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on the Work of its 64th Session

Cluster III: immunity of state officials; provisional application of treaties;formation and evidence of customary international law; the obligation to extradite or prosecute; treaties over time; and most-favoured-nation clause

Statement by

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Mr. Chairman,

Permit me to start with the topic of **"immunity of state officials from foreign criminal jurisdiction"**. We wish the new Special Rapporteur, Ms. Concepción Escobar Hérnandez, full success in the further elaboration of this topic. Her preliminary report submitted to the Commission this year already showed remarkable insight in this topic which in Austria's view is of particular importance, reflected also in various recent judicial decisions.

In her preliminary report, the Special Rapporteur pointed out several issues that, in her view, deserve particular attention and were intensively discussed in the Commission. Although the Commission has not yet presented specific draft articles which could be commented upon, Austria nevertheless would like to contribute to the discussion already at this moment.

As to the fundamental approach to be taken by the Commission, i.e. restatement of lex lata or progressive development de lege ferenda, Austria has already stated last year that the starting point must be the identification of the existing norms of international law. Once this has been done, the Commission should embark on a possible progressive development in accordance with the present needs of the international community.

Therefore, Austria gives priority to the inductive approach based on the existing norms the result of which could later on be juxtaposed to the results of a value based deductive approach and the identification of trends that emerged in recent time.

When this topic was started in the Commission, Austria already referred to the need of drawing clear distinctions between the different kinds of immunities, the different categories of beneficiaries, the scope of the immunities and the different circumstances under which immunities can be invoked. In particular, attention has to be paid to the difference between immunity in civil and in criminal proceedings.

As to the scope of the topic, Austria maintains the view that it does not encompass the issue of jurisdiction and that, therefore, there is no need to address in this context also the issue of universal jurisdiction. The present topic is confined to the question as to whether states, once they are exercising criminal jurisdiction, are impeded in this exercise by the immunity of foreign state officials under international law.

As far as the so called troika enjoying immunity ratione personae is concerned, we believe – and thereby we also reply to a question raised in Chapter III of the Commission's report – that present customary international law does not extend this

particular immunity to other high ranking officials who, nevertheless, could enjoy immunity ratione materiae.

A central point of the discussion of the immunity ratione materiae is undoubtedly the definition of officials or persons acting on behalf of a state in an official capacity. In this context it has to be examined whether the rules of attribution defined by the Articles on State Responsibility could be helpful to distinguish between persons acting on behalf of a state and other persons. It would also be necessary to define the official acts of a state for which immunity could be invoked.

Another major point is the possibility of exceptions to such immunity, either ratione personae or ratione materiae. Austria has already indicated last year that certain exceptions for international crimes are evolving and that therefore further reflection on this complex issue is necessary.

Finally, in view of the procedural nature of immunities, Austria shares the view that it is necessary also to discuss the procedural elements, such as the point in time determining the extent of the immunity.

Mr. Chairman,

Permit me now to turn to the topic of the **"provisional application of treaties"**. Austria welcomes the inclusion of this topic into the agenda of the Commission and the appointment of Mr. Juan Manuel Gómez-Robledo as Special Rapporteur.

In recent times, provisional application has increasingly been resorted to although neither the conditions under which it is available nor its legal effect is undisputed. Since legal doctrine has also not very frequently dealt with this matter, provisional application remains vague and ambiguous.

For instance, one question is that of the scope of the provisional application of a treaty. Article 25 of the Vienna Convention of the Law of Treaties does not specify the extent to which a treaty is applied if it is provisionally applied, whether in its entirety, including also its procedural provisions like dispute settlement, or only partly, relating only to provisions of substance.

Another issue is whether provisional application of a treaty can be based on a unilateral declaration - as the UN Treaty Handbook seems to suggest - or whether an agreement of all states parties is needed for this purpose. The wording of Article 25 of the Vienna Convention favors the latter alternative, as it explicitly refers to the wording of the treaty itself or to an additional agreement of the negotiating states, which means of all negotiating states.

Provisional application raises a number of problems in relation to domestic law. It was argued that provisional application was possible even if domestic law including the constitution of a state was silent on this possibility. The opposite position is that domestic law defines the procedures by which a state accepts international commitments in an exhaustive manner. In addition, it also has to be pointed out that there is a certain tension between provisional application and parliamentary approval procedures based on the idea of democratic legitimacy.

The Austrian constitution does not contain any rules on the provisional application of treaties. However, since Austria has become a member of the European Union in 1995 and in view of the EU practice of provisional application, the need arose to apply provisionally certain treaties with third countries. Austria accepted this practice, but in order to respect democratic legitimacy it applied such treaties provisionally only after their approval by the Austrian parliament. If the treaty does not specify that the provisional application becomes effective only upon notification, allowing Austria to conclude its parliamentary procedure, Austria has adopted the practice of declaring that it would apply the treaty provisionally only after its parliamentary approval in Austria.

The Special Rapporteur also raised the question of the relation between Article 25 and Article 18 of the Vienna Convention, the latter regarding non-frustration. It is our view that these two issues concern different problems and should be kept separately, although both provisions apply simultaneously. Whereas provisional application is subject to its own conditions and may entail a restricted extent of application of a treaty, the duty not to frustrate the object and purpose of a treaty relates to the whole treaty.

Mr. Chairman,

Austria welcomes the plan of the Commission to contribute to the clarification of the formation and evidence of **customary international law** and the appointment of Sir Michael Wood as Special Rapporteur.

