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(translation)

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At the 69th Session of the UN General Assembly

On Agenda Item 78

**Report of the 66th Session of the International Law Commission
(Part 2)**

New York, 29 October–3 November 2014

Mr. Chairman,

I would like to present China's views on certain topics considered by the International Law Commission.

1. On "the obligation to extradite or prosecute"

China appreciates the contribution of the Chairman of the Working Group on the obligation to extradite or prosecute, Mr. Kittichaisaree, and the ex-Special Rapporteur, Mr. Galicki.

The Final Report on this topic clearly detailed various types of obligation to extradite or prosecute and their specific contents. The result of this study demonstrates that this obligation applies to a great variety of crimes via widely different corresponding operational mechanisms. As such, its scope of application should be based on the provisions of specific treaties concerned. Therefore, the obligation to extradite or prosecute is a treaty-based obligation. There is no general practice or *opinio juris* to prove that it has become a rule of customary international law.

China has taken note of the proposition in the Final Report that there is no definitive link between the obligation to extradite or prosecute and universal jurisdiction. We agree with this conclusion, and believe that the two are different and should not be mixed up.

2. On "immunity of State officials from foreign criminal jurisdiction"

The 66th Session of the Commission considered the third report of the Special Rapporteur, Ms. Hernández, and adopted two draft articles. The Chinese delegation appreciates the results achieved by the Commission and Ms. Hernández.

In recent years, there occurred time and again cases of abusing criminal prosecution against foreign state officials in disregard of their immunity from criminal jurisdiction. These occurrences hamper normal international exchanges and impair the stability of international relations. In order to maintain the rule of law at the international level and promote stable interstate relations, it is indeed necessary for the international community to pay attention to this topic. We should

study it carefully and codify relevant rules of international law, rather than rush to develop new rules.

Draft article 2, para (e) adopted by the Commission defines “State official” as “any individual who represents the State or who exercises State functions”. On the whole, China believes it is a viable definition since it covers both the representative and functional characteristic of such officials. It must be emphasized that the representation by an official of a state or his exercise of state functions should be interpreted in a broad sense and on a case by case basis in accordance with the constitutional system, laws and regulations and the practical situation of his state, instead of being determined subjectively and arbitrarily by the state where the court is located.

The Chinese delegation would like to take this opportunity to reiterate its position on two basic issues. First, on the scope of immunity *ratione personae*. In addition to heads of state and government and foreign ministers, other high officials such as heads of parliament, deputy prime ministers and government ministers are increasingly taking part in international exchanges and exercising functions directly on behalf of states. Consequently, they should also be accorded immunity *ratione personae*.

Second, on exceptions to immunity of state officials, which the Special Rapporteur plans to study next year. Since immunity of state officials is procedural in nature, it does not exempt them from substantive liabilities. As stated by the ICJ in the *Arrest Warrant* case, these officials can still be held criminally accountable without prejudice to the immunity from foreign criminal jurisdiction through measures such as prosecution by their own national courts, waiver of their immunity, prosecution at the termination of their tenure of office, and prosecution by an international criminal justice organ. Therefore, immunity is not necessarily linked with impunity. Moreover, though the international community has identified crimes of genocide, ethnic cleansing, and crime against humanity as serious international crimes, it has not developed rules of customary international law on disregarding immunity of state officials in such crimes. When the Commission considers exceptions to such immunity in the future, it should research national practices comprehensively and handle the issue of exceptions to immunity prudently.

3. On “protection of the atmosphere”

The Chinese delegation appreciates the in-depth discussion of this topic at the ILC and thanks the Special Rapporteur, Mr. Shinya Murase, for his informative first report.

Protection of the atmosphere is mankind’s common task. It is also a multi-faceted issue with political, legal and scientific dimensions. When incorporating this item into its work programme, the ILC recognized the complexity and sensitivity of the issues involved, and took a prudent approach by providing an understanding for the Rapporteur. The Chinese delegation appreciates this approach and hopes that the Commission will follow this understanding as much as possible in its consideration of this topic. The Chinese delegation has the following comments to make on this topic:

First, the work of the Commission should be oriented towards providing beneficial complement to the various political and legal negotiation processes. Currently, negotiations in the fields of climate change and the depletion of ozone layer are at a critical stage. Relevant work of the Commission should be carried out in a prudent and rigorous manner, in order to complement constructively relevant mechanisms and on-going efforts. It should neither reinvent the wheel, nor play down existing treaty mechanisms, nor distort such major principles as equity, common but differentiated responsibilities and national capacities. On the other hand, the Commission may consider looking at difficulties related to capital, technology and capacity building facing international cooperation for environmental protection, and provide guidance from the perspective of international law for the reference of countries. In the field of protection of the atmosphere, various specialized treaties and mechanisms already exist and are generally effective, particularly those in the areas of chemical control and protection of the ozone layer. Their advantage lies in their specificity and sharp focus. It is far from certain what practical effect can be achieved by trying to do the contrary and seek a general comprehensive law on the protection of the atmosphere.

Secondly, the development of the draft guidelines should be based on common international practice and current laws. The report of the Special Rapporteur

focused mostly on the research of treaties of certain regions, guidelines of certain international organizations that are soft law in nature, and practices of certain individual countries. The narrow scope of the study can hardly meet the requirement of the Commission for the codification and progressive development of international law. China is of the view that the Commission should comprehensively consider general international practices of more regions and mechanisms, and codify relevant legal rules on the basis of current laws.

Finally, we have also noticed that the Commission failed to reach agreement on the three Draft Guidelines proposed by the Special Rapporteur. The Special Rapporteur defined “the protection of the atmosphere” as “common concern of humankind”, which seems to be unrelated to the legal status of the atmosphere itself. Moreover, the term “common concern of humankind” is a vague concept with its legal content difficult to define accurately. Therefore, it is not appropriate to include it in the section of “glossary” or “definition”. The Commission may wish to continue to strengthen its research on relevant theories and practices in a rigorous manner, avoid using ambiguous concepts and gradually clarify relevant guidelines.

Thank you, Mr. Chairman.