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on the Work of its 66th Session

Cluster II: The obligation to extradite or prosecute (Chapter VI), Subsequent agreements and subsequent practice in relation to the interpretation of treaties (Chapter VII), Protection of the atmosphere (Chapter VIII), Immunity of state officials from foreign criminal jurisdiction (Chapter IX)

Statement by

Ambassador Helmut Tichy

New York, 29 October 2014

Mr. Chairman,

Austria takes note of the work of the Working Group regarding the topic **"The obligation to extradite or prosecute (aut dedere aut iudicare)"** and commends the Special Rapporteur Mr. Kriangsak Kittichaisaree and the Working Group for the final report. It provides a valuable presentation of the full scope of this topic.

Austria has consistently stated that there is no duty to extradite or prosecute under customary international law and that such an obligation results only from specific treaty provisions. This situation makes it also difficult to establish a common legal regime for this topic. A report such as the one now before us seems to be the only way to deal with this matter. As indicated already in our previous statements, we do not object to the conclusion of this topic.

As to the substance of the report, I would only like to refer to the observation of the Commission in paragraph 14 of the report concerning the existence of a gap in the present international conventional regimes regarding most crimes against humanity. This issue is certainly a matter that should be addressed in the framework of the topic of crimes against humanity, a matter to which we have referred to in the discussion under Cluster I**.**

Mr. Chairman,

The Austrian delegation congratulates the Special Rapporteur, Professor Georg Nolte, on the advancement of the Commission's work on **"Subsequent agreements and subsequent practice in relation to the interpretation of treaties"** and the formulation of a further set of draft conclusions with commentary.

My delegation shares the view expressed in the first sentence of draft conclusion 7 paragraph 3 that the parties to a treaty are presumed not to amend or modify a treaty by subsequent agreement or practice. Rather, the presumed intention of the parties is the interpretation of treaty provisions. This presumption aptly describes faithfulness to treaty obligations and the principle of pacta sunt servanda.

The statement contained in the second sentence of draft conclusion 7 paragraph 3 that "the possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized" raises some questions. One may strictly adhere to this statement on the basis of the proposed definition of "subsequent practice" in draft conclusion 4 paragraph 2, which is only regarded as "an authentic means of interpretation". In so far as "subsequent practice" is defined as an act of interpretation, it will not extend to amendment or modification.

However, as indicated by the discussions within the Commission, this conclusion leads to the more general issue whether a subsequent practice of treaty parties may modify a treaty. In the view of the Austrian delegation, this effect may not be generally excluded. Notwithstanding the fact that during the 1969 Vienna Codification Conference on the law of treaties former draft article 38 on the modification of treaties by subsequent practice was not adopted, it seems clear that a "subsequent practice" establishing an agreement to modify a treaty should be regarded as a treaty modification and not merely as an interpretation exercise.

Also where no such intention of the parties can be established, general international law does not exclude that states parties to a treaty may create customary international law through their subsequent practice, if accompanied by opinio iuris, and thereby modify the rights and obligations contained in the treaty. This consequence is even reinforced by the fact that

international law does not know any hierarchy between the sources of international law. Thus, the change of international law based on custom by treaty rules and vice versa is a generally accepted phenomenon which the formulation of the second sentence of draft conclusion 7 paragraph 3 should not be understood to exclude.

The Austrian delegation appreciates the formulation in draft conclusion 9 paragraph 1 that an agreement under article 31 paragraph 3 subparagraph (a) and (b) of the Vienna Convention on the Law of Treaties "need not be legally binding". We note that apparently the question was not uncontroversial in the deliberations of the International Law Commission. As already stated in our previous comments and in particular last year's statement in the Sixth Committee we are convinced that such an "agreement" only has to be an "understanding" indeed and need not be a treaty in the sense of the Vienna Convention. Also informal agreements and non-binding arrangements may amount to relevant "subsequent agreements."

With regard to the first sentence of draft conclusion 9 paragraph 2, Austria wishes to emphasize that the subsequent practice of fewer than all parties to a treaty can only serve as a means of interpretation under very restrictive conditions. This applies in particular to the silence on the part of one or more parties referred to in the second sentence of this draft conclusion.

