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**69<sup>th</sup> Session of the General Assembly of the United Nations  
Sixth Committee**

***Agenda item 78***

**International Law Commission  
Report on ILC's 66<sup>th</sup> Session**

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

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

Chapter VIII – Protection of the atmosphere

Chapter IX – Immunity of State officials from foreign criminal jurisdiction

**Speech delivered on behalf of Mr. Ion Gâlea  
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**New York, October 2014**

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Mr. Chairman,

In this second intervention of the delegation of Romania on this year's ILC report I will address all the chapters in the report as indicated in the programme of work.

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

The Delegation of Romania welcomes the work of the International Law Commission on the subject of *aut dedere aut iudicare* and would like to express its gratitude to the Working Group and to its chairman, Mr. Kriangsak Kittichaisaree, for this year's report, which summarizes the work of the Commission on this subject.

The final report represents, in our view, a useful tool on a subject which plays a crucial role in the fight against impunity for the crimes of concern to the international community.

Romania believes that at least some of the findings of the report should be reflected in the future work of the International Law Commission on the topic "*Crimes against humanity*".

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

The delegation of Romania welcomes the work of the International Law Commission concerning subsequent agreements and subsequent practice in relation to the interpretation of treaties and expresses its interest in the topic, as it aims at clarifying significant aspects concerning the law of the treaties. Although Romania is not a party to the Vienna Convention on the Law of the Treaties, Romania applies most of its provisions as customary international law.

Romania commends the ILC and in particular the Special Rapporteur, Mr. Georg Nolte, for the progress in studying this topic and proposing five new draft conclusions, in addition to the first six adopted during the previous session. The delegation of Romania shares, in general, the conclusions of the Commission and makes only a few brief remarks.

With respect to Conclusion 7, Romania welcomes the effort aimed at drawing the line, which is not always self-evident, but actually very difficult to establish, between interpretation of a treaty and amendment to a treaty on the basis of state practice.

Romania believes, however, that the general formulation in paragraph 3 of conclusion 7 stating the presumption that state practice in the application of a treaty would imply its interpretation, and not its amendment or modification (since such a possibility has not been generally recognised), would be sufficient. While sharing the views expressed by the Special Rapporteur in paragraph 35 of the Commentaries to Conclusion 7, Romania considers that the second phrase of paragraph 3, „The possibility of amending or modifying a treaty through subsequent practice has not been generally recognized”) should be eliminated.

Romania notes that article 38 of the 1966 Draft Articles relied on the 1963 *Air Services Transport*

*Arbitration (France v. US)*, which, on its turn, invoked the 1962 *Temple of Preah Vihear Case*. Neither of these cases could be regarded as a strong basis for amendment or modification of a treaty through State practice. However, since the line between interpretation and modification is thin, and since examples of modification through State practice have been given (paras 30 and 31 of the Commentaries), the second phrase of paragraph 3 might be seen as too restrictive.

Moving further to Conclusion 9, the Romanian delegation would like to point to paragraph 23 of the Commentaries, mentioning a “new agreement replac[ing] the previous one as an authentic means of interpretation from the date of its existence at least with effect for the future” and to the footnote under that paragraph. Romania would like to point out the distinction between two different situations: i) first, the situation envisaged in paragraph 23, when an interpretative agreement *replaces* another existing interpretative agreement. In such case, it is true that the effect of the new interpretation would operate for the future; ii) second, the most common situations when an interpretative agreement is reached at a certain point in time, without replacing a previous interpretative agreement. In such case, the agreement under art 31 (3) a) of the VCLT should also be able to clarify the will of the parties at the moment when the agreement on which the interpretation purports was concluded. Such interpretation would be relevant for the future application of the treaty to which it refers itself, but it is equally relevant to matters of dispute pertaining to the interpretation of the treaty arising before such a subsequent agreement is reached.

Paragraph 23 raises as well the interesting question of establishing the moment since when such a subsequent agreement starts to exist. The Romanian delegation considers that the issue is worth visiting further during the work of the Commission on the topic.

