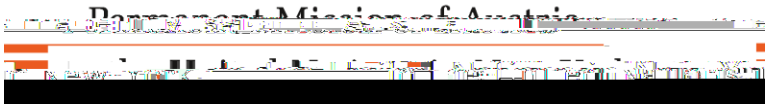

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68th Session of the
United Nations General Assembly

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,

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.

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.

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

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.