Mr. Chairman,

We commend the Special Rapporteur Professor Shinya Murase for the elaboration of the first report on the topic of the **"protection of the atmosphere".** The report takes stock of the already existing legal regimes concerning this matter, which prove that States are aware of the particular problems of pollution of the atmosphere. Nevertheless, these different regimes pursue only a piecemeal approach insofar as they only regulate individual issues such as, for instance, industrial accidents, the ozone layer or persistent organic pollutants, to name only a few. More general conventions such as the 1979 Convention on Long-range Transboundary Air Pollution exclude the topic of responsibility for breaches of its provisions, whereas the Kyoto Protocol raises problems regarding its implementation.

Although an all-encompassing regime for the protection of the atmosphere, of either hard or soft law, would certainly be desirable in order to avoid a fragmented approach, it seems that at present states would be reluctant to accept such a regime.

In such a situation, a report on the various legal options to improve the status of the atmosphere could undoubtedly be an important contribution. The most recent studies illustrate convincingly that urgent and concerted efforts are needed in order to save the atmosphere. It would thus seem very useful to identify the rights and obligations incumbent upon states which can be derived from various existing legal principles and rules applicable to the protection of the atmosphere.

As to the individual draft guidelines, my delegation wonders why draft guideline 1 on the use of terms restricts the definition of the atmosphere to the troposphere and the stratosphere, but excludes the mesosphere and thermosphere which also form part of the atmosphere. Neither the Long-range Transboundary Air Pollution Convention nor the Framework Convention on Climate Change limit their scope of application in such a way.

The text of draft guideline 2 subparagraph b, according to which the present draft guidelines refer to "the basic principles relating to the protection of the atmosphere", raises the question of its relationship to the understanding of the Commission regarding the scope of

the guidelines. The 2013 understanding explicitly stated inter alia that "the topic will not deal with, but is also without prejudice to, questions such as: liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights." In our view, this demonstrates once more that the understanding of 2013 might be too narrow to permit any meaningful work on this matter.

As to draft guideline 3 on the legal status of the atmosphere, it is questionable whether the legal status can be defined before the substance of the rights and obligations is determined. The qualification of the atmosphere as a natural resource, whose protection is a common concern of humankind, still leaves open, which particular obligations can be derived therefrom. It might seem advisable to embark first on the substance of this matter and then to find the right definition of its legal status.

Mr. Chairman,

Regarding the subject of "**Immunity of state officials from foreign criminal jurisdiction"**, my delegation commends the Special Rapporteur, Concepción Escobar-Hernández, for the most valuable third report.

The definition of "State official" in draft article 2 subparagraph (e), as adopted by the Commission, reveals the complexities of this term and needs further explanations. For instance, the term "State functions" in the definition lacks a clear definition itself. In particular, the commentary leaves open whether the scope of "State functions" is only determined by the internal law of the State, as in article 4 of the Articles on the responsibility of States for internationally wrongful acts of the state, or relies on an internationally agreed definition. Moreover it is unclear whether there is a distinction between "governmental authority", as used in article 5 of the Articles on state responsibility, and the expression "State functions" used in the present draft article 2.

Accordingly, it must be asked whether, for instance, personnel which is contractually mandated by a state to exercise certain security functions would fall under this definition. In this respect, it would be useful to study the relations between the Articles on State responsibility and the present topic in order to clarify how far acts that give rise to state responsibility would fall under the immunity *ratione materiae*.

Draft article 5 on persons enjoying immunity *ratione materiae* also raises certain questions: There is no definition of the expression "acting as such". For instance, it is unclear whether persons acting in excess of authority (ultra vires) or in contravention of instructions should also enjoy immunity. As to the term "from the exercise of foreign criminal jurisdiction" Austria has stated already last year that this expression needs further clarification. In particular, it should be clarified that this terms also includes the criminal jurisdiction exercised by administrative authorities. Furthermore, measures to ascertain the facts of a case are not precluded by immunity, since the procedural bar of immunity is only relevant once formal proceedings have been instituted against a person. Further clarifications are also needed concerning so-called hybrid courts and acts of judicial authorities on the basis of an arrest warrant issued by an international criminal tribunal.

My delegation hopes that these issues will be addressed in the further work of the Commission on this topic.

Thank you, Mr. Chairman.