As to the scope of this topic, Austria is in full support of the Special Rapporteur's intention to limit it to "secondary" or "systemic" rules on the identification of customary international law.

With regard to the potential inclusion of jus cogens in the topic, subject to further discussion Austria sees no difficulty in including it although this issue does not seem to be inherently linked to customary law. *Norms of international law, whether conventional, customary or otherwise, may or may not have peremptory character.*

Thus, while one may not be able to exclude the jus cogens character of some customary law rules, this is not intrinsically linked to the question of custom.

As to the analysis of the case-law, Austria considers that the judicial findings of both international and domestic courts and tribunals should be scrutinized; the emphasis of the Commission's work should be on a critical assessment of how the different courts and tribunals have identified customary rules. Such an approach would be in line with the Commission's intention to focus on "secondary" rules.

In this respect, Austria agrees with the suggestion that the Commission's work should focus on an analysis of the elements of state practice and opinio juris, including their characterization, their relevant weight and their possible manifestations in relation to the formation and identification of customary international law.

Austria further agrees that the extent to which these two elements were actually relied upon by courts and tribunals as well as by states should be a central aspect of the Commission's work in order to help clarify and solidify the formation and identification of customary international law.

In view of the wide range of other points that may be covered by the Commission, Austria suggests limiting the work to the core issues, such as the identification of state practice and opinio juris; the potential change of the process of the formation of rules of customary international law; the degree of participation by states in their formation - including the "persistent objector" debate - as well as the so-called "words" vs. "actions" problem.

In Austria's view this project of the Commission is not suited to lead to a convention or similar form of codification. Rather, it could provide useful guidance for practitioners on various levels to identify and to prove custom in the form of guidelines or conclusions with commentary.

Mr. Chairman,

As to the topic ***"extradite or prosecute"*** *Austria recognizes the work that was done so far by the former Special Rapporteur, Professor Zdyslaw Galicki. His work already identified the various problems connected with this topic and by doing so considerably contributed to its further elaboration.*

Austria concurs with the views expressed in the Commission that presently stocktaking is needed in order to decide in which direction this topic should be continued or whether it should be terminated.

It seems that the view prevails that there is no duty to extradite or prosecute under present customary international law and that such obligations only result from specific treaty provisions. These individual treaty provisions can be of a different content so that a harmonization would hardly be feasible. Therefore, Austria would not object to terminate this topic.

However, should the Commission decide to pursue this topic, Austria recommends to consider also the result of the working group established in 2009, which constituted a valuable supplement to the work of the Special Rapporteur.

Mr. Chairman,

Austria welcomes the reorientation and upgrading of the issue of **"treaties over time"**, so far discussed in a study group, into the full-fledged topic "subsequent agreement and practice" and the appointment of Professor Georg Nolte as Special Rapporteur. *In view of this change, the discussion will be focused on Article 31 of the Vienna Convention on the Law of Treaties and deal with widely disputed issues in the framework of the interpretation of treaties. Judicial practice has already revealed that this field requires clarification in order to avoid conflicting results of interpretation 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.

As regards the role of subsequent practice in the interpretation of a treaty, Austria is not convinced that the subsequent practice of only one or less than all parties is sufficient. In order to serve as context for the interpretation of a treaty, the practice must, according to Article 31, embrace all states parties unless an effect only for certain states is envisaged.

As to the relation between formal interpretation procedures and practice as a means of interpretation it has been demonstrated that formal procedures do not exclude the consideration of subsequent practice for interpretation purposes.

Concerning the relation between formal modification of a treaty and interpretation by subsequent practice, states sometimes prefer resorting to interpretation over formal modification, because it allows them to avoid national approval procedures for treaty modifications. However, one has to take into account that a proposal according to which treaties could be modified by subsequent practice was defeated at the Vienna Conference on the Law of Treaties.

Mr. Chairman,

Austria regards the work undertaken by the Commission concerning the **"most-favoured-nation clause"** as a valuable contribution to clarifying a specific problem of international economic law which has led to conflicting interpretations, in particular, in the field of international investment law.

Austria finds that the extremely contentious interpretation of the scope of MFN clauses by investment tribunals makes it highly questionable whether the work of the Commission could lead to draft articles. Nevertheless, there is certainly room for an analytical discussion of the controversies regarding MFN clauses.

These controversies can best be illustrated by reference to recent judicial developments: After the 2000 Maffezini v. Spain decision (Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000) investment tribunals have been split on whether MFN clauses reach beyond the "importation" of substantive protection. Tribunals now follow the entire range of possible outcomes, from denying any effect of MFN clauses beyond substantive protection to permitting the importation of all - substantive, procedural and jurisdictional - advantages of other bilateral investment treaties.

As regards the main problem of the proper scope of MFN clauses, Austria considers that this issue is primarily a question of treaty interpretation and that it depends in first line on the specific wording of the applicable MFN clause whether it includes or excludes procedural and jurisdictional matters.

The Commission should also clarify the relation of MFN clauses stricto sensu to similar clauses, like the most favoured organization clauses in headquarters agreements. Pursuant to these clauses Austria concludes supplemental agreements to headquarters agreements extending terms and conditions granted to other organizations to the organization concerned. These clauses stipulate that their effect is not automatic, but depends upon an additional agreement. This clearly contrasts with the MFN clause usually found in trade and investment treaties.

Thank you, Mr. Chairman.