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on the Work of its 67th Session

Cluster 2: Chapters VI, VII, & VIII (Identification of customary international law; Crimes against humanity; Subsequent agreements and subsequent practice in relation to the interpretation of treaties)

Statement by

Professor August Reinisch

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Mr. Chairman,

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

However, my delegation was surprised by the use of the term *lex ferenda* in paragraph 70 of the Commission's report, concerning the introduction by the Special Rapporteur of his third report. In this paragraph, the Special Rapporteur is quoted as having said that "it was important to distinguish between those [rules] that were intended to reflect existing law – *lex lata* – and those that were put forward as emerging law – *lex ferenda*". This wording seems to suggest that the expression *lex ferenda* would relate to law *in statu nascendi,* to emerging law. In Austria's understanding, *lex ferenda* is not law beginning to be formed, but simply the expression of the political wish that new legal rules be adopted.

Austria notes that, as reflected in paragraph 88 of the Commission's report, several members of the Commission were of the opinion that the work of the ILC could not be equated to "writings" or teachings of publicists. However, in paragraph 104 of the report we can see that the Special Rapporteur thought that a separate conclusion on the work of the ILC was not justified. Austria believes that the work of the ILC has special importance for the identification of customary rules of international law. The results of the Commission's work normally lead to General Assembly resolutions. The role of such resolutions is reflected in draft conclusion 12 adopted by the Drafting Committee regarding "Resolutions of international organizations and intergovernmental conferences". While this conclusion covers large parts of the work of the ILC, the remaining work would fall under draft conclusion 14 regarding "Teachings". For us, it is difficult to apply the expression "Teachings of the most highly qualified publicists of the various nations" contained in this draft conclusion to the ILC and to other international expert bodies as well as to international scientific institutions. Austria believes that there should be a specific reference to the role of the ILC and other expert bodies and institutions in the draft conclusions, or at least in the commentary.

As far as the other draft conclusions are concerned, we would like to point out that draft conclusion 4 paragraph 3 on the irrelevance of the conduct of other actors does not do justice to the important contribution of the International Committee of the Red Cross to international practice.

As far as draft conclusion 11 (1)(c) on the role of treaties is concerned, my delegation believes that it will be important to clarify in the commentary that the "general practice" to which a treaty has given rise, referred to in this provision, must include also the practice of non-state parties to the treaty concerned and not only the practice of the states-parties.

Austria welcomes the fact that the draft conclusions address the difficult issue of the persistent objector in draft conclusion 15. We welcome the explicit restriction of the effect of persistent objections to the opposing state, which, therefore, is not in a position to prevent the creation of a rule of customary international law. Nevertheless, it would be necessary to

further develop some issues relating to persistent objection, like the non-effect of persistent objections to rules of *ius cogens* and their relation to obligations *erga omnes*.

Concerning the topic **"Crimes against humanity"**, my delegation welcomes the report of Special Rapporteur Sean Murphy and his conclusions regarding a convention on this topic that would have an existence independent from the Rome Statute of the International Criminal Court.

This year, the Commission provisionally adopted the text of five draft articles of such a future convention.

According to the first draft article, on the scope, the future convention will apply to the prevention and punishment of crimes against humanity. My delegation is in favour of the proposed extension of the scope of the convention also to the prevention of such crimes. The commentary on this draft article spells out that the draft articles avoid any conflict with the obligations of states arising under the constituent instruments of international or hybrid criminal courts or tribunals, in particular the obligations resulting from the Rome Statute of the ICC. This is an important point for the Austrian delegation. However, the text of this draft article does not yet reflect this legal relationship, and we hope that it will be explicitly reflected in the final draft articles. Otherwise, the *lex posterior* regime of the Vienna Convention on the Law of Treaties could lead to different results.

Draft Article 2 relating to the general obligation to prevent and punish qualifies crimes against humanity as "crimes under international law". Although the 1996 Draft Code of crimes against peace and security of mankind has used this term, it has not yet received a clear understanding in international law and is unknown to the Rome Statute of the ICC. According to the commentary, this qualification should indicate that these crimes are punishable even when they are not incorporated in national criminal codes. This, however, applies only to international courts; in order to be punishable at the national level, the crimes need to be incorporated into national law. This should be clearly spelt out in the articles and the commentary.

