

AUSTRIA



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Cluster II

Statement by the Republic of Austria

delivered by

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Chairperson,

To begin with, I would like to express Austria's deep regret that the Commission's work was so strongly impacted by the liquidity crisis of the United Nations. While we fully understand the difficulties posed by this crisis and the need for all parts of the UN system to contribute to overcoming it, we nevertheless question the appropriateness of this drastic reduction. It severely hampered the efficiency of the Commission which in turn entails further negative financial consequences. We recommend returning to a length of the ILC's session next year that allows for a meaningful consideration of its programme of work. Austria thanks the Commission members for their efforts and thorough work despite the challenges they faced. As regards the future schedule of work, we recommend prioritizing the consideration of those topics that have been on the Commission's agenda at the present session already with a view of finalizing them and making time available for the newly included topics.

As regards the compilation of the Commission's report, we would like to reiterate one remark that we have made before on several occasions: In case draft texts are merely adopted by the Drafting Committee and neither discussed nor adopted in plenary, it would be most helpful if these texts could still be included in some way directly in the report.

Chairperson,

Allow me now to start with the topic of "**Immunity of State officials from foreign criminal jurisdiction**" and to congratulate Special Rapporteur Claudio Grossman Guiloff on his second report. I would also like to thank the Drafting Committee and its Chairperson, Mr. Mario Oyarzábal, for their diligent work. Again, the Austrian delegation would like to stress its regret that given the reduced session, the Drafting Committee only had very limited time for considering draft articles 7 to 17. In the following, my remarks will focus mainly on draft article 7 on "Crimes under international law in respect of which immunity *ratione materiae* shall not apply" as provisionally adopted by the Drafting Committee, which Austria considers of great relevance.

Austria welcomes the expansion of the list of crimes by adding the crimes of aggression, slavery and slave trade to the list, which is certainly warranted by the seriousness of these crimes. This extension of scope enhances the overall significance of draft article 7. Austria considers the essence and very idea of draft article 7 as reflecting customary international law. Therefore, the extension no doubt will strengthen and enforce the legal certainty of this important provision. We have only one formal comment, namely that we would recommend to combine the crimes of “slavery” and “slave trade” under one subparagraph.

As regards the deletion of paragraph 2 of draft article 7 and its replacement by the phrase “as defined according to the applicable rules of international law” in former paragraph 1, Austria appreciates the reasons for this deletion as explained by the Chairperson of the Drafting Committee in his statement. However, the previous paragraph 2 appears to have been more precise in defining the applicable rules of international law concerning the crimes for which no immunity *ratione materiae* applies. If the Commission were to adopt the deletion of previous paragraph 2, we strongly urge to include relevant definitions of these “applicable rules of international law” in the commentary to draft article 7 so as to provide clear guidance to states.

As to the form of the final outcome of the topic, Austria strongly favours the ultimate goal of the draft articles to become a treaty. We fully agree with the Special Rapporteur in his opposition to the idea of splitting the outcome so that some provisions would be presented in the form of draft articles and others as draft principles or conclusions. Such an approach would undermine the rationale of the draft articles which address the immunity of State officials as an integral topic.

Chairperson,

Allow me to turn to the topic of “**Subsidiary means for the determination of rules of international law**” and to congratulate Special Rapporteur Charles Jalloh on his third report. Before addressing the substance of this topic, I would like to reiterate our disappointment that the Commission has been unable to

discuss the topic fully and to adopt the draft conclusions on first reading due to time constraints. In the following, my remarks will focus on the draft conclusions as adopted by the Drafting Committee.

Austria notes that the proposed draft conclusion 9 on “Weight of teachings” corresponds to draft conclusions 7, 11 and 13, assessing the respective weight of decisions of courts and tribunals as well as of expert bodies and of resolutions. In a situation like this, textual variations, even if minor, always raise certain concerns. First, we wonder why draft conclusion 9 includes the qualifier “as appropriate” whereas draft conclusions 7 and 11 do not include such language. The Commission may want to revert to this question at a later stage. Second, from a systematic point of view, we believe that the second sentence currently contained in draft conclusion 8 on “Teachings”, would be better positioned as second sentence to draft conclusion 9. The respective sentence currently reads: “In assessing the representativeness of teachings, due regard should also be had to, *inter alia*, gender and linguistic diversity.” In Austria’s view, the elements “gender and linguistic diversity” are relevant for assessing the weight of subsidiary means rather than defining teachings as such.

