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Agenda Item 78

Report of the International Law Commission

on the Work of its 66th Session

Cluster I: Introductory parts (Chapters I-III), Other decisions and conclusions of the Commission (Chapter XIV), Expulsion of aliens (Chapter IV), Protection of persons in the event of disasters (Chapter V)

Statement by

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New York, 27 October 2014

Mr. Chairman,

Austria would like to thank the International Law Commission and its Special Rapporteurs for the work undertaken this year as reflected in the Commission's report. We will comment on this report in the order of the suggested clusters. Concerning the questions in Chapter III of the report, we intend to provide the relevant information in writing.

Mr. Chairman,

Austria takes note of the Commission's decision to include the topic "**ius cogens**" in its long-term program of work. The proposal of Mr. Dire Tladi shows that there are a number of issues that merit a deeper study. While the concept of *ius cogens* as such has become generally accepted, it is obvious that the precise scope of international norms that have such a character remains unclear. Similarly, the process by which some legal norms acquire the status of *ius cogens* is not fully determined. Since the Commission decided to exclude issues relating to *ius cogens* from the topic "Identification of customary international law" it is appropriate to address the topic "*ius cogens*" separately. The Austrian delegation thus supports the idea of Mr. Tladi that the Commission study a number of issues such as the nature of *ius cogens* and the requirements for the identification of a norm as *ius cogens*, and that the Commission establish an illustrative list of norms which have achieved the status of *ius cogens* and look into the consequences or effects of violations of *ius cogens*.

Mr. Chairman,

Already in last year's statement, Austria expressed its support for the inclusion of the topic "**Crimes against humanity**" in the agenda of the Commission. In Austria's view the Commission and Special Rapporteur Sean Murphy should put emphasis on the need of cooperation and adequate domestic legislation rather than on the elaboration of new definitions of such crimes. New definitions that differ from the already existing ones like those contained in the Rome Statute of the International Criminal Court (ICC) could only create problems for the pursuit of the goal of combating impunity. The Commission should also take into account the joint initiative of Argentina, Belgium, the Netherlands, Senegal and Slovenia on mutual legal assistance regarding atrocity crimes.

As to the issues relating to "Crimes against humanity", on which, according to Chapter III of the report, comments would be of particular interest to the Commission, Austria intends to convey written answers. Already now, however, we can give the following preliminary answer:

Austria is in the process of finalizing legislation regarding crimes against humanity as part of the Austrian Criminal Code. The definition of the proposed crime will largely follow the definition contained in the Rome Statute of the ICC. Up to now, crimes that could qualify as crimes against humanity could only be prosecuted as ordinary crimes on the basis of the existing provisions of the Criminal Code. As to the future Austrian jurisdiction over crimes against humanity, the draft bill envisages such jurisdiction if either the perpetrator or the victim is Austrian, if the crime affects other Austrian interests or if the perpetrator is a foreigner present in Austria and cannot be extradited. The public consultation procedure relating to the relevant draft bill has been completed a couple of days ago, and we hope that the government will soon be able to submit the bill to parliament.

Mr. Chairman,

Regarding the topic "**expulsion of aliens**", Austria expresses its appreciation to the Special Rapporteur, Maurice Kamto, and to the Commission for the final elaboration of the complete set of draft articles after second reading.

Generally speaking, Austria's practice is largely in conformity with these draft articles. For instance, in line with draft article 19 (b) relating to the separation of aliens detained for the purpose of expulsion from persons sentenced to penalties, Austria has constructed detention facilities for the exclusive purpose of such separation.

As to draft article 6 subparagraph a) concerning the prohibition of expulsion of refugees, as Member State of the European Union, Austria applies the relevant EU legislation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, the so-called Dublin Regime. These EU rules determine Austria's practice relating to the expulsion of refugees to those Member States of the European Union where they entered the EU for the first time. In addition, the application of these rules is scrutinized by the European Court of Human Rights.

Austria has no objection to the wording of draft article 8 concerning the deprivation of nationality for the purpose of expulsion. Austria shares the understanding expressed in the commentary that this draft article does not affect a state's right to deprive an individual of its nationality on a ground that is provided for in its legislation. This may be the case if legislation provides for the deprivation of nationality of persons that take part as fighters in foreign armed conflicts. Such deprivation would not be contrary to draft article 8 which prohibits the deprivation of nationality for the sole purpose of expulsion. In this context, we would have welcomed an obligation incumbent upon foreign States to recognize the nationality as indicated by the person being subject to expulsion. This obligation of transparency also requires that states that do not provide the withdrawal of nationality should make this fact notorious.

