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on the Work of its 68th Session

Cluster 3: Chapters X, XI & XII (Protection of the environment in relation to armed conflicts; Immunity of State officials from foreign criminal jurisdiction; Provisional application of treaties)

Statement by

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New York, 1 November 2016

Mr. Chairman,

With regard to the topic **"Protection of the environment in relation to armed conflicts"**, the Austrian delegation welcomes the third report of Special Rapporteur Marie Jacobsson, proposing some new draft principles regarding prevention and the post-conflict phase as well as some draft principles of a more general nature. *At this year's session, the Drafting Committee provisionally adopted nine renumbered draft principles, yet without commentaries. Since my delegation had commented, already last year, on the substance of many draft principles which form the gist of this year's report,* we will confine our remarks to the new draft principles provisionally adopted by the Drafting Committee this year.

As to draft principle 4 on "measures to enhance the protection of the environment" we wonder why the qualifier "effective" before "legislative and other measures" is needed. *It is a common practice in international instruments only to refer to legislative and other measures without such a qualifier; introducing it here raises questions of consistency.* Furthermore, the specification that states have to take such measures "pursuant to their obligations under international law" could be understood as restricting the obligation only to measures already required by existing international law, and as excluding new obligations.

We note that draft principle 7 on "agreements concerning the presence of military forces in relation to armed conflict" is formulated in a very soft manner, providing only that provisions regarding environmental protection "should, as appropriate" be included in such agreements. Moreover, we wonder whether there is not an overlap between this draft principle 7 and draft principle I-3 on "status of forces and status of mission agreements", as proposed by the Special Rapporteur in her third report.

Draft principle 8 on "peace operations" might require a clarification of its scope, since the term "peace operations" is not defined in international law, including international humanitarian law. *This term could be understood in a very narrow manner, referring only to measures designed to restore "peace" in a very formal, legal sense. However, it should be clear that the term "peace operations" refers to any operation aiming at the termination of the use of armed force.*

Similarly, also draft principle 14 on "peace processes" raises the problem of the meaning of peace, considering that formal peace agreements terminating armed conflicts nowadays hardly exist. Regarding paragraph 2 of this draft principle, on the role of international organizations in peace processes, it should be understood that this principle does not broaden the existing competences of international organizations.

As to draft principle 15 encouraging cooperation among relevant actors in respect to "post-armed conflict environmental assessments and remedial measures", my delegation proposes to harmonize the wording in this and other draft principles which use "should", "encourage" and other similar expressions difficult to distinguish.

We also would like to point out that draft principle 16 paragraph 2 regarding "remnants of war" seems to be only partly applicable in situations of non-international armed conflict, as non-state parties would hardly be in a position to enter into formal agreements with other

states. Consequently, to remedy this shortcoming, "agreements", in the context of this draft principle, has to be understood in a broad way or to be replaced by another expression.

The wording of the commitment under draft principle 17 on "remnants of war at sea" is too broad and unspecific, as the scope of such a commitment depends on the particular status of the relevant maritime space where the remnants are located. For instance, any commitment to cooperate concerning remnants of war situated in a territorial sea must be seen in the context of the rights of the costal state concerned.

Mr. Chairman,

I shall now turn to the topic of **"Immunity of State officials from foreign criminal jurisdiction"**, which is of great practical relevance and therefore of special interest to my delegation. We welcome the fifth report of Special Rapporteur Escobar Hernández analyzing the question of limitations and exceptions to the immunity of state officials from foreign criminal jurisdiction. In view of the importance of the limitations of the immunity and the exceptions to it, we patiently accept that the Commission needs to continue this discussion also in its next session. We shall abstain from commenting on the interesting questions of theory which were discussed at this year's session, such as the relationship between immunity and jurisdiction, between immunity and responsibility, between state immunity and immunity of state officials or between national and international jurisdiction. All these are important issues, but we prefer to wait for the results of next year's discussion and shall then offer our comment thereon.

