

73nd Session
of the General Assembly
Sixth Committee

Agenda Item 82
Report of the International Law Commission
on the Work of its 70th Session

**Cluster I: Chapters: I, II, III, IV (Subsequent agreements & subsequent practice),
V (Identification of customary international law), XII (Commemoration) and XIII
(Other decisions)**

Statement by
Ambassador Helmut Tichy

New York, 22 October 2018

Chairperson,

With regard to the topic **“Subsequent agreements and subsequent practice in relation to the interpretation of treaties”**, the Austrian delegation wishes to congratulate Special Rapporteur Nolte on the adoption of the draft conclusions and commentary on second reading by the Commission. The Special Rapporteur’s thorough work, contained in a total of five reports, provides a wealth of scholarship based on a profound analysis of state practice, international and domestic jurisprudence and discussion of the relevant literature in the field.

We particularly appreciate the Special Rapporteur’s determination to fit his work into the framework of the Vienna Convention on the Law of Treaties. We understand that the conclusions emphasise the nature of subsequent agreements and subsequent practice as authentic means of interpretation, which manifest the will and understanding of the parties.

With regard to the possible contribution of decisions of domestic courts to subsequent treaty practice, we note that paragraph 1 of Draft Conclusion 5 has been amended in second reading to include a reference also to the exercise of judicial functions as a form of subsequent practice. However, we would still have preferred a specific Draft Conclusion on “decisions of domestic courts”, as had been suggested by the Special Rapporteur. As rightly pointed out by the Special Rapporteur and acknowledges in Draft Conclusion 5, domestic court decisions may constitute state conduct in the application of a treaty and thus “relevant state practice” for the interpretation of a treaty.

Chairperson,

The Austrian delegation equally welcomes the successful completion of the work of the Commission on the topic **“Identification of customary international law”** after second reading. We also want to express our compliments to Special Rapporteur Sir Michael Wood for his dedicated work. The succinct draft conclusions will provide a highly useful tool in particular for national courts and international law practitioners when confronted with questions concerning the assessment of the existence and content of customary international law.

We particularly note two issues that have been discussed also in the 6th Committee over the last years.

First, the Commission found a good drafting compromise in Draft Conclusions 4, 10 (2) and 12 acknowledging the importance of international organisations, not only as fora for states to express their *opinio juris*, but also as contributors to the “formation” of customary international law by their own acts. Draft Conclusion 4 (2) correctly

notes that “in certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.”

Second, we note that the current wording of Draft Conclusion 13 still distinguishes between decisions of international courts and tribunals and national courts as far as their relevance for the determination of customary international law is concerned. Whereas the former constitute “subsidiary means for the determination of” custom, only “regard may be had, as appropriate” to the latter. We have pointed out in our statement in this Committee in 2016 that such a principled distinction should not be made. Article 38 of the Statute of the International Court of Justice does not make such a distinction, and any potentially different weight given to decisions of international or national courts and tribunals should result only from their persuasive force and the quality of their reasoning.

Chairperson,

As far as the topic “**Universal Criminal Jurisdiction**” is concerned, Austria has already at previous occasions supported the idea that the Commission examines this topic. There is an obvious need for a profound analysis of this topic, which would help to avoid misunderstandings that sometimes still come up in discussions relating to the exercise of universal criminal jurisdiction. Therefore we are pleased to see that the Commission has decided to include this topic in its long-term programme of work. In its endeavours, the Commission can rely on material already elaborated for the 6th Committee discussion of the issue of “universal jurisdiction”.

As indicated in the presentation of this topic by Mr. Jalloh annexed to the report of the Commission, it is necessary first to elaborate a definition of the concept of universal jurisdiction and its scope. In Austria’s view, universal jurisdiction may not only be based on treaties, but may also result from customary international law.

Since there are several kinds of jurisdiction, we welcome the Commission’s decision to restrict its work on this topic to universal *criminal* jurisdiction. We support the idea that the Commission examine all different forms of jurisdiction, including jurisdiction to legislate, to adjudicate and to enforce. In this context, also the limitations of these forms of jurisdiction will have to be considered. For example, it is Austria’s view that jurisdiction to adjudicate should be restricted to trials in the presence of the accused. Furthermore, the jurisdiction to enforce, which certainly comprises the enforcement of judgments delivered under the universal jurisdiction to adjudicate, finds its limits in the sovereignty of other states.

For the sake of clarity let me point out that when we discuss criminal jurisdiction we also mean criminal jurisdiction exercised by administrative authorities, and although

trials should be conducted in the presence of the accused, this does not prevent authorities to conduct investigations in their absence.

Furthermore, the concept of universal criminal jurisdiction of states is to be clearly distinguished from the jurisdiction of international courts and tribunals, such as the International Criminal Court and others.

The issue of universal jurisdiction must also be distinguished from the issue of immunity that, if applicable, must be considered separately. In addition, the relationship between the concept of universal jurisdiction and the duty to extradite or to prosecute, previously examined by the Commission, has to be discussed.

As to the result of the work of the Commission regarding this topic, Austria supports the idea of an elaboration of guidelines.