As to draft article 18 concerning the obligation to respect the right to family life we share the view confirmed by the practice of the European Court of Human Rights and expressed also in the commentary that this right does not provide an absolute protection of an individual against expulsion or against the expulsion in a state preferred by the individual.

Austria also emphasizes that, with regard to draft article 22 concerning the state of destination of aliens subject to expulsion, there does exist an obligation to receive own nationals, but cases can occur where also other states than the national state are obliged to receive individuals. These situations mostly result from particular treaty obligations.

I would like to recall that after the adoption of the draft articles by the Commission after first reading Austria submitted an elaborated comment on the whole set of draft articles where it raised concerns regarding some of the draft articles. *These concerns related to the present draft article 2 (Use of terms), draft article 10 (Prohibition of disguised expulsion), draft article 16 (Obligation to protect the right to life of an alien subject to expulsion), draft article 17 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment), draft article 19 (Detention conditions of an alien subject to expulsion), draft article 22 (State of destination of aliens subject to expulsion), draft article 24 (Obligation not to expel an alien to a State where he or she may be subjected to torture or to cruel, inhuman or degrading treatment or punishment), draft article 26 (Procedural rights of aliens subject to expulsion), draft article 27 (Suspensive effect of an appeal against an expulsion decision), draft article 30 (Responsibility of States in cases of unlawful expulsion) and draft article 31 (Diplomatic protection).*

We are grateful to the Commission that some of these concerns have been reflected in the present text; but we also learn and regret that others have not been taken up, without any

explanation in the commentary. So, for instance, the redundancy of draft articles 30 and 31 has neither been addressed nor has the need to retain these draft articles been explained.

We support the submission of these draft articles to the General Assembly to enable it to take note of them. A decision on a possible elaboration of a convention on the basis of these draft articles should, however, be taken only after a certain time has elapsed. This deferral will allow us to assess the degree of acceptability of these draft articles by states.

Mr. Chairman,

Austria commends the Special Rapporteur, Eduardo Valencia-Ospina, for his seventh report and congratulates him and the Commission for the elaboration of the whole set of draft articles and commentaries on the "**protection of persons in the event of disasters**" after first reading. Recent events illustrate the importance of this subject in international relations, in particular of the issue of the conditions under which external assistance should be accepted or may be refused.

Austria intends to provide written comments on these draft articles as requested by the Commission. Permit me, nevertheless, to offer already here some comments regarding the three new draft articles 4 (*formerly 3 bis*), 18 (*formerly 14 bis*), and 21 (*formerly 17*) that were examined by the Drafting Committee during this year's session of the Commission. The draft articles formerly proposed as draft article 18 concerning matters related to disaster situations not regulated by the present draft articles and draft article 19 concerning the relationship to the Charter of the United Nations were not included in the text adopted on first reading. My delegation concurs with this decision since these draft articles would be redundant.

As to draft article 4 concerning the use of terms the definitions contained in this provision are generally acceptable. However, we are wondering why the definitions of "assisting State" and "other assisting actor" (*in sub-paragraphs b) and c)*) contain the qualifier "at its request or with its consent". These qualifiers seem to be unnecessary since these particular conditions are the result of the substantive provisions of the draft articles and need not be included in the definitions. Furthermore, the comment on subparagraph e) on the definition of relief personnel has to be reconciled with state practice since military personnel remains under the full command of the assisting state irrespective of the operational control of the affected state. Accordingly, such relief operations remain attributable to the assisting state. Draft article 12 should also reflect this understanding.

Draft article 21 concerning the relationship of these draft articles to international humanitarian law deals with a major issue relating to the scope of application of these draft articles. According to draft article 1 defining the scope of the draft articles in connection with draft article 3 regarding the definition of disasters, the draft articles apply without distinction to all kinds of disasters, whether natural or man-made, which would include also armed conflicts. Draft article 21 limits the scope insofar as it determines that these articles do not apply to situations to which the rules of international humanitarian law are applicable. According to this wording these articles do not apply to disasters connected with international and non-international armed conflicts, whereas disasters connected with internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, would be covered.

However, the commentary presents a different understanding insofar as it states that the draft articles "can nonetheless apply in situations of armed conflict to the extent that existing rules of international law, particularly the rules of international humanitarian law, do not

apply." According to the commentary, the draft articles would apply also to disasters connected with armed conflicts to the extent that the rules of international humanitarian law do not address this particular disaster situation. This difference between the draft articles and the commentary does not permit a clear understanding of what the Commission envisaged. In our view, the draft articles should apply also to situations of armed conflict, but only insofar as they are not contradicting the particular rules of international humanitarian law.

Thank you, Mr. Chairman.