Permanent Mission of Austria
to the United Nations in New York

Check against delivery

68th Session of the
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 III (Chapters VI, VII, VIII, IX, X and XI)

Statement by

Professor August Reinisch

Delegation of Austria

New York, 4 November 2013

(Disasters)

Mr. Chairman,

Permit me to address first the topic of the "protection of persons in the event of disasters". Austria congratulates the Special Rapporteur, Eduardo Valencia-Ospina, for his work and would like to offer its comments on the draft articles provisionally adopted by the Drafting Committee during the 65th session of the Commission.

As to draft article 5 bis, Austria is not convinced of the need to retain this article. As the commentary itself states, article 5 bis does not contain any normative substance, only a demonstrative enumeration of possible forms of cooperation. *Although we appreciate the presentation of the various measures taken by states, such an inventory would better remain in the commentary and need not be reflected in a normative provision. The forms of cooperation can hardly be defined in a general way, as they would depend on the particular type of disaster and the specific circumstances of the situation.*

Draft article 12 establishes a right to offer assistance. In our view, the stipulation of such a right is necessary. As a consequence, the affected state is precluded from considering such an offer either as an unfriendly act or as an intervention into its internal affairs. *This consequence was explicitly confirmed by the Institut de Droit International. The commentary rightly recognizes, in line with draft articles 10 and 11, that an offer of assistance does neither entail a duty to accept the offer nor a duty to provide assistance. In this understanding, draft article 5, which provides for a duty of cooperation, needs to be better brought in line with draft articles 10 to 12.*

We welcome the differentiation between states and intergovernmental organizations on the one hand and NGOs on the other, now contained in draft article 12. Austria has already advocated such a differentiation in its statement two years ago. The second sentence of this draft provision takes the important role of NGOs in the field of disaster response into account, but is not to be understood as endowing NGOs with international legal personality. With this understanding we support the present drafting of article 12.

As to draft article 13 , Austria reiterates that the conditions under which assistance may be provided should not be the result of the unilateral decision of the affected state. We believe that they should be the result of consultations between the affected state and the assisting actors, taking into account the general principles governing assistance and the capacities of the assisting actors.

As to draft articles 14 and 15 Austria retains its comments made last year on these provisions and their need of further elaboration. In particular, the right to terminate assistance, subject to consultations, should be spelled out explicitly.

Draft article 16 on the duty to reduce the risk of disasters seems to exceed the original mandate under this item confined to the "protection of persons in the event of disasters". Such a duty would certainly go very far, also in view of the broad definition of disasters in draft

article 3 which includes all kinds of natural and man-made disasters. There is a risk that such a broad duty could interfere with existing legal regimes regarding the prevention of certain kinds of disasters, in particular man-made disasters including such caused by terrorist attacks.

Accordingly, if the Commission envisages addressing the issue of prevention also in the present context, it should concentrate on the prevention and reduction of the effects of disasters.

When it addressed the issue of prevention in the context of the topic "Prevention of Transboundary Harm from Hazardous Activities", the Commission did not impose a duty on states to prevent harmful activities, but to prevent any harm resulting from those activities. Article 5 of the relevant draft articles reads: "The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof." Similarly, as the commentary itself points out, the Hyogo Declaration issued at the 2005 World Conference on Disaster Reduction refers to the duty of reduction of the risk of harm caused by a hazard, as distinguished from the prevention of disasters themselves.

Draft article 5 ter likewise refers to the duty to reduce the risk of disasters. Given the broad definition of disasters, this would oblige states to cooperate in reducing the risk of terrorist acts or civil strife below the level of non-international armed conflict. We are of the opinion that the cooperation in these areas is, to a large extent, already covered by other regimes.

(Customary law)

Mr. Chairman,

Allow me to turn to Chapter VII on customary international law. As indicated previously, Austria welcomes the plan of the Commission to contribute to the clarification of the formation and evidence of customary international law. We support the Commission's recent decision to emphasize the methodology of finding evidence for custom by changing the name of the topic to "Identification of customary international law".

The delegation of Austria commends the Special Rapporteur on this topic, Sir Michael Wood, for the comprehensive work he has performed in his first report. Austria equally appreciates the thorough study of the Secretariat contained in its memorandum, identifying elements in the previous work of the Commission that could be particularly relevant to the formation and evidence of customary international law.

As to the scope of this topic, Austria supports the Special Rapporteur's recommendation not to deal with jus cogens at this stage for pragmatic reasons. Customary international law rules may have jus cogens character, but we are of the view that this highly complex work should not be complicated further.

As to the case-law that could potentially help to identify customary international law, Austria concurs with the Special Rapporteur's finding that the relevant practice of international,

regional and domestic courts and tribunals should also be scrutinized by the Commission. With regard to the "reliability" of domestic courts to identify custom, Austria appreciates the Special Rapporteur's "cautious" approach. However, domestic court practice itself may constitute relevant state practice and express opinio juris and thereby contribute to the formation of customary international law regardless of the accuracy of its "identification" of existing custom in specific cases. The development of jurisdictional immunities serves as a clear example of domestic courts, not only "identifying", but actually "forming" customary international law. In any event, the practice and legal opinion of state organs competent for international relations should be duly reflected.

Austria reiterates its view that this project is not suited to lead to a convention or similar form of codification. It is pleased with the present approach of the Special Rapporteur to provide guidance in the form of "conclusions" with commentary.

