

STATEMENT BY Mr. Tomoyuki Hanami
REPRESENTATIVE OF JAPAN
AT THE MEETING OF THE SIXTH COMMITTEE
ON THE REPORT OF THE INTERNATIONAL LAW COMMISSION
ON THE WORK OF ITS SIXTY-SIXTH SESSION (PART TWO)

The obligation to extradite or prosecute (*aut dedere aut judicare*)

Thank you, Mr. Chairman,

I would like to start from the topic of “The obligation to extradite or prosecute (*aut dedere aut judicare*).” The delegation of Japan honors the decision of the Commission to conclude its consideration of this topic. We note that the final report is included in the chapter of this topic, which overviews the deliberation by the Commission and analyzes several major points of discussion such as typology of provisions in multilateral instruments. This final report is indeed a useful reference for member states. The delegation of Japan deems that the obligation to extradite or prosecute is provided for primarily by treaty regimes, and, as the Commission concluded, points of deliberation have already been exhausted. On the other hand, some points taken up under this topic are closely related to other topics such as “Immunity of State officials from foreign criminal jurisdiction” and “Crime against humanity”, so we hope that the outcome of the discussion under this topic will contribute to addressing those topics and development of international criminal law in general. The Japanese delegation would like to extend its deepest appreciation to Mr. Kriangsak Kittichaisaree, the Chairman of the Working Group of this topic for his tremendous contribution.

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

Mr. Chairman,

Now, I am turning to the topic of “Subsequent agreements and subsequent practice in relation to the interpretation of treaties.” The delegation of Japan would like to commend the Special Rapporteur, Mr. Georg Nolte for his extensive work as drawing up the second report and draft conclusions therein. We duly note the draft conclusions provisionally adopted by the Commission; namely draft conclusion from 6 to 10. Here, I would like to address several points.

To begin with, the Commission ought to give clear explanation on the relationship between Article 31 paragraph 3 and Article 32 of the Vienna Convention on the Law of Treaties (VCLT). In the draft conclusions 6, 7, 8 and 10, both articles are referred to as if they equally stipulate the subsequent practice. The delegation of Japan has a skeptical view on such assumption particularly on Article 32 as it doesn't include wording “subsequent practice”. We recognize that, as the Special Rapporteur so referred, the Commission decided to treat “other subsequent practice” under Article 32 in the last session. However, it should not be understood that any type of acts which could be categorized as “other subsequent practice” can be treated as same as subsequent practice stipulated under Article 31 paragraph 3. The delegation of Japan deems that Article 32 should complement the rules of Article 31, so their interrelationship is not equal.

Secondly, the legal significance of silence should be studied more carefully. The second sentence of the draft conclusion 9, paragraph 2 states that silence can constitute acceptance of the subsequent practice. Even though this conclusion is made with certain conditions, there is some room for misinterpretation that mere inaction of a state could be considered as acceptance of the subsequent practice, even if it doesn't have such intention. Similarly, the Japanese delegation believes that taking part in the consensus decision of the Conference of State Parties, which is stipulated in the draft conclusion 10, paragraph 3 does not always constitute an agreement. The delegation of Japan hopes that the Commission will continue to discuss this

matter.

Lastly, the Japanese delegation would like to stress that any modification to the rule stipulated in treaties must be made by clear expression of intention of states, and not solely by unclear subsequent agreement and subsequent practice. Primary rule in this issue is stipulated in article 39 of the VCLT. We, therefore, positively consider the draft conclusion 7, paragraph 3.

The delegation of Japan hopes that further discussion will take place in the next session.

Protection of the atmosphere

Mr. Chairman,

Now, I would like to touch upon the topic of "Protection of the atmosphere". First of all, the delegation of Japan would like to congratulate the Special Rapporteur, Mr. Shinya Murase, on the commencement of this topic in the sixty-sixth session of the Commission. Overall, his first report is well balanced by taking moderate approach in its deliberation and analysis. Particularly, the report includes useful information on historical development of international efforts in the field of atmospheric environment protection. In this context, the delegation of Japan welcomes that, as the ILC report describes, members of the Commission shared the view that the protection of the atmosphere is extremely important for humankind. This widely shared recognition must be the very basis of the discussion of this topic.