Moreover, various legal instruments use the expression "international crimes". To us it is not clear what is the difference between the term "international crimes" and the term "crimes under international law". We would be interested in a clarification if there is a distinction between the two expressions; if not, the term "crimes under international law" should be avoided.

As to draft Article 3 containing the definition of crimes against humanity, my delegation supports the definition of these crimes which corresponds, as much as possible, to Article 7 of the Rome Statute, which is considered to reflect customary international law. Any other approach would create major obstacles, both to the further work on this topic and to the practice of states, since a number of states have used Article 7 of the Rome Statute as a model for their own legislation. This is also the case for Austria which has introduced, as of 1 January 2015, new provisions on international crimes into its criminal code, including a definition of crimes against humanity based on Article 7 of the Rome Statute.

Draft Article 4 on the obligation of prevention should be understood as extending not only to the prevention, but also to the punishment of such crimes, because of the preventive effect of legislative measures providing for punishment. This view has been confirmed by a judgment of the European Court of Human Rights, which explicitly refers to the connection between preventive effect and measures of punishment in the case of *Makaratzis v Greece*.

Paragraph 1 (a) of Article 4 obliges states to take legislative and other measures in any territory under their jurisdiction or control. My delegation supports this definition of the geographical scope which corresponds also to various judgments of the European Court of Human Rights, such as in the case of *Jaloud v The Netherlands,* where the Court discussed at length the question of control and jurisdiction.

Mr. Chairman,

With regard to the topic **"Subsequent agreements and subsequent practice in relation to the interpretation of treaties",** the Austrian delegation would like to express its appreciation of the very thorough and comprehensive report of Special Rapporteur Georg Nolte on this topic.

We welcome the provisional adoption of draft conclusion 11 on constituent instruments of international organizations. This conclusion reflects the growing importance of the role of international organizations both as actors in their own right and as important fora for the collective action of their member states. The report rightly elaborates on the distinction between these two emanations of international organizations and their contribution to the interpretation of treaties.

The practice of international organizations is of particular importance for the interpretation of their constituent instruments since it entails even the possibility of the application of the implied powers doctrine. Accordingly, the ICJ has already emphasized the particular nature of the constituent instruments of international organizations.

Nevertheless, certain clarifications are still needed: First, the term "international organizations" should be understood as referring only to intergovernmental organizations, as the expression was used by the ILC in texts for conventions such as e.g. the 1986 Vienna Convention on the Law of Treaties between States and International Organizations. Second, for the purposes of the draft conclusions, the term "constituent instruments" only comprises instruments that are treaties. However, this does not exclude that organizations can be based on constituent instruments not having treaty character.

As to paragraph 2 of draft conclusion 11 we would be interested to know how the term "practice of an international organization in the application of its constituent instrument" relates to the term "established practice of the organization". The latter expression has been used as part of the "rules of the organization" defined in Article 2 paragraph 1 subparagraph (j) of the 1986 Vienna Convention. Generally speaking, it is difficult to determine the meaning of "practice of international organizations", in particular whether it includes all acts that are attributable to the organization as mentioned in the commentary. The commentary, in paragraph 24, calls for a "cautionary approach" in this regard but does not answer this question.

My delegation specifically appreciates the report's rich elaboration on the existing judicial and other dispute settlement practice which has been the basis for the elaboration of draft conclusion 11. With regard to the commentary on conclusion 11 paragraph 4 we appreciate the mentioning of the WTO but would have liked to have an express reference to Article IX paragraph 2 of the WTO Agreement on the authentic interpretation of the WTO Agreement as well as the multilateral trade agreements. While the case concerning *United States measures affecting production and sales of clove cigarettes* discussed in the commentary is reflective of some of the problems, the WTO Agreement demonstrates how difficult it often is to reconcile the institutionalized rules of an organization on interpretation with the role of member states as parties to the constituent instrument of an organization in interpreting this instrument.

Finally, the Austrian delegation is in favour of reflecting the practice of international organizations as such also in other draft conclusions, as suggested in footnote 354 of the Commission's report. In our view, draft conclusion 4 paragraph 3, which currently only refers to "conduct by one or more parties" of a treaty, should be broadened and refer also to the conduct of an international organization established by such a treaty. This understanding would correspond to conclusion 1 paragraph 4, which refers to other subsequent practice without limiting it to state parties.