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Report of the International Law Commission

on the Work of its 66th Session

Cluster II: The obligation to extradite or prosecute (Chapter VI), Subsequent agreements and subsequent practice in relation to the interpretation of treaties (Chapter VII), Protection of the atmosphere (Chapter VIII), Immunity of state officials from foreign criminal jurisdiction (Chapter IX)

Statement by

Ambassador Helmut Tichy

New York, 29 October 2014

Mr. Chairman,

Austria takes note of the work of the Working Group regarding the topic **"The obligation to extradite or prosecute (aut dedere aut iudicare)"** and commends the Special Rapporteur Mr. Kriangsak Kittichaisaree and the Working Group for the final report. It provides a valuable presentation of the full scope of this topic.

Austria has consistently stated that there is no duty to extradite or prosecute under customary international law and that such an obligation results only from specific treaty provisions. This situation makes it also difficult to establish a common legal regime for this topic. A report such as the one now before us seems to be the only way to deal with this matter. As indicated already in our previous statements, we do not object to the conclusion of this topic.

As to the substance of the report, I would only like to refer to the observation of the Commission in paragraph 14 of the report concerning the existence of a gap in the present international conventional regimes regarding most crimes against humanity. This issue is certainly a matter that should be addressed in the framework of the topic of crimes against humanity, a matter to which we have referred to in the discussion under Cluster I**.**

Mr. Chairman,

The Austrian delegation congratulates the Special Rapporteur, Professor Georg Nolte, on the advancement of the Commission's work on **"Subsequent agreements and subsequent practice in relation to the interpretation of treaties"** and the formulation of a further set of draft conclusions with commentary.

My delegation shares the view expressed in the first sentence of draft conclusion 7 paragraph 3 that the parties to a treaty are presumed not to amend or modify a treaty by subsequent agreement or practice. Rather, the presumed intention of the parties is the interpretation of treaty provisions. This presumption aptly describes faithfulness to treaty obligations and the principle of pacta sunt servanda.

The statement contained in the second sentence of draft conclusion 7 paragraph 3 that "the possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized" raises some questions. One may strictly adhere to this statement on the basis of the proposed definition of "subsequent practice" in draft conclusion 4 paragraph 2, which is only regarded as "an authentic means of interpretation". In so far as "subsequent practice" is defined as an act of interpretation, it will not extend to amendment or modification.

However, as indicated by the discussions within the Commission, this conclusion leads to the more general issue whether a subsequent practice of treaty parties may modify a treaty. In the view of the Austrian delegation, this effect may not be generally excluded. Notwithstanding the fact that during the 1969 Vienna Codification Conference on the law of treaties former draft article 38 on the modification of treaties by subsequent practice was not adopted, it seems clear that a "subsequent practice" establishing an agreement to modify a treaty should be regarded as a treaty modification and not merely as an interpretation exercise.

Also where no such intention of the parties can be established, general international law does not exclude that states parties to a treaty may create customary international law through their subsequent practice, if accompanied by opinio iuris, and thereby modify the rights and obligations contained in the treaty. This consequence is even reinforced by the fact that

international law does not know any hierarchy between the sources of international law. Thus, the change of international law based on custom by treaty rules and vice versa is a generally accepted phenomenon which the formulation of the second sentence of draft conclusion 7 paragraph 3 should not be understood to exclude.

The Austrian delegation appreciates the formulation in draft conclusion 9 paragraph 1 that an agreement under article 31 paragraph 3 subparagraph (a) and (b) of the Vienna Convention on the Law of Treaties "need not be legally binding". We note that apparently the question was not uncontroversial in the deliberations of the International Law Commission. As already stated in our previous comments and in particular last year's statement in the Sixth Committee we are convinced that such an "agreement" only has to be an "understanding" indeed and need not be a treaty in the sense of the Vienna Convention. Also informal agreements and non-binding arrangements may amount to relevant "subsequent agreements."

With regard to the first sentence of draft conclusion 9 paragraph 2, Austria wishes to emphasize that the subsequent practice of fewer than all parties to a treaty can only serve as a means of interpretation under very restrictive conditions. This applies in particular to the silence on the part of one or more parties referred to in the second sentence of this draft conclusion.

Mr. Chairman,

We commend the Special Rapporteur Professor Shinya Murase for the elaboration of the first report on the topic of the **"protection of the atmosphere".** The report takes stock of the already existing Aust3V8Wpp'jzV"7""W7p7jH7''7Whp'jq"778z3HH"Wnp'jq"7778Wd"'z8"VVWSp8j78H8qW"7"

the guidelines. The 2013 understanding explicitly stated inter alia 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 our view, this demonstrates once more that the understanding of 2013 might be too narrow to permit any meaningful work on this matter.

As to draft guideline 3 on the legal status of the atmosphere, it is questionable whether the legal status can be defined before the substance of the rights and obligations is determined. The qualification of the atmosphere as a natural resource, whose protection is a common concern of humankind, still leaves open, which particular obligations can be derived therefrom. It might seem advisable to embark first on the substance of this matter and then to find the right definition of its legal status.

Mr. Chairman,

Regarding the subject of “