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on the Work of its 66th Session

Cluster III: Identification of customary international law (Chapter X), Protection of the environment in relation to armed conflicts (Chapter XI), Provisional application of treaties (Chapter XII), The Most-Favoured Nation clause (Chapter XIII)

Statement by

Professor August Reinisch

New York, 3 November 2014

Mr. Chairman,

Allow me to start with the topic **"Identification of customary international law"**. As already indicated, Austria strongly supports the Commission's aim to clarify aspects relating to this source of public international law by formulating "conclusions" with commentaries. We specifically commend the Special Rapporteur Sir Michael Wood for the work undertaken in his second report focusing on the two constituent elements of custom, "general practice" and "accepted as law".

However, with regard to some specific points in the Commission's report, my delegation has doubts concerning the desirability of defining "customary international law" and "international organisations" as proposed in the draft conclusions. As the first term, "customary international law", is defined in Article 38 of the ICJ Statute, and as this definition is generally accepted also outside the ambit of the ICJ, it does not seem useful to introduce a new definition. The wording proposed in draft conclusion 2 subparagraph (a), which was controversially debated by the Commission, may lead to confusion about the general concept.

Concerning the definition of "international organisation", the Austrian delegation would not like to question the fact that international organisations may also play a role in the creation of customary international law. However, we are not convinced that this definition is necessary in the text of the draft conclusions. It would be preferable to clarify the meaning of this term in the commentary on the relevant draft conclusions, such as draft conclusion 7 on "forms of practice". There, it could be stated that the term "international organisation" does not comprise non-governmental organizations and that international organisations as subjects of international law can be created by states or other international organisations. For this reason, we are not convinced that the term "intergovernmental organisation" would be appropriate.

As regards the basic approach to the identification of rules of customary international law the Austrian delegation strongly supports the Special Rapporteur's insistence on the so-called "two-element approach".

Concerning the scope of potential actors in the process of the creation of customary international law, a limitation to the practice of states, or to states as only potential creators of customary international law would be misguided. The Austrian delegation thinks that this potential norm creating role should be kept open for other subjects of international law. In that regard we would prefer that the Special Rapporteur's approach could be expanded.

The Austrian delegation further welcomes the illustrative list of "Forms of practice" (draft conclusion 7) as well as "Evidence of acceptance as law" (draft conclusion 11 subparagraph (4)) and it particularly concurs with the approach of the Commission to acknowledge that certain manifestations of acts and inactions may actually demonstrate both. We agree with the reference in the Commission's report that the inclusion of "inaction" as a form of practice, as well as the concept of "specially affected states", needs to be further explored and clarified.

Mr. Chairman,

With regard to the topic **"Protection of the environment in relation to armed conflicts"**, which was placed on the agenda of the Commission last year, we commend the Special Rapporteur, Ms. Marie Jacobsson, for the preliminary report on this topic.

According to the distinction of the different phases within this legal regime, the Special Rapporteur concentrated in her report on phase I, the phase prior to an armed conflict. The

report demonstrates that the entirety of international law on the protection of the environment would apply in this phase. In our view, it is not necessary to discuss under this topic the whole range of environmental law, which is under permanent development and review. Instead, the main emphasis should be placed on the relationship between environmental law and international humanitarian law.

As to the use of terms, in particular two terms, which are fundamental for this topic, require further discussion: the terms "environment" and "armed conflict". As to the former, the different international legal instruments existing so far use very different definitions. Nevertheless, the definition adopted by the International Law Commission in the Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities seems to be an appropriate starting point. A definition that also relates to the cultural heritage would certainly be too broad for the present topic.

As to the term "armed conflict", my delegation is in favour of applying the definition used in international humanitarian law also in this context. This definition encompasses international and non-international armed conflicts, but does not reach beyond the lower threshold of the latter, i.e. to situations of internal disturbances and tensions, riots, isolated and sporadic acts of violence or other acts of a similar nature.

Already in our statement of last year we referred to the need to coordinate the Commission's work on this topic with the work of the ICRC. Although specific weapons regimes are not included within the ILC topic, they are nevertheless related to it. In this respect, my delegation would like to draw attention to the upcoming Vienna Conference on the Humanitarian Consequences of Nuclear Weapons, to be held on 8 and 9 December 2014.

Mr. Chairman,

With regard to the topic **"Provisional application of treaties"**, the Austrian delegation commends the Special Rapporteur, Mr. Gómez-Robledo, for his second report, which underscores the importance of this topic, as evidenced by some recent decisions on provisional application relating to the Arms Trade Treaty and the Chemical Weapons Convention. Already in our statements in the preceding years, Austria stressed the particular importance of the topic of the provisional application of treaties, identified the particular issues requiring further elaboration and explained its general position regarding this matter.

In his present report, the Special Rapporteur dealt with the issue of the source of provisional application and identified four ways in which Article 25 of the Vienna Convention on the Law of Treaties might be manifested. However, one may question whether Article 25 of the Vienna Convention can be interpreted as permitting a state to unilaterally declare the provisional application of a treaty if the treaty itself is silent on this matter. Since the provisional application is deemed to establish treaty relations between the state parties, it could be argued that a unilateral provisional application would oblige the state parties to accept treaty relations with a state without their consent. This consent is usually expressed by the ratification and accession clauses of a treaty or the special clause on its provisional application.

A provisional application of a treaty by unilateral declaration without a special clause in the treaty could only take place if it can be established that the state parties agreed to this procedure in some other manner according to Article 25 paragraph 1 subparagraph b of the Vienna Convention on the Law of Treaties.

However, this conclusion does not rule out the possibility that a state commits itself to respect the provisions of a treaty by means of a unilateral declaration without obtaining the agreement of the state parties. Whereas the provisional application results in the establishment of treaty rights and obligations with the other state parties, the application resulting from a unilateral declaration can only lead to obligations incumbent upon the declaring state. This is also reflected in the "Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations", adopted by the International Law Commission in 2006, according to which a unilateral declaration entails obligations for the declaring state and cannot generate obligations incumbent on the other state parties without their consent.

As to the effects of provisional application, Austria shares the view of the Special Rapporteur that a breach of the applicable provisions of a treaty provisionally applied entails state responsibility that can be invoked by the other state parties.

Mr. Chairman,

Austria continues to regard the work envisaged by the Commission concerning **"The Most-Favoured-Nation clause"** as a valuable contribution to clarifying specific problems of international economic law. As the Commission itself suggested, this should be undertaken by a systematic study of the main issues and not by an attempt to formulate draft articles. The highly contentious interpretations of MFN clauses, in particular, in the field of international investment law, wisely commend such a careful approach.

The Austrian delegation looks forward to studying the final draft report of the Study Group which will address a wealth of highly topical MFN problems. My delegation would have welcomed if the individual reports mentioned in paragraph 254 of the Commission's Report had been made available as well.

Thank you. Mr. Chairman.