

AUSTRIA

LEGAL BASIS

1. Has your State signed and/or ratified the *United Nations Convention on special missions* (1969)? If not, does your State intend to sign/ratify the Convention?

Austria is a party to the United Nations Convention on special missions (1969) as well as to the Optional Protocol to the Convention on special missions concerning the compulsory settlement of disputes (acceded on 22 August 1978, entered into force on 21 June 1985).

2. Does your State apply other international legal instruments in this area (ex.: bilateral, multilateral agreements or headquarters agreements)?

Austria hosts a large number of international organisations. For special missions to these international organisations the respective headquarters agreements are relevant (see e.g. the Agreement between the Republic of Austria and the United Nations regarding the Seat of the United Nations in Vienna, Federal Law Gazette III No. 99/1998 – Article XI Section 33, the Agreement between the Republic of Austria and the United Nations Industrial Development Organization regarding the Headquarters of the United Nations Industrial Development Organization in Vienna, Federal Law Gazette III No. 100/1998 – Article XI Section 33, the Agreement between the Republic of Austria and the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization regarding the Headquarters of the CTBTO, BGBl. III No. 71/1997-Article XIV Section 41, the Agreement between the Republic of Austria and the International Atomic Energy Agency regarding the Headquarters of the IAEA, BGBl. No. 82/1958 as amended - Article XIV Section 33 and the Agreement between the Republic of Austria and the Organization of Petroleum Exporting Countries regarding the Headquarters of the OPEC, Federal Law Gazette No. 382/1974 as amended - Article 20). All these agreements can be found in the Austrian legal information system (<http://www.ris.bka.gv.at> – Bundesrecht).

3. Has your State adopted a specific national legislation in the field of immunities of special missions?

- a. **If so, please provide information concerning the relevant legislative provisions (in particular title, source and content; if possible, please provide official translations in French or in English and/or references to online sources);**
- b. **If not, is the issue of immunities of special missions covered by another part of your legislation? If so, please provide information concerning these relevant legislative provisions (in particular title, source and content; if possible, please provide official translations in French or in English and/or references to online sources).**

As a self-executing treaty approved by the Austrian parliament, the Convention on special missions, published in Federal Law Gazette No. 380/1985, has the status of statutory law and is directly applicable in Austria.

Customary international law is part of Austrian law. Article 9 (1) of the Austrian Federal Constitution stipulates that generally recognized rules of international law are an integral part of Federal law.

4. Have the authorities of your State released official statements, reports or any other document concerning the status and the immunities of special missions? If so, please provide any relevant information relating to these documents.

Not available.

5. Does your State consider that certain obligations and/or definitions regarding immunity of special missions derive from customary international law? If so, please provide a

brief description of the main requirements of customary international law in this respect.

Although Austria is aware of the progressive elements in the Convention, it considers it as reflecting by and large customary international law. Austria thus applies the provisions of the Convention in relation to any state. If a state not party to the Convention contested the customary status of a provision in a particular situation, a detailed case-by-case analysis would be necessary.

6. Please provide information on the scope of the immunities of special missions, in particular:

a. The extent of the privileges and immunities granted to special missions and to their members;

Austria applies the rules of the Convention to members of special missions, which – for the main members of the mission – is equivalent to diplomatic immunity. However, certain categories of persons, such as administrative and technical staff or private staff, enjoy immunity to a lesser extent (see Articles 36-38 of the Convention). Family members enjoy the same immunities as the persons they accompany (see Article 39 of the Convention).

b. The scope *ratione personae* (categories of individuals who may enjoy an immunity of special mission);

The rules on special missions apply to all members of the special mission regardless of their rank. The relevant criterion for the applicability of the Convention is the consent of the receiving state to the mission and its members.

c. The scope *ratione materiae*, in particular by specifying if there are exceptions to the granting of the immunity;

Every member of a special mission enjoys immunity from criminal jurisdiction for official acts. As to immunity in civil and administrative proceedings, Article 31 (2) of the Convention applies. As to private acts, there is no immunity from jurisdiction for certain members of the mission (see Article 37 of the Convention relating to service staff). It depends on the rank of the member of a special mission whether immunity is granted.

d. The temporal limits of the immunities accorded to special missions.

