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**STATEMENT OF THE CHAIRMAN OF THE INTERNATIONAL  
LAW COMMISSION, MR. KIRILL GEVORGIAN**

*Part Two*

*Chapters VI-IX: The Obligation to extradite or prosecute (aut dedere aut judicare); Subsequent agreements and subsequent practice in relation to the interpretation of treaties; Protection of the Atmosphere and Immunity of State officials from foreign criminal jurisdiction.*

*Chapter VI: The Obligation to extradite or prosecute (aut dedere aut judicare)*

In this second cluster of issues I will begin with Chapter VI of the report concerning the topic, “**The obligation to extradite or prosecute (aut dedere aut judicare)**”, which has been on the agenda of the Commission since 2005. In recent years there has been a concerted effort to finalize work on this topic. In the past three years, the Commission has been dealing with the topic primarily in the context of a Working Group under the chairmanship of Mr. Kriangsak Kittichaisaree, whose valuable contribution is deeply appreciated by the Commission. I am pleased to report that following the adoption of the final report this year, the Commission has completed work on the topic.

It will be recalled that last year, the Commission presented to the Sixth Committee **a report of the working group**, which evaluated the progress and work of the Commission on this topic.

The 2013 report of the Working Group was generally well received in the Sixth Committee debate. Accordingly, this year, the Working Group, once it was established by the Commission, focused on finalizing its work, taking to account the views of Governments as expressed in the Sixth Committee. These additional matters touched on the following: (a) the customary international law status of the obligation to extradite or

prosecute; (b) the gaps in the existing conventional regime; (c) the transfer of a suspect to an international or special court or tribunal as a potential third alternative to extradition or prosecution; (d) the relationship between the obligation to extradite or prosecute and *erga omnes* obligations or *jus cogens* norms; and (e) the continued relevance of the 2009 General Framework. The final report on the topic adopted by the Commission, at contained in paragraph 65 of the present report, is thus an amalgamation of the 2013 report of the Working Group and an analysis of the additional issues that the Working Group was seized of for discussion this year as mentioned just now.

The report **contextualized the topic within the broader framework of efforts to combat impunity and in the respect for the rule of law.** It is grounded against the background of the Survey by the Secretariat in 2010, which provided an analysis of the typology of provisions containing the obligation to extradite or prosecute in multilateral instruments, as well as the Judgment of 20 July 2012 of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*.

The scope of the obligation to extradite or prosecute under the relevant treaty regimes ought to be **analyzed on a case-by-case basis.** Considering the diversity in the formulation, content, and scope of the obligation in conventional practice, the utility of harmonizing the various treaty clauses containing the obligation, as each is negotiated within the context of a particular treaty regime, was viewed to be of limited value.

This is not to suggest that there are **no general trends or common features concerning the obligation, particularly in the more recent instruments, which are modelled on article 7 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft (otherwise called “The Hague formula).** Following an analysis of the typology of treaty provisions concerning the obligations, the report, predominantly drawing upon the judgment of the International Court of Justice in the *Questions relating to the Obligation to Prosecute or Extradite*, thus offers a set of considerations regarding the implementation of the obligation. These considerations concern in particular the

criminalization of the relevant offences at the national level, and the attendant consequences of delay, the establishment of jurisdiction, the obligation to investigate, the obligation to prosecute, the obligation to extradite and the consequences of non-compliance.

It will be recalled that when in 1996 the Commission adopted the draft Code of crimes against the peace and security of mankind, its draft article 9, which provided an obligation to extradite or prosecute with respect to genocide, crimes against humanity, war crimes and crimes against United Nations and associated personnel, was presented as a matter of progressive development of international law. The Commission notes that further developments in international law since then reflect State practice and *opinio juris* in this respect. However, since the Commission decided to present its outcome on the present topic in the form of a report it did not consider it necessary to engage in an analysis of the customary law character of the obligation. This is not intended to imply that it has found that the obligation has not become or is not yet crystallising into a rule of customary international law, be it a general or regional one. It bears recalling also that in the *Belgium v. Senegal* the International Court of Justice refrained from addressing this issue.

