

 Permanent Mission of Austria
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United Nations General Assembly**

6th Committee

Agenda Item 81:

**Report of the International Law Commission
on the Work of its 63rd and 65th Session**

Part I (Chapters I-III, IV, V und XII)

Statement by

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Mr. Chairman,

Before offering the comments of Austria on the items falling under Cluster I we would like to make a general comment: We appreciate the high quality of the reports submitted by the Special Rapporteurs of the International Law Commission and by the Commission itself. However, their quality could be further enhanced by a better reflection of the views expressed by states, both in written contributions and in the discussions of the Sixth Committee.

Mr. Chairman, let me now address the topics under Cluster I:

(Subsequent practice)

Austria welcomes the reorientation and focusing of the issues initially examined under the name of “treaties over time” as a full topic entitled “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”. We appreciate the work of Professor Georg Nolte as Special Rapporteur and of the Drafting Committee, which has provisionally adopted five draft conclusions on this topic.

The discussion in the Commission was very helpful as it clarified a number of aspects contained in article 31 of the Vienna Convention on the Law of Treaties. Judicial practice has already revealed that this field requires clarification in order to avoid conflicting interpretations that could endanger the stability of treaty relations.

The Special Rapporteur offered preliminary conclusions that are based on existing judicial and other state practice and deserve comments:

1. In Austria’s view, conclusion 4 para.1 deserves clarification. It should be mentioned already in the text of the conclusion that the “agreement” that may constitute a “subsequent agreement” in the sense of that conclusion does not need to be a treaty in the sense of the Vienna Convention on the Law of Treaties. Also informal agreements and non-binding arrangements may amount to relevant “subsequent agreements.”

Equally, interpretative declarations by treaty bodies can be regarded as such “subsequent agreements”. In this sense, the NAFTA Arbitral Tribunal, in the case of *Methanex Corporation v. United States of America*, qualified the NAFTA Free Trade Commission’s interpretation of NAFTA provisions as “subsequent agreement”¹. *It stated: “It follows from the wording of Article 31(3)(a) that it is not envisaged that the subsequent agreement need be concluded with the same formal requirements as a treaty; [...] the Tribunal has no difficulty in deciding that the [Free Trade Commission’s] Interpretation ... is properly characterized as a “subsequent agreement” on interpretation falling within the scope of Article 31(3)(a) of the Vienna Convention.”*

¹ Final Award on Jurisdiction and Merits, 3 August 2005, II B, paras. 20, 21

2. In this respect the delegation of Austria would like to draw attention to the fact that the Guidelines of the Commission on Reservations also deal with “interpretative declarations”, and that there may be a need to bring the results of the work of the Commission on these two topics in line.

3. As regards the role of subsequent practice in the interpretation of a treaty as referred to in draft conclusion 4 para. 3, Austria wishes to emphasize that the subsequent practice of only one or of less than all parties to a treaty can only serve as supplementary means of interpretation under the restrictive conditions of article 32 of the Vienna Convention.

(Immunity)

Mr. Chairman,

Regarding the subject of “Immunity of state officials from foreign criminal jurisdiction”, my delegation commends the Special Rapporteur, Concepción Escobar-Hernández, for the most valuable report on the first articles on this topic. It is of particular interest to my delegation. The general significance of this topic is reflected in the already rich relevant judicial practice of national and international courts and tribunals dealing with these questions.

Draft article 1 regarding the scope of the draft articles raises the question of the meaning of decisive terms, such as “state officials” and “criminal jurisdiction”. We note that the term “officials” will be defined at a later stage, but in our opinion also the expression “criminal jurisdiction” needs further clarification. Usually it is confined to the jurisdiction of national criminal courts or tribunals. Nevertheless, already the ILC commentary on article 29 of the Vienna Convention on Diplomatic Relations attaches a broader meaning to this expression, as it includes also the criminal jurisdiction exercised by administrative authorities. In Austria’s view, the same clarification would be needed with respect to the present draft articles.

