Subsequent agreements and subsequent practice in relation to the interpretation of treaties; Protection of the Atmosphere; and Immunity of State officials from foreign criminal jurisdiction

Chapter VI: The Obligation to extradite or prosecute (aut dedere aut judicare)

In this second cluster of issues I will begin with Chapter VI of the report concerning the topic, ***aut dedere aut judicare*** **,** which has been on the agenda of the Commission since 2005. In recent years there has been a concerted effort to finalize work on this topic. In the past three years, the Commission has been dealing with the topic primarily in the context of a Working Group under the chairmanship of Mr. Kriangsak Kittichaisaree, whose valuable contribution is deeply appreciated by the Commission. I am pleased to report that following the adoption of the final report this year, the Commission has completed work on the topic.

It will be recalled that last year, the Commission presented to the Sixth Committee **a report of the working group**, which evaluated the progress and work of the Commission on this topic.

The 2013 report of the Working Group was generally well received in the Sixth Committee debate. Accordingly, this year, the Working Group, once it was established by the Commission, focuse

prosecute; (b) the gaps in the existing conventional regime; (c) the transfer of a suspect to an international or special court or tribunal as a potential third alternative to extradition or prosecution; (d) the relationship between the obligation to extradite or prosecute and *erga omnes* obligations or *jus cogens* norms; and (e) the continued relevance of the 2009 General Framework. The final report on the topic adopted by the Commission, at contained in paragraph 65 of the present report, is thus an amalgamation of the 2013 report of the Working Group and an analysis of the additional issues that the Working Group was seized of for discussion this year as mentioned just now.

The report **contextualized the topic within the broader framework of efforts to combat impunity and in the respect for the rule of law.** It is grounded against the background of the Survey by the Secretariat in 2010, which provided an analysis of the typology of provisions containing the obligation to extradite or prosecute in multilateral instruments, as well as the Judgment of 20 July 2012 of the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*.

This year, the Commission had before it the second report of the Special Rapporteur, Mr. Georg Nolte, containing six draft conclusions. Following the debate in the plenary, the six draft conclusions were referred to the Drafting Committee. The Drafting Committee decided to reformulate them into five draft conclusions, which were then provisionally adopted by the Commission. The text of the provisionally adopted draft conclusions, together with commentaries, can be found at paragraph 76 of the report.

Draft conclusion 6

sense of a narrowing down of possible meanings of a particular term or provision, or of the scope of the treaty as a whole. Alternatively, such taking into account may contribute to a clarification in the sense of confirming a wider interpretation.

Paragraph 2 concerns possible effects of subsequent practice in interpretation in the context of article 32, which does not reflect an agreement of all parties regarding the interpretation of a treaty. Such practice, as a supplementary means of interpretation, can confirm the interpretation which the interpreter has reached in the application of article 31, or determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

Paragraph 3 addresses the question of how far the interpretation of a treaty can be influenced by subsequent agreements and subsequent practice in order to remain within the realm of what is considered interpretation under article 31, paragraph 3 (a) and (b). This paragraph reminds the interpreter that agreements subsequently arrived at may serve to amend or modify a treaty, but that such subsequent agreements are subject to article 39 of the Vienna Convention and should be distinguished from subsequent agreements under article 31, paragraph 3 (a). While acknowledging that there are examples to the contrary in case-law and diverging opinions in the literature, paragraph 3 stipulates that the possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized.

Draft conclusion 8, Weight of subsequent agreements and subsequent practice as a means of interpretation identifies some criteria that may be helpful for determining the interpretative weight to be accorded to a specific subsequent agreement or subsequent practice in the process of interpretation in a particular case. Paragraph 1 specifies that the weight to be accorded to a subsequent agreement or subsequent practice as a means of interpretation depends, *inter alia*, on its clarity and specificity. The use of the term *"inter alia*
should not be seen as exhaustive. Paragraph 2 deals only with subsequent practice under article 31, paragraph 3 (b), and specifies that the weight of subsequent practice also

depends on whether and how it is repeated. Paragraph 3 addresses the weight that should

.