It is the hope of the Commission that the **report might be useful for States, particularly in appreciating the kinds of obligations** that may be assumed when they become party to particular conventional regimes containing the obligation to extradite or prosecute.

This concludes my introduction of Chapter VI.

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

Mr. Chairman,

I will now turn to **Chapter VII**, which concerns the topic “**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**”.

This year, the Commission had before it the second report of the Special Rapporteur, Mr. Georg Nolte, containing six draft conclusions. Following the debate in the plenary, the six draft conclusions were referred to the Drafting Committee. The Drafting Committee decided to reformulate them into five draft conclusions, which were then provisionally adopted by the Commission. The text of the provisionally adopted draft conclusions, together with commentaries, can be found at paragraph 76 of the report.

**Draft conclusion 6** is entitled “**Identification of subsequent agreements and subsequent practice**”. Its purpose is to indicate that subsequent agreements and subsequent practice, as means of interpretation must be identified as such. Paragraph 1 reminds the interpreter that the identification of subsequent agreements or subsequent practice, for the purpose of article 31, paragraph 3, of the Vienna Convention on the Law of Treaties, requires particular consideration concerning the question whether the parties, by an agreement or practice, have taken a position regarding the interpretation of a treaty or whether their conduct has been motivated by other considerations. The purpose of paragraph 2 is to acknowledge the variety of forms that subsequent agreements and subsequent practice can take under article 31, paragraph 3 (a) and (b). It intends to reflect the fact that the Vienna Convention has recognized that the treaties within its scope shall also be interpreted by taking into account less formal agreements and practice. Paragraph 3 provides that, in identifying subsequent practice under article 32, the interpreter is required to determine, whether, in particular, conduct by one or more parties is in the application of the treaty.

**Draft conclusion 7** deals with the “**Possible effects of subsequent agreements and subsequent practice in interpretation**”. It seeks to indicate how subsequent agreements and subsequent practice may contribute to the clarification of the meaning of a treaty. Paragraph 1 emphasizes that subsequent agreements and subsequent practice must be seen in their interaction with other means of interpretation. It indicates further that the taking into account of subsequent agreements and subsequent practice under article 31, paragraph 3, may contribute to a clarification of the meaning of a treaty in the

sense of a narrowing down of possible meanings of a particular term or provision, or of the scope of the treaty as a whole. Alternatively, such taking into account may contribute to a clarification in the sense of confirming a wider interpretation.

Paragraph 2 concerns possible effects of subsequent practice in interpretation in the context of article 32, which does not reflect an agreement of all parties regarding the interpretation of a treaty. Such practice, as a supplementary means of interpretation, can confirm the interpretation which the interpreter has reached in the application of article 31, or determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

Paragraph 3 addresses the question of how far the interpretation of a treaty can be influenced by subsequent agreements and subsequent practice in order to remain within the realm of what is considered interpretation under article 31, paragraph 3 (a) and (b). This paragraph reminds the interpreter that agreements subsequently arrived at may serve to amend or modify a treaty, but that such subsequent agreements are subject to article 39 of the Vienna Convention and should be distinguished from subsequent agreements under article 31, paragraph 3 (a). While acknowledging that there are examples to the contrary in case-law and diverging opinions in the literature, paragraph 3 stipulates that the possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized.

**Draft conclusion 8**, entitled “**Weight of subsequent agreements and subsequent practice as a means of interpretation**”, identifies some criteria that may be helpful for determining the interpretative weight to be accorded to a specific subsequent agreement or subsequent practice in the process of interpretation in a particular case. Paragraph 1 specifies that the weight to be accorded to a subsequent agreement or subsequent practice as a means of interpretation depends, *inter alia*, on its clarity and specificity. The use of the term “*inter alia*” indicates to the interpreter that the provision should not be seen as exhaustive. Paragraph 2 deals only with subsequent practice under article 31, paragraph 3 (b), and specifies that the weight of subsequent practice also

depends on whether and how it is repeated. Paragraph 3 addresses the weight that should be accorded to “other subsequent practice” under article 32.