Before turning to those draft conclusions collectively forming part of “Part Five”, entitled “Other means generally used to assist in determining rules of international law”, Austria would like to reiterate its hesitation to acknowledge other additional subsidiary means going beyond what Article 38, paragraph 1 (d) of the Statute of the International Court of Justice states exhaustively. The term “subsidiary means” in this provision is based on a broad understanding of “teachings” and comprises the works of expert bodies, resolutions and other texts produced by international organisations or at intergovernmental conferences as well as separate and dissenting opinions attached to decisions of international courts and tribunals. Their addition as “other means” may be confusing. Therefore, we suggest integrating the draft conclusions currently forming Part Five into Part Four and also elaborating a new conclusion on separate and dissenting opinions.

With that proviso, I will continue commenting on the suggested draft conclusions forming Part Five as adopted by the Drafting Committee.

Chairperson,

Permit me to turn now to draft conclusion 10, entitled “expert bodies”. Austria appreciates that there has been considerable debate within the Commission concerning the originally proposed distinction between private and public expert bodies. We generally welcome limiting the consideration to the work of experts serving in their personal capacity. At the same time, this limitation clearly approximates the work of such expert bodies. Hence, in our view the work of expert bodies in this sense could certainly fit under Part Four dealing with “Teachings”.

From the discussion in the plenary as well as the Drafting Committee (as reported), Austria understands that “expert bodies” in the sense of draft conclusion 10 include both expert bodies established on the basis of treaties, such as the ILC itself or the Human Rights Committee, and learned societies, like the International Law Association or the Institut de Droit international. If their work is not treated as “teachings” but rather as “other means” this would imply, according to draft conclusion 10 as it is now formulated, that for instance the work of the ILC only “may serve” as a subsidiary means, as opposed to teachings which “are subsidiary means”. On its face, this clearly relegates the work of such important bodies to a secondary position as opposed to teachings of individuals and we wonder whether that was really intended.

I will now briefly address draft conclusion 11, entitled “weight of the works of expert bodies”. This provision suggests additional criteria to assess such weight – additional to those contained in draft conclusion 4. Concerning the complementary or additional character, we wonder whether draft conclusion 11, subparagraph (d), referring to “the extent to which the body is comprised of experts with competence in international law” actually is complementary or additional to “the expertise of those involved”, as contained in draft conclusion 4, subparagraph (c). Rather, it appears that “competence in international law” corresponds to the notion of “expertise” as already contained in draft conclusion 4, subparagraph (c).

Chairperson,

Permit me also to make a few remarks on the topic “**Settlement of disputes to which international organizations are parties**”. At the outset, I would once again like to express Austria’s regret that the first reading of this topic could not be concluded at this year’s session of the Commission due to time constraints. As a consequence, the Special Rapporteur will not be able to accompany the topic to its second reading and to finalize it during the current quinquennium, which is detrimental to the efficiency of the ILC’s work.

Let me now turn to the issues covered by the third report of the Special Rapporteur as briefly discussed by the Working Group of the Whole at the present ILC session. Austria supports the Commission addressing the relationship between jurisdictional immunity of international organizations and access to justice for private parties to a dispute. We regard this issue to be the most important one of this topic. In our view, it is reasonable for the Commission’s guidelines to build on the principle that the jurisdictional immunity of international organizations should be respected. This jurisdictional immunity ensures the independent functioning of international organisations. At the same time, we recognize the possible impact of such immunity on the rights of private persons, in particular their human right of access to justice. Similarly as in the case of state immunity, this aspect needs to be properly addressed.

As host state to numerous international organizations and as a contracting party to the European Convention on Human Rights, which enjoys the status of constitutional law in Austria, and many other human rights treaties, it is vital to strike a balance between fair trial rights and the immunity of international organizations based in Austria, and to ensure that headquarters agreements meet the requirements of access to justice and fair trial standards. We expect the Commission to provide thorough guidance on this matter. We therefore think that the wording of draft conclusion 10 on “Access to justice” as proposed by the Special Rapporteur should be reinforced. Dispute settlement mechanisms that meet human rights standards, in particular the requirements of impartiality and independence, must be available for all such cases. Additionally, we wonder

whether the proposed guideline 10 should not be combined with the proposed guideline 11 on “Dispute settlement and procedural rule of law as well as human rights requirements”.

Chairperson,

to end my statement, I would like to express Austria’s disappointment that the Commission could not adopt a report that would end its work on the topic “**Succession of States in respect of State responsibility**”. While understanding the time constraints faced by the ILC this year, we would have considered it to be a priority to finalize work on a topic that is to be discontinued and to make time and resources available for the new topics on the Commission’s agenda.

Thank you!