There is, however, a particular question in this context which we would like to discuss already at this point, namely the question whether acts of a private nature of a state, acts *iure gestionis*, such as the purchase of prohibited war material, would fall under immunity addressed in these draft articles. My delegation has consistently referred to this problem during the last years. The definition of an "act performed in an official capacity" as "any act performed by a State official in the exercise of State authority" does not make it clear whether it comprises also acts of a private nature. Is "state authority" only authority *iure imperii* or does it comprise the full range of activities attributable to a state, including acts of a private nature? The national laws quoted in the report of the Special Rapporteur contain different solutions, since some of them do not recognize immunity for acts of a private nature while others do. The report of the Commission seems to exclude acts *iure gestionis* from immunity, obviously assuming that state authority only means sovereign authority, as state authority is understood in the United Nations Convention on Jurisdictional Immunities of States and Their Property. However, the absence of the qualifier "sovereign" in draft article 2 (f) does not necessarily lead to this interpretation. Paragraph 3 of the commentary on this provision, which refers to the link between the act and the state, also does not shed sufficient light on this issue.

The Special Rapporteur courageously proposed a draft article 7 on exceptions to immunity, addressing in particular so-called international crimes. My delegation accepts the idea of restricting immunity in certain criminal proceedings. However, we also have to consider that such restrictions can be abused for political and other, even fraudulent, purposes. Therefore, restrictions of immunity, if provided for certain crimes, should be combined with an international mechanism aiming at the prevention of such abuse. Such a mechanism, to be

set up in the future Convention on the Immunity of State Officials from Foreign Criminal Jurisdiction, could be inspired by the provisions on interim measures and other urgency procedures before international courts and tribunals. The establishment of its jurisdiction could be a precondition for the relaxation of immunities in certain areas.

As far as the substance of exceptions are concerned, obvious candidates are the exceptions enumerated in the proposed draft article 7 paragraph 1 (a), namely genocide, crimes against humanity, war crimes, torture and enforced disappearances. Whether there should be an exception for "crimes of corruption" is a matter for further debate, as it is sometimes very difficult to prove corruption, and as allegations of corruption are especially susceptible to abuse. The crimes referred to in paragraph 1 (c), relating to harm inflicted on persons or property, which are inspired by article 12 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, also need further discussion: It will have to be assessed whether acts causing harm only to property should entail the loss of immunity or whether in such situations the balance should not rather be on the side of immunity. A possible exception to immunity for espionage activities should also be discussed.

As to draft article 7 paragraph 2 Austria concurs with the view that persons enjoying immunity *ratione personae* would not be affected by the exceptions to the immunity contained in paragraph 1. Accordingly, a former head of state who only enjoys immunity *ratione materiae* after the end of his or her term of office would not enjoy immunity for the crimes listed in paragraph 1.

Mr. Chairman,

The Austrian delegation wishes to congratulate Special Rapporteur Juan Manuel Gómez-Robledo for his work on the topic "**Provisional application of treaties**", and, in particular, for his fourth report on this topic.

As regards the Commission's debate, my delegation would like to make the following comments:

In respect of reservations, the Austrian delegation shares the approach that reservations can be made also to provisionally applied treaties.

With regard to the new draft guideline 10, my delegation is happy with the current implicit and explicit references to articles 27 and 46 of the Vienna Convention on the Law of Treaties. However, it considers further elaboration on the problem of valid consent important. The question of internal, mostly constitutional law prerequisites for the provisional application of treaties is one of the most important areas in this field of treaty law.

As already stated last year, my delegation concurs with the underlying notion that once a state has committed itself internationally to the provisional application of a treaty, it cannot avoid its obligations thereunder. However, whether or not a commitment by a state to provisionally apply a treaty can be made depends not only on the provisions of the treaty, but also on the state's internal law. While this notion may seem implicit in the reference to article 46 of the Vienna Convention in the new draft guideline 10, a more explicit confirmation, at least in the commentary, would be useful. It would also underline the link

between provisional application and its democratic legitimation according to the internal law of each individual state.