Let me now turn to **draft conclusion 9**, which is entitled “**Agreement of the parties regarding the interpretation of a treaty**”, paragraph 1 of which intends to capture what is common in subparagraphs (a) and (b) of article 31, paragraph 3, which is the agreement between the parties, in substance, regarding the interpretation of the treaty. It sets forth the principle that an “agreement” under article 31, paragraph 3 (a) and (b), requires a common understanding by the parties regarding the interpretation of a treaty. In order for that common understanding to have the effect provided for under article 31, paragraph 3, the parties must be aware of it and accept it. The aim of the second sentence of paragraph 1 is to reaffirm that “agreement”, for the purpose of article 31, paragraph 3, need not, as such, be legally binding. Paragraph 2 confirms the principle that not all the parties must engage in a particular practice to constitute agreement under article 31, paragraph 3 (b). It clarifies that acceptance of such practice by those parties not engaged in the practice can indeed be brought about by silence. Nevertheless, the draft conclusion takes into consideration that agreement by silence is not easily established and depends to a large extent on the circumstances of the specific case.

The **draft conclusion 10** addresses a particular form of action by States which may result in a subsequent agreement or subsequent practice under article 31, paragraph 3, or subsequent practice under article 32, namely, **decisions adopted within the framework of Conferences of States Parties**. In order to acknowledge the wide diversity of Conferences of States Parties and the rules under which they operate, paragraph 1 provides a broad definition of the term “Conference of States Parties” for the purpose of these draft conclusions, which only excludes action of States as members of an organ of an international organization. Paragraph 2 provides that the legal effect of a decision adopted within the framework of a Conference of States Parties depends primarily on the treaty in question and any applicable rules of procedure. It recognizes that decisions of Conferences of States Parties may constitute, under certain circumstances, subsequent agreement or subsequent practice for treaty interpretation

under articles 31 and 32 of the Vienna Convention. This conclusion is limited by the acknowledgment that decisions of Conferences of States Parties often provide a range of practical options for implementing the treaty, which may not necessarily embody a subsequent agreement and subsequent practice for the purpose of treaty interpretation. Paragraph 3 sets forth the principle that agreements regarding the interpretation of a treaty under article 31, paragraph 3, must relate to the content of the treaty. Thus, what is important is the substance of the agreement embodied in the decision of the Conference of States Parties and not the form or procedure by which that decision is reached.

This concludes my introduction of Chapter VII of the report.

### **Chapter VIII: Protection of the Atmosphere**

I now invite you to turn to chapter VIII, which deals with the topic, “**Protection of the Atmosphere**”, included in the Commission’s programme of work last year. The Commission this year had before it a detailed first report by the Special Rapporteur Mr. Shinya Murase. The report addressed the **general objective of the project**, by among other things providing the rationale for work on the topic, delineating the general scope, identifying the applicable sources of the law and relevant basic concepts and offering perspectives and approaches to be taken with respect to the subject as the Commission moves forward in its consideration. In the report, the Special Rapporteur also presented three draft guidelines defining (a) the term “atmosphere; (b) the scope of the draft guidelines; and (c) the legal status of the atmosphere. The summary of the introduction of the debate by the Special Rapporteur is contained in paragraphs 80 to 84 of the report. In particular, he drew attention to the circumstances attendant to the inclusion of the topic in the Commission, the debate in the Sixth Committee last year as well as the highly technical nature of the subject. In view of the deteriorating state of the atmosphere, the Special Rapporteur also highlighted the pressing concern of the international community in addressing the topic, and the need for the Commission to look at it from the perspective of general international law. The Special Rapporteur noted that the

contemporary challenges to the atmosphere concerned three areas, namely (a) tropospheric transboundary air pollution, (b) stratospheric ozone depletion and (c) climate change. The Special Rapporteur also took the occasion to introduce the three draft guidelines he had proposed in his report.

