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PERMANENT MISSION TO THE UNITED NATIONS

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Sixty-Ninth Session of the General Assembly

**Report of the International Law Commission
on the work of its sixty-sixth session**

Part II

Agenda item 78

S T A T E M E N T

BY

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OCTOBER 31, 2014

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

Mr. Chairman,

Poland welcomes the final report of the International Law Commission concluding its consideration on the topic *aut dedere aut judicare*. Adoption of the report indicating main trends in treaty regulations and describing principal elements of *aut dedere aut judicare* obligation deserves appreciation, taking into account that beyond the basic common features, provisions containing the obligation in multilateral conventions vary considerably in their formulation, content and scope.

Our delegation fully concurs with principal conclusion of the Commission that the obligation *aut dedere aut judicare* should be considered as an crucial element of combating impunity for crimes of international concern.

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

Mr. Chairman,

With regard to Chapter VII of the International Law Commission Report, let me first congratulate Professor Nolte for his outstanding and nuanced second report on the topic „Subsequent agreements and subsequent practice in relation to the interpretation of treaties“.

The International Law Commission has presented this year five draft conclusions (6 – 10) with commentaries. All of the conclusions rightly warn those who interpret a treaty that they have to be very careful in determining the significance of various forms of agreements, other acts or omissions while qualifying them under article 31 paragraph 3 or article 32 of the Vienna Convention. We find particularly useful all the clarifications concerning article 32. In our view the distinction, proposed in the conclusions, between article 31 paragraph 3 and article 32, is well founded and should be maintained.

Conclusion 6 is based on differentiation of interpretation and application of the treaty in the process of identification of subsequent agreements and subsequent practice under article 31 paragraph 3 and subsequent practice under article 32. While article 31 paragraph 3 refers to interpretation, article 32 is general, that is why conclusion 6 paragraph 3 contains important and useful clarification in that regard.

Subsequent practice under article 32 requires a determination whether conduct by one or more parties is in the application of the treaty. It is not easy to find the definitions of interpretation or of application of a treaty which will satisfy everybody but the proposition in the commentary, together with following explanations and various examples of the conduct, and emphasis on requirement of careful consideration, is well balanced.

Conclusion 7 rightly emphasizes, on one hand, the interaction in the process of interpretation, on the other, that the subsequent practice under article 32 can also contribute to the clarification of the meaning of a treaty. We support the presumption described in paragraph 3 and the cautious attitude towards the subsequent practice "ability" to amend or modify a treaty. Since some of the examples given in the commentary are controversial (e.g. Al-Saadoon case), it is appropriate to conclude simply that the possibility of amending or modifying a treaty by subsequent practice has not been generally recognized.

We look forward for the report on the question of subsequent agreements and subsequent practice relating to international organizations (we hope that the EU member states practice will be carefully studied, like famous Luxemburg compromise). However, if the commentary refers to the WTO practice, we think it is worth to strengthen the conclusion that a treaty may preclude the subsequent practice of the parties from having modifying effect (point 32, 34) by referring to the European Court of Justice decision in the landmark Defrenne case where the Court held that the resolution of the member states of 30 December 1961 concerning the issue of equal pay for man and women was ineffective to modify the time-limit fixed by the treaty.

As conclusion 8 is concerned, we are convinced by the commentary that it is more convenient to use terms "clarity", "specificity" and refer to "repetitiveness" instead of terms "uniform", "consistent", "common". These latter terms are used to identify customary law, while under conclusion 8 the terms serve to evaluate the weight of agreement or practice as a means of interpretation. However in our opinion, conclusion 8 would be more clear if it devoted paragraph 1 only to the weight of a subsequent agreement, and paragraph 2 to subsequent practice.

We note with satisfaction taking into account the difficult but important issues of silence as a possible element of an agreement under article 31 of the Vienna Convention of the Law of Treaties, and decisions adopted within the framework of a Conference of State Parties, and moderate approach of the Commission`s conclusion 9 paragraph 2 in the first case and conclusion 10 in the latter.

Immunity of State officials from foreign criminal jurisdiction

Mr. Chairman,

With regard to the topic “Immunity of State officials from foreign criminal jurisdiction” we see it as very difficult and at the same time important issue. Polish delegation considers that the aim of the Commission’s work in this regard is to find best equilibrium between respecting immunities of officials of sovereign states on the one hand, and ensuring accountability for heinous crimes as a crucial element of the rule of law in international relations on the other.

In this context we agree with the enumeration of persons enjoying immunity *ratione persone* included in draft article 3.

With regard to immunity *ratione materiae* Polish delegation supports the conclusion emphasizing the functional nature of this immunity. Nonetheless, within this context the crucial issue is the material scope of immunity *ratione materiae*. It should be evaluated taking into account *ultra vires* acts and the concept of universal jurisdiction. It is unquestionable that State officials enjoy immunity *ratione materiae* for acts performed in an official capacity. Simultaneously however, it is difficult to accept that this immunity could be applied in situation of international crimes committed in the course of duty.

Furthermore, in our view it is necessary to draft an article regarding temporal scope of immunity *ratione materiae*. Although this issue can be interpreted *a contrario* from draft article 4 as applicable during and after representation of the State or exercising State functions, it seems valuable to expressly indicate this norm.

Protection of the atmosphere

Mr. Chairman,

On the topic "Protection of the atmosphere" Polish delegation agrees with those members of the Commission who expressed their reservations to the term, introduced by the Special Rapporteur with regard to atmosphere, namely "common concern of humankind". It is unclear what legal implications such a concept entails, particularly whether they are similar to those expressed in the Convention on Biological Diversity. At the same time, the Polish delegation is of the opinion that the strict application of the Convention on Biological Diversity rules to the regime of the protection of atmosphere is neither feasible nor advisable.

Thank you Mr. Chairman.