

69<sup>th</sup>

The Obligation to Extradite or Prosecute (aut dedere aut judicare) (Chapter VI of the Report)

Mr. Chairman,

I will start by briefly turning to the obligation to extradite or prosecute (aut dedere aut judicare) in the final report of the Working Group on this subject over the past few years.

Mr. Chairman,

The Commission has had the opportunity to examine the final report of the Working Group which summarized the work of the Commission on this subject over the past few years.

As emphasized in the report, the discussion on the obligation to extradite or prosecute raised important issues. However, we feel that the Commission was unable to find solutions and give clear answers to all of these issues and, as a consequence, it encountered difficulties in continuing with its work.

Mr. Chairman,

Portugal has repeatedly stressed the importance of this topic, taking into consideration the objectives underlying this obligation, which we have stated many times and cannot be overlooked: the fight against impunity for offenders and against the creation of safe havens for them. The legal community and the international society in general must continue to debate the obligation to extradite or prosecute and strive to find answers to the questions raised by the Commission.

The discussion within the final report of the Working Group forms a good basis for continuing to discuss this subject in other settings.

In this sense, we commend the Commission and the Working Group on their study of this topic, which we recognize was difficult and complex.



situations has already been made by the Commission last year, in paragraph 3 of draft conclusion 4 and in its commentary thereto.

In this sense, we welcome the redrafting that was operated by the Drafting Committee on different situations. It is our expectation that the Commission and the Special Rapporteur will continue to address Articles 31 and 32 at different levels when proceeding with their analysis of this topic in the following years.

Mr. Chairman,

Paragraph 2 of draft conclusion 8 (Weight of subsequent agreements and subsequent practice as a mean of interpretation) draws to attention a relevant question when it comes to subsequent practice. Its weight in the interpretation of treaties depends on whether and how it is repeated.

As pointed out by the Commission in the commentary to this conclusion, the continuity in time as well as the character of the repetition of the subsequent practice demonstrates how rooted a particular position of States regarding the interpretation of a treaty is. We, therefore, welcome the insertion of such reference in the text of this draft conclusion.

Mr. Chairman,

To end our intervention on this topic, Portugal reiterates that the Commission must avoid the temptation of going beyond the Vienna Conventions on the Law of Treaties. Its work should strive to clarify and guide States, international organizations, courts and tribunals, as well as individuals that are subjects of treaty rights and obligations.

This is a topic to which Portugal attaches quite some importance and therefore we look forward to seeing how the Commission will continue its approach on this topic, namely when delving into the new questions foreseen in the plan of work and addressing question that have already risen as its work progresses.



This is a topic to which Portugal attaches great importance. The Commission may have an important contribution to this vital debate on our common future as humankind. We, thus, encourage the Commission to proceed with its work and to explore without any hesitations every aspect of the legal dimension of the protection of the atmosphere.

Immunity of State Officials from Foreign Criminal Jurisdiction (Chapter IX of the Report)

Mr. Chairman,

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\$V UHJDUGV WKH GHILQLWLRQ RI µ6WDWH RIILFLDOV¶ GUDIW definition proposed by the Commission. It is straightforward and broad enough to allow a case-by-case interpretation. Nevertheless, that also means that the commentary on the definition has to establish very precise criteria for such interpretation.

\$V IRU WKH FRQFHSW GHVLJQDWLRQ ZH DJUHH WKDW WKH WH the term µRUJDQ¶ 7KH WHUP µRIILFLDO¶ UHIHUV YHU\ FOHDUO\ W the subject of immunity in the present topic. For example, the Certain Questions of Mutual Assistance case<sup>1</sup> ZLGHO\ XVHV WKH WHUP µRIILFLDO¶ O HQG R QLVWDHOW confusion with a legal person, which falls outside the scope of this topic.

Mr. Chairman,

Turning now to draft Article 5, on the persons enjoying immunity *ratione materiae*, we do agree that any act performed for the benefit of the person falls outside the scope of immunity from the exercise of foreign criminal jurisdiction. Immunities are functional in nature and should be as limited as possible. Therefore, considerations of *ordre public* and regarding individual rights should prevail over any act performed within the private sphere of a State official.

In this regard, it is our understanding that it would be advantageous to refer in the FRPPHQWDULHV WR WKH GUDIW DUWLFOHV WKDW WKH LPPXQL general obligation to consider withdrawing the immunity of one of its own State officials when requested.

Furthermore, and where the immunity is not withdrawn, it should also be referred in the commentaries that States have a legal obligation to prosecute at home their own State officials who commit a crime abroad in the exercise of State functions. Since such obligations apply to all State officials, including those who enjoy immunity *ratione personae*, such commentaries could be placed either in draft article 1, on scope, or specifically in both draft articles 4 and 5 (persons enjoying immunities *ratione personae* and *ratione materiae*, respectively).

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<sup>1</sup> Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008, p.177.