According to Article 43 of the Convention, members of the special mission enjoy the privileges and immunities from the moment she or he enters the territory of the receiving state for the purpose of performing her or his functions in the special mission. The privileges and immunities cease at the moment of leaving the territory of the receiving state or on expiry of a reasonable period in which to do so.

NATIONAL PRACTICE AND PROCEDURE

7. Is there national case law in the field of immunities of special missions? If so, please provide information on these decisions (date of the judgment, authority that issued the judgment, name of the parties, main points of law, French or English translation of the judgment or summary of the judgment in English or in French).

In 1998, the Austrian Supreme Court in its decision No. 12Os3/98; dealt with the provisional arrest of a Syrian national, Dr. S, carrying a diplomatic passport. The Regional High Court of Vienna had ordered his release on the ground that he enjoyed immunity as a representative of a member state on a visit to UNIDO under Article XI of the respective headquarters agreement. Having rejected this argument, the Supreme Court turned to the issue of whether Dr. S was on an ad hoc mission and could claim immunities and privileges on this ground. The Supreme Court underlined the relevance of customary international law in this regard and referred inter alia to the UN Convention on special missions. It finally expressed the view that a special mission to an international

organization cannot be undertaken without the consent of that organization (see *Oberster Gerichtshof* (Supreme Court of Justice, Austria), *Syrian National Immunity* case, Case 12 Os 3/98, 12 February 1998, *International Law Reports*, vol. 127, pp. 88-93, attached). The question whether a member of a special mission enjoys formal diplomatic status thus is less important in this context, as long as the member has been notified to and accepted by the receiving state or international organization.

- 8. Is there a mechanism of formal agreement of special missions, namely a process under which your State can accept in advance that an official visit constitutes or not a special mission?**
 - a. If yes, which authority delivers these agreements? What weight do the courts attach to such agreements? Is there a formal notification or communication procedure between the governmental authorities and the courts?**
 - b. In the absence of such a formal agreement, can an implied consent derive from the behaviour of the governmental authorities?**

There is no formal requirement. The relevant criterion is the consent of the receiving state, whatever form it may take (however, there should be at least some written documentation). Usually the sending state notifies the members of the mission following prior contacts between the relevant state institutions.

APPENDIX TO THE REPLY OF AUSTRIA

AUSTRIA (SUPREME COURT)

International organizations – Immunity – Representatives of Member States – Scope of immunity – United Nations Industrial Development Organization (“UNIDO”) Headquarters Agreement, 1967, Article XI – Immunity limited to representatives of Member States “having official business with UNIDO” – Meaning – Question of whether representative acting within scope of activities of UNIDO – Whether dependent on view of UNIDO or sending State – Whether requiring decision of UNIDO recognizing status of person in question as a State representative entitled to diplomatic immunity

Diplomatic relations – Special missions – “Ad hoc” mission to international organization – Determination of status – UNIDO Headquarters Agreement, 1967 – Rules of customary international law – Whether such mission capable of coming into existence without consent of international organization concerned – The law of Austria

SYRIAN NATIONAL IMMUNITY CASE

(Case 12 Os 3/98)

Austria, Supreme Court. 12 February 1998

SUMMARY: *The facts:* – Dr S, a Syrian national carrying a diplomatic passport, was placed under provisional arrest pending extradition in November 1994, under an order made by the District Court of Vienna following a request made by the German authorities. The Superior Provincial Court (“OLG”) of Vienna ordered his release on the ground that he enjoyed immunity as a representative of a Member State on a visit to the United Nations Industrial Development Organization (“UNIDO”) in Vienna. Article XI of the Headquarters Agreement between UNIDO and Austria, 1967, provided that representatives of Member States who had official business with UNIDO enjoyed immunity. The Court also held that the accused was entitled to immunity since he was on an “ad hoc” mission to UNIDO. The Prosecutor General lodged an appeal to the Supreme Court.

Held: – The appeal was allowed. The provisions of Article XI of the Headquarters Agreement had been incorrectly applied since the lower court had failed to examine what official steps had been taken by UNIDO in relation to the accused.