The summary of the debate, containing **general comments and specific comments on the draft guidelines**, is reflected in paragraphs 85 to 115. The debate was diverse and varied, given the legally, politically and technically and scientifically complex nature of the subject. As will be recalled, the topic last year was included on the basis of the **understanding** that: Work will proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range transboundary air pollution. It was understood 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 addition, the topic will also not deal with specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States. The project will not seek to “fill” the gaps in the treaty regimes. It is also understood that questions relating to outer space, including its delimitation, are not part of the topic. Moreover, the outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein.

Given that it was also understood that Special Rapporteur’s reports would be based on the above considerations, whether or not the terms of the understanding had been complied with in the preparation of the first report gave rise to a wide ranging debate. Comments were also made on the methodological approach taken by the Special Rapporteur, which sought to focus on the atmosphere *per se*, as a single composite unit instead of taking into account State practice and practical realities. A focus on the “rights and obligations” of States and such non-State actors in the field was viewed, by some members, as the best guarantor for the protection and conservation of the atmosphere.



In his concluding remarks, as reflected in paragraphs 116 to 122 of the report, the Special Rapporteur advocated a **middle-of-the road approach on the understanding**, acknowledging its existence as it was the basis for the Commission's inclusion of the topic, while appealing for flexibility in the identification of issues relevant to the topic in a manner that assists the Commission to make progress in its consideration. He stressed the importance of viewing the atmosphere as a comprehensive single unit, not subject to division along State lines. The atmosphere was fluid and dynamic such that it would be impractical, if not impossible, for the purpose of the project, to divide it in terms of the air that was under the territorial jurisdiction and control of one State from the air that is outside that jurisdiction. He also welcomed the helpful comments, suggestions and constructive criticisms made by members. He noted that he was inclined to defer referral of the draft guidelines to the Drafting Committee until next year, as he would be afforded an opportunity to reformulate parts thereof in the light of the comments made. It is also expected that next year, the Commission will have the benefit of having consultations with members of the scientific community. A similar approach was followed by the Commission when it dealt with the law of transboundary aquifers.

The further development of this topic would require information on State practice from States, In this connection, as noted in chapter III, the Commission requests the provision relevant information, by 31 January 2015, on domestic legislation and the judicial decisions of the domestic courts.

This concludes my introduction of Chapter VIII.

***Chapter IX: Immunity of State officials from foreign criminal jurisdiction.***

Mr. Chairman,

I shall now turn to **Chapter IX**, which relates to the topic **“Immunity of State officials from foreign criminal jurisdiction”**. The work on this topic has been proceeding at an encouraging pace since the Commission adopted, provisionally, draft

articles on it last year. This year the Commission had before it the third report of the Special Rapporteur, Ms. Concepción Escobar Hernández. The third report focused on the subjective normative elements of the conduct based immunity *ratione materiae*, leaving aside for future consideration its material and temporal scopes. In other words, it sought to deal with the “who”, while the question of what are “official acts” or acts that could be characterized as “acts performed in an official capacity”, and aspects that immunity *ratione materiae* is not time-bound and continues to subsist once an official leaves office, would both be subject of separate treatment next year. In its analysis of the subjective scope, the report addressed in particular the concept of an “official”, some terminological issues, as well as substantive criteria that could be used to identify persons who may be covered by such immunity. The Special Rapporteur proposed draft articles on the term “State official” for the purposes of the draft articles, and on the subjective scope of immunity *ratione materiae*. Following their consideration in the Drafting Committee, the Commission provisionally adopted draft articles 2 (e) and 5, together with commentaries, appearing in paragraphs 131 and 132 of the present report. Draft article 2 (e), in Part One of the draft articles, defines State official, while draft article 5, in Part Three dealing with Immunity *ratione materiae*, addresses the question of persons enjoying immunity *ratione materiae*.

In her second report last year, the Special Rapporteur proposed a draft article on **definitions** containing four paragraphs. These paragraphs remain in the Drafting Committee, and draft article 2 was reserved for that purpose. This year, on the basis of the proposal by the Special Rapporteur, the Commission has provisionally adopted draft article 2, paragraph (e), which defines “**State official**” for purposes of the draft articles.

