treaties in contrast to the general approach on treaties over time.

The general character of the draft conclusions adopted so far by the Commission - some of them reprising relevant provisions of the 1969 *Vienna Convention on the Law of the Treaties* - establishes the framework of the analysis on the subject and anticipates the

issues to be further explored in this context. There is not much that my delegation could contribute at this stage to the topic other than making the following specific comments:

We share the view expressed in draft conclusion 1 that articles 31 and 32 of the *Vienna Convention on the Law of the Treaties* reflect customary international law and believe that the same conclusion applies for article 33.

We are also in agreement with the Commission with regard to the difference between state practice under article 31 and state practice under article 32 of the *Vienna Convention on the Law of the Treaties* and consider the former one as being more relevant to treaty interpretation than the latter one, which is a mere supplementary means of interpretation and not an authentic one.

This delegation is also mindful of the fact that the different means of interpretation of a treaty are to be applied by way of a single combined operation, without any predetermined hierarchical order. The fact that the evaluation of the interpreter places emphasis on a certain means of interpretation does not signify a departure from the provisions of the 1969 Vienna Convention and does not open the door to arbitrariness, but is a part of the complex process of interpretation that requires to take into account the circumstances of each specific case.

However, we would suggest placing differently paragraph 5 of conclusion 1, as we believe that it would be better situated right after paragraph 1 of the same conclusion taking into account its general character.

The Commission leaves open for debate whatever influence the "nature" of a treaty has on the weight to be given to certain means of interpretation. The view of this delegation is that, while the nature of a treaty could be in itself a relevant circumstance for the interpretation of the treaty, it can not be used per se to establish in abstract, as a general rule, the consideration to be given to various means of interpretation, as the situations that trigger the necessity of treaty interpretation cannot be anticipated in an exhaustive manner.

Regarding draft conclusion 3, we consider justified the arguments put forward by the Commission to maintain a balanced approach in between the "contemporaneous" interpretation and the "evolutionary" interpretation of the treaties and we find appropriate the language in which this approach is expressed. We consider that either of the approaches is relevant for treaty interpretation depending on the circumstances of the situation that triggers the necessity of treaty interpretation.

We look further to considering the future more specific conclusions and commentaries of the Commission on this topic.

*Immunity of State officials from foreign criminal jurisdiction*

My delegation has examined with great interest the six draft articles included in the second report of the Special Rapporteur and the three provisionally adopted draft articles on the *immunity of State officials from foreign criminal jurisdiction*, and I would like to commend Ms. Concepción Escobar Hernández for her outstanding work that translates into a significant progress in the consideration of this specific topic that has been on the agenda of the Commission for 5 years now.

I will approach the three provisionally adopted articles altogether and make several observations that I hope will be useful in the Commission's work on this issue.

We strongly believe that the use of the term "officials" should be carefully analyzed, and not only because of its different meanings or translations into various languages, but also because of its very wide scope within the national systems. Given that the Commission has limited the scope of the draft articles to the immunity *ratione personae* from foreign criminal jurisdiction of the Heads of States, Heads of Government and Ministers of Foreign Affairs, a limitation with which we express our agreement, it could be useful, for the sake of clarity and un-ambiguity to reconsider even the title of the draft articles to reflect that they concern the immunity both *ratione personae* and *ratione materiae* of a very limited number of State officials. This suggestion is of course without prejudice to the considerations that are to be given to the immunity *ratione materiae* from foreign criminal jurisdiction, which could widen the scope of application of the draft articles. It is however this delegation's view that the acts of other officials of a State fall within the "without prejudice clause" of draft article 1 para. 2.

Similarly, since the "foreign" criminal jurisdiction could be understood to mean any other jurisdiction but the jurisdiction of the State concerned, and this any other jurisdiction could include as well the jurisdiction of international courts and tribunals, which is, as a matter of fact, excluded from the scope of this topic, we would find merits in using all over the text of the draft articles, instead of "foreign criminal jurisdiction", "the criminal jurisdiction of another State" as mentioned in draft article 1 para.1.

We believe, at the same time, that although the Commission considers that the conditions under which a person acquires the status of Head of State, Head of Government or Minister of Foreign Affairs are irrelevant for the purposes of the draft articles, a discussion should nevertheless take place within the Commission on these conditions, for example in

the case of extraordinary events leading to the replacement, permanent or temporary, of one of these officials.

Finally, in relation to Article 4, we note that the effect of using the word "only" in paragraph 1 is that the current text does not emphasize the temporal scope of immunity, although it implicitly includes it, but the fact that, as the International Court of Justice showed in the *Arrest Warrant case*, a person who is no longer Head of State, Head of Government or Minister for Foreign Affairs does no longer benefit of the procedural stay of exercise of the criminal jurisdiction of another State, attached to the immunity *ratione personae*.

Generally we consider the work so far of the Commission for this specific topic highly accurate and reflecting the status of the matter under international law and international and national practice. We look forward to the future work of the Commission on this topic especially from the point of view of the limitations to the immunity *ratione personae* of the State officials given the scope of application of the international criminal law, especially as concerns the commission of serious crimes of international concern, such as crimes against humanity, genocide, war crimes. From this point of view we would also find merits in the consideration of whether the "exercise of the criminal jurisdiction" by a State over the officials of another State includes the arrest of those officials for the purpose of referral to an international criminal court on the basis of the duty of that State to cooperate with that court.

#### Future programme of work

We find interesting and welcoming the decision of the Commission to include in its programme of work the topic *Protection of the atmosphere* and we are very interested to see how the Special Report intends to approach this matter giving consideration as well to the restrictions qualifying the terms of reference for his reports.

We very much appreciate the work of the Commission on the protection of the environment related issues and we encourage it to include more matters pertaining to the protection of environment in its programme of work.

Similarly, we appreciate the undertaking of the ILC to include in its programme of work the consideration of the issue of the crimes against humanity. However, more consideration is needed on the proposed outcome of this topic being included in the ILC's programme of work in view of other initiatives related to this matter.

Thank you.