- (1) For someone to be considered as a representative of a Member State “who had official business with UNIDO”, within the meaning of Article XI and from Austria, to enjoy the privileges and immunities provided in Article IV of the Convention on Privileged and Immunities.”

The facts upon which the OLG based its judgment were that Dr S was in Vienna at the time in question because the Syrian Government had given him the task of visiting the International Tobacco Fair that was taking place there and of using it as an opportunity to make official contact with UNIDO on a diplomatic mission in order to promote the Syrian tobacco industry. The Foreign Ministry of the Syrian Government had previously informed the Austrian Government of this visit “for political purposes” through the Austrian Embassy in Damascus. In addition Syria’s representative at the UNO in Geneva (Ambassador A) had informed the UNIDO Officer in Charge, Mehdi A. Al-H, that Dr S would shortly be calling at that organisation in Vienna, although he did not in fact do so owing to his arrest.

Amongst the documents taken into consideration by the OLG was inter alia a verbal note of UNIDO dated 11 November 1994, in which UNIDO in essence expressed the view that despite the above mentioned contact between Ambassador A and the UNIDO official Al-H, and the latter’s statement

that it would be possible to arrange a meeting between Dr S and UNIDO officials in Vienna, the question of immunity had not been raised at all because, since that conversation no contacts of any kind had taken place in regard to a visit by Dr S; nor had Ambassador A ever been accredited to UNIDO as the Permanent Representative of Syria. Annexed to that document was a statement of UNIDO official Al-H to the effect that, following a meeting arranged by UNIDO, Ambassador A – possibly not in his capacity as diplomat but as an official of a chamber of commerce – had referred to the wish of Dr S, the Managing Director of the Syrian Tobacco Company, to raise a number of unspecified matters with UNIDO officials on the occasion of a visit that he would shortly be making to Vienna, and that in response Mr Al-H had confirmed in non-binding, general terms that such a meeting would be possible. In substance, the UNIDO verbal note at least indicated that because the contacts set out above were not of an official nature, they were from the outset not of such a nature as to cause the visit of Dr S to Vienna to be in the nature of official business.

Nevertheless, the OLG Vienna held as follows:

As is evident from the notice published in the Syrian official gazette, the mission given to Dr S by the Prime Minister of the Syrian Government concerns initial discussions with a view to the promotion of the Syrian tobacco industry by UNIDO and so, in the view of the OLG Vienna, clearly corresponds to “official business” in connection with the scope of activity that is evident from UNIDO’s title, namely Organisation for Industrial Development. Austria, as the State in which that organisation has its headquarters, was informed in due time of the visit for political purposes and noted it through the issue of an endorsement.

As regards the legal appraisal of these facts, the view expressed in the legal opinion given by prof. Dr K (in agreement with the view expressed by Prof. Dr Z) cannot be ignored, namely that although upon the dispatch of State agents on official missions in bilateral relations between two States adequate contact must be taken up with the receiving State and its “agrément” obtained, in the case of multilateral diplomacy in regard to multilateral organisations this is not always feasible in this form – nor is it necessary – because no provision is made for an “agrément” in that regard. If an official UNIDO representative (Officer-in-Charge Al H) was notified of the visit of Dr S on behalf of his government, it does not matter that a fixed date for that activity was not agreed. Nevertheless, it is not for the organisation itself alone to decide at its discretion whether immunity from criminal proceedings should be given to an individual; that decision is to be taken by an independent court, which must review the relevant documents submitted in that regard.

In his application for annulment on public interest grounds, the Procurator General rightly points out that the OLG thereby incorrectly applied the provisions of Article XI Section [33] of the Agreement between the Republic of Austria and the United Nations on the official headquarters of UNIDO.

Representatives of the Member States “who have official business with the UNIDO” do not include representatives who in the view of their own State are acting officially in a matter that, viewed abstractly, falls within the scope of activity of UNIDO; rather, it refers to State representatives whom UNIDO regards as acting in connection with a matter which UNIDO considers to fall specifically within its remit and to be in accordance with its objectives. The fact that the sender State has officially entrusted a mission to a representative is therefore irrelevant in that respect.

