PERMANENT MISSION OF AUSTRIA TO THE UNITED NATIONS IN NEW YORK

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71st Session

of the General Assembly

Sixth Committee

Agenda Item 78

Report of the International Law Commission

on the Work of its 68th Session

Cluster 1: Chapters I-VI & XIII (Protection of persons in the event of disasters; Identification of customary international law; Subsequent agreements and subsequent practice in relation to the interpretation of treaties; Other decisions and conclusions of the Commission)

Statement by

Professor August Reinisch

New York, 25 October 2016

Mr. Chairman,

My delegation thanks Special Rapporteur Eduardo Valencia-Ospina for his eighth report on the topic **"Protection of persons in the event of disasters"** and congratulates the Commission for the adoption of the 18 draft articles on second reading, together with the commentaries. *The high frequency of disasters, either natural or man-made, which cause the loss of many lives, like the recent earthquake in our neighbour country Italy, proves the necessity of addressing international disaster cooperation in ILC draft articles. The magnitude of such disasters regularly exceeds the capability of individual states to cope, and international assistance is required. Consequently, the draft articles fill a gap in an important area.*

Austria has submitted extensive comments, orally and in writing, on the first reading version of the draft articles. We recognize that several of our remarks and proposals have been reflected in the new text, such as those regarding draft article 2 on the "purpose" of the draft articles and draft article 18 on their "relationship to other rules of international law", as well as on former draft article 10 on "cooperation for disaster risk reduction", which has been dropped following our suggestion.

However, some of our comments have not been adequately taken into account: for instance, our comments regarding the definitions of "disaster" and "assisting actor" in draft article 3 on the "use of terms"; our comments regarding draft article 7 on the "duty to cooperate", which should not be understood as affecting the principle of voluntariness; and our comments regarding draft article 8 on the "forms of cooperation in the response to disasters", which has only a declaratory effect. Concerning the "duty of the affected state to seek external assistance" in draft article 11, it is still unclear whether the term "manifestly", in the context of disasters manifestly exceeding national response capacities, is to be understood as "obviously" or as "substantially". Also the commentary does not provide a clear guidance in this respect.

As to the "conditions on the provision of external assistance" in draft article 14, we maintain our view that such conditions should not be the result of a unilateral decision of the affected state, but rather 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.

With regard to the "facilitation of external assistance", practice shows that even more issues have to be addressed by national laws than those mentioned in draft article 15, such as confidentiality, liability, reimbursement of costs, control and competent authorities. *Articles 6 to 10 of the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency of 1986 as well as Point VII (2) of the resolution of the Institut de Droit International on Humanitarian Assistance of 2003 are very illustrative in this regard. Furthermore, such national legal measures should be taken as early as possible in order to be already in place in the event of a disaster; this would be in line with the rule on prevention and preparedness contained in draft article 9.*

We also recognize that draft article 18 on the "relationship to other rules of international law" confirms that the draft articles apply also to situations of armed conflict**,** albeit in a subsidiary manner in relation to international humanitarian law. Accordingly, the draft articles do not impede the further development of international humanitarian law. However, the wording of

draft article 18 paragraph 2 raises the question whether the draft articles only give way to those rules which specifically address disaster relief, or to all rules of international humanitarian law.

The Commission has now submitted the draft articles to the General Assembly, together with the recommendation to elaborate a convention on the basis of these draft articles. In the view of the Austrian delegation, it would be premature to undertake this exercise immediately; instead, states should first have time to familiarize themselves with the draft articles. After a couple of years, the General Assembly will have a better understanding whether state practice already warrants their conversion into a convention.

Mr. Chairman,

Let me now address the topic **"Identification of customary international law"**. Austria expresses its continued support for the Commission's plan to clarify important aspects of this source of public international law by formulating conclusions with commentaries. We commend Sir Michael Wood for his most efficient work as Special Rapporteur on this topic. The 16 draft conclusions adopted on first reading provide an excellent starting point, also for non-insiders, to appreciate the intricate difficulties of the subject.

However, Austria would like to draw the Commission's attention to a few points that may require adaptation.

We have noted that draft conclusion 13 proposes to introduce an important differentiation between decisions of international and national courts and tribunals. Paragraph 1 considers decisions of international courts and tribunals "to be" subsidiary means for the determination of customary international law, whereas, pursuant to paragraph 2, one may only "have regard to, as appropriate," decisions of national courts for the purpose of evidencing customary international law as subsidiary means. As the commentary explains, this may be due to a lack of international law expertise and other reasons.

However, the Austrian delegation is not convinced that such a principled distinction should be made. Article 38 of the Statute of the International Court of Justice does not make such a distinction, and it would also not pay sufficient regard to the importance of decisions of national courts which, as draft conclusion 6 confirms, are a form of state practice relevant for the formation of customary international law.

The Austrian delegation is of the view that possible differences between decisions – whether of international or national courts and tribunals – result only from their different persuasive force with which they serve as evidence of customary international law. We fully concur with the concluding remarks in the Secretariat memorandum on the "role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law" that "the authority of a statement made in a decision of a national court as a subsidiary means for the determination of a rule of law resides essentially in the quality of the reasoning and its relevance to international law." In the view of the Austrian delegation, this statement also applies to decisions of international courts and tribunals.

Maintaining the strict distinction between international and national courts and tribunals in draft conclusion 13 is difficult in practical terms. This is illustrated by regional international courts, like the European Court of Human Rights and the Court of Justice of the European Union, which exercise functions both as international courts and, at the same time, as quasi-national, even constitutional courts.