General international law does not provide a definition of State official. The Commission viewed the formulation of such a definition for the purposes of the present draft articles as advisable and feasible, even though some members considered it unnecessary. In the view of these members what was essential for immunity *ratione materiae* was the nature of the acts and not the individual who carries them out on behalf of the State.

As presently formulated the definition is broad enough to cover the *troika* and those individuals who exercise a range of other State-related functions in a variety of capacities on behalf of the State. It was considered unnecessary to include expressly any reference in the definition to Head of State, Head of Government or Minister for Foreign Affairs as their position as State officials was self-evident. In the commentaries of the draft articles provisionally adopted last year, immunity was justified on representational and functional grounds. The present definition thus combines the “representative” and “functional” approaches. The use of the present tense of the verb “represents” and “exercises” in the definition of State official is without prejudice to the application of immunity *ratione materiae* to former State officials.

The definition employs the word “individual” as opposed to “person” to underscore the fact that legal persons are excluded from the scope of the definition.

The definition does not address the nature of the acts performed. It is anticipated that the discussion on the material scope of immunity *ratione materiae* next year would provide the substance of any limitations to the scope of such immunity.

The term “State functions” is not a term of art. In general, international law does not govern the structure of the State and the functions of its organs. It is up to each State to determine how it structures, internally, its administration and functions that may be assumed by its government. This state of affairs suggests the need to view “State functions” broadly. What constitutes “State functions” would depend on the circumstances of each case, and may bear on procedural aspects concerning invocation of immunity. Both internal law and practice and international law have a bearing on determining whether the functions in question appertain to the State or to the exercise of the functions of government. It may be noted that some members of the Commission viewed the reference to “State functions” to be imprecise.

Draft article 5 entitled “**Persons enjoying immunity *ratione materiae***” corresponds to draft article 3, provisionally adopted last year, which appears in Part Two dealing with Immunity *ratione personae*. Focusing on the subjective scope, draft article 5 is the first of the articles to be comprised in Part Three. Subsequent articles will seek to address the material and temporal scope of immunity *ratione materiae*.

It is widely acknowledged that State officials enjoy immunity *ratione materiae* for their official acts or for acts performed in an official capacity. However, one has to be regarded to be a State official in order to enjoy such immunity. Conversely, the fact that one is a State official does not necessarily mean that he would enjoy immunity *ratione materiae* for acts that may be performed in a private capacity.

As presently formulated the draft article provides that State officials acting “as such” enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction. Even though the draft article is focused on the subjective scope, the reference to “acting as such” seeks to flag the importance of a link of the official to the State, even though the precise nature of such link will be addressed as part of the material scope of the immunity. It is intended to refer to the State official as an individual who represents the State or who exercises State functions. Once whether or not the act was performed in an official capacity is addressed the reference to “as such” could be the subject of review.

It will be recalled that paragraph 3 of draft article 4 on the Scope of Immunity *ratione personae* provisionally adopted last year provides that the cessation of immunity *ratione personae* is without prejudice to the rules of international law concerning immunity *ratione materiae*. When the material scope of immunity *ratione materiae* is addressed the question of immunity *ratione materiae* of former Heads of States, Heads of Government and Minister for Foreign Affairs will be one of the issues to be taken into account.

The Commission is most grateful to all those government that responded to its request last year for information on practice regarding immunity *ratione materiae*. The

Commission seeks information from as many States as possible. Accordingly, in Chapter III, of the present report it has reiterated its request. More specifically, the Commission requests States to provide information on their domestic law and their practice, in particular judicial practice, with reference to the meaning given to the phrases “official acts” and “acts performed in an official capacity” in the context of the immunity of State officials from foreign criminal jurisdiction. In addition, this year, the Commission has added an extra request for similar information with respect to the exceptions to immunity of State officials from foreign criminal jurisdiction. It would be appreciated if such information could be received by 31 January 2015.

Mr. Chairman,

This concludes my introduction of Chapter IX and my second statement. Thank you for your attention.

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