Let me now turn to **draft conclusion 9 Agreement of the parties regarding the interpretation of a treaty** , paragraph 1 of which intends to capture what is common in subparagraphs (a) and (b) of article 31, paragraph 3, which is the agreement between the parties, in substance, regarding the interpretation of the treaty. I

requires a common understanding by the parties regarding the interpretation of a treaty. In order for that common understanding to have the effect provided for under article 31, paragraph 3, the parties must be aware of it and accept it. The aim of the second sentence

need not, as such, be legally binding. Paragraph 2 confirms the principle that not all the parties must engage in a particular practice to constitute agreement under article 31, paragraph 3 (b). It clarifies that acceptance of such practice by those parties not engaged

under articles 31 and 32 of the Vienna Convention. This conclusion is limited by the acknowledgment that decisions of Conferences of States Parties often provide a range of practical options for implementing the treaty, which may not necessarily embody a subsequent agreement and subsequent practice for the purpose of treaty interpretation. Paragraph 3 sets forth the principle that agreements regarding the interpretation of a treaty under article 31, paragraph 3, must relate to the content of the treaty. Thus, what is important is the substance of the agreement embodied in the decision of the Conference of States Parties and not the form or procedure by which that decision is reached.

This concludes my introduction of Chapter VII of the report.

Chapter VIII: Protection of the Atmosphere

I now invite you to turn to chapter VIII, which deals with the topic, **of the Atmosphere ,** The Commission this year had before it a detailed first report by the Special Rapporteur Mr. Shinya Murase. The report addressed the **general objective of the project**, by among other things providing the rationale for work on the topic, delineating the general scope, identifying the applicable sources of the law and relevant basic concepts and offering perspectives and approaches to be taken with respect to the subject as the Commission moves forward in its consideration. In the report, the Special Rapporteur also presented three draft guidelines defining
guidelines; and (c) the legal status of the atmosphere. The summary of the introduction of the debate by the Special Rapporteur is contained in paragraphs 80 to 84 of the report. In particular, he drew attention to the circumstances attendant to the inclusion of the topic in the Commission, the debate in the Sixth Committee last year as well as the highly technical nature of the subject. In view of the deteriorating state of the atmosphere, the Special Rapporteur also highlighted the pressing concern of the international community in addressing the topic, and the need for the Commission to look at it from the perspective of general international law. The Special Rapporteur noted that the

contemporary challenges to the atmosphere concerned three areas, namely (a) tropospheric transboundary air pollution, (b) stratospheric ozone depletion and (c) climate change. The Special Rapporteur also took the occasion to introduce the three draft guidelines he had proposed in his report.

In his concluding remarks, as reflected in paragraphs 116 to 122 of the report, the Special Rapporteur advocated a **middle-of-the road approach on the understanding**, acknowledging its existence as it was the

articles on it last year

Draft article 5 entitled **Persons enjoying immunity *ratione materiae*** corresponds to draft article 3, provisionally adopted last year, which appears in Part Two dealing with Immunity *ratione personae*. Focusing on the subjective scope, draft article 5 is the first of the articles to be comprised in Part Three. Subsequent articles will seek to address the material and temporal scope of immunity *ratione materiae*.

It is widely acknowledged that State officials enjoy immunity *ratione materiae* for their official acts or for acts performed in an official capacity. However, one has to be regarded to be a State official in order to enjoy such immunity. Conversely, the fact that one is a State official does not necessarily mean that he would enjoy immunity *ratione materiae* for acts that may be performed in a private capacity.

As presently formulated the draft article provides that State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction. Even though the draft article is focused on the subjective scope, the reference

flag the importance of a link of the official to the State, even though the precise nature of such link will be addressed as part of the material scope of the immunity. It is intended to refer to the State official as an individual who represents the State or who exercises State functions. Once whether or not the act was performed in an official capacity is

It will o be recalled that paragraph 3 of draft article 4 on the Scope of Immunity *ratione personae* provisionally adopted last year provides that the cessation of immunity *ratione personae* is without prejudice to the rules of international law concerning immunity *ratione materiae*. When the material scope of immunity *ratione materiae* is addressed the question of immunity *ratione materiae* of former Heads of States, Heads of Government and Minister for Foreign Affairs will be one of the issues to be taken into account.

The Commission is most grateful to all those government that responded to its request last year for information on practice regarding immunity *ratione materiae.* The

Commission seeks information from as many States as possible. Accordingly, in Chapter III, of the present report it has reiterated its request. More specifically, the Commission requests States to provide information on their domestic law and their practice, in

officials from foreign criminal jurisdiction. In addition, this year, the Commission has added an extra request for similar information with respect to the exceptions to immunity of State officials from foreign criminal jurisdiction. It would be appreciated if such information could be received by 31 January 2015.

Mr. Chairman,

This concludes my introduction of Chapter IX and my second statement. Thank you for your attention.