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**Agenda Item 81**

**Report of the International Law Commission**

**on the Work of its 69<sup>th</sup> Session**

**Cluster 2: Chapters VI & VII (Protection of the atmosphere; Immunity  
of State officials from foreign criminal jurisdiction)**

**Statement by**

**Ambassador Helmut Tichy**

New York, 26 October 2017

In the interest of time I will deliver a shortened statement today. The full version will be on record on the Papersmart Platform.

Mr. Chairman,

Concerning the topic "**Protection of the atmosphere**", the Austrian delegation commends the Special Rapporteur, Professor Shinya Murase, for his fourth report regarding, in particular, the interrelationship between the rules of international law on the protection of the atmosphere and the rules of international law in other areas, namely international trade and investment law, the law of the sea and international human rights law.

The three new preambular paragraphs provisionally adopted by the Commission which relate to the interaction between the atmosphere and the oceans, the special situation of low-lying coastal areas and small island developing states and the interests of future generations reflect situations and effects which are generally recognised and have already been addressed in the discussions on the law of the sea within the United Nations and the International Maritime Organization. Particular emphasis was put on the effect of global warming on the rise of the sea-level as well as on the interests of future generations. Although other effects of global warming, such as the effect of the degradation of the atmosphere on human health, could also have been highlighted, the emphasis on the situations and effects now mentioned in the new preambular paragraphs is well-founded.

The new draft guideline 9 provisionally adopted by the Commission, called "Interrelationship among relevant rules", addresses a central issue of the present topic and shows that the protection of the atmosphere is a horizontal or cross-cutting matter. The topic of protection of the atmosphere is characterised by a number of overlaps with other fields of international law. This leads to the question of compatibility. According to draft article 9(1), possible conflicts should be avoided by resorting to "principles of harmonization and systemic integration". These principles, although they were already addressed in the 2006 report of the ILC Study Group on Fragmentation of International Law, have never been clearly defined, and their relationship to Articles 30 and 31(3)(c) of the Vienna Convention on the Law of Treaties, which are referred to in draft guideline 9, is still not fully determined. In any case, applying the principles of harmonisation and systemic integration should not lead to a reduction of the intended protection of the atmosphere.

Draft guideline 9(2) could be understood as requiring that new rules for the protection of the atmosphere have to be compatible with all existing rules of international law, which would impede any new development that substantially differs from existing rules. We do not believe that such a restriction of the future development of norms should be envisaged.

Draft guideline 9(3) quite rightly demands special consideration for persons or groups particularly vulnerable to atmospheric pollution and atmospheric degradation. However, my delegation is of the view that the specific groups mentioned in this paragraph, i.e. indigenous peoples and people of least developed countries, low-lying areas and small island developing states, not only "may", but rather "should" be included among the particularly vulnerable groups. If their inclusion is only optional, they could also be excluded. The demonstrative effect that according to the ILC Commentary should be reflected by the term "may" is already sufficiently expressed by "inter alia".

Concerning the particularly vulnerable groups we note that the ILC Commentary on draft guideline 9 refers in point 16 to the fact that the World Health Organization has also included people living in mountainous regions among those particularly vulnerable. In this context, we would like to draw attention to the contribution, as far as our own region is concerned, of the Alpine Convention and its Protocols, in particular those on Nature protection and landscape conservation and on Mountain forests, to the protection of the atmosphere.

Mr. Chairman,

Turning to the topic **“Immunity of State officials from foreign criminal jurisdiction”**, the Austrian delegation appreciates the work of the Special Rapporteur and of the Commission on this highly important and certainly controversial topic. It welcomes the fact that the Commission was able to discuss the fifth report of Special Rapporteur Escobar Hernández presented already in 2016 which addressed the crucial issue of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. Austria has taken note of the fact that the Commission even took the unusual step of voting on the adoption of proposed draft article 7.

As already expressed in past years, the Austrian delegation, in principle, is in favour of the proposed exceptions and limitations to immunity *ratione materiae*. However, my delegation understands the need for clarification whether these exceptions and limitations already reflect customary international law or are more of a progressive development character. We believe it would be useful if the Special Rapporteur and the Commission could make additional efforts to indicate to what extent the exceptions and limitations under consideration reflect already existing customary international law. Whatever the outcome of the work of the Commission on this topic, such indication would provide essential guidance for the assessment of the existence or not of immunity by national courts and other authorities.

In principle, Austria concurs with the idea expressed by the Special Rapporteur and reflected in paragraph 84 of the report that the Commission should support a developing trend in the field of immunity, rather than halt such a development. In particular, the Austrian delegation shares the view expressed in paragraph 109 of the report that perpetrators of international crimes ought not to be allowed to hide behind the cloak of sovereignty to shield themselves from prosecution as their acts ultimately affect the international community as a whole. Indeed, the purpose of exceptions and limitations to immunity from criminal jurisdiction is the protection of human rights and the fight against impunity which are part of the fundamental interests of the international community.

At the same time, the Austrian delegation sees a clear link between exceptions and limitations to immunity on the one side and efficient procedural safeguards on the other. Already last year, we suggested that restrictions of immunity should be combined with procedural safeguards in order to avoid misuse and politically motivated criminal prosecutions of state officials in foreign countries. We wish to reiterate that one possible solution would be to create an international mechanism aiming at the prevention of such misuse. Such a mechanism could be inspired by the provisions on interim measures and other urgency procedures before international courts and tribunals, and the proposed

immunity restrictions could be made conditional upon the establishment of such a mechanism. However, we are also ready to consider other procedural safeguards which would guarantee an effective prosecution by national or international courts.

In that spirit, Austria looks forward to the Special Rapporteur's suggestions in her next report regarding procedural safeguards.

Regarding the crimes listed in draft article 7(1) provisionally adopted by the Commission, in respect of which immunity shall not apply, the Austrian delegation agrees with the approach to limit the exceptions to specific crimes under international law.

With regard to the crime of corruption my delegation sympathises with the view that corruption, although it usually involves some official activities, is itself an abuse of an official position for private gain and cannot therefore be regarded as an act performed in an official capacity. However, if this interpretation was generally accepted and immunity therefore not available in cases of alleged corruption, procedural safeguards would also in this context be necessary, as allegations of corruption are especially susceptible to misuse.