As far as Conclusion 10 and the Commentary to it are concerned, the Romanian Delegation suggests adding to the many examples of relevant practice of international organizations that of the International Criminal Court, whose Statute of 1998 contains explicit provisions with regard to the powers of the Assembly of States Parties in relation to the interpretation of the Statute. Thus, article 9 of the ICC Statute provides that the Elements of Crime, that shall “assist the Court in the interpretation and application of articles 6, 7 and 8”, “shall be consistent with this Statute” and “shall be adopted by a two-thirds majority of the members of the Assembly of States Parties”. This represents an example where, contrary to the general conclusion included in paragraph 31 (the validity of which is not contested) of the Commentary to Conclusion 10, does give a clear indication as to the legal effect of a resolution of a Conference of States Parties.

To conclude, Romania underlines its interest in the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties and is looking forward to the further study of the International Law Commission on the matter.

### *Protection of the atmosphere*

In the last year intervention, the Romania welcomed the decision of the Commission to include in its programme of work the topic *Protection of the atmosphere*, and expressed Romania’s interest in seeing how the Special Rapporteur intended to approach the matter, giving consideration as well to the restrictions qualifying the terms of reference for his reports.

In view of these restrictions, the understanding according to which the Commission included the topic in its programme, which make the study on this topic somehow difficult, we very much

welcome the approach taken by the Special Rapporteur, Mr. Murase, in his first report.

Thus, we fully agree that the main task for the Commission consists in identifying custom, whether established or emerging, regarding the topic and identifying, rather than filling, any gaps in the existing treaty regimes. An exploration of the possible mechanisms of international cooperation can be also useful, especially as a tool in the ongoing political negotiations on the matter.

We note that, while there is a well-functioning global treaty regime addressing ozone depletion and a vigorous global negotiation process dealing with climate change, there is no regulation of transboundary air pollution at a global level. We hope the Special Rapporteur will pay a special attention to this matter. The practice under the UNECE Convention on Long Range Transboundary Air Pollution and its subsequent Protocols, including the decisions of its Executive Body or its Implementation Committee, should be carefully analyzed by the Special Rapporteur in the documentation of the subject.

#### *Immunity of the state officials from foreign criminal jurisdiction*

The delegation of Romania welcomes the work of the International Law Commission on the immunity of State officials from foreign criminal jurisdiction and commends the *Special Rapporteur*, Ms. Concepcion Escobar Hernandez, for a very meticulous third report on this subject.

The two draft articles provisionally adopted by the Commission at the present session may appear simple and obvious at first sight, but, as illustrated in the documents of this session (in-depth report of the Special Rapporteur, debates in the Commission and report of the Drafting Commission), they are the result of a careful examination, which contemplated different possible approaches to this sensitive matter.

#### Draft article 2 (e) – Definition of “state official”

Romania acknowledges the inherent difficulties in shaping a definition of the “*state official*”; however, despite the terminological difficulties, highlighted in much detail in the report of the *Special Rapporteur*, Romania favors the use of the term “*official*” instead of the term “*organ*”.

The Romanian delegation agrees that there is no need to explicitly mention the beneficiaries of immunity *ratione personae*, namely the Head of State, the Head of Government and the Minister of Foreign Affairs, since they are covered by the expression “*State official*” and consequently need not to be differentiated for the purposes of the abovementioned definition.

Romania equally shares the view that it is practically impossible to draw up an exhaustive list of the individuals covered by immunity *ratione materiae*, while attempting to establish an indicative list of these individuals may also prove inadequate and incomplete. Therefore, the identification of a “*State official*” on a case-by-case basis, by application of the criteria included in the definition, seems to be, in our view, the most appropriate approach.

#### Draft article 5 - “Persons enjoying immunity *ratione personae*”

With respect to draft article 5, we believe that the replacement of the expression “*state officials who exercise elements of governmental authority*” with “*state officials acting as such*” represents an

improvement, as the initial proposal would have been too narrow in terms of identification of the beneficiaries of the immunity.

Romania is looking forward with great interest for the next reports on the matter and especially for the one addressing the exceptions to immunity from foreign criminal jurisdiction.

Thank you.