At the same time, we are aware that there were certain points that members of the Commission took different positions or perspectives. The particular case was about the understanding adopted in the sixty-fifth session. Some members argued that the first report was touching upon matters such as climate change and ozone depletion, which is inconsistent with the understanding prescribing that the "Work on the topic will proceed in a manner

so as not to interfere with relevant political negotiation". The Special Rapporteur, on the other hand, reaffirms that the report was prepared in full compliance with the understanding and assures that he had the intention neither to interfere with relevant political negotiations nor to deal with specific polluting substances. The delegation of Japan understands that the first report was written in a prudent manner in order to fully comply with objectives of the understandings. Certainly, the first report introduced several binding and non-binding documents on specific substances, but the main purpose of referring to such documents is to elucidate international regime on the protection of the atmosphere, not dealing with the substances per se. Reading the first report as a whole, we do not see that the report deviated from the understanding of the Commission.

With regard to the definition of the atmosphere, the delegation of Japan understands that, during its debate, several members of the Commission argued that there was certain difficulty in defining the atmosphere due to its technical nature and lack of scientific knowledge. Some others were doubtful whether such definition was necessary for deliberating this topic. As it has been frequently noted, one of the difficulties pertaining to this topic is its highly technical nature. Therefore, the delegation of Japan agrees with the point raised by several members that they need an opportunity to gain input from scientific experts regarding the airborne environment and other technical information. We note that the Commission has a plan to hold an interactive session with experts in the sixty-seventh session, which is greatly welcomed.

The last point of this topic is about the legal status of the atmosphere and its protection. In his first report, the Special Rapporteur analyzed the atmosphere and its protection under several concepts; namely airspace, shared or common natural resources, common property, and common concern of humankind. As a conclusion, he proposed the draft guideline that "the atmosphere is a natural resource essential for sustaining life on earth, human health and welfare, and aquatic and terrestrial ecosystems; hence, its protection is a common concern of humankind". The delegation of Japan is aware that this conclusion elicited a variety of reactions from the members of the Commission. From our point of view, the apprehension proposed by the Special Rapporteur that the protection of the atmosphere is a common concern

of humankind is reasonable and a good start for further deliberation. The concept of “a common concern of humankind” appears in several legal and non-legal documents such as the UN Framework Convention on Climate Change and the Convention on Biological Diversity. Affirming the legal status of the protection of the atmosphere as a common concern of humankind does not necessarily entail substantive legal norms which directly set out legal relationships among states. Rather, such affirmation should only mean that the protection of the atmosphere is not an exclusive domestic affair, but it inherently has bilateral, regional and international nature. As long as the connotation of this concept is limited to that extent, we positively recognize the conclusion presented by the Special Rapporteur.

Mr. Chairman,

The delegation of Japan sincerely hopes that, as the protection of atmospheric environment requires coordinated action by the international community, deliberation of this topic will be continued in the Commission in a cooperative and constructive manner.

Immunity of State officials from foreign criminal jurisdiction

Mr. Chairman,

Finally, I would like to discuss the topic of “Immunity of State officials from foreign criminal jurisdiction”. The delegation of Japan understands that, as a result of the discussion of its plenary and drafting committee at its sixty-sixth session, the Commission provisionally adopted two draft articles; namely definition of “State official” in Article 2 paragraph (e), and “Persons enjoying immunity *ratione materiae*” in Article 5.

The delegation of Japan notes that this topic had been debated during previous sessions in the light of potential conflict between the rule of immunity of state officials and global efforts of fighting against impunity. The former rule is

connected with the State immunity which has been one of the fundamental principles of international law derived from the equality of sovereign States.

On the other hand, we have realized that in these few decades, development of international criminal law as well as universal jurisdiction has exerted an influence on the traditional principle of State immunity. In particular, the foundation of the International Criminal Court (ICC) was one of the symbolic events in which the international community upheld the new concept of “fight against impunity” as a key element of international security and justice. As enshrined in Article 27 of the Rome Statute, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under the Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence when those people are alleged to commit serious international crimes. This rule has great impact on the modern rule of immunity.

At the same time, even in modern days, it is a widely shared view that the notion of jurisdictional immunity greatly contributes to the stability of international relations. In that sense, striking a balance between the notion of “fight against impunity” and “state sovereignty” is necessary for deliberation in the Commission. The ILC’s effort to reconcile the apparent conflict between the rule of immunity of state officials and the evolving concept of fight against impunity is essential for sound international criminal justice.

The delegation of Japan will continuously pay attention to the discussion on the scope and the legal status of the immunity *ratione materiae*. Whereas this statement in no way prejudices Japan’s construction of the notion of universal jurisdiction, Japan maintains that the core crimes under international law must be punished without exceptions. The delegation of Japan would like to renew our strong support for ILC’s continued efforts.

Thank you, Mr. Chairman.