A further issue related to the exercise of “criminal jurisdiction” is whether preliminary investigatory steps can be conducted irrespective of a possible immunity. Austria is of the opinion that measures to ascertain the facts of a case are not precluded by immunity. The procedural bar of immunity is only relevant once formal proceedings are to be instigated against a person.

It must also be clarified to what extent so-called hybrid courts fall under the ambit of the draft articles. Because of the ambiguous nature of such institutions, it has to be clarified whether immunity can be invoked before them. This problem arises in particular in cases where individuals of third states are involved.

A further issue that merits clarification is whether the immunity can be invoked also in relation to national judicial authorities acting on the basis of an arrest warrant issued by an international criminal tribunal. This problem was encountered recently with arrest warrants issued by the International Criminal Court. Although the decisions of the ICC regarding Chad

and Malawi of 12 and 13 December 2012 are indicative in this respect, clear guidance by the Commission would be helpful. We believe that a solution should be found which is in the interest of the fight against impunity and respects the rule of law.

Austria understands para. 2 of this draft article as a non-exhaustive enumeration of *leges speciales* concerning immunity. However, it must be clarified whether these special rules take precedence over the draft articles only if the relevant person enjoys a broader scope of immunity under those special rules or also if the special rules provide a lesser amount of immunity than the present draft articles.

Another question is whether these draft articles envisage providing immunity only if persons are present in the state of the forum or also if they are absent. In our view, the draft articles, or at least the commentary, should be very clear in this respect. We are of the opinion that such immunity applies also if the person is not in the territory of the forum state.

Mr. Chair, permit me to turn to draft article 3:

Austria supports the limitation of immunity *ratione personae* to the three categories of persons referred to in the present draft article. Although we cannot deny that other persons also carry out similar functions, they only enjoy immunity as members of special missions. As such they fall under the exception of draft article 1, para. 2.

A still open issue, so far not addressed by the Commission, is whether family members accompanying the relevant persons would also benefit from this immunity. Also in this context Austria suggests that the Commission follow the approach of the immunity of special missions.

As to draft article 4, there is no doubt that this immunity is enjoyed only during the term of office as expressed in para. 1. Immunity as a procedural device would bar any formal proceeding during this time, even if the relevant acts were committed prior to the taking of office.

(Protection of the atmosphere)

We take note with great interest that the topic “Protection of the atmosphere” has been placed on the agenda of the Commission and we are looking forward to seeing the first report. Due to the limits of this topic decided by the Commission, it seems that only a restricted number of issues can be addressed. However, it will be unavoidable to address in this context also some of the issues currently excluded from the mandate, such as liability or the precautionary principle.

(Crimes against humanity)

Austria welcomes the inclusion of the topic „Crimes against humanity” in the long-term working plan of the Commission. The Rome Statute of the International Criminal Court certainly cannot be the last step in the endeavor to prosecute such crimes and to combat impunity. The Court is only able to deal with a few major perpetrators, but this does not take away the primary responsibility of states to prosecute crimes against humanity. Although the Preamble of the Rome Statute requires states to adopt the necessary legislation in order to be able to prosecute the crimes within the jurisdiction of the ICC, including crimes against humanity, such legislation is still missing in a large number of states. This also engenders a lack of cooperation among states in this area. Austria supports the efforts undertaken by a number of states to improve this cooperation on the basis of a new legal instrument. This initiative was also addressed this year in Vienna during the annual meeting of the UN Commission on Crime Prevention and Criminal Justice. Unfortunately, it was not yet possible to adopt a resolution advancing this topic at that meeting. We would welcome a close cooperation between the ILC and the promoters of the initiative to improve legal cooperation in the area of combatting crimes against humanity. The result of the work of the ILC on this topic should contribute to close the cooperation gaps which have been identified.

Thank you, Mr. Chairman.