(Provisional application)

Mr. Chairman,

As already stated last year, my delegation welcomes the inclusion of the topic "Provisional application of treaties" into the work program of the Commission and commends the Special Rapporteur for his first report. This report and the discussion held in the Commission already highlight the main issues requiring clarification. The particular importance of this topic has been demonstrated by some recent decisions on provisional application, relating to the Arms Trade Treaty and the Chemical Weapons Convention.

As to the form envisaged of this work, my delegation shares the approach of elaborating guidelines or model clauses that could help states wishing to resort to the provisional application of a treaty.

We also share the view that the provisional application of treaties by international organizations must be included in this topic, since the 1986 Vienna Convention on the law of treaties of international organizations also refers to this possibility.

As to the problems to be addressed, we can only reiterate what we pointed out last year. My delegation concurs with the view that the expression "provisional application" is to be preferred to the expression "provisional entry into force". As to the legal effects of "provisional application" the work of the Commission will have to explain whether provisional application encompasses the entire treaty or whether certain clauses cannot be applied provisionally. However, once a treaty is being applied provisionally, the obligations resulting therefrom are obligations the breach of which would lead to state responsibility.

It also must be clarified in which way provisional application can be initiated and terminated, in particular whether unilateral declarations are sufficient for this purpose. While article 25 of

the Vienna Convention on the Law of Treaties leaves no doubt as to the possibility of unilateral termination, there is no uniform view concerning unilateral activation.

In a more general view, the Commission will have to examine how far the rules contained in the Vienna Convention, such as regarding reservations or invalidity, termination or suspension as well as the relation to other treaties, also apply to provisionally applied treaties.

My delegation shares the view that interim agreements are substantially different from provisional application since they are treaties that are subject to the usual entry into force procedures and to which the Vienna Convention applies without restrictions.

As the discussion about article 45 of the Energy Charter Treaty illustrates, the relationship between provisional application and national law is not yet sufficiently explored. The Austrian delegation does not share the view of the Special Rapporteur that "domestic law does not provide a barrier to provisional application." On the contrary, provisional application raises a number of problems in relation to domestic law, in particular if the constitution of a state is silent on this possibility. Moreover, as a matter of principle, not only in the context of constitutional law, but also of international law, the Commission must give serious consideration to the need to ensure that democratic legitimacy is preserved, even in the case of provisional application. It is for this reason that Austria applies treaties provisionally only after their approval by the Austrian parliament. *As to our practice in this regard we can refer to our statement of last year.*

(Protection of the environment in relation to armed conflicts)

It is with great interest that Austria took note of the topic "Protection of the environment in relation to armed conflicts" which was placed on the agenda of the Commission this year. We also welcome Ms Marie Jacobsson as Special Rapporteur for this topic.

The Special Rapporteur proposed to proceed from a broad understanding of this topic and encompass not only the phase during the armed conflict, but also the phases prior and subsequent to it. Austria commends this approach. We also support the inclusion of non-international armed conflicts. Nevertheless, the question still remains whether riots and internal disturbances should also be included.

As to the different emphasis put on the three phases, it must be recognized that the second phase, namely that during the conflict, is already subject to certain conventional regimes, *such as the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1978 (ENMOD Convention) or certain rules of the 1977 Additional Protocol I to the 1949 Geneva Conventions such as articles 35 and 55.* Accordingly, it would be necessary to coordinate the work of the Commission on this topic with the ICRC to avoid the duplication of work or different results. In view of the existing legal regimes and the work of the ICRC, we welcome the decision to start with Phase I, the pre-conflict period that has not yet been addressed. When doing so, the effects on phase II and

III will have to be taken into account. We also understand that with regard to Phase I the question of the protection of the environment as such will only be addressed as far as the possibility of a military conflict requires special measures of protection.

My delegation also shares the view that the effects of weapons should not be addressed, since such a work would require major technical advice and would be subject to further technical development.

(The obligation to extradite or prosecute)

Austria took note of the work of the Working Group regarding the topic "The obligation to extradite or prosecute *(aut dedere aut judicare)*" under the guidance of Mr. Kriangsak Kittichaisaree.

In our view it is certainly worthwhile to include into the discussion 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) where the court dealt with this issue in extenso. At several occasions Austria has already stated that there is no duty to extradite or prosecute under present customary international law and that such obligations only result from specific treaty provisions. Accordingly, the scope of the duty to extradite or prosecute and the method and form of its implementation vary considerably and it will be difficult to establish a common regime.

Nevertheless, it might be possible to sort out some common features. Here, the result of the Working Group established in 2009, which constituted a valuable supplement to the work of the Special Rapporteur, could be of assistance to the present Working Group.

(Most-favoured-nation clause)

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 reiterates its view 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. We therefore appreciate the current Study Group's assertion that this is not intended. Nevertheless, there is certainly room for an analytical discussion of the controversies regarding MFN clauses.

On this note, Austria welcomes the Commission's plan to pursue further studies in the field of MFN clauses and their practical applications with a view to safeguarding against the further fragmentation of international law in general and to counter the risk of incoherence and lack of predictability which currently seems to prevail in the field of investment arbitration.

The Austrian delegation also welcomes the Study Group's intention to broaden its scope of investigation and to address not only other fields of economic law where MFN treatment plays a role, but to look at problems of MFN treatment in headquarters agreements which is of central importance to international organizations and their host states.

Thank you, Mr. Chairman.