This interpretation follows quite simply from the notion of “official business” as it is used in the Headquarters Agreement. In particular it is illustrated by Article X Section [29], in which activities of a person “on official business” or “in his official capacity” refer exclusively to the scope of activities of UNIDO. Also militating in favour of such an interpretation are the following: under Article XI Section [36] the inclusion, in a list, of privileged State representatives at UNIDO and the notification of that list to the Austrian Government are the sole responsibility of UNIDO; the rights and exemptions granted in the agreement are intended solely to facilitate and promote the public interest activities of UNIDO; and the interests of the organisation as the principal rule of interpretation is also expressly laid down in the agreement with UNIDO. It is incompatible with those matters for the diplomatic immunity of a State’s representatives to be recognised simply on the basis of the unilateral announcement of a visit, without reference to specific decisions taken by organs of UNIDO.

Accordingly, the OLG Vienna should not have based its decision merely on the fact that Dr S had travelled to UNIDO on behalf of Syria after the announcement of that visit in rather indefinite terms, but the OLG Vienna should have considered whether the meeting he sought with UNIDO (also) represented official business of UNIDO. In so doing, the OLG should also have taken into account the UNIDO verbal note indicating the complete absence of any preparation for the visit and also the primary testimony of Dr S, who – without even hinting at the existence of a specific UNIDO official as his intended interlocutor – merely asserted that he had intended to contact Mr A, a Syrian diplomat.

Nor do the facts found justify the conclusion in law that Dr S was on an ad hoc mission to UNIDO and could therefore claim diplomatic immunities and privileges. This proposition, which the OLG Vienna evidently ultimately concluded was correct, was indeed submitted by the defence and accompanied by an expert legal opinion of Prof. Dr K, but cannot be upheld in the light of the facts found by the court.

An “ad hoc” mission means a legation, limited in duration, which represents a State and is sent by that State to another State, with the latter’s consent, for the purpose of dealing with specific issues with that State and to fulfill a specific task in relation to it (...). The position of such ad hoc State representatives – also those sent to an international organisation – is determined primarily by the relevant agreement on the official headquarters of that organisation, secondarily by customary international law, for the determination of which (limited) reference may be made to the Vienna Convention of 14 March 1975 on the representation of States in their relations with International Organisations of a universal character, and by analogy also the UN Convention on special missions (...). None of those legal sources can support the assumption that an ad hoc mission to UNIDO may come into being without the consent of the organisation. In the case in point, UNIDO would be comparable to the recipient State or an ad hoc legation; that State has the right to cooperate, through its consent, in the despatch to it of such a mission, so that unwanted missions cannot arise (...). Accordingly, the question whether an ad hoc legation represents official business of the sender State and of UNIDO is not determined by the performance of any particular formal step in regard to Austria; instead, the prior agreement of UNIDO is required in order to cause a visit by a State representative to become an ad hoc legation. If that requirement is not satisfied, a special mission does not exist.

The OLG Vienna did not find that there had been such agreement of UNIDO. It was merely able to establish that a visit had been announced (“informed” and “notified”) by a representative of Syria at the UNO in Geneva. The subsidiary question of the need for an “agrément” (consent to the appointment of a specific person as head of a Permanent Mission) in multilateral diplomacy, which the OLG Vienna, referring to the opinion of Prof. Dr K, dealt with in this connection and treated as an issue subordinate to the need for consent, is unconnected with the need for there to be agreement to the existence of an ad hoc mission.

A unilateral ad hoc mission to an international organisation that arises independently of a declaration by the organs of that organisation and without reference to its rules is foreign to international law. Not even the Vienna Convention of 14 March 1975 (not yet in force) provides for such an event, in spite of the fact that its rules are intended to give non-accredited representatives of a State a more favourable position than that currently provided under international law (...).

Accordingly – although it correctly held that UNIDO had no power to grant immunity in this specific case – the OLG Vienna, by merely applying the test based on an abstract framework of competence inferred from the name of the organisation without reference to the official steps actually taken in that organisation, incorrectly appraised the question of law concerning the existence of immunity for the purposes of Article XI Section [33] of the Agreement on the Official Headquarters of UNIDO.

[Report: *Juristische Blätter* 1999, p. 677 (in German)]