My delegation also wishes to address the fact that, in addition to international and national courts and tribunals, there is a wide range of judicial institutions which combine international with national elements. The commentary to draft conclusion 13 suggests that the term "national courts" also applies to courts with an international composition operating within one or more domestic legal systems, such as hybrid courts and tribunals involving a mixed national and international composition and jurisdiction. Examples for such judicial institutions are various criminal tribunals, such as those relating to crimes committed in Cambodia, Lebanon and Sierra Leone. Also the jurisprudence of these tribunals is highly relevant as subsidiary means for the determination of rules of customary international law. Thus, an express reference to them in the text of the conclusions would be preferable to a simple mentioning in the commentary.

Already last year, we welcomed the elaboration of draft conclusion 15 relating to "persistent objectors" and advised that the conclusion should also be interpreted to mean that a single state is not in a position to prevent the creation of a rule of customary international law. We thus welcome the formulation now found in paragraph 2 of the commentary to draft conclusion 15, distinguishing individual persistent objections from "a situation where the objection of a substantial number of States to the formation of a new rule of customary international prevents its crystallization altogether."

The Austrian delegation appreciates that the commentary to draft conclusion 16 on "particular" customary international law stresses that the expression "whether regional, local or other" was chosen in order to acknowledge that "particular" customary international law may also develop among states "linked by a common cause, interest or activity". We suggest to include a few relevant examples in the commentary, such as the development towards an understanding that the death penalty and the use of nuclear weapons are already prohibited by particular customary law. As far as the death penalty is concerned, the emerging customary nature of this prohibition has been referred to in a statement made by New Zealand in the UN Human Rights Council on 16 September 2016 on behalf of a group of states, including Austria, recognising and welcoming "the emerging customary norm that considers the death penalty as per se running afoul of the prohibition of torture and cruel, inhuman or degrading treatment or punishment", consistent with the spirit of Article 6 paragraph 6 of the International Covenant on Civil and Political Rights.

Mr. Chairman,

With regard to the topic **"Subsequent agreements and subsequent practice in relation to the interpretation of treaties",** the Austrian delegation would like to commend Special Rapporteur Georg Nolte for his very thorough and informative report, containing two additional proposed draft conclusions on "pronouncements of expert bodies" and on "decisions of domestic courts". It also congratulates the Commission to the textual streamlining of the draft conclusion on "pronouncements of expert bodies" and notes that

"decisions of domestic courts" are not yet reflected in the draft conclusions provisionally adopted.

As regards the new draft conclusion 13 on "pronouncements of expert treaty bodies", Austria shares the view expressed in the Commission's report that "any possible legal effect of a pronouncement by an expert treaty body depends, first and foremost, on the specific rules of the applicable treaty itself." We thus concur with the proposed wording of draft conclusion 13 paragraph 2. However, we would suggest reflecting the report's consideration by inserting the word "primarily" between the words "is" and "subject", so that it would read "relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is primarily subject to the applicable rules of the treaty.".

The Austrian delegation is also in agreement with the Commission's core finding that a "pronouncement of an expert treaty body cannot as such constitute subsequent practice under article 31, paragraph 3 (b) of the Vienna Convention on the Law of Treaties, since this provision requires a subsequent practice of the parties that establishes their agreement regarding the interpretation of the treaty." It suggests that this important proviso be also reflected in the wording of draft conclusion 13 paragraph 3 which currently merely reflects the consideration that a pronouncement of an expert treaty body "may give rise to, or refer to," a subsequent agreement or subsequent practice by parties.

We also note that the Commission did not provisionally adopt a draft conclusion on "decisions of domestic courts" as suggested by the Special Rapporteur in his report. Austria considers that in their final version the conclusions should also address "decisions of domestic courts". As rightly pointed out by the Special Rapporteur, domestic court decisions may actually constitute state conduct in the application of a treaty and thus "relevant state practice" for the interpretation of a treaty.

Going back to the report of the Special Rapporteur, Austria has noted the different structure of draft conclusions 12 and 13 as proposed in his report: Draft conclusion 12 of that report, dealing with "pronouncements of expert bodies", addressed only the outcome of the work of such expert bodies as subsequent practice. Draft conclusion 13 of that report on "decisions of domestic courts" did the same in paragraph 1 for the role of decisions of domestic courts, but, in paragraph 2, with its five sub-paragraphs, dealt also with a different issue, namely how subsequent agreements and subsequent practice should be taken into account by domestic courts. If the Commission decides, as we suggest, to include a draft conclusion on decisions of domestic courts, the substance of draft conclusion 13 paragraph 2 of the Special Rapporteur's report should either be included in a separate provision or omitted.

Mr. Chairman,

Concerning the "**Other decisions and conclusions of the Commission**", the Austrian delegation has taken note of the two topics for further deliberation by the Commission provided in annexes A and B to the Commission's report.

Austria appreciates the overview of the legal problems elaborated by Sir Michael Wood in his short report on **"The settlement of international disputes to which international organizations are parties"**. We support the inclusion of this topic into the agenda of the

Commission but think that any possible future work on this subject should not be limited to disputes and relationships governed by international law. As our discussions, also those in the meetings of the legal advisers on public international law of the Council of Europe (CAHDI), have shown, it is disputes with private parties, governed by domestic law, that are most relevant in practice and have raised important questions: These questions include the scope of privileges and immunities enjoyed by international organizations and the need for adequate dispute settlement mechanisms, as required by most instruments conferring privileges and immunities on international organizations. It is thus our conviction that these problems should also be covered by any future work of the Commission on the settlement of disputes to which international organizations are parties.

The Austrian delegation noted with equal interest the report of Mr. Pavel Šturma on **"Succession of states in respect of state responsibility"**. This, however, is a highly controversial topic that has been excluded from previous work of the ILC. It has been recently discussed by the Institut de Droit International with a result which we find difficult to accept. We wonder whether dealing with the most controversial issues of state responsibility would lead to